Partial Histories:
Constituting a Conflict between Women's Equality Rights and Indigenous Sovereignty in Canada

by

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Abstract

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This dissertation is a history of an idea, a retelling of a simple story about an idea as a complicated one, and an explanation of the effects of believing the simple story. From 1869 to 1985, to be an Indian in the eyes of the Canadian state – to be a "status Indian" – a person had to have a status Indian father. The Canadian government registered a population of Indigenous people as status Indians and decided that Indian status passed along the male line. If an Indian man married a non-Indian woman, his wife gained status and their children were status Indians. In contrast, if a status Indian woman married a non-Indian man, she lost her Indian status, and her children were not status Indians. This rule exiled women from their families of birth and tore them from the political fabric of their communities. The Indian status system is a keystone in Canada's colonizing governance of Indigenous life. The rules in the *Indian Act* for the transmission of Indian status came under heavy criticism and, in 1985, the federal government amended the law. Because the 1985 amendments perpetuated sex discrimination by conferring an advantage to those who traced Indian status along the male line, the rules for Indian status were the object of decades of subsequent campaigning and litigation. In 2008 and 2015, landmark judgments in *McIvor* and *Descheneaux* declared the rules to be in breach of the gender equality guarantees in Canada's *Charter of Rights and Freedoms*.

In overturning the *Indian Act*'s status rules, the courts have relied on the government's explanation of the history of these rules. The legislative history told by the government mirrors commonly held views about the history of the 1985 amendments to the *Indian Act*. According to this canonical history, the core explanation for the *Indian Act* amendments is a tension between individual rights to gender equality and collective rights to Indigenous self-governance, embodied in a conflict between Indigenous women and Indigenous communities (often represented by male Indigenous leaders). According to the canonical history, the opposition between these groups yielded an

intractable political stalemate – a Gordian political knot that could only be sliced by the equality rights offered in constitutional and international human rights law.

This dissertation unseats the canonical history by advancing an alternative account, one with both a wider aperture on the political and social context and a sharper focus on detail, complexity, and contingency. The dissertation asks how individual equality rights and Indigenous self-governance became juxtaposed to one another in a relationship of tension and dichotomous opposition and explains the discursive, political, and social forces that came together to create this idea of opposition. It situates the history of the *Indian Act* amendments in the context of negotiations for the re-founding of Canadian sovereignty and the passage of the *Charter of Rights and Freedoms*, Indigenous demands for recognition as a third order of government in Canada's federal state, changing understandings of equality in Canadian law, and shifts in the categorization of the problem of Indian women's loss of status as a political, social, or cultural problem. It traces the role of Indigenous political organizations, Indigenous women's political organizations, and the white-led women's movement in shaping the debate. It tracks how an issue transformed from a political problem into a question of fundamental rights.

Debates about amending the *Indian Act* showed a consensus among Indigenous people about the importance of Indigenous self-governance and the need to end sex discrimination in the *Indian Act*. Conflict among Indigenous groups arose about the mechanisms for recognizing Indigenous self-governance and the definition of self-governing polities. Rather than a pitched battle among Indigenous people, the central threads running throughout the history of reforms to the *Indian Act* are the federal government's steadfast refusal to recognize inherent Indigenous self-governance and a desire to limit government spending on status Indians, all in service of a project of constructing and defending Canadian sovereignty. The dissertation exposes the government's share of responsibility in creating a conflict between gender equality rights and Indigenous self-governance. It reveals the law's hand in shaping the discourses of rights through which this idea of tension became articulated, labeling those rights as fundamental, pitting those rights against one another as intrinsically opposed, and then balancing them in the name of justice and fairness.

In contemporary litigation over the *Indian Act*, the Canadian government deploys a story about competing interests of Indigenous women and Indigenous communities as a justification for continued discrimination in the *Indian Act*. In doing so, the government's retelling of history omits its own active role in shaping and exacerbating the idea of a fundamental conflict of rights. This omission does more than distort history. Through this narration of a partial history and its repetition by the courts, the words uttered by the Canadian state aim to achieve a perfected, completed sovereignty, one that has already silenced the eruptive speech of rival sovereignties. The telling of history by the court tames the wilder moments of the past, when neither the possible nor the likely outcomes were clear. The dissertation aims to make the present readable as just one of many alternatives among the past's futures.

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~ Genevieve Renard Painter

A Note on Terminology

Since confederation, the federal government has regulated "Indians" through nine permutations of one department. Changes in departmental name were sometimes signs of drastic changes in mandate or jurisdiction, as in the shift from the Department of Mines and Resources (1936-1950) to the Department of Citizenship and Immigration (1950-1965). Changes in departmental moniker since 1950 not signify huge changes in policy direction. As a result, the dissertation does not closely track the minor terminological changes in the department's name. I generally refer to the department as the Department of Indian Affairs.

The terms "Indian", "Indigenous", and "Aboriginal" are used in this dissertation with purpose.

I used the term "Indian" to refer to the legal category of "Indian status" held by individuals under the *Indian Act*, as in the distinction between a "status Indian" and a "non-status Indian." The plural "Indians" denotes a group of status Indians.

I also use the adjective "Indian" and the noun "Indians" occasionally to refer to the political category as seen through the eyes of the federal government – for example, in the phrases "Indian policy" or "consultation with the Indians." When used to describe, ventriloquize, or analyze federal policy, I aim to convey the ideas in the terms that they were spoken and written, leaving the derogatory connotations purposefully intact.

I use the term "Aboriginal" refers to Canadian government law and policy in relation to the umbrella category of Indigenous peoples living in Canada – as in, for example, the term "Aboriginal treaty rights" or "Aboriginal title."

I use the term "Indigenous" to refer to the original peoples, laws, and governments of lands now known as Canada. This term encompasses the people, cultures, traditions, values, and beliefs that descend from the original peoples of these lands. Where possible, I indicate Indigenous nation. The term "Indigenous law" refers to the laws of Indigenous nations; it is distinct from "Aboriginal law", the term Canadian state law vis-à-vis Indigenous people.

1. Introduction

A Judge's Knowing Smile

The Montreal courtroom is stuffy, windowless, and painted in that shade of bureaucratic grey that came to coat public life in the eighties. Coats are piled in a stockade, ready to brave the winds of winter 2015. Trials are mostly dull affairs, everyone present enmeshed in a thick tangle of paper, procedure, protocol, and performance. Any break in the monotony is a noticeable event, but let me tell you about one event in particular. The judge, sitting at a table on a raised platform, is listening patiently to a witness, a soft-spoken, elderly white man appearing for the government in a case pitting the state against Indigenous people in Canada. The witness worked most of his life in the administration of Indian Affairs in Canada. He is here to explain the history of a piece of legislation passed back when all those rooms were being painted grey. The legislation claimed to end sex discrimination in the federal government's rules for determining who was an Indian. Until that legislation was passed, the surest way to be recognized as an Indian was to have an Indian father; better yet, to have two Indian grandfathers. The trial is about whether the legislation is constitutionally valid. The legislation is complicated. But, the witness assures us, the origins of the legislation are simple: "The trouble was that the Indians couldn't agree. The Indian women's groups wanted one thing, and the Indians wanted another. We had a terrible time trying to reach a compromise. This legislation is the result."

Breath bated, I watch the judge. Before being appointed to the trial court, the judge spent her career litigating constitutional and civil liberties cases. She knows a thing or two about sex discrimination. She looks up at the witness. Nods. Smiles knowingly, perhaps bitterly. The witness pauses in his testimony. It is unclear what the judge is thinking. But it is clear that his speaking and our listening produce a complicity in the courtroom. Everyone knows the witness needn't explain further: it's just a problem of squabbling 'Indians', with 'Indian' women on one side and 'Indian' men on the other.

Sitting up on her bench, the judge seems relieved to finally hear from a witness. She has spent most of the trial listening to lawyers referring her to single sentences plucked from eighteen four-inch ring binders that surround her like the cliffs of a box canyon. This judge is not alone, because other judges before her have tried to make sense of the history of this law about who should be an Indian. They had the same binders, because the government sent them over as part of its defense of the law. One judge's version of the history of the amendments to the *Indian Act* has become important because she wrote it down first. A judge in Vancouver wrote eighty paragraphs of analysis about the legislative history of the *Indian Act*.[1] The analysis extends back to before the arrival of Europeans to Canada, includes evidence from academic experts, and weaves together parliamentary records and Cabinet documents. It was a huge amount of work, and writing it temporarily turned that judge into a historian. When the government introduced the law in question in 1985, it said that the law was a compromise between

[1] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827

the competing interests of women and Indian communities. Now, in 2015, in this airless Montreal courtroom, the government has presented paper and testimony to reinforce that message. That will be the understanding repeated by the judge in her decision when the trial is over: the 1985 amendments to the *Indian Act* were an effort to reconcile 'competing interests'.[2]

But here's the rub. During the parliamentary debates about this law about being an Indian and passing that status on to one's children, only one 'Indian' argued in favor of the idea that having Indian status required having an Indian father. And none of the Indigenous women's groups argued against their communities having the self-governance inherent to Indigenous sovereignty. This simple story of conflict, offered by the government's witness and accepted by judges, no longer looks like an open-and-shut case of the competing interests of quarrelsome groups and a government stepping in to make peace.

It is bigger than these trials, too. At a cocktail reception at an academic conference, I field the question, 'What is your dissertation about?' I know if I say the words 'women's rights' and 'Indigenous communities', I will again meet that knowing smile. These two terms invariably lead the listener to presume that my work is about Indigenous women oppressed by 'traditional' Indigenous culture and rescued by 'modern' state law. Sometimes people ask whether my project is like the Santa Clara case in the US.[3] In that case, the courts decided that tribal self-determination trumped women's equality rights – a decision that affronted feminists from Catherine MacKinnon on down.[4] The rub is in this one, too. There, as here, when you dig deeper in the history and interview the people involved, the story is quite a bit more complicated.[5] This project is an effort to turn a simple story into a complicated one.

Responses to the Narrative of Competing Interests

Let me begin with the claim – which I will challenge in this project – that the equality rights of Indigenous women stand in opposition to the rights of Indigenous communities to govern themselves. If one starts with this claim, a number of well-worn paths of inquiry spring up. I summarize the questions animating these inquiries before saying a little about each.

> 1) Are women in Indigenous communities oppressed by male-led movements for Indigenous self-determination?

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[2] *Descheneaux c Canada (Procureur général)* (2015), QCCS 3555, JE 2015-1378 (CS)

[3] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)

[4] Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987).

[5] Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (Cambridge: Cambridge University Press, 2007) at 114–141.

> 2) Are Indigenous women seeking gender equality making an authentic demand for justice, or is there something intrinsically Western about feminism?
>
> 3) How can the relationship between gender rights and self-governance be rearticulated using Indigenous political theory and Indigenous law?
>
> 4) Using the tenets of Western political theory and the tools of the liberal state, what is the most just way of legislating and thinking about the relationship between Indigenous women and Indigenous communities?

The first question, replete with empirical and normative valences, asks whether women in Indigenous communities are oppressed on the basis of sex. Are movements of resistance and national liberation often led by sexist men? Do leaders of these movements forget about gender inequality and other forms of discrimination, arguing when pressed that these problems can wait until 'after the revolution'? The answer to all these questions is often yes. Lots of academics work on answering these questions; even more people work within the jaws of their answers.[6] This is important. But it is equally important to remember that even the most sexist independence movement struggles in a busy and cacophonous discursive landscape, where there is more than enough sexism and human imperfection to go around. As Gayatri Spivak famously observed, the analytic train often grinds to a halt once it seems to be a case of white men saving brown women from brown men.[7]

The second question asks whether an Indigenous feminism is 'authentic' or whether, instead, there is something intrinsically or historically white about feminism. Indigenous feminism has been treated as an oxymoron, on the basis that feminism was learned from white society. Some Indigenous women have indeed spurned the language of feminism.[8] Mohawk scholar Patricia Monture-Angus, for example, wrote: "I do not see feminism as removed from the colonial practices of this country."[9] But there has also been reclaiming and redefinition of Indigenous feminisms, as multiple, heterogeneous,

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[6] Angela Gilliam, "Women's Equality and National Liberation" in Chandra Talpade Mohanty, Ann Russo & Lourdes Torres, eds, *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991) 215; Sita Ranchod-Nilsson & Mary Ann Tétreault, *Women, States, and Nationalism: at Home in the Nation?* (London; New York: Routledge, 2000); Nira Yuval-Davis, *Woman, Nation, State* (Basingstoke: Macmillan, 1989); Francesca Polletta, *Freedom is an Endless Meeting: Democracy in American Social Movements* (Chicago: University of Chicago Press, 2002); Virginia Woolf, *Three Guineas* (New York: Harcourt, Brace, Jovanovich, 1966).

[7] Spivak, Gayatri Chakravorty, "Can the Subaltern Speak?" in Patrick Williams & Laura Chrisman, eds, *Colonial Discourse and Post-colonial Theory: a Reader* (New York: Columbia University Press, 1994) 66 at 93.

[8] Grace Ouellette, *The Fourth World: an Indigenous Perspective on Feminism and Aboriginal Women's Activism* (Halifax, N.S.: Fernwood Pub., 2002).

[9] Patricia A Monture & Mary Ellen Turpel, *Thunder in my soul: a Mohawk woman speaks* (Halifax, Nova Scotia: Fernwood Publishing, 1995) at 177.

responsive to changing political contexts, and grounded in experience of the interwoven effects of gender, sexuality, and Indigenous heritage.[10] Indigenous feminist theorists situate responses to violence against Indigenous women as central and fundamental to the survival of Indigenous peoples. This means being serious about sexism within Indigenous communities, rather than simply labeling sexism as a Western import.[11] It also means rooting Indigenous sovereignty in relations to families, kinship structures, and lands, and questioning the nation-state as the appropriate form for governance. Cree thinker Sharon Venne writes, "We understand the concept of sovereignty as woven through a fabric that encompasses our spirituality and responsibility."[12] Indigenous feminist scholars hold the floor here.

The third path is similar to the 'Indigenous feminism' question in a shared normative grounding in Indigenous theory. Scholars walking down the third path ask how Indigenous law and norms can be used to understand relationships within and beyond Indigenous nations. What does Indigenous political theory have to say about the place of women in political life?[13] How do Indigenous laws understand equality in family and political life?[14] What is the place of violence and domination in relationships? Is working against violence against Indigenous women a defense of Indigenous sovereignty?[15] Dene scholar Glen Coulthard advocates a turn to the land because "[i]ndigenous anticolonialism is deeply informed by what the land as system of reciprocal relations and obligations can teach us about living our lives in relation to one another and the

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[10] Joyce A Green, *Making Space for Indigenous Feminism* (Black Point, N.S.: Fernwood Pub, 2007); Cheryl Suzack, *Indigenous women and feminism: politics, activism, culture* (Vancouver: UBC Press, 2010); Mishuana Goeman & Jennifer Denetdale, "Native Feminisms: Legacies, Interventions, and Indigenous Sovereignties" (2009) 24:2 Wicazo Sa Review 9; Sunseri, Lina, "Moving beyond the Feminism versus Nationalism Dichotomy: an Anti-colonial Feminist Perspective on Aboriginal Liberation Struggles" (2000) 20:2 Downsview 143.

[11] Cindy Holmes, Sarah Hunt & Amy Piedalue, "Violence, Colonialism and Space: Towards a Decolonizing Dialogue" (2015) 14:2 ACME: An International E-Journal for Critical Geographies 539; Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:01 Can JL & Soc 113; Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48 UBCL Rev 593; Andrea Smith, "Native American Feminism, Sovereignty, and Social Change" (2005) 31:1 Feminist Studies 116.

[12] Venne, quoted in Smith, *supra* note 11 at 129.

[13] Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (2014).

[14] Eric Cheyfitz et al, *Sovereignty, Indigeneity, and the Law* (Durham, NC: Duke University Press, 2011); Leanne Simpson, *Dancing on our Turtle's Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Pub., 2011); Joanne Barker, *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-determination* (Lincoln: University of Nebraska Press, 2005); Gerald R Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, Ont.; Orchard Park, N.Y.: Broadview Press, 2005); Sylvia McAdam, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (2015); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

[15] Holmes, Hunt & Piedalue, *supra* note 11.

natural world in non-dominating and non-exploitative terms."[16] This line of questioning addresses the relationship between Indigenous women and their communities from within the normative universe of Indigenous law – a framework that shifts depending on the applicable Indigenous law.

The fourth path is normative but covers Western ground. Western political theory has excelled at treading this path since John Stuart Mill first worried about the 'minorities within minorities' problem.[17] After Mill, Marx worried about the Jewish question.[18] Charles Taylor worried about the francophone Quebecois.[19] Susan Moller Okin worried about women and all of multiculturalism.[20] Seyla Benhabib worried about women wearing veils.[21] Wendy Brown worried about the siren song of tolerance.[22] Some, including Sarah Song, Monique Deveaux, Sherene Razack, and Will Kymlicka, worried specifically about the rights of Indigenous women in Indigenous communities living under conditions of colonization.[23] This latter strand of political theory considers what just political arrangements might correct the brutal realities of modern colonial states. In their normative concerns, these political theorists find company with critical legal theorists like Leti Volpp, Kirsty Gover, Ratna Kapur, and Pamela Palmater, who expose the law's role in creating and policing the terms of this problem.[24] Policy-oriented legal scholars try to figure out what the law should be.[25] This is not an idle daft question given that, with respect to the story that concerns us here, the Canadian government is, again, on the threshold of another amendment to the law defining Indian status.

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[16] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014).

[17] John Gray & G W Smith, eds, *J.S. Mill, On liberty - in focus* (London; New York: Routledge, 1991).

[18] Karl Marx, "On the Jewish Question" in Robert Tucker, ed, *The Marx-Engels Reader* (1978) 26.

[19] Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montréal, Que.: McGill-Queen's University Press, 1993).

[20] Susan Moller Okin et al, *Is Multiculturalism Bad for Women?* (Princeton, N.J.: Princeton University Press, 1999).

[21] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, N.J.: Princeton University Press, 2002).

[22] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, N.J.: Princeton University Press, 2006).

[23] Song, *supra* note 5; Sherene Razack, *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002); Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford; New York: Oxford University Press, 2006); Will Kymlicka, *Multicultural Citizenship: a Liberal Theory of Minority Rights* (Oxford; New York: Clarendon Press□; Oxford University Press, 1995).

[24] Leti Volpp, "The Indigenous as Alien" (2015) 5 UC Irvine L Rev 289; L Volpp, "The Culture of Citizenship" (2007) 8:2 Theoretical Inquiries in Law 571; Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford; New York: Oxford University Press, 2010); Ratna Kapur & Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi; Thousand Oaks, Calif.: Sage Publications, 1996).

[25] Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal, Que.: McGill-Queen's University Press, 2009).

These paths are all important but also well-trampled. The work that follows sets off on a different path, one that in some sense lies behind us. The territory traversed by these well-trampled paths can be illuminated by turning to history and by asking different and prior questions. That is, how did individual equality rights and Indigenous self-governance become juxtaposed to one another in a relationship of tension and dichotomous opposition? What discursive, political, and social forces came together to create this idea of opposition, which in turn gave rise to the idea that these interests can be balanced against one another? To be clear, by 'we', I mean non-Indigenous people living outside Indigenous law and ontologies – this is a problem of Western thought. How did this tension get taken for granted as part of our political landscape? Where did the judge's knowing if bitter smile come from? Asking these questions requires clearing a new path through history, and one that veers sharply away from the existing historical narrative.

The Canonical History

To understand how a turn to history can shed new light on the question of the relationship between gender equality rights and Indigenous self-governance, it is useful to begin with the commonly accepted account of the historical evolution of this relationship. For the case of Canada, one narrative dominates. Its central thesis is that the tension between individual gender equality rights and collective self-governance is rooted in a fundamental conflict between Indigenous women and Indigenous communities, as represented by male Indigenous leaders, and that the conflict between these groups was a Gordian political knot that could only be severed by the law. This received wisdom was telegraphed in the Montreal courtroom by the government witness's reference to a 'simple story' of infighting among Indians. It also holds sway in the academic literature on the topic. Although the literature on the question of Indian status is too voluminous to parse in detail here, its account of the history of amendments to the *Indian Act* gravitates, by in large, to this narrative of competing interests.[26] I offer a composite account of the canonical history, in order to juxtapose it to the alternative account I develop in the dissertation.

The canonical history usually begins in 1960, with the passage of a new federal law to protect the civil liberties of Canadians. But this statute, the *Canadian Bill of Rights,* proved to be toothless. A new prime minister, Pierre Trudeau, believed that a constitutionally entrenched bill of rights would succeed in guaranteeing rights where the *Canadian Bill of Rights* had failed and unite a country threatened by a secessionist movement. His passion for a united Canada was matched only by his enmity for any forces threatening the country's unity, most of all the Quebec nationalists but secondly, the Indigenous sovereignty movement. The *Canadian Bill of Rights* had been a consistent disappointment until a dramatic decision by the Supreme Court that used the statute's prohibitions of race discrimination to throw into doubt the statutory basis for the federal

[26] For a bibliography of this literature, see Minister of Indian Affairs and Northern Development, *A Selected and Annotated Bibliography Regarding Bill C-31, Indian Registration, and Band Membership, Aboriginal Identity, Women and Gender Issue*s, (Ottawa: Minister of Public Works and Government Services Canada, 2004)

government's relationship with 'Indians'.[27] Shortly after this ruling, the federal government announced it intended to end the whole idea of separate Indian status. Indigenous political leaders rushed to the defense of the *Indian Act* as the legal vessel for the special relationship between the Crown and the Indians. The threat to the *Indian Act* de-escalated when the Supreme Court determined that there was no discrimination (racial or otherwise) in the *Indian Act*'s rules stripping Indian women of their status on marriage to non-Indians.[28] While those defending the *Indian Act* rejoiced, those defending equality rights despaired. A movement grew for a constitutionally entrenched bill of rights that would provide courts with the power to strike down laws that violated rights. At the same time, Indigenous political leaders demanded an overhaul of the relationship between the Crown and Indigenous people and blocked any amendments to the *Indian Act*, including the rules affecting women who married non-Indians. A stalemate resulted, with Indigenous men on one side, demanding self-determination, and Indigenous women demanding equality rights, supported by a white-led women's movement, on the other. These were the sides locked in a fundamental conflict of interests.

In the canonical history, rights are the pivotal and heroic protagonists in ending this stalemate. In 1985, Parliament passed a law amending the *Indian Act*. The received wisdom about these reforms is that they were catalyzed by the law. The *Canadian Bill of Rights* had proved powerless in freeing women from sex discrimination in the *Indian Act*, and the federal government had been unwilling or unable to do so. The logjam was broken by either domestic or international law, or both. A new constitution and *Charter of Rights and Freedoms*, enacted in 1982, prohibited state-imposed sex discrimination. Legislators were forced to amend the *Indian Act* before the *Charter* came into force to avoid violating its equality guarantees. The international law moral of the story is a decision by the UN's Human Rights Committee in *Lovelace*.[29] The international human rights system required a government to account for its laws and policies, put pressure on the government to change those laws, and catalyzed action after years of delay. In *Lovelace*, the committee held that Canada's laws on Indian status violated international human rights – an international censure that forced the government to amend the *Indian Act*. Whether grounded in domestic or international law, the canonical history of the 1985 amendments to the *Indian Act* tells a story of rights in law finally triumphing over politics. But, because the amendments were an imperfect remedy, thirty years of litigation and advocacy ensued.

Indigenous women have a voice in shaping the canonical history. In describing the long battle against sex discrimination in the *Indian Act*, the campaigns by revered Indigenous women leaders represent a story of triumph over adversity. The outcome of the *Lovelace* case at the United Nations stands out as an unalloyed victory, in contrast to the

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[27] *R. v. Drybones*, [1970] S.C.R. 282

[28] *Attorney General of Canada v. Lavell & Bedard*, [1974] SCR 1349

[29] *Sandra Lovelace v. Canada* (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), Decision (30 July 1981)

mitigated success of reforms to the *Indian Act* in 1985. This literature is often highly critical of the role of male leaders in Indigenous national organizations and of the intransigence of the federal government. Much of the Indigenous feminist critical commentary on the *Indian Act*'s history is imbued with commitments to self-governance.[30] But, in the reception of this literature by the canonical history, this talk of Indigenous feminist self-governance gets sloughed off. What remains is a simple story about women battling for equality, against the opposition of men in their communities and the inertia of the federal government. It was only the law – and its promise of equality rights – that ended the injustice, by striking a balance between women's equality rights and Indigenous demands for self-governance.

An Alternative to the Canonical History

In contrast to this received wisdom about the 1985 amendments to the *Indian Act*, this project offers a different and novel interpretation of the history of the relationship between gender equality rights and Indigenous rights of self-governance. This alternative account is the result not simply of studying the historical evidence more closely, but asking a different set of questions about the political and social construction of this perceived dichotomy.

Asking these questions requires me to discard a number of key but unstated presumptions that underpin the canonical history. First, I do not presume that, as events unfolded, the definition of equality was settled or understood, in either domestic or international law. Second, I do not presume that social movements sprung up from nowhere in response to one political event, nor that diverse social movement actors had fixed interests and related to one another across black-and-white differences of opinion. Third, I do not presume that the underlying logic driving the 1985 reforms to the *Indian Act* was the need to comply with the *Charter*'s equality provisions or international law. Fourth, I do not define the renegotiation of Canada's constitution and the passage of a bill of rights as an ancillary or mere background issue to the *Indian Act* reforms. Fifth, and most importantly, I do not presume the stability, coherence, or completeness of Canadian sovereignty.

Many of the presumptions I reject seem rooted in seeing the story of the 1985 amendments from the vantage point of the present, with knowledge of how the story ended. I attempt to recover the debates in the terms in which they unfolded, with all their complexity and contingency. First, I take a broad view that puts events, movements, and discourses into context and into relation with one another, and second, I query the historical production of the concepts and categories through which events were debated and disputed. I observe how the same problem is framed differently in different time periods. To take one instance, over the course of the 20th century, the injustice in the *Indian Act*'s rules on status is, at different times, described as a civil

[30] Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16 Can J Women & L 106.

liberties problem, a housing shortage problem, a cultural rights problem, or an individual equality rights problem.

It is by attending to a broad range of discursive, political, and legal forces that I am able to challenge the core thesis of the canonical version of history – namely, that there was a fundamental conflict of interests between different groups of Indigenous people that was resolved by the law's triumph over politics.

My attention to this broad array of factors is nourished by several analytic commitments. My first point of departure is that history "takes places in the present and in the head."[31] The implication is that history is not sitting in the archive waiting to be retrieved, but created by the present-day historian. The common protest against telling history from the vantage point of the present is that it colors the study of the past with ideological or partisan concerns. Such a charge is often leveled against outsider or subaltern histories, in the defense of a presumed objectivity. Subaltern histories challenge the cool neutrality of the historian, the unchanging significance of events over time, and the transparent meaning of facts.[32] Critical histories represent a frontal attack on the plea for the retelling of history "as it actually happened."[33] According to Reinhart Koselleck, the discipline of history "always performs a political function, albeit a changing one."[34] More pointedly, "[t]he proliferation of Others' histories…," Joan Wallach Scott writes, "has exposed the politics by which one particular viewpoint established its predominance."[35] Once the activity of history writing is situated in the bodies of present-day humans, politics surges into history, large as life – and all for the better, in my view.

This being said, I share an anthropological sensitivity to trying to see things through the eyes of those who are the object of our scholarly fascinations.[36] Recovering the varying dynamics at play in the construction of ideas requires an effort to understand discourses as they might have been marshaled and understood in the past. Actors are rarely aware, at the time, of the significance of events or the impact of their words. Although this effort is necessarily incomplete and partial, this does not make the resulting picture useless.

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[31] Gareth Stedman Jones, quoted in Elizabeth A Clark, *History, Theory, Text: Historians and the Linguistic Turn* (Cambridge, Mass.: Harvard University Press, 2004) at 18.

[32] *Ibid* at 21.

[33] Leopold von Ranke, quoted in *Ibid* at 9.

[34] Reinhart Koselleck & Todd Samuel Presner, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford, Calif.: Stanford University Press, 2002) at 14.

[35] Joan Wallach Scott, quoted in Clark, *supra* note 31 at 23.

[36] Sally Engle Merry, *Colonizing Hawai'i: the Cultural Power of Law* (Princeton, N.J.: Princeton University Press, 2000); Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press, 2008); Dirks, Nicholas, "Annals of the archive: ethnographic notes on the sources of history" in Brian Keith Axel, ed, *From the margins: historical anthropology and its futures* (Durham [N.C.]: Duke University Press, 2002); Antoinette M Burton, *Archive stories: facts, fictions, and the writing of history* (Durham, N.C.: Duke University Press, 2005).

When one takes seriously the changing shape of ideas over time, the question of origins looms as a thorny problem. Unwinding the origins of an idea happens only with the benefit of hindsight. The exercise of pinpointing the origins of something transforms the any-old-thing of the past into an origin moment. This is paradoxical, because things in the past cannot be caused by things in the future. As Walter Benjamin wrote,

> [N]o state of affairs is, as a cause, already a historical one. It becomes this, posthumously, through eventualities which may be separated from it by millennia. The historian who starts from this, ceases to permit the consequences of eventualities to run through the fingers like the beads of a rosary.[37]

This alchemy is familiar to the common law. The technique of precedent performs precisely this temporal redefinition of an entirely unremarkable and unnoticeable case from the past into the source or origin of a legal principle in the present.[38] Because time offers the most basic architecture for this analytic attention to origins, I unfold the story chronologically, from the past to the present.

But while the future cannot be the cause of the past, future discourses, ideas, and events do change the significance of the past. The fact that the meaning of past events for the present is perceptible only in hindsight speaks to the difficulty of gauging significance from the vantage point of the past. But the effort to temporally situate ideas, discourses, and events within their own eras sheds some light onto the context from which some ideas jut out, after the fact, as significant. Turning around to look at the surrounding field of contextual variety permits an analysis of how things might have turned out differently – how the significance of one idea reflects not an inevitability, but a contingent outcome.[39] That significance is usually observable only in hindsight can be heard as a warrant to cast a net onto the past, gathering events in the net inwards towards the shore of a necessary outcome. But in this way of thinking, gauging the significance of past events becomes an exercise in finding the thread whose end is the necessity of the present. My appeal to contingency is intended, quite to the contrary, to make the present readable as just one of many alternatives among the past's futures.

The history I tell here is developed with the gift and burden of a present-day understanding of the significance of events and moments in the past. I use this vantage point to generate categories of analysis, as opposed to categories of inevitability. I started with three main analytic frames.

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[37] Walter Benjamin, "On the Concept of History" in Michael William Jennings & Howard Eiland, eds, *Walter Benjamin: Selected Writings* (Cambridge, Mass.: Belknap Press, 2004) 389 at 397.

[38] Renisa Mawani, "Law's Archive" (2012) 8:1 Annual Review of Law and Social Science 337 at 359; Kunal M Parker, "Law in and as History: The Common Law in the American Polity, 1790-1900" (2011) 1 UC Irvine L Rev 587.

[39] On the turn to contingency in legal history, see: Christopher Tomlins, "After Critical Legal History: Scope, Scale, Structure" (2012) 8:1 Annual Review of Law and Social Science 31 at 33–37.

First, we know, today, that advocacy organizations were a key player in the amendments to the *Indian Act*. Rather than taking the organizations for granted as stable actors inter-relating with one another with clearly defined interests, I treat these organizations as analytic fields. Informed by social movement scholarship about political opportunity structures, resources mobilization, and discursive framing, my analytic approach is sensitive to questions about how organizations developed, who led them, how they were financed, how they fit within or broke with prior forms of organizing, and how they picked up, revised, and discarded different discursive frames for their work.[40]

Second, the project is a history of an idea – the idea of competing interests between equality rights and Indigenous self-governance. It is not an intellectual history, except perhaps in the vein of intellectual historians attuned to the political and social contexts in which 'high theory' develops.[41] My analysis starts from the belief that the actions of speaking, writing, and listening give life to ideas. Because ideas are socially embedded, the speaker and the context matter. Some people's speech is more influential than others.[42] Sometimes influence is institutional: for example, the influence of a judge's ideas resides in the speaker's position within a political and legal framework that confers meaning and authority. Influence can also be extra-institutional: a charismatic leader can succeed not only in getting people to follow her, but in gathering people around her ideas and her framings of a problem. Whether institutional or extra-institutional, an attention to the influence of speakers is a way of getting at the inextricable enmeshment of language in social context. Ideas don't rise or fall on their own.

The third analytic frame begins with the observation that bad ideas can be astonishingly successful.[43] By 'bad ideas', I mean not only ideas that are normatively distasteful (perhaps only according to present day mores), but also ideas that are, at a more basic level, just misguided, poorly grounded, or incoherent. A social and political history of an idea requires a generosity towards human fallibility. Mistakes, confusion, and misfires abound in human speech and action. Sometimes ideas are muddled up, and

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[40] N Pedriana, "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s" (2006) 111:6 American Journal of Sociology 1718; Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998); Daniel M Cress & David A Snow, "The Outcomes of Homeless Mobilization: The Influence of Organization, Disruption, Political Mediation, and Framing" (2000) 105:4 The American Journal of Sociology 1063; Bert Klandermans & Suzanne Staggenborg, eds, *Methods of Social Movement Research* (Minneapolis: University of Minnesota Press, 2002).

[41] Quentin Skinner, "Meaning and Understanding in the History of Ideas" (1969) 8:1 History and Theory 3; Martin Jay, "Historical Explanation and the Event: Reflections on the Limits of Contextualization" (2011) 42:4 New Literary History 557.

[42] Pierre Clastres, *Society against the State: Essays in Political Anthropology* (New York; Cambridge, Mass.: Zone Books; Distributed by the MIT Press, 1987).

[43] I draw this insight from Liam McHugh-Russell's ongoing research on the relationships between law and global finance.

even these muddled ideas can leap out from the past to play their part in moments of origin.

The Rewards of an Alternative to the Canonical History

The project stands to make three scholarly contributions. First, by re-narrating history with sensitivity to a broad range of discursive, political, and legal forces, I show that the central thread running throughout the history of reforms to the *Indian Act* is the project of constructing and defending Canadian sovereignty. If the *Indian Act* is a jurisdictional field for the relationship between Canada and Indigenous peoples, the Canadian government trampled all over the rights of Indigenous women in that field in the service of a state-building project to secure a stronger, unified foundation for Canada's sovereignty. Some parts of this history have not been written at all, due to lack of interest, lack of sources, or both. Indeed, some of the documents analyzed in this project have, until recently, been inaccessible to the public. Re-narrating the origins of the tension between equality rights and Indigenous self-governance represents an effort to challenge a historical record written from a colonial vantage point. As such, it can shed new light on the paths already well-traveled by scholars in Indigenous critical studies, Indigenous feminist and legal theory, and Western political theory.

Second, a narrative of this conflict that unseats the canonical history matters if you care about the law and what it does. The moral of the canonical story is that the liberal state rescued the Indians from their long-running internecine dispute. By passing laws, grounded in rights commitments, the liberal state stepped in to achieve reconciliation. But the law is no peacemaker if there is no war. Thus, for the law to play this role of striking a balance between fundamental principles to equality and self-determination, those principles have to be figured as opposed and, paradoxically, also similar enough to be amenable to reconciliation. The problem with this account of the law's role as peacemaker is that, in this case, it finds little grounding in the political, legal, and discursive events of the past. Instead, the past shows the law's hand in shaping the discourses of rights through which the tension became articulated, labeling those rights as fundamental, and then pitting those rights against one another as intrinsically opposed.

Third, revealing an alternative history of the tension between equality rights and Indigenous self-governance is important to understanding history's role in legal decision-making. The courts figure as heroes in the epilogue to this canonical history. The government's 1985 amendments to the *Indian Act* only partially remedied sex discrimination. As a result, Indigenous women spent over a quarter of a century lobbying and litigating for their equality rights. Through their powers of judicial review, the courts succeed where the legislature failed, forcing the government to dig out discrimination in the *Indian Act* from its roots, as opposed to simply pruning the tree, as the government had done in 1985. It is a coda to the paean about the triumph of the law.

In finding that the *Indian Act* perpetuates sex discrimination, courts have relied on the canonical history of the 1985 amendments to the *Indian Act*. As a case in point, the government's witness in the Montreal courtroom summarized the legislative history as

a problem of the competing interests of two camps – one in favor of equality rights, the other in favor of Indigenous self-governance.

Ever since constitutional historian Alfred Kelly described law-office history as "very bad history" based on "the selection of data favorable to the position being advanced without concern for contradictory data," it has become something of a national sport among historians to point out the frailties and distortions of judge-made history.[44] Indeed, as Geertz observed with his trademark pith, "Whatever it is that the law is after, it is not the whole story."[45] But my project's motivation is not proving that a trial court judge got the history wrong. Nor is my project engaged in the productive research on the role of historians as expert witnesses in court cases[46] or the deeply important work of getting Indigenous accounts of history heard by the courts.[47]

Rather, I develop an alternative history of the 1985 *Indian Act* amendments as a foil against the history told in and by the courts. The alternative history has both a wider aperture on the political and social context and a sharper focus on detail, complexity, and multiple perspectives. A central conclusion of this alternative history is that the government played a huge role in manufacturing the conflict between gender equality rights and Indigenous self-governance rights.

By juxtaposing this alternative history to the canonical version received and accepted by the courts, I can figure out what kinds of histories thrive in the airless courtrooms of *Charter* review and what kind of work is accomplished by such histories. In the courts, the government's responsibility in manufacturing a conflict between gender equality rights and Indigenous self-governance is not simply overshadowed by the canonical narrative of a conflict between Indians. Quite to the contrary, the government invokes the historical existence of a conflict of 'competing interests' as its primary justification for the law being challenged, while omitting its part in generating that conflict. In this context, history in a court's judgment works not simply as a tidy just-so story that confirms the correctness of the court's application of the law to the facts. The

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[44] Alfred H Kelly, "Clio and the Court: An Illicit Love Affair" (1965) 1965 The Supreme Court Review 119; Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996); but see, contra: Matthew J Festa, "Applying a Usable Past: The Use of History in Law" (2008) 38 Seton Hall Law Review 479.

[45] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 173.

[46] Arthur Ray, "Native History on Trial: Confessions of an Expert Witness" (2003) 84:2 Canadian Historical Review 253; Ruth Milkman, "Women's History and the Sears Case" (1986) 12:2 Feminist Studies 375; Michael Grossberg, "The Webster Brief: History as Advocacy, or Would You Sign It?" (1990) 12:3 The Public Historian 45; James C Mohr, "Historically Based Legal Briefs: Observations of a Participant in the Webster Process" (1990) 12:3 The Public Historian 19.

[47] Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver; Toronto: UBC Press, 2011); Ann Curthoys, Ann Genovese & Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press, 2008); M Johnson, "Making History Public: Indigenous Claims to Settler States" (2008) 20:1 Public Culture 97.

deployment of the canonical history in courtrooms and in legal decisions conjures the state's role as a peacemaker in a war that it helped to start.

In this regard, the project's concern for what happens when history is written in the courts is most closely tied to a set of ideas and practices in a field optimistically dubbed 'transitional justice'. Hannah Arendt's analysis of the Eichmann trial is just one notable example of a rich body of scholarship that asks how history is told and written in trials that are meant to mark a threshold between a past time of conflict and a future time of peace.[48] In such trials, parties, judges, and observers worry procedurally about whether all sides in the war received a fair hearing, they agonize substantively about the political fallout of legitimizing a victor's account of history, and they fret over whether judges have the proper training to be historians.[49] Indeed, post-conflict tribunals are so aware of the importance of history in plucking justice from thin air that there is even a self-reflexive obsession with the history of the tribunals' own foundations.[50] Because the international legal fairy tale of state succession – the idea that 'the state' endures, no matter what has happened to the people, the borders, or the government – is believed to be the only thing standing between the tribunal and a legal vacuum or, more drastically, another outbreak of conflict, tribunals are keen to identify and shore up a sovereign authority to carry the scepter of the rule of law.[51] As such, the transitional justice literature on post-conflict justice has illuminated that trials are only partly about the fates of individuals accused of wartime crimes. Judges in post-conflict political trials are deeply enmeshed in processes of founding and refounding state sovereignty, most crucially in their role as historians explaining the relationship between the past of conflict and the present and future of peace.

Although litigation about the *Indian Act* happens in the humble trial courts of Canada rather than in the heady tribunals of international law, I discover in the chapters that follow that this litigation is no less a story about the search for a united sovereignty and no less representative of the law's constant effort to found and re-found that sovereignty. This is because Canada's sovereignty has been and continues to exist under clouds of uncertainty, clouds pushed by the winds of Quebec and Indigenous nationalisms. In the canonical history, the reforms to the *Indian Act* were a big deal for Indigenous women and Indigenous communities and a minor irritant to the Canadian state, which was

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[48] Hannah Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* (New York: Viking Press, 1963).

[49] Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011); Stephen Whinston, "Can Lawyers and Judges Be Good Historians: A Critical Examination of the Siemens Slave-Labor Cases" (2002) 20 Berkeley Journal of International Law 160.

[50] Sofia Stolk, "'The Record on Which History Will Judge Us Tomorrow': Auto-History in the Opening Statements of International Criminal Trials" (2015) 28:04 Leiden Journal of International Law 993.

[51] Ruti G Teitel, *Transitional Justice* (New York; Oxford: Oxford University Press, 2001). For a careful discussion of the relationship between international criminal law and sovereignty, see: Christopher Gevers, "International Criminal Law and Individualism: An African Perspective" in Christine E J Schwöbel, ed, *Critical Approaches to International Criminal Law: An Introduction* (New York: Routledge/Taylor & Francis Group, 2014). On the doctrine of state succession, see: Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2003), chap 3.4.

more concerned with securing a new constitution and bill of rights. By developing a more complex and multi-layered history of the amendments to the *Indian Act* and by showing how that history is deployed in contemporary litigation, the project aims to position the debate over the equality rights of Indigenous women as a pivotal chapter in the continuing, contested story of Canadian sovereignty.

A Primer on the Relationship on Canada's Relationship with Indigenous Peoples and with the British Crown

This chapter offers a synopsis of the story that I offer as a rebuttal to the canonical history of the 1985 amendments to the *Indian Act*. Before presenting this synopsis, I provide some background information about the relationship between the Canadian state, Indigenous peoples, and the British Crown. The place many now call Canada is the product of several centuries of colonization and European wars. Indigenous nations traded with hunters and trappers from Europe, and they joined military alliances, helping one side or the other in the wars between the French and British. Treaties of peace and mutual military support were signed between Indigenous nations and the British Crown; the treaties provided for the use and occupation of lands by 'Indians'. The British parliament confederated the provinces of the colony in 1867, creating the Dominion of Canada.[52] From that moment until 1982, Canada was on a sovereignty drip-feed controlled by the British Crown.

The English beat the French in the colonial wars, and Canada has ever since been riven. Unlike the other Canadian provinces, Quebec is governed under Quebec civil law, a variant of the civil law inked in the Napoleonic Code. Canada's fragile sovereignty depended on a land grab from Indigenous people, laws policing the country's boundaries and bedrooms in order to ensure a white Dominion, the quashing of Indigenous sovereignty, and the containment of Quebec nationalism. Quebec nearly voted to secede in 1980. In 1982, the British Parliament granted Canada legal independence through the passage of a new constitution and a new *Charter of Rights and Freedoms*.

The country's halting journey towards sovereignty has unfolded alongside, over, against, and in spite of the unextinguished sovereignties of Indigenous nations. Even if the treaties signed with Indigenous nations are taken as extinctions of sovereignty (which they should not be), there is still the fact of most of British Columbia (BC), where no treaty was ever signed. Indigenous people have protested, every step of the way. But they have also just lived their lives and their laws. Speaking at a Truth and Reconciliation Commission hearing in 2013, a residential school survivor from the BC Interior remembered that, in the 1930s, when the Canadian state officials came to lock him up in residential school, it was the first time he had seen a white man or his laws.

Each dosage of sovereignty dispensed by the British Crown brought about a renegotiation of the government's relationship with Indigenous nations. Specifically, the

[52] *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK), reprinted in RSC 1985, App II, No 5.

Canadian government found it necessary to define who was an 'Indian' for the purpose of determining who could live on lands reserved for Indians. It created a legal status of 'Indian'. Having 'Indian status' is like having citizenship – both come from the government, are materially represented with a government document (a status card or passport), can be transmitted to one's children, entitle the holder to material benefits, and represent a relationship between a person and the state.

Registration as a status Indian passed between parent and child along patriarchal lines. From 1869 on, "status had begun with a man; women had Indian status only as wives or daughters of an Indian man."[53] Indian women marrying anyone other than an Indian lost their status, and their children never acquired it. When Indian men married non-Indian women, their wives acquired status, and their children were born with status. After two generations of marriage to non-Indians, children no longer had status. It worked just like citizenship laws in many Western countries. For example, until 1982, a British woman could not pass on her nationality to her child born outside of Britain; a British man could.[54]

Built on this patrilineal skeleton, the rules on the transmission of status became Kafkaesque in their complexity.[55] For example, if an un-married Indian man had children, the illegitimate male child was Indian, whereas as the illegitimate female child was not. Under the double mother rule, a person lost status at 21 if his or her mother and paternal grandmother had become Indian through marriage.

The *Indian Act*'s rules on Indian status were patriarchal, but they did not invent gender-based inequality or sexism in Indigenous communities. The effect of the *Indian Act* was to cement

> a much longer process of social formation in which Indian men's political, economic, and cultural roles and responsibilities were elevated and empowered while those of Indian women were devalued. Within this process, sexist ideologies and practices were normalized, and not 'for the first time' – patriarchy, sexism, and homophobia within Indian communities being much older than 1876.[56]

Since 1876, the federal government has used the rules about who is an Indian to administer Indian life from cradle to grave. Being a status Indian entitles a person to extended health benefits, financial assistance with post-secondary education and extracurricular programs, and exemption from certain taxes. Indian status entitles a

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[53] David Schulze, *The McIvor Decision and Its Impact*, Presentation at Canadian Aboriginal Law Conference (Ottawa, 2009).

[54] *British Nationality Act 1981*, (UK) 1981, c. 61

[55] Grammond, *supra* note 25 at 102.

[56] Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians: feminism, race, transnationalism 127 at 132.

person to live on reserve; conversely, non-Indians cannot live on reverse. Reserves are lands allotted to Indian nations by the Crown; land is held in common and cannot be bought, sold, or mortgaged by individuals. Because of the connection between status and reserve residency rights, the Canadian government effectively determines who can be part of Indigenous communities living on reserve.[57] Furthermore, for much of the 20th century, programs administered by the federal government were the primary source of personal income for individual status Indians.[58] Women who lost status due to 'marrying out' were not able to receive a per capita share of band capital or revenue and lost access to day-care, school supplies, and housing grants. They were also generally denied property willed to them.[59] They experienced cultural and personal losses like not being able to come to the reserve to participate in family life or be buried with family on reserve.[60]

In addition to these material dimensions, status has acquired deep significance within Indigenous communities. The *Indian Act* separated status Indians from all others of Indigenous heritage; over time, having Indian status became a marker of authentic Indigeneity. In ways that are so familiar they seem second-nature, Indigenous identity has become understood through the *Indian Act* and its rules on status.[61] A non-status woman explained, "'[i]t's a very unsure and scary feeling not to be identified by government or by native organizations as aboriginal people. We were taught by our parents that we are part of the first people of this country. After marriage out of the band, we don't belong."[62]

The Canadian government also created 'bands' and 'band councils.' An Indigenous nation like the Cree encompasses many communities, many of whom live on specific reserve lands allocated by the federal government. These reserves are 'bands', the status Indians who live there are on the 'band list', and the governments that preside over them are 'band councils'. These band councils are creatures of federal statute and elected by the community. Of note, by the 1960s, "only 6 per cent of elected chiefs and council members were women."[63]

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[57] Bonita Lawrence, *"Real" Indians and others mixed-blood urban Native peoples and indigenous nationhood* (Lincoln: University of Nebraska Press, 2004) at 12.

[58] Jo-Anne Fiske, "Political Status of Native Indian Women: Contradictory Implications of Canadian State Policy" (1995) 19:2 American Indian Culture and Research Journal 1 at 8.

[59] Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln, NB: University of Nebraska Press, 2004) at 54.

[60] Lawrence, *supra* note 57 at 55.

[61] *Ibid* at 3.

[62] Lilianne E Krosenbrink-Gelissen, "Caring is Indian women's business, but who takes care of them?: Canada's Indian women, the renewed *Indian Act* and its implications for women's family responsibilities, roles and rights" in Rene Kuppe and Richard Potz, eds, *Law and Anthropology: International Yearbook for Legal Anthropology, vol 7* (Dordrecht: Martinus Nijhoff Publishers, 1994) at 115.

[63] Barker, *supra* note 56 at 133.

Indian status is not only integral to Indigenous identity but a keystone of the governance of Indigenous communities. Prior to 1990, with some rare exceptions in Alberta, Indian bands were almost wholly dependent on the federal government. Most bands lacked an independent fiscal base, such as the right to levy taxes or royalties on resources. The budget for band councils is disbursed by the federal government on the basis of the number of status Indians on the band list.[64]

Neither 'status' nor 'band councils' are rooted in Indigenous laws; their present-day significance is a testament to the hegemonic influence of the *Indian Act*.[65] Having 'status' has come to signal Indigenous authenticity, and the 'band council' has become the local government. Alongside these terms and institutions, Indigenous experiences and definitions of identity and membership have continued to endure, rooted in the laws of specific nations. These varied definitions of identity, traceable to life before the arrival of Europeans, contain both expansive and restrictive principles: a generous approach to adopting children from outsider communities is as possible as a rule tracing membership to the identity of one's father.[66] Indigenous governments, referred to as traditional or hereditary councils, continue to govern according to Indigenous law. Before contact with Europeans, Indigenous law, political practice, and ceremonial life gave women and other gendered people "a relatively public, empowered position within their bands as diplomats and traders with others."[67] The Canadian federal government outlawed these governments, along with many other parts of Indigenous political and cultural life, as part of the colonization process. They nonetheless endure.

Synopsis

Before beginning a detailed story that unseats the accepted wisdom about the 1985 amendments to the *Indian Act*, I offer a shorter version to provide the reader with an overview of the story. I omit details, disclaimers, and nuances, in order to paint a blunt, broad picture.

We begin in mid-20th century Canada. In the war's aftermath, the international community founded a new international legal order that preserved most of the advantages its Western imperial founders had enjoyed under previous global orders. In building this new international edifice, states steadfastly refused to recognize the collective rights of self-determining minorities, as this might threaten the territorial integrity of existing states. They relented on granting human rights to individuals. The froth of international human rights alighted on a Canadian domestic climate highly sensitive to the heavy hand of government. The Liberal government had spent much of the Depression and the Second World War suppressing worker dissent and interning the Japanese. This looked bad, because a war had just been fought against despots.

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[64] Fiske, *supra* note 58 at 8.

[65] Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the US: An Overview" (2003) 18(2) Hypatia 3 at 21.

[66] Grammond, *supra* note 25 at 78.

[67] Barker, *supra* note 56 at 132.

Bolstered by newly minted international humans rights, demand surged for a domestic bill of rights that would protect individuals from the state. As a dividend, these new rights would include non-discrimination. In 1946, the federal government set about inventing Canadian citizenship, a status independent of that of British subject. Included in these reforms was a (non-Indian) woman's right to maintain her citizenship even if she married a non-Canadian. The reason for this rule was not so much gender equality as granting women control over their citizenship status. Even so, equality was in the air, if not for women or Indians. There was a growing consensus that the scores of post-war immigrants should receive the expanded benefits of the welfare state on an equal basis with other Canadians. Defining Canadian citizenship raised the awkward matter of the people living here before Europeans had arrived. They were not citizens, but wards of the Crown, and they could not vote. But there was hope that they, like immigrants, might be taught to be citizens. Canada stood on the threshold of an era of equality.

In the meantime, government officials tasked with administering federal programs on reserves had run out of patience with definitions of 'Indian' based on vague factors. The law was overhauled. In 1951, a crisp ream of paper crackled in a new office in Ottawa. On it was written the name of every Indian in Canada and his or her band affiliation. This was a line in the sand. On the 'non-Indian' side of the line were the thousands of people who had only one Indian parent, who were Métis, whose fathers had lost status by getting an education or being a war veteran or because the Minister said so, whose communities had been out on the trap lines when the commissioner first took down the names of Indians – the reasons go on. In short, non-Indian did not mean 'white', but, nevertheless, an impressionistic sketch of the Indigenous population was etched in stone as the time zero of 'status'. Even though the government had just given non-Indian women control over their citizenship, the new law on Indian status reinforced the old sexist rule: an Indian woman lost status if she married a non-Indian man, and her children would not have status, whereas a non-Indian woman gained status if she married a Indian man. From now on, the principle that non-Indians could not live on reserve would be firmly enforced. This hit women who had 'married out' the hardest, as they couldn't go home if their marriages ended. The Indigenous leadership protested. They had been offered no say in the new *Indian Act*. They demanded recognition of capacities to govern their own communities. The government promised that once they had grown big and strong, they might one day become municipalities. Indigenous organizations developed at the provincial and national level, but divided between status Indians and non-status Indians.

The Liberals held national power until the late fifties. They used this time to expand large-scale national infrastructure, health, and welfare projects, while continuing to block national human rights legislation. The rights movement picked up steam at the provincial level instead, although with little interest in women's rights. Meanwhile, in Alberta, some people had been evicted from their homes on a reserve because they were not Indians. Evictions under the *Indian Act* had happened before, but this time, things were different. Concerns over an over-reaching government armed with boundless discretionary power made the evictions look like civil liberties violations. In addition, oil had been discovered under that very reserve, and the proceeds – hypothetical, as yet – stood to be divided among the people whose names appeared on that crisp list in

Ottawa. The lawyer representing the people who had been evicted was politically connected, and soon enough the Canadian Bar Association weighed in on the civil liberties problems raised by the government's regulation of residence on an Indian reserve. The issue in the *Indian Act* was not the unequal treatment of women compared to Indian men but the abuse of ministerial discretion. The government's Indian policy was exposed on another flank as well. On the international stage, Canada became uncomfortably aware that its policies towards Indians looked rather more like racial discrimination than like development or temporary 'affirmative action' measures to correct historic disadvantage. Canada's legal community began to cogitate on the meaning of equality and the challenge of 'difference'.

The Opposition got its day in the sun in 1957. Helmed by a prime minister fanatical about the protection of individual rights, the Conservatives at last passed federal legislation to beat back the overzealous administrative state. The *Canadian Bill of Rights* gave Canadians a fistful of fundamental rights, including the right to equality before the law. Steeped in civil libertarian values, Conservatives fretted over the freedom deficits in the *Indian Act*. The Department of Indian Affairs was in some respects the epitome of the heavy-handed administrative state, as it held jurisdiction over Indian life from cradle to grave. Freedom-loving Conservative lawmakers alighted not on the problem of mandatory residential schooling and resulting deaths from malnutrition and tuberculosis, but instead on lack of voting rights and rules forcing veterans to lose Indian status. This was no way to thank Indian veterans. The fact that Indian women lost Indian status if they married out, on the other hand, never appeared as a mandatory loss of status that trenched on freedom. In any case, the Cabinet nodded, out-migration from the reserves – an effect of the marrying out rule – was necessary as there was no question of expanding the Indians' land base. In 1960, the government gave Indians the right to vote in federal elections; few Indians cheered.

Increasingly well-organized Indigenous groups made stronger demands for Indigenous self-government. The government believed that these demands could be satisfied by dangling the carrot of municipal status. Indigenous leadership insisted on self-governance, pointing out that municipalities were delegated bodies, whereas Indigenous sovereignty was inherent. In contrast to their earlier petitions about the Indigenous relationship with the federal government, they did not complain about the marrying out rule. This omission was because a fragile national consensus among Indigenous leaders had started to crumble, and the division of interests between status and non-status Indians caused priorities to diverge. Moderates advocated piecemeal revisions of the *Indian Act*, while hard-liners demanded a complete overhaul of the federal-Indigenous relationship. These demands for self-governance gained a foothold in the Department of Indian Affairs. The outline of a new policy emerged, in which bands would gain control over membership and Indian women would no longer lose status through marriage. This proposal was washed away in the tide after the Conservatives lost the 1963 election and the Liberals returned to power. But it juts out as a moment in which equality in the rules on Indian status and increased recognition of Indigenous sovereignty sat peaceably alongside one another, neither in political nor fundamental opposition to one another.

In the sixties, Canada was tossed into the sea of social upheaval and re-generation. This brought a period of confusion and innovation about rights and the meaning of equality. Quebec slipped free of Catholicism. On the coattails of Quebec's Quiet Revolution came secularism and a nationalist movement. For some in Anglophone Canada, the Quiet Revolution turned the inscrutable Quebecois from Papist peasants into communist revolutionaries. Collective rights emerged as an idea enmeshed with Quebec nationalism.

The rise of Quebec nationalism had the legal pantheon scrambling to defend the primacy of the individual and his liberty rights to speak English especially if he lived in Quebec. Then, a new front opened on the 'Indian problem'. The general public (to say nothing of Indigenous people) could no longer stomach the devastating life conditions on Indian reserves. In 1967, a government-appointed expert concluded that the solution to blight in Indian communities required the recognition of their special status as '*Charter* Canadians'. As such, they should be entitled to all the riches that Canadians enjoyed, and then some. 'Special status for Indians as *Charter* Canadians' collided with and became connected to the idea of collective rights for the Quebecois. Things become more muddled, still, when bureaucrats in Ottawa concluded that Canada's Indian policy was best justified in international law terms as the protection of a vulnerable group, much like legislation that protected women from doing jobs unsuited to their delicate and moody constitutions. This frame turned the law stripping Indian women of status into affirmative action, a permissible discrimination *in favor* of women. The conclusion from these two separate policy strands was that Indians were 'special' – but it wasn't clear exactly how, nor whether this implied a need for protection or a need for recognition.

When it came to the meaning of equality and the nature of 'Indians', the fog was thick in Ottawa. And it was not lifted by judges' interpretation of the *Canadian Bill of Rights*. They crab-stepped their way around Canadians' new rights, concluding that an ordinary statute may well be chock-full of rights but still could not supersede the will of Parliament. Liberty and equality enthusiasts were down but not out, because throughout the sixties, the provinces forged ahead with human rights legislation that went beyond limited notions of discrimination to capture systemic, substantive inequality.

The confusion in Canada's legal mind about equality happened against a backdrop of widespread social mobilization. Justice-seeking movements flowered, including an elite-led, well-heeled woman's movement in Anglophone Canada. An Indigenous resurgence grew as young Indigenous leaders congregated in urban areas, reconnecting with the networks of resistance they had formed in residential school. Even the government seemed swept up by the fervor. Participation, civic empowerment, and community development manifested in federal policy documents as medicine rather than disease. Money was distributed hand over fist to civil society groups. The participation wind howled through Indian Affairs, where bureaucrats had been making their careers suppressing Indigenous dissent since before the Great War. In a new program launched in 1964, fresh-faced white undergraduates and the occasional anarchist fanned out to Indian reserves to teach empowerment to people who had been governing themselves

since before Canadian time began. Indigenous leaders were invited to join regional and national boards to talk about government policy. A few years of this medicine yielded an organized national Indigenous movement, steered by young, well-connected and charismatic leaders, steeped in an Indigenous political resurgence rooted in inherent sovereignty. The government was tone-deaf to these changed and more forceful articulations of Indigenous sovereignty. It kept offering self-government through progression to municipal status. To add fuel to the fire, the government proposed giving Indians individual rights to property on reserve, thus undercutting collective rights to reserve land and a fundamental tenet of Indigenous governance. Again, Indigenous leadership refused the scheme for amending the *Indian Act*, but this time, they also refused any changes to the rules for the determination of Indian status. The federal government remained convinced that Indians, like women, needed improvement and protection, rather than equality.

The parallel rise of Indigenous sovereignty and Quebec nationalism turned 'collective rights' and 'special status' into politically loaded terms. In 1968, Canada elected a new Liberal leader with a hatful of ideas and the charismatic authority and tactical sangfroid to see them into the world. A Francophone Quebecer, Pierre E. Trudeau was an ardent promoter of a united and bilingual Canada, peopled by opportunity-seeking individuals with no needs for protection. In the Trudeau government's view, the *Indian Act* smacked of odious, nannying protection of a sub-national collective. The government consulted with Indians, ignored their views, and then proposed to repeal the *Indian Act* – in the name of equality. At most, separate Indian status would be maintained as a temporary measure until Indians 'caught up'.

Previous sovereignties, European wars, negotiated treaties – this history was all dead weight as Canada rocketed into the future. In a conceptual world built on the primacy of individual liberal rights, the collective identity grounding Quebec sovereignty was illogical, outmoded, and a threat to national unity. Then, life mirrored the theoretical. In October 1970, a radical wing of the Quebec sovereignty movement kidnapped state officials; a minister in the Quebec provincial government was murdered. Trudeau imposed martial law. A reconciliation between Quebec and a federal Canada was desperately needed. The crisis cemented the analogy between the collective rights of the Quebecois and of Indigenous peoples. It was argued that if the federal government bowed to Quebec, they would have to bow to the Indians as well. Conversely, it was hard to rally under the banner of collective rights for the Francophone minority without signaling support for the collective rights of Indigenous peoples.

The late sixties brought an increased openness to the idea of gender equality, a development welcomed by the white-led women's movement. Equality of opportunity and equality before the law would come in handy at work. In 1970, a federal commission on the status of women confirmed the need to treat women the same as men. Where the commission struggled with women's differences from men (pregnancy and child care), it gave up entirely on the issue of women differing from one another, labeling such differences as 'cultural' and therefore outside its remit. Through the advocacy of Mary Two-Axe Earley, a Mohawk woman, the commission condemned the government's rule stripping Indian women of their status if they married out. The

commission saw this as a problem of formal inequality produced by statute. It had nothing to do with Indigeneity, nor was it a civil liberties violation, as has been argued after the expulsion of Indians from oil-rich bands in Alberta. The violation of individual legal equality rights was the frame through which the white-led, Anglophone women's movement began to mobilize around sex discrimination in the *Indian Act*.

Given the Trudeau government's ardent commitments to liberal equality, the government proposed to repeal the *Indian Act*, in the 1969 White Paper. The government developed the policy in secret, while running a photo-studded consultation process with Indigenous organizations. The policy threatened the unilateral termination of the Crown's obligation to Indians. Indigenous leadership rallied to the defense of the *Indian Act* as the modern manifestation of the Crown's special relationship with Indians. Any aspect of sovereignty became worth fighting for. Indigenous organizations blasted the proposal. All groups made a procedural claim grounded in relationship: federal laws affecting Indians had to be developed with the consent of Indians. Under a hail of criticism, the government was forced to rescind the White Paper proposals. The debacle created a toxic climate of distrust between the federal government and Indigenous leaders.

Meanwhile, a national Indigenous women's movement was taking shape in a conference hall in Alberta. Views ranged widely about the priorities for the movement. Some women heralded a woman's role in caring for children and transmitting Indigenous practices; others wanted action on crippling poverty and the epidemic of alcohol abuse on reserve. One faction spoke out against sex discrimination in the *Indian Act*. They were mainly women who had lost status through marriage and were living and working in urban areas. The Indigenous women's movement began in unity in 1972, before specializing and ultimately dividing based on the divergent interests of status and non-status women. The faction campaigning against the marrying out rule was accused by many of being against the *Indian Act* and thus against their own people, even though these women were desperately trying to get back into their communities by recovering status and band membership. Admonitions flew: male Indigenous leaders argued that the federal government's threat of repeal of the *Indian Act* had to be met with a united front. Some of the people running the Indigenous organizations were male chauvinists. In a neat cocktail of sexism and racism, the women were presumed to have been given the idea of their own equality by the white-led women's movement.

A trip to the Supreme Court in 1973 sharpened the battle lines. A young Indigenous political leader, Jeannette Lavell, lost her status when she married a white man. Alleging sex discrimination, Lavell sued the federal government and won. The federal government appealed to the Supreme Court. The white-led women's movement threw its chips in with the Indigenous women's movement. Assisted by a grant from the federal government, the major national Indigenous organizations intervened in support of the government. The pleadings of the Indigenous organizations said little about gender inequality in the status rules. Rather, they defended their procedural rights to be consulted about changes to the *Indian Act* and their inherent rights to control membership in their own communities. Those points were lost in the spectacle of 'Indians fighting'.

Everyone was stunned by the Supreme Court's conclusion in *Lavell* that the marrying out rule in the *Indian Act* did not offend equality rights. For the white-led white women's movement, the Supreme Court's decision signaled the very dire health of the *Canadian Bill of Rights* and catapulted the *Indian Act*'s status rules on to the national stage. The stage was familiar – there had been that play about civil liberties a few years earlier, but this new show was about sex discrimination, and suddenly half the country seemed affected. The national Indigenous organizations read the Supreme Court's decision as a victory for Indians' 'special status' and a mandate for political, rather than judicial, negotiation about the *Indian Act*. Between the decision in *Lavell*, another Supreme Court victory recognizing Aboriginal title, and new discourses of Indigenous self-determination, the Indigenous leadership had the wind at their backs. Leaders from Alberta pitched a new model *Indian Act* to the government. Among its many facets was an even narrower, even more patrilineal system for determining Indian status. It is worth recalling that oil revenues had just started flowing in to Alberta, swelling the bank accounts and bargaining power of a handful of Indian bands. The divisions between status and non-status Indians intensified, pushing those in the Indigenous women's movement who were campaigning for changes to the *Indian Act* further from the national Indigenous organizations (led, in some cases, by their cousins, brothers-in-law, and close friends) and towards the white-led women's movement. This latter movement, now teeming with lawyers, was straining to hold together a meeting-minuting moderate faction with a street-marching radical faction. By this time, the courts had managed to make an even larger dog's dinner of equality law, in a judgment, *Bliss,* distinguishing women from pregnant persons. For the women's movement, the marrying out rule in the *Indian Act* presented a tidy problem of old-fashioned legal inequality – provided that the 'Indigenous' part of the story could be ignored.

This tumultuous period between 1974 and 1978 drew the battle lines between individual equality rights and an end to sex discrimination in Indian status on one side and collective rights and Indigenous sovereignty on the other. Each side peered through the fog of Equality. The sides appeared diametrically opposed, and you had to pick one. Only fifteen years later, having a little of each of these 'sides' became not only conceptually possible, but a recipe for justice. How did this discursive transformation take place?

The answer lies in part with the federal government's announcement that there would be a new constitution with a bill of rights. Same players. Same projectiles. The field had moved underneath them.

The first draft of the new Constitution in 1978 made no mention of aboriginal rights, proving the fears of Indigenous leaders that Indigenous peoples would not be included as a third order of government in a renewed federation. Because treaties with the Indigenous nations had been signed by the British monarch as Canada's representative in foreign affairs, Chiefs set off on a historic multi-nation delegation to refresh the Queen's memory about the Crown's treaty obligations. The Queen was indisposed for an audience with the chiefs, but they gained the attention of the British Parliament. Back in Canada, federal leadership had switched parties. The new Conservative prime minister, Joe Clark, persisted with the claim that Indigenous self-governance could be

realized by tinkering with the *Indian Act*; Indigenous people had no need to worry themselves over the Constitution. While the Chiefs were lobbying in London, over 300 Indigenous women marched from Montreal to Ottawa in a protest about Indigenous women's rights. Some of the women hailed from Tobique, New Brunswick, where a dispute that started with a woman's eviction from her home had exposed serious housing, poverty, and governance problems in the community. By the time the march arrived in Ottawa in July 1979, the press had packaged the event as a march about sex discrimination in the *Indian Act*. The march grabbed the prime minister's attention, leading the government to spell out the first serious plan for remedying sex discrimination in the *Indian Act*. The government proposed that Indian status would pass to one generation only, there would be no loss or gain of status through marriage, and bands could gain control over their own membership lists. Rights of women to Indian status and rights of bands over membership were bundled together, but they were not fundamentally opposing rights. These proposals were as short-lived as the Conservative government. The Liberals were returned to power in 1980.

Given the result in *Lavell,* Indigenous activists from New Brunswick held no hope for justice from the Supreme Court. Instead, they took one woman's case to the just-christened UN Human Rights Committee, alleging that the *Indian Act* violated the *International Covenant on Civil and Political Rights* (ICCPR). Sandra Lovelace, an Indigenous leader from Tobique, complained that the status rules in the *Indian Act* violated her equality rights and that the government was hiding behind sham consultations in order to dodge the cost of a longer list of Indians. As the federal government squirmed, several leading figures of Canada's legal community descended to push the women's case along. The complaint landed at the UN Human Rights Committee shortly after its first meeting, when the meaning of the rights in the ICCPR was up for grabs. The forum was new, but the ICCPR's equality rights were not being cut from whole cloth. Lawyers on all sides sifted through Canadian, European, and international law, each advancing different interpretations of the rights in the ICCPR. The *Lovelace* complaint forced a team from the Departments of External Affairs, Indian Affairs, and Justice to work together to defend Canada at the Human Rights Committee. This was trying: because they were working on different problems, they could not agree on what to tell the UN. For the Department of External Affairs, the complaint was about Canada's international reputation and its responsibility for the sensible development of international law. For the Department of Indian Affairs, the complaint was not about federal law but about problems located at a band level in the actions of Indigenous people. Not to be outdone by a spatial disagreement, the Department of Justice added a temporal one. Justice's worry was the retroactivity of rights violations – it was a short leap from restoring rights to Indigenous women to the demands of Japanese internees. This fear of retroactivity led the Department of Justice to obdurately defend a law that seemed to be patent sex discrimination. In her complaint, the plaintiff had, as an afterthought, anticipated and rebutted the government's argument that the status rules in the *Indian Act* were affirmative action protecting a vulnerable minority. Lovelace reminded the Committee of the principle that equality rights cannot be sacrificed on the altar of special protective measures. A government lawyer purred in an inter-office memo that 'affirmative action for a minority group' was indeed the key to the case. Prior government discourse had framed the 'Indian problem' as one of poverty, racial

discrimination, and sex discrimination. Through the *Lovelace* complaint, the 'Indian problem' now appeared in new light as a problem of a minority's cultural rights.

In 1981, the Human Rights Committee decided in *Lovelace* that Canada had violated the ICCPR, a finding most had anticipated. But everyone was floored by the grounds: not sex inequality but denial of the right to culture. An Indigenous woman, Sandra Lovelace, had gone to the UN with a political, equality problem and come home with a cultural problem. The Human Rights Committee's decision confirmed the discursive shift of 'Indigeneity' to a cultural terrain. The federal government still had to do something about the *Indian Act*. But, now, delaying reforms to the *Indian Act* due to lack of agreement among 'the Indians' became a sign of respect for cultural rights – a far more palatable reason politically than respect for Indigenous sovereignty.

By replacing 'Indigeneity' with 'culture', international human rights helped to undercut the sovereignty talk of the Indigenous movement, thus strengthening the government's hand in its efforts to prevent the constitutional entrenchment of Aboriginal rights. Such reinforcements were welcome, because the Indigenous movement was making headway and Quebec had nearly voted to secede. The federal government needed a constitution to unite the country, and now. The constitutional chariot slowed and very nearly flipped, as the provinces, the courts, the Indigenous movement, and the British Parliament threw their spears in the wheels. The provinces did not want to cede ground to a stronger federal government. They cared even less for the recognition of rights of Indigenous people, particularly if those rights included undetermined rights to natural resources. This put the British Parliament in a bind. If the British Parliament blocked the passage of the amending legislation that severed its control over Canada's Constitution, it looked uncomfortably like the Imperial government of yore. If it let the legislation pass despite provincial protests, it looked uncomfortably like a fair-weather friend to democracy.

Through lobbying, marches, and cross-country caravans over the autumn of 1980, the Indigenous movement made the case for the constitutional recognition of Indigenous people as founding orders of government in Canada's federation. The federal government would not budge. Indigenous leaders pressed their case with the Crown, reminding the British Parliament of the Crown's promises to Indians and urging it and the British courts to block any constitution that omitted Canada's treaty obligations to Indigenous people. During public hearings about the constitution, control over Indigenous citizenship appeared as a core element of Indigenous sovereignty. The Indigenous movement and the Indigenous women's movement both framed the question of who held control over band membership lists as a constitutional question, and both movements demanded respect of inherent self-governance rights. This got lost in a Manichean din, in which demands for sex equality implied opposition to Indigenous sovereignty, and defending the primacy of Indigenous sovereignty over the *Charter* implied support for sex discrimination. This dichotomy was further entrenched by the white-led women's movement, which rallied behind the cause of Indigenous women (provided collective sovereignty rights weren't mentioned). The women's movement was fighting an uphill battle of its own to ensure that the *Charter* was not as toothless as the *Canadian Bill of Rights*. For the women's movement, this was no time for any incomprehensible 'differences' that might muddy equality rights. They also worried

that the clauses about multiculturalism were constitutional idioms for the protection of forced marriage, veiling, and other [barbaric] 'cultural practices'.

The federal government ran a decoy in order to loosen the Indigenous movement's hold on the constitution. This required ignoring a parliamentary committee that had found self-governance to be inherent to the unextinguished sovereignty of Indigenous nations. Instead, the federal government claimed to advance self-governance by offering modest powers to local band councils. Band councils would be allowed to draft their own constitutions and then send them to Ottawa to have them corrected for compliance with federally imposed criteria. Concrete gains to local leaders would drive a wedge between the national leadership working the corridors in Ottawa and London and the local leaders, who were seen to be disconnected from heady constitutional politicking. Crucially, it would disentangle self-governance from inherent sovereignty, and re-stitch it back into the fabric of Canadian statutory law.

The constitutional drama had reached its dramatic conclusion by the winter of 1982. At the eleventh hour, the Indigenous movement won a very mitigated victory with the recognition and affirmation of "existing aboriginal and treaty rights" in the Constitution and a commitment to a series of constitutional conferences for the definition of these rights. The white-led women's movement secured the equality rights they wanted in the Constitution, but these rights were on ice until April 1985, allowing time for across-the-board statutory overhauls. By April 1982, Canada had a new *Charter of Rights and Freedoms* and a new constitution that severed the last remaining vestige of Canada's status as a Dominion of the British Empire.

Since 1969, the male-led Indigenous movement had staunchly blocked changes to the *Indian Act*, on the grounds that any renegotiation of the federal-Indigenous relationship was conditional on the recognition of Indigenous self-determination. With the opening of the *Charter* negotiations in 1978, this demand had migrated to the constitutional arena. This political tactic turned Indigenous women's equality rights into hostages in a battle with the federal government over Indigenous sovereignty. The passage of the *Charter* in 1982 reduced this leverage. The Justice minister proposed to disarm the Indians by letting the clock run down: the coming-into-force of the equality section of the *Charter* in 1985 would automatically 'knock out' the sex discrimination in the *Indian Act*. The Department of External Affairs howled in protest over this tactical plan. Diplomats had spent years leading the negotiations that had at last birthed an international treaty against sex discrimination, the Convention against all forms of Discrimination against Women (CEDAW). Then, in the *Lovelace* case, Canada had earned the very dubious honor of being the first Western country found in breach of international human rights guarantees, on a case renown in the international community as a case about women's rights (despite the cultural rights ratio offered by the Human Rights Committee). And, now, on the eve of Canada's highly publicized ratification of CEDAW, the government proposed to sit on its hands on the *Indian Act*. They could hear the Soviets typing the press releases about Canadian hypocrisy.

Trudeau's Cabinet agreed that something had to be done about the *Indian Act*, and it had better look like ending sex discrimination. Ideally, it would also mollify Indigenous

demands for self-governance without legitimizing Indigenous sovereignty. But, most importantly, it had to be cheap. These parameters shaped an old field that had been twice re-tilled – first by the *Charter*, and then by international human rights. Draft amendments were batted around and took shape in the winter of 1984. The 1984 proposal tackled the equality problem by providing that no one would gain or lose Indian status through marriage, and status would be passed to children and grandchildren of status Indians. It gestured towards Indigenous self-governance, by creating a two-year waiting period before reinstated people would be put back on band lists and gain the right to return to reserve. In the main, the demands for self-governance were answered through the separate legislation giving band councils the chance to write constitutions that would be corrected by Ottawa bureaucrats.

In designing these plans for amendments to the *Indian Act*, the government disconnected band membership from Indian status. The government would continue to keep a list of status Indians, but everyone on the government's list was not necessarily on a band list. Instead, those who had Indian status but lacked band membership would go on a new list, one that did not come with rights to reserve residence. The proposal brought together very modest powers for band councils regarding membership lists with equality rights for women.

As such, the 1984 proposal was a political compromise, not a substantive balancing of equality rights and self-governance. The compromise mirrored a truce that had been brokered by Indigenous political leaders in the context of the constitutional negotiations. The constitution passed in April 1982 provided for a series of constitutional conferences to negotiate the meaning of 'existing Aboriginal and treaty rights'. After, the second constitutional conference, in March 1984, Indigenous leaders had little to show by way of recognition of Indigenous self-governance. Recall how the Indigenous women's movement had split along the status and non-status line. The status wing of the Indigenous women's movement and the male-led status Indigenous organizations cut a deal in May 1984. In return for the status women's support of the self-governance agenda, the male-led organizations promised their support for *Indian Act* reforms. The truce lay in an agreement about band membership: those who regained Indian status would not go immediately onto band membership lists and onto reserves. The non-status Indigenous women's groups and the white-led women's movement deplored this proposal for ersatz Indian status. The Liberal government's proposed solution to the 'Indian problem' was fiercely debated in Parliament throughout the spring of 1984. Neither the amendments on sex discrimination nor the proposals on self-governance were approved by Parliament before time ran out on the Liberals. An election was called.

The politicking over the Constitution combined with a trip to international law had sharpened the contours around equality rights and Indigenous self-determination and shown the volatility of political alliances. As boundaries around concepts had become clearer, they had become more trade-able for political gain. This makes the story's next chapter baffling and breathtaking in equal measure.

In September 1984, the Conservatives won an election, and Brian Mulroney became prime minister. The new Conservative government gave lofty speeches about Indians

being fed up of big government controlling their lives. They then offered the Indigenous leadership a constitutional 'power' that could be vetoed by the provinces, and called it self-governance. The Indigenous leadership rebuffed the offer. The constitutional self-governance train ground to a halt.

This turned the *Indian Act* into the last hope for any legal recognition of Indigenous self-governance, in turn causing rhetoric about Indigenous self-governance to escalate. All Indigenous parties to the debate about reforms to the *Indian Act* made passionate pleas for self-governance, but the oil-rich bands from Alberta adopted the most hardline rhetoric. In the name of inherent jurisdiction rooted in Indigenous sovereignty, they flatly rejected any federal authority over band membership questions – including the reinstatement of Indian women who had married out.

Having drenched the constitutional fires, the Conservative government proposed one piece of legislation, introduced in early March 1985, to tie up the loose ends on the 'Indian problem'. The Conservative government broke new ground in tackling the *Indian Act* amendments, through a paradigm-shifting proposal for two classes of Indian status. Those with first and second-class Indian status would have different rights to transmit status to their children and grandchildren and different rights to band membership. Nonetheless, the new system still gave an advantage to those who traced Indian status to an Indian grandfather. An Indian man would be able to pass status to his grandchildren, whereas an Indian woman could not. The legislation did not correct the fact that Indian men and women were starting the new multi-generation 'status race' from unequal start lines. The government also proposed giving bands the right to draft and vote on their own membership codes, thus permitting bands to admit anyone to their band lists. The band council could not propose codes that excluded those who had been reinstated through the non-discrimination legislation, because this would violate the *Charter's* gender equality provisions which now bound band councils. In short, the women who had married out could not now be voted out. There was much talk of the recognition of Indigenous definitions of identity and belonging.

The Conservative government might have contented itself with an omnibus bill on self-governance and sex discrimination in the *Indian Act*. But no. The legislation substantively connected these two concepts, and the discourse surrounding the proposed legislation was replete with talk of balance and reconciliation. Thus, the concepts transmuted from bargaining chips in a multi-decade political battle to "cherished ideals" that needed to be balanced against one another. The government's deft transformation of the political into the fundamental evidenced an alchemy to rival Midas'.

Pecuniary concerns were indeed central to the 1985 amendments. Although bands could put whomever they wanted on band lists, federal funding remained tied to the number of status Indians on the band's list. Furthermore, the government refused to commit to increasing band council budgets to accommodate the influx of returning status Indians. Those who had regained Indian status would return to communities already facing acute housing and infrastructure shortages. The federal government's gift of self-governance and its remedy to sex discrimination were unfunded mandates.

The government described the draft legislation as bringing an end to sex discrimination in Indian status, despite the continuing inequalities in transmission of status to grandchildren. It said that this satisfied the Indigenous women's movement, on the one hand. The power to draft band membership codes, on the other hand, was a concession to the self-governance demands of Indigenous leaders. By putting Indigenous women on the side of 'status' and the male-led Indigenous organizations on the side of 'self-governance', the government's rhetoric erased the self-governance claim underpinning women's insistence on returning to their bands as members of the band electorate. And it erased the non-discrimination commitments underlying campaigning by some male-led Indigenous organizations. The dichotomy thus wrought, the government proceeded to 'balance' these opposing interests and argue that sacrificing 'a bit' of gender equality and 'a bit' of self-governance would achieve reconciliation.

This amounted to peacemaking in the wrong war. Almost no one on the Indigenous side argued that there should be fewer status Indians or that the new rules on status should continue sex discrimination. On the contrary, most Indigenous leaders welcomed more status Indians provided that paying for the services they required fell on the federal government, not already-stretched band councils. The war among Indigenous peoples concerned band membership. Some wanted people who had regained status to be automatically returned to their old band membership lists. Others wanted a phased process for reinstated people's return to reserves. A minority, who happened to be the oil-rich bands, wanted the right to entirely refuse band membership to reinstated people. Everyone agreed that band membership was a core part of Indigenous sovereignty; the disagreements concerned who would be part of the self-governing polity and when.

In pitching the legislation, the Conservative government talked incessantly about the need for compromise between the rights of individual Indian women to equality and the collective rights of Indigenous communities to self-governance. But when Opposition members observed that the statute perpetuated de jure sex discrimination against individuals, the government replied that this inequality would be dealt with 'later' in a few generations' time. The government shrugged at the fact that, given rates of out-marriage, the inter-generational transmission rules were a sunset clause on the whole idea of 'Indian'. Amendments were proposed. The government was as immovable as cinder blocks on shag carpet.

For all the talk of balancing 'Indian' interests, the only balancing that mattered was budgetary. While bureaucrats in Indian Affairs were busy lining up incommensurate things on imaginary scales and the minister was in Parliament talking about reconciling a fundamental conflict of rights, a secret, high-level Cabinet task force was scouring the government looking for cost savings. It didn't tarry long over the Department of Indian Affairs. The main proposal, according to its April 1985 report, was to abolish the department and transfer the whole problem to the provinces. If this sounds familiar, it is because it was a repeat of the infamous recommendation of the 1969 White Paper. When the press and MPs got wind of the Task Force Report, the government was forced to backpedal. Indian Affairs and 'Indians' survived. Despite heavy fire, the government succeeded in passing its slate of amendments to the *Indian Act*. In 1985, the rules on Indian status changed so that women no longer lost status through marriage, and band

councils gained new powers to draft membership codes. But there were now two classes of Indians, and sex discrimination remained embedded in the *Indian Act*.

In crafting amendments to the *Indian Act* in 1985, the Conservatives kicked the problem spatially, to quarrelsome in-fighting 'Indians', and temporally, into the next quarter century. It was not until 2007 that a court rendered judgment on the sex discrimination in the *Indian Act*, in *McIvor*. The government's main defense has been that the 1985 amendments represent the best available peace in a pitched war between Indians – a partial history that entirely omits the government's role in the conflict. The courts have consistently found the *Indian Act* to be in breach of the equality promised in the *Charter of Rights and Freedoms*. In doing so, they have rejected the government's defense, but they have accepted the canonical account of history on which it is based. By juxtaposing this canonical history to the alternative history developed in this project, it is possible to see the work being accomplished by the Canadian state in its courtroom retelling of the history of the *Indian Act* amendments. Furthermore, the juxtaposition reveals the place of history and the role of law in Canada's quest for sovereignty.

Outline of Dissertation

The next chapter discusses the empirical foundations and methodological approach of the project. The remainder of the dissertation proceeds chronologically. It begins with broad brushstrokes at the confederation of Canada in 1876 and becomes progressively more and more fine-grained in the decades and years culminating in the 1985 amendments to the *Indian Act*. The dissertation concludes by analyzing the political and normative significance of the deployment of history in modern-day litigation about sex discrimination in the *Indian Act*.

2. Methodology

Introduction

This dissertation rests on empirical data collected through research conducted in several archives, interviews, and ethnographic observation. In this section, I discuss my research methodology and my analysis process. I also discuss implications of my research experience for the politics of the archive and for the field of legal history in Indigenous-colonial contexts.

Government Archives

This dissertation rests on empirical data collected through research conducted in several archives. I studied records of parliamentary processes, including the verbatim records of debates, hearings, and special committees, briefs submitted by witnesses to those hearings, and final reports. For the most part, these materials are publicly accessible in government repository libraries. The materials are voluminous: for example, Parliament's investigation of Aboriginal self-governance lasted a year and the Special Joint Committee on the Constitution heard from over 900 individuals and organizations.

There are too many words in the Parliamentary record to read them all; the researcher must make choices. The difficulty of this task varies. As some subjects have already attracted academic interest, the relevant primary materials have been sorted and collated. For example, a two-volume treatise exists of the legislative history (the changes in wording, etc.) of the *Charter of Rights and Freedoms*.[1] Aboriginal rights issues have not attracted this level of scrutiny, and there is no similar comprehensive compilation of the primary sources regarding the development of the Aboriginal rights provisions in the Canadian constitution. Through the labors and team spirit of historian Dominique Clement, the briefs submitted to the Special Joint Committee on the Constitution have been scanned and made available digitally. But the briefs submitted to the Royal Commission on the Status of Women remain confined to a microfiche reel accessible through inter-library loan. The point I wish to stress is that the collection and organization of primary materials – even materials that are already in the public domain – reflect the priorities of academic research to date. The archive relevant to some questions is heavily curated, while the archive of others remains un-constructed and therefore requires more brute force, ground clearing before rigorous analysis can take place.

Studying these materials shed light on the public version of the development of federal policy. This is only one part of the story, however, and I used various techniques to get behind the scenes of the public narrative. The main repository for these purposes is the Library and Archives of Canada (LAC), where I conducted six months of research. The collections contain the records selected by government departments for archiving. I studied records of the following government departments: Indian Affairs, External

[1] Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: a Documentary History* (Toronto; London: McGraw-Hill Ryerson, 1989).

Affairs, the Secretary of State, the Privy Council Office, and the Prime Minister's Office. The records of Prime Minister Brian Mulroney remain classified, but Prime Minister Trudeau's records are accessible. This fonds[2] includes the papers of his closest advisers; in many ways, the advisers' papers are more revealing than Trudeau's own.

To describe the LAC's online catalogue as arcane would be generous. Archival records are organized by department, and the classification system reflects a department's internal filing system. Records arrive at the Archives 'as is', rather than being categorized or re-filed in an 'ex post facto' system. As a result, if one wants to learn about the Canadian government's position during the multi-decade drafting of the *International Covenant on Civil and Political Rights*, one has to start by imagining what that file was called in 1950, when the treaty had not yet been named the '*International Covenant on Civil and Political Rights*.' If one wants to know what Indian Affairs and External Affairs thought about the effect of new international human rights commitments on the *Indian Act*, one has to look for those files in both departments. Navigating the archives takes place without professional guidance. A historian informed me that until the early 1990s, research in the national archives was normally conducted with the assistance of a professional curatorial archivist, who would provide information about how fonds were organized and where records might be found.[3] Today, apparently due to changes in government funding priorities, there is absolutely no research support provided to a researcher or member of the public who walks in to LAC. Due to the lack of ex post classification, the poor online catalogue, and the dearth of technical assistance, an apt metaphor for this archive involves needles and haystacks.

This is provided the needle is not in microfiche. When a box of paper files is delivered to the researcher, file folder headings can be quickly scanned to assess whether there is anything worthwhile in the box. This is necessary because the library catalogue rarely contains any further information beyond a general topic heading and year range. When entire boxes are microfiched, the file folders and their labels disappear. They might be summarized in a 'Contents' sheet that is then buried and indistinguishable from the other thousands of pages on a microfiche reel, as one reel can wind up half a dozen boxes. Thus, records that have been moved from the paper medium become, in practice, even more deeply buried.

In addition to internal government records, I also studied the 'Personal Papers' of the following individuals: Pierre Trudeau, Brian Mulroney, Walter Tarnopolsky, Vincent Evans, Marilou McPhedran, Michael Posluns, and Mary Eberts. 'Personal papers' is a catch-all for an idiosyncratic set of documents amassed by people over the course of their careers. With the exception of the papers of Mary Eberts, all these collections have been put in the public domain. The papers of former prime ministers are carefully vetted before being rested in the national archives. Jurist Walter Tarnopolsky was

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[2] A fonds is the entire body of records of an organization, family, or individual that have been created and accumulated as the result of an organic process reflecting the functions of the creator. See: Richard Pearce-Moses, *A Glossary of Archival and Records Terminology* (Chicago: Society of American Archivists, 2005) at -.

[3] Interview with author

assiduous in weeding out any information from his personal papers that bore directly on cases or which was otherwise covered by client-solicitor privilege. The McPhedran and Posluns papers are both at the Clara Thomas Archives and Special Collections of York University. These are archives of private individuals, so they are not subject to access to information laws. The papers held by Mary Eberts are not in a public archive. Eberts allowed me to go through the vast collection of materials she has gathered over the course of her career as an equality rights lawyer, including material from her time as counsel for the Native Women's Association of Canada.

Records held at the LAC are subject to varying degrees of classification under a legal framework created by the *Access to Information Act* and the *Privacy Act*.[4] Records of the operations of government are classified if the records are less than twenty years old.[5] Parliament and courts have recognized the importance of the confidentiality of Cabinet deliberations to the operations of government.[6] For records that are more than twenty years old, a general rule is that Department of Justice records are out of bounds, as they can be blanketed under solicitor-client privilege.[7] This classification can be worked around to an extent, as the letters, memos, and opinions sent by the Department of Justice to their clients in Indian Affairs or External Affairs often appear in the records of the client department. Records that relate to personal information are classified under privacy laws.[8] The interpretation of this prohibition is often generous. For example, under an initial informal review conducted by archivists, the entire External Affairs file on the Sandra Lovelace case was 'restricted' on privacy grounds. For an ordinary member of the public, there are significant barriers to consulting government records held at the national archives. Gaining access requires creativity, both in working with the filing system and in working around classification rules.

The national archives keep as many secrets as they disclose. I drew on two additional techniques to reach hard-to-get documents: Access to Information requests and trial records.

Access to Information Requests

The first technique stems from the rights provided in the Access to Information and Privacy Act to Canadian citizens and permanent residents (i.e. not anyone) to "any record under the control of a government institution" (4(1)). As I learned from my experience and that of other researchers and lawyers, drafting access to information requests is something of a craft. Requests have to be sufficiently specific that they can be completed with a reasonable amount of effort, and they have to ask for records that can be found. In practice, this means that a request needs to refer to the types of documents

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[4] *Access to Information Act*, R.S.C., 1985, c. A-1 [*ATIA*]; *Privacy Act*, R.S.C., 1985, c. P-21 [*Privacy Act*]

[5] *ATIA*, *supra* note 4 at art. 21(1)

[6] *Babcock v. Canada (Attorney General),* [2002] 3 S.C.R. 3 at para. 18

[7] *ATIA*, *supra* note 4 at art. 23

[8] *Privacy Act, supra* note 4, at art. 19(1)

held by the institution in question – if you want to know what the Cabinet decided, you have to ask specifically for the document called 'Cabinet Conclusions', rather than asking for 'Action Points' or any other term. I sent eight official Access to Information requests for records held by the Privy Council Office, External Affairs, and Indian Affairs. For some topics, I sent the exact same request to several departments, to see which department would disclose the records. Most of these requests had to be redrafted and resubmitted based on helpful advice received from access to information officers.

The limitations to disclosure of information are the same used by Library and Archives officials to deny access to holdings, like protection of personal privacy or solicitor-client privilege. But sending an Access to Information request differs from pecking through the LAC catalogue in several ways. First, the request is an exercise of a statutory right, so a refusal of access comes with an automatic right of appeal. This means that decisions to refuse access are made officially, rather than informally, and my experience has been that official review by an officer responsible for implementing the Act produces a wider scope of access. For example, the Lovelace records that were deemed classified for reasons of privacy by LAC's informal review process were subsequently disclosed to me under an Access to Information request. Second, an access to information request compels skilled government-side researchers to find documents that answer a specific question. First addressed to the department holding the records, requests are usually then forwarded to someone at the Archives, who then combs through the archival holdings. This professional archivist has many years of experience with government records and has access to all sorts of internal catalogues and registries. Third, records are disclosed in electronic form, as a single PDF file. This means that the hours of sorting and photographing of documents are completed on the government's dime.

Access to information requests are not the historian's magic bullet, however. Although the Act provides a right of access within thirty days, departments can request lengthy extensions. Most of my requests took more than six months to be processed. They can come with costs for retrieval; a kindly officer waived these costs on the basis of my status as a graduate student. Access varies depending on who holds the records. The Privy Council Office still holds all Cabinet documents after 1977 – even those that are not presumptively classified under the twenty-year rule. All my requests to the Privy Council Office are pending – nearly a year later. I am informed that my requests are now decomposing in the purgatory of 'Department of Justice review'. The Act allows any request for records to be reviewed by the Department of Justice for potential breaches of solicitor-client privilege. There is a multi-year backlog at Justice for such review. Thus, even with additional statutory rights to information, the historian's road is decidedly uphill, both ways.

Trial Records

The second technique I used to get access to information is to mine trial records. In general, trials that raise questions about the validity of legislation draw on evidence about legislative intent. In a *Charter* claim, the burden of proof for legislative intent is on the government, as intent is relevant to the government's defense of a breach of the *Charter* under section one. For once, this works out well, because the government is

better placed to lead evidence about its own intentions. While all defenses of a law raise questions of intent, Aboriginal rights cases are a particularly juicy site for historical evidence.

Case records provide a potential gold mine of historical evidence about the process behind the passage of a law. The government gets to choose what to put before the court to show legislative intent, and these records then (usually) become part of the public record of the case. For matters that are more than twenty years old, a party to a dispute should be able to procure all government records through Access to Information laws, except those covered by exemptions. The government's choice about what evidence to produce regarding legislative intent is governed by basic obligations related to the administration of justice. The government is obliged to make a full disclosure to the Court and parties of any information that is relevant to the disposition of the case. Save for reasons of solicitor-client privilege, documents produced to the court cannot be redacted. The odds are that significantly more information about legislative history can and will be disclosed by the government in the course of litigation than can be gleaned from the national archives.

The empirical foundation of this dissertation is proof of that point. A significant proportion of the empirical basis of this dissertation is a 7,000-page collection of documents produced by the federal government to defend the Bill C-31 amendments to the *Indian Act*. This is not only a lot of material. It is also, I believe, material that almost no one other than the government could have accessed and collated. Soon after the passage of Bill C-31 in 1985, cases alleging sex discrimination began to develop. The multiplying cases were enough of a thorn in the government's side that the federal government tasked a research unit in Indian Affairs to study the history of Bill C-31. That research unit conducted its work in the context of live litigation.

Through some prying and an access to information request, I identified the private consulting company that was hired to conduct this research. Since its founding in 1995, Public History Inc. has been a supplier of historical research to Indian Affairs. In the world of professional Aboriginal history, companies tend to work for either the federal government or First Nations clients. Public History has had some First Nations clients, but most of its work has been for government agencies.[9] In 2005, Public History Inc. had a contract with the Litigation Management and Resolution Branch of Indian Affairs to interview federal officials involved in the development or implementation of Bill C-31 and conduct additional research in primary and secondary source materials.[10] This preparatory research led to a conference on First Nations membership issues in March 2006. The Senior Research Manager of the Strategic Research and Analysis Directorate

[9] "Public History™", online: <http://www.publichistory.ca/>.

[10] Letter from Erik Anderson, Senior Research Manager, Strategic Research and Analysis Directorate, Indian and Northern Affairs Canada to Gerard Hartley, Principal, Public History (15 March 2005), Obtained through Access to Information Disclosure (Request # A-2014-01267)

suggested to the Research Manager that the conference would be an appropriate forum to discuss "the undertaking of historical research in the context of litigation."[11]

In September 2006, Public History Inc. and Indian Affairs and Northern Development concluded a standing order contract. The agreement was worth over $1.9 million. The main objective of the standing order was to "[t]o conduct all research analysis, research and writing required to ensure that a complete factual situation is presented for specific court actions."[12] The scope of work covered identifying information repositories, conducting primary and secondary research, and creating documentary collections, bibliographies, reports, and summaries – standard fare for the historian. But, in addition, the company was assigned the following tasks:

> RA-1 Review and analyse the statements of claim, statements of defence and other court documents to identify factual and policy issues relevant to the litigation
>
> RA-5 Prepare a paragraph by paragraph analysis of the Statement of Claim (factual response) setting out a factual analysis of each allegation raised, providing document citations supporting the facts and analysis relied upon.
>
> RA-6 Conduct analysis on all relevant primary and secondary sources in the context of litigation and the impact on the position of the Crown.[13]

In short, the history company was 'on-side', working with the government to analyze the factual and policy issues in legal pleadings and assess the impact of historical evidence on the Crown's case.

The upshot is that the 7,000 pages of evidence submitted by the government in defense of Bill C-31 are the outcome of a multi-million dollar, expert-led research project. The obvious concern about relying on the resulting record is the risk of bias. I found the historian who ran the project and asked him, not quite so directly, whether they had cherry-picked from the archive in service of the government's version of the legislative history.[14] He denied it. Even making allowances for the fact that people in business tend

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[11] Letter from Erik Anderson, Senior Research Manager, Strategic Research and Analysis Directorate, Indian and Northern Affairs Canada to Sean Darcy, Research Manager, Litigation Management and Resolution Branch (4 October 2005), Obtained through Access to Information Disclosure (Request # A-2014-01267)

[12] Department of Indian Affairs and Northern Development, "Statement of Work – Standing Order contract between Public History and DIAND - Contract Number 20-06-6006/6" (1 September 2006), Obtained through Access to Information Disclosure (Request # A-2014-01267) [Public History Contract, 1 September 2006]

[13] Public History Contract, 1 September 2006, *supra* note 12

[14] Interview with author

not to denigrate their own work, I found him convincing. He pointed out that largely due to the boom in Aboriginal rights and land claims proceedings, demand has surged for high-quality historical research. This contrasts to the 'early days', when much of the treaty claims historical research was done by lawyers. Delivering incomplete or partisan historical research damages a company's credibility as professional historians. It is worth bearing in mind that most staff at history consultancies are trained historians, but they do not have the disciplinary and social recognition that comes from academic positions and publication records. Furthermore, as this historian explained, when the company is asked to provide all evidence relevant to a legal matter, they take pride in delivering everything – particularly evidence that goes against the client's position, because if they don't find it, the other side could.

If the history consultancy firm does in fact try to bring everything home from the archives, what are they able to access? This historian confirmed that when working on a government contract, the company has preferential access to government records. In particular, they had facilitated access to the internal records of Indian Affairs. For other departments, however, there were some barriers. Notably, the company did not succeed in acquiring Cabinet records from the Mulroney administration. This is possibly because when Public History was conducting this research, Mulroney-era Cabinet records were still covered under the twenty-year Cabinet confidences rule. Ten years later, I have requested the same records, now no longer within the twenty-year rule, but they have yet to be disclosed.

The question that remains, then, is the filtering process between the evidence gathered by Public History and the evidence entered into the court record by the Crown. Due to issues of solicitor-client privilege, I am not able to consult the paper trail for this process, but the historian I spoke to suggested that this line divides the responsibilities of lawyers and historians. The worry arises that the evidence is far too incomplete a sample from the historians' haul to serve as a credible data source. This worry was somewhat assuaged when I unearthed an internal document commissioned by the Research and Analysis Directorate of DIAND and written by Public History in 2006. It is a legislative history of Bill C-31. The vast majority of the sources in this report are either filed as evidence in *McIvor* or published in parliamentary papers, newspapers, magazines, or academic publications.[15] All this suggests that the record in *McIvor* can be taken as a reasonably complete account of the archival evidence about legislative intent in the development of Bill C-31.

My methodological conclusion is that legal scholars shortchange themselves by spending all their time poring over what comes out of a courtroom and so little of their time considering what goes into it. Scholars study the parties' pleadings to understand the court's reasoning.[16] They analyze transcripts of a trial to ask how witnesses tell their

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[15] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827

[16] Nicholas R Parrillo, "Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950" (2013) 123:2 Yale Law Journal, online: <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2357555>.

stories or how they are treated by judges.[17] The evidence presented to the court may be considered to show what a judge should or should not have done with it. But, in an intellectual enterprise that tends to start at the Supreme Court and work down from there, the 'record' is uncomfortably close to the grubbiness of fact.

My observation is that scholars have an opportunity to take the evidence and run – in the opposite direction. Rather than asking what the evidence could or could not have done for the outcome of the trial, we can just ask what the evidence says. This is really important for history (and politics, and life), if not for law, because my experiences have taught me that it is really difficult to make sense of government intent simply by plunging into the archives as an academic researcher. The government has a clear advantage at the archives, and scholars should try to draft off of that advantage.

Archives of Organizations

As the project is aimed at understanding how a social, political, and legal world helped to shape ideas, I also consulted non-governmental archives. Though less fettered by privacy and confidentiality laws, these archives are, in general, much more sparse. These archives are also sensitive politically, so access was restricted for other reasons. There were four main types of organizations who participated in debates around reforms to the *Indian Act* in the seventies and eighties: Indigenous organizations, Indigenous women's organizations, women's organizations, and civil rights associations.

Researching the history of Indigenous political organizations is challenging for a few reasons. The studies that have been done rely on carefully brokered access to internal organizational archives or extensive interview data.[18] I lacked such access. I spent several months in dialogue with the Assembly of First Nations to research in their archives, during a period of leadership turnover in the organization. They asked that I meet with their lawyer to talk about my request, but even this meeting could not be scheduled. Eventually I abandoned my request.

I had better luck with the Union of British Columbia Indian Chiefs (UBCIC). I was able to consult records from the organization's annual meetings and chiefs' meetings (beginning in 1967) and files related to the McIvor case and subsequent advocacy for legislative reform. The UBCIC has prioritized research from day one, as one of the organization's core mandates was to support land claims, which require voluminous

[17] Colleen Sheppard & Sarah Westphal, "Narratives, Law and the Relational Context: Exploring Stories of Violence in Young Women's Lives" (2000) 15 Wisconsin Women's Law Journal 335.

[18] Nellie Carlson, Linda Goyette & Kathleen Steinhauer, *Disinherited Generations: our Struggle to Reclaim Treaty Rights for First Nations Women and their Descendants* (Edmonton: University of Alberta Press, 2013); Laurie Meijer Drees, *The Indian Association of Alberta: a History of Political Action* (Vancouver, B.C.: UBC Press, 2002); Lilianne Ernestine Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: the Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987* (Saarbrücken: Verlag Breitenbach, 1991); Paul Tennant, *Aboriginal Peoples and Politics: the Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990); Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto, Ont.: Women's Press, 1987).

historical records. The UBCIC has a resource center and a library, containing, amongst other things, records of the Department of Indian Affairs and the Louise Mandell collection on Indigenous peoples and the law. Attached to the library is an internal institutional archive, managed in full and part-time ways by a professional archivist. The existence of an internal archive is unheard of in the world of under-funded non-governmental organizations. Indeed, when I arrived at UBCIC for the first time, the archival unit was slated to shutter its doors in two days time due to a withdrawal of federal funding. Although the archivist had just been laid off, she showed me around the collections and allowed me to conduct my research there for several weeks. The collections are comprehensive and meticulously organized, permitting a researcher to trace one organization's activities and evolution from the late sixties to the present-day. The archivist was re-instated several months later when another grant came in. The experience underlined the extreme fragility of the UBCIC's collections and of the overall enterprise of civil society memory work. The UBCIC requires researchers to sign an Ethical Research Policy, whose purposes is to ensure that "appropriate respect is given to the cultures, languages, knowledge and values of Aboriginal peoples."[19] Researchers commit to ensuring "the protection of Aboriginal interests and resources, including the protection from any negative impact that the research project may result in from being made public."[20] Thus, while research in government-held archives is bounded by rules on privacy and secrecy, this archive constrains the researcher based on potential impact to Aboriginal peoples. In contrast to leading figures on the government side, Indigenous leaders rarely archive their personal papers for posterity. For example, I contacted the Center for World Indigenous Studies, home of the Chief George Manuel Memorial Library, but I was informed that his personal papers were most likely still held by his family. I tried to compensate for the absence of these personal archives by consulting memoirs and biographies – this helped with respect to Harold Cardinal and George Manuel.[21] I did not attempt research in the archives of any other Indigenous organization. The dearth of materials from the Native Council of Canada (the non-status organization) is an obvious absence in the empirical foundation of the dissertation.

The core challenge of this research has been the dearth of archival records of the work of Indigenous women's organizations. There are two reasons for this challenge: first, there are few public archives of these records, and second, it is hard for a settler outsider to get access to records that do exist. The campaign to end discrimination in the *Indian Act* was led by Indian Rights for Indian Women and the Native Women's Association of Canada. Neither organization has official archives. I spent several months trying to ingratiate myself with the Native Women's Association of Canada, with a hope that I

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[19] Union of BC Indian Chiefs, *Ethical Research Policy* (Vancouver, BC).

[20] *Ibid*.

[21] see: Harold Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig, 1977); Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969); Peter McFarlane, *Brotherhood to nationhood: George Manuel and the making of the modern Indian movement* (Toronto: Between the Lines, 1993); George Manuel, *The Fourth World: An Indian Reality* (Don Mills, Ont: Collier-Macmillan Canada, 1974).

would eventually be able to consult their organizational archives and craft a research output that might be of some benefit to them. The organization was too understaffed to take on a volunteer. I was able to learn, however, that the organization has no 'archives' to speak of – someone waved in the general direction of old filing cabinets and bookcases jammed with boxes. I may have been spared a very frustrating few months. Indian Rights for Indian Women is no longer in operation. There is a tremendous wealth of information about the organization in the recently published book, *Disinherited Generations: Our Struggle to Reclaim Treaty Rights for First Nations Women and their Descendants*.[22] Through the collaborations that led to that book, Jenny Margetts' papers have now been placed in the Provincial Archives of Alberta. I did not have sufficient funds for a research trip to Alberta. If Mary Two Axe Earley's papers exist, they are not, to my knowledge, accessible to researchers. While at the Union of BC Indian Chiefs, I had access to the complete run of the *Indian Voice*, the newspaper of the BC Indian Homemakers' Association. This provides some insight into the workings of the leading Indigenous women's organization in British Columbia.

The exercise of gaining access to over-stretched and under-funded women's organizations put me on dicey and uncomfortable political terrain. The potential gains to me were obvious, in terms of finding something that no one had seen before and furthering my intellectual and academic interests. The gains to the organizations were far less obvious. A plunder-and-run operation seemed plausibly less offensive than the presumption that I had anything useful to offer as a volunteer, to say nothing of the ethics of giving with one hand while taking with the other. As someone who used to work in a women's organization, there is nothing quite as annoying as lawyers coming in and volunteering to 'put their law degrees to good use'. There is rich scholarship in fields ranging from feminist studies to critical Indigenous studies about how to negotiate these ethical problems to produce respectful and mutually beneficial research agreements.[23] I acknowledge and fully support this kind of work. I also fully acknowledge its absence in this project. The explanation rests in time, resources, and beginning several hundred yards from the start line in terms of access. Furthermore, there are social and political reasons why Indigenous researchers are not just better placed to conduct research with Indigenous leaders, but ought to be the ones hearing and telling those stories.

Substantively, this research project never set out to be deeply embedded in what Indigenous organizations thought and did about *Indian Act* reforms. I needed to try to get a sense of Indigenous perspectives in order to talk back to the story coming out of the government archives. But the project was not and likely could not have started from

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[22] Carlson, Goyette & Steinhauer, *supra* note 18.

[23] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999); Liz Stanley, *Feminist praxis: research, theory, and epistemology in feminist sociology* (London; New York: Routledge, 1990); Nancy A Naples, *Feminism and Method: Ethnography, Discourse Analysis, and Activist Research* (New York: Routledge, 2003); Norman K Denzin, Yvonna S Lincoln & Linda Tuhiwai Smith, *Handbook of Critical and Indigenous Methodologies* (Thousand Oaks, CA: Sage Publications, Inc, 2008).

the Indigenous experience: instead, it is a story of what a settler government thought about Indians.

The primarily white-led women's movement has been the object of academic scrutiny for many years, but little has been written about the relationship between the white-led women's movement and Indigenous organizations. The main archival holdings related to the white-led women's movement are held by the Archives and Special Collection of the University of Ottawa. I consulted the archives of the National Action Committee on the Status of Women (NACSW) and the Canadian Women's Movement. The NACSW collection consists of all the records of the organization, ranging from financial papers to newsletters and published advocacy briefings. I consulted all the records of annual general meetings and most of the files related to Indigenous women, the *Indian Act*, and *Charter* negotiations. The Canadian Women's Movement collection contains records from more than 2000 organizations, spanning the period from 1960 to the early 1990s. I consulted files related to the Indigenous women's movement. Consulting these archives proved to be one of the few remedies to the yawning dearth of archival records about Indigenous women's organizing. NAC and other women's organizations received documents like briefings and conference reports from NWAC and IRIW; they engaged in lengthy correspondence with leaders like Mary Two Axe Earley and Nellie Carlson. These letters and reports were duly filed by staff at NAC, and now constitute a (regrettably minimal) record of the organizing work of Indigenous women.

I did not conduct any primary research in the archives of civil rights associations, relying instead on the extensive work done by historian Dominique Clément.[24]

Politics of the Archive

The existence of archival records mirrors configurations of power and sovereignty. The empirical foundations of my research have ended up reflecting precisely the power inequalities I am writing against. I have an ocean of government records, and a drought-stricken stream of records from Indigenous women's organizations. It is no coincidence that the organizations with the least power and resources – Indigenous women's organizations – are also the organizations who have left the least trace in official archives. To be clear, I'm not saying that these organizations have no history, or that their histories are not somewhere – just that the histories are not accessible to an outsider academic researcher.

I tried several strategies to compensate for this gap, techniques that themselves speak volumes about power inequalities in memory work. First, I looked for records about Indigenous women's organizations in the federal government's records of funding to civil society organizations. In their fundraising applications and grant reports, organizations like IRIW provided information about their activities and membership. Second, I combed through the highly-organized archives of the National Action Committee on the Status of Women for records of their correspondence and

[24] "Archives ~ Canada's Human Rights History", online: <http://historyofrights.ca/archives/>.

collaboration with Indigenous women. Third, I consulted archival materials filed by lawyers and advisors who worked with these organizations. It seems that lawyers excel at keeping and filing things. I found documents in the papers of Eberts and McPhedran that were not accessible elsewhere. Posluns' papers helped to compensate for my lack of access to records of the Assembly of First Nations (the successor to the National Indian Brotherhood). Posluns ran the firm that provided lobbying advice to the AFN/NIB during negotiations over the *Indian Act*. The methodological insight I drew is that when faced with a dearth of records, it is worth asking what 'type' of person or organization would be likely to have the time, resources, legal obligation, and commitment to keep and file paper.

The physical location of materials telegraphs statements about sovereignty by archival institutions and the powers they serve. At McGill University, all official records of the federal government are housed in a non-circulating Government Documents collection. Consultation of any document in Canada's national archives occurs under constant video monitoring, the hourly scrutiny of punctilious security guards, and strict rules about the materials permitted in the reading room (and ensuing debates about whether one is wearing a blazer (permitted) or coat (forbidden)). Compare the setting of cherished government documents to the stacks at McGill. On a shelf, thrown in alongside the other dog-eared, dusty, and fading documents, is a loose-leaf folder containing the agenda, speeches, and report from the All Chiefs' Delegation to London to petition the Crown in 1979 about the Canadian constitution. The speeches are about the Crown's treaty obligations to Indians and the status of Indigenous peoples as co-founders of Canadian sovereignty. The physical location of these primary sources in the library's collection is an archival commentary of Canada's view of the sovereignty being asserted.

The accessibility of government documents is the outcome of a political choice. In Canada, it is difficult to consult public records, even those presumptively declassified after twenty years. Cabinet documents are particularly difficult to come by. That this is the product of a political choice is evident through comparison. The patriation of the Canadian constitution required a lengthy political and diplomatic process with the British government. In an afternoon, I was able to search the UK National Archives and download seven years of the minutes of UK Cabinet meetings of relevance to the patriation of the Canadian constitution. In contrast, on the Canadian side, I am still waiting for records of six months of Cabinet meetings. In 2013, the Canadian government entered into a controversial agreement to advance digitization of national archival holdings. Under the agreement, Canadiana has a 10-year exclusive license to sell the documents in sophisticated digital format.[25] As the 10-year exclusive rights expire, digital images will be returned to the free public domain. Fabien Lengellé, LAC's director general of content access, said

[25] "Canadiana - Frequently-Asked Questions", online: *Canadiana.org* <http://www.canadiana.ca/en/heritage-faq>.

> Canadians would have free access to the basic images during their decade of 'privatization' and for $10 a month will be able to access the full, sophisticated metadata version from their home computers. … Members of the public will also be able to access the Canadiana portal for free at university libraries.[26]

Critics pointed out that access to most university libraries is limited to students and faculty. When the news leaked, Ian Wilson, Canada's former chief librarian and archivist, described the Héritage project's mission as "downloading the cost of digitization to the universities … Other countries see this as a national responsibility. England (and) the United States are putting huge amounts of money into digitizing their documentary heritage."[27] According to a member of parliament, the announcement of the new digitization project came on the heels of a $10 million cut by the federal government to the budget of the Library and Archives of Canada, resulting in the lay-off of 215 staff, "including half of those who were working on digitizing of the archive."[28]

Interviews

In addition to research in documentary sources, I conducted about 30 meetings or interviews related to this research project. The bulk of these interviews concern the McIvor case. I spoke with Sharon McIvor, her lawyers, the lawyers for nearly all the interveners in the case, several intervener organizations, and a few organizations involved in advocacy around sex discrimination in the *Indian Act*. I completed four interviews relevant to the legislative history of *Indian Act* reforms in the seventies and eighties. I did not attempt to complete a full sample of interviews with respect to this time period. These interviews were conducted according to the procedures described and approved by UC Berkeley's Committee for the Protection of Human Subjects.[29]

I drew the sample for interview subjects by identifying the main players in the story and then figuring out ways to reach them. On my long list of quarry included people like Sharon McIvor and the federal bureaucrat behind the *Indian Act* reform process in the eighties. Getting access to the people on this list was much easier said than done. I started the interview process from the outside of the circle, identifying the people who

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[26] Chris Cobb, "Secret deal 'about access,' Library and Archives says; Confusion, anger grow over Heritage Project, but officials say it's misunderstood", *The Ottawa Citizen* (13 June 2013), online: <http://search.proquest.com/canadiannews/docview/1367251322/4285D84FD1FA492BPQ/7?accountid=12339>.

[27] Tom Spears, "Private plan to digitize archives slammed; Need systematic national program, former chief librarian says", *The Ottawa Citizen* (14 June 2013), online: <http://search.proquest.com/canadiannews/docview/1367646552/4285D84FD1FA492BPQ/5?accountid=12339>.

[28] Chris Cobb, "Millions of documents could leave public domain; Library and Archives Canada has deal with private consortium", *The Ottawa Citizen* (12 June 2013), online: <http://search.proquest.com/canadiannews/docview/1366763696/4285D84FD1FA492BPQ/1?accountid=12339>.

[29] CPHS Protocol Number, 2013-12-5859

were the least important to my research question but who could introduce me to people closer to the inside of the circle.[30] This was a process of modified snowball sampling, in which I used a small pool of initial informants to nominate other participants who met the eligibility criteria for the study.[31] This meant that I gained experience practicing interview questions with less central interview subjects, and I was able to ask questions that helped me map the political terrain I was walking into. I asked all my interview subjects if they would be willing to refer me to people directly or if I could use their names when contacting the next person on the list. I used the fact that I had worked as a lawyer with a reputed aboriginal law firm to gain entrée with lawyers. I contacted anyone I knew who might know people on my target list and asked them for help. As an example, a childhood friend of mine married to a partner in an Aboriginal law firm hosted a dinner party so I could meet a lawyer friend of his who then organized a meeting with someone at the Native Women's Association of Canada. This worked some of the time. But I got a fair proportion of the rest of my interviews by figuring out what events people might attend and then going to that conference, reception, or meeting, and finding some way to introduce myself. This involved wheedling my way into more than a few awkward cocktail receptions in Ottawa. For about a year, if I knew someone on my list was going to be somewhere, I dropped everything to get there if I could.

This effort notwithstanding, I did not get a few key interviews. I was not able to get a recorded interview with Sharon McIvor. I have in principle agreements from three key players from the eighties, but they have been unavailable to meet in practice. I did not set out to conduct interviews with the Indigenous political leadership, in the present era or in the eighties, largely because of the difficulties in getting time with these people.

Seventeen of my meetings were recorded interviews. In some cases, I held preparatory meetings with people before moving to a full interview. This proved to be the exception to the rule, however. Most of the people I sought to interview were political leaders or busy lawyers. Very few had time for one conversation, let alone two. They were accustomed to being asked about their views on political questions. In many cases, I was unable or not permitted to make reliable recordings; I rely on jottings and field notes for these interviews. All interviews, whether recorded or not, were conducted on the basis of confidentiality, except if the person wanted the interview specifically attributed to them. Interviews that were recorded were professionally transcribed. In the other cases, I prepared detailed notes of the conversation after the interview. Notes and transcriptions are stripped of identifying information, to the extent possible given the public profile of many of the figures interviewed. The original recordings, transcriptions, and notes are held in my personal files.

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[30] Kristin Luker, *Salsa Dancing into the Social Sciences: Research in an Age of Info-glut* (Cambridge, Mass.: Harvard University Press, 2008) at 145–53.

[31] Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 927 at 934.

My primary challenge in interviews concerned consent forms. My research protocol required me to get written consent; in retrospect, this was a mistake. Despite my efforts to ensure informants that the forms were there to protect their interests, most people regarded the forms as an irritant and additional burden, rather than a protection. I complied with the procedures described in my research protocol, but I consistently felt the protocol wrongly starts from the presumption that research subjects are vulnerable people in need of protection. For context, one of my Indigenous interviewees wedged our conversation between meetings with foreign ambassadors about a multi-lateral trade agreement. There were exceptions: a few interviewees requested transcripts of the interviews or a right of review on my use of extracts from the interviews.

Ethnography

My research questions did not require a significant fieldwork component, and my research protocol did not provide for ethnographic data collection. But I used ethnographic research methods during my time in the archives and on the road. I believe that both history and anthropology improve with a self-reflexive awareness of context.[32] I am a non-Indigenous researcher studying a federal political process that regulates Indigenous life. I spent three weeks observing a trial about sex discrimination in Indian status in the Superior Court in Montreal, Quebec. I could relate to trials, parliamentary law-making processes, and government bureaucracies due my career experience as a lawyer and human rights lobbyist. But my research also called for hearing and interpreting Indigenous political speech. As I was relatively unfamiliar with the political milieus in which this speech is developed and debated, I decided to try to observe Indigenous political spaces, when invited.

I was invited to and attended as an observer at the following conferences: the Chiefs' Council of the Union of BC Indian Chiefs (2014), the Annual General Assembly of the Assembly of First Nations (2013), and the Annual General Meeting of the Native Women's Association of Canada (2013). I also attended two days of hearings in Vancouver of the Truth and Reconciliation Commission on residential schooling. The days I spent listening and watching were a mind-opening experience. I did not treat these contexts as field sites but, rather, as places where I was privileged to be able deepen my understanding of Indigenous ways of being and governing.

Analysis Process

Having amassed an abundance of data, a significant challenge of the project was organizing and classifying this data. I ended up with over 1,500 documents, some of which had to be manually collated from the collection of 5,000 photographs of

[32] Laura Nader, "Orientalism, Occidentalism and the Control of Women" (1989) 2:3 Cultural Dynamics 323; Annelise Riles, *The network inside out* (Ann Arbor: University of Michigan Press, 2000); Jean Comaroff & John Comaroff, "Ethnography on an awkward scale: postcolonial anthropology and the violence of abstraction" (2003) 4:2 Ethnography 147; Sally Falk Moore, "The Ethnography of the Present and the Analysis of Process" in Robert Borofsky, ed, *Assessing Cultural Anthropology* (New York: McGraw-Hill, 1994).

individual pages of archival documents. In addition, I have transcripts or notes from 20 full-length interviews.

The first step of classifying the archival materials involved producing a title and one-line description of the documents and sorting them chronologically. I then used qualitative coding and analysis techniques, informed by a grounded theory perspective.[33] I used these techniques at the top-line level of the document. I analyzed the secondary literature and reflected on my experiences skimming primary source materials. Drawing on this backdrop, I open coded from the one-line summaries of documents to inductively develop a set of keywords and topics. From this open coding process, I created a system of relationships and hierarchies among topics – for example, the category 'Women's movement' included 'Funding of', 'Equality Rights Advocacy', and 'Relationships with Indigenous Women's Groups'. These categories were related to but distinct from the category 'Royal Commission on the Status of Women' or 'Federal Equality Laws'. I used this initial open coding to categorize a sample of documents, and then refined keywords and categories into a more focused set of categories. I then applied this grid of keywords to the entire data set, effectively closed-coding all the documents into conceptual files.

To conduct the more fine-grained analysis, I queried my database of materials, drawing chronological, topical samples from the data. I conducted a careful reading of the set of documents under a given topic. I paid attention to actors, their place within institutional hierarchies, their movements within hierarchies and between institutions (in some regards, it was a longitudinal study of political and bureaucratic careers). I analyzed the drafting process and revisions of policy documents. When warranted, I did close readings of texts, noticing rhetorical issues of tone, syntax, and word choice. I was sensitive to the material presentation and physical form of archival sources.

The dissertation does not represent my analysis of the entire volume of data I collected over the course of my empirical work. For example, although the dissertation does not broach the detailed story of the preparation of the litigation strategy in *McIvor*, my conversations with the plaintiff, interveners, and lawyers were an important frame in my understanding of the issues at the heart of the project. I have described the process of gathering the data and the types of information I gathered in order to explain my research technique. Furthermore, although I was not able to write about all the data I gathered, the ensemble represents the intellectual and empirical world in which the ideas contained in this dissertation developed. One cannot help reading in the archives, even if one cannot return home and write about everything.

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[33] Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (London; Thousand Oaks, Calif.: Sage Publications, 2006); Barney G Glaser & Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine Pub. Co., 1967); John Lofland, *Analyzing Social Settings: a Guide to Qualitative Observation and Analysis* (Belmont, Calif.: Wadsworth Pub. Co., 1971).

3. Setting the Scene for post-World War II Canada

Introduction

In this section, I review a selection of key turns in Canada historian in the period between Confederation in 1876 and the late 1930s. Through laws, treaties, infrastructure projects, and violence, the federal government forged a fragile and incomplete sovereignty out of the lands and peoples living in Canada. I discuss relationships between Indigenous nations and the federal government, including the introduction of a patrilineal system of Indian status. I talk about refusal and resistance by Indigenous nations. I touch on the federal government's policies towards immigrants, in the context of policy aimed at creating a white Canada. I briefly review changes in Canada's status as a Dominion of the British Empire.[1]

Treaties and Scrip Tackle the Land Problem

From the perspective of Canada's federal and provincial governments, the challenges of the post-Confederation period were 1) Land and 2) Population.[2] By the late 1880s, the Canadian Pacific Railroad symbolically linked the Pacific city of Vancouver to federal power in the capital in Ottawa. Despite this signal of a transcontinental sovereignty, the government's hold on the west was at best aspirational, and everyone knew it. For example, in 1864, Canadians were gripped by stories of the killing of a team of white construction workers who were prevented by the Tsilhqot'in from taking a road through Tsilhqot'in territory.[3]

British Columbia "hung precariously at the edge of Britain's literal and symbolic empire," until 1871 when it was brought into Confederation.[4] As part of confederation, a trans-continental railway was promised to connect the new province to the east. The railroad required huge land concessions and labor. Labor was sought from immigrants.[5] The trouble with the land was that all the proposed routes ran through land controlled by Indigenous nations. The federal government was bound by treaty to respect these nations.

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[1] For reasons of scope, I do not discuss the social and political influence of religious institutions.

[2] James C Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).

[3] Wendy Stueck, "B.C.'s apology for hanging Tsilhqot'in war chiefs one step in a long healing process", *Globe and Mail* (24 October 2014); Tina Loo, "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia" in Susan Lewthwaite, Tina Loo and Jim Phillips, eds, *Essays in the History of Canadian Law Crime and Criminal Justice in Canadian History* (Toronto: University of Toronto Press, 2000) 112.

[4] Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto; Buffalo: University of Toronto Press, 2001) at 3.

[5] Kay Anderson, *Vancouver's Chinatown: Racial Discourse in Canada, 1875-1980* (Montreal; Buffalo: McGill-Queen's University Press, 1991); David Goutor, "Constructing the 'Great Menace': Canadian Labour's Opposition to Asian Immigration, 1880-1914" (2008) 88:4 The Canadian Historical Review 549; Patricia Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: University of British Columbia Press, 1989).

The federal government had inherited the British Crown's responsibility for Indians and Indian lands when the British North America Act was passed in 1867. This included the Crown's obligations under the *Royal Proclamation* of 1763. Announced by King George III at the end of the wars between France and England that saw France ceding most of its North American possessions, the *Royal Proclamation* defined the land west of the European colonies as "Hunting grounds" "reserve[d] … for the use of the said Indians" where people "should not be molested or disturbed" by settlers.[6] It forbade settlers from purchasing land from Indigenous nations.

Treaties were not an innovation specific to the land grab in the West. Over eighty treaties were concluded between Indigenous nations and the Crown prior to Confederation.[7] For example, in 1784, in recognition of losses of territory during the wars of independence, Great Britain and the Six Nations negotiated the Haldimand Treaty, providing them with land near present-day Brantford, Ontario.[8] Other treaties bore witness to military alliances. The Haudenosaunee Confederacy formed an alliance with Great Britain during Great Britain's war with its colonies; this alliance was recorded in wampum belts exchanged between the two parties.[9] One side took this military alliance seriously. Mohawks from Six Nations fought for Great Britain "in every battle on the Niagara frontier in the War of 1812,"[10] served as voyageurs to navigate the Nile during the failed British attempt to free Khartoum in 1885,[11] and sent an entire battalion to World War I in recognition that the "Queen's grandson needed help."[12] Yet another other category of treaties were diplomatic agreements between Indigenous nations, formed prior to and after contact with European settlers. For example, the Gdoo-Nagaanina (Dish with One Spoon) treaty between the Anishnaabe and Haudenosaunee Nations provided for the sharing of hunting grounds, allowing the two nations to share territory and curb war while remain independent.[13]

Because the government's promised railroad could not be built across land reserved for the use of Indians (under Canadian law) and lived on by Indigenous nations (under Indigenous law), the federal government sought agreements with the nations living on

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[6] *Royal Proclamation, 1763 (The)*, R.S.C., 1985, Appendix II, No. 1.

[7] Timothy C Winegard, *For King and Kanata: Canadian Indians and the First World War* (Winnipeg, Manitoba: University of Manitoba Press, 2012) at 18.

[8] *Ibid* at 16.

[9] Kathryn V Muller, "The Two 'Mystery' Belts of Grand River: A Biography of the Two Row Wampum and the Friendship Belt" (2007) 31:1 The American Indian Quarterly 129.

[10] Winegard, *supra* note 7 at 67.

[11] Carl Benn, *Mohawks on the Nile: Natives Among the Canadian Voyageurs in Egypt, 1884-1885* (Toronto [Ont.]: Dundurn Press, 2009).

[12] Winegard, *supra* note 7 at 46.

[13] Leanne Simpson, *Dancing on our Turtle's Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Pub., 2011) at 113.

the land. Seven treaties were concluded between 1871 and 1877.[14] As an example, Treaty Seven, signed in 1877, created delimited reserves, annual payments and provisions from the Crown, and continued hunting and trapping rights on the lands they had allegedly surrendered to the Crown. No treaty was ever signed regarding most of present-day British Columbia. Not all Indigenous nations, and not all individual members of Indigenous nations, were brought into treaty. Furthermore, instead of signing on to Treaty, some individuals 'took scrip', meaning that they renounced their Indian status and acquired citizenship, a sum of money, individual ownership of a land parcel, access to liquor, and the right to vote.

The numbered treaties only partially addressed the federal government's land problem, as the Métis were still in the way of the railroad. A political force to be reckoned with throughout the 19th century, the Métis are people of mixed European and Indigenous ancestry.[15] The Manitoba Metis defended their lands in the 1870 Red River Resistance. In 1885, the Métis were joined by the Cree, Blackfoot, Blood, Peigan, and Saulteaux nations in a five-month insurgency to defend their lands from settler encroachment. The 1885 Red River Rebellion was quashed after an 8000-man military action and the capture and execution of leader Louis Riel.[16]

The federal system of Metis scrip began in response to the Manitoba uprising in 1870. By 'taking scrip', individuals acquired land or money and relinquished any claims as Metis. The government did not negotiate with the Métis as a collective, but sent out commissioners to Metis communities to take individual signatures. First rolled out in Manitoba, Métis scrip-taking was then implemented in the North-West Territories (now Saskatchewan and Alberta). The Métis lifestyle of hunting and trapping was not easily

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[14] There is a wealth of literature that I cannot address here discussing the nature of these treaties, the agreements they represented, and the differing accounts in Indigenous and settler histories. For one example, see: Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

[15] The nomenclature is complex, as there are present-day and historical distinctions between the Métis communities around Red River Colony and the broader category of any person of mixed European-Indigenous descent. In the 1960s and 1970s, the term Métis included anyone with mixed white and Indigenous ancestry. People who were non-status or had lost status were welcome to join Metis organizations. However, by the mid-1980s, 'Metis' had come to be an identity in its own rights, and non-status Indians were no longer represented by Métis political leaders. This was largely because the Constitution specifically recognized the Métis in 35(2), but did not enumerate 'non-status Indians' as a category holding rights. In March 1983, the Metis Nation gained a seat in constitutional negotiations and thus required a Metis-specific national representative body, the Metis National Council. With the formation of the Metis Native Council, the remit of the NCC narrowed to non-status Indians living off-reserve. In 1993, the Native Council of Canada re-organized, and changed its name to the Congress of Aboriginal Peoples. The issue of the identity of the Metis remains debated today, with distinctions drawn between 'Red River Métis' and 'other Métis.' See Chris Andersen, *Métis: Race, Recognition, and the Struggle for Indigenous Peoplehood* (2014); Joe Sawchuk, "Negotiating an Identity: Métis Political Organizations, the Canadian Government, and Competing Concepts of Aboriginality" (2001) 25:1 American Indian Quarterly 73.

[16] Winegard, *supra* note 7 at 21.

transformed to the sedentary life of farming. In aggregate, the effect of scrip was to extinguish Métis claims on the land they lived on.[17]

The numbered Treaties were only part of the solution to the federal government's land problem. They were complemented by an existing system for removing Indigenous nations from their territories and confining them to reserves. Removal from the land was further hastened by massive loss of life due to disease and widespread famine, with the federal government declaring that emergency rations would be refused "until the Indians were on the verge of starvation, to reduce the expense."[18] One of the first acts of the Province of Canada, in 1850, had been to pass legislation for the creation of Indian reserves.[19] Under the 1857 *Gradual Civilisation Act*, reserve lands could be transmuted into ordinary plots of land and sold to settlers, in the event that an Indian lost Indian status.[20]

Immigration and Indian Laws address the Population Problem

British rule in North American had proceeded on the basis of a loose definition of the 'Indian tribes'. The early colonial government did not define membership in Indigenous communities.[21] For example, legislation in 1845 referred simply to "people usually called Indians."[22] Indigeneity was based on repute rather than blood line or legal identifications. This changed after Confederation.

The Canadian government invented the legal status of "Indian" as part of its efforts at constructing and strengthening sovereignty over territory occupied by Indigenous peoples. As the white settler population expanded, Indians were restricted to certain areas; settlers could go anywhere, except the lands reserved for Indians. This required a clear definition of both groups.

This was easier said than done. It had become difficult to determine who was 'white', 'Indian', 'half-breed', or otherwise.[23] During the white settlement of Canada, the survival of white settlers depended on their ability to cooperate with Indigenous

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[17] Sawchuk, *supra* note 15.

[18] James W Daschuk, Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life (2013) at 134.

[19] *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, S.C. 1850, c. 74 (13-14 Vict.)

[20] *An Act to Encourage the gradual Civilization of Indian Tribes in the Province and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26

[21] Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal, Que.: McGill-Queen's University Press, 2009) at 71.

[22] *Ibid*.

[23] Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3 at 8.

societies, often through intermarriage and integration.[24] Two centuries of the fur trade had created a mixed-raced Métis population living on the prairies.[25] Mixed-raced and non-monogamous unions had been so common place that they even became accepted during the pre-Confederation years.[26] Even the courts acknowledged inter-marriage, as in an 1867 Quebec decision upholding a customary marriage between a white man and Native woman.[27]

But, by the 1860s, the existence of increasingly mixed race society compelled the government to police the lines around 'white'. New immigrants with their suspicious sexual cultures – including Mormons from the United States – 'flooded' across the border, drawn by promises of work in the mines or on the railroads.[28] According to British Columbia's provincial administrators, the country's western coast was buffeted by waves of Chinese immigration who threatened to mingle with the white settler population.[29] Legislators appealed for immigration curbs, on the basis that Chinese immigrants "most materially affect the immigration of a white population, through whom alone we can hope to build up our country and render it fit for the Anglo-Saxon race."[30]

Officials fretted over whether the new country would qualify as a 'white' Dominion of the British Empire. The remedy was to install white, non-divorceable, monogamous couples on productive homesteads, enclose nuclear indigenous families on reserves, and outlaw inter-racial mixing.[31] By force or law, the heterosexual, monogamous dyad would bring the wanton and untamed West into Canada's confederation. The viability of the just-born Dominion depended on it.

Galvanized by fears of miscegenated future, state officials passed laws to encourage white settlement, racially classify populations, and prevent further 'mixing'.[32] In 1885,

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[24] Bonita Lawrence, *"Real" Indians and Others: Mixed-blood Urban Native peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004) at 48.

[25] Sylvia Van Kirk, *"Many tender ties": Women in Fur-trade Society in Western Canada, 1670-1870* (Winnipeg, Man.: Watson & Dwyer, 1980).

[26] Sarah Carter, The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915 (Edmonton: University of Alberta Press, 2008).

[27] *Connolly v. Woolrich*, (1867) 17 RJRQ 75.

[28] Nayan Shah, Stranger Intimacy: Contesting Race, Sexuality, and the Law in the North American West (Berkeley: University of California Press, 2011).

[29] Reginald Good, "Regulating Indian and Chinese Civic Identities In British Columbia's 'Colonial Contact Zone,' 1858–1887." (2011) 26:01 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 69; Perry, *supra* note 4; Roy, *supra* note 5.

[30] Appeal by the Legislature of British Columbia to the Lt. Governor of British Columbia on the Chinese question, February 1884. Journals of the Legislative Assembly of British Columbia, vol. 13, 9 May 1876

[31] Renisa Mawani, *Colonial Proximities Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921* (Vancouver [B.C.]: UBC Press, 2009); Carter, *supra* note 26; Perry, *supra* note 4.

[32] Renisa Mawani, "`Half-breeds,' racial opacity, and geographies of crime: law's search for the `original' Indian" (2010) 17:4 Cultural Geographies 487; Jean Barman, "Beyond Chinatown: Chinese men and

with the railroad nearly completed, Canada passed the *Chinese Immigration Act*.[33] This limited the entrance of Chinese immigrants by charging a head tax of fifty dollars for each immigrant, effectively prohibiting female migration and, it was hoped, the long-term settlement of the Chinese labor force.[34] Meanwhile, white female immigrants were solicited from Europe. Forbidden from divorcing, they were tasked with bearing white children to populate 'empty lands' and bringing virtue, civilization, and morality to their families.[35] Even the Indian agent had to marry if he wanted to keep his job.[36]

While immigration law established the entry and exit rules, what was to be done about the people already here? Laws regulating Indians were a powerful weapon in the white supremacist battle for Canada. In the 1869 Gradual Enfranchisement Act, the Canadian government asserted the power to register communities as Indian or not. The Act introduced the first version of the marrying out rule. An Indian woman who married a white man would lose her Indian status and any right to band membership.[37] White-Indigenous inter-marriage worked along gendered lines: white women became Indian if they married in, and Indian women became white if they married out. The 1876 *Indian Act* created the regime of patrilineal transmission of Indian status that continued until 1985, under which indigenous women lost Indian status through marriage to a non-Indian.[38] In doing so, they and their mixed-race children lost rights to live on reserve, and the number of people with the constitutional claim to "lands reserved for Indians" dwindled over every successive generation of out-marriage

The transmission of community membership along the male line was not an Indigenous tradition. Clan identity was not based exclusively on descent or blood line.[39] Membership was formed based on social criteria including language, culturally appropriate behavior, social affiliation, and loyalty.[40] Communities integrated outsiders from other groups, whether they arrived through adoption, migration, or as prisoners of war. They even adopted white settlers during the first days of colonial settlement.[41] Pre-contact, Indigenous societies were not uniformly organized along patriarchal lines. For example, in the Haudenosaunee, it was the Clanmothers who made decisions about war

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indigenous women in early British Columbia" (2013) 0:177 BC Studies: The British Columbian Quarterly 39.

[33] An Act of Respecting and Regulating Chinese Immigration into Canada, 1885. S.C. 48-49 Victoria, Chapter 71

[34] Roy, *supra* note 5.

[35] Perry, *supra* note 4 at 139.

[36] Carter, *supra* note 26 at 72.

[37] Lawrence, *supra* note 23 at 8.

[38] *Indian Act*, S.C. 1876, c. 18 (39 Vict.)

[39] Grammond, *supra* note 21 at 78.

[40] Sebastien Grammond, "Disentangling Race and Indigenous Status: The Role of Ethnicity" (2008) 33 Queen's LJ 487, para 54.

[41] Grammond, *supra* note 21 at 78.

and who held the collective land base for all the nations of the confederacy.[42] Among the Anishinaabe, kinship networks helped to pattern political alliances and influenced access to community resources.[43] In any case, modern understandings of male-female, heterosexual-homosexual, and patriarchal-matriarchal may not be the right analytic categories for the diversity of life worlds in pre-contact societies.[44]

The issue of pre-contact ordering is relevant because it goes to the question of origins. On this question, it seems highly unlikely that the patrilineal transmission of Indian status was initiated by Indigenous nations.[45] Although Indigenous nations may have feared for their reserve lands, these lands were already protected by the prohibition, under the 1869 Act, against non-indigenous men acquiring status through marriage or owning property on reserve.[46] In debates on the 1869 reforms, Indigenous groups protested features of the bill, such as the exclusion of Indian women who married out. In 1872, the General Council of Ontario and Quebec Indians asked that Indian women be able to retain status regardless of who they married.[47] In 1875, the Joint Council of the Garden River and Batchewana Bands demanded that Indian women who 'married out' remain members of the band.[48]

However, Indian status was not permanent, and it was not to be lost only through marriage. If an Indian 'enfranchised', he lost Indian status and all associated benefits. He gained citizenship rights, including the franchise, provided he met the other requirements for the franchise. The connection between voting rights and Indian status is the reason the term 'enfranchisement' came to mean loss of Indian status. Enfranchisement was not necessarily voluntary. Until 1880, an Indian could be enfranchised automatically simply by earning a university degree, practicing medicine or law, or entering the Christian clergy.[49] Between 1857 and 1918, only 102 Indian persons enfranchised voluntarily.[50] Between 1920 and 1922, and 1930 and 1951, it was possible to be compulsorily enfranchised at the discretion of a board of examiners.[51]

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[42] Lawrence, *supra* note 24 at 47.

[43] Heidi Bohaker, "'Nindoodemag': The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701" (2006) 63:1 The William and Mary Quarterly 23.

[44] Mark Rifkin, When did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty (New York: Oxford University Press, 2011).

[45] Grammond, *supra* note 21 at 92.

[46] *Ibid* at 91.

[47] *Ibid* at 92.

[48] *Ibid*.

[49] Fiske, Jo-Anne, "Constitutionalizing the Space to be Aboriginal Women: the *Indian Act* and the Struggle for First Nations Citizenship" in Yale Deron Belanger, ed, *Aboriginal Self-government in Canada: Current Trends and Issues* (Saskatoon: Purich Pub., 2008) 309 at 311.

[50] Lawrence, *supra* note 24 at 31.

[51] *Ibid*.

Enfranchisement permitted Indian agents to remove from communities those Indians who had become empowered by education or financial security.[52]

Indigenous Political Orders are Supplanted

Forced resettlement onto reserves and the definition of community membership were seen by the Crown to promote the civilization of Indians and were experienced by Indigenous nations as violence. British and Canadian legislative efforts were held together by a shared narrative of progress, from barbarism to civilization. In 1830, the Colonial Office in London adopted "the settled purpose of gradually reclaiming them [the tribes] from a state of barbarism and of introducing amongst them the industrious and peaceful habits of life."[53] As Leslie writes, "Transforming Indian hunters and warriors into self-reliant agriculturalists became the project of an enthusiastic cadre of imperial and colonial government officials, missionaries, and educators who formulated and managed the British Indian civilization program."[54] As Indians were seen as dependent and backwards wards of the Crown, the duty of Indian affairs was to promote their advancement.

Policies to achieve their 'civilization' included the criminalization of Indigenous ceremonies, restrictions on freedom of assembly, mandatory residential schooling, and the outlawing of Indigenous governments. In addition to its rules on Indian status and marriage, the 1869 Act for the Gradual Enfranchisement of Indians also abolished hereditary governments and replaced them with a male-only elective system.[55] Given women's central role and the importance of kinship structures in political life, the banishment of women who married non-Indians profoundly disrupted Indigenous governments.[56] Further legislation in 1884 promised that Indians "may be trained for the future exercise of municipal privileges and powers", but reserved its application only to those bands of Indians who were "fit" for the these so-called advanced powers.[57] A further amendment in 1895 made male-only elective systems of governance mandatory in all bands.[58] The Six Nations of Grand River, who had been governing themselves since 1784 according to the consensus-based Great Law, petitioned to be exempted from

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[52] *Ibid*.

[53] Quoted in John F Leslie, *Assimilation, integration or termination?: the Development of Canadian Indian Policy, 1943-1963* (Doctor of Philosophy (History), Carleton University, 1999) [unpublished] at 29.

[54] *Ibid* at 5.

[55] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6. (32-33 Vict.)

[56] Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians: feminism, race, transnationalism 127 at 132.

[57] *An Act for conferring certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers*, 1884, S.C. 1884, c. 28]

[58] Martin J Cannon, "First Nations Citizenship: An Act to Amend the *Indian Act* (1985) and the Accommodation of Sex Discriminatory Policy" (2006) 0:56 Canadian Review of Social Policy / Revue canadienne de politique sociale, online: <http://pi.library.yorku.ca/ojs/index.php/crsp/article/view/34072> at 46.

the mandatory elected band councils. Indigenous women would not regain the vote in band councils until 1960.

Indigenous Political Leaders Resist

Indigenous leaders mounted sustained petitions, campaigns, and rebellions to defend their nations and demand respect of the treaties.[59] Their political actions were often addressed to the British Crown, as a signatory of treaties, but the Department of Indian Affairs usually re-routed these petitions back to the local Indian Agent. In an effort to curb resistance in native communities, the *Indian Act* was revised frequently between 1910 and 1930.[60] In 1927, the government amended the *Indian Act* to prohibit political organizing.[61] In spite of interference by the police and Indian Affairs officials, Indigenous leaders extended their political reach internationally, petitioning other states and the League of Nations. For example, in 1922, Chief Levi General of the Six Nations succeeded in petitioning members of the League of Nations for help in defending their territories from incursions by Canada and forcing Great Britain to respect its treaty obligations. In response, Canadian police invaded Six Nations and seized the wampum belts recording these treaties. Two years later, the federal government staged an election that saw the hereditary council overthrown in favor of a male-only elected band council. Six ballots were cast.[62]

Indigenous nations were organized politically prior to and throughout colonization. While all Indigenous nations were seen by the federal government under the category of 'Indian', they did not identify themselves as a cohesive political subjectivity. Their political groupings dated from centuries of diplomatic practices and international relations, among nations across North America.[63] The concerns of the Mi'kmaq in Nova Scotia became connected to those of the Nuu-chah-nulth on Vancouver Island through the frame created by colonization and settlement.

Early attempts at national level organizing occurred in the shadow of World War I. The League of Indians of Canada and the League of Indians of Western Canada eventually faltered through government interference and schisms between Indigenous participants.[64] With the exception of some members of the Haudenosaunee Confederacy in Ontario and Quebec, national organizations did not seek abolition of the *Indian Act*. Many activists in the inter-war period sought control of band membership, enhanced

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[59] Leslie, *supra* note 53 at 7–8; Ravi de Costa, "Identity, Authority, and the Moral Worlds of Indigenous Petitions" (2006) 48:3 Comparative Studies in Society and History 669.

[60] Anne-Marie Mawhiney, *Towards Aboriginal Self-Government: Relations between Status Indian Peoples and the Government of Canada* (New York: Garland, 1994) at 35.

[61] *Indian Act,* R.S.C. 1927 c. 98

[62] Andrea Lucille Catapano, *The Rising of the Ongwehònwe Sovereignty, Identity, and Representation on the Six Nations Reserve* (Doctor of Philosophy (History), Stony Brook University, 2007) [unpublished].

[63] Laura Parisi, Corntassel, Jeff, "In Pursuit of Self-Determination: Indigenous Women's Challenges to Traditional Diplomatic Spaces" (2007) 13:3 Canadian Foreign Policy Journal 81.

[64] Leslie, *supra* note 53 at 84.

band council powers, improved services, and better Indian agents. Some leaders, like Andrew Paull (Squamish) from British Columbia, or John Tootoosis (Cree) from Saskatchewan, opposed Euro-Canadian integration plans, whereas others, in a sign of internalized colonization, supported accelerated assimilation.[65]

Canada Strains at the Empire's Apron-Strings

World War I was a proving ground for the Dominion of Canada. Canada had been brought into the conflict as a result of Britain's declaration of war. Thus began a foot race with the other white Dominions – Australia, New Zealand, and South Africa – to gain favor, accolades, and lucrative war contracts.[66] As war losses intensified, Canada committed more soldiers and materials and, in return, expected more respect and political autonomy. As Canada was a Dominion of the Crown, rather than a sovereign country, Britain represented Canada in foreign relations.[67] But the British government's response to the appeal by the Six Nations to the League of Nations signaled its changed posture regarding Canadian sovereignty. Although Britain policed the back channels of diplomacy with its usual heavy-handed gusto, its public line was that this matter of the Six Nations was solely within Canada's domestic jurisdiction and one that Canada could handle on its own.[68]

But the war weakened Britain's hold across the Empire. Demands for greater autonomy culminated in the 1926 Imperial Conference, where it was declared that Britain and its Dominions were constitutionally equal in status. In 1931, the *Statute of Westminster* gave full legal freedom to the Commonwealth Dominions, save for the power of constitutional amendment, which was retained by the British Parliament.[69] Canada thus further disentangled itself from British rule.

Conclusion

Through a combination of reserves, treaties, scrip commissions, and warfare, the federal government had secured a greater hold on the West by the end of the 19th century. As in the East, many of the Indigenous nations in the West were confined to reserves. The Métis insurgency had been tamed. Though anxiety remained about the future of a white Canada, racial mixture had been curtailed through legislation aimed at Indigenous people and immigrants. Heterosexual monogamy was secured as the normative family

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[65] Laurie Meijer Drees, The Indian Association of Alberta: a History of Political Action (Vancouver, B.C.: UBC Press, 2002); Paul Tennant, Aboriginal Peoples and Politics: the Indian Land Question in British Columbia, 1849-1989 (Vancouver: University of British Columbia Press, 1990) at 85.

[66] Timothy C Winegard, *Indigenous Peoples of the British Dominions and the First World War* (New York: Cambridge University Press, 2011) at 75.

[67] William Harrison Moore, "The Dominions of the British Commonwealth in the League of Nations" (1931) 10:3 International Affairs (Royal Institute of International Affairs 1931-1939) 372.

[68] Grace Li Xiu Woo, "Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations" (2003) Law, Social Justice & Global Development Journal 1.

[69] *Statute of Westminster, 1931* (UK) 22 & 23 Geo. V., c. 4. S. 2.

model. The familial and political structures of Indigenous communities had been disrupted through laws on Indian status and marriage that saw women exiled from their communities if they married non-Indians. The ultimate objective of federal government policy was to eliminate Indigenous peoples. In 1920, the deputy-superintendent of Indian Affairs informed a House of Commons committee of its long term objective of ensuring that "there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department."[70] Indigenous people mounted sustained resistance to these policies, including petitions to the British Crown for respect of treaty obligations. After World War I, political action began to take place at a Canadian national level, as opposed to being organized along Indigenous national lines. Canada's tentative sovereignty acquired firmer footing in 1931 with the legal declaration of its equality and independence from the British Crown.

[70] E Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 50.

4. Canada's Human Rights State and the *Indian Act*'s Civil Liberties Problem

Introduction

The Liberals' long hold on power continued after World War II, as William Lyon Mackenzie King (1935-1948) handed the reins to Louis St. Laurent (1948-1957). Post-war Canada was reluctantly dragged into a national and international movement for human rights. The government had more appetite for nation-building projects like citizenship and the welfare state than human rights legislation. It was Opposition Conservatives and civil libertarians who pressed for laws curbing an ever-expanding federal bureaucracy. Civil libertarians seized on liberty problems created by the *Indian Act's* rules linking Indian status to rights to live on reserve. The *Indian Act* also came under scrutiny in international legal arenas. In the context of national and international fervor for rights, questions arose about the meanings of equality.

Canada as a Reluctant Human Rights State

World War II changed Canada's legal and social environment. Citizens acquired rights to free health care and some protections from state surveillance. Laws barring immigration from China were repealed, and Japanese Canadians were released from internment camps. The Liberals' post-war reconstruction program focused on full employment, domestic infrastructure development, and expanded social security and welfare policies.[1] Nevertheless, there remained endemic discrimination on the basis of race, ethnicity, Indigenous status, religion, sexuality, and gender.

Rumblings began in 1945 for the creation of a *Canadian Bill of Rights*. These demands came from two sources: a domestic context that had witnessed federal and provincial governments violating civil liberties during the Great Depression and World War II, and a post-war international context that saw states negotiating and signing human rights treaties.[2]

Domestically, many critics were dismayed by the attacks on civil liberties during the economic and social crises of the thirties and World War II. Civil liberties associations had formed to fight the state's repression of workers, union organizers, Jehovah's Witnesses, and Communists. Demands arising from the domestic context were marked by debate over competing definitions of rights, with the minimalist wing focused on 'freedoms' from the state and a more strident wing pushing for a more active state role in economic redistribution and social justice. The organizations pushing these demands were fiercely non-partisan. They were not mass-based, and their small memberships usually hailed from the educated, white, male Christian middle-class.[3] Therese Casgrain,

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[1] Reginald Whitaker, *The Government Party: Organizing and Financing the Liberal Party of Canada, 1930-58* (Toronto; Buffalo: University of Toronto Press, 1977) at 144–147.

[2] Christopher Maclennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill-Queen's University Press, 2003) at 3–4.

[3] Dominique Clément, *Canada's Rights Revolution Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008) at 37.

F.R. Scott, and Walter Tarnopolsky, who went on to become leading figures in Canada's constitutional drama in the late seventies and eighties, were all engaged through these associations in the post-war battle for civil liberties.

Pressure from the international context arose due to the appearance of the UN *Charter* and the Universal Declaration of Human Rights. Canadians asked why similar rights protections could not be offered domestically.[4] Women's groups seized on Canada's leading role in bodies like the UN Commission on the Status of Women to reinforce their claims about women's issues domestically. The federal government sought to reconcile its rhetorical support for international human rights with a concerted policy to stymie any domestic human rights legislation.[5] This became harder to sustain as the Canadian public became aware of newly minted international human rights, due largely to the work of advocacy organizations.

Public rhetoric aside, Canada dragged its feet throughout the international negotiations. Canada initially opposed the UDHR, and was coerced into signing to avoid the company of other non-signers: the Soviet bloc, Saudi Arabia, and South Africa.[6] Like most other Western states, Canada balked at any recognition of social, economic, and cultural rights and tried to limit implementation mechanisms.[7] In its defense, Canada pleaded parliamentary sovereignty and the difficulties posed by federalism – a defense using jurisdiction as a shield against jurisdiction.

In 1947, the federal government sought to pacify demands for domestic human rights legislation by creating a special joint committee to mull over the question.[8] Civil liberties groups trooped in to Parliament to make the case for human rights. Opponents protested that a parliamentary democracy could not brook any law overriding the will of Parliament. Parliamentary supremacy became the watchword of the reigning Liberals, who believed their ambitious program of social and economic reforms required an unbridled Parliament. The provinces were even less enthusiastic about a bill of rights, as it augured further encroachment by the federal government on provincial jurisdiction.[9] Meanwhile, Department of Justice lawyers were buffing their arguments for the complete rejection of a bill of rights.[10] Civil society associations were not mollified.[11] In

[4] Maclennan, *supra* note 2 at 3–4.

[5] *Ibid* at 61.

[6] *Ibid* at 75.

[7] *Ibid* at 75–80.

[8] *Ibid* at 53.

[9] Clément, *supra* note 3 at 21.

[10] Maclennan, *supra* note 2 at 56–57.

[11] *Ibid* at 83.

1948, the federal government reappointed a parliamentary committee. Justice lawyers begrudgingly offered new rights limited to criminal law matters.[12]

As the federal government stonewalled, provinces began passing their own anti-discrimination legislation. Ontario led the way, with the 1944 *Racial Discrimination Act*, followed by *Saskatchewan's Bill of Rights* in 1947. The first wave of such legislation was ineffective, in part because judges balked at treating discrimination as a criminal offense.[13]

Though anti-discrimination statutes spread across Canada like a heat rash by the late 1950s, there were no statutes that prohibited discrimination against women. Women in the workforce experienced pay gaps, male-only hiring rules, and loss of employment due to marriage or pregnancy. Organized labor and human rights organizations were mostly blind to gender equality issues.[14] This was in part because the women's movement lacked political influence and organizational strength. This began to change, as several women's organizations mounted a concerted campaign on the exclusion of sex discrimination from the federal government's 1953 *Fair Employment Practices Act*.[15] Key to this campaign were groups like the Canadian Federation of University Women and the Canadian Federation of Business and Professional Women's Clubs, headed by Margaret Hyndman.[16] Hyndman, a lawyer, helped to draft Ontario's 1951 *Ontario Female Employees Fair Remuneration Act*, the first equal pay statute in the country.[17] The actors in the movement showed little concern for the situation of minority women, however.[18] Popular demands for a bill of rights strengthened throughout the fifties.

The Canadian Citizen

While the bill of rights question was being masticated in Parliament, another parliamentary committee debated a new citizenship law. The government had greater appetite for this one.

World War II had provided the Dominions with another venue for the assertion of sovereignty, in a reprise of the dynamics during and after World War I. Soldiers in both wars had served as British subjects. The Liberal government set about ensuring that future wars would be fought by Canadian citizens. Canadian national identity and ideologies of multiculturalism are usually traced to the late 1960s and the Royal

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[12] *Ibid* at 85.

[13] Clément, *supra* note 3 at 25.

[14] Dominique Clément, *Equality Deferred: Sex Discrimination and British Columbia's Human Rights State, 1953-84* (Vancouver, 2014) at 69.

[15] *Canada Fair Employment Practices Act*, S.C. 1952-53, c.19

[16] Leslie Alexander Pal, *Interests of State: the Politics of Language, Multiculturalism and Feminism in Canada* (Montréal, Quebec: McGill-Queen's University Press, 1993) at 246.

[17] Clément, *supra* note 14 at 72.; *Female Employee's Fair Remuneration Act* S.O.1951, C. 26

[18] *Ibid* at 71.

Commission on Bilingualism and Biculturalism. However, the roots of Canadian citizenship policy and a sense of a national identity lay in the war. The wartime effort by the federal government, led by a new Nationalities Branch, focused on the problem of ethnic 'others' in Canada and their loyalty to the war effort.[19] Japanese internment was one egregious response to anxieties about loyalty.

Until reforms in 1946, the population in Canada was governed by a confusing patchwork of nationality and immigration law.[20] There were 'aliens' and 'Canadian nationals'. 'Canadian nationals' were a subset of 'British subjects' under British law.[21] Many new immigrants from Europe objected to landing in Canada to find they had become 'British subjects', as did many Haudenosaunee who had long maintained that they were allies, not subjects of the Crown.[22]

The *Canadian Citizenship Act*, passed in 1946, established a status separate from British nationality.[23] It conferred a common Canadian citizenship to all Canadians, whether or not they had been born in Canada, and it provided that immigrants could apply for citizenship if they had been resident in Canada for five years. The act restored citizenship to women who, as a result of a marriage to a foreign man, had lost their status as British subjects. This rule had been put in place in many countries during World War I in the context of fears about enemy aliens.[24] By repealing the rule that a woman's nationality changed upon marriage, the law reverted to the default position at common law.[25] A marrying-out rule was thus repealed for non-Indian women. The Citizenship Act specifically included Indian people as Canadian citizens, (puzzlingly) in the section on 'Canadian citizens other than Natural-born'.[26]

In introducing the Citizenship Act in Parliament, the Minister referenced 'new Canadians' and the need to create "a consciousness of a common purpose and common interests as Canadians."[27] The need that was felt to 'integrate' 'new Canadians' posed the question of 'integration' to what. The federal government tasked a new Citizenship

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[19] Leslie A Pal, "Identity, Citizenship, and Mobilization: The Nationalities Branch and World War Two" (1989) 32:3 Canadian Public Administration 407 at 410.

[20] Valerie Knowles, Canada and Citizenship and Immigration Canada, *Forging our Legacy: Canadian citizenship and immigration, 1900-1977* ([Ottawa]: Citizenship and Immigration Canada, 2000).

[21] British Nationality and Status of Aliens Act 1914, (UK), 1914,. 4 & 5 Geo. V., c. 17

[22] John F Leslie, *Assimilation, integration or termination?: the Development of Canadian Indian Policy, 1943-1963* (Doctor of Philosophy (History), Carleton University, 1999) [unpublished] at 284. (284)

[23] *Canadian Citizenship Act*, S.C. 1946, c. 15 [*Canadian Citizenship Act*, 1946]

[24] Candice Lewis Bredbenner, *A Nationality of her Own: Women, Marriage, and the Law of Citizenship* (Berkeley: University of California Press, 1998) at 195–196.check

[25] George T Tamaki, "The Canadian Citizenship Act, 1946" (1947) 7:1 The University of Toronto Law Journal 68 at 79.

[26] *Canadian Citizenship Act*, 1946, *supra* note 23 at s.9(4).

[27] Knowles, Canada and Citizenship and Immigration Canada, *supra* note 20.

branch with devising programs for promoting Canadian citizenship. Whereas civic education and citizenship values had previously been left to missionaries and teachers, the war effort had underlined that a sense of national identity was an important state priority.[28] The rising cultural and ethnic pluralism of Canadian society was now a site of management aimed at integration, overseen by a government branch. These programs were then applied to Indian populations, who, in the eyes of federal officials, suffered many of the same deficits as new immigrants from Eastern Europe.[29]

To implement this new policy, a new department was established with responsibility for both Citizenship and Immigration. Indian Affairs was added to this portfolio, on the basis that "the purpose of the activities of that department was to make Canadian citizens of those who were born here of the original inhabitants of the territory, or those who migrated to this country."[30] The inference was clear: Indians were not citizens by birth, but had to be made into citizens. Thus, the Department of the Secretary of State acquired responsibility for Indian Affairs in 1946.

Pressure Grows for Defining the 'Indian' in the *Indian Act*

At the same time that Parliament was debating a national bill of rights and forging a new Canadian citizenship, it was also holding hearings about Indian affairs. The impetus for reforms of the *Indian Act* had begun before the war. In the late 1930s, Indian Affairs bureaucrats solicited feedback from local staff. Resident Indian agents demanded greater clarity about their powers on reserve. Their major grievance was defining who was an 'Indian' and thus within their jurisdiction. Agents were applying a definition of 'Indian' that had remained virtually unchanged since 1880. According to the federal government, Indian agents were responsible for deciding who could live on reserve and receive treaty payments and government social assistance. From the Indian Agents' perspective, the definition of 'Indian' was maddeningly imprecise, in particular in Depression-era conditions of people migrating between reserves looking for assistance.[31]

The definition of Indian status was linked to the male line and to membership in a band:[32]

> 3. The term 'Indian'
>
> First. Any male person of Indian blood reputed to belong to a particular band;

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[28] Pal, *supra* note 19.

[29] Heidi Bohaker & Franca Iacovetta, "Making Aboriginal People `Immigrants Too': A Comparison of Citizenship Programs for Newcomers and Indigenous Peoples in Postwar Canada, 1940s-1960s" (2009) 90:3 The Canadian Historical Review 427.

[30] Prime Minister Saint Laurent, quoted in Pal, *supra* note 16 at 81.

[31] Leslie, *supra* note 22 at 80.

[32] *Indian Act,* R.S.C. 1927 c. 98 [1927 *Indian Act]*

> Secondly. Any child of such persons;
>
> Thirdly. Any woman who is or was lawfully married to such a person.

Indian status depended on 'reputed' band membership – a categorization further clouded in agents' eyes by the Act's provisions for "irregular bands" – groups who had no reserve lands – and "non-treaty Indians" – people "of Indian blood … reputed to belong to an irregular band or … follow[s] the Indian mode of life."[33]

A few Indigenous groups also submitted input to the department. For example, the Indian Association of Alberta sought recognition by the government of Indian associations, as they represented a "stage towards fuller responsibilities of citizenship."[34]

The issue of band membership had become a political and symbolic issue before the war, due to government intervention in a dispute involving the Samson Band in Lesser Slave Lake, Alberta. In the 1930s, there were efforts to strike 'illegal' Indians from the official branch membership list of 14 bands. These Indians were allegedly 'half-breeds' who had taken Metis scrip.[35] By July 1942, 640 Treaty 8 Indians had been expulsed from their bands. This prompted a political uproar among other bands in Alberta, religious leaders, and non-native Indian supporters, for whom the expulsions were a violation of civil rights. The issue festered for several years, leading eventually to the reinstatement of the majority of people in 1944. The Lesser Slave Lake crisis focused Indian and non-Indian attention on the control held by the government in determining band membership.[36]

After the war, informal consultations with Indigenous leaders continued. At a meeting in 1945 between the newly formed North American Indian Brotherhood and federal officials, Indian representatives argued that Indian people should determine, through a majority vote, the qualifications for band membership.[37] The Minister of Indian Affairs agreed.

The post-war period brought heightened scrutiny to government Indian policy, due to abominable living conditions on reserves and rising esteem for Indigenous peoples' contributions to the war efforts. In 1946, a special joint committee of the Senate and House was tasked with reviewing the *Indian Act*. A second set of hearings took place in 1947, during which parliamentarians were confronted by a bewildering range of opinion from Indian leaders on band membership control, obtaining the right to vote, and the

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[33] 1927 *Indian Act*, *supra* note 32, at s. 2(g) and 2(h).

[34] Leslie, *supra* note 22 at 101.

[35] See Chapter X for discussion of Metis scrip.

[36] Maclennan, *supra* note 2 at 3–4.

[37] Leslie, *supra* note 22 at 105.

operation of day and residential schools.[38] The joint committee issued three reports before closing in 1948.

In procedural debates at the start of its mandate, the committee fretted over the participation of Indian representatives and whether "they would insist on bringing along their 'squaws and papooses'."[39] It was assumed by Whites that women did not belong at the hearings. The anxiety reveals the politicians' categorization of women as 'squaws', while at the same time suggesting that Indian women were known to travel with men to political gatherings. In breach of settled procedure, the chairman conceded to Indigenous demands to deliver testimony at the hearings.[40]

Indigenous leaders raised the issue of band membership, as they had done during the informal consultations. As the Lesser Slave Lake controversy of the 1930s was still in living memory, associations from Saskatchewan, Alberta, and Manitoba aimed to present a united front on band membership, sourced in their Treaty rights. The IAA sought the continued "recognition of an Indian as an Indian" as both a political and moral right, and it re-iterated its position that control of band membership was linked directly to the achievement of self-government.[41] According to the associations from western Canada, all descendants of a male Treaty Indian should retain full treaty rights, regardless of the ancestry of the mother. Illegitimate children should be granted treaty privileges. Their views reversed some elements of the existing system, whereby children of inter-marriages would not be band members. It proposed that children of a treaty Indian who "married outside" should continue to have full band membership, and orphans and children of widows should be granted full treaty rights. The minor children of an Indian woman who married off reserve, lost her husband, and returned to the reserve and remarried a Treaty Indian, should also be admitted to the band. None of the proposals allowed women to keep their band membership upon marriage off reserve, however. All the recommendations were couched in the proviso of "band approval", affirming the importance of local control of these matters.[42] For its part, the North American Indian Brotherhood recommended that "Indian band membership should be determined by Indians themselves" and that "the policy of compulsory Indian enfranchisement should be abolished."[43]

Indigenous leaders demanded an end to compulsory enfranchisement. They were concerned about the loss of treaty rights, the imposition of taxation, impacts on reserve-

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[38] *Ibid* at 134.

[39] *Ibid* at 116.

[40] *Ibid* at 125.

[41] Laurie Meijer Drees, *The Indian Association of Alberta: a History of Political Action* (Vancouver, B.C.: UBC Press, 2002) at 134.

[42] Leslie, *supra* note 22 at 147.

[43] *Ibid* at 127.

based kinship networks, and loss of band funds due to payments when Indian women married non-Indian men.[44]

For non-Indian witnesses to the Committee, the problem with enfranchisement was that it was seen as a condition precedent to full citizenship. Indians could not acquire full, universal citizenship, on an equal basis with all other Canadians, without relinquishing their special status, treaty rights, dispensation from paying taxes, and cultural heritage.[45] Indeed, Dr. Diamond Jenness, the government's official anthropologist, presented a plan to "liquidate" the Indian problem by abolishing the separate political and social status of Indians and integrating Indians with other Canadians in provincial and federal service streams. His remarks were met with applause from the Committee.[46]

Hearings included testimony from Indigenous leaders and professional and voluntary groups. Leaders from the North American Indian Brotherhood and the Native Brotherhood of British Columbia articulated a policy agenda espousing self-determination, Aboriginal and treaty rights, and the settlement of land claims.[47] Parliamentarians were shocked to learn that Indians believed that the treaties recognized an inherent Indian right to self-government. As part of its advocacy for greater self-government, the Indian Association of Alberta complained about the ultimate power given to the minister over decisions made by band councils.[48] The Union of Saskatchewan Indians provided a comprehensive briefing about self-government, authored by lawyer Morris Shumiatcher in collaboration with USI vice-president, John Gambler (Cree). Shumiatcher was an adviser to Saskatchewan premier Tommy Douglas, who had been an early supporter of the USI.[49] In evidence of connections between the burgeoning post-war rights movement and the Indigenous movement, Shumiatcher had also drafted the Saskatchewan Bill of Rights in 1947.

The coordinated call for Indigenous control of band membership and respect of the treaties fell on deaf ears. Government testimony reprised concerns raised by Indian agents during informal consultations about the definition of 'Indian' and the headache this created for policing reserve residence and receipt of treaty and welfare payments.[50] Ceding control to communities over the definition of 'Indian' meant that Indian identity would be maintained and extended, and "Financial costs associated with extended welfare state benefits to reserve Indians would sky-rocket."[51] This was unacceptable to

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[44] *Ibid* at 151.

[45] *Ibid* at 156.

[46] *Ibid* at 134.

[47] *Ibid* at 10.

[48] Meijer Drees, *supra* note 41 at 133.

[49] Leslie, *supra* note 22 at 140.

[50] *Ibid* at 117.

[51] *Ibid* at 148.

most policy-makers, particularly those in the Finance Department who held the purse strings.

The parliamentary committee's final report was issued in June 1948. It made recommendations for granting greater self-government powers to band councils, and it suggested that women over 21 be permitted to vote in band council elections. With regard to band membership, the Committee lined up with the government's interests, in its proposal that the term 'Indian' be redefined. Band lists should be revised, and "welfare expenditures should not go to those who are not legally members of a band."[52] The overall aim of revised policy should be to assist Indians "to obtain the full rights and to assume the responsibilities of Canadian citizenship."[53]

The government had been pushed into holding the hearings due to public dismay over the plight of Indians, and public opinion favored making all the benefits of the welfare state available to Indians.[54] The tightening of the definition of 'Indian' in the *Indian Act* was thus brought about by a pincer move between Indian Affairs bureaucrats trying to manage administration at the reserve level, Treasury officials trying to minimize spending in general, and forces outside government appalled at unfairness and poor living conditions of Indigenous peoples. The solution was to weed out the 'phoney Indians' and streamline delivery of government programs to a smaller, known group: in short, from accounting to the counting of Indians.

A Draft *Indian Act* gets a Hostile Reception

The government embarked on a belabored process to revise the *Indian Act*. Assailed by Indigenous leaders, church leaders, members of the opposition, and others, numerous draft bills were read and withdrawn before the 1951 *Indian Act* saw the light of day.

The government's draft legislation drew from the 1948 Special Joint Committee report in proposing a radical change in the definition of 'Indian' and the administration in band membership. The bill established an Indian Membership Register to be held at Ottawa headquarters. The Indian Registrar would list every Indian and their band affiliation and ensure that lists were maintained and updated. The list would be populated by everyone who could trace descent through the male line to an ancestor who:

> a) had the legal status of 'Indian' on July 1, 1867,
>
> b) was a member of a band or group who signed a Treaty, or
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> c) any person who name appeared on a band membership or general list.

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[52] *Ibid* at 178.

[53] *Ibid* at 177.

[54] *Ibid* at 159.

In addition, any woman married to any of these Indians would be included, and any child of an unmarried Indian woman, unless it was shown that the father of child is a non-Indian. Thus, the new Indian Registrar followed and solidified the rule that federal Indian status passed along the male line. Descendants of those who had taken 'half-breed scrip' (Metis scrip) were excluded from the new list.[55]

In addition to centralizing federal power over the definition of 'Indian', two changes confirmed that status passed along the male line. First, the draft legislation proposed to push Indian women off reserve. Since 1869, federal legislation had stipulated that an Indian woman lost her Indian status when she married a non-Indian man. However, if she did not take a final payment from her band (referred to as 'taking commutation'), she could continue to receive treaty money and distribution of revenue from band revenues, but would have no other rights as an Indian. In treaty areas in the 1930s and 1940s, such women received a special red treaty card to indicate this status. As 'Red Ticket holders', such women were also often allowed to stay on reserve, along with blue-ticket holders, Metis or non-status Indians, many of whom also lived on reserve.[56] In 1948, the government proposed that once an Indian woman married out, she lost her Indian status, received a one-time payment of band funds, and was forced to leave the reserve. She would lose both her place as a status Indian on the list maintained by the Registrar and her membership in her band.

Second, the government introduced the double-mother rule. It provided that if a child's mother and paternal grandmother had both gained Indian status through marriage, the child would lose Indian status at the age of 21. In other words, if a child had only one Indian grandparent, he or she would lose status at the age of 21. Cabinet discussions show that the new rule was based explicitly on blood quantum, as Cabinet agreed that "quarter-bloods born of marriages contracted after the passing of the amendment would lose Indian status."[57]

In the context of Indian demands for greater self-government, the government proposed to turn reserves into municipal-like bodies. The 1948 draft bill proposed that 'advanced' Indian bands could develop their own constitutions and by-laws and, eventually, apply for incorporation as a provincial municipality.[58] These 'advanced' bands could gain title to reserve lands, and individuals could then obtain title to their holdings from the band, permitting them to own property on the same basis as non-Indians.[59] Bands that did not seek municipal incorporation would instead gain enhanced powers to pass by-laws and

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[55] *Ibid* at 188–189.

[56] Nellie Carlson, Linda Goyette & Kathleen Steinhauer, *Disinherited Generations: our Struggle to Reclaim Treaty Rights for First Nations Women and their Descendants* (Edmonton: University of Alberta Press, 2013) at xxxii.

[57] Cabinet, "Cabinet Conclusions: Legislation - *Indian Act* Amendment" (4 May 1950), in Ottawa, National Archives of Canada, (RG2, Vol. 2645, Series A-5-a (Microfilm Reel T-2366))

[58] Leslie, *supra* note 22 at 192.

[59] *Ibid* at 209.

training in how to become a municipality. Indian agents were to act as advisors and limit their participation in band council meetings.[60] The major impact of IAA lobbying was the recognition of the principle of Indian control over reserve assets and trust funds.[61]

For the first time, status Indian women would be permitted to vote in band council elections. However, status Indians were not permitted to vote in federal elections, in spite of pressure from civil liberties groups. Indigenous people were not unanimously keen on the franchise, mostly because voting had been conditional on loss of Indian status. Furthermore, Cabinet ministers were afraid that the Indian vote "could be bought" by the leftist party, the Co-operative Commonwealth Federation (CCF) (now the New Democratic Party).[62]

In presenting the new legislation before Parliament, in June 1950, the Minister of Indian Affairs asserted that:

> It may be said that ever since Confederation the underlying purpose of Indian administration has been to prepare the Indians for citizenship with the same rights and responsibilities as enjoyed and accepted by other members of the community.[63]

The government's tabling of these proposals met immediate political outrage. No one was happy. Indian leaders said their views had been ignored, and they complained about the continuation of extensive powers of the Minister, including the continued scope for compulsory enfranchisement. Civil liberties group thought the legislation was draconian.[64] The Canadian Civil Liberties Union (CCLU) argued that Indian 'integration' depended on the retention of certain traditional cultural, linguistic and organizational skills. They called for equal citizenship for Indian people and the granting of self-government. Furthermore, the CCLU advocated that Indian women who marry Whites should retain their status and right to remain on reserve.[65]

Thus barraged, the Minister of Indian Affairs backed down and instructed branch officials to undertake regional consultations with band council leaders. At these consultations, Indigenous leaders insisted on discussing treaty rights, rather than *Indian Act* modifications.

The department modified the Bill before re-introducing it in Parliament in February 1951. Plans were made for a conference with Indigenous leaders in Ottawa to discuss

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[60] *Ibid* at 193.

[61] Meijer Drees, *supra* note 41 at 136.

[62] Leslie, *supra* note 22 at 206.

[63] Quoted in *Ibid* at 211–12.

[64] *Ibid* at 184.

[65] *Ibid* at 214.

the new draft. The consultation process was carefully crafted "in a conscious effort to control spreading Native political consciousness and activism."[66] The Haudenosaunee were not invited, as they had insisted in all previous meetings on their sovereignty and the illegitimacy of the *Indian Act*. At the meeting itself, the seating chart placed the most vocal leaders from the western associations furthest from the minister.[67] As testimony proceeded in timed slots, loquacious and articulate Indigenous spokesmen from the west were prevented from dominating the conversation.

At this consultation, the government came under fire on the issues of enfranchisement and band membership. The Indian Association of Alberta protested that provisions of the Act made it possible for Indians to be removed from band lists. It also complained about the 'double-mother rule' (section 12(1)(a(iv)), the new rule that persons of one-quarter Indian blood would not be eligible for enrollment on band lists.[68] In contrast to the compulsory disenfranchisement of Indian women upon marriage, this rule affected both men and women equally.

The 1951 *Indian Act*

The government's proposals passed into legislation, despite the objection of Indigenous leadership and civil rights organizations.[69] Some powers had been decentralized, but headquarters remained in charge of the overall policy direction, and the Minister retained a laundry list of discretionary powers. Restrictions on Indian potlatches and ceremonies had been lifted, but largely because the police had admitted during the negotiations over the Act that these laws were basically unenforceable.[70] The rhetoric had changed from an open campaign for assimilation towards 'integration', in the context of a wider social and political agenda to 'integrate' new immigrants to Canada.

The most significant changes took place in the realm of band membership. The 1951 *Indian Act* significantly tightened the rules on band membership, ended the 'Red Ticket' system that had permitted Indian women who married non-Indians to remain on reserve, instituted a one-quarter blood rule based on patrilineal descent, and created a centralized list of Indians managed by the federal government.

When the bill was passed in June 1951, it was the first total overhaul of Indian affairs legislation since Confederation. Some government officials lauded it as the most significant change in Indian affairs since 1880.[71] There was, in fact, more continuity than change with the past. Indian policy remained oriented around the principle of making Indian peoples self-sufficient, through increased political power as citizens and

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[66] *Ibid* at 221.

[67] *Ibid* at 222.

[68] *Ibid* at 226.

[69] *Indian Act,* S.C., 1951, c. 29

[70] Leslie, *supra* note 22 at 238.

[71] *Ibid* at 237.

increased economic power as landowners. At the same time, the Liberal administration sought to limit self-determination, on the basis that if Indians required government assistance, then the government had to maintain authority over them.[72] Protection, amelioration, and assimilation remained the core values behind Indian affairs.

After the 1951 *Indian Act* was passed, a further set of consultations took place with Indigenous leaders, civil society organizations, and academics. Pension and welfare benefits were extended to Indians on the same basis as other Canadian citizens, thereby increasing administrative responsibilities for Indian Affairs officials and increasing incentives for people to stay on reserve.[73] Pressure on reserve resources and compulsory enfranchisement were among the issues discussed with Indigenous leaders in consultation meetings in 1953. Further consultations in 1955 and 1956 re-iterated these concerns, particularly regarding band membership, local government powers, and respect of Indian treaty rights, particularly hunting rights.

By participating in federal consultation policies, Indigenous political groups gained legitimacy and public recognition. However, their views were also channeled into interminable special joint committees that had little impact on the policy direction within the government bureaucracy. By acknowledging national associations and drawing them into political dialogue, the federal government blunted national Indigenous resistance. At the same time, the increasing devolution of power to band councils, coupled with the divergence of interests across regional and tribal groupings, further checked the power of national associations.[74]

The Liberal Government's Heavy Hand with Indians

By channeling Indigenous mobilization into consultation processes, the federal government succeeded in quelling political dissent for much of the fifties. But by the late 1950s, the government was again under fire over its handling of land expropriations and band membership disputes.[75] Both cast the government as wielding a heavy, highly discretionary hand over Indigenous peoples.

The federal government expropriated Mohawk lands for construction of the St Lawrence Seaway. According to the Mohawks at Caughnawaga (now Kahnawake), the expropriation violated the new *Indian Act* and international and historic treaties.[76] The expropriation controversy attracted the attention of civil libertarians. F.R. Scott, an influential legal scholar from McGill University, was among the Mohawks' legal

[72] Meijer Drees, *supra* note 41 at 131.

[73] Leslie, *supra* note 22 at 246–48.

[74] Meijer Drees, *supra* note 41 at 138.

[75] Leslie, *supra* note 22 at 15.

[76] Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (2014) at 52–53. The St. Lawrence Seaway expropriations remain the object of one of the longest running trials before Canada's federal courts.

advisers. The government was assailed by criticism from Conservatives on the right and the CCF on the left.

While the St. Lawrence Seaway controversy roiled, another round of band expulsions in Alberta took place, in a reprise of the expulsions in the late 1930s. This time, though, the controversy attracted media attention and became a cause célèbre of influential civil libertarians, who saw the issue as an opportunity to rebuke the heavy-handed Liberal government. It all began with the theft of a horse. On his release from jail, the thief retaliated by using the *Indian Act*'s procedure for protesting registration. He alleged that the man who had turned him in was not an Indian, because three of the man's ancestors had taken Metis scrip, and thus they and their descendants lost Indian status and treaty rights. If the newly created Indian Registrar saw fit to remove this man from the list, it imperiled the registration of over one hundred members of the Samson Band. The Registrar, thus seized on the complaint, undertook genealogical research, and the Minister responsible for Indian Affairs appointed a Commissioner to determine the issue. As a result, 103 Cree were expulsed from the Hobbema reserve, and a firestorm ensued.

To many in the community, the issue was mysterious: "whose ancestors took scrip and whose had not was either irrelevant, unknown, or incomprehensible", particularly as "[t]he Government tells the Indians to forget the old times and yet they are digging it up."[77] Press releases at the time explained the controversy as based in greed and personal feuds. Much more than a horse was on the line. Major oil discoveries occurred in Alberta in 1946.[78] Discoveries were made in 1953 on the Pigeon Lake Indian Reserves.[79] In 1946, the bands at Hobbema surrendered their mineral rights under to the Crown, who was to develop the resource, hold the funds in trust, and pay the bands for programs and other spending at the bands' requests.[80] The benefits from the oil discovery at Pigeon Lake were to be divided amongst the four bands adjoining the lake. Although revenues did not begin flowing into the Hobbema bands until the 1970s, it was clear in 1953 that more band members would mean more people among whom to divide the revenues.[81]

The government's decision to remove the 103 people from the Samson Band list caused an uproar. The lawyer for the Samson Band, Ruth Gorman, was also the lawyer for the

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[77] Meijer Drees, *supra* note 41 at 150.

[78] W T Easterbrook & Hugh G J Aitken, *Canadian Economic History* (Toronto: Macmillan Co. of Canada, 1963).

[79] Aboriginal Affairs and Northern Development Canada, "Indian Oil and Gas Canada: History", (14 January 2010), online: <http://www.pgic-iogc.gc.ca/eng/1100110010713/1100110010714>.

[80] Fred R Fenwick, "Samson Cree Trial Decision: 365 days of trial end in disappointment for Samson Cree", online: <http://www.thefreelibrary.com/Samson+Cree+Trial+Decision%3A+365+days+of+trial+end+in+disappointment...-a0160104851>.

[81] Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Lester & Orpen Dennys, 1989).

Indian Association of Alberta. She enjoyed close ties to the IAA leadership and Morris Schumiatcher, a Saskatchewan civil rights advocate who had worked for the premier and the Union of Saskatchewan Indians.[82] Because Gorman was on the executive of the Civil Liberties Section of the Canadian Bar Association (CBA), the CBA penned a strong critique of the handling of membership issues by Indian Affairs. In 1955, the CBA appointed a committee to study the legal status of Canadian Indians, headed by Gorman. Civil libertarians seized on the problems created by boundless ministerial discretion and the sorting of Indian communities based on the repellant criterion of 'blood lines'.[83]

The government dug its heels in, citing its mandate to implement the new *Indian Act*, further fanning the criticism from Opposition leader John Diefenbaker. The Minister responsible for Indian Affairs reported to Cabinet in January 1957 that "there was little doubt that they were legally not Indians but what the Alberta public seemed to want Parliament to do was legalize the squatters' rights."[84] It was noted by Cabinet that although Indians who had accepted scrip had continued to live on the reserve illegally, "this fact was overlooked until the discovery of oil made the land valuable."[85] In April 1957, the Alberta courts over-turned the Registrar's recommendation, and the 103 Cree were returned to the band list of the Samson Band. The government paid dearly for the controversy, as it inflamed Indigenous demands for control over membership, drew attention to material reasons for doing so if bands had natural resource wealth, and attuned civil libertarians to rule of law problems in the *Indian Act*.

Besieged at the domestic level on its handling of Indian affairs, the government was also under pressure in international circles. The director of Indian Affairs joined the Canadian delegation during discussions at the International Labor Organization. The ILO was busy drafting Convention No. 107, the first international treaty on Indigenous and Tribal Populations.[86] Canada's conduct towards Indigenous peoples came under scrutiny, particularly with respect to civil liberties and land claims issues.[87] Convention No. 107 was adopted in June 1957. The 'General Policy' advocated by the Convention urged parties to ensure that Indigenous peoples had the same rights and liberties as other members of the population.[88] It provided that Aboriginal peoples deserved protection, but not to the extent that it led to racial segregation.[89] The convention put

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[82] Meijer Drees, *supra* note 41 at 148.

[83] Leslie, *supra* note 22 at 294.

[84] Cabinet, "Cabinet Conclusions: Legislation - *Indian Act* Amendment" (31 January 1957), in Ottawa, National Archives of Canada, (RG2, Vol. 1892, Series A-5-a)

[85] Cabinet Conclusion, 31 January 1957, *supra* note 84.

[86] The ILO had become interested in Indigenous peoples as workers in 1921, in light of evidence of the serious labor exploitation of 'native workers' in the overseas colonies of European powers.

[87] Leslie, *supra* note 22 at 246.

[88] International Labour Organization (ILO), *Indigenous and Tribal Populations Convention, C107*, 26 June 1957, C107 (entered into force 2 June 1959) at art. 2(2) [ILO Convention 107, 1957]

[89] ILO Convention 107, 1957, *supra* note 88 at art. 3

many Canadian officials on edge, who feared that it would both galvanize domestic Indigenous activists and attract international scrutiny of Indigenous claims about land, treaty rights, and expropriations of territory for development projects.[90]

Indigenous Organizing

The hearings of the Special Joint Committee from 1946 to 1948 had a number of additional effects beyond changes to the *Indian Act*. By bringing together Indigenous leaders from across the country, the hearings also helped nourish the development of a national Indigenous movement.

Between the thirties to the mid-forties, Indian groups had begun to develop at a provincial level, as leaders overcame geographic distances and tribal and language barriers.[91] Of specific note are three organizations from Alberta, Saskatchewan, and British Columbia.

The Indian Association of Alberta (IAA) was founded in 1939 by John Callihoo and Metis leader, Malcolm Norris. Although its origins lay in the nationally oriented League of Indians of Western Canada, it represented a deliberate shift towards provincial, rather than national, organizing.[92] Between its founding in the late 1930s and the mid-1960s, the relationship between the IAA and the federal government ran rather smoothly. The IAA participated in discussions relating to post-war reconstruction, and its moderate positions helped to generate credibility with federal officials. During revisions of the *Indian Act* after the 1946 Special Joint Committee on Indian affairs, the IAA was one of the few Indian political organizations invited to government-sponsored discussions. As Drees argues, "The result of this recognition was the co-optation of the IAA."[93]

This cordial relationship contrasted with the Indigenous political environment in British Columbia and Saskatchewan. British Columbia had been the scene of sustained political organizing since the late 19th century. When the federal government outlawed land claims advocacy in the 1927 *Indian Act*, Indigenous leadership regrouped to form the Native Brotherhood of British Columbia in 1931. The new group was prohibited from pursuing any land claims, but it was composed of leaders who opposed assimilation and had been campaigning for recognition of aboriginal title. By the mid-1940s, the Native Brotherhood of BC had become a strong voice for Indigenous groups from the central and northern coast of BC. The main BC Indigenous leaders were all involved: Peter Kelly, Andrew Paull, and Frank Calder.[94]

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[90] Leslie, *supra* note 22 at 288–89.

[91] Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 84.

[92] Meijer Drees, *supra* note 41 at xiii.

[93] *Ibid* at 137.

[94] Paul Tennant, Aboriginal Peoples and Politics: the Indian Land Question in British Columbia, 1849-1989 (Vancouver: University of British Columbia Press, 1990) at 118–120.

In Saskatchewan, the merger of the League of Indians of Western Canada, the Protective Association for Indians and their Treaties, and the Association of Saskatchewan Indians brought the founding of the Union of Saskatchewan Indians (USI) in 1946. The USI's primary goal was the protection of treaties and treaty rights. Its first actions concerned day schools on reserve, the welfare of returning First Nations war veterans, and access to higher education and old age pensions. Its first president was John Tootoosis. Premier of Saskatchewan Thomas Douglas was one of USI's early supporters. Representatives from the USI testified before the Special Joint Committee investigation of the *Indian Act*.[95]

From these provincial organizations came growing momentum for the creation of a national Indigenous organization. The North American Indian Brotherhood (NAIB) was formed in 1944 by two hundred representatives from fifty bands. The impetus for the organization had come in part from a conference in 1943, in which fifty-five Indian delegates discussed issues related to military service and taxation.[96] It was led by Andrew Paull (Squamish) from North Vancouver, and it operated between 1944 and 1950. Even at this stage, the efforts to found a national organization confronted the divisions between Treaty and non-Treaty Indians. At the founding of the NAIB, a splinter group formed, called the Indian Nation of North America, led by John Tootoosis of the Union of Saskatchewan Indians. It stressed recognition of the 1763 *Royal Proclamation*, fulfillment of treaties, removal of whites from reserves, and recognition of Indians as a Nation. The NAIB, for its part, pledged to "give leadership to the Indian Nation, within the sovereignty of the British Crown."[97] It sought to cooperate with the federal government in resolving outstanding treaty claims and grievances. Several years later, the NAIB folded due to government interference and the absence of a widespread political base.[98]

Until the late sixties, there was a dearth of Indigenous women's organizations, in spite of the central role that women played in Indigenous government before and after colonization. When the federal government created elected band councils on reserves in 1869, women were denied rights to stand for election or vote in those elections.[99] Women only gained the right to vote in band council elections in 1951. This indicates very little about the role women played in politics in band councils or in the governments operating according to Indigenous law. It does help to elucidate the absence of women's organizations oriented towards federal government political processes. Women were not entirely absent from the provincial organizations, however.

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[95] "Federation of Saskatchewan Indians", online: *The Encyclopedia of Saskatchewan* <http://esask.uregina.ca/entry/federation_of_saskatchewan_indian_nations_fsin.html>.

[96] Leslie, *supra* note 22 at 11.

[97] *Ibid* at 93.

[98] J Rick Ponting, Roger Gibbins & Andrew J Siggner, *Out of Irrelevance: a Socio-Political Introduction to Indian affairs in Canada* (Toronto: Butterworths, 1980) at 197.

[99] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria*, Chapter 42, S.C. 1869, c. 6. (32-33 Vict.) at art. 10.

For example, at the Indian Association of Alberta, women were invited as official delegates to annual meetings, and some women took on leadership roles on health and education issues. A woman delegate to the 1952 meeting urged that "We women should not be afraid to talk for ourselves."[100]

A form of organization common to many Indigenous women emanated from a federal government program to assimilate and civilize Indians. In 1937, the Department of Indian Affairs and Northern Development initiated homemakers' clubs, aimed at assisting Indian women to improve 'home efficiency'. The federal government supported the homemakers' associations by providing small grants for equipment, like sewing machines.[101] By the early 1950s, such clubs existed on reserves in six provinces across the country. These clubs were the conduit for delivery of the federal government's 'integration' activities – the same home economics courses delivered for new immigrants from eastern Europe.

Conclusion

The Liberals held national power until the late 1950s. They used this time to expand large-scale national infrastructure, health, and welfare projects, while continuing to block national human rights legislation. The rights movement picked up steam at the provincial level instead, although with little interest in women's rights. Civil libertarians got their teeth into the government's heavy hand again over the issue of expulsions from Indian reserves. The issue was not the unfair treatment of women compared to Indian men however, but the abuse of ministerial discretion. The government's Indian policy was exposed another the international flank as well. Canada became uncomfortably aware that its policies towards Indians looked rather more like racial discrimination than like formal equality or temporary 'affirmative action' measures to correct historic disadvantage. Canada's legal community began to cogitate on the meaning of equality and the challenge of 'difference'.

[100] Meijer Drees, *supra* note 41 at 38.

[101] Bohaker & Iacovetta, *supra* note 29 at 445.

5. A National Bill of Rights

Introduction

Embattled on several fronts, the Liberal government lost the federal election in June 1957. The new prime minister, Conservative John Diefenbaker, was a civil libertarian and a long-time ally of Indigenous peoples in western Canada. In Parliament, he had represented a constituency in Saskatchewan that contained numerous Indian reserves and a large Metis population.[1] His administration brought the first federal bill of rights and another round of debate about revisions to the *Indian Act*. Modest proposals were made to band membership and Indian status laws but did not pass before the government lost power. Debates about the *Indian Act* reforms exposed growing divisions among the Indigenous organizations, whose interests diverged depending on constituency (of status or non-status people) and depending on political tactics of moderation or head-on confrontation. A national-level Indigenous organization foundered precisely because of the gap in interests between status and non-status people.

At last, a National Bill of Rights

Diefenbaker had built his career protecting individual freedoms and safeguarding the institution of Parliament from attacks by the Liberals.[2] As such, he stood to bridge the gap between traditional defenders of civil liberties and post-war advocates of equality and non-discrimination. Within a year of his election, Diefenbaker's government tabled a federal bill of rights that would protect individuals from harm from a bureaucracy implementing an ever-growing list of federal mandates.[3] The bill opens by recognizing and declaring rights and freedoms that "have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex" (art. 1), and it guarantees rights to "equality before the law and the protection of the law" (art. 1(b)).[4] In unveiling the bill, Diefenbaker promised that the bill "would give to Canadians the realization that wherever a Canadian may live, whatever his race, his religion or his colour, the Parliament of Canada would be jealous of his rights."[5]

The Liberal government had stood firm in refusal during a decade of pressure for a national bill of rights. It was only Diefenbaker's election that caused a shift in government policy.[6] By 1960, even the Liberals had changed their tune. Speaking as

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[1] John Diefenbaker (1895-1979), Progressive Conservative, born in southwestern Ontario and raised in Saskatchewan. A lawyer with early and indefatigable ambition for public office, he was finally elected to the House of Commons in 1940.

[2] Christopher Maclennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill-Queen's University Press, 2003) at 121.

[3] *Ibid* at 123.

[4] *Canadian Bill of Rights*, SC 1960, c 44, art. 1

[5] Maclennan, *supra* note 2 at 126.

[6] *Ibid* at 108.

opposition leader, Lester B. Pearson criticized Diefenbaker's proposed bill of rights, not in principle, but because of an absence of fulsome consultation with the provinces.[7]

The bill struggled through two years of debate before being passed in 1960. Through several rounds of parliamentary debate, Diefenbaker refused any major amendments to the *Canadian Bill of Rights*. The major criticisms were that as a mere statute, the bill could not bind future parliaments, and it could only affect federal laws.[8] The *Canadian Bill of Rights* would prove to be a hollow victory for civil rights advocates.

Diefenbaker's Promised Revisions to the *Indian Act*

The emphasis in the *Canadian Bill of Rights* on equal rights for all Canadians, combined with Diefenbaker's criticism of apartheid policy in South Africa, rendered the legal treatment of Indigenous peoples increasingly indefensible. During his election campaign, Diefenbaker had promised western chiefs that he would remove some of the objectionable sections of the *Indian Act*.[9] Post-election, Diefenbaker assigned this task to the new Minister of Justice and acting Minister of Citizenship and Immigration, E. Davie Fulton.

In late 1957, Fulton made another round of revisions to the rules on enfranchisement in the *Indian Act*. In December 1957, Cabinet discussed removing the authority of the Registrar to delete descendants of those who had taken Metis scrip.[10] Emboldened by its re-election as a majority government in March 1958, Diefenbaker's administration forged ahead with a more substantial revision. In August 1958, an amendment was passed to prevent re-occurrence of disputes similar to the Samson Band controversy.[11]

The seemingly inexhaustible appetite in Parliament for joint committees about Indian Affairs produced another round of hearings, first in 1959, and again from May to July 1960. A new joint parliamentary committee on the *Indian Act* was co-chaired by Senator James Gladstone, a Cree adopted by the Blackfoot, and former president of the Indian Association of Alberta. In 1960, the committee "met 41 times, heard 61 witnesses, and received 73 briefs from Indian bands, Native rights associations, voluntary and professional organizations, … the major churches … and four provincial governments."[12] The hearings showed that civil society actors – notably, human rights organizations – evinced a greater interest in Indian policy.

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[7] Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008) at 23.

[8] Maclennan, *supra* note 2 at 127.

[9] John F Leslie, *Assimilation, integration or termination?: the Development of Canadian Indian Policy, 1943-1963* (Doctor of Philosophy (History), Carleton University, 1999) [unpublished] at 307.

[10] Cabinet, "Cabinet Conclusions: Legislation - *Indian Act* Amendment" (17 December 1957), in Ottawa, National Archives of Canada, (RG2, Vol. 1893, Series A-5-a)

[11] Leslie, *supra* note 9 at 313.

[12] *Ibid* at 323.

All Indian participants spoke to the joint committee about the need for repeal of provisions on compulsory enfranchisement (section 112) and a greater degree of self-government. Indian leaders spoke about integration and the meaning of citizenship. Haudenosaunee traditionalists maintained their full-throated defense of sovereignty. The Nisga'a Tribal Council took a more moderate position. Although they were considering legal action, the Nisga'a sought recognition of aboriginal title as original owners of the land and fair compensation, rather than political independence.[13] The tribes of the BC Interior were represented by George Manuel, William Walkem, and Genevieve Mussell.[14] Their presentation stressed a desire to maintain a separate identity and traditional way of life, goals which collided with the integration objective of the federal government and the liberal, democratic individualism of a rights-based Canadian citizenship.

Band membership was also an issue. As an example, the Union of Ontario Indians demanded that illegitimate children be permitted to acquire band membership and that enfranchised Indians should be permitted to return to reserve if they repaid band funds.[15]

The government had the last word at the hearings. In the government's eyes, the most pressing issues were already being addressed. Indian Affairs was studying the creation of Indian municipal governments. The question of compulsory enfranchisement had been put to rest, as nearly half of the Indians who had relinquished status since 1948 were Indian women who had married non-Indians – which, it was implied, was not a problem of compulsory enfranchisement.[16] In any case, loss of Indian status was necessary, the government stated, as "there were no plans nor financial resources to expand the reserve land base."[17]

The committee submitted its final report in July 1961, setting the stage for a further cycle of revisions to government policy. Many of the Committee's recommendations transformed Indigenous demands for self-determination and Aboriginal rights into palatable policies. For example, band governments were to be restructured as municipal governments, and the federal government would devolve some powers to these governments. The committee recommended establishing an Indian claims commission to address Aboriginal land claims, while simultaneously recommending a changed land tenure system that would allow individuals to hold an individual right to reserve land parcels. Band membership was touched upon, in the abolition of compulsory enfranchisement. But the Committee did not define loss of status upon marriage as a form of compulsory enfranchisement. Rather, the report recommended that Indian women who married non-Indians "should not receive a per capita share of band funds

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[13] *Ibid* at 329.

[14] *Ibid* at 331.

[15] *Ibid* at 325.

[16] *Ibid* at 382.

[17] *Ibid* at 383.

for a period of five years but retain the right to return to their reserve in the intervening period."[18]

In response to the parliamentary joint committee, the Diefenbaker government introduced two new policy initiatives: the establishment of an Indian claims commission and a revision of the *Indian Act*. The revised legislation incorporated most of the Joint Committee's recommendations. As proposed to Cabinet in 1962, the objective of the revised legislation remained Indian integration. Reserves would become equivalent to municipalities, and individual Indians could hold property title, thus transforming them into liberal citizens on par with other Canadians.[19] In addition to some enhanced self-government through municipal-like powers, band councils would also gain authority over band membership.[20] All enfranchisement provisions would be removed from the Act, including the double mother rule (section 12(1)(a(iv)). Furthermore, Indian women would no longer lose status or band membership upon their marriage to non-Indians, and the illegitimate children of Indian women could no longer lose band membership through protest procedures.[21] Cabinet approved the legislation, but the government fell before it could be discussed in Parliament.

An Indigenous Movement increasingly divided

Clarity from the federal government on the policy line was juxtaposed with divided opinion among Indigenous leadership. Many associations favored piecemeal revision of the *Indian Act*. But the Federation of Saskatchewan Indians had lost patience and sought, instead, a restructuring of government-Indian relations on the basis of an agreement of its own creation.[22] These divisions regarding political strategy manifested at the organizational level.

The joint committee hearings had underlined the need for a strong national voice to represent Indigenous views. The next attempt at a national-level Indigenous organization occurred in the form of the National Indian Council (NIC). Formed in 1961 under the leadership of William Wuttunee,[23] the NIC aimed "to promote unity among Indian people … and to create a better understanding of [the] Indian and non-Indian relationship."[24] The NIC's activities focused on cultural programming, rather than political lobbying, and its membership was drawn mainly from middle class, urban, and non-status Indians. While at the helm, Wuttunee sought to bring together treaty and

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[18] *Ibid* at 384.

[19] *Ibid* at 394.

[20] *Ibid* at 400.

[21] *Ibid* at 402.

[22] *Ibid* at 398.

[23] William Wuttunee (1928-2001) was a Cree of mixed ancestry from Saskatchewan and a founder of the Federation of Saskatchewan Indians.

[24] J Rick Ponting, Roger Gibbins & Andrew J Siggner, *Out of Irrelevance: a Socio-Political Introduction to Indian affairs in Canada* (Toronto: Butterworths, 1980) at 197.

non-treaty Indians, as well as non-status Indians and Métis.[25] The NIC was the first attempt to "break down regional and tribal barriers between native people which had been so encouraged by the federal government," but, as Cree leader Harold Cardinal recalled, it foundered because "the deep division between registered and nonregistered Indians could not be bridged."[26] Treaty and status Indians were concerned with protecting Treaty rights, while the non-status Indians and Métis focused on the recognition of Aboriginal rights. Division based on Indian status also had an impact on political organizing in Alberta. In 1961, the Indian Association of Alberta amended the organization's constitution to devote itself uniquely to the concerns of Treaty people, rather than to both Treaty and Métis people.[27]

Conclusion

Diefenbaker succeeded in passing the first national bill of rights, thus shaping the national landscape on discrimination and equality. His commitment to a bill of rights was founded with a concern for restraining the heavy hand of government. This concern shone through in the federal government's approach to Indian policy. Discussions about reforming the *Indian Act* were focused on the violations of civil and political rights owed to individuals, like voting rights and the compulsory loss of status. But, Indian women's loss of status never appeared as a compulsory loss of status or a form of discrimination. Increasingly muscular demands for Indigenous self-governance fell on deaf ears, as the federal government offered, instead, the promise of municipal status. The outline of a new Indian policy emerged but did not survive the election. It is noticeable as a single moment in which it was envisaged that Indian women would no longer lose status through marriage and bands would gain some control over membership as part of self-governance powers. The two objectives were not seen as irreconcilable.

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[25] *Ibid* at 198.

[26] Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 92.

[27] Laurie Meijer Drees, *The Indian Association of Alberta: a History of Political Action* (Vancouver, B.C.: UBC Press, 2002) at 162.

6. Participation, Empowerment, and Activism in the Heady Sixties

Introduction

The sixties was an era of upheaval and renewal in Canada. Activism flourished across the social and political spectrum, including an increasingly vocal Indigenous movement and a widespread women's movement. Quebec shook off the bounds of Catholicism, giving rise to both secular modernization and secessionist nationalism. Demand surged for remedies to the blight on Indian reserves, and a government-commissioned report recommended Indigenous people be recognized as holding 'special status' as '*Charter* Canadians'. Existing Indigenous political organizations were unintentionally strengthened by federal programs for local development and consultation, as the federal government, too, seemed intoxicated by the heady airs of participation.

Social Context

Like many other countries, Canada was rocked by waves of social movement activism throughout the sixties and seventies. The student movement organized campus demonstrations on university governance, lesbian and gay people formed rights groups, women convened in community centers to provide services to domestic violence survivors and raise awareness about equal pay and abortion rights, peace activists protested nuclear weapons and the Vietnam war, African-Canadians formed organizations to combat systemic racial discrimination, and environmentalists founded Greenpeace International.[1] Activism was arrayed across the political spectrum, ranging from reformers pushing for acceptance by mainstream society and legal rights and radicals pushing for wholesale revolution or separatism.

Indigenous peoples staged blockades, led cross-country caravans, and launched lawsuits. Indigenous activism took place in the context of the Red Power movement, an Indigenous resurgence across North America calling for fundamental change in Indigenous-White relations. Indigenous people in Canada collaborated closely with the American Indian Movement. Mohawks living across the US-Canadian border staged blockades to draw attention to the Jay Treaty and its guarantees of open access across the border.[2] Indigenous mobilization was influenced by the global context of uprising. As Cardinal put it,

> We can and we have watched black riots in the United Sates and we can and we have pondered their lessons. … Our people have seen the methods used by other groups in similar situations, and we have measured their successes – and failures. We are learning

[1] Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008) at 32.

[2] *Ibid*.

> from others about the forces that can be assembled in a democratic society to protect oppressed minorities.[3]

Indigenous organizing was helped in part by the increasing urbanization of the Indigenous population. Cities like Edmonton and Toronto became homes to thriving Indigenous communities.[4] While many men left reserves in pursuit of employment or education, "many women who left the reserve were compelled to do so because they were fleeing violence or because they had lost their status and housing."[5] The younger generation had met in residential schools, a setting that cultivated an acute sense of injustice, survival skills, and networks of contacts ready to raise hell. Direct action and demonstrations by Indigenous people blossomed across the country throughout the sixties.[6]

"The Indian Problem"

The Joint Committee on Indian Policy released its report in 1961, but it failed to provide clear direction on Indian policy. Pearson's administration treated Indian policy as part of the government's war on poverty. To that end, cabinet committees were restructured, and aspects of Indian policy were incorporated into a new Social Policy Secretariat.[7] Cabinet-level changes did little to orient bureaucrats in the department, however. The political environment of the 1960s was uncertain, as Pearson presided over successive minority governments. Between 1963 and 1966, ministers arrived and left as though from a short-order line, leaving bureaucrats with little direction and ever-diminishing morale.[8] With the exception of Arthur Laing, whose term was from 1966 to 1968, no minister was in office long enough to become well briefed on the issues.[9]

At the staff level, Indian Affairs was run by an old guard who had been with the department since the 1930s.[10] Officials remained devoted to suppressing Indigenous dissent and managing the policy environment. Demands for treaty rights, self-determination, and expressions of Indigenous sovereignty had to be "carefully stage-

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[3] Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 91.

[4] Nellie Carlson, Linda Goyette & Kathleen Steinhauer, *Disinherited Generations: our Struggle to Reclaim Treaty Rights for First Nations Women and their Descendants* (Edmonton: University of Alberta Press, 2013) at xiv.

[5] Nancy Janovicek, "'Assisting our own': Urban Migration, Self-Governance, and Native Women's Organizing in Thunder Bay, Ontario, 1972-1989" (2003) 27:2 The American Indian Quarterly 548 at 548.

[6] Clément, *supra* note 1 at 32.

[7] John F Leslie, *Assimilation, integration or termination?: the Development of Canadian Indian Policy, 1943-1963* (Doctor of Philosophy (History), Carleton University, 1999) [unpublished] at 12.

[8] Laurie Meijer Drees, *The Indian Association of Alberta: a History of Political Action* (Vancouver, B.C.: UBC Press, 2002) at 159.

[9] Sally M Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (Toronto; Buffalo: University of Toronto Press, 1981) at 45.

[10] *Ibid* at 46.

managed or simply ignored."[11] Paternalism remained an orienting attitude. There was no love lost between these bureaucrats and the Indigenous leadership. For example, Harold Cardinal thought that

> The Honourable Mr. Laing's ignorance of the Indians in Canada in the mid-sixties was exceeded only by his arrogance. … His greatest contribution to the Indian situation came about because his silly doctrinal statements helped bring Indians from one coast to the other closer together.[12]

The tradition of paternalistic control in Indian Affairs sat uneasily with the government's new emphasis on participation and empowerment. The idea of citizens' participation in democratic life manifested through increasingly generous funding of civil society organizations by the Secretary of State.[13] The Pearson government founded the Company of Young Canadians (CYC), an autonomous organization modeled on the US Peace Corps. A joint initiative between the Company of Young Canadians and the National Film Board, led to a film starring Saul Alinsky, a community organizer famed for his *Rules for Radicals*, in which he encouraged Indigenous people to organize themselves and exert pressure on the government.[14] For several young Indigenous activists, the CYC was one entrée into direct action and political organizing.

It was a stew of departmental malaise, simmering citizen participation, and boiling Indigenous resistance. The Department of Indian Affairs tried to encourage local level initiatives. Two programs epitomized its maladroit efforts to channel the new enthusiasm for participation and local empowerment. The first, a community development program, sent workers out into reserves, and the second, Indian advisory boards, sought to bring Indians into departmental offices to consult on policy. Both flopped, but were wildly successful in supporting Indigenous resistance.

The Community Development Program

First, the Department of Indian Affairs created local community development programs. Established on reserves in 1964, the program sought to develop local government skills among Indians on reserve.[15] Its broader aim was to promote the transformation of band councils into municipal governments, so that reserves might be accepted as municipalities under provincial jurisdiction.[16] Under the program, recent university

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[11] Leslie, *supra* note 7 at 411.

[12] Cardinal, *supra* note 3 at 100.

[13] Leslie Alexander Pal, *Interests of State: the Politics of Language, Multiculturalism and Feminism in Canada* (Montréal, Quebec: McGill-Queen's University Press, 1993) at 99–100.

[14] Weaver, *supra* note 9 at 9.

[15] Hugh Shewell, "'Bitterness behind Every Smiling Face': Community Development and Canada's First Nations, 1954-1968" (2002) 83:1 Canadian Historical Review 58.

[16] Paul Tennant, *Aboriginal Peoples and Politics: the Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990) at 141.

graduates in the social sciences and humanities were sent to reserves to teach Indians about governance. Once on reserve, naïve and enthusiastic community development workers clashed with seasoned Indian agents, who were chagrined by any uprising by local Indigenous leaders.[17] The majority of community development workers were white, and the few Indigenous hires became assistants to the white workers.

In British Columbia, George Manuel was one of the dozen Indigenous people hired under the community development program. George Manuel (1921-1985), a Shuswap Indian from Neskainlith (British Columbia), rose to prominence as a leader in British Columbia under the mentorship of Andrew Paull (leader of the short-lived national organization, the North American Indian Brotherhood). Manuel was a self-taught man, having spent much of his life working as a boom man in the lumber mills.[18] Hired by Department of Indian Affairs, Manuel spent the sixties doing community development work with Indigenous communities in British Columbia. Manuel "was popular with the Indians, made a favourable impression on the leading Whites in the area, and made use of the time away from his own people to improve his knowledge and skills."[19] In 1968, Manuel left the DIA position to join the Indian Association of Alberta, newly under the leadership of Harold Cardinal. Referring to the community development programs, Harold Cardinal wrote, "Non-Indians have no business trying to organize the Indian people. Such would-be helpers go into Indian communities with predetermined and, inevitably, mistaken conclusions about problems and solutions."[20]

When the Community Development program folded in 1969, it had "increased political awareness and instilled a new confidence at the band level" and "created chaos" within the Department of Indian Affairs.[21] Indian Affairs bureaucrats had "not understood that Indian self-determination would probably bring with it a vehement rejection of the branch and its representatives at a local level."[22] That the Community Development program yielded so much pushback might seem like a predictable case of shooting oneself in the foot. That bureaucrats were so astonished and dismayed speaks to the over-riding paternalism in the Department. Minister Arthur Laing asserted in 1963 that, "[t]he prime condition in the progress of the Indian people … must be the development by themselves of a desire for the goals which we think they should want."[23]

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[17] Weaver, *supra* note 9 at 28.

[18] George Manuel, *The Fourth World: An Indian Reality* (Don Mills, Ont: Collier-Macmillan Canada, 1974) at 103.

[19] Tennant, *supra* note 16 at 141.

[20] Cardinal, *supra* note 3 at 78.

[21] Tennant, *supra* note 16 at 142.

[22] Weaver, *supra* note 9 at 28.

[23] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 63.

Indian Advisory Boards

The second ill-starred government initiative was the creation in 1964 of Indian advisory boards at the regional and national levels. Each region of the Department of Indian Affairs had a ten-member advisory council, and a national level advisory board was selected from these regional bodies. In 1965, the federal government decided that the Indians themselves would choose who sat on these advisory bodies. In the BC/Yukon region, the existing provincial Indian organizations sent their presidents to sit on the Advisory Council, meaning that the Native Brotherhood, NAIB, and BC Indian Homemakers' Association were represented. George Manuel was a member of the BC-Yukon Regional Advisory Council. Indigenous participants sought to consult and report to their communities, and they wanted their views to make a difference in policy decisions. While Indigenous leaders saw the advisory boards as representative bodies, the federal government saw the advisory boards as a showcase for hearing from token Indians.[24]

The regional and national advisory councils "served the completely unintended purpose of dramatically increasing political communication among British Columbia Indians and between them and others in Canada."[25] Minutes of meetings were circulated among the regional advisory bodies, and these minutes and the national council allowed Indigenous political leaders to develop an understanding of nation-wide concerns. It built a network of contacts among Indians and with Ottawa officials and politicians. In fact, it was through the National Indian Advisory Board that George Manuel and Harold Cardinal met, and it was through national-level meetings that leaders like George Manuel gained national prominence. "Had DIA in fact intended to lay the foundation for province-wide and Canada-wide Indian political organization," Tennant writes, "it could scarcely have done a better job than it did."[26]

While the department had been proving the law of unintended consequences, a massive research effort was underway. In 1963, the government commissioned a comprehensive study of the situation of Indians, undertaken by a team led by anthropologist Harry B. Hawthorn. The research was conducted without Indigenous input.

The two-volume Hawthorn Report landed on government desks in 1967 to deliver one central message.[27] Indigenous people should be regarded as 'citizens plus': as '*Charter* members' of the Canadian community, they deserved certain rights in addition to the normal rights and duties of citizenship. The report recommended the retention of the *Indian Act*, a strengthened role for the Department of Indian Affairs in advocating Indian interests, and shared responsibility with the provinces for services. This last recommendation would end the federal government's exclusive responsibility for

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[24] Weaver, *supra* note 9 at 30.

[25] Tennant, *supra* note 16 at 144.

[26] *Ibid* at 145.

[27] Harry B. Hawthorn, ed. A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies, Parts I and II (Ottawa: Indian Affairs, 1966-1967)

Indian affairs, thus fanning anxieties among Indigenous peoples about the special bond with the Crown. The report advised the federal government to support Indigenous political associations and expand their role in decision-making.[28]

1967: An Overdue Refit of the Indian Act Overlooks Gender Equality

By the mid-1960s, the Department of Indian Affair was buffeted by demands from all corners. The community development program had folded. Indian advisory boards had fizzled out once Indian participants saw them as a waste of time. In 1966, the Minister of Northern Affairs and National Resources was abolished, and the Minister of Indian Affairs acquired responsibility for Northern Development. Bolstered by the findings in the Hawthorn report, civil servants uncovered damning statistics about Indigenous life.[29] A scathing memo described conditions of deplorable poverty, a life expectancy that was half the national average, and scandalously bad housing. But "[w]hile Indians are becoming relatively poorer, the federal bureaucracy and federal expenditures are expanding."[30] Parliament agonized over the skyrocketing costs of running the Department.[31] Indigenous people and others in Canada clamored for reforms. Frustration boiled within and beyond government. The department endured the "moral collapse of the old order."[32] A comprehensive overhaul seemed inevitable.

In 1967, Prime Minister Pearson, Minister of Indian Affairs and Northern Development Arthur Laing, and Minister of Justice Pierre Trudeau put their heads together to contemplate a comprehensive reform of the *Indian Act*.

Minister Laing worried that the "Indians…" had become "…increasingly restive about the tight legislative controls."[33] Proposals circulated for a new *Indian Act* that would "enable local government to be established more effectively at the Indian reserve level, to remove discriminatory provisions and to provide general authority for the social and economic development of Indians."[34] The policy described economic growth and self-sufficiency of reserves as the measures of success of Indian political and social growth. The main innovation was that Indian bands would be grouped into three stages of development, with different reforms applied depending on stage. 'Advanced' (stage 3) bands would get "virtually complete authority for the control and management of their lands, funds and reserve resources." Some bands would be allowed "to increase the

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[28] Meijer Drees, *supra* note 8 at 166.

[29] Weaver, *supra* note 9 at 26.

[30] Quoted in Dale A Turner, *This is not a Peace Pipe: towards a Critical Indigenous Philosophy* (Toronto; Buffalo: University of Toronto Press, 2006) at 16.

[31] *Ibid* at 15.

[32] Meijer Drees, *supra* note 8 at 159.

[33] Arthur Laing, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet - The *Indian Act*: Proposed Revision Thereof" (29 May 1967), in Ottawa, Library and Archives of Canada, (RG25, File No. 45-CDA -13-3-1) [Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 May 1967]

[34] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 May 1967, *supra* note 33 at 1

degree of local control on a staged basis."[35] All Indians would be subject to new rules on membership and the sale of reserve lands. The governance reforms encouraged bands to exercise municipal-type functions. Land reforms were directed at the development and financing of Indian reserve lands and businesses, achieved principally by allowing individual band members to acquire exclusive rights to reserve property.

The *Indian Act* was acknowledged to contain discriminatory provisions that merited repeal – namely, the rules on liquor and the sale of produce by Prairie Indians.[36] The repeal of the liquor provisions was judged to be "in the best interests of the Indians," rather than being necessary under the *Canadian Bill of Rights*.[37]

Proposed changes to the membership provisions did not address the marrying out rule. In fact, they reinforced the idea that Indian status passed along the male line. New rules on illegitimate children sought to clarify that a child born out of wedlock to a non-Indian mother would become an Indian if the child was legitimized through marriage to the Indian father and, similarly, that a child born to an Indian mother would lose Indian status if the mother married the non-Indian father.[38] The government sought to ban the procedure permitting bands to protest the membership of an illegitimate child on the basis of the child's non-Indian paternity. The government proposed abolishing the double-mother rule (section 12(i)(a)(iv), describing it as a form of "compulsory enfranchisement based on blood content" that offended the principle of "freedom of choice for withdrawal from band membership."[39] There was no mention of loss of status through marriage as a form of compulsory enfranchisement.

This draft was chewed over by an Interdepartmental Committee, and a revised proposal put to Cabinet in November 1967. As the purpose of the legislation broadened, its debt to liberal individualism increased. Its object was to provide a

> legislative framework which will enable the Indian people to achieve full equality of opportunity with all other Canadians. This equality must be complete and the individual Indian must be able to select from the alternatives which are available to him and within his own range of capabilities the type and kind of life he wishes to lead.[40]

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[35] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 May 1967, *supra* note 33 at 1

[36] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 May 1967, *supra* note 33 at 14

[37] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 May 1967, *supra* note 33 at Appendix, 4

[38] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 May 1967, *supra* note 33 at 3

[39] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 May 1967, *supra* note 33 at Appendix, 3

[40] Arthur Laing, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet - The *Indian Act*: Proposed Revision Thereof" (24 November 1967), in Ottawa, Library and Archives of Canada, (RG25, File No. 45-CDA -13-3-1, Pt. 1) [Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 24 November 1967] at 1

The policy sought to foster the development of Indian band councils to engage in "municipal type government," and it opened routes for provinces to take on provision of health, education, and social services to Indians. The draft policy states that, "[r]epeal of the *Indian Act* has been considered" but dropped because it would require passing new legislation to deal with Indian status and membership, reserve lands, and band funds.[41] "Repeal would appear to be premature,"[42] indicating that, already in 1967, repeal of the *Indian Act* had been envisioned as an ultimate outcome.

Notwithstanding this change in legislative purpose, there were no revisions on the proposed new band membership rules. Status still passed along the male line for children born out of wedlock. In fact, the memo confirms specifically that "Indian women who marry non-Indians would, as at present, lose their membership privileges; similarly, non-Indian women who marry Indians would acquire membership."[43] In explanatory notes, the memorandum notes that this rule was maintained in spite of the recommendation by the Joint Committee of the Senate and House of Commons (in 1961) that "Indian women who marry non-Indians should have the right to return to the band within a five year period and that no per capita share of the funds of the band should be paid to them before the five year period expired." The Joint Committee, it seemed, had proposed a five-year probation period on marriages between non-Indian men and Indian women. But, according to this memo, "there is controversy among the Indians" regarding an initial proposal that an Indian woman would lose status only upon application. Although some Indians agreed with this, "there was strong objection by some members of the National Indian Advisory Board who wanted to retain the present provisions for the automatic withdrawal from membership of all women who marry other than an Indian."[44]

The Interdepartmental Committee reported to the Prime Minister in late November 1967 about the proposed legislation. Although the outline of the bill had already been elaborated, ministers suggested that it would be necessary to consult with Indians before introducing the bill in Parliament.[45]

A further concern before tabling the bill in Parliament was the compatibility of the *Indian Act* with international human rights standards – already a sensitive subject given the pressure put on Canada a decade earlier at the International Labor Organization.[46]

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[41] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 24 November 1967, *supra* note 40

[42] Arthur Laing, Minister of Indian Affairs and Northern Development, "Memorandum to the Cabinet: The *Indian Act* - Proposed Revisions" (29 November 1967), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1, Pt. 1) [Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 November 1967] at 2

[43] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 24 November 1967, *supra* note 40, Appendix B, 1

[44] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 24 November 1967, *supra* note 40, Appendix C

[45] Indian Affairs, Cabinet Memo: *Indian Act* Revisions, 29 November 1967, *supra* note 42

[46] C.V. Cole, United Nations Division, External Affairs, "Memorandum to file: Amendment of the *Indian Act* and Human Rights" (27 December 1967), in Ottawa, Library and Archives of Canada, (RG25, Vol.

Officials from the Department of External Affairs considered Indians to be an example of "traditionally protected groups" and, as such, they could hope to achieve "human rights standards" at a slower rate compared to other Canadian citizens. In other words, the Indian remained backward and in need of a patient hand in guiding him to modernity. The *Indian Act* was seen "to raise questions of discrimination against Indians,"[47] due to the procedures for enfranchisement.[48] However, the Department of Indian Affairs assured colleagues from External Affairs of the department's intentions to table new legislation that would include "liberalizing of an Indian's right to choose between complete enfranchisement as an ordinary Canadian citizen and a status as an Indian which affords him the protection of the *Indian Act* but also imposes upon him certain restrictions."[49] The problem with the existing legislation was that enfranchisement decisions of a parent affected minor children, and a formula was needed "whereby minor children of Indians can be protected from the follies of irresponsible parents."[50] A subsequent review of draft legislation by lawyers from the Department of External Affairs drew attention to the rules on adoption of Indian children as a potential source of discrimination, on the basis that there was discrimination in favor of Indians in rights of adoption.[51] Rules in the *Indian Act* about trespass on reserves were also seen to be discrimination in favor of Indians.

The rights of women appear several times as sites of potential discrimination, but in none of these cases are women the victims of discrimination. The rules providing for a woman's change of band upon marriage are described as "discrimination in favor of women … in opposition with the principle of equality of all before the law."[52] The system on the *Indian Act* under which a wife and child 'follow' the man's status – either in terms of band list or enfranchisement – are explicitly *not* discrimination, because, according to External Affairs lawyers, international human rights standards protect the family as the "natural and fundamental group unit of society."[53] Throughout these conversations, there seems to have been no mention of discrimination against Indian women.

14958, File No. 45-CDA-13-3-1, Pt. 1) [External Affairs, *Indian Act* Amendments and Human Rights, 27 December 1967]

[47] External Affairs, *Indian Act* Amendments and Human Rights, 27 December 1967, *supra* note 46

[48] G.S. Shortliffe, External Affairs, "Memorandum: Covenants on Human Rights - Discussion with Indian Affairs Branch" (2 June 1967), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1, Pt. 1) [External Affairs, *Indian Act* & Human Rights Covenants, 2 June 1967]

[49] External Affairs, *Indian Act* & Human Rights Covenants, 2 June 1967, *supra* note 48

[50] External Affairs, *Indian Act* & Human Rights Covenants, 2 June 1967, *supra* note 48

[51] Letter from G.H. Duguay, Legal Division, External Affairs to G.V. Cole, UN Division, External Affairs (6 December 1967), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1, Pt. 1) [Legal Division to UN Division, External Affairs, 6 December 1967] at 1

[52] Legal Division to UN Division, External Affairs, 6 December 1967, *supra* note 51 at 2

[53] Legal Division to UN Division, External Affairs, 6 December 1967, *supra* note 51 at 2-3

In summary, the Pearson administration subjected federal Indian policy to high-profile experiments in consultation and local empowerment, only to learn that Indigenous leaders balked at spoon-fed self-governance and stubbornly failed to "desire … what we think they should want," as the Minister for Indian Affairs put it. The Hawthorn Report cloaked Indians with the mantle of 'special status'. Although this special status was not threatened by reforms to the *Indian Act*, it was not implemented in a manner that recognized Indigenous sovereignties. Instead, the federal government peddled the same sop of eventual graduation to the status of municipalities. The patrilineal transmission of Indian status was maintained, now shored up through an international law argument about protecting the family as the natural unit of society. The loss of status through marriage did not count as discrimination against women.

Quebec's Quiet Revolution brings Collective Rights

Mid-20th century Quebec was "provincial in every sense of the word, that is to say marginal, isolated, out of step with the evolution of the world,"[54] according to a born and raised Montrealer, Pierre Trudeau. In the 1960 election, the Liberals ousted the long-reigning Union Nationale, in part thanks to opposition by civil libertarians who were fed up of attacks on basic civil rights.[55] The election triggered the Quiet Revolution, a period of rapid political, cultural, and social change in Quebec, including more legal rights for women in marriage, the modernization of education, and the plummeting influence of the Catholic Church. The Quiet Revolution transformed the political landscape in Quebec and Canada.

Two separatist parties and a handful of activist organizations were established to advance the goal of an independent Quebec. The Front de libération du Québec (FLQ) was founded in 1963 as a radical, militant expression of Quebec nationalism. The FLQ decried the second-class status of Francophones in Canada, likening the treatment of the Quebecois to that of black people in the United States and colonized people worldwide.[56] The FLQ saw itself as part of a decolonization movement, spanning from Algeria to Cuba, that would bring about an independent Quebec.[57] The FLQ was responsible for hundreds of bomb attacks between 1963 and 1970, targeting federal government property, transportation links, and business links. The sovereignty movement would come to be represented by the Parti Quebecois, formed in 1968.

Trudeau was dismayed by the rise of a Quebec nationalist movement. In his view,

> instead of becoming more open to universal values in Quebec, there was talk of nothing but being 'masters in our own house'. … Were we to leave the abusive tutelage of our Holy Mother Church

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[54] Pierre Elliott Trudeau, *Memoirs* (Toronto, Ont.: McClelland & Stewart, 1993) at 61.

[55] Clément, *supra* note 1 at 99.

[56] Sean Mills, *The Empire Within Postcolonial Thought and Political Activism in Sixties Montreal* (Montreal: McGill-Queen's University Press, 2010).Mills

[57] Clément, *supra* note 1 at 105.

> and free ourselves from an atavistic vision, only to throw ourselves now under the shadow of our Holy Mother Nation?[58]

Such views were shared by other civil libertarians. The Ligue des droits de l'homme (LDH) was founded in 1963 in Montreal, as "a comfortable affair among a group of intellectual elites, many of whom were close friends," two thirds of whom were Francophone.[59] Its founding members included veterans from the first generation of rights struggles, like Therese Casgrain, who had led the campaign leading to suffrage for Quebec women in 1940, and a younger generation of rising political stars, including Pierre Trudeau. Between 1963 and 1970, the association was led by Frank Scott, famed for his work in the post-war period and now a McGill University law professor. In its first phase, the LDH distanced itself from French language rights, the core demand of a rising Quebec. Instead, the LDH focused squarely on individual rights issues and was almost obsessive in its pursuit of a provincial bill of rights.[60] Indeed, when esteemed jurist Walter Tarnopolsky was appointed a decade later as a founding member of the UN Human Rights Committee, Scott's note of congratulations to him joked that, "Maybe one of your first decisions will be whether Quebec has the right to 'self-determination'!"[61]

The LDH was an incubator of what would become a national debate about the tension between individual and collective rights and the idea of a federal Canada. At the same time that the Hawthorn Report urged federal officials and parliamentarians to recognize the special status of Indians as 'citizens plus', civil libertarians were staunchly opposing a movement for the recognition of Quebec nationalism, on the basis that individual rights trumped collective rights.

Human Rights Disappoint

The federal *Canadian Bill of Rights*, passed in 1960, was sliced and diced by the judiciary. Judges found the myriad reasons that a mere human rights statute could not invalidate laws passed by parliament. Provincial human rights statutes did no better. For example, seventy percent of complaints under British Columbia's anti-discrimination status were dismissed.[62]

As the *Canadian Bill of Rights* limped along, provinces transformed their human rights protections. The patchwork of issue-specific human rights statutes on everything from employment to housing coalesced into provincial human rights codes. These codes prohibited discrimination on numerous grounds and, significantly, they created human rights commissions for enforcement, mediation of individual complaints, and raising

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[58] Trudeau, *supra* note 54 at 73.

[59] Clément, *supra* note 1 at 98.

[60] *Ibid* at 101.

[61] Letter from Frank Scott to Walter Tarnopolsky (8 October 1976), in Ottawa, Library and Archives of Canada, (MG31-E55, Vol. 50, Pt. 1)

[62] Clément, *supra* note 1 at 26.

awareness in the general public. This made them vastly more effective than the anti-discrimination statutes of the 1950s.[63] Ontario led the way with a human rights code in 1962, and by 1977, every jurisdiction in Canada had a code and a full-time human rights commission.[64] Whereas the post-war discourse of human rights had sought simply to protect the individual from the state, human rights codes placed a positive burden on the state to protect victims from discrimination, through both prohibiting overt discrimination and correcting systemic conditions that produce discriminatory results. Human rights code thus helped change the meaning of equality and drew attention to the differences between formal, de jure equality and substantive, de facto equality.

A Movement Decries Gender Inequality as Discrimination

By the sixties, Indigenous women were already organized in local groups, in part due to the federal government's program supporting homemakers' associations. These groups shifted from local concerns to national organizing around explicitly political mandates.[65] Significant interaction between Indigenous women's groups and other feminist groups did not take place until late in the sixties.

In Quebec, the Quiet Revolution did not center on women's concerns, a failing that did not escape an already-organized women's movement. Throughout the fifties and sixties, women had been organizing in small groups, initially under the aegis of a Ministry of Agriculture program for farmers. By 1950, there were over 600 such groups in Quebec, and a further 30,000 women were organized in a parallel group run by the Catholic church.[66] These groups had been mobilized after the twenty-year campaign for Quebec women's suffrage, won at last in 1940. The campaign was led by Therese Casgrain (1896-1981). Casgrain was a member of a wealthy and political Montreal family, founder of the Ligue des droits de la femme, and leader in 1951 of the Quebec wing of the leftist CCF Party (Co-operative Commonwealth Federation). In 1965, Therese Casgrain convened a conference to celebrate the 25th anniversary of the franchise for Quebec women. Bringing together women from across Quebec's political spectrum, the conference led to the founding of the Federation des femmes du Québec in 1966.[67] The FFQ was an umbrella grouping of women's organizations in Quebec. It was initially moderate in orientation, as the radical women's liberation movement was not founded until 1969. The FFQ engaged quickly with the English-speaking women's movement,

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[63] Dominique Clément, *Equality Deferred: Sex Discrimination and British Columbia's Human Rights State, 1953-84* (Vancouver, 2014) at 78.

[64] Clément, *supra* note 1 at 28.

[65] Jamieson, Kathleen, "Multiple Jeopardy: The Evolution of a Native Women's Movement" (1979) 2:1 Atlantis: Critical Studies in Gender, Culture & Social Justice 157.

[66] Micheline Dumont, "The Origins of the Women's Movement in Quebec" in Constance Backhouse & David H Flaherty, eds, *Challenging Times: the Women's Movement in Canada and the United States* (Montreal, Que.: McGill-Queen's University Press, 1992) 72 at 81.

[67] Jill Vickers, Pauline Rankin & Christine Appelle, *Politics as if Women Mattered: a Political Analysis of the National Action Committee on the Status of Women* (Toronto; Buffalo: University of Toronto Press, 1993) at 72.

but the relationship between Quebec and rest of Canada feminists would prove to be delicate.

Shortly after the founding of the FFQ, English-speaking feminists organized as the Committee for the Equality of Women (CEW), a coalition composed of thirty-two women's associations across the country.[68] The Committee for the Equality of Women (CEW) agreed in May 1966 to push the federal government for a commission to investigate the status of women. The Committee for the Equality of Women was ideologically diverse, and its members decided to frame the demand in terms of human rights, as an ideological framework that could hold together organizations with many feminist perspectives. Furthermore, 1968 had been designated as the International Year for Human Rights.[69] Women from Quebec were not deeply invested in the idea of a commission because women felt that the time had come for action, not more studies.[70] The FFQ supported the lobbying effort in order to prevent a French-English split being used to sabotage the federal lobbying priorities of the women's movement.[71]

Judy LaMarsh, Secretary of State, had been lobbying for many years in Parliament for a commission on the status of women, but Pearson had consistently panned the idea. Women's rights organizations threatened a march on Parliament Hill.[72] Pearson capitulated. The Royal Commission on the Status of Women (RCSW) was created in 1967.

Conclusion

When Pearson stepped down as prime minister, he left several balls in the air. It had become clear that federal Indian policy and the *Indian Act* needed a drastic overhaul, but concretely, little had been done aside from inadvertently building networks among the next generation of Indigenous leadership. The women's movement had pushed the government into investigating the status of women, in a national climate that was increasingly repudiating discrimination based on race and religion but saw gender inequality as normal. Despite high hopes, the *Canadian Bill of Rights* had played a minor role in the battle against discrimination. Provincial human rights codes and commissions had shifted attention from formal legal inequality to substantive inequality. This set the stage for continuing debate and confusion over the meanings of equality.

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[68] Monique Begin, "The Canadian Government and the Commission's Report" in Caroline Andrew & Sandra Rodgers, eds, *Women and the Canadian State* (Montréal: McGill-Queen's University Press, 1997) 12 at 13.

[69] Cerise Morris, *No More than Simple Justice□: the Royal Commission on the Status of Women and Social Change in Canada* (Doctor of Philosophy (Sociology), McGill University, 1982) [unpublished] at 118–119.

[70] *Ibid* at 135.

[71] *Ibid*.

[72] Vickers, Rankin & Appelle, *supra* note 67 at 26.

7. Canada Divided: Gender Equality, Indian Special Status, & Quebec Secession

Introduction

In April 1968, Justice Minister Pierre Trudeau rose to the position of prime minister, having been appointed to replace Prime Minister Lester B. Pearson. Trudeau won a landslide election victory a few months later. Although continuing in the footsteps of his Liberal predecessor, Trudeau's government cut several wide new paths across Canada's political and legal landscape regarding equality, collective rights, the constitution, and Canadian-Indigenous relations. As this chapter weaves together several stories, they are foreshadowed here.

Consensus on the frailties of *Canadian Bill of Rights* strengthened the calls for a constitutionally entrenched bill of rights. A federal commission to study the status of women underlined the problem of sex discrimination but struggled to meet the demands of equality in conditions of difference. The issue of discrimination against Indian women became legible as a problem of sex-based discrimination. Equality was a second-string concern in Trudeau's push for constitutionally entrenched rights: the more pressing impetus came from the threat of secession by disaffected Francophone Quebecers. When this threat became violent, it turned 'collective rights' and 'special status' into fighting words. In taking a principled stand against collective rights, the federal government drew two battle lines, one with the Quebec separatists and the other with Indigenous nations. The federal government proposed abolishing the 'special status' of 'Indian' and, with it, the collective rights of Indians sourced in Treaties with the Crown. In the ensuing outcry, the *Indian Act* came to stand for the modern manifestation of treaty relationship, leading Indigenous leaders to defend it on the procedural ground that amendment of the *Indian Act* required Indigenous consent. The Indigenous movement became better organized nationally, and the political lines between status and non-status Indians sharpened. A diverse and multi-vocal national Indigenous women's movement was born in Alberta. Among the factions of the women's movement forged in these fires was a movement dedicated to ending sex discrimination in the *Indian Act*. This movement gained the attention of a well-heeled, majority white women's movement. The women's movement was leading the charge for formal equality rights, while turning a blind eye to the confusing and frightening 'difference' represented by Quebec and Indigenous feminists.

The *Canadian Bill of Rights*: A Dead Letter

In less than a decade, the Achilles heel of the *Canadian Bill of Rights* had been found, several times. Due to its lack of constitutional entrenchment, it could neither bind future parliaments nor affect matters within provincial jurisdiction. The courts were lily-livered when faced with cases that required declaring laws inoperative due to violations of the Bill of Rights. The statute ran aground most often on cases requiring the interpretation of equality and discrimination. For example, the Supreme Court upheld a law banning businesses from operating on Sundays. Since freedom of religion existed

before the passage of the Bill of Rights, the *Canadian Bill of Rights* created no new rights, and the impugned law had never before been seen as an infringement of freedom of religion, then the act could not subsequently become inoperative on the grounds of religious discrimination.[1] On that basis alone, all prior legislated discrimination was immune to the *Canadian Bill of Rights*. As predicted by jurist and legal scholar Bora Laskin, the *Canadian Bill of Rights* proved to be "a mere scrap of paper."[2]

As evidence amassed that the *Canadian Bill of Rights* was a dead letter, the need for a constitutional amendment became widely accepted among politicians, policy-makers, and intellectuals.[3] In 1967, at the annual meeting of the Canadian Bar Association, the then Justice Minister, Pierre Trudeau, announced his plans for a constitutionally-entrenched *Charter of Rights and Freedoms* that would not only cure the frailties of the *Canadian Bill of Rights* but would, by protecting language rights, ensure that "French Canadians would cease to feel confined to their Quebec ghetto."[4] Trudeau believed that through a constitutional bill of rights, "we will be testing – and hopefully establishing – the unity of Canada."[5] In failing, the *Canadian Bill of Rights* had prepared the ground for a defense of national unity. A special joint committee on the Constitution was struck and recommended, in 1970, a constitutional amendment to add a bill of rights. In 1972, the Special Joint Committee concluded that "Parliamentary sovereignty is no more sacrosanct a principle than is the respect for human liberty which is reflected in a Bill of Rights."[6]

Although its successor was already being contemplated, the stock of the *Canadian Bill of Rights* rose briefly with a case on discrimination in the *Indian Act*. In 1969, the Supreme Court ruled that the *Indian Act*'s rule prohibiting Indians from being intoxicated off reserve was a violation of equality under the law.[7] The majority decision concluded that "equality before the law" meant "at least that no individual or group of individuals is to be treated more harshly than another under that law." Where an individual was, "on account of his race," subject to a criminal offense and a criminal penalty for actions that others could undertake freely, this amounted to a denial of equality before the law.[8]

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[1] *Robertson and Rosetanni v. R.*, [1963] SCR 651

[2] Christopher Maclennan, *Toward the Charter Canadians and the demand for a national bill of rights, 1929-1960* (Montreal; Ithaca [New York]: McGill-Queen's University Press, 2003) at 152.

[3] *Ibid* at 159.

[4] *Ibid*.

[5] *Ibid* at 152.

[6] Quoted in Dominique Clément, Canada's rights revolution social movements and social change, 1937-82 (Vancouver: UBC Press, 2008) at 24.

[7] *R. v. Drybones*, [1970] S.C.R. 282

[8] *Drybones*, *supra* note 7 at 297.

Drybones raised hopes among human rights activists about the heft of the *Canadian Bill of Rights* in invaliding discriminatory legislation. Simultaneously, it sowed alarm among Indigenous leaders. The decision implied that the entire regime of special status for Indians would be declared to be discrimination on the basis of race.

The Royal Commission on the Status of Women Confronts Equality and Difference

While the courts struggled with equality cases under the *Canadian Bill of Rights*, a mass popular consultation exercise was under way about women's equality. Prime Minister Pearson had begrudgingly agreed to a federal commission to study the status of women. After months of hearings and deliberations, the commission issued a report containing nearly two hundred recommendations, one of which concerned the marrying out rule in the *Indian Act*. Coursing through the pages of the report were fundamental disagreements about the meaning of equality.

In 1968, the Royal Commission on the Status of Women (RCSW) held six months of public hearings across Canada and received thousands of letters and briefs. The commission was chaired by prominent journalist Florence Bird. Its seven commissioners were "drawn from the upper levels of society, were mainly of English-Canadian origin, and resided mainly in Central Canada."[9] Amongst the Commissioners was John P. Humphrey, an architect of the Universal Declaration of Human Rights. One of the consultants to the Commission was Flora MacDonald, who would later become Secretary of State for External Affairs and a strong advocate of Indigenous women's rights.[10] Although Indigenous peoples were not included in the terms of reference for the Commission and the Commission completed a very limited social science research agenda, two expert reports specifically about Indian women were prepared for the Commission.[11]

The Commission became aware of the issue of Indian women's rights through the lobbying work of Mary Two-Axe Earley, a Mohawk woman from Quebec. The RCSW received written briefs and presentations from "A Group of Women from a Canadian Reserve, Mary Two-Axe Earley" from Kahnawake, Quebec.[12] Despite pressures from within Kahnawake not to speak out, thirty women from Kahnawake traveled to Ottawa to present their brief to the Commission.[13] Individual Indigenous women came to give

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[9] Cerise Morris, No More than Simple Justice : the Royal Commission on the Status of Women and Social Change in Canada (Doctor of Philosophy (Sociology), McGill University, 1982) [unpublished] at 150.

[10] Royal Commission on the Status of Women, Report of the Royal Commission on the Status of Women in Canada, (Ottawa: Information Canada, 1970) [RCSW Report, 1970] at 455.

[11] RCSW Report, 1970, *supra* note 10 at 454.

[12] RCSW Report, 1970, *supra* note 10 462 and 467.

[13] Mary Two-Axe Earley, "Indian Rights for Indian Women" in Denise Piché, Dagenais, Huguette, eds, *Women, Feminism, and Development* (Montréal, Que.: McGill-Queen's University Press, 1994) 429 at 431.

testimony, and Bird recalls that some of the submissions by Indian women contained strong emotional appeals.[14]

The RCSW issued its report in September 1970. A Herculean reform agenda ranged from tax reform to the establishment of a national day care plan and the decriminalization of abortion. Although the report did not announce a theoretical framework for gender equality, its debt to liberal and cultural feminism is evident. Its recommendations focused on reforming laws, policies, and procedures to guarantee formal equality. The influence of 'cultural feminism' appears in the report's emphasis on day care and access to abortion. The default whiteness of the report's analysis can be seen through the separation of sections for specific 'categories' of women, such as immigrant or Indigenous women. Radical feminist groups presented briefs, but the issues they raised, including violence against women and lesbians, received no attention in the report.[15]

The Problem of Difference

Indigenous women's rights made a small but significant appearance in the report, in the discussion of poverty, education, and marriage. The report described the marrying out rule as a "special kind of discrimination under the terms of the *Indian Act* which can affect Indian women upon marriage."[16] The marrying out rule fit comfortably within the report's liberal feminist framework, as it could be understood as a clear case of formal inequality produced by law. The Report draws a comparison between the effects of marriage to non-Indians for men and women. It stresses the material effects of enfranchisement (loss of status): loss of interest in land on the reserve, loss of capital and revenue shares, and loss of annuities, interest, money or rents. Furthermore, a non-Indian woman married to an Indian man gained all the tribal privileges of her husband, including, the report emphasizes, that "she can vote on major issues … [and] participate in the direct election of a Tribal Councillor."[17] Indian status was framed as an issue of material interests and participation in political life. RCSW's report concluded that the marrying out rule was discriminatory, and it recommended that women who married should retain their status and be able to transmit status to their children.[18] A commentator writing in the early 1980s described this recommendation as a matter of removing existing discrimination in federal law, but as nonetheless "one of the most

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[14] Morris, *supra* note 9 at 222.

[15] Jill Vickers, Pauline Rankin & Christine Appelle, *Politics as if Women Mattered: a Political Analysis of the National Action Committee on the Status of Women* (Toronto; Buffalo: University of Toronto Press, 1993) at 26.

[16] RCSW Report, 1970, *supra* note 10 at 237

[17] RCSW Report, 1970, *supra* note 10 at 238

[18] RCSW Report, 1970, *supra* note 10 at s 237-238 and 410.

radical and controversial of the recommendations."[19] If there was controversy, it did not reach the halls of Parliament: Indian women and their loss of status through marriage was not mentioned once during Parliament's discussion of RCSW report.[20]

Separate statements annexed to the Report indicate some of the unease already present in 1970 about Indigenous women's rights. Commissioner Jacques Henripin included a statement in which he explained his endorsement of the report but his reservations about a few of the Report's assertions issues including day care and abortion. He was, in addition, concerned about the report's conclusions on 'Indians and Eskimos', an admittedly "neglected group" but one that was "outside the Commission's terms of reference."[21] He felt that the Commission was "not qualified to deal with the complex problems which arise when attempting to introduce social and economic changes in cultures which are so very different from ours."[22] 'Difference' appears through the rubric of 'culture', rather than nation, race, ethnicity, language, or class. He did not, for example, refuse competence related to immigrant women. He expressed his concerns about recommendations #90-97 related to "Indians and Eskimos" and noted "that most of the recommendations concerning Indians and Eskimos have little to do with women in particular."[23] This analysis cleaves 'Indigeneity' from 'women' thus rhetorically eradicating the intersectional category of 'Indigenous women'. His comments regarding the recommendations exclude Recommendation #106 on the marrying out rule in the *Indian Act*. This might have been an oversight. Or, it might indicate that discrimination in the *Indian Act* was not seen as an 'Indigenous' problem but a problem about 'women' and, specifically, a problem of formal legal inequality.

John Humphrey declined to sign the report, including instead a Minority Report. His primary point of disagreement was the framing of women as a "sociological minority group" and the recommendation that women receive any kind of special or compensatory treatment. In his view, this was clear inequality of treatment (as between women and men) and perilously close to the "protective measures to which so many women object."[24] Preferential treatment was appropriate for racial groups, in Humphrey's view, but in the case of women, it would be "likely to perpetuate their present inferior status."[25]

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[19] Morris, *supra* note 9 at 253.

[20] House of Commons Debates, (March 1971)

[21] RCSW Report, 1970, *supra* note 10 at 425

[22] RCSW Report, 1970, *supra* note 10 at 425

[23] RCSW Report, 1970, *supra* note 10 at 426

[24] RCSW Report, 1970, *supra* note 10 at 435

[25] RCSW Report, 1970, *supra* note 10 at 437

The divergence of opinion between Humphrey and Henripin points to a fundamental tension in the understanding of equality developing in this time period. A core principle of the RCSW report was that affirmative action or 'special treatment' was necessary and appropriate to overcome the adverse effects of discriminatory practices.[26] This principle underpinned many of the report's recommendations for interim 'special treatment' for women, drawing the analogy to racial discrimination and US civil rights protections.[27] Differences of opinion about 'special treatment' rest on disagreement about the causes of inequality. If inequality is explained as based in individual malice or lack of opportunity, then rooting out the 'bad apples' and ensuring equality of opportunity puts every individual on a level playing field. But if inequality is sourced in systemic discrimination based on generations of stigma, then formal equality is an insufficient remedy, and remedies targeted at entire disadvantaged groups are needed. Concealed within this now well-rehearsed debate are questions about the unit (individual or group) and the metric of success (equal opportunity or equal outcome). Within the false dichotomy about the unit is the significant oversight of the operation of intersectional privilege and discrimination. An 'individual' lives simultaneously in many groups, benefiting and suffering from a range of ascribed social positions. The debate about 'affirmative action', pithily summarized by the statement that the report's findings about 'Natives' were not about 'women in particular', helped to create a conceptual lacuna, a space between stools in which Indigenous women would find each other for the next 15 years.

The Impact of the Royal Commission on the Status of Women

The RCSW served as a career stepping stone for a number of feminist politicians. The Chair, Florence Bird, became a Senator in 1978 and an advocate for women's rights. Commissioner Elise Gregory MacGill went on to the executive of the National Action Committee on the Status of Women. Monique Begin, executive director of the RCSW, was elected as Liberal MP in 1972 and was appointed Minister of Health and Welfare in Trudeau's Cabinet from 1977 to 1979 and again in 1980. Staff in the Secretariat went on to civil service positions in Trudeau's Cabinet, the Advisory Council for the Status of Women, and the Canadian Human Rights Commission.

The RCSW helped to cement a relationship between a handful of these feminist politicians and Mary Two-Axe Earley. The grande dame of Quebec feminism, Therese Casgrain, supported Two-Axe Earley's efforts to take the issue of discrimination against Indian women to the Royal Commission on the Status of Women.[28] And it was through

[26] RCSW Report, 1970, *supra* note 10 *supra* note 10 at xii

[27] Morris, *supra* note 9 at 240–2.

[28] Nellie Carlson, Linda Goyette & Kathleen Steinhauer, *Disinherited Generations: our Struggle to Reclaim Treaty Rights for First Nations Women and their Descendants* (Edmonton: University of Alberta Press, 2013) at 135.

the RCSW report that the mainstream, white-led women's movement became aware of the marrying out rule in the *Indian Act*.[29]

Trudeau, the Just Society, & Individual Rights

Trudeau had won an election on a campaign promise of national unity and the creation of a progressive 'Just Society'. The key tenets of this 'Just Society' were individual rights, opportunity, participation, and sharing of the country's affluence across the country's regions and groups. In response to rising Quebec nationalism, Pearson had established a Royal Commission on Bilingualism and Biculturalism in 1963. The commission was to work out how to create an "equal partnership between the two founding races," thus writing Indigenous peoples out of the story as founders of the country.[30] Steered by bilingualism's chief crusader, Trudeau, the 1969 *Official Languages Act* made bilingualism a federal policy. Many Canadians believed that the 1969 Official Languages Act had unfairly given 'special status' to Francophones.[31]

Trudeau's belief in individual rights and equality of opportunity underpinned his approach to both Quebec nationalism and Indigenous sovereignty. The difference between the two was that, as Trudeau saw it, the Quebecois could threaten Canadian unity, whereas Indigenous people could not.[32] For Trudeau, Indigenous people were holders of individual rights whose place in Canada was as full, individual citizens. He believed the idea of a state founded on a 'nation', as a cultural entity, was "'absurd' and 'illogical', for the future of federalism lay in reason, not in the emotion of nationalism which would create ethnocentrism and intolerance, eventually resulting in political instability."[33] Cultures should not be protected by governments, but should live or die through competition. Policies based on race or nationalism affronted core liberal ideologies, as they were based on collectives requesting protection by the state, rather than individuals demanding fundamental freedoms from the state.[34]

As Quebec nationalism intensified, the 'Indian problem' gripped public attention as a shameful problem of poverty. The *Indian Act* came to stand for all that was wrong with federal policy, as a racist, discriminatory, and paternalist piece of legislation.[35] Reserves

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[29] Interview with author.

[30] Sally M Weaver, *Making Canadian Indian policy: the hidden agenda 1968-70* (Toronto; Buffalo: University of Toronto Press, 1981) at 14.

[31] *Ibid*.

[32] *Ibid*.

[33] Trudeau quoted in *Ibid* at 54.

[34] *Ibid*.

[35] *Ibid* at 19.

were 'ghettos' that segregated Indians from Whites. Civil libertarians considered the *Indian Act* an affront fundamental freedoms of choice and individuality.

The October Crisis Knits Together Violence, Collective Rights, and Self-determination

The political and affective charge of 'special status' and 'collective rights' changed overnight when violence arrived on the scene of Quebec secession.[36] The 1970 October Crisis began with the kidnapping of British Trade Commissioner James Cross and, five days later, the kidnapping of Pierre Laporte, the Minister of Labour in the Quebec government. A massive manhunt ensued and, by the height of the crisis, 6000 military troops were stationed in Montreal.[37] The provincial government appealed for negotiations with the FLQ, but the federal Cabinet unanimously favored emergency legislation that would grant powers of mass arrest without warrant. One day after Trudeau invoked the *War Measures Act*, Pierre Laporte was found dead in the trunk of a car. James Cross was freed after two months of negotiations. The FLQ claimed responsibility for the kidnappings. Though they consistently pleaded their innocence, the cell responsible for the kidnappings was also found guilty of Laporte's murder.

Defenders of human rights and civil liberties were stunned and divided by Trudeau's decision to invoke the *War Measures Act* during the October Crisis in 1970. Most English-language papers supported the government's resort to the War Measures Act.[38] In spite of their roots in protests against martial law during World War II, many Canadian rights associations also applauded the steps taken by Trudeau's government.

In Quebec, the October Crisis undermined the militant wing of Quebec nationalism and strengthened support for political routes to independence, including support for the separatist Parti Quebecois. In contrast to the rest of the country, opinions were divided regarding the resort to martial law – particularly among defenders of civil liberties. Most of the province was up in arms about the heavy-handed feds, but the Ligue des droits de l'homme released a tepid statement, condemning the use of emergency powers but sympathizing with the federal government.[39] Seething critics were quick to point out that Trudeau had been a founding member of the LDH. The criticisms eventually led to a change in leadership in the LDH and, in 1972, the publication of a

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[36] On the October Crisis, see: Darren Pacione, "The FLQ Trials, 1969-1971: Judicial Tensions and Constitutional Questions" (2013) 55 Quebec Studies 101; Louis Fournier, *F.L.Q.: the Anatomy of an Underground Movement* (Toronto: NC Press, 1984); Marc Laurendeau, *Les Quebecois violents: un ouvrage sur les causes et la rentabilite de la violence d'inspiration politique au Quebec* (Sillery, Quebec: Editions du Boreal express, 1975).

[37] Clément, *supra* note 6 at 107.

[38] *Ibid* at 108.

[39] *Ibid* at 111.

new manifesto expanding the organization's remit from the narrow protection of civil liberties.

The shift is noteworthy because it was in this expansion from civil liberties to positive rights like economic, social, and cultural rights that the LDH also took on collective rights and concern for 'minorities' like women, immigrants, and First Nations.[40] The old guard of the LDH, associated with Trudeau, had focused on individuals' freedoms. The new generation took on collective rights, signaled most clearly by its new position on language rights. Significantly, the LDH's statement declaring its interest in the entrenchment of French as Quebec's official language contained acknowledgements of the equal rights of Aboriginals to explore their own separate cultural identities. The LDH did not take an explicit position on Quebec's independence, but it did articulate a clear support for the self-determination of minorities, citing the *Charter* of the United Nations. In other words, for the LDH, self-determination was relevant to both the Quebecois and Aboriginal peoples.[41] Language rights were the entry point for the recognition and inclusion of collective rights.

For the older generation of rights activists, this was anathema. Frank Scott, a founder of the LDH and member of Canada's legal pantheon, resigned from the executive of the LDH in 1972 over its new interest in positive rights. In 1976, he complained that the LDH had been "captured by a group of extreme nationalists and separatists," and he decried their position on language rights and collective rights.[42] In this regard, the older generation of Quebec activists had much in common with the Canadian Civil Liberties Association, who believed that the imposition of French language laws in Quebec violated individual rights.[43] As a member of a national federation of civil liberties and human rights associations, the new LDH carried the mantle of collective rights and argued against the dominant view among Anglophone organizations that human rights were limited to individuals' civil and political rights.[44] In short, in the search to redirect the aspirations of Quebec nationalism away from violent secession, civil libertarians opened a door to safer, legally bounded concepts of self-determination and collective rights. Opening that door provided an avenue for reframing the claims of Indigenous people, across comparable chasms of language and difference, against similar threats of violence, and in a way that eschewed reference to the politically sensitive language of 'special status' and sovereignty.

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[40] *Ibid* at 117.

[41] *Ibid* at 118.

[42] *Ibid* at 129.

[43] *Ibid*.

[44] *Ibid* at 134.

The 1969 White Paper: The Government upends Indian Policy

The human rights activists were not alone in joining the causes of the Quebecois and the Indigenous. Trudeau frequently drew the parallel and rejected 'special status' for both.[45] His new administration shelved the recommendations of the Hawthorn Report, the report on the Indian Problem commissioned during the Pearson administration, specifically because it described Indians as '*Charter* citizens' or 'citizens plus', thus offending the principle of uniform, individual, liberal rights.[46] A totally new approach was required – the result would become known as the 1969 White Paper.

Plotting the Demise of the Indian Act

The proposals pondered by Pearson's administration for overhauling the *Indian Act* were given a second lease on life under Trudeau. By 1968, powerful people wanted significant change in Indian policy. In his first year of office, Trudeau spent more time on Indian policy than on anything else.[47] It was a high political priority, both for Trudeau and for the new Minister of Indian Affairs and Northern Development, Jean Chrétien.

The special unit in the Privy Council Office (PCO) responsible for advising on the 'war on poverty' had lost patience with the Department of Indian Affairs' kid-glove treatment of the *Indian Act*.[48] A PCO adviser tore to shreds an initial draft submitted by Indian Affairs.[49] Among his myriad criticisms, the adviser noted that patching up the *Indian Act* might be ill-advised, revisions to the Act were a low priority for Indians, and the *Drybones* case before the Supreme Court of Canada could "call into question the relationship between the *Indian Act* and the Bill of Rights."[50] Federal officials were well-aware that the *Indian Act* could be struck down through judicial review. The proposal failed to take "the new bold new direction which the Trudeau government was seeking."[51]

A new direction emerged that fell in line with Trudeau's ideas about equality. In a letter to Trudeau, Minister for Indian Affairs and Northern Development Jean Chrétien wrote:

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[45] Weaver, *supra* note 30 at 53.

[46] Laurie Meijer Drees, *The Indian Association of Alberta: a History of Political Action* (Vancouver, B.C.: UBC Press, 2002) at 166.

[47] Alan Cairns, Citizens Plus: Aboriginal Peoples and the Canadian State (Vancouver: UBC Press, 2000) at 52.

[48] Weaver, *supra* note 30 at 53.

[49] *Ibid* at 80.

[50] *Ibid* at 85.

[51] *Ibid* at 87.

> The policy I intend to follow must make possible the treatment of Indians on the same footing as other Canadians … in accordance with … the Universal Declaration of Human Rights. … this kind of equality cannot exist when certain services are provided specially to one group of people, or to a single group.[52]

In this new direction, "[t]he Indian problem was seen as 'discrimination' against Indians in both a positive (special rights) and a negative sense (lack of provincial services)."[53] The policy was driven by the belief that "Indian emphasis on special rights was basically a reaction to their being denied equal status – a defense mechanism based on their exclusion. In short, Indians were viewed in terms of the socio-economic class structure, not ethnicity."[54]

As the policy process crystallized, ending discrimination against Indians and achieving equality became labeled as non-discrimination – completing a metamorphosis in which 'special status' came to be to 'non-discrimination'.[55] A further transformation occurred in the winnowing out of references to respect for treaty obligations. Furthermore, Indigenous demands for resolution to land claims grievances came to be equated with and wholly synonymous with Indigenous self-determination. Consequently, officials thought that recognition of "Aboriginal rights would require the same recognition for the French in Canada."[56]

This liberal view of equality and a framing of the 'Indian problem' as rooted in racial discrimination found support from the international law experts in government. The PCO asked the External Affairs for advice on "the possibility of any international criticism which might be leveled at Canada."[57] A legal adviser at the PCO summarized the proposed policy direction as "an overall program of integrating Indians into Canadian society and eliminating any special position which they may now occupy in legal and constitutional terms … thus leaving them to be dealt with by Parliament or the provinces … just as any other Canadians."[58] This entailed, in the PCO's view, eliminating both "special restrictions" and "special benefits which they may now claim

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[52] Quoted in *Ibid* at 103.

[53] *Ibid* at 104.

[54] *Ibid* at 196.

[55] *Ibid* at 114.

[56] *Ibid* at 134.

[57] Letter from B.L. Strayer, Director, Constitutional Review Section, Privy Council Office to P.A. Bisonnette, Under-Secretary of State for External Affairs (10 April 1969), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1 Pt 2) [PCO to External Affairs, 10 April 1969]

[58] PCO to External Affairs, 10 April 1969, *supra* note 57

under 'treaties'."[59] The legal adviser sought advice on whether this would run afoul of international conventions with respect to the protection of minorities.

The Department of External Affairs reassured the PCO that the *International Covenant on Civil and Political Rights* had no provisions that "are specifically directed to the particular problems with the rights of racial or ethnic minorities" (rather surprisingly given the existence of article 27 and its later use in the *Lovelace* case).[60] The more pertinent treaty was the *Convention on the Elimination of Racial Discrimination*, whose provisions (1(4) and 2(2)) spoke of special, time-bound measures to ensure the development and protection of racial groups that would not be considered discrimination.[61] In other words, *Indian Act* reforms could be defended as affirmative action. The more pressing problem might be the matter of the Jay Treaty of 1794, the customs exemptions it provided to Indians entering Canada, and Canada's inheritance of these obligations as the successor state to Great Britain, the signatory of the treaty. Canada could come under attack for not "compensating the Indians for these and other special rights of which they would be deprived."[62] Save for this recognition of Treaty obligations, the legal opinion accorded with the predominant framing of the 'Indian problem' as a 'minority problem' that placed a burden on government for their protection and advancement.

Meanwhile, a Sham Consultation

After the demise of the rubber-stamping Advisory Boards instituted under Pearson, Chrétien inveigled Indigenous people into yet another consultative process. In March 1968, a booklet entitled 'Choosing a Path' landed in every status Indian household, band council, and Indian organization. The booklet presented the *Indian Act*, posed questions about how the Act could be amended, and offered a set of possible alternatives. Public meetings were held at the band level, with views from these meetings feeding into regional meetings and a national conference.

Publicity surrounded the consultation process, and "the Indians had begun to believe the government really meant to talk with us and to listen to us."[63] Across the country,

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[59] PCO to External Affairs, 10 April 1969, *supra* note 57

[60] Letter from P.A. Bisonnette, Under-Secretary of State for External Affairs to B.L. Strayer, Director, Constitutional Review Section, Privy Council Office (10 April 1969), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1 Pt. 2) [External Affairs to PCO, 10 April 1969] at 1

[61] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) at arts. 1(4) and 2(2)

[62] External Affairs to PCO, 10 April 1969, *supra* note 60 at 4

[63] Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 102.

people complained the consultations were overly focused on the *Indian Act* and "made it obvious that they were interested in treaty rights, aboriginal rights and settlement of land claims first and foremost."[64] In a regional consultation meeting, Indian leaders "made it crystal clear to federal government representatives that before any new working relationship could be established with the Indians, the outstanding questions of the treaty and aboriginal rights of the Indians would have to be settled."[65] At the national consultation meeting, Indian leaders refused to talk about changes in the *Indian Act*; instead, leaders "unanimously agreed that a general declaration of intent containing the principles and spirit of the treaties and aboriginal rights would have to be adopted before any move by the federal government in the direction of new Indian legislation could be considered."[66] BC delegates underlined the unique position of Indians in BC, as they had never surrendered title to their lands, and they redirected conversation from the *Indian Act* to the questions of land claims and aboriginal rights.[67]

The White Paper is Released

Tabled by Chrétien on 25 June 1969, the "Statement of the Government of Canada on Indian Policy" set out a reform agenda intended to lead to "full, free and nondiscriminatory participation of the Indian people in Canadian society."[68] The statement quickly became known as the White Paper.

The 1969 White Paper declared itself to be a definitive "break with the past."[69] The White Paper proposed the abolition of Indian status, the transfer of responsibility from the federal government to the provinces, the abolition of the Department of Indian Affairs, the elimination of the legal status of 'Indian', and the reclassification of reserves as private property. Its basic message was that Indians had been held back and barred from entry into majority society by laws defining their difference. The government's proposed strategy was to end the legal and constitutional bases of discrimination by repealing the *Indian Act*. Indian people would be put into the same streams as other Canadians for purposes of federal and provincial services, and they would gain control of their lands through private property rights. The 'principle of common services' was, in the White Paper's view, unassailable. The Department of Indian Affairs would be abolished, and the federal government's responsibility for Indians would be transferred

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[64] *Ibid*.

[65] *Ibid* at 106.

[66] Cardinal, *supra*, note 63 at 107

[67] Paul Tennant, Aboriginal Peoples and Politics: the Indian Land Question in British Columbia, 1849-1989 (Vancouver: University of British Columbia Press, 1990) at 149.

[68] Department of Indian Affairs and Northern Development, Statement of Government of Canada on Indian Policy (The White Paper) (June 1969) (Ottawa: Queen's Printer) [1969 White Paper] at 9.

[69] 1969 White Paper, *supra* note 68 at 5

to provincial governments, band councils, or other federal ministries. Land would no longer be held in trust by the Crown, but rather owned in fee simple by Indians. Bands who were the farthest behind economically would receive selective, tailored assistance. The government gestured to its treaties with Indians, described them as containing "limited and minimal promises" and stated that the "significance of the treaties in meeting … needs of the Indian people has always been limited and will continue to decline."[70] Finally, the White Paper urged "the positive recognition by everyone of the unique contribution of Indian culture to Canadian life."[71]

The White Paper connected the federal government's control of band membership under the *Indian Act* to its responsibility for land reserved for Indians. Thus, under the proposed reforms, "[w]hen bands take title to their lands, they will be able to define and apply these qualifications themselves."[72] The government's understanding of the significance of status was thus limited to the issue of rights to reside on reserve and share in band assets.

Indigenous Refusal and the Equality Problem in the White Paper

The government had ignored the findings in the Hawthorn Report and the results of nearly a year of consultations with Indigenous political leaders. When the government released the White Paper in June 1969, the consultative process was exposed as a farce. Cardinal stated that

> it is quite obvious that during the exact period in which the government was theoretically pursuing consultation, federal officials, in isolation from they were supposed to be consulting, were plotting unilaterally a policy paper designed to alter the future of every Indian in Canada.[73]

A national outcry ensued. The rejection of the policy by Indian political leaders was initially mixed but soon became emphatically negative.[74] Harold Cardinal, leader of the Indian Association of Alberta, described the proposed policy as "a thinly disguised programme of extermination through assimilation," and a refrain of the federal government's view that "the only good Indian is a non-Indian."[75] The policy "leads directly to cultural genocide."[76] "A large number of Indians recognized what was going

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[70] 1969 White Paper, *supra* note 68 at 12

[71] 1969 White Paper, *supra* note 68 at 6

[72] 1969 White Paper, *supra* note 68 at cite 11

[73] Cardinal, *supra* note 63 at 108.

[74] Meijer Drees, *supra* note 46 at 168.

[75] Cardinal, *supra* note 63 at 1.

[76] *Ibid* at 118.

on immediately …" Day summarized, "[t]hey had never wanted to become Canadian, *still* did not want to become Canadian."[77]

The central document describing Indian refusal was the Red Paper, entitled 'Citizens Plus' in a nod to the framing of the Hawthorn Report. It was drafted by the Indian Association of Alberta with Cardinal's leadership. The National Indian Brotherhood signed on to the Red Paper, after adding some further language on treaties and Aboriginal rights.

Indigenous leaders delivered the Red Paper in person to the entire Cabinet. Women were included in this delegation, notably Rose Charlie from the BC Indian Homemakers' Association. They placed a copy of the White Paper in front of Chrétien, signaling their rejection, and a copy of the Red Paper in front of Trudeau, signaling their intent to discuss counter-proposals.[78] In a carefully staged performance, Chief Adam Soloway and Chief John Snow of the Indian Association of Alberta took turns reading the text of the White Paper and the counterpoint from the Red Paper, producing the spectacle of a dialogue between the state and the Indigenous leaders. The plan had been for the Cabinet to simply receive the documents. But Trudeau spoke off-script:

> We had perhaps the prejudices of small 'l' liberals and white men at that who thought that equality meant the same law for everybody, and that's why as a result of this we said, 'well let's abolish the *Indian Act* and make Indians citizens of Canada like everyone else. … We are here to discuss this.[79]

But Trudeau maintained his opposition to special rights, drawing the comparison, again, to the French in Canada: "the way to be strong in Canada is not to be apart but to be equal to the English."[80]

The government's casual dismissal of the treaties struck at the heart of the federal-Indigenous relationship. The Red Paper opened with an ardent defense of Indian peoples' treaty rights: "To us who are Treaty Indians there is nothing more important than our Treaties, our lands and the well being of our future generation."[81] The treaties were not political agreements from a long time ago; they were "sacred agreements" and

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[77] Richard J F Day, *Multiculturalism and the history of Canadian diversity* (Toronto, Ont.: University of Toronto Press, 2000) at 187.

[78] Weaver, *supra* note 30 at 184.

[79] *Ibid* at 185.

[80] *Ibid*.

[81] Indian Chiefs of Alberta, "Citizens Plus" (2011) reprinted in 1:2 aboriginal policy studies, online: <https://ejournals.library.ualberta.ca/index.php/aps/article/view/11690>, pt Preamble.

violating them "is morally reprehensible in a political relationship between nations."[82] The White Paper created a world in which "our people would be left with no land and consequently the future generation would be condemned to the despair and ugly spectre of urban poverty in ghettos."[83]

In a direct challenge to the theory of equality as sameness, the Red Paper asserted that "[r]etaining the legal status of Indians is necessary if Indians are to be treated justly. Justice requires that the special history, rights and circumstances of Indian People be recognized."[84] It justified this position by citing international law on the protection of minorities. While defending a unique status based in history, the Red Paper was not grounded in Indigenous nationhood, but rather in the protections due to a minority. In fact, the Red Paper described Indian status as a precondition for being "a good useful Canadian."[85]

The Red Paper rejected the transfer of responsibility to the provinces, as provinces had never signed treaties with the Indians, and it called for entrenchment of the Treaties in the Constitution. It laid out detailed recommendations in two areas of immediate policy reform: education on reserve and strategies for economic development. The Red Paper had nothing to say about the rules for determining band membership.

The Red Paper thus positioned Aboriginal and treaty rights at the front and center of federal-Indian dialogue. And, although such rights claims are often associated with full-blooded assertions of sovereignty, these claims only entered the political space because of a degree of amicable relations between the federal government and Indigenous national organizations. The Indian Association of Alberta had been in open dialogue with the federal government since the late forties. In 1970, under more militant leadership, the IAA used this access in order to defend Indians' special status and their Treaty rights.[86]

In November 1970, the Union of BC Indian Chiefs issued its own response, 'A Declaration of Indian Rights'. The document, which came to be known as the Brown Paper, began with an ardent defense of the 'special relationships' between Indians and the federal government, describing them as carrying "immense moral and legal force."[87]

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[82] Dale A Turner, *This is not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto; Buffalo: University of Toronto Press, 2006) at 26.

[83] Indian Chiefs of Alberta, *supra* note 81, pt Preamble.

[84] *Ibid*, pt B.1.

[85] *Ibid*.

[86] Meijer Drees, *supra* note 46 at 170–171.

[87] Union of BC Indian Chiefs, "A Declaration of Indian Rights: The BC Indian Position Paper" (17 November 1970), in Vancouver, Union of British Columbia Indian Chiefs Resource Centre (Archive) [UBCIC Brown Paper, 17 November 1970] at 1

The UBCIC called for a constitutional commitment to this special relationship. They recommended expanded services for Indians and greater delegation of authority to the local level.

In contrast to the silence on this issue in the Red Paper, the UBCIC's response argued that new legislation implementing the Government's commitment to its treaties must "provide consideration for all people of Indian ancestry regardless of bureaucratic classification."[88] This was a reference to the 'bureaucratic' distinction between status and non-status Indians. The paper described Indians as an "ethnic group" and stated that the rules on status in the *Indian Act* "creates self-destruction of our ethnic identity."[89] The UBCIC repudiated the process of enfranchisement, stating that a person could remain an Indian after enfranchisement and calling for band authority on entitlement to reserve property.[90]

Like the Hawthorn Report and the Red Paper, UBCIC argued for the same rights as non-Indian citizens and "certain additional rights due us because of our special status as Indians."[91] These measures were necessary to "preserve and develop our culture" (rather than nationhood, sovereignty, or self-determination), and culture required preserving "our status, rights, lands and traditions."[92]

Although the strident rejection of the White Paper seemed to have blindsided the federal government, the responses were in fact relatively moderate. The Red Paper and Brown Paper both used the language of Canadian citizenship and referred to the compatibility of Indian and Canadian political and cultural life. The UBCIC stated that its proposed principles were "intended to improve Canadian unity,"[93] and it called for policies "to safeguard our unique Indian status and to preserve our valuable contribution to the multi-cultural ethnic structure of our nation."[94] Although the language of nationhood was employed, neither paper framed the response in terms of secession.[95] In contrast to the Red Paper, the UBCIC explicitly named Indigenous self-determination, but it clarified that this would take place in the context of continuing

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[88] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 10

[89] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 10

[90] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 10

[91] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 10

[92] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 11

[93] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 1

[94] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 3

[95] Cairns, *supra* note 47 at 68.

federal monetary support and a continued federal-Indigenous relation.[96] As Harold Cardinal wrote,

> the question of establishing a positive Indian identity does not mean political separatism – not yet, at least, not if the white man will agree to be reasonable – nor does it mean a desire to return to the days of yesteryear. The fact remains, however, that most Indians firmly believe that their identity is tied up with treaty and aboriginal rights. Many Indians believe that until such rights are honoured there can be no Indian identity to take its place with the other cultural identities of Canada.[97]

The 'Indian Problem' as an Equality Problem

The White Paper encapsulated the tension between liberal ideals of equality and the idea of special status.[98] It was unflinching in its characterization of the Indian as an individual Canadian who should only survive as "the result of unaided Indian efforts in the marketplace of competing lifestyles, not the product of government fostering."[99] In its foreword, the White Paper rhetorically and typographically asserted the essence of 'Indian' identity as difference:

> To be an Indian is to be a man, with all a man's needs and abilities. To be an Indian is also to be *different*. It is to speak *different* languages, draw *different* pictures, tell *different* tales and to rely on a set of values developed in a *different* world.[100]

It went to on to explain that this difference caused Indians' squalor and misery; the remedy for the misery was to be found in ending the difference. The erasure of difference was then defined simultaneously as freedom and as equality with other Canadians. In its discussion of services for "those who are furthest behind", the White Paper acknowledged that "equality before the law … does not necessarily result in equality in social and economic conditions."[101] But any additional funds to those "furthest behind" was justified based on present need and therefore (by definition) temporary. In short, the policy rested on the most arid version of 'same as' formal equality.

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[96] UBCIC Brown Paper, 17 November 1970, *supra* note 87 at 2

[97] Cardinal, *supra* note 63 at 21.

[98] Weaver, *supra* note 30 at xii.

[99] Cairns, *supra* note 47 at 52.

[100] 1969 White Paper, *supra* note 68 at 2

[101] 1969 White Paper, *supra* note 68 at 10

Trudeau's ardent defenses of the White Paper were grounded in his liberal philosophy of equality. In a speech in Vancouver, Trudeau called for the end of the 'ghetto' of Indian status:

> We can go on treating the Indians as having a special status. We can go on adding bricks of discrimination around the ghetto in which they live and at the same time perhaps helping them preserve certain cultural traits and certain ancestral rights. Or we can say you're at a crossroads – the time is now to decide whether the Indians will be a race apart in Canada or whether it will be Canadians of full status. ... It's inconceivable, I think, that in a given society, one section of the society have a treaty with the other section of the society. We must all be equal under the laws and we must not sign treaties amongst ourselves.[102]

Trudeau asserted that the government had made an honest effort to solve the Indian problem, and that though the choices were difficult, 'special rights' were incongruous with a modern and just society.[103] Trudeau emphatically rejected Indigenous rights. He said that no society could be built on 'might-have-beens' and that this would open the floodgates to compensation for all manner of historical injustices, ranging from the expulsion of the Acadians to the internment of Japanese-Canadians.[104]

Indian Association of Alberta leader, Harold Cardinal, pointed out the White Paper's deep misunderstanding of equality and the Treaties. No one would deny that Indians were victims of discrimination, but the White Paper asserted that this discrimination came from difference, and this difference from the *Indian Act*. In Cardinal's view,

> [t]he *Indian Act* has been and continues to be a restrictive, repressive and discriminatory piece of legislation. It is true that the *Indian Act* is partially responsible for keeping Indians apart from and behind other Canadians. It is not true, however, to say that the treaty rights of Indians have had the same effect.[105]

Cardinal argued that the White Paper confused the administrative nature of the *Indian Act* with the government's legal and moral responsibilities under treaties. To the claim that ending 'Indian status' would magically end discrimination, Cardinal suggests "one needs only examine the position of the nonregistered Indians or Métis to find that their

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[102] J Rick Ponting, Roger Gibbins & Andrew J Siggner, *Out of Irrelevance: a Socio-Political Introduction to Indian affairs in Canada* (Toronto: Butterworths, 1980) at 27–28.

[103] Weaver, *supra* note 30 at 179.

[104] *Ibid*.

[105] Cardinal, *supra* note 63 at 113.

precious supposed constitutional and legal equality has failed, almost criminally, to mean equality, socially, economically or even legally."[106] Taking a cue from Trudeau's frequent parallel between Quebec and Indigenous nations, Cardinal observed that,

> If the government truly opposes constitutional discrimination then it will, of course, remove all references to French Canadians or English Canadians from the Canadian constitution. Naturally, the newly passed languages bill must be revoked. In light of the government's own definition of equality and discrimination, it just isn't fair to either the French Canadian or the English Canadian that they should be discriminated against while the Indian thrives on a government-created environment of equality and discrimination.[107]

The White Paper's understanding of equality defined Indians as members of an ethnic minority.[108] The national and international environment had attuned the government to the problem of racial discrimination. The remedy required asserting an Indian's rights to be treated, individually, just as well as if s/he had been a settler and, if necessary, a temporary recognition of difference through affirmative action measures. Absent from this attack on race-based discrimination was any recognition of the political nature of the category 'Indian.' That Indigenous people were not recognized as belonging to Indigenous nations explains why the White Paper dismissed the treaties and the fiduciary obligations arising from treaties and confederation. According to the White Paper, "it followed that in freeing individual Indians, Indians as a distinct group would be freed from being a 'burden on the Crown'."[109] Dismissing the political subjectivity of Indian nations and the Crown's treaty obligations with those nations also jettisoned the land as the site and source of those treaty obligations. The federal government answered the demand for Indian control and ownership of reserve land with the instrument of individual rights, transforming Indian territories from sites of political life into parcels of private property.

The Aftermath of the 1969 White Paper

In spite of the hue and cry, the federal government stuck to its guns, only rescinding the policy in March 1971 after relentless pressure. Indian spokesmen and civil servants

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[106] *Ibid* at 115.

[107] *Ibid* at 121.

[108] Turner, *supra* note 82 at 22.

[109] *Ibid* at 23.

speaking off the record expressed their continued belief that "termination remains the unofficial policy of the government."[110]

The White Paper debacle produced a climate of suspicion and mistrust that colored relations between the federal government and Indigenous peoples throughout the 1970s. Officials in Indian Affairs were left unmoored in the aftermath of the White Paper's defeat. Indigenous leaders, for their part, retrenched around the protection of special rights – Trudeau's bête-noire and the very thing the White Paper had sought to end. Between the *Indian Act* and the October Crisis, the political climate recoiled at the idea of special status and collective rights. The prevailing understanding of equality stressed abstract, individual liberal rights to non-discrimination, thus jettisoning the political and historically grounded nature of claims by the Indigenous and separatist Quebecois.

Indigenous Organizing Gains National and Provincial Strength

The controversy surrounding the White Paper had two main effects on the Indigenous political environment. First, it underlined the need for national-level organizations that could defend Indigenous peoples from the federal government. Second, it accentuated the political and material significance of status and Treaty rights. When the government began funding of civil society groups, this distinction mattered even more.

The Secretary of State's funding of civil society organizations had already augmented with the rise of the idea of citizens' participation under the Pearson administration. In 1970, the Citizenship department of the Secretary of State flexed its muscles, becoming a "flamboyant, freespending animateur sociale … [sending] massive grants … to militant native groups, tenants' associations, and other putative aliens of the 1970s."[111] Under new leadership, the department aimed to bankroll Trudeau's 'Just Society'. This included funding Indian, Métis, and Inuit political, social, and cultural organizations, despite the protests of the Department of Indian Affairs.[112] By 1972, the Citizenship branch had become the most important federal funder of voluntary organizations.[113]

Leaders from the western provinces were central in shaping a new national Indigenous organization adapted to the new political climate. Cree leader Harold Cardinal asserted that "the central issue is the degree of sophistication that we can develop in creating organizations which are Indian controlled and representative at the reserve level."[114] An initial effort at a national Indian organization, the National Indian Council (NIC),

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[110] Weaver, *supra* note 30 at 5.

[111] Gwyn quoted in Leslie A Pal, *Interests of State: the Politics of Language, Multiculturalism and Feminism in Canada* (Montreal, Quebec: McGill-Queen's University Press, 1993) at 107.

[112] *Ibid* at 109.

[113] *Ibid* at 112.

[114] Cardinal, *supra* note 63 at 82.

fizzled precisely because the organization sought to represent both status and non-status Indians. In 1968, the NIC split into two organizations: the National Indian Brotherhood (NIB) and the Canadian Métis Society. The impetus behind this new organization came from the leadership of the main Treaty provinces – Walter Deiter of Saskatchewan, Dave Courchene of Manitoba, and Harold Cardinal of Alberta.

The mandate of the National Indian Brotherhood was to represent provincial Indian organizations, work to solve problems confronting Indians, and secure the enforcement of Indian treaties and aboriginal rights of Indians. The structure of the National Indian Brotherhood addressed the diversity of Indigenous political demands by keeping power and decision-making in the hands of existing provincial organizations and appointing delegates from these provincial bodies to the national meeting.[115] It was, squarely, an organization for status Indians.

Walter Deiter was named first president of the NIB in 1968. Walter Deiter had been chief of the Federation of Saskatchewan Indians from 1966 to 1969. Deiter's leadership of the fledgling organization was quickly challenged and, in 1970, George Manuel became NIB leader. Manuel led the National Indian Brotherhood from 1970 to 1976. His leadership style emphasized consultation, participation, and non-hierarchical organization. He saw a national-level organization like the NIB as a vehicle for bringing in people from the local level, fostering their leadership skills, and developing the Indian community. His sights were not solely trained on winning battles with the federal government. Marie Smallface Marule, his longtime colleague, was quoted as saying, "People got the impression that they were working for themselves and their people, not for him."[116] He was careful to insulate himself from bureaucrats and government officials, and he sought to build consensus around his ideas rather than pushing them on people.[117]

When Manuel took over the NIB, the organization was in disarray, financially and administratively. Manuel's first decision as NIB president was to declare bankruptcy. The NIB executive over-ruled this decision, and members of the Indian Association of Alberta lobbied effectively at the Privy Council Office and the Department of The Secretary of State to get funds to keep the lights on. With a staff reduced to three (George Manuel, Marie Small Face Marule, and Omer Peters), Manuel and his team spent the first year traveling the country to establish the legitimacy of the NIB with people at the reserve level. Manuel also traveled internationally, where he learned about the situation of Indigenous peoples in Australia, New Zealand, and Sweden and the political philosophies of leaders of the non-aligned movement, including Julius

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[115] *Ibid* at 94.

[116] Ponting, Gibbins & Siggner, *supra* note 102 at 201.

[117] *Ibid* at 202.

Nyerere, president of Tanzania. These international experiences convinced Manuel of the need for an international council of indigenous peoples, and in 1975, Manuel became the founding president of the World Council of Indigenous Peoples.

Two of the leaders who would go toe-to-toe with the federal government had made meteoric ascents from provincial-level politics. George Manuel had risen to national attention through his work in the developed and factionalized political environment of BC. The Indian Association of Alberta (IAA) was resuscitated under Harold Cardinal's leadership.

It was not until the entry of young and dynamic leadership that the IAA re-asserted itself as the representative of Alberta's Treaty Indians, provincially and nationally. This was due in large part to the leadership of Harold Cardinal (1945-2005), a Cree Indian from the Sucker Creek reserve in Northern Alberta. Cardinal studied sociology at Carleton University and, later in life, earned a law degree, an LLM from Harvard University, and a doctorate in law from the University of British Columbia. In 1966, at the age of 21, he was elected president of the Canadian Indian Youth Council. He did a stint at Company of Young Canadians, where he met activist Jeannette Corbiere Lavell. At the age of 23, he was elected leader of the Indian Association of Alberta, and led the organization from 1968 to 1977. Cardinal changed the organization from a volunteer-staffed, grassroots operation to an organization with full-time, professional staff based in urban offices. Under his leadership, the IAA accepted funds from the federal government. The change in leadership and injection of funds ended the amiable collaboration between the federal government and the IAA. It began to challenge the federal government on the national stage, with a well-constructed, publicized policy positions. Cardinal brought in George Manuel, between 1968 and 1970, to help develop the IAA.

When George Manuel moved to Alberta to work with Cardinal, he left behind his work at the community level in BC. By the late sixties, British Columbia had six main Indigenous political organizations, aside from the band council governments and hereditary and tribal councils. The Native Indian Brotherhood, founded in 1931, drew its support from the west/central and north coast of BC. The North American Indian Brotherhood (NAIB), founded in 1959, was based in the south coast and interior areas among Salish peoples. Picking up from organizing work by Andrew Paull, George Manuel had founded the NAIB in 1959. The Native Indian Brotherhood and the North American Indian Brotherhood vied with each other for the title of representative of all BC Indigenous peoples. The BC Indian Homemakers' Association was formed in 1968 as a breakaway from the women's home economics groups promoted by the Department of Indian Affairs. On the coast, three associations represented distinct linguistic, tribal groups: the Southern Vancouver Island Tribal Federation, the West Coast Allied Tribes (of the Nuu-chah-nulth), and the Nisga'a Tribal Council. The Nisga'a Tribal Council was the older of the three, formed in 1955 by Frank Calder.

There were no province-wide organizations. This changed in 1969, with the founding of two new organizations representing status and non-status Indians.[118]

In November 1969, the Union of British Columbia Chiefs was founded during an unprecedented five-day assembly of chiefs held in Kamloops, BC. In response to the outcry about the White Paper, the NAIB, the BC Indian Homemakers Association, and the Southern Vancouver Island Tribal Federation convened a special assembly. The assembly itself was more representative than any previous province-wide organizing efforts.[119] It aimed to establish a united front and fought for a comprehensive land claims settlement for BC Indians.[120] Its original structure consisted of the chiefs of the 190 bands in the province.

Non-status Indians in British Columbia became organized politically under the aegis of the British Columbia Association of Non-Status Indians (BCANSI). Formed in March 1969 by H.A. 'Butch' Smitherham, the aim of BCANSI was to secure the same benefits for status Indians, non-status Indians, and Métis. The organization did not fully spread its wings until 1971. BC had not historically been home to a Métis population, but many Métis migrated to BC after WW2. Smitherham viewed "the non-status Indians and Métis as suffering the same social and economic discrimination as status Indians but as lacking the benefits in housing, post-secondary education, occupational training, economic development grants, and reserved lands accorded to status Indians."[121]

In 1970, the leadership of BCANSI invited leaders of the Métis organizations from the Prairie provinces to the annual general meeting. The Métis Association of Alberta, the Métis Society of Saskatchewan, the Manitoba Métis Federation, and the BC Association of Non-Status Indians discussed the fact that the cleaving of the National Indian Council into status and Métis organizations had left non-status Indians out in the cold. Stan Daniels, a Métis activist and president of the Métis Association of Alberta, had been instrumental in ensuring that the Canadian Métis Society included non-status Indians.[122] Together, the organizations agreed to found a national non-status and Métis organization: the Native Council of Canada.

Meanwhile, in BC, the consensus remained that the divergent concerns of non-status and status Indian populations should be represented by separate organizations, and

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[118] Paul Tennant, "Native Indian Political Activity in British Columbia, 1969-1983" (1983) 57 BC Studies: The British Columbian Quarterly 112 at 112.

[119] Tennant, *supra* note 67 at 152.

[120] Lana C Lowe, *A Strategic Analysis of the Union of British Columbia Indian Chiefs* (M.A. (Indigenous Governance), University of Victoria, 2004) [unpublished] at 21.

[121] Tennant, *supra* note 67 at 160.

[122] Ponting, Gibbins & Siggner, *supra* note 102 at 218.

that the issue of a land claims settlement was reserved to status Indians. Only the Nisga'a Tribal Council continued to work in the name of both status and non-status members, through their litigation efforts for the recognition of Nisga'a land claims.

While these national organizations were taking shape, provincial organizations continued to blossom. The Union of Nova Scotia Indians, founded in 1969, was the first province-wide association for Indigenous people in Nova Scotia. The Indian Brotherhood of the Northwest Territories was founded in October 1969. Furthermore, aided by a significant increase in funding from the Secretary of State, Indian friendship centers appeared across the country.[123]

The Indigenous Movement: Conclusion

To recap, by the mid seventies, Indigenous leaders had strengthened advocacy institutions at provincial and national levels. A national organization, the National Indian Brotherhood, represented status Indians. The Native Council of Canada represented the Métis and non-status Indians. The long-running Indian Association of Alberta gained a young firebrand of a leader. British Columbia remained host to a multitude of status and non-status organizations, including the new Union of British Columbia Indian Chiefs. In forging national organizations, Indigenous leaders looked past centuries of national differences and linguistic barriers. The difference that mattered was status, and it divided the movement: both in terms of whether status was held, and in terms of whether status was sourced in Treaty obligations.

1968-1972: A Formative Period for Organizing by Indigenous Women

As the male-led Indigenous organizations grew, an Indigenous women's movement was just beginning to see the light of day. National-level organizing efforts by Indigenous women bloomed simultaneously across the country around 1968. By 1974, a vibrant movement brought together leaders from Quebec, Ontario, Alberta, Saskatchewan, and British Columbia.

By the late seventies, there would be two organizations representing Indigenous woman across Canada: Indian Rights for Indian Women (IRIW) and the Native Women's Association of Canada (NWAC). These two organizations would go on to play different roles in advocacy on the *Indian Act* and the Constitution. The story of their evolution and parting of ways began in the late 1960s, with the organizing of women in Quebec, Alberta, and British Columbia.

Roots in Local Organizing

Indigenous women had been organizing politically throughout the 20th century. The shift in the late sixties consisted of a move from reserve-level and provincial organizing

[123] Clément, *supra* note 6 at 31.

to the national and international stage, on the basis of a shared understanding of Indigeneity. The evolution of the national Indigenous women's movement has been described as a period of formation, from 1968 to 1973, a period of consolidation and growth, from 1973 to 1976, and a period of action and confrontation, from 1976 on.[124] The historiography of organizing by Indigenous women has sought to recognize that "a Native Women's movement has evolved as a separate, distinct phenomenon which is a unique response to social and political developments within and without Native society."[125] This recognition is necessary to counter the claim made, at the time and subsequently, that Indigenous women's activism was simply derivative of the white feminist movement, and that Indigenous women's assertions of equality were a betrayal of their culture.

Until the mid-1960s, organizing took place at a local level, mostly through voluntary labor. Federal funding, sourced in the Liberal enthusiasm for citizen participation, helped to nourish the growing Indigenous women's movement, but it also fractured the pre-existing bases of unity. The Department of Indian Affairs would only fund organizations of status Indians, while the Secretary of State insisted that organizations have both status and non-status members. The funding structure balkanized organizations and exacerbated existing tensions between status, Métis, and non-status people.

National level organizing grew from work at a community level, largely located in Indigenous women's centers. These centers developed in response to on-going migration from the reserves to cities. Centers provided housing for women and children in need, offered services like assistance with job placement and alcohol and drug counseling, and ran cultural programs. By 1979, there were seven such native women's centers in Alberta, Saskatchewan, and Ontario.[126]

A Mohawk Woman founds Equal Rights for Native Women

One movement began outside of Montreal, Quebec. Mary Two-Axe Earley was born in 1911 in Kahnawake, to a Mohawk father and an Oneida mother from Wisconsin. On her mother's death, she returned to Kahnawake from North Dakota to be raised by her grandparents. She moved to New York when she was 18 and married an Irish-American electrical engineer, Edward Earley.[127] As a result of her marriage to a non-Indian, she lost status under the *Indian Act*. In 1966, a friend of Two-Axe Earley's died in

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[124] Jamieson, Kathleen, "Multiple Jeopardy: The Evolution of a Native Women's Movement" (1979) 2:1 Atlantis: Critical Studies in Gender, Culture & Social Justice 157 at 162.

[125] *Ibid* at 161.

[126] *Ibid* at 169.

[127] Wayne Brown, "Mary Two-Axe Earley", online: *Footprints | Windspeaker - AMMSA: Indigenous news, issues and culture* <http://www.ammsa.com/content/mary-two-axe-earley-footprints>.

New York, having been exiled from Kahnawake after losing status. Two-Axe Earley was convinced that her friend's death from a heart attack was due to the stress of having lost her Indian status. Thus began her campaign for equality rights for Indigenous women.

Two-Axe Earley founded Equal Rights for Indian Women in 1967.[128] When her husband died in 1969, Two-Axe Earley returned to Kahnawake to live in the house she inherited from her grandparents. However, because she had lost Indian status, she had no legal right to live on the reserve. She gave the house to her daughter, who had gained status by marrying a status Indian. The band council tolerated her presence until evicting her in 1975.

A Woman's Organization in British Columbia Advocates for Self-Determination

While this organizing work was going on in Quebec, a women's group in British Columbia was liberating itself from the federal government. A federal government program, dating from the 1930s, taught home economics to clubs of Indigenous women. By 1970, an Indian Affairs official noted that Indian women had grown tired of these clubs and were, instead, forming new organizations and allying with provincial Indian associations.[129] The department sought to dissuade this development by confining funding to "organizations formed and active at the band level."[130] One such association was the BC Indian Homemakers' Association (BCIHA).

The Department of Indian Affairs and Northern Development withdrew the funds of the BC group, on the basis that they had become a political pressure group. In May 1969, the group registered as a new independent organization. The women "were focused on 'why they aren't treated like other citizens'."[131] Rose Charlie, from Sts'Ailes (Chehalis, BC), became the organization's president, a position she retained for the next 28 years. The group brought together women from reserves and urban communities, all over the province. In their first years, the association sought to address needs at the reserve level, recommending, for example, that federal training programs should teach women business administration, not hairdressing.[132] Its field of vision became province-wide, through the publication of the *Indian Voice*, a newspaper that circulated in BC from 1969

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[128] Don Whiteside, National Indian Brotherhood, *Historical Development of Aboriginal Political Associations in Canada* (Ottawa: National Indian Brotherhood, 1973) at 11.

[129] Jamieson, Kathleen, *supra* note 124 at 163.

[130] *Ibid* at 162.

[131] Celia Haig-Brown, Taking Control: Power and Contradiction in First Nations Adult Education (Vancouver [B.C.]: UBC Press, 1995) at 78.

[132] Patricia Miranda Barkaskas, *The Indian Voice-Centering Women in the Gendered Politics of Indigenous Nationalism in BC, 1969-1984* (M.A. (History), University of British Columbia, 2009) [unpublished] at 12.

to 1984.[133] Leaders of the BCIHA were engaged at the national level in the movement for Indigenous self-determination. The BCIHA co-founded the Union of BC Indian Chiefs. Leaders Rose Charlie and Evelyn Paul both participated in lobbying around the 1969 White Paper.[134]

The BC Indian Homemakers Association was not the only game in town, though. Some women were concerned that the BCIHA was controlled by one family. In response, Mildred Gottfriedson founded the BC Native Women's Society.[135] Her husband, Gus Gottfriedson. had headed the North American Indian Brotherhood.

The Founding Conferences of the Indigenous Women's Movement, 1968 - 1969

While women from Kahnawake were protesting the marrying out rule and the women in British Columbia had thrown off the federal government's traces, Edmonton became the epicenter of a movement that united and divided families.

In November 1967, under the leadership of Alice Steinhauer and Mary Ruth McDougall, a committee of 12 women had come together to plan the first Alberta Native Women's Conference. The conference was held in Edmonton in March 1968 and funded by the federal and provincial governments. Conference planners placed great emphasis on participation in decision-making, noting that, "People … are stating that a change is necessary in the status of Canadian minority groups such as the Native Indian. But prior to any positive change, there must be the involvement of the … native person himself or herself."[136] Conference delegates came from across Alberta for the three-day conference. The list of delegates records whether a person was 'Treaty' or 'Métis', but does not list a tribal or national affiliation. Of the 173 delegates, 108 were 'Treaty' and 65 were listed as 'Métis'.

Mary Ann Lavallee of the Cowessess Indian Reserve gave the keynote address. Lavallee had entered public political life in 1960 when she and her husband faced the failure of their farm on Cowessess Reserve. Due to prohibitions in the *Indian Act* on using land title as collateral for a loan, they nearly went into bankruptcy. She devoted herself to national advocacy on the issue of restrictions on Indians' use of land as collateral for credit.

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[133] *Ibid* at 2.

[134] "Mrs. Rose Charlie and delegates present Red Paper to Trudeau in Ottawa", *The Indian Voice* (July 1970) 1.

[135] Tennant, *supra* note 67 at 271.

[136] Voice of Alberta Native Women's Society, "Report of First Alberta Native Women's Conference, Edmonton, March 12-15, 1968" (12 March 1968), in University of Alberta (Special Collections) [First Alberta Native Women's Conference, 12 March 1968] at 3

Lavallee opened her remarks by informing participants that the federal government had recently inaugurated a Royal Commission on the Status of Women. She noted that "white women" had pressed for equal job opportunities, equal pay and reforms to divorce law and abortion law, and she asked delegates how these items concerned Indian women: "What is her position … will Indian woman gather her courage, lift her head, and speak out?"[137] She stressed,

> We must get involved in community affairs. Thus far the voice of Indian woman has not been heard in tribal and council affairs. … to have an active voice we need strong, decisive leadership that will be astute enough to recognize the potential of our reserve and its individual members.[138]

But, in addition to this message advocating political mobilization, she also urged conference delegates to focus on education, raising children, and "the art of homemaking and the art of motherhood."[139]

Speaker Alice Mustos stressed education, women's role in raising children, and the importance of positive thinking,[140] while Clare Yellowknee stated that "It is the wish of the Métis people that our Treaty neighbors will work along with us to better our community."[141] Discussion groups broached a welter of subjects, including housing shortages, alcohol abuse, poor health conditions, discrimination against Indigenous people in the cities, mistreatment by the justice system, inadequate health and sanitation services, and equality of treatment between Métis and Indians. Two comments concerned political life:

> [I]t is recommended that immediate steps be taken which would give native people a greater part in planning towards attaining self-government and control over their affairs.[142]

> I would like discussion on how to train the men to let their wives go to a conference without interference.[143]

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[137] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 4

[138] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 6

[139] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 7

[140] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 9

[141] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 10

[142] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 36

[143] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 36

The discussion groups did not address the marrying out rule in the *Indian Act*. Delegates did take immediate action to protect a federal government decision altering health services for Indians on reserve. The next day, delegates went straight to the office of the provincial premier with a briefing complaining about these changes; he, in turn, telegrammed the prime minister to "strongly protest this action" and "the fact it was initiated without consultation with the Indians or with us."[144]

Thus, at the first conference of Indigenous women in Alberta, women delegates stressed homemaking, motherhood, education, and political mobilization, and they took direct political action to influence federal health policy. It was an auspicious and diversified start to the Indigenous women's movement.

The second conference of the Voice of Alberta Native Women's Society took place in March 1969 in Edmonton. Attended by nearly 200 Indian and Métis women, the conference focused on integrating education about Native issues in the Canadian curriculum, awareness of legal rights upon arrest and incarceration, and the problems related to alcohol abuse in Indian and Métis communities.[145] During a briefing by the executive director of the Canadian Native Friendship Centre of Edmonton, conference delegates raised the issue of discrimination in the *Indian Act*, asking whether "Indians really accept the *Indian Act* – or because they think they have to?"[146]

As in the first conference in 1968, the 1969 keynote was delivered by Mary Ann Lavallee. Lavallee's remarks turned on the theme of the "Indian woman as a whole", who she described as "wife and mother … a work horse and a baby machine … also a doctor, a lawyer, a carpenter, a judge and a jury, and a referee."[147] The home, according to Lavallee, was the "cradle of civilization and the homemaker as the mother is the civilizer,"[148] and she lamented the problem of alcoholism in Indian homes. She also believed that "we are losing far too many of our beautiful young people to inter-marriage" and suggested "it would not happen if we mothers diplomatically guided our sons and daughters to think about marrying their own kind."[149] She spoke of her "dreams and plans that one day Indian people will again be a great people." Though the journey might be long, "we have wonderful people like you Indian women to

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[144] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136, Appendix IV

[145] Mary Mark, "Plans to use woman power", *Western Producer* (13 March 1969) 44.

[146] Voice of Alberta Native Women's Society, "Report - Second Annual Conference, Edmonton, Alberta, March 1969" (3 March 1969), in Ottawa, University of Ottawa, Archives and Special Collections, Canadian Women's Movement Archives Fonds (X10-1, Series 2, Box 152) [Second Alberta Native Women's Conference, 3 March 1969] at 34.

[147] Second Alberta Native Women's Conference, 3 March 1969, *supra* note 146 at 17

[148] Second Alberta Native Women's Conference, 3 March 1969, *supra* note 146 at 17

[149] Second Alberta Native Women's Conference, 3 March 1969, *supra* note 146at 18

quietly lead the way in help, in education and in community life."[150] The role for Indian women was in 'quiet' leadership at home and in the community.

Lavallee's speech at the second conference of the burgeoning women's movement is a telling sign of the diversity of views among Indigenous women in the Prairies in the late sixties. While some stressed women's role in raising children and supporting leaders through quiet means at the local level, others urged a more direct role for women in political action.

A strand of more strident political action was spearheaded by Kathleen Steinhauer, Nellie Carlson, and Jenny Margetts.[151] Life-long friends, these three Cree women were related to each other and came from the same reserve, Saddle Lake, in Treaty Six Territory. As children, both Steinhauer and Carlson suffered physical and emotional abuse during their confinement in residential school.[152]

Kathleen Steinhauer (1932-2012) was the daughter of a Cree Indian and an American-born woman of Scottish descent.[153] Her father became a chief of the Saddle Lake reserve. Kathleen's first husband was Allan Small Face, a member of the Kainai First Nation in Treaty Seven Territory.[154] Through her first marriage, she befriended Marie Small Face Marule. After her separation from her first husband, Kathleen married Gilbert Anderson and, as a result, lost her Indian status. Gilbert Anderson was from the Michel First Nation. After heavy government and settler pressure to surrender their prime agricultural lands, the entire Michel First Nation had enfranchised in 1958.[155] All members of the Michel band lost status. As a result of her first marriage, Kathleen's band membership was transferred from Saddle Lake to Kainai First Nation. As a result of her second marriage, Kathleen lost status, because Gilbert was a non-status Indian. Kathleen was a public health nurse.

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[150] Second Alberta Native Women's Conference, 3 March 1969, *supra* note 146 at 18

[151] In a welcome contrast to many of the other Indigenous women activists, a great deal has been written about the lives of Steinhauer, Carlson, and Margetts, through a book based on ten years of interviews with them. Journalist and author Linda Goyette spent eleven years in conversation with Nellie Carlson and Kathleen Steinhauer. She describes the book as a "long series of conversations … a spoken history in the oral tradition of Cree and Métis culture on the prairies" (xxi). The conversations took place in English, with some interludes in Cree. Goyette introduces the book by wondering: "can a non-Cree journalist properly transcribe a story rooted in the experiences of Cree storytellers when she has grown up in a country that refuses to confront the historic injustices that Aboriginal peoples continue to endure? (xxiv). See: Carlson, Goyette & Steinhauer, *supra* note 28.

[152] *Ibid* at 16.

[153] *Ibid* at 4.

[154] *Ibid* at 41.

[155] *Ibid* at 42.

Nellie Carlson (née Makokis (1927-) is the grand-daughter of Thomas Makokis, a traditional chief at Saddle Lake in the 1920s.[156] Kathleen Steinhauer and Nellie Carlson were cousins. Nellie Carlson's husband was Elmer Carlson. Carlson, who was older than Steinhauer and Margetts, worked in community groups.

Jenny Margetts (née Shirt) (1936 – 1991) left the Saddle Lake Reserve at the age of 16 to study in a convent and at Laval University in Quebec. Her plans to become a nun and a teacher changed when she met and married Gordon Margetts in 1960. Her husband was a white man, and so she lost status when they married. Trained as a teacher, Margetts organized Cree language and cultural education for First Nations and Métis children across Alberta and founded Awasis, a Cree-language kindergarten.[157]

Carlson and Steinhauer trace their family lineage directly to leaders who signed Treaty Six. Treaty Six was negotiated by Cree leaders and representatives of the British Crown in 1876. Cree oral history records Treaty Six as a peace agreement "to share the land and natural resources with newcomers for mutual benefit."[158] The treaty is the basis for modern-day rights to land rights, hunting and fishing rights, and health and education benefits. Nellie Carlson's great-great-grandfather, Onchaminahos (Little Hunter), signed Treaty Six along with Pakan (known as James Seenum), another of Carlson's ancestors. Nellie Carlson's husband was Elmer Carlson. His maternal great-great-grandfather was Kehewin (The Eagle), who also signed Treaty Six. Kathleen Steinhauer's great-great-grandfather Papastayo (also known as Papaschase) signed an adhesion to Treaty Six in 1877. Kathleen Steinhauer's husband was Gilbert Anderson. Anderson's great-grand-father was Chief Michel Callihoo, a Cree-Iroquois leader who signed an adhesion to Treaty Six in 1878.[159] This connection to Treaty signatories is a sign of their kinship connections to political power within their communities.

In the late sixties, Carlson, Steinhauer, and Margetts were well integrated in the organizing work in Edmonton. Though none were on the Voice of Alberta Native Women's conference planning committee, they attended the Native Women's conferences held in 1968 and 1969.[160] Margetts joined the Voice of Alberta Native

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[156] *Ibid* at 4.

[157] *Ibid* at 110–11.

[158] *Ibid* at xxix.

[159] *Ibid* at 122.

[160] Conference Registration Lists in First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 and Second Alberta Native Women's Conference, 3 March 1969, *supra* note 146.

Women in 1970.[161] Steinhauer and Carlson had less interest in Voice of Alberta Native Women, as they regarded it as focused on baking, sewing, and home economics.[162]

Carlson and Steinhauer had heard about the organizing work of Mary Two-Axe Earley in Quebec and the efforts of a woman from Ontario, Jeannette Lavell, to sue the federal government over her loss of Indian status through marriage.[163] Steinhauer contacted her friend and first husband's sister, Marie Small Face Marule. Marule (1944-2014) acted as a hub connecting between different parts of the Indigenous resurgence. A member of the Blood tribe in Alberta, she earned a bachelor's degree in sociology and anthropology from the University of Alberta and volunteered as a teacher in Zambia in the early 1960s.[164] In Zambia, she became involved in the anti-apartheid movement, where she met Jacob Marule, an ANC activist in exile from South Africa.[165] As a result of her marriage, the band council tried to take her off the Treaty list. She became the executive director of the National Indian Brotherhood and worked as the right hand to George Manuel in the new office established in Ottawa.

Months passed after Carlson and Steinhauer's letter to Marule. One day, Marule arrived in Edmonton and called a meeting at Carlson's house. Steinhauer recalls that Marule "got us started … she wrote it all down for us, the legal resolutions, all of it. And we were off."[166] In this initial meeting, Marule told them, "One of the things you'll have to do is go after them for your share of the band assets."[167] The group called themselves the Ad Hoc Committee on Indian Women's Rights.

A National Indigenous Women's Movement builds Steam

Building on their work hosting two conferences for women in Alberta, the Voice of Alberta Native Women's Society hosted the first national conference in 1971 in Edmonton, Alberta. It was funded in part through a grant from the federal government. Over 160 women came from the Yukon, the Northwest Territories, and every province save for Newfoundland and Prince Edward Island.[168] The conference was a turning

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[161] Carlson, Goyette & Steinhauer, *supra* note 28 at 72.

[162] *Ibid* at 62–63.

[163] *Ibid* at 59.

[164] "Obituary: Marie Smallface Marule", online: *University of Lethbridge Retired Faculty Association* <http://www.uleth.ca/retired-faculty/obituaries/marule-marie-smallface>.

[165] Anthony J Hall, American Empire and the Fourth World: The Bowl With One Spoon, Part One (McGill-Queen's Press - MQUP, 2003) at 238.

[166] Carlson, Goyette & Steinhauer, *supra* note 28 at 61.

[167] *Ibid*.

[168] Catherine Shorten, "Native women's association to be organized on national basis", *Western Producer* (1 April 1971) 52.

point for the movement, as Jeannette Lavell, Kathleen Steinhauer, Nellie Carlson, Jenny Margetts, and Mary Two-Axe Earley met for the first time.

The conference showed that Indigenous women were attuned to political changes and opportunities at the local and national level. For some, there was a direct link between the rise of Indigenous self-government and the need for women to empower themselves politically. Rose Yellowfeet, a former president of the Alberta women's group, argued that, whereas before Indian Affairs controlled everything on reserve, "Now there is self-government on the reserves and Indian Affairs moves out. Now the Chiefs and Councillors are the ones who are making the decisions for us and doing things for us. What I would like to see now is for us to get up on our feet and start learning to walk."[169] Evelyn Paul, of the BC Indian Homemakers' Association, called for unity, stating that the words 'status' and 'non-status' were "names … only put forward by the federal government – we didn't put them there."[170]

Feedback reports from provincial discussion groups raised issues including housing, education, removal of Indigenous children by welfare authorities, and alcoholism. Most discussion groups also raised the problem of Indian women losing their status due to marriage.[171] Monica Turner from Ontario, Jenny Margetts from Alberta, and dozens of other women spoke of the effects of loss of status on their lives and their children's lives. Women reported feeling shunned by their own people, and they asked the conference delegates to take on board the concerns of non-status women.[172] "I get quite emotional about this," Margetts declared, "as I am still an Indian and will always be an Indian whether I have a treaty number or not."[173] Christine Daniels of the Voice of Alberta Native Women's Society said, "I was a treaty Indian before my marriage to a Métis; now I am not considered to be an Indian any more by my own people."[174] A motion was passed by the conference to create a special committee to "deal with the question of native women retaining their treaty rights when they marry off the reserve."[175] The need for action on the marrying out issue seemed uncontroversial, and "the 200 native

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[169] Voice of Alberta Native Women's Society, "Report - First National Native Women's Conference, Edmonton, March 22-23, 1971" (22 March 1971), in Ottawa, University of Ottawa, Archives and Special Collections, Canadian Women's Movement Archives Fonds (X10-1, Series 2, Box 152) [First National Native Women's Conference, 22 March 1971]at 7

[170] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 10

[171] Shorten, *supra* note 168.

[172] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 22

[173] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 23

[174] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 28

[175] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 41

women present from all parts of Canada" supported recommendations for advocacy directed at the House of Commons.[176]

George Manuel, president of the National Indian Brotherhood, addressed the conference. He mentioned education, economic development, the Mackenzie Valley pipeline, hunting and fishing rights, and aboriginal rights, concluding that: "I think it is time we quit pussyfooting around and say that Canada is ours. We were here first. … for the Canadian people to deny this is to deny justice to the Indian people of Canada."[177] He made no remarks, however, about the rules in the *Indian Act* on status and marriage.

The other major action item of the 1971 conference concerned the establishment of a national Indigenous women's organization. Flora Mike from Saskatchewan spoke of the difficulties in creating an organization that brought together treaty, non-treaty, and Métis women, as the groups had different concerns.[178] Eileen Marquis from Quebec explained that it was difficult for the Mohawks in Quebec to organize with people in the northern part of Quebec because they spoke French and couldn't understand one another.[179] The conference set up a steering committee to discuss the issue. The committee included Evelyn Paul from BC, Monica Turner from Ontario, and Eileen Marquis from Quebec, and others.[180] At this stage, the women in leadership positions were united around the idea of one national Indigenous women's organization.

Despite this initial unity, the subsequent conference witnessed the birth and fracturing of a national Indigenous women's movement, with the fracturing mainly rooted in the differences between status and non-status women. At the 1972 National Native Women's Conference in Saskatoon, marriage and status dominated the conference and divided delegates. Personal attacks flew back and forth.[181] Some women supported the views of speakers like Marie Smallface Marule and Jeannette Corbiere-Lavell and advocated activism to reform the *Indian Act* and end discrimination against women. Marule affirmed the view that being an Indian was more than a scrap of paper from the government: "Is there a word in your language for non-status?" But, she said, she believed that "each band should decide who belongs to the band, who lives on the land."[182] For Corbiere-Lavell, the crux of the matter was the legal effects of marriage:

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[176] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 42

[177] First National Native Women's Conference, 22 March 1971, *supra* note 169 at iv.

[178] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 29

[179] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 31

[180] First National Native Women's Conference, 22 March 1971, *supra* note 169 at 46

[181] "National Native Women's Conference", *Saskatchewan Indian* (March 1972) 2; "Laval case", *Saskatchewan Indian* (March 1972) 4.

[182] Catherine Shorten, "Status question divides Indian women", *Western Producer* (30 March 1972) 51.

"By the *Indian Act* it is only registered Indian women who lose certain rights when they marry, other women in Canada do not."[183]

Others followed the line taken by Mary Ann Lavallee of Saskatchewan and Agnes Bull of Alberta. Lavallee explained the loss of status upon marriage as a consequence of the marriage sacrament, "the natural order, the unwritten law." Furthermore, she said, "the security of reserves will be undermined by the influx of white marrieds."[184] According to Agnes Bull,

> If a white man is allowed on the reserve, he will go all the way. We will lose the little land we have left. … You ladies got married to a white man and now you turn around and say you are discriminated against. … You have no confidence in your men. You think they might not provide for you.[185]

Mary Anne Lavallee of Saskatchewan submitted a declaration to the chairman of the conference. Signed by Lavallee in the name of 'Saskatchewan Indian Women', the declaration rejected any resolutions dealing with the effect of marriage on band membership and demanded that the recommendation on marriage and the *Indian Act* "be stricken from the records of the Royal Commission on the Status of Women."[186] Furthermore, the declaration stated that Saskatchewan delegates at the conference refused to recognize the National Indian Women's Group as a legally organized body and stated that the authority for matters of band membership rested only with "our elected Band Councils and they, in turn, consult with their Band Members."[187]

The conference leadership blocked an effort to put section 12(1)(b) on the conference agenda. Some delegates felt that discussing the issue of inter-marriage at a conference that included Treaty and Métis women represented an obvious threat to unity and collaboration.[188] In Steinhauer's recollection, Monica Turner got up and asked anyone who wanted to continue this discussion to meet outside.[189] The group included Mary

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[183] *Ibid*.

[184] *Ibid*.

[185] *Ibid*.

[186] Saskatchewan Indian Women, "Resolution presented at the 1972 National Native Women's Conference to the Government of Canada" (23 March 1972), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-13)) [Saskatchewan Indian Women Resolution, 1972 Conference, 23 March 1972]

[187] Saskatchewan Indian Women Resolution, 1972 Conference, 23 March 1972, *supra* note 186

[188] Second Alberta Native Women's Conference, 3 March 1969, *supra* note 146 at 48

[189] Steinhauer dated the founding of Indian Rights for Indian Women. She dates this event to a meeting in Saskatoon in March 13, 1968. However, the Voice of Alberta Native meeting in March 1968 was held in Edmonton, not Saskatoon, and the women she lists in the group were not on the participant list. She also

Two-Axe Earley, Marie Small Face Marule, Philomena Ross, Frieda Patiel, Jenny Margetts, Mary Louise Frying Pan, Philomena Aulotte, Ethel Johnson, Kathleen Steinhauer, and three others. Monica Turner was named the eastern president, and Jenny Margetts, the western president.[190] The meeting formalized the Ad Hoc Committee that had first emerged in the conversation around Jenny Margetts' kitchen table. A national committee, Indian Rights for Indian Women, was founded.[191]

The Founding of Two National Indigenous Women's Organizations

Indian Rights for Indian Women (IRIW) was a loose coalition of activists in different communities, spanning tribal lines, from across the country. As the organization developed, it linked activism by women across the country.[192] Women worked together informally, usually as volunteers and with almost no funding, writing letters, organizing events, and raising awareness. Their politics was "not the Ottawa kind … but kitchen work."[193] Their strategy "was to host small meetings, spread the word, and women and some men came."[194] They focused their attention on lobbying Ottawa. They depended on small donations from family and friends, law students and lawyers who donated time pro bono, and a few sympathizers in the non-Indigenous community. They had the help of determined young law students, Jim Robb and Jean McBean, and prominent women's rights lawyer from Edmonton, Marguerite Ritchie, supported the group.[195]

While the founders of Indian Rights for Indian Women were meeting in the basement, the other delegates also discussed establishing a national organization. A steering committee was struck to study the question. The National Committee for Native Women of Canada included Jean Goodwill (Saskatchewan), Bertha Clark (Alberta), and Rose Charlie (British Columbia).

The constitution of a new national women's organization was drafted in July 1973. Assisted by a grant from the Secretary of State's Native Women's Program, a planning and executive meeting took place early in 1974, and in August 1974 the first annual assembly of the Native Women's Association of Canada took place in Thunder Bay,

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mentions that the Ad Hoc Committee which led to Indian Rights for Indian Women was inspired in part by the Lavell case, but Jeannette Lavell had only just met her would-be husband in 1968.

[190] Carlson, Goyette & Steinhauer, *supra* note 28 at 63.

[191] Shorten, *supra* note 182.

[192] Carlson, Goyette & Steinhauer, *supra* note 28 at xxxvi.

[193] *Ibid* at xvi.

[194] *Ibid* at xv.

[195] Marguerite Ritchie was born in Edmonton in 1919. In 1963, she was the first Canadian female lawyer named a federal Queen's Counsel. See: *Ibid* at 85, 135.

Ontario.[196] NWAC's structure was based on local chapters at reserve level, who were represented by provincial or territorial member associations (PTMAs). The PTMAs fed into the national level organization, the Native Women's Association of Canada. The Quebec Native Women's Association was formed in 1974.

Many of these organizations formed out of pre-existing organizing work by women. For example, in Ontario, women joined forces in 1971 to create an organization that combined status, non-status, and Métis women.[197] Funded by a $5000 grant from the government's Citizenship Secretariat, a convention was held in May 1972, leading to the founding of the Ontario Native Women's Association.[198] The group could not get funding from the Department of Indian Affairs and Northern Development, because of the involvement of non-status and Métis women in the group.[199] A briefing produced by the association stressed that the organization was based on "the concept of unity of all Indian women, regardless of legal categories."[200] Jeannette Lavell was a founding member of the association and Monica Turner its first president. Both Lavell and Turner were also key players in Indian Rights for Indian Women. But the issue of loss of status upon marriage was noticeably absent from the organization's founding documents. The remit of the Ontario Native Women's Association spanned the social, cultural, and economic development of Indian society. The group's founding brief concludes by stating "the traditional culture of our people, founded on concepts of community, democratic self-government, and mutual co-operation, has much to teach modern white society."[201]

The work of the Native Women's Association of Canada ranged from "encourage[ing] Indian women to assume a more positive and active role" to "assist[ing] in the … stimulation of interest in … arts and crafts, folklore, cultural tradition."[202] The organization had an executive and board of directors with representation from the provinces and territories. The first president was Bertha Clark, who had headed the first

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[196] Native Women's Association of Canada, "NWAC - A Voice of Many Nations" (1 September 1985), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 73) [NWAC, Voice of Many Nations, 1 September 1985] at 3

[197] Nancy Janovicek, "'Assisting our own': Urban Migration, Self-Governance, and Native Women's Organizing in Thunder Bay, Ontario, 1972-1989" (2003) 27:2 The American Indian Quarterly 548 at 553.

[198] Ontario Native Women's Association, "Briefing: The Ontario Native Women's Association: Its Foundation, Aims and Objectives" (30 May 1972), in Ottawa, Library and Archives of Canada, (RG6-F-4, File No. CB 9-390-59, Box 97) [Ontario NWA, Briefing, 30 May 1972]

[199] Citizenship Secretariat, "Funding of Ontario Native Women's Association" (2 March 1972), in Ottawa, Library and Archives of Canada, (RG6-F-4, File No. CB 9-390-59, Box 97)

[200] Ontario NWA, Briefing, 30 May 1972, *supra* note 198

[201] Ontario NWA, Briefing, 30 May 1972, *supra* note 198

[202] NWAC, Voice of Many Nations, 1 September 1985, *supra* note 196 at 4

conference convened by Voice of Women Alberta. The organization operated without core funding or national office until 1980.

Until late in the 1970s, no bright line separated Indian Rights for Indian Women (IRIW) and the Native Women's Association of Canada (NWAC). IRIW and NWAC were forged in the same fires at the same conference. Between 1974 and 1984, the Board of Directors of NWAC included women who were also involved with Indian Rights for Indian Women, like Rose Charlie, Jeannette Corbiere Lavell, and Jane Gottfriedson.[203] The main differences concerned scope and institutional form. The sights of IRIW were narrowly trained on discrimination in the *Indian Act*. NWAC's remit was broader. NWAC was formally constituted as an organization with provincial member organizations. NWAC pushed IRIW to expand its remit to issues like foster care, but IRIW remained focused on discrimination against Indigenous women in the *Indian Act*.[204] Indian Rights for Indian Women was the more overtly political organization, and it encountered greater government animosity and opposition than other Indigenous women's groups.[205]

Diverse and Heated Responses to Organizing by Indigenous Women

Opposing discrimination in the *Indian Act* was dangerous work. Leaders of Indian Rights for Indian Women received abusive phone calls and threats of violence. IRIW offices in Edmonton were vandalized.[206] In addition to this pressure from within their communities, women were the subjects of surveillance by the RCMP.[207]

People felt that the women were attacking the Treaties and threatening life on reserve. Carlson recalls a meeting in Vancouver with Indigenous leaders: "The leaders, they stood at each mic, and did they ever bawl us out."[208] Carlson said that the male leadership's defense of the rules on membership in the *Indian Act* came from 'brainwashing' by the colonial *Indian Act* and the residential school experience.[209] Steinhauer suggested that the men were afraid of the influence that urban, educated Indigenous women might have on reserve politics, and they were fearful that the women would scupper the gains they were making in negotiating with the federal government.[210] Once the National Indian Brotherhood took a public stance against the

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[203] NWAC, Voice of Many Nations, 1 September 1985, *supra* note 196 at 4-16.

[204] Carlson, Goyette & Steinhauer, *supra* note 28 at 68.

[205] Jamieson, Kathleen, *supra* note 124 at 173.

[206] Carlson, Goyette & Steinhauer, *supra* note 28 at 93.

[207] *Ibid* at 82–83.

[208] *Ibid* at 66.

[209] *Ibid* at xxxvi.

[210] *Ibid* at xxxvii.

women advocating to end discrimination in the *Indian Act*, tension surfaced between Indian Rights for Indian Women and Marie Small Face Marule. Steinhauer reminisced that Marule "got into an awful tangle once the National Indian Brotherhood turned against us, but I am grateful to her."[211]

Opposition came from close quarters. Leaders in Alberta were well acquainted with Harold Cardinal, the influential Cree political leader and president of the Indian Association of Alberta from 1968 to 1977. Kathleen Steinhauer, a founder of the Alberta women's movement, was a cousin of Eugene Steinhauer. Eugene Steinhauer founded the Alberta Native Communications Society and became president of the Indian Association of Alberta in the early 1980s. Eugene Steinhauer was a staunch advocate of Aboriginal and treaty rights but opposed activism by women who wanted to get back their Treaty rights.[212]

Some chiefs in British Columbia argued that there was no need for a separate women's organization like the BC Indian Homemakers' Association), as the UBCIC could represent everyone's interests. Others thought that women should participate as 'auxiliaries' to the main organization.[213] In his keynote to the first national native women's conference, George Manuel, leader of the NIB, was circumspect about a new national women's organization, suggesting instead that "You, as women, will have to support the other Indian organizations."[214] This attitude was not unanimous, however. Chief Forrest Walkem of British Columbia pointed out that the relationship between the UBCIC and the BC Homemakers' Association was complementary, and he knew of "at least three women chiefs who belong to the Homemakers and who are also members of our Union... If the ladies want to voice their opinions, I think we should let them do so."[215]

Steinhauer recalled that "Some men agreed with us quietly, we know they did. … These men would speak publicly against us, but privately we knew many understood and sympathized with our situation."[216] Carlson recalled a conversation with leader of the Indian Association of Alberta, Harold Cardinal:

> Once I talked with Harold Cardinal about section 12(1)(b). I said: 'You know we're right.' And he said: 'Yes, I know, but my

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[211] *Ibid* at 61.

[212] *Ibid* at 142.

[213] Barkaskas, *supra* note 132 at 18.

[214] First National Native Women's Conference, 22 March 1971, *supra* note 169 at iii.

[215] Barkaskas, *supra* note 132 at 18.

[216] Carlson, Goyette & Steinhauer, *supra* note 28 at 69.

> constituents don't know.' We had long talks about the issue in Cree. He was always respectful.[217]

Indigenous women earned the enmity of other women, even within their families. The women most opposed to them were non-Indigenous women who had gained status through marriage. For example, Kathleen Steinhauer's own mother, an American-born woman of Scottish origins, opposed her daughter's campaign.[218] These women felt their acquired rights were under threat. Others felt that women had 'made their beds' when they married out, and they had to face the consequences.

A small minority of women invoked respect for patriarchal traditions and wifely duties as their basis for opposition. Saskatchewan activist Mary Ann Lavallee believed that "[t]here is no greater or nobler calling on earth than the one of becoming a mother."[219] But this view was not linked to a message of feminine submission. At the 1970 conference of Saskatchewan Indian women, Lavallee challenged women to look to themselves to organize, rather than asking the government for help.[220] When the federal government allocated all funding for Indian women to the Federation of Saskatchewan Indians, Lavallee led the charge for the founding of an independent Saskatchewan Indian Women's Association in June 1971.[221] Lavallee would go on to represent the Federation of Saskatchewan Indian Nations during debates on *Indian Act* reforms in the early 1980s. She consistently advocated the participation of women in an independent organization. Yet, in addition to a firm stance on women's political voice, she argued consistently against amendments of the *Indian Act* to repeal the marrying out rule.

For many women in the Indigenous women's movement, their campaign included the rights of men.[222] Many non-status men did not have Indian status or Treaty rights precisely because their mothers had lost status through marriage. Men had been enfranchised in other ways. For example, men came back from serving in the military, signed papers in order to get veterans' benefits, and discovered later that they had signed out of Treaty. The multiple routes to loss of status gave women and men grounds for common cause. Some men with status and Treaty rights faced censure for their support of the women's activism. For example, the brother of Philomena Ross, one

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[217] *Ibid*.

[218] *Ibid* at 66.

[219] First Alberta Native Women's Conference, 12 March 1968, *supra* note 136 at 7

[220] Shorten, Catherine, "Indian women vote for independence", *Western Producer* (3 September 1970).

[221] Letter from Unknown to Mrs. Graham Spry, Federated Women's Institutes of Canada (1 December 1970), in Ottawa, Library and Archives of Canada, (MG30-C249, File 23); "Saskatchewan Indian Women's Association", *Saskatchewan Indian* (January 1972) 9. Whiteside, National Indian Brotherhood, *supra* note 128 at 21.

[222] Carlson, Goyette & Steinhauer, *supra* note 28 at 59.

of founders of Indian Rights for Women, had his garage burned down after he publicly declared his support for the women.[223]

Alberta proved to be a key site for building the relationship between the women's groups and non-status groups. Christine Daniels (née Whiskeyjack) was a vice president of the Voice of Alberta Native Women and a member of Indian Rights for Indian Women.[224] She lost her Indian status when she married Stan Daniels. Stan Daniels (1924-1983) was a Métis activist and, in 1967, became the first president of the Métis Association of Alberta. When the National Indian Council folded in 1968, Daniels had been influential in brokering the inclusion of non-status people under the umbrella of the Métis. The Alberta women also knew Harry Daniels (1940-2004), a Métis activist from Saskatchewan. Harry Daniels was vice president of the Métis Association of Alberta in 1972 and leader of the Native Council of Canada from 1976 to 1981.[225]

The Native Council of Canada supported Indian Rights for Indian Women in their campaign to regain status under the *Indian Act*. In a published statement, the NCC described the *Indian Act* as discriminatory towards women. The NCC's concern was that the *Indian Act* "divide[d] the Indian people on the basis of their choice of marriage partners."[226] But the NCC stopped short of an open attack on status Indian organizations:

> The Native Council of Canada in no way wishes to prejudice the position that may be taken by the National Indian Brotherhood or its member organizations nor is its action intended to weaken or refute the demands of the Status Indian organizations in Canada to the full protection of their special rights that are guaranteed by the *Indian Act*.[227]

Women activists cultivated links with these non-status organizations. For example, Gail Stacey-Moore, a Mohawk woman from Kahnawake, joined the executive of the Quebec branch of the Native Council of Canada. She believed that women were not getting anywhere with the status groups, and they needed to connect their cause to a more powerful lobby.[228]

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[223] *Ibid* at 143.

[224] *Ibid*.

[225] "Harry Daniels, Métis National Council", online: *Metis Nation* <http://www.metisnation.ca/index.php/who-are-the-metis/order-of-the-metis-nation/harry-daniels>.

[226] "Council Supports Women's Fight", *The Indian Voice* (January 1973) 1.

[227] *Ibid*.

[228] Judy Rebick, *Ten Thousand Roses: the Making of a Feminist Revolution* (Toronto: Penguin Canada, 2005) at 109.

Conclusion: The Indigenous Women's Movement

By 1974, the Indigenous women's movement had two national organizations, the Native Women's Association of Canada (NWAC) and the Indian Rights for Indian Women (IRIW). Although their paths would eventually diverge, by 1974, there was no clear line between them. Both shared leadership, had emerged from the same conference, and were devoted to improving the lives of Indigenous women. IRIW could be considered a specialist and independent task force, its sights trained solely on ending sex discrimination in the *Indian Act*. Whereas NWAC brought together status and non-status women, the reins of IRIW were held by non-status women. Both organizations operated on a largely volunteer basis, and the little funding provided by the federal government sharpened the line dividing status and non-status Indians. Leading members of both organizations were closely connected to leadership of the National Indian Brotherhood and Native Council of Canada, demonstrating both the relevance of kinship ties and the close-knit nature of Indigenous political networks. The Indigenous women's movement was neither homogeneous nor centrally coordinated. A woman leader in Saskatchewan defended the existing patrilineal rules on Indian status. Women in British Columbia were central to BC's movement for Indigenous self-determination. A woman from Quebec forged important links with the white-led women's movement. Indigenous women leaders encountered resistance from some quarters, but they also garnered the support of the organization representing non-status Indians and the white-led women's movement.

The Women's Movement defends Gender Equality and a Federal Canada

The Canadian women's movement grew in strength following the Royal Commission on the Status of Women. By the early 1970s, the movement contained diverse organizations, organized into coalitions and umbrella groups, reflecting wide differences of opinion on policy.[229] The movement combined grass-roots networks, a base of middle-class supporters, and smaller groups of professional experts, located inside and outside government. Consciousness-raising groups disseminated information, provided forums for critical discussion, and mobilized women into a grass-roots movement.[230] Local and provincial organizations channeled activism, initially into feeding views into the hearings of the Royal Commission on the Status of Women and then into actions ranging from Take Back the Night demonstrations to union campaigns.[231]

The report of the Royal Commission on the Status of Women raised expectations about legislative reforms and positive changes for women's rights. By 1972, patience had

[229] Amy Gill, *In Their Finest Hour: Deciphering the Role of the Canadian Women's Movement in the Formulation of the Charter of Rights and Freedoms* (M.A. (History), University of Ottawa, 2010) [unpublished] at 6.

[230] *Ibid* at 70.

[231] *Ibid* at 72.

worn thin. Hundreds of women gathered at the 'Strategy for Change' conference in April 1972. The assembly founded the National Action on the Status of Women (NACSW), often referred to simply as 'NAC'. It was created initially simply to monitor implementation of the recommendations of the RCSW.[232] During its early days, from 1972 to 1978, NAC's work was done by middle-class, educated volunteers operating out of a Toronto office. It was primarily a lobby shop, and

> it chose leaders experienced in the official political process, who would intuitively understand the kind of group that would succeed in the federal system … [it] was consequently seen by many … as a traditional Toronto 'club', reluctant to share power by developing a broader base.[233]

From this rather elitist start, NAC grew to represent more than 600 women's groups, including both conservative women's groups, like church groups, and radical groups, like rape crisis centers and unions. It ended up being the primary voice of a multi-generational national women's movement.

The influential women from Toronto who started NAC sought to knit together two generations - older, establishment feminists and a dynamic younger generation influenced by radical feminism.[234] The first generation leaders were already well-connected to mainstream sites of political power. NAC's founding president was Laura Sabia (1916-1966), a Progressive Conservative and head of the Canadian Federation of University Women.[235] Sabia had been chair of the Committee for the Equality of Women (CEW) and played a key role in forcing the government to create the Royal Commission on the Status of Women. Therese Casgrain, a leader of the Quebec feminist movement, and Florence Bird, chair of the Royal Commission on the Status Women, participated in NAC's founding conference.[236] Journalist Doris Anderson (1921-2007) had served as editor of the women's magazine, *Chatelaine*, from 1957-1977. The magazine shaped English-speaking Canadian feminism of the 1950s and 1960s, with reporting and calls to action on access to contraceptives, maternity leave, equal pay, and pension benefits.[237] Anderson ran unsuccessfully as a Liberal candidate in a 1978 by-election. She served as chair of the CACSW from 1979, resigning in protest, and then becoming president of the National Action Committee on the Status of Women from 1982 to 1984. Lynn McDonald

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[232] Vickers, Rankin & Appelle, *supra* note 15 at 74.

[233] *Ibid* at 76.

[234] Rebick, *supra* note 228 at 27.

[235] *Ibid* at 23.

[236] *Ibid* at 29.

[237] See Valerie J Korinek, *Roughing It in the Suburbs: Reading Chatelaine Magazine in the Fifties and Sixties* (Toronto: University of Toronto Press, 2000).

(1940-), a sociology professor, was chair of NACSW from 1979 to 1981. The older generation was not uniformly moderate. Madeleine Parent (1918-2012) was a leftist union leader from Quebec. Kay Macpherson (1913-1999), chair of NACSW from 1977 to 1979, had founded Voice of Women in 1960 and been a jailed for her activism against nuclear weapons.[238]

This older generation of feminist activists linked up with a clutch of women lawyers from Toronto.[239] The increase of women law graduates throughout the 1960s and 1970s was central to the growth of the women's movement.[240] Mary Eberts, Marilou McPhedran, and Beverley Baines were among the second-generation legal strategists. Eberts began her law teaching career in 1974 at the University of Toronto, before joining Tory, Tory, Deslauriers and Binnington, a leading equality rights firm, in 1980. Baines was (and is) a law professor at Queen's University. Eberts and Baines wrote NACSW's studies of the proposed amendments to the Constitution. Marilou McPhedran graduated from Osgoode Hall Law school in 1974 and began her legal and activist career in a rape crisis centre. Based in Toronto, she worked as a contract lawyer on a range of human rights issues before joining NAC in the late 1970s.

In addition to the well-heeled and degree-toting leadership of NACSW, the women's movement also had important contacts in government and in Parliament. In 1973 the federal government established the Canadian Advisory Council on the Status of Women (CACSW), an external, quasi-independent research agency. The CACSW had 28 members from across the country, including the heads of major organizations like the FFQ and NAC. Its mandate was to advise the Minister responsible for the status of women.[241] Using their direct access to government, staff at the CACSW fed information to local, provincial, and national organizations about how and when to push for policy changes.[242]

NAC also had cross-party contacts in Parliament. Friends of the movement included Pauline Jewett (1922-1992), a political science professor, who had resigned as a Liberal MP over Trudeau's use of the *War Measures Act*, and was then re-elected for the NDP in 1970, Flora MacDonald (1926-2015), a Conservative MP elected to the House of Commons in 1972, and Senator Joan Neiman (1920-), a lawyer and stalwart Liberal party supporter.

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[238] "Obituary: Kay Macpherson", online: *Canadian Centres for Teaching Peace* <http://www.peace.ca/kaymacphersonhero.htm>.

[239] Gill, *supra* note 229 at 62.

[240] Charles R Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (Chicago: University of Chicago Press, 1998) at 148–150, 184.

[241] Vickers, Rankin & Appelle, *supra* note 15 at 78. (Vickers 78)

[242] Gill, *supra* note 229 at 65.

The founding president of NACSW, Laura Sabia, insisted on bringing everyone in, including the most radical groups. At the first conference, the pearls-and-sweater-set crowd broke bread with consciousness-raising bra-burners. But this effort at unity papered over significant ideological divisions within the movement. Still smarting from the disappointments of provincial and federal human rights and anti-discrimination statutes, liberal feminists pushed for legal equality and equality of opportunity, including entry into the work force, equal pay, and participation in public policy processes. Socialist feminists privileged, in contrast, systemic problems like material poverty and lack of maternity leave and childcare. The radical feminist wing of the movement denounced 'equal opportunity', instead stressing pervasive gender bias and issues like violence against women reproductive rights. Notwithstanding this diversity, NAC's moderate stance was visible in its tepid support for the rights of lesbians, its basic defense of private property, and its belief in law and the state as progressive vehicles for social change.[243]

An ideologically divided, English-speaking feminist movement intersected with equally diverse movements by French-speaking Quebec women and Indigenous women. In Quebec, the women's movement was deeply influenced by the Quiet Revolution.[244] After the success of the Quiet Revolution, Quebec nationalism intensified throughout the sixties and seventies. For Quebec separatists, the full-throated expression of the collective rights of Francophone Quebecois could only be realized through secession from Canada. Though the Quebec nationalist movement decried the oppression of the Quebecois as a stigmatized and colonized minority, it was, at the same time, often misogynistic.[245] A militant feminist movement emerged in the early 1970s, calling both for an end to gender oppression and for the liberation of Quebec.[246] These women gathered around the slogan, "Pas de liberation des femmes sans Quebec libre, pas de Quebec libre sans liberation des femmes."[247] For the feminist wing of the Quebec sovereignty movement, liberation rested on the recognition of collective rights and the

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[243] Vickers, Rankin & Appelle, *supra* note 15 at 25.

[244] See Micheline Dumont, "The Origins of the Women's Movement in Quebec" in Constance Backhouse & David H Flaherty, eds, *Challenging Times: the Women's Movement in Canada and the United States* (Montreal, Que.: McGill-Queen's University Press, 1992) 110; Micheline De Sève, "The Perspectives of Quebec Feminists" in Constance Backhouse & David H Flaherty, eds, *Challenging Times: the Women's Movement in Canada and the United States* (Montreal, Que.: McGill-Queen's University Press, 1992) 110.

[245] Sean Mills, The empire within postcolonial thought and political activism in sixties Montreal (Montreal: McGill-Queen's University Press, 2010).

[246] Sean Mills, "Québécoises deboutte! Nationalism and Feminism in Quebec, 1969-1975" in Mona Lee Gleason, Adele Perry & Tamara Myers, eds, *Rethinking Canada: the Promise of Women's History* (Don Mills, Ont.: Oxford University Press, 2011) 339.

[247] Vickers, Rankin & Appelle, *supra* note 15 at 56.

self-determination of Quebec. The problem was that NAC was "committed primarily to an individualist notion of women's equality."[248]

The assumption among Anglophone women's groups was that the thinking Quebecoises were united in their opposition to secession. As de Sève recalled, "I remember the felling that when you are in an English Canadian environment, and you begin to talk about politics, it's like they infer that being educated and rational and feminist you *had* to be pro-Canada."[249] In fact, the Quebec women's movement was internally divided on secession: "the truth is that females were, like males, equally split."[250] Large official organizations like the Federation des femmes du Quebec stayed neutral on the question. As the FFQ represented the Quebec women's movement at NAC, NAC had little direct contact with sovereignty-seeking feminists.[251]

Aside from the question of Quebec secession, Quebec and rest-of-Canada feminists also diverged in their views about federal and provincial governments. Quebec feminists tended to view their provincial government as more progressive than the federal government. Feminists from the rest of Canada viewed the federal government more favorably than the provinces, fearing a patchwork of provincial fiefdoms of inequality. For example, when the federal government proposed to transfer jurisdiction for divorce to the provinces, it split the national movement, as many Quebec feminists considered Quebec family law to be more progressive than anything the federal government could offer.[252]

Trudeau's constitutional exercise was in large measure an effort to stymie the Quebec secession project. As the English-speaking women's movement wanted a stronger *Charter* with a better deal for women, it became classed, necessarily, on the side of a united Canada. An in-built federalism in the English-speaking women's movement clashed with the perceived parochialism of Quebec feminists. The Liberal party exploited the federalist leanings of Anglophone feminists, also drawing on their existing attachments to the Liberal party. Trudeau tried to use the movement in the campaign to prevent Quebec's secession.[253] The Secretary of State's Women's Program,

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[248] *Ibid* at 7.

[249] Interview with M. de Sève, quoted in Laura Bonnett, *Toward a More Inclusive Concept of Citizenship: Women and the 1981 Ad Hoc Constitutional Conference* (M.A. (Canadian Studies), Carleton University, 1997) [unpublished] at 42.

[250] De Sève, *supra* note 244 at 113.

[251] Vickers, Rankin & Appelle, *supra* note 15 at 8.

[252] *Ibid* at 110.

[253] *Ibid* at 29, 82.

for example, increased funding to organizations that were willing to become effectively bilingual.[254]

The English-speaking Canadian women's movement dismissed any dissension by Quebec feminists – regardless of their views on secession – as a product of Quebec nationalism. The 'difference' of women from Quebec was entirely attributed to their national identity. It was a collapsing of duality that erased the ways that "the women of Quebec did not betray the cause of women; they did not put the Quebec cause before women's cause. They simply defined what seemed indispensable for them to remain both feminists and Quebecers."[255] The move erased the nationalistic commitments of the feminist movement – or, as De Sève put it, "as if being federalist was not another form of nationalism, asserting a monolithic conception of Canadian unity based on the dominion of English Canada."[256] The nationalism of Quebec feminists was routinely presented as "treacherous, emotional, or locally oriented", while English-speaking feminists maintained a 'pure' and rational feminist position, devoid of nationalist sentiment.[257] As De Sève said to the Anglophone feminists, "nationalism does not move Quebec women away from feminism any more than your feelings as Canadians prevent you from networking with feminists from other countries."[258] Quebec feminists were read as either 'same' – just like English-speaking feminists – or 'different' – Quebecois. No conceptual space remained for a politics built on both. These differences deepened as the movements grew to incorporate more women. English-speaking activists within NAC had very little understanding of the range of forces at work in the Quebec women's movement. The mutual incomprehension deepened as the movements on both sides became less elitist and the percentage of bilingual women declined, leading eventually to total communication breakdowns.[259] NAC was largely unsuccessful in maintaining relationships with Francophone feminists in Quebec. In 1981, the Federation des femmes du Quebec withdrew from NAC.

The reaction to the sovereignty wing of the Quebec women's movement is important to understanding how the English-Canadian movement interpreted the sovereignty talk of Indigenous women. The appearance of collective rights to Quebec sovereignty took place at about the same time as Indigenous mobilization for self-determination and the respect of treaty and Aboriginal rights. Much like their reaction to feminists pushing for Quebec nationalism, the English-speaking feminist movement dismissed claims for

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[254] *Ibid* at 82.

[255] Dumont, *supra* note 244 at 89.

[256] De Sève, *supra* note 244 at 115.

[257] *Ibid*.

[258] *Ibid* at 116.

[259] Vickers, Rankin & Appelle, *supra* note 15 at 9.

Indigenous sovereignty as 'sullying' the cause of women's equality. This erased the fact of a white settler state sovereignty underpinning this 'pure' campaign for equality rights. Indeed, De Sève explicitly connected the nationalism of some elements of the Quebec feminist movement to the self-assertion represented in an Indigenous women's decision to be a member of the Assembly of First Nations.[260]

The issue of discrimination against Indigenous women was not a centerpiece of the feminist movement in the sixties. But when the report of the RCSW framed the marrying out rule as a problem of formal, legal inequality based on sex, the issue fell precisely in the wheelhouse of NAC. Mary Two-Axe Earley linked the Indigenous women's movement to the white-led women's movement represented by NAC.[261] Two-Axe Earley had a long-standing collaboration with Quebec feminists Therese Casgrain and Madeleine Parent. However, the relationship between Indigenous women and the white feminist movement proved to be fraught and one-dimensional. Gail Stacey-Moore remembers that "NAC was incredible to Mary and her group." But, although the women were invited to every NAC meeting,

> It was felt it was a solidarity thing rather than being part of the organization. Because we were raised in a different culture, there were too many differences. There are women's issues and cultural issues. … Even people who I thought were advanced in their thinking unintentionally said hurtful things.[262]

Structurally, NAC had no means of engaging with women who were advocating the sovereignty of Indigenous nations over questions of citizenship and membership, as it had no relationships with Indigenous women "who believed that the rights of individual native women could not be secured unless the collective rights of the First Nations were secured."[263] Indigenous nationhood was defined as a different type of problem from gender equality, in the same way as white Anglophone women treated the sovereignty talk of Quebecois feminists. Just as in the case of Quebec feminists, NAC tuned out when Indigenous women started talking about collective rights and self-determination.

Conclusion

By 1974, the picture drawn by these multiple and dynamic threads was of a federal political arena populated by Trudeau's Liberals, an elite-led Anglophone white women's movement, and a legalistic human rights movement, loosely united in an

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[260] De Sève, *supra* note 244 at 115.

[261] Vickers, Rankin & Appelle, *supra* note 15 at 220.

[262] Rebick, *supra* note 228 at 110.

[263] Vickers, Rankin & Appelle, *supra* note 15 at 9, 220.

ardent defense of individual rights against attacks from Quebecois separatists and Indigenous proponents of sovereignty and collective rights.

Then, the Supreme Court decided *Lavell & Bedard*.

8. *Lavell*, Coalitions, and Resurgence: The Staging of a Political Conflict

Introduction

In 1973, the Supreme Court decided that the status rules in the *Indian Act* did not violate women's rights to equality, in a case launched by Jeannette Corbiere Lavell, a leader of Toronto's Indigenous resurgence. Lavell's legal challenge generated two interpretations of the fundamental nature of the marrying out rule in the *Indian Act*: it was either the site of a threat to Indigenous sovereignty or a threat to women's equality rights. Each reading was seized by national activists. Due to the judgment's analysis of the equality promises in the *Canadian Bill of Rights*, discrimination against Indigenous women became an issue of concern to the white-led women's movement. Some in the Indigenous women's movement allied with the women's movement in opposing sex discrimination in the *Indian Act*. National Indigenous organizations, on the other hand, were galvanized by the court's decision and hardened their advocacy stance regarding self-governance and Indian Rights. Meanwhile, federal Indian policy stumbled along, pinioned between waning public interest in the 'Indian problem' and an Indigenous movement emboldened by legal victories, increasingly audacious public mobilization, and young, dynamic leadership from Alberta and British Columbia. By the end of Trudeau's term as prime minister, Quebec separatists would rise to provincial power, and Trudeau would press for a new constitution to unite the country. The issue of *Indian Act* reforms would thus be upstaged by Quebec nationalism and the constitutional agenda.

Lavell & Bedard

In 1973, the Supreme Court of Canada decided on the validity of the status system in the *Indian Act*. The case was a turning point on the legal and political front. Legally, it brought into focus the very dire health of equality law under the *Canadian Bill of Rights*. Politically, it reconfigured and sharpened alliances and enmities among social movements. The story begins in Toronto with a woman named Jeannette Corbiere.

Jeannette Corbiere Lavell, an Ojibwa from Manitoulin Island, Ontario, moved to Toronto as a young woman. Born in 1942, she was registered as a status Indian and member of the Wikwemikong. After following courses in business studies, Corbiere Lavell returned home briefly to work for Indian Affairs. The pull of the big city drew her to Toronto in the height of the mid-sixties Indigenous resurgence. Through the Indian Friendship Centre, she became involved in the revival of Indigenous dances, songs, culture, and art and was crowned 'Indian Princess of Canada' in a national competition in 1965. She was a founding member of the Canadian Indian Youth Council, along with Harold Cardinal and other young leaders.[1] She joined the Company of Young Canadians, a youth program modeled after the US Peace Corps that placed volunteers in small communities. In her role as Youth Coordinator at the Indian Friendship Centre, Corbiere Lavell met young lawyer Clayton Ruby and invited him to

[1] *Sawridge Band v. Canada*, 2008 FC 322, Docket No. T-66-86, (Willsay of Jeannette Corbiere Lavell, on behalf of Native Women's Association of Canada" (2006) at 3 [*Sawridge*, Corbiere Lavell Willsay, 2006]

give workshops at the Centre about legal rights. Having been called to the Ontario Bar in 1969, Ruby was just embarking on a legal career in criminal and constitutional law advocacy.[2] One contemporary described the milieu in which Lavell was operating in the following words:

> she [Jeannette Lavell] was in very activist circles and hung out with a lot of media people and a lot of glamorous people if I can put it that way. And of course, Clay Ruby was in that circle of glamorous people. … they were defending the rights of street kids in Yorkville. He was really hip. … And I think Jeanette was more in that crowd … because she did a lot of modeling; she was winner of a lot of Indian princess type beauty and talent contests and so on. So he took up her case.[3]

Corbiere Lavell established the Toronto Native Times, a community-based monthly newspaper that circulated between 1968 and 1981.[4] Through the newspaper, Corbiere Lavell met David Mills Lavell, a journalism student.[5] David Mills Lavell was not a status Indian. They married in April 1970.

Lavell knew before her marriage that the Department of Indian Affairs would strip her of her status and band membership upon marriage. Rooted in her activist work, she determined to not submit to this treatment and made the first move.[6] In October 1970, Clayton Ruby filed an injunction on Lavell's behalf prohibiting Indian Affairs from removing her name from the list of status Indians and the band list at Manitoulin Island. The grounds were sex discrimination prohibited under the *Canadian Bill of Rights*.[7] The Ontario Supreme Court declined jurisdiction, stating that Corbiere Lavell had to wait to be struck off before lodging a protest. In December 1970, Lavell received a letter to that effect from Indian Affairs. On 17 December 1970, Ruby filed a protest in response to Jeannette Lavell's removal from the band list.

The case was first heard at the York Judicial District County Court. Ruby re-iterated the argument that the marrying out rule in the *Indian Act* denied Indian women the equality before the law promised in the *Canadian Bill of Rights*. In a June 1971 decision, Judge Grossberg disagreed and confirmed Corbiere Lavell's loss of status and band

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[2] Clayton Ruby (1944-) would go on to become one of Canada's leading criminal defense and constitutional rights lawyers.

[3] Interview with author

[4] Heather Howard-Bobiwash, "Women's Class Strategies as Activism in Native Community Building in Toronto, 1950-1975" (2003) 27:2 The American Indian Quarterly 566 at 123.

[5] *Sawridge*, Corbiere Lavell Willsay, 2006, *supra* note 1 at 4

[6] *Sawridge*, Corbiere Lavell Willsay, 2006, *supra* note 1 at 4

[7] Farrell Crook, "Judge refuses ruling on removing woman from Indian band", *The Globe and Mail* (30 October 1970) 29.

membership. He thought little of her "emotional and militant evidence"[8] and her complaint that she was losing access to her community of birth: "[W]ith no disrespect to her, [I am] am unable to accept her assertion that she cannot retain her Indian culture, heritage and customs and inculcate these in her child or children if she so desires."[9] His reasons stressed that Lavell Corbiere's marriage "imposed on her the same obligations [that it] imposed on all Canadian married females."[10] The relevant comparator was "all other Canadian married females" and, relative to them, Corbiere Lavell was equal.[11] In its choice of 'all other married women' as the comparator group, the decision defined the case as being about gender equality, not Indigeneity. Indeed, Lavell recalled that the judge commented "about how I should be happy to no longer legally be an Indian and glad that marriage to David took me away from the terrible reserves."[12]

Corbiere Lavell appealed the decision to the Federal Court of Appeal and won. In October 1971, the Federal Court of Appeal decided that the *Indian Act*'s rules affecting married women constituted "discrimination by reason of sex within the meaning of the *Canadian Bill of Rights*."[13] The court reached this conclusion by comparing Indian women to Indian men and pointing to the different results of marriage for each group. The court stated that this constituted a denial of equality before the law, as they "abrogate, abridge, and infringe the right of an individual Indian woman to equality with other Indians before the law."[14] The comparator group was 'other Indians'.

Meanwhile, on a reserve about 100 kilometers east of Toronto, a woman and two children were fighting homelessness. Yvonne Bedard, an Onondaga woman, was born to status Indian parents on the Six Nations Reserve in Brantford, Ontario. She lost her Indian status and band membership in 1964 when she married a non-Indian. When she and her husband separated, Bedard returned to Six Nations with her two young children and moved into a house left to her by her mother. She soon received a notice from the Council of Six Nations, informing her that she was obliged to sell the house and leave the reserve because she was not a status Indian and could not inherit reserve land. Fearing an eviction, she sued the band council. Her lawyer filed an injunction to prevent an eviction citing the prohibitions against race and sex discrimination in the *Canadian Bill of Rights*.[15]

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[8] *Re Lavell and Attorney-General of Canada,* (York Judicial District County Court) (1971) 22 DLR (3d) 182 at 186 [*Lavell,* 1st instance, 1971]

[9] *Lavell,* 1st instance, 1971, *supra* note 8 at 187

[10] *Lavell,* 1st instance, 1971, *supra* note 8 at 186

[11] *Lavell,* 1st instance, 1971, *supra* note 8 at 186

[12] Speech by Jeannette Lavell, quoted in Suzack, Cheryl, "Law Stories as Life Stories: Jeannette Lavell, Yvonne Bédard, and Halfbreed" in Marlene Kadar, Warley, Linda and Perreault, Jeanne, eds, *Tracing the Autobiographical* (Waterloo, Ont.: Wilfrid Laurier University Press, 2005) 117 at 137.

[13] *Lavell v. Canada*, (Federal Court of Appeal) (1971) 22 D.L.R. (3d) 188 [*Lavell*, FCA, 1971].

[14] *Lavell*, FCA, 1971, *supra* note 13

[15] Suzack, Cheryl, *supra* note 12 at 119.

Bedard's case became linked to Corbiere Lavell's through the courts. The women did not know one another and their routes into litigation differed. Lavell was embedded in Indigenous rights activism, but Bedard was not.[16] The Ontario High Court heard Bedard's case in December 1971, a few months after the appellate court decision in Lavell. The court was persuaded by the Federal Court of Appeal's reasoning in *Lavell*. It decided that the *Indian Act* provisions "discriminate by reason of sex with respect to the rights of an individual to the enjoyment of property" and produced a different result between Indian men and Indian women who marry non-Indians.[17] The court declared the *Indian Act*'s marrying out rule (section 12(1)(b)) to be inoperative and granted Bedard an injunction to prevent the band council from evicting her from the reserve.

The judges deciding the cases of Bedard and Lavell were well aware of the political climate that had been created by the *Drybones* case and the debacle following the 1969 White Paper. Recall that *Drybones* had invalidated one section of the *Indian Act* as impermissible racial discrimination, thus paving way for the invalidation of the entire *Indian Act*. The 1969 White Paper had proposed the termination of Indian status. In the first instance decision in *Lavell*, the trial judge stressed that if the provisions in the Act were "distasteful or undesirable to Indians, they themselves can arouse public conscience, and thereby stimulate Parliament … to correct any unfairness or injustice."[18] In *Bedard,* the judge acknowledged that his decision might mean that "virtually the entire Act must be held to be inoperable." He pointed to the Supreme Court's statement that implementing the *Canadian Bill of Rights* may well give rise to great difficulties – implying that people would have to live with the consequences.[19] The decisions were thus situated in a climate of anxiety among the judiciary, who were apprehensive of encroaching on parliamentary jurisdiction by striking down laws.

Notwithstanding this judicial handwringing, by December 1971, two Indian women had brought the courts to declare the invalidity of a section of the *Indian Act*. The cases rippled through Indigenous communities.

For the Indigenous women's movement, this was their first clear victory in the battle against sex discrimination. The victory featured as a huge success in the pages of the *Voice*, the newspaper of the BC Indian Homemakers' Association.[20] Corbiere Lavell was already a central figure in the nascent national Indigenous women's movement, as shown by her role in establishing the Ontario Native Women's Association and helping to found Indian Rights for Indian Women. It was her keynote address at the 1972 National Native Women's Conference that helped to set the conference ablaze. Her victory in the appellate court cemented her leadership role.

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[16] *Sawridge*, Corbiere Lavell Willsay, 2006, *supra* note 1 at 4

[17] *Bedard v. Isaac et al.*, (Ontario Court of Justice) (1971) 25 D.L.R. (3d) 551 [*Bedard*, 1st instance, 1971]

[18] *Lavell,* 1st instance, 1971, *supra* note 8 at 187

[19] *Bedard*, 1st instance, 1971, *supra* note 17

[20] "Mixed Marriage: Woman Keeps Status as Indian", *The Indian Voice* (October 1971) 8.

When Indian Rights for Indian Women held its first national conference in December 1972, Lavell's case was the central agenda item. A news release in preparation for the conference laid out the group's position on the *Lavell* case. It stated that the group had decided to support Lavell's case "solely because of the sex discrimination contained in the *Indian Act*, because it is contrary to the *Canadian Bill of Rights*."[21] The memo reassured its readers that a victory for Lavell at the Supreme Court of Canada would not eliminate the *Indian Act* or Treaty rights or lead to over-crowding on reserves. Women "deny that they wish to return to the reserves but feel they should be entitled to the other benefits Indian status would give them."[22] The group lay the blame squarely at the feet of the federal government, describing the *Indian Act* as "obviously a means of limiting the number of Indian people to whom the Canadian government has Treaty obligations."[23] It stated that 'status' makes women into a "second class Indian" and is "a definition made up by the Canadian government for administrative decisions – to decide who cannot get the benefits which they are entitled to, as Indians."[24] At the conference in Ottawa, the group agreed to intervene in Lavell's case at the Supreme Court. Their nuanced position was quickly drowned out, as Indigenous women were seen to be single-mindedly pursuing equality rights at the expense of Indigenous self-governance.

In contrast to the jubilation among many Indigenous women triggered by the appellate court decision, dismay coursed through the male-led Indigenous political world. The judge in *Bedard* had said, outright, that the entire *Indian Act* might be declared inoperable. Fears raised by the decision in *Drybones* and the 1969 White Paper re-surfaced. An editorial in the *Saskatchewan Indian* connected the *Lavell* decision to the federal "white paper assimilation policies" and suggested that "Indian organizations … were caught flat footed … [and not] prepared for all the implications and legal nightmare this case had brought with it."[25] The editorial saw the case as a threat to the self-determination of Indian people. A columnist for the *Indian Voice* interviewed George Manuel, leader of the National Indian Brotherhood, for his views about the *Lavell* decision. With regard to band membership, Manuel stated that the "decision should be in the hands of the people themselves" and suggested that communities, not band councils should be able to determine the citizenry of their people.[26] In the same publication, Chief John L. George connected the status question to colonization and stated that Indigenous people were in the best position to "decide Status and draw up

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[21] Indian Rights for Indian Women , "News Release: National Conference on Indian Rights for Indian Women" (1 December 1972), in Ottawa, Library and Archives of Canada, (MG30-C249, File 23) [IRIW, National Conference Press Release, 1 December 1972] at 1

[22] IRIW, National Conference Press Release, 1 December 1972, *supra* note 21 at 1

[23] IRIW, National Conference Press Release, 1 December 1972, *supra* note 21 at 2

[24] IRIW, National Conference Press Release, 1 December 1972, *supra* note 21 at 2

[25] "Laval case", *Saskatchewan Indian* (March 1972) 4.

[26] Quoted in Patricia Miranda Barkaskas, *The Indian Voice-Centering Women in the Gendered Politics of Indigenous Nationalism in BC, 1969-1984* (M.A. (History), University of British Columbia, 2009) [unpublished] at 21.

policy in this regard, and definitely not a white men's court."[27] Don Whiteside, staff member at the National Indian Brotherhood, wrote that the basic question raised by the *Lavell* case was "[w]ho has the rightful authority to determine who is an Indian, the federal government or Indian people?"[28] He suggests that "all Indians would welcome and support" Lavell's case were it not for the fact that "much of the traditional judicial authority of the tribal and band councils has been usurped by Indian agents and federal government regulations."[29] In short, for Whiteside, the problem with Indian status was connected to the colonial theft of self-governance structures. But this nuanced view was also quickly drowned out. The Indigenous organizations rallied around a jurisdictional claim about Indigenous sovereignty over band membership decisions. There was a deafening silence about the injustice of sex discrimination and the fact that a federal law granted non-Indian women status as a result of marriage to Indian men. The claim also omitted the impact on Indigenous women's lives and the commitment of Indigenous women to Indigenous self-determination.

These views contrasted with the position taken by the main non-status Indian organization, the Native Council of Canada (NCC). The NCC drew attention to both the loss of status by Indian women through marriage and the acquisition of status by non-Indian women. Like the National Indian Brotherhood, the NCC underlined the self-governance dimensions of the issue. With regard to Indian women who lost status through marriage, the NCC stated that "no federal or Provincial agency has the right to tell them what they are and … no law such as the *Indian Act* should be respected if it attempts to divide the Indian people on the basis of their choice of marriage partners."[30]

The *Lavell & Bedard* cases led to pointed questions in Parliament, particularly once the federal government decided to appeal the victory by Lavell and Bedard. When asked about the impact of Lavell's victory at the Federal Court of Appeal, Minister for Indian Affairs Jean Chretien replied that the *Indian Act* could not be amended "unilaterally" in the absence of consultation and agreement from "the Indians."[31] The Minister of Justice, John Turner, framed the case as an important "interpretation on the application of the *Canadian Bill of Rights* with regard to the concept of 'equality before the law' and 'discrimination … by sex,"[32] thus meriting consideration by the Supreme Court of Canada. Members of Parliament from the Conservative and NDP benches protested the

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[27] Quoted in *Ibid* at 23.

[28] Don Whiteside, National Indian Brotherhood, "The Lavell Case: Another Indian Tragedy or an Opportunity for the Possible Return to the Traditional Judicial Authority of the Tribal and Band Councils" (30 July 1972), in Toronto, York University, Clara Thomas Archives and Special Collections, Michael Posluns Fonds (1989-020/010, File 11) [NIB, Lavell Case, 30 July 1972] at 1

[29] NIB, Lavell Case, 30 July 1972, *supra* note 28 at 5

[30] Native Council of Canada, "News Release: Jeannette Lavell Case" (12 December 1972), in Ottawa, Library and Archives of Canada, (MG30-C249, File 23)

[31] *House of Commons Debates*, (29 June 1971) at 7440 (Hon. Jean Chrétien)

[32] *House of Commons Debates*, (1 December 1971) at 10045 (Hon. John Turner)

government's appeal of the only ruling under the *Canadian Bill of Rights* "establishing equality between the sexes and equality as far as race and colour are concerned."[33]

The Supreme Court did not hear the Lavell and Bedard appeals until the winter of 1973. Bedard's appeal was joined to the *Lavell* case. Several organizations were allowed to intervene. The Association of Iroquois and Allied Indians had pleaded with the federal government to appeal.[34] Soon after, Chrétien was quoted in a national newspaper as "willing to help any Indian group wishing to appeal to the Supreme Court of Canada to reverse … the Federal Court of Appeal" decision in *Lavell*.[35] Due in part to government funding, the intervener organizations who were defending the *Indian Act* were coordinated and well-organized, while those defending Lavell and Bedard were loosely organized and reliant on pro bono legal assistance.

Bands could not reach agreement on a unified strategy at the annual conference of the National Indian Brotherhood in August 1972. *Drybones* and the 1969 White Paper cast their long shadows over the deliberations. The Indian Association of Alberta, led by Harold Cardinal, forged ahead and prepared a legal argument for overturning the Federal Court of Appeal's decision in *Lavell*. As Cardinal put it, the Indian Association of Alberta had taken the position

> that it was not the rights of women at stake. If it was decided that the *Canadian Bill of Rights* was supreme over the *Indian Act*, that decision would wipe out the *Indian Act* and remove whatever legal basis we had for our treaties. Thus, the relationship between the Indians and the government would be dramatically affected. What was at stake was the whole relationship between Indians and whites.[36]

The Indian Association of Alberta's central argument was that the *Indian Act* could only be revised through "a political process in which the Indian people can participate as members of the Canadian public."[37] This political process was necessary because of the special status of Indians, encapsulated by the *Indian Act*. In addition, the Indian Association of Alberta substantively defended the discriminatory scheme in the *Indian Act* as based in a valid legislative purpose: "to maintain a viable reserve system and neither to deplete the Indian population nor to expand it unduly (thus placing

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[33] *House of Commons Debates*, (1 December 1971) at 10046 (Eldon Wooliams MP)

[34] "Retain *Indian Act* to preserve reserve lands, association asks Ottawa", *The Globe and Mail* (29 November 1971) 8.

[35] Rudy Platiel, "Willing to help Indians appeal, Chretien says: Group objects to ruling that woman wed to white still an Indian", *The Globe and Mail* (29 November 1971) 8. The Ottawa Bureau of The Globe & Mail, "Glad to hear Indians talking back, Chretien says", *The Globe and Mail* (29 November 1971) 8.

[36] Harold Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig, 1977) at 111.

[37] *Attorney General of Canada v. Lavell & Bedard*, [1974] SCR 1349 (Factum of the Indian Association of Alberta at 2) [*Lavell,* IAA Factum]

intolerable pressure on the fixed reserve land base)."[38] It argued that the *Indian Act* should be considered as a form of positive discrimination. And, in any case, any woman who loses Indian status through marriage "becomes equal, in law, to the general Canadian population."[39]

The Indian Association of Alberta thus made procedural, substantive, and legal arguments. The procedural one concerned the need for a political, rather than legal, resolution of the *Indian Act* conflict. The substantive claims concerned the necessity of a sex-based system for distribution of status and reserve residence rights. The legal argument asserted that Lavell's situation was best compared to the situation of 'all other Canadian married women', thus jettisoning the Indigenous basis of Lavell's claim.

As the hearing of the case neared, the stance taken by the Indian Association of Alberta gained support from nearly all the major status Indian organizations:

- Indian Association of Alberta
- Union of British Columbia Indian Chiefs
- Manitoba Indian Brotherhood Inc.
- Union of New Brunswick Indians
- Indian Brotherhood of the Northwest Territories
- Union of Nova Scotia Indians
- Union of Ontario Indians
- Federation of Saskatchewan Indians
- Indian Association of Quebec
- Yukon Native Brotherhood and The National Indian Brotherhood

It made for a formidable alliance. The Council of Six Nations submitted their own brief, arguing that the provisions of the *Indian Act* must prevail over the *Canadian Bill of Rights*.[40] The remaining pro-government brief, the Treaty Voice of Alberta Association, defended the patrilineal transmission of Indian status as necessary to protect the institution of the family in society. It stated that "the customs of the Indian people are exactly the provisions set out in the *Indian Act*. An Indian maiden who married a brave from another band left her band for the band of her husband."[41] But, this group, too, made the procedural argument that it was not for the courts to wade into this matter.

On the other side of the case were the interveners in support of Lavell and Bedard. Indian Rights for Indian Women demanded that the *Indian Act* provide equal protection of the law to both Indian men and women. It disputed historical claims about patrilineal membership traditions in Indigenous communities. It defined the relevant comparator

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[38] *Lavell,* IAA Factum, *supra* note 38 at 6.

[39] *Lavell,* IAA Factum, *supra* note 38 at 19

[40] *Attorney General of Canada v. Lavell & Bedard*, [1974] SCR 1349 (Factum of the Six Nations Band of Indians of the County of Brant).

[41] *Attorney General of Canada v. Lavell & Bedard*, [1974] SCR 1349 (Factum of the Treaty Voice of Alberta at 2).

as Indian men who marry non-Indian women. It contrasted the experience of Indigenous women against the equality granted in citizenship laws to Canadian women who married non-Canadians. The Alberta Committee of Indian Rights for Indian Women factum was co-signed by:

- University Women's Club of Toronto
- University Women Graduates Limited
- North Toronto Business and Professional Women's Club Inc.
- Viola Shannacappo, Rose Wilhelm, and Monica Agnis Turner

The list of co-signers showed the participation of Toronto-based groups of middle-class professional women, groups who were also involved in the mainstream women's movement led by the National Action Committee on the Status of Women. But note that the interveners did not include the other main national Indigenous women's organization, the Native Women's Association of Canada, composed primarily of status Indian women.

In its factum, the Native Council of Canada argued that rights connected to Indigenous identity should be "derived from one's racial and cultural organizations rather than from the discriminatory provisions of the *Indian Act*."[42] It stressed that the discrimination that mattered was "within the group", as "all peoples within the legislation are not dealt with equally."[43] The non-status Indians' support for Lavell and Bedard inflamed tempers in Indigenous communities in the Prairies, where, as leader Harold Cardinal recalled, "Another element in our midst wanted to turn the cases into a fight between treaty Indians and Métis … [W]e worked for a hell of a long time just trying to quell that hostility."[44]

The only Indigenous nation that intervened in support of Lavell and Bedard was the Anishnawbekwek of Ontario. The Anishnawbekwek of Ontario claimed that the *Indian Act*'s status rules created "inequalities … based upon classifications of race … [and] … sex."[45] The *Indian Act* provisions on status

> create the classification that Indian families are only those which have Indian husbands. … [S]uch a classification is based on sex; … it fetters an Indian women's right to marry and thereby involves a racial criterion; and … given an Indian woman who desires as her

[42] *Attorney General of Canada v. Lavell & Bedard*, [1974] SCR 1349 (Factum of the Native Council of Canada at 4) [*Lavell*, NCC Factum]

[43] *Lavell*, NCC Factum, *supra* note 42 at 10

[44] Cardinal, *supra* note 36 at 111.

[45] *Attorney General of Canada v. Lavell & Bedard*, [1974] SCR 1349 (Factum of the Anishnawbekwek of Ontario Inc. at 8) [*Lavell*, Anishnawbekwek Factum]

> spouse, a non-Indian, the classification encourages the avoidance of marriage.[46]

Furthermore, the *Indian Act*'s rules assume that "the male spouse in marriage is dominant … [and] deny to the female spouse an independent identity or status both inside and outside the context of marriage." The effect is "to deny to the families of certain Indian women a social and cultural input based on the heritage of the female spouse."[47]

The Supreme Court hearing in February 1973 was highly-charged. The government had invited leadership from the national Indigenous organizations to Ottawa for the hearing.[48] The Indigenous women's groups came on their own dime.[49] When the delegation of 60 women from Indian Rights for Indian Women arrived at the steps of the Supreme Court, Nellie Carlson recalled that "[t]here were men who were swearing at us. Outright bitches, they said. That's how we were treated."[50] A police escort took the women to their seats in the upstairs gallery at the Court.

To the shock of many, the Supreme Court decided against Lavell and Bedard. In August 1973, a divided court decided that the rules stripping Indian women of status upon marriage to a non-Indian did not constitute discrimination. The court held that the *Canadian Bill of Rights* could not invalidate a provision of the *Indian Act*. Furthermore, the equality guaranteed in the *Canadian Bill of Rights* was "equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land."[51] A forceful dissent argued that the majority's decision was irreconcilable with the decision in *Drybones* outlawing race-based discrimination. The majority opinion suggested that a victory for Lavell would have invalidated any special treatment for Indigenous people, thus preventing the federal government from carrying out its constitutional responsibilities to Indians.

Faced with an impossible and false choice between racial or sexual inequality, the Court had chosen to ignore sexual inequality and avoid a judicial termination of Indian status and the *Indian Act*. The decision dashed feminist hopes for a robust *Canadian Bill of Rights* and calmed Indian fears about the immediate nullification of the *Indian Act*. It astonished the leadership of the National Indian Brotherhood, who had been certain of Lavell's victory.

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[46] *Lavell*, Anishnawbekwek Factum, *supra* note 45 at 12

[47] *Lavell*, Anishnawbekwek Factum, *supra* note 45 at 12

[48] Nellie Carlson, Linda Goyette & Kathleen Steinhauer, *Disinherited Generations: our Struggle to Reclaim Treaty Rights for First Nations Women and their Descendants* (Edmonton: University of Alberta Press, 2013) at 114.

[49] IRIW, National Conference Press Release, 1 December 1972, *supra* note 21 at 3

[50] Carlson, Goyette & Steinhauer, *supra* note 48 at 114.

[51] Attorney General of Canada v. Lavell & Bedard, [1974] SCR 1349 at 1373

Lavell & Bedard was a watershed moment for the construction of the opposition between women's equality rights and Indigenous self-governance. On the Indigenous women's side, the case accentuated the divisions between status and non-status women. It reinforced the need for an independent national Indigenous women's organization. Such an organization could say what it wanted about the *Indian Act*, whereas organizations tied to national, provincial, or tribal organizations would have to negotiate with male leadership. The lead-up and denouement of *Lavell & Bedard* caused the fracturing of the Indigenous women's movement founded in Alberta. The Voice of Alberta Native Women came out against Lavell, leading non-status women in Alberta to split from this group and join Indian Rights for Indian Women.[52]

Indigenous women leaders issued forceful responses to the decision. Indian Rights for Indian Women declared they would throw their weight behind the non-status Indian movement to "ask for compensation for the loss of our land" and assured the Prime Minister that "We will not be assimilated! We are Indian and no government documents stating that we are deemed no longer to be Indians will change that fact."[53] The BC Indian Homemakers' Association described the decision as a violation of "rights as equal Canadian citizens [and] … of the United Nations Universal Declaration of Human Rights."[54]

The National Indian Brotherhood (NIB) heralded the judgment as "a victory defending the *Indian Act* against possible nullification or further erosion"[55] and as vindication of the principle that reforms to the *Indian Act* should take place through a political process, not a judicial one. But the case had also forced the national Indigenous leadership into a public stance of supporting sex discrimination. Until this point, they had hewed to a procedural path about the need for consultation and consent before *Indian Act* reforms. In defending the *Indian Act* as the legal incarnation of treaty relationships, the NIB supported the perpetuation of sex discrimination. And while it is wrong that they used women's equality rights as a bargaining chip in a battle with the federal government over sovereignty, it bears a moment of consideration that only a small minority argued that equality for Indigenous women was substantively in tension with Indigenous self-governance. Women's equality was, rather, something that could wait or could be resolved best through a political reconciliation of the Canadian-Indigenous relationship. While this was a male-centered position that situated men as gatekeepers to women's justice claims, it was based on how, not if, sex discrimination could be achieved.

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[52] Jamieson, Kathleen, "Multiple Jeopardy: The Evolution of a Native Women's Movement" (1979) 2:1 Atlantis: Critical Studies in Gender, Culture & Social Justice 157 at 168.

[53] Letter from Nellie Carlson, Alberta Committee on Indian Rights for Indian Women to Pierre Trudeau, Prime Minister (4 September 1973), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace) at 1

[54] Letter from Rose Charlie, BC Indian Homemakers Association to Jean Chretien, Minister of Justice and Attorney General of Canada (23 October 1973), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 713)

[55] Thomas Isaac & Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1991) 21 Man LJ 453, para 17.

Leader of the Indian Association of Alberta, Harold Cardinal, was well aware of the odious nature of this brinkmanship. As he recalled:

> We realized when we decided to intervene that we would, of course, alienate the feminist movement, and that we would also lose some of our traditional support. It proved one hell of a mess to get into, because no matter what we did, everyone got mad at us, and it was difficult to maintain a sane and rational discussion on the issues involved. … We had a tough time … keeping our people focused on the position that whatever injustices an Indian woman faces under the current provisions of the *Indian Act*, those injustices can best be rectified when the *Indian Act* is amended. We freely admitted that such a step was still down the road a way.[56]

Cardinal laid blame for the entire problem at the feet of the federal government:

> After five or six decades during which the government has hopelessly fouled up the question legally, at the same time seriously dividing Indians, it now proposes to throw the whole mess it created into the laps of Indians. This issue will create division more sharply than before and will serve to divert the energies of Indian people in the wrong directions at a time when all their energy is required to move forward.[57]

The *Lavell & Bedard* decision vaulted sex discrimination in the *Indian Act* onto the agenda of the white-led women's movement. The Court's decision in *Lavell & Bedard* cast the relevant comparison as whether Lavell was treated equally relative to all other married Indian women – in other words, all the women affected by the statute had it equally bad. Such a narrow, circular, and self-defeating definition of comparator group imperiled the equality rights of all women. Women's organizations had known about the marrying out rule since the Royal Commission on the Status of Women, but, as one activist put it, "they had been asleep at the radar … the Lavell case was so awful that there was one of those eureka moments."[58] According to this activist, the realization of the mainstream women's movement "wasn't so much about Indian women; it was about the *Canadian Bill of Rights*; it was the death of all hope."[59] Aside from the work of Mary Two Axe Earley and Therese Casgrain, there had been little collaboration on feminist campaigns between white women and Indigenous women. This changed overnight with the *Lavell & Bedard* case. The same activist recalls that, after *Lavell*,

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[56] Cardinal, *supra* note 36 at 111.

[57] Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 136.

[58] Interview with author

[59] Interview with author

> when they [Indian women] ventured into the terrain of the *Canadian Bill of Rights*, then the groups that I was involved in took interest. But as long as they were working within their own communities, there was no interest on the part of the English Canadian women's movement that I knew.[60]

As a sign of this enhanced interest, Indian Rights for Indian Women was invited to join the newly formed National Action Committee on the Status of Women (NACSW).[61]

A Rising Tide of Indigenous Self-Determination

The status Indian organizations were buoyed by the decision in *Lavell & Bedard*. It had shown what could be done through coordinated advocacy. This was a useful counterpoint to the other landmark victory of 1973 – the *Calder* case – which the Nisga'a had steered on their own to the Supreme Court.[62] The Nishga Indian Tribal Council sought recognition that Aboriginal title over Nisga'a lands had not been extinguished. Lawyer Thomas Berger pled their case, without victories, in the British Columbia Supreme Court and Court of Appeal.[63] At the Supreme Court, the Nisga'a showed how to win while losing. According to three justices, Aboriginal title existed at one time but had been legitimately extinguished. Despite a loss on the merits, the *Calder* decision signaled an in-principle acceptance of Aboriginal title. This in-principle acceptance "significantly influenced Trudeau's own thinking, leading him to believe there was greater legitimacy to Indian claims than he had thought in 1969."[64] In 1973, the federal government was compelled to begin negotiations over a Comprehensive Land Claims policy, as a better alternative than seeing the title question decided by the courts. Between 1970 and 1976, Indigenous organizations received $17 million in federal assistance to research land claims. The victory by the Nisga'a on their land claims case forced a volte-face regarding the legitimacy of claims to Aboriginal rights.

For Indigenous people, the wind seemed to be in their favor. Occupations of Indian Affairs offices took place in Ottawa and Calgary in the summer of 1973 and 1974.[65] Nation-wide protests erupted in the summer of 1974. A cross-country bus caravan stopped at communities stretching from the west coast to Ottawa, culminating in a protest at the opening of Parliament in late September 1974. A bloody clash with the

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[60] Interview with author

[61] Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16 Can J Women & L 106 at 113.

[62] *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313

[63] *Calder et al. v. Attorney-General of British Columbia*, (1970), 74 W.W.R. 481, 13 D.L.R. (3d) 64.

[64] Sally M Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (Toronto; Buffalo: University of Toronto Press, 1981) at 198.

[65] James Treat, ed, *Around the Sacred Fire: Native Religious Activism in the Red Power Era - A Narrative Map of the Indian Ecumenical Conference* (New York: Palgrave Macmillan, 2003) at 258.

police ensued. Leaders with affiliations to the American Indian Movement came under police surveillance as radicals and extremists.[66]

The rising tide of Indigenous refusal was laced with Indigenous statements of inherent sovereignty. Resource development schemes in Quebec, British Columbia, and the Northwest Territories threatened to damage Indigenous lives and livelihoods. The James Bay and Mackenzie Valley projects provoked widespread mobilization by Indigenous leaders and non-Indigenous supporters. In July 1975, the Dene issued a declaration of self-determination, and the NIB offered their full support. The Dene Nation asserted:

> We the Dene of the Northwest Territories insist on the right to be regarded by ourselves and the world as a nation. … The Dene find themselves as part of a country. That country is Canada. But the Government of Canada is not the government of the Dene.[67]

In 1976, Dene leader George Erasmus became president of the Indian Brotherhood of the Northwest Territories (renamed the Dene Nation in 1978). At the 1976 hearings in the Northwest Territories about the Mackenzie Valley pipeline, Dene and Métis elders emphatically asserted sovereignty over their territories. The once-moderate NIB denounced the federal government's policy of making extinction of Indian rights, titles, and interests a condition of land claims settlements.[68] The Federation of Saskatchewan Indians released a position paper on Indian Government in 1977. A second paper, released in 1979, expanded on the idea of self-government as an inherent and absolute attribute of sovereign First Nations.

In the face of this resurgence grounded in Indigenous sovereignty, the government's offers of self-governance were mere trinkets. A federal proposal permitting each band to decide on its own government structures was rejected by Indigenous leadership because it failed to recognize inherent self-governance rights.[69]

Trudeau was re-elected in July 1974, moving the Liberals from a minority to a majority government, in an election dominated by economic issues. By the autumn, after months of Indian protest, the Department of Indian Affairs was both rudderless and "in a state

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[66] Gary William Kinsman, Dieter K Buse & Mercedes Steedman, Terry Pender, "The Gaze on Clubs, Native Studies, and Teachers at Laurentian University, 1960s-1970s" in *Whose National Security?: Canadian State Surveillance and the Creation of Enemies* (Toronto: Between the Lines, 2000) 110 at 111.

[67] "Dene Declaration, 21 August 1975", online: *kinan□skomitin (with University of Saskatchewan Archives)* <http://scaa.sk.ca/ourlegacy/solr?query=Subject%3A%22Dene%20Declaration%22&start=0&rows=10&mode=view&pos=0&page=2>.

[68] J Rick Ponting, Roger Gibbins & Andrew J Siggner, *Out of Irrelevance: a Socio-Political Introduction to Indian affairs in Canada* (Toronto: Butterworths, 1980) at 207.

[69] Tennant, Paul, "Aboriginal Rights and the Penner Report on Indian Self-Government" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 73 at 327.

of virtual siege."[70] A Cabinet shuffle moved Jean Chretien to the Treasury Board and put Judd Buchanan at the helm of Indian Affairs. Buchanan set about restructuring the department. The march on Ottawa had rattled Indian Affairs officials, and vice-president of the NIB, Clive Linklater,[71] seized the moment. He pushed the federal government to reboot regular consultation between the NIB and Cabinet. Thus was formed the Joint NIB/Cabinet Committee.

The Joint NIB/Cabinet Committee Produces a Stalemate

The Joint/NIB Committee proved to be the setting of a complete stalemate on equality for Indigenous women. After the failed National Indian Advisory Board under Pearson and the debacle of the White Paper consultation, the Department of Indian Affairs had proposed a scheme allowing Indigenous leaders to feed their views to civil servants. Indigenous leaders spurned the offer, as they demanded dialogue with political, not bureaucratic, federal representatives.[72] This new consultation mechanism, brokered in the teeth of protests, promised to be different, because Indigenous leaders gained direct access to Cabinet ministers.

Established in late 1974, the Joint Sub-Committee of Cabinet and the National Indian Brotherhood on Indian Rights and Claims created a direct forum for dialogue between a select group of cabinet ministers and the NIB executive.[73] Key participants for the NIB included George Manuel, Harold Cardinal, Clive Linklater, and Noel Starblanket. Marc Lalonde and Allan MacEachen chaired on the government side.[74] The Sub-committee was tasked with developing proposals for amendment of the *Indian Act.* The marrying out rule was one item on the sub-committee's agenda.

Although *Lavell & Bedard* had gone their way, the NIB played its advantage, seizing on the vulnerability of a new administration rocked by a summer of protest. The NIB went into the Joint Committee consultations with clear proposals for reforms to the marrying out rule. Recall that the NIB leadership had expected they would lose in the *Lavell & Bedard* case. Even before the judgment was handed down, they were drafting model legislation to replace the invalidated *Indian Act*.[75] The task of designing the model law was delegated to the Indian Association of Alberta, and the process was chaired by Mr. F.W. Gladstone of the Blood Band in Alberta. The nine-person study steam included only one woman. In October 1974, the National Indian Brotherhood delivered its model

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[70] Ponting, Gibbins & Siggner, *supra* note 68 at 206.

[71] Clive Linklater (-2007) was a Saultaux from Couchiching, near Fort Francis, Ontario. A teacher by training, he went on to work for the Indian Association for Alberta as an education consultant and became vice-president of the National Indian Brotherhood in 1974. "Obituary: Clive Linklater", *Edmonton Journal* (14 July 2007).

[72] Weaver, *supra* note 64 at 200.

[73] Sally M Weaver, "The Joint Cabinet/National Indian Brotherhood Committee: a unique experiment in pressure group relations" (1982) 25:2 Canadian Public Administration 211.

[74] *Ibid* at 215.

[75] Cardinal, *supra* note 36 at 112.

legislation for a new *Indian Act* to the Department of Indian Affairs and Northern Development.[76] As part of a comprehensive reform package, the NIB proposed new rules on status Indian registration and membership, according to three main principles: 1) the separation of status from band membership, 2) the determination of Indian status based on patrilineal blood quantum, and 3) the enforcement of the separation of the Indian and non-Indian population through rules about residence on reserve. The principal recommendation regarding membership was that only the natural child of two Indians may register on the status list or tribal list.[77]

The Department of Indian Affairs described the model legislation as based on "extreme positions,"[78] as the only persons eligible for registration would be natural children of two status Indian parents.[79] Officials worried that the paper could foment further division between treaty and non-treaty Indians, which would in turn augment demands on the government. Indian Rights for Indian Women protested that the "Federal Government has handed that task of doing the research and developing a new *Indian Act* to groups such as the National Indian Brotherhood and the Indian Association of Alberta, both of which are notorious for their opposition to Jeannette Lavell and any concept of equality as between native men and native women."[80] The issue languished.

By the summer of 1976, the Joint Committee published a 'New Federal-Government Indian Relationship'.[81] It sought to reassure Indigenous leaders that "Indian status will continue as long as the Government and the Indian people feel there is a need for it" and that preservation of Indigenous identity was a core government priority.[82] The NIB denounced the 1976 paper for a host of reasons, including that it ruled out the

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[76] Study Team of the Indian Association of Alberta, for the National Indian Brotherhood, "Report of *Indian Act* Study Team, presented to Minister Judd Buchanan" (31 October 1974), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-16)) [IAA, *Indian Act* Study Team, 31 October 1974]

[77] IAA, *Indian Act* Study Team, 31 October 1974, *supra* note 76 at art. 44

[78] J.B. Hartley, Acting Director, Policy Planning and Research, Indian and Northern Affairs, "Memorandum: Distribution of the NIB Proposals on the *Indian Act*" (19 November 1974), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-17))

[79] Staff, Indian and Northern Affairs, "Memorandum: Analysis of National Indian Brotherhood Submissions on Revisions to the *Indian Act*" (1 January 1975), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-18))

[80] Letter from Nellie Carlson, Alberta Committee on Indian Rights for Indian Women to Otto Lang, Minister of Justice (28 March 1974), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace) at 2

[81] Weaver, *supra* note 64 at 202.

[82] Ponting, Gibbins & Siggner, *supra* note 68 at 176–77.

possibility of Indigenous sovereignty and was formulated entirely without consultation.[83]

The government felt it was getting nowhere. It did not help that department leadership seemed trapped in a revolving door. The dust had barely settled on Buchanan's departmental restructuring when Buchanan himself was replaced by Warren Allmand in September 1976. Allmand's leadership was an abrupt change. Allmand was far more open to Indigenous leadership, consultation, and decentralization.[84]

When Allmand took over, the department was under public scrutiny. The Mackenzie Valley Pipeline Inquiry, led by Thomas Berger, had gained widespread media coverage. For many Canadians, footage from the Berger Commission was their first introduction to Indigenous peoples speaking about the destructions of their lives and territories.[85] In May 1976, Nelson Small Legs, Jr., a 23-year old leader of the American Indian Movement in Southern Alberta, took his own life in an act of ritual suicide two days after testifying at the Berger Commission. He left a suicide note condemning the treatment of Indigenous peoples and the corruption in the Department of Indian Affairs.[86] The Berger Commission report, released in the summer of 1977, concluded that the pipeline project would have a devastating impact on the Indigenous people living in the North. It recommended that no pipeline ever be built along the north slope of the Yukon and a ten-year moratorium on the Mackenzie Valley project, to allow time for environmental and land claims issues to be resolved.[87]

The heat of public scrutiny provided no light on what should be done about the 'Indian problem'. Then, as the economic recession soured public opinion on lavish social welfare programs, the government commitment to the problem waned.[88] Hugh Faulkner replaced Warren Allmand as Minister of Indian Affairs in September 1977.

While the temperature of public opinion and the economic climate signaled to policy-makers that little could be done on 'the Indian problem', the legal and international environment mandated otherwise. Discussions in the NIB/Cabinet Joint Committee took place during a period of increased attention to human rights standards and corresponding pressure for action on sex discrimination. In 1976, Canada acceded to the *International Covenant on Civil and Political Rights* (ICCPR) and its Optional Protocol permitting individual complaints. By 1976, many provinces had passed their own human rights statutes. Once the ICCPR came into force, questions surfaced about Canada's compliance with the treaty. At a federal-provincial meeting on the

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[83] *Ibid* at 178.

[84] *Ibid* at 127.

[85] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis, MN: University of Minnesota Press, 2014) at 59.

[86] Treat, *supra* note 65 at 258.

[87] Coulthard, *supra* note 85 at 59.

[88] Weaver, *supra* note 64 at 203.

implementation of Canada's obligations under the ICCPR, the New Brunswick Human Rights Commission presented a case study of housing discrimination against Indigenous women who had lost status through marriage as an example of Canada's non-compliance with the treaty.[89] We will return to this moment in the next chapter.

On the domestic human rights scene, the Canadian Human Rights Commission was established in 1977 and tasked with implementation of a new law, the *Canadian Human Rights Act*.[90] The *Canadian Human Rights Act* extended human rights guarantees to federally regulated activities. It contained a significant compromise on equality rights, justified in the name of consultation with Indigenous leadership. Provincial human rights commissions had no jurisdiction over matters on reserve, as reserves were under federal jurisdiction.[91] But instead of extending human rights protections to reserves, the new federal human rights legislation reinforced this carve-out.[92] As the Canadian Human Rights Commission lacked jurisdiction over matters on reserve, both the federal government and band councils were shielded from human rights complaints arising from provisions of the *Indian Act* or its administration. According to Minister of Justice, Ron Basford, the carve-out was necessary in light of the government's undertaking not to revise the *Indian Act* pending ongoing consultations with the National Indian Brotherhood and others on *Indian Act* reforms.[93] Witnesses to the parliamentary committee reviewing the proposed legislation protested that this carve-out was an affront to human rights and particularly prejudicial to Indigenous women.[94]

Meanwhile, at the Joint Sub-committee, discussions about reforming the *Indian Act* proceeded at a glacial pace. A memo to the Minister of Indian Affairs stated that the *Indian Act* "clearly discriminates against Indian women."[95] It concludes that "the

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[89] New Brunswick Human Rights Commission, "Submission to Meeting of Continuing Federal-Provincial Committee of Officials Responsible for Human Rights, ICCPR - Case Study: An Illustration of Non-Compliance, Discrimination against Native Women in Canada" (21 November 1977), in University of Saskatchewan, Native Law Centre (online: <https://www.usask.ca/nativelaw/un-human-rights--first-nations/sandra-lovelace-v.-canada-1977-1981.php>))

[90] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6

[91] Dominique Clément, *Equality Deferred: Sex Discrimination and British Columbia's Human Rights State, 1953-84* (Vancouver, 2014) at 84.

[92] The provision of the *Canadian Human Rights Act* read:

> s.63(2) "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." (renumbered to s.67, repealed in June 2008)

[93] House of Commons Standing Committee on Justice and Legal Affairs, Evidence, Issue 15:46, 25 May 1977 (Hon. Ron Basford).

[94] Although the exemption was described at the time as a temporary measure, it was not until 2008 that the provision was removed from the *Canadian Human Rights Act* was amended. For further history of the amendments, see Mary C. Hurley, *Legislative Summary - Bill C-21: An Act to Amend the Canadian Human Rights*, (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2008)

[95] Arthur Kroeger, Indian and Northern Affairs Canada, "Memorandum for the Minister: Discrimination Against Indian Women - Your Meeting on December 7, 1977 with Representatives of Indian Women's Organizations" (5 December 1977), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE

government has been persuaded for some time that the *Indian Act* … should be revised to allow the Indian women of Canada to enjoy the same status and position as Indian men before the law."[96] A Cabinet level commitment to end sex discrimination came late in 1977.[97]

President of the NIB, Noel Starblanket, welcomed Joint Committee discussion of the issues affecting women but emphasized that the NIB represented the interests of Indian women and reiterated that the NIB would not acquiesce to piecemeal revisions of the *Indian Act*, not even the provision on marrying out. Starblanket said that the NIB had been liaising with the 'Indian women's movement', namely, the Native Women's Association of Canada and Indian Rights for Indian Women. But the NIB blocked these groups' presence on the Joint Committee. Although the federal government had acquiesced to persistent requests by Indigenous women to be included in the joint NIB-Cabinet meetings, the members of the NIB Executive, with the exception of the President, Noel Starblanket, all opposed the women's participation.[98] The Joint Sub-Committee tabled the item concerning Indian women and loss of status for future discussion.[99]

Despite fine words on both sides, the Joint Committee meetings led to a stalemate on the *Indian Act* in a heated meeting in December 1977.[100] Ministers underlined the government's need to reform the *Indian Act* due to pressures from members of Parliament and the Canadian Human Rights Commission. They re-affirmed their preference for cooperation with the Indian leadership, but also said they would have to proceed on their own if cooperation was not forthcoming. As summarized by an adviser to Trudeau, the NIB refused to discuss reforming the rules on Indian women's status; instead, "they would only discuss this issue when the government had given a decision on their 'rights'."[101]

2015-1378 (CS) (Evidence submitted by the plaintiff (P-30)) [INAC, Memo re. Meeting with Indian Women's Organizations, 5 December 1977] at 3

[96] INAC, Memo re. Meeting with Indian Women's Organizations, 5 December 1977, *supra* note 95 at 4

[97] Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet: *Indian Act* Revision" (15 March 1979), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-25)) [Minister of Indian Affairs, Cabinet Memo: *Indian Act*, 15 March 1979] at 16

[98] Jamieson, Kathleen, *supra* note 52 at 171.

[99] Joint Sub-Committee of Cabinet and National Indian Brotherhood on Indian Rights and Claims, "Minutes" (31 October 1977), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-19))

[100] Weaver, *supra* note 64 at 236.

[101] J.C. de Montigny Marchand, Deputy Secretary to Cabinet, Privy Council Office, "Memorandum to the Prime Minister: Joint Committee of Cabinet and the National Indian Brotherhood" (3 January 1978), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-20)) [PCO to Prime Minister, Memo re NIB/Cabinet Joint Committee, 3 January 1978]

In a subsequent memorandum from the Privy Council Office to Trudeau, the meeting was described as a fruitful one, as "Ministers and Indian leaders exchang[ed] views candidly and bluntly."[102] According to Trudeau's advisor, the issue of Indian 'rights' would be laid to rest in the next six months, and "progress on revising the *Indian Act* will accelerate once the Indians know that they have to compromise."[103] Indeed, the Minister of Justice had tried to force the NIB to negotiate on the status rules in the *Indian Act* by blocking implementation of a land claims agreement.[104] This was 'consultation'.

By the winter of 1978, hopes for the Joint Cabinet-NIB Committee began to fade. The government thought it was an advisory body, whereas the NIB thought it was a forum for substantive political negotiations. Cabinet officials viewed Indigenous demands as unreasonable; NIB members complained of federal intransigency and secrecy about policy plans. In April 1978, the NIB pulled out of the Joint Committee.[105]

Throughout the brief life of the NIB/Cabinet Joint Committee, the NIB emphasized band control over membership as a pillar of Indigenous sovereignty that the federal government could not unilaterally amend. For its part, the government affirmed its commitment to consult with Indians before any amendments.[106] The claim for women's equality was a bargaining chip in the NIB's negotiations with the federal government. Whether or not the NIB favored an end to sex discrimination, it was willing to hold women's rights hostage in its bid to force the government to fundamentally rethink its relationship with Indigenous peoples.

Draft Reforms to the *Indian Act* by DIAND

By the late summer of 1978, officials at the Department of Indian Affairs and Northern Development (DIAND) began concerted efforts towards wholesale revisions of the *Indian Act*. An initial proposal created a new Indian registration system whereby status would not be gained or lost by marriage.[107] A detailed discussion paper followed in November 1978.[108] The paper admits that the registration sections of the *Indian Act*

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[102] PCO to Prime Minister, Memo re NIB/Cabinet Joint Committee, 3 January 1978, *supra* note 102.

[103] PCO to Prime Minister, Memo re NIB/Cabinet Joint Committee, 3 January 1978, *supra* note 102.

[104] National Indian Brotherhood, "10th Annual General Assembly Penticton" (1 April 1978), in Vancouver, Union of British Columbia Indian Chiefs Resource Centre (UBCIC Archival Records) at 17

[105] Weaver, *supra* note 64 at 203.

[106] Douglas Sanders, "The Renewal of Indian Special Status" in Anne F Bayefsky & Mary A Eberts, eds, *Equality rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 540 at 547.

[107] Staff, Indian and Northern Affairs, "Note to File: *Indian Act* - Discrimination against Sex" (11 August 1978), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-21))

[108] Indian and Northern Affairs, "Discussion Paper: *Indian Act* Revision" (10 November 1978), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-22)) [Indian Affairs, *Indian Act* Revision Discussion Paper, 10 November 1978]

contain discrimination on the grounds of sex.[109] It proposes that the status of registered Indians, both male and female, shall not be affected by marriage to a non-Indian. Further, a non-Indian person shall not gain status by marriage. The children of mixed (non-Indian/Indian) marriages would be given Indian status. After two generations of mixed marriages, the child would not have status but could apply to become a band beneficiary at the discretion of the Band concerned. This policy introduced the idea that the benefits of status and band membership would no longer be linked. The proposal provided that children of mixed marriages would cease to have status after three generations of mixed marriage.[110]

The Minister of Indian Affairs and Northern Development, Hugh Faulkner, put these proposals to Cabinet in March 1979. The memo begins with the firm statement that, "The Government … has decided that provisions which discriminate on the basis of sex must be eliminated from the Act."[111] The question of retroactive reinstatement was already a knotty problem. Women's groups and groups of non-status Indians called for retrospective amendments, but some status Indian leaders opposed this, fearing it would increase pressure on existing reserve land. The Minister noted to the Cabinet that

> A much more difficult and potentially controversial question is whether persons alive today who lost their status as an Indian entitled to be registered by the operation of the *Indian Act*, should apply to be registered. This would retroactively remove the discriminatory effects of the Act. Approximately 30,000 adults and children would be eligible to regain status, although only a portion would likely do so. The financial consequences of such a step would depend upon the number that regained status and, of these, the number who became band members (with the full range of attendant federal program benefits).[112]

The Minister of Indian Affairs and Northern Development asked the Cabinet to provide guidance "on this major question" of a retroactive remedy to sex discrimination.[113]

The Women's Movement in the Seventies

While momentum was building within Indian Affairs around ending sex discrimination in the *Indian Act*, the white-led women's movement was recovering from the shock of the Supreme Court's decision in *Lavell & Bedard*. The judgment had come to stand for the very dire condition of equality guarantees in law. Court cases about equality rights became flash points, mobilizing women's groups to intervene at the Supreme Court

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[109] Indian Affairs, *Indian Act* Revision Discussion Paper, 10 November 1978, *supra* note 108 at 1

[110] Indian Affairs, *Indian Act* Revision Discussion Paper, 10 November 1978, *supra* note 108 at 8

[111] Minister of Indian Affairs, Cabinet Memo: *Indian Act*, 15 March 1979, *supra* note 97 at 5

[112] Minister of Indian Affairs, Cabinet Memo: *Indian Act*, 15 March 1979, *supra* note 97 at 17

[113] Minister of Indian Affairs, Cabinet Memo: *Indian Act*, 15 March 1979, *supra* note 97 at 17

level. A landmark case in 1979 on pregnancy and unemployment benefits, *Bliss v. Canada,* rivaled the equality defeat represented by *Lavell & Bedard*. The majority concluded that the inequalities experienced by pregnant women were created "not by legislation, but by nature" and that the discrimination complained of was not against women but against pregnant people.[114]

The Supreme Court's decisions meant that the women's movement had its work cut out for it. At the helm of an increasingly strong and diverse movement remained the National Action Committee on the Status of Women (NACSW). NACSW grew to represent more than 600 women's groups, including both conservative women's groups, like church groups, and radical groups, like rape crisis centers and unions.[115]

Funding was key to the flowering of the women's movement.[116] The Women's Program of the Department of the Secretary of State disbursed funding to grass-roots, service-oriented, community-based projects.[117] The program began with $200,000 of funds in 1973, increasing steeply to $3.2 million by 1982.[118] By the mid-1970s, 50-80% of the budget of every key feminist advocacy organization was funded by the Women's Program under the Secretary of State.[119] Provincial women's organizations received the largest proportion of grants from the Secretary of State Women's Program.[120] The Secretary of State also created a separate Native Women's Program.

On the government side, a federal agency, Status of Women Canada (SWC), was established in 1976, and staffed by civil servants answerable to a Minister responsible for the status of women. SWC was tasked with providing policy advice about gender equality and coordinating among the gamut of federal and provincial departments and agencies.

NACSW struggled to ride the crest of an ideologically diverse movement. Dramatic strikes by women employees revealed that the scene of activism for working class feminists was the picket line, not the Parliament.[121] A radical women's movement

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[114] *Bliss v. Attorney General of Canada*, [1979] 1 SCR 183 at 184

[115] Amy Gill, *In Their Finest Hour: Deciphering the Role of the Canadian Women's Movement in the Formulation of the Charter of Rights and Freedoms* (M.A. (History), University of Ottawa, 2010) [unpublished] at 74.

[116] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) at 180.

[117] Jill Vickers, Pauline Rankin & Christine Appelle, *Politics as if Women Mattered: a Political Analysis of the National Action Committee on the Status of Women* (Toronto; Buffalo: University of Toronto Press, 1993) at 80.

[118] Leslie A Pal, *Interests of State: the Politics of Language, Multiculturalism and Feminism in Canada* (Montreal, Quebec: McGill-Queen's University Press, 1993) at 142.

[119] *Ibid* at 8.

[120] *Ibid* at 222–226.

[121] Vickers, Rankin & Appelle, *supra* note 117 at 103.

mobilized against rape, domestic violence, pornography, incest, and beauty pageants.[122] Women's centers and consciousness raising circles were more concerned with safety at home and on the street than the goings-on in Ottawa's corridors of power. Issues on NACSW's agenda ranged from equal pay, pension reform, and family law to affordable childcare and access to birth control. The comfort zone issues were those that could be remedied with law reforms; the alliance frayed around economic, redistributive issues. For example, the pay equity issues facing working class women provoked conflict at the 1977 annual general meeting.[123] In 1978, NACSW president, Kay Macpherson, reported that the organization hoped "for greater representation from union women and from immigrant and minority groups."[124] These tensions came to a head at the 1979 annual membership meeting. Armed with slogans like "Don't give us your old clothes. Give us your support," an organized group of women on housing assistance and mothers' allowances disrupted the 1979 annual conference.[125] A contemporary commentator on the divided women's movement explained that,

> Although the broad basis of both is the improvement of the quality of life for women in Canada, the philosophy of the women's rights groups is that civil liberty and equality can be achieved *within* the present system, while the underlying belief of women's liberation is that oppression can be overcome only through a radical and fundamental change in the structure of society.[126]

By 1979, it had become clear that no single ideological position had the upper hand within NACSW. The rise in influence of a radical and working-class movement within NACSW spurred tactical shifts and criticism of NACSW's focus on policy advocacy. Until the late seventies, NACSW worked mainly through political lobbying. Issues were aired during the annual conferences in Ottawa and lobbying trainings held for delegates. The last day of the conference was devoted to a Parliamentary lobby, during which conference delegates fanned out to the offices of Parliament Hill in teams of two or three, armed with agreed talking points. Afterwards, teams filled out reports of their meetings with MPs and submitted them to NACSW staff, who would often follow up with letters to ministers or parliamentarians. The 'brief-and-lobby' approach favored by politically

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[122] Adamson, Nancy, "Feminists, Libbers, Lefties, and Radicals: The Emergency of the Women's Liberation Movement" in Joy Parr, ed, *A Diversity of Women: Ontario since 1945* (Toronto, Ont.: University of Toronto Press, 1995) at 255.

[123] Vickers, Rankin & Appelle, *supra* note 117 at 85.

[124] National Action Committee on the Status of Women, "NAC President's Report, March 1978" (17 March 1978), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 634) at 3

[125] Vickers, Rankin & Appelle, *supra* note 117 at 107.

[126] Adamson, Nancy, *supra* note 122 at 255.

savvy, suit-wearing moderates was discredited by women who wanted the organization to take 'real action' that "could empower politically inexperienced women."[127]

Relations between NACSW and the Indigenous Women's Movement

It was precisely through this 'brief-and-lobby' strategy that the white-led women's movement began speaking out against the discrimination caused by the status rules in the *Indian Act*. The *Lavell & Bedard* decision had thrust the problem of Indian women's equality rights directly into the path of the national women's movement. Through the advocacy work of Mary Two Axe Earley and the report of the Royal Commission on the Status of Women, a few key players were already informed of the discrimination experienced by Indigenous women. Then, in the wake of the *Lavell & Bedard* decision, the Advisory Council on the Status of Women – the parastatal research council established in 1973 with good links to NACSW – issued a briefing paper stating that "discrimination on the grounds of sex against Indian women is inexcusable."[128] The ACSW had become active on the issue during lobbying work on the draft *Canadian Human Rights Act* and the exemption for Indian reserves.

At an executive meeting of the National Action Committee on the Status of Women (NACSW) in April 1976, the group passed a resolution on discrimination against Indian women. Its framing of the issue is significant. The problem was "the right of Indian councils to strip native women of their heritage" and one action point was to "mount a delegation to the Minister of Indian Affairs to ask that evictions of native women on the Caughnawagna reservation be halted."[129] This implies that their entry point was Mary Two Axe Earley's eviction from Caughnawagna, and their understanding of the problem was that it lay with the band council, not the federal government's *Indian Act*. The problem was pinned on Indian men. An additional action point stressed the importance of the on-going negotiations for an entrenched bill of rights, inferring the connection they saw between the issue, the failed *Canadian Bill of Rights*, and the carve-out in the *Canadian Human Rights Act*.[130]

In May 1976, Lorna Marsden, president of NACSW, wrote to Judd Buchanan, the Minister of Indian Affairs, about issues concerning Indian women. Buchanan's lengthy reply referenced only the situation at Caughnawagna, attempting to clarify "widespread misunderstanding about it," and to reassure NACSW that the Government was working

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[127] Vickers, Rankin & Appelle, *supra* note 117 at 99.

[128] Advisory Council on the Status of Women, "Indian Women and the *Indian Act*, Briefing by ACSW" (23 April 1976), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 713.21) at 2

[129] National Action Committee on the Status of Women, "Special Executive Meeting, Minutes" (25 April 1976), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 633) [NACSW Minutes, 25 April 1976] at 2

[130] NACSW Minutes, 25 April 1976, *supra* note 129 at 2

with the NIB on reforms.[131] In a follow-up letter that reveals something of the gulf and hierarchies between the white-led women's movement and the Indigenous women's movement, Two Axe Earley thanked Marsden for NACSW's lobbying efforts:

> To think, an organization like yours, has written to the Government on our behalf is something we are very grateful for. … Your conference in Ottawa was such a success and you Toronto girls worked really hard. We are fortunate to be included in your group.[132]

The issue remained on NACSW's agenda throughout the seventies. At the 1977 annual meeting, the group agreed on a resolution pressing for federal funding to enable Indigenous women to participate in the redrafting of the *Indian Act*.[133] After the meeting, lobby teams descended on Parliament Hill to buttonhole MPs about a short list of issues – one of which was the *Indian Act*. They lobbied for federal funding of non-status Indigenous women's groups – namely, Indian Rights for Indian Women.[134] Members of the NACSW executive appeared before the parliamentary committee studying the *Canadian Human Rights Act* to protest the exclusion of Indian women from its protections.[135] A resolution of the March 1978 annual meeting reaffirmed the group's "strong objection to the exclusion of Indian women from the Human Rights Act."[136] In October 1977, Kay Macpherson, president of the NACSW, penned an op-ed supporting the efforts of Indian Rights for Indian Women to be included in the NIB/Cabinet Joint Committee discussions about *Indian Act* reforms.[137] In 1978 the President's Report noted

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[131] Letter from Judd Buchanan, Minister of Indian and Northern Affairs to Lorna Marsden, National Action Committee on the Status of Women (12 June 1976), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 713) at 4

[132] Letter from Mary Two Axe Earley to Lorna Marsden, National Action Committee on the Status of Women (14 July 1976), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 713)

[133] National Action Committee on the Status of Women, "Proposals arising from 1977 Annual meeting of the National Action Committee on the Status of Women" (18 March 1977), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 633) at 3

[134] Jean Cottain, National Action Committee on the Status of Women, "Record of Visit to MP, Judd Buchanan" (1 March 1977), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 633)

[135] National Action Committee on the Status of Women, "NAC President's Report, March 1978" (17 March 1978), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 634) [NACSW President's Report, 17 March 1978]

[136] National Action Committee on the Status of Women, "1978 Annual Meeting - Resolutions" (17 March 1978), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 633) at 3

[137] Letter from Kay Macpherson to Editor, Globe and Mail (27 October 1977), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 6, Box 860)

that "we work closely with Indian Rights for Indian Women and hope to join with other native women's organizations also."[138] Another volley of letters from NACSW to the Minister of Indian Affairs in 1978 solicited the standard government reply about ongoing consultations with the National Indian Brotherhood.[139]

In 1978, the post-conference Parliamentary Lobby Day replaced one-on-one meetings with MPs with party caucus meetings. The meetings show the extent of collaboration between the white-led women's movement and the Indigenous women's movement. In meetings with the NDP, Liberal, and Conservative caucuses, NACSW delegates asked what would be done about the *Indian Act* and the *Canadian Human Rights Act*.[140] Nellie Carlson of Indian Rights for Indian Women was among the lobbyists.[141] The NDP worried "that if the government overrode native groups' wishes, it would be accused of 'reverse racism'"[142] and the Liberal party said it insisted "on the removal of discrimination when the *Indian Act* is reformed, but the National Indian Brotherhood keeps turning it down.[143] Only the Conservative MPs were pushing for immediate action on law reform.[144] A similar caucus lobby meeting in 1979 included Mary Two Axe Earley.[145] By this time, the NDP had come around in favor of *Indian Act* reforms, and both the Conservatives and NDP stated their support for retroactive implementation.[146] In 1978, Jenny Margetts, the western chair of Indian Rights for Indian Women, was voted in as one of the vice-presidents of NACSW.[147] The 1979 annual meeting included resolutions for the repeal of the discriminatory provisions in the *Indian Act* and the

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[138] NACSW President's Report, 17 March 1978, *supra* note 135 at 3

[139] Letter from Warren Allmand, Minister of Indian and Northern Affairs to Brigid Munsche, National Action Committee on the Status of Women (22 July 1977), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 713)

[140] National Action Committee on the Status of Women, "NAC Lobby Report - Question on *Indian Act*" (20 March 1978), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 634) [NACSW Lobby Report, 20 March 1978]

[141] National Action Committee on the Status of Women, "NAC Parliamentary Lobby - Handwritten Meeting Minutes" (20 March 1978), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 634) [NACSW Handwritten Lobby Report Minutes, 20 March 1978]

[142] NACSW Lobby Report, 20 March 1978, *supra* note 140 at 2

[143] NACSW Lobby Report, 20 March 1978, *supra* note 140 at 3

[144] NACSW Lobby Report, 20 March 1978, *supra* note 140 at 4

[145] NACSW Handwritten Lobby Report Minutes, 20 March 1978, *supra* note 141

[146] NACSW Handwritten Lobby Report Minutes, 20 March 1978, *supra* note 141

[147] National Action Committee on the Status of Women, "1978 Annual Meeting - Resolutions" (17 March 1978), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 633)

Canadian Human Rights Act and support for the participation of non-status Indian women in the *Indian Act* reform process.[148]

There was, in short, a sustained connection between the National Action Committee on the Status of Women and the non-status wing of the Indigenous women's movement, represented by Indian Rights for Indian Women. A campaign that began with support of Mary Two Axe Earley and the women at Caughnawagna broadened to include the funding of non-status Indigenous groups and the exception included in the *Canadian Human Rights Act*. NACSW's discussions on this issue did not, however, ever broach the Indigenous rights and sovereignty elements of non-status Indian women's efforts to return to their communities. Nor is there any evidence that NACSW had contacts with women who had Indian status or with the other major national organization, the Native Women's Association of Canada.

Organizing by Indigenous Women

Indian Rights for Indian Women was the main link between the white-led women's movement and organizing by Indigenous women. But IRIW's lobbying activities in Ottawa were only one facet of a strengthening Indigenous women's movement. Between 1971 and 1979, Indigenous women's rights activists were also campaigning at local, provincial, and international levels.[149] For example, Mary Two Axe Earley attended the first UN World Conference on Women held in Mexico City in 1975. She and other Indian women sent a telegram to Trudeau from the Mexico City conference, calling for an end to discrimination in the *Indian Act*.[150]

The Indigenous women's movement that developed throughout the seventies was neither homogeneous nor unified. A grass-roots strand started from local level governance problems and broadened from there to work on problems ranging from education and health care on reserve. Another strand focused on lobbying the federal government. During this period, lobbying on the *Indian Act* was a point of common ground between Indian Rights for Indian Women and the Native Women's Association of Canada. For example, in 1976, IRIW and NWAC joined forces to give a joint presentation in Parliament to the Standing Committee on Indian Affairs and Northern Development.[151] The president of the Native Women's Association of Canada began their joint testimony in Parliament with the statement, "We come here today united in the interest of all native women."[152]

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[148] National Action Committee on the Status of Women, "1979 Annual Meeting - Resolutions" (23 March 1979), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 634) at 2-3

[149] Teressa Nahanee, "Indian Women, Sex Equality, and the *Charter*" in Caroline Andrew & Sandra Rodgers, eds, *Women and the Canadian State* (Montréal: McGill-Queen's University Press, 1997) 89 at 96.

[150] McIvor, *supra* note 61 at 114.

[151] Jamieson, Kathleen, *supra* note 52 at 170.

[152] *Ibid* at 179.

Meanwhile, far removed from parliamentary committee rooms, mobilization was afoot in a small community in New Brunswick. In the spring of 1977, the Maliseet women of the Tobique Reserve organized to protest their experiences of poverty, domestic violence, and dismal housing conditions. Their organizing was sparked by the eviction of a woman and daughter from their home by a man. Their immediate concern was to get the band government to provide women with equal access to housing and social services.[153] Band councils were responsible for the allocation of housing on reserve, in accordance with *Indian Act* rules restricting housing on reserve to status Indians. Women who had married non-Indians, and thus lost status, were not entitled to housing. Caroline Ennis, one of the Tobique women, said, "When I got involved in the demonstrations and lobbying, it wasn't for the non-status thing; it was purely a women's thing – because of the things they were doing to women."[154]

In August 1977, the women occupied the band council's office, as a way to hold the council accountable for helping them find safety from poverty and abusive husbands.[155] The occupation polarized the Tobique community, with some people siding with the women and others with the chief and his administration. Women began to see the band council as part of a bureaucratic system headed by the Department of Indian Affairs, in which band councils were tasked with implementing the *Indian Act*'s rules giving men housing and stripping women of status and property rights.[156]

The situation at Tobique was rooted in a problem of local band politics. Kinsella described the community as a small town, where everyone knew one another, and once "[t]here was a shortage of resources on reserve … it was just a question of whose side you were on."[157] One of the leaders of the movement, Sandra Lovelace, was the granddaughter of a former chief at Tobique, Charlie Nicholas.

The original target of the Women of Tobique was not the *Indian Act* or their entire community, but the band council. They were challenging local leaders. The women themselves noted that they were labeled "white-washed, women's lib … but we never considered ourselves 'liberated women'; we were just women who needed decent homes."[158] Although the issue became framed as a conflict pitting women against men, the protesters initially understood it as a conflict about failures in local governance. The political nature of their protest would be eclipsed, however, and the protest would be re-framed as a question of gender equality in marriage and individual human rights.

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[153] Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians: feminism, race, transnationalism 127 at 139.

[154] Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto, Ont.: Women's Press, 1987) at 94.

[155] *Ibid* at 106.

[156] *Ibid* at 120.

[157] Interview with author.

[158] Silman, *supra* note 154 at 126.

Across the country, Indigenous women who challenged the marrying out rule faced intimidation and violence. The Maliseet women from Tobique were threatened by their band administration, were physically beaten in the streets, and endured threats against their families.[159] When the Mohawk women attended the Mexico City UN women's conference in 1975, the band council served them with eviction notices in their absence.[160] Jeannette Lavell and Yvonne Bedard were blackballed by status Indian organizations.[161]

Though there was collaboration across the Indigenous women's movement, the relationship among its different facets was not plain sailing. Some of the tension was about money. Competition for funding generated leverage for the government and calcified the divisions between status and non-status Indians and between women's groups and male-led groups. Nellie Carlson's assessment of the government's funding strategy was that "I think they thought it would defeat us."[162] Funding came from the Department of Indian Affairs or the Department of the Secretary of State. While Indian Affairs refused to fund organizations that included non-status people, the Secretary of State's funding criteria required organizations to include both status and non-status Indians. Native women's centers competed with native friendship centers for funding from the Department of the Secretary of State. The Department of Indian Affairs channeled funding to provincial bodies, like the Federation of Saskatchewan Indians, who were then charged with distributing it to women's groups. But women's groups either never saw the money or felt obliged to fall in line with the positions adopted by the provincial bodies.

Until 1977, the Department of Indian Affairs refused any funding to Indian Rights for Indian Women, on the basis that its members were all non-status Indians. Instead, Indian Affairs funded the Native Women's Association of Canada, which counted status Indians among its members. In 1978, Indian Affairs changed course and gave funding to IRIW to run workshops on the *Indian Act*. Provincial women's groups, many of which were affiliated with NWAC, complained about IRIW's poor financial management, leading the government to cut off IRIW funding pending a financial audit. Although the controversy fractured IRIW for a time, the core of women from Alberta, Ontario, and Quebec remained allied. On the Secretary of State side, the Voice of Alberta Native Women and Indian Rights for Indian Women were forced to apply together for joint funding, even though they had diametrically opposed lobbying positions, resulting in an acrimonious dispute.[163]

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[159] *Ibid* at 142.

[160] Bonita Lawrence, *"Real" Indians and Others: Mixed-blood Urban Native peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004) at 58.

[161] Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3 at 25.

[162] Carlson, Goyette & Steinhauer, *supra* note 48 at 68.

[163] Jamieson, Kathleen, *supra* note 52 at 178.

The funding structure forced activists to pick a side between 'status' and 'non-status'. Recall that NWAC and IRIW were founded at the same conference from the same group of activists, and that they shared board and executive members. At the outset, IRIW was a specialist, targeted, militant wing of an internally diverse but nonetheless 'single' Indigenous women's movement. But the increasingly tense discussions over *Indian Act* reforms combined with a fight over meager financial resources widened the gaps between the organizations. These tensions yielded, by the late seventies, a 'status women' movement and a 'non-status women's movement.

If the relationships among the Indigenous women's organizations were sometimes tense, their relationship with the male-led national Indigenous organizations was downright stormy. While George Manuel was president (from 1970 to 1976), IRIW sought the NIB's support for their campaign against sex discrimination. Manuel resisted, arguing that the question of band membership should be decided at the band level, but he attempted to enlist IRIW's support for the NIB's work on hunting, fishing, and trapping rights.[164] One commentator stated that, aside from some keynote addresses at conferences, "there otherwise appears to be very little substance to the relationship"[165] between the NIB and IRIW.

Throughout the seventies, the NIB hardened its position on the marrying out rule: it could not be amended without the consent of band councils or outside of a comprehensive renegotiation of Indigenous-federal relations. This position martyred the cause of Indigenous women's equality rights in the name of Indigenous self-determination, while simultaneously denying women's stake in Indigenous sovereignty.

In contrast, the Indigenous women's groups had better relations with groups representing non-status Indians. The Native Council of Canada had intervened in support of Lavell and Bedard in 1973, and it continued to support the women's advocacy. Their alliance underlines the centrality of the status / non-status line in the Indigenous political environment of the seventies. For all of the NIB's strident campaigning for Indigenous sovereignty, the NIB excluded people, like Alberta activists Kathleen Steinhauer and Gilbert Anderson, who were both non-status Indians but directly descended from Chiefs who had signed Treaties with the Crown. For its part, the Native Council of Canada positioned non-status people as within the sphere of self-determining peoples. The cleavage between status and non-status Indians was most accentuated in the Prairies, as organizations like the Federation of Saskatchewan Indians and the Indian Association of Alberta emphasized band-level control over life on reserves. Many of these communities were already drawing down significant proceeds from the development of oil and natural gas deposits on their territories. Some of the 'hard-liners' blocking *Indian Act* reforms under the banner of self-determination were those who had the most to lose, as proceeds from oil and gas stood be divided into smaller shares if membership increased.

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[164] "An Interview with George Manuel, President of the National Indian Brotherhood", *Saskatchewan Indian* (November 1971) 6.

[165] Ponting, Gibbins & Siggner, *supra* note 68 at 273.

Indigenous Organizations

While the Native Council of Canada had collaborative relations with elements of the Indigenous women's movements, relations between the Native Council of Canada and the National Indian Brotherhood were often strained. Indeed, the "less-than-oblique support which NCC provided to the Indian Rights for Indian Women organization on the issue of sex discrimination … was a significant irritant within NIB."[166] Tensions present in the Prairies between the Metis and Treaty Indians rose to the surface in the relationship between the NIB and the NCC.

In British Columbia, in the context of an increasingly powerful sovereignty movement, the divisions between status and non-status Indians fractured the Indigenous political landscape. Partly from a desire to demonstrate Indigenous self-sufficiency, members of the Union of BC Indian Chiefs voted in 1975 to reject all federal funding, including funding to bands for education, welfare, and health. This decision met an immediate outcry at the community-level, as many people depended on federal funds. The BC Indian Homemakers' Association withdrew their support for the organization, the UBCIC lost all credibility, its leadership resigned, and the organization collapsed soon afterwards.

After this collapse, the BC Association of Non-status Indians (BCANSI) swept up the cause of status Indians. Previously an organization representing non-status Indians, it renamed itself the United Native Nations, elected Bill Wilson its president, and took on the cause of all Indigenous people, both status and non-status. As a result, the national non-status organization, the Native Council of Canada, threw out the United Native Nations – no small irony, as Wilson and his predecessor at BCANSI, Smitherham, had played a central role in founding the Native Council of Canada.[167] This showed that there was no room on the national stage for an Indigenous organization that defended both status and non-status Indians.

In 1976, George Manuel stepped down as leader of the National Indian Brotherhood. He returned to British Columbia to revive what could be saved of the UBCIC. Government funding flowed back in to the organization, and, given Manuel's deep contacts in Ottawa, the UBCIC became well connected to national spheres of influence. These connections positioned the UBCIC to play a pivotal role in the fight over the patriation of the Constitution. Although the UBCIC remained 'the' status Indian organization in BC in the eyes of the federal government, the internecine struggles of the seventies had made room for the strengthening of tribal councils. From 1977 to 1983, the tribal councils of the Nisga'a, Gitksan-Carrier, North Coast, and Nuu-chah-nulth all flourished and sought to defend the interests of their members, both status and non-status.[168]

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[166] *Ibid* at 272.

[167] Paul Tennant, "Native Indian Political Activity in British Columbia, 1969-1983" (1983) 57 BC Studies: The British Columbian Quarterly 112 at 119.

[168] *Ibid* at 121.

In the meantime, leaders from Alberta and Saskatchewan had solidified their influence on the executive of the NIB. When George Manuel stepped down from the leadership of the NIB in 1976, Noel Starblanket (1946-) took the helm. Starblanket was the NIB National Chief from 1976 to 1980. Starblanket was a twenty-nine year old Cree from Saskatchewan. He was the great-great-grandson of one of the signatories of Treaty 4, and he became chief of his reserve at the age of 24. In 1973, he was elected vice-president of the Federation of Saskatchewan Indians and was re-elected in 1975. Like Cardinal and Lavell, he was involved in the Company of Young Canadians. He pursued a law degree at the University of Saskatchewan.

Whereas Manuel had been a leader 'of the people', Starblanket emphasized the professionalization of the NIB and the creation of a highly educated, young, and energetic lobbying force on Parliament Hill. For example, Starblanket created an Indian Policy Development Secretariat, a Parliamentary Liaison Unit, and a Canadian Indian Constitutional Commission. The idea for a NIB Parliamentary Liaison Unit came from Michael Posluns, a white man whose career had included stints at the Company of Young Canadians, the Canadian Civil Liberties Association, and *Akwesasne Notes*, an influential Indigenous newspaper. In 1974, Posluns and George Manuel co-authored the landmark text, *The Fourth World: an Indian Reality*.[169] In 1976, Posluns became director of the NIB's new Parliamentary Liaison Unit, a lobbying wing that channeled positions from the NIB to parliamentarians and disseminated political intelligence from Ottawa to the executive and member organizations.[170] The increasing professionalization of the NIB raised the hackles of some of the older Indigenous politicians, who feared that the executive would lose accountability to the reserve level.[171]

Getting out ahead of Quebec: Trudeau and the Constitution

While the debates over women's rights, the *Indian Act*, and inherent Indigenous sovereignty united and divided activists, momentum was building to amend the Canadian constitution. The constitutional agenda had gained new urgency. In the 1976 provincial election in Quebec, the Liberal Party's sixteen-year reign ended with an upset victory by the Parti Québécois, led by René Lévesque. The Quebec sovereignty movement had gained a voice in power.

In 1978, the federal government tabled a white paper on constitutional reform entitled 'A Time for Action'. Recognition of Aboriginal rights was set out as one of the principles to guide the renewal of the federation.[172] The constitutional amendment bill, introduced in June 1978, included a provision specifying that the proposed *Charter of Rights* would

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[169] George Manuel, *The fourth world: an Indian reality* (Don Mills, Ont: Collier-Macmillan Canada, 1974).

[170] Ponting, Gibbins & Siggner, *supra* note 68 at 253.

[171] *Ibid* at 211.

[172] Roy Romanow, "Aboriginal Rights in the Constitutional Process" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 73 at 73.

not erase rights recognized in the *Royal Proclamation* of 1763, but it rejected the concept of self-determination for Canada's Aboriginal peoples.

The announcement of an amendment to the constitution opened new political space. Indigenous leaders sought recognition in the constitution of the existence of Aboriginal rights and a constitutional guarantee of the Crown's promises to Indians.

The first obstacle was getting in the door in order to participate in the constitutional review process.[173] By August 1978, the NIB threatened to petition the Queen to block patriation of the Constitution until Indigenous people were allowed to participate in the negotiations.[174]

With this new constitutional frontier, the need to protect the *Indian Act* as the source of Indigenous rights might be expected to have waned. But, in the same month it introduced the constitutional amendment, the federal government announced its intention to amend the *Indian Act* to end sex discrimination.[175] The announcement implied that the federal government thought it could unilaterally amend the *Indian Act*, which flew in the face of nearly a decade of promises that it would not amend the *Indian Act* without Indigenous consent. Within this new frame of the constitutional debates, the *Indian Act* became concretized as a political terrain for the defense of self-governance and Indigenous rights in Canada's constitutional order.

The government subsequently softened its opposition to Indigenous participation in the constitutional process. In October 1978, the NIB, Native Council of Canada, and Inuit were invited as observers to the First Ministers' Conference. No Indigenous women's group was invited. But NIB leader Noel Starblanket complained it would have been just as useful to watch the proceedings on television.[176] In February 1979, the issue of 'Canada's native peoples' was added to the list of constitutional agenda items. This signaled, to Indigenous leaders, that they might be able to participate equally in constitutional negotiations.[177]

Conclusion

Jeannette Corbiere Lavell's legal challenge to the *Indian Act* changed the legal and political landscape. Victories in the lower courts fanned Indigenous fears about the invalidation of the *Indian Act* and the judicial termination of Indian status. Her loss at the Supreme Court dismayed both Indigenous and non-Indigenous women – the former

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[173] Douglas Sanders, "Aboriginal Rights: The Search for Recognition in International Law" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 292 at 297.

[174] *Ibid*.

[175] Sanders, *supra* note 106 at 548.

[176] Douglas E Sanders, "The Indian Lobby" in Keith G Banting & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy, and the Constitution Act* (Toronto: Methuen, 1983) 301 at 304.

[177] Romanow, *supra* note 172 at 76.

due to the remaining discrimination in the *Indian Act*, the latter due to the implications for equality rights tout court. By funding interveners in the case at the Supreme Court, the federal government also forced Indigenous organizations to choose sides. The result was a stark polarization, with Indian Rights for Indian Women on one side championing women's equality and the National Indian Brotherhood standing against a judicial rewriting of status rules. In their pleadings to the court, however, all sides made procedural arguments about the need for Indigenous participation in decisions affecting their lives.

Boosted by the Supreme Court's decision in *Lavell*, the National Indian Brotherhood rode atop an increasingly self-assured tide of Indigenous mobilization. Their hand thus strengthened, the NIB refused any amendments to remedy sex discrimination in the *Indian Act* until the government recognized rights to self-governance inherent in Indigenous sovereignty. One result was that the *Canadian Human Rights Act* was passed with a carve-out exempting both the federal government and band councils from its regulatory scope, thus shielding the sex discrimination in the *Indian Act* from judicial review. Under the leadership of the Indian Association of Alberta, the NIB then proposed an even more patrilineal system for status in a revised *Indian Act*. This "extreme proposal" goosed the Department of Indian Affairs into another round of internal deliberations on a revised *Indian Act*, during which the problem of the retroactive reinstatement of those who had unfairly lost Indian status emerged as a linchpin problem.

The divergent interests of status and non-status Indians divided federal-level Indigenous organizations. By the late seventies, the National Indian Brotherhood was in the pocket of leaders from Alberta and British Columbia. The BC political landscape was acrimoniously over-populated with organizations headed by experienced Indigenous leaders, including the Union of BC Indian Chiefs, the BC Association of Native Indians, the United Native Nations, and several Tribal Councils. These leaders from the West had a decade of Ottawa lobbying experience under their belts.

Meanwhile, in the wake of the acrimonious alignments triggered by the *Lavell & Bedard* case, Indian Rights for Indian Women strengthened its collaboration with the non-status organization, the Native Council of Canada, and the women's movement led by the National Action Committee on the Status of Women. Throughout the seventies, NACSW championed the cause of women who had lost Indian status through marriage. As a problem of sex discrimination caused by statute, the *Indian Act* offered a welcome respite from the knotty, redistributive problems being lobbed at the organization by its radical, working-class left wing. However, NACSW's support for non-Indian women did not broach the self-determining, sovereignty dimensions of their claims. A sovereignty of another sort then captured national attention when the separatists won a Quebec provincial election. The pace quickened for constitutional reform. But the opening moves of the constitutional match paid little heed to the place of Indigenous people and their treaties in a renewed Canadian federation.

9. *Lovelace* and International Human Rights: From Politics to Culture

Introduction

In 1977, one of the multiple sites of activism by Indigenous women reached the international arena. A protest by Indigenous women in Tobique, New Brunswick was transformed from a small-town dispute over housing to an international cause célèbre reverberating through Canada's ongoing constitutional drama. Sandra Lovelace, one of the women from Tobique, submitted a complaint to the UN's Human Rights Committee seeking a declaration that Canada's *Indian Act* violated the *International Covenant on Civil and Political Rights* (ICCPR). The complaint was initiated by a group of women from Tobique, New Brunswick but steered through the UN process by an elite human rights legal community. The result in the *Lovelace* complaint is often heralded as an unalloyed victory in the struggle for equality and justice for women. In this chapter, I explain how the significance of the Lovelace case has been misunderstood. As foreshadowed in the summary that opens the chapter, I discuss the development of the *Lovelace* complaint, responses to it by the government, rebuttals by Lovelace, and the Human Rights Committee's decision.

Lovelace's complaint was one of the very first instances of an individual using a rights regime newly created in international law to challenge state action. As the Human Rights Committee was a freshly minted entity, there was both much at stake and very little precedent to work with. The first scene in which the resulting confusion played out involved discussions among lawyers from various departments of the Canadian government. Each agency had something different at stake in crafting a response to the *Lovelace* complaint. The Department of Justice saw the case as a class action suit with huge retroactive implications. For External Affairs, Sandra Lovelace had put Canada's international reputation on the line. Indian Affairs, for its part, thought that the problems at the center of the *Lovelace* complaint were not in the *Indian Act* but 'out there', at the band level, and principally tied to the government's efforts to protect Indians. This panoply of views fed inter-departmental conflict that in turn obstructed a timely response to the complaint. For her part, Lovelace charged that self-interest drove the government's failure to amend the marrying out rule. The marrying out rule promoted assimilation of status Indians, limited the growth of the status Indian population, and thereby minimized government disbursals for the services owed to status Indians under Canada's existing constitution. Canadian government officials eventually reached a hard-fought consensus, which was then mirrored in the Committee's judgment. The Committee did not give the government the result it wanted, but it did adopt its framing of the problem. The Committee decided that the status rules in the *Indian Act* violated Lovelace's rights as a member of a cultural minority – not her gender equality rights. On this account, the *Indian Act* could be read as an imperfectly-implemented scheme of affirmative action for the benefit of a minority. The Human Rights Committee's decision set the stage for a rendering of the marrying out rule as a struggle between the equality rights of individuals and the collective rights of cultural minorities. An additional effect of the 'cultural minority' frame was the erasure of the political valence of the claims made by Indigenous women like Lovelace.

The Development of the Complaint from the Tobique Reserve to the New Brunswick Human Rights Commission

Carole Ennis of the Tobique Reserve was one of the leaders of the protest at the Tobique Reserve. As a student at St. Thomas University, she attended a course on international human rights taught by Professor Noel Kinsella, who was also the founding chair of the New Brunswick Human Rights Commission.[1] As Kinsella recalls, after he explained the international human rights covenants and their effects in Canada, a student from the back of the room exclaimed, "That's okay if you're not an Indian."[2] Ennis told the class about the myriad forms of discrimination experienced by Indigenous people in New Brunswick. Kinsella suggested that the issue could become a class project. Ennis said she could produce a real-life person – a person whose name was Sandra Lovelace – to be the plaintiff. Lovelace, one of the Tobique women leaders, was born a Maliseet Indian but lost her rights and status as an Indian through marriage to a non-Indian. When her marriage ended, Lovelace returned to the Tobique Reserve, but she was not legally entitled to live there or receive housing as she no longer had Indian status. She and her young son were living in a tent.

Given the Supreme Court's decision in *Lavell,* the Canadian courts offered Sandra Lovelace no hope for a remedy. Instead, Lovelace took her complaint to the new Human Rights Committee of the United Nations. Kinsella recalls that students wrote the first draft of a complaint under the optional protocol of the *International Covenant on Civil and Political Rights* (ICCPR). Glenna Perley, Lovelace's first cousin, and Dan Ennis were central in the decision to take their complaint to the UN.[3] Caroline Ennis saw the idea "as a *strategy* to put pressure on the Canadian government in order to make officials address the concerns Native women were raising."[4]

The Women of Tobique received support from the New Brunswick Human Rights Commission, which had emerged during the wave of provincial human rights legislation that swept the country in the sixties. The Commission had received calls about an occupation by women of the band council offices. Electricity to the reserve had been cut off, and when employees from the New Brunswick Electric Power Commission approached the power poles to restore service, they were harassed and forced to leave the reserve.[5] Kinsella followed up with a visit by the New Brunswick Human Commission to the Tobique Reserve to gather information about the housing problem. As he recalls, "the chiefs came down carrying shot-guns, so we left."[6]

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[1] Interview with author

[2] Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto, Ont.: Women's Press, 1987) at 60.

[3] *Ibid* at 160.

[4] *Ibid* at 176.

[5] New Brunswick Human Rights Commission, "Extract of Minutes" (17 October 1977), in University of Saskatchewan, Native Law Centre (online: <https://www.usask.ca/nativelaw/un-human-rights--first-nations/sandra-lovelace-v.-canada-1977-1981.php>))

[6] Interview, *supra* note 1.

In a letter appealing for action by the Minister of Indian Affairs and Northern Development, Kinsella described the problem as one of "married women who, without a certificate of possession, have been forced to leave their homes due to family difficulties."[7] A perfunctory response from the Minister stated that he was "well aware of the gravity of this social problem."[8] At this stage, federal and provincial officials categorized this as a 'social problem' about housing, rather than as a problem of human rights, gender discrimination, and the need for reforms of the *Indian Act*.

Recall that in 1976, a new federal-provincial committee had been tasked with discussing Canada's potential liability under the ICCPR. The New Brunswick Human Rights Commission presented the Women of Tobique's case to the Federal-Provincial Committee.[9] Authored by Kinsella, the Commission's memo showed how Canada might be found in violation of its obligations under the ICCPR.[10] The memo framed the issue as a problem of gender equality, marriage equality, and rights concerning the family. It noted the possible argument that the minority rights provisions under article 27 could be used to say "that the loss of certain rights for women marrying outside their Indian culture is an attempt to protect both the Indian minority and its reservation lands from outsiders."[11] But it goes on to argue that while this intent may be laudable, "Parliament must adopt a formula for their protection that does not involve discrimination between males and females."[12] In Kinsella's recollection of the meeting, "the people from the federal government said, 'this won't be a problem.' So we sent the thing to the UN."[13]

From the Women of Tobique to a Fraternity of Human Rights Lawyers

The Optional Protocol to the ICCPR gives individuals the opportunity to submit a complaint alleging violations of rights under the ICCPR, if the offending state is both a

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[7] Letter from Dr. Noel Kinsella, Chairman, New Brunswick Human Rights Commission to Hugh Faulkner, Minister of Indian Affairs and Northern Development (19 October 1977), in University of Saskatchewan, Native Law Centre (online: <https://www.usask.ca/nativelaw/un-human-rights--first-nations/sandra-lovelace-v.-canada-1977-1981.php>))

[8] Letter from Hugh Faulkner, Minister of Indian Affairs and Northern Development to Dr. Noel Kinsella, Chairman, New Brunswick Human Rights Commission (8 November 1977), in University of Saskatchewan, Native Law Centre (online: <https://www.usask.ca/nativelaw/un-human-rights--first-nations/sandra-lovelace-v.-canada-1977-1981.php>))

[9] New Brunswick Human Rights Commission, "Submission to Meeting of Continuing Federal-Provincial Committee of Officials Responsible for Human Rights, ICCPR - Case Study: An Illustration of Non-Compliance, Discrimination against Native Women in Canada" (21 November 1977), in University of Saskatchewan, Native Law Centre (online: <https://www.usask.ca/nativelaw/un-human-rights--first-nations/sandra-lovelace-v.-canada-1977-1981.php>)) [NB Human Rights Commission, ICCPR-Native Women Case Study, 21 November 1977]

[10] NB Human Rights Commission, ICCPR-Native Women Case Study, 21 November 1977, *supra* note 9 at 3

[11] NB Human Rights Commission, ICCPR-Native Women Case Study, 21 November 1977, *supra* note 9 at 3

[12] NB Human Rights Commission, ICCPR-Native Women Case Study, 21 November 1977, *supra* note 9 at 4

[13] Interview, *supra* note 1

party to the treaty and to its Optional Protocol.[14] The Human Rights Committee (HRC) receives the complaint and asks the State party for information and observations relevant to the admissibility of the complaint. Based on review of this information, the HRC decides on the complaint's admissibility. If deemed admissible, the HRC asks the State party for an explanation and indication of whether any remedy has been taken. The complainant can respond to the government's explanation. Throughout, the HRC can ask either party for further clarifying information. The HRC then issues its views on the merits of the complaint. For most States parties, these views are non-binding.

The HRC's early work was marked by timidity and great concern for the proper placement of state feathers.[15] This is unsurprising given that the Committee's existence was thanks to an 11th hour rescue to preserve a state oversight mechanism in the draft Covenant. The monitoring and implementation mechanisms under the ICCPR were the subject of considerable controversy during the negotiations. The early draft of the ICCPR, in 1954, envisioned a quasi-judicial committee. But by 1966, the majority of states opposed any obligatory provisions for inter-state dispute resolution, and the Soviet Union opposed any committee of any kind. A coalition of African and Asian countries cobbled together a compromise. The only mandatory implementation function under the Treaty would be a committee to review states reports, and the individual complaint procedure was hived off into an optional protocol.[16]

In December 1977, Sandra Lovelace filed a complaint with the HRC under the Optional Protocol to the ICCPR. Lovelace alleged violations of her rights to family life (art. 23), equality (art. 26), and minority status (art. 27). Dan Ennis, Commissioner of Human Rights and relative of Carol Ennis, witnessed the complaint. Her complaint was copied nearly word for word from the memo by Noel Kinsella to the Continuing Federal-Provincial Committee on Human Rights.[17]

Sandra Lovelace thought the complaint would make its way to the United Nations but did not think much would come of it, because "every time an aboriginal person would want to file complaints, there's usually … not enough contacts …"[18] Lovelace believed her case was not much different from all the others, save for one difference – "Some of

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[14] *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, (entered into force March 23, 1976)

[15] Thomas Buergenthal, "The UN Human Rights Committee" (2001) 5 Max Planck Yearb U N Law 341 at 342.

[16] Dominic McGoldrick, *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights*, Oxford monographs in international law (New York: Oxford University Press, 1991) at 9; Torkel Opsahl, "The Human Rights Committee" in Philip Alston, ed, *U N Hum Rights Crit Apprais* (Oxford: Clarendon Press, 1992) 369 at 372.

[17] Communication to United Nations Human Rights Committee From Sandra Lovelace, December 29, 1977 [*Lovelace* complaint, (29 December 1977)].

[18] Interview with author

the people involved at the time were really anxious to pursue and made sure that the government acted on this issue."[19] She named Noel Kinsella as one of the main drivers.

Kinsella was, in fact, a driving force behind the complaint – and an extremely well-connected one at that. Even at the time the complaint was filed, Kinsella's involvement in the complaint was well-known. A memo between External Affairs officials in Geneva and Ottawa discusses "two communications concerning rights of Canadian Indian Women"; marginalia by the Ottawa official notes that "one is from NB (Noel Kinsella)."[20] Though Lovelace and the Women of Tobique continued their campaigns at the domestic level, their direct involvement in the complaint waned as the complaint made its way through the UN system.

Instead, in an era when freshly minted human rights held so much promise, the *Lovelace* complaint became a watering hole for the elite of the Canadian human rights movement, largely due to Kinsella's contacts. Through Kinsella's role in the New Brunswick Human Rights Commission, the Canadian Association of Statutory Human Rights Agencies (CASHRA) was apprised of the issue. The 1978 CASHRA annual meeting passed a resolution about the *Lovelace* complaint, urging the federal government to "expedite a resolution of the alleged statutory sex discrimination prior to this matter being determined by the UN Human Rights Committee."[21] The Canadian Human Rights Commission also championed the cause, through the leadership of Gordon Fairweather, the first chief commissioner of the Canadian Human Rights Commission. Fairweather had been the Attorney General of New Brunswick until 1960; he returned to his home province to give a lecture at St. Thomas University, where Kinsella was a law professor. Kinsella orchestrated a protest from students about the *Indian Act* to make the point to the highest-ranking federal human rights official that the situation at Tobique was a federal matter.[22] The Canadian Human Rights Commission would later supply evidence to support Lovelace's submissions to the UN.

Most important of all, however, was Kinsella's direct connection to a sitting member of the UN's Human Rights Committee, Walter Tarnopolsky. Tarnopolsky was a towering figure in Canada's legal community and had been involved in the federal-provincial discussions on implementation of the human rights Covenants. When Kinsella prepared his 'discussion paper' on the *Indian Act* for the Federal-Provincial Committee of Ministers, he talked it over with Tarnopolsky.[23]

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[19] Interview, *supra* note 18

[20] Letter from Permanent Mission of Canada, Geneva to Ottawa Desk, External Affairs (7 April 1978), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1, Pt. 5)

[21] Letter from Kathleen Ruff, President, Canadian Association of Statutory Human Rights Agencies to Donald Jamieson, Minister of External Affairs (16 June 1978), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1, Pt. 6)) at 2

[22] Interview, *supra* note 6.

[23] Interview, *supra* note 6.

Tarnopolsky joined the Human Rights Committee as one of 18 members nominated by States parties and serving in their personal capacity. The Committee began its work on 1 January 1977. The Committee attracted a group of esteemed lawyers, international law scholars, and judges.[24] In a departure from earlier practice related to the ICCPR, the HRC operated based on a tacit agreement to avoid politicization.[25] The Provisional Rules of Procedure, adopted at the first and second session of Committee, added an oath that Committee members would swear before taking on their duties, "to discharge my duties as a member of the Human Rights Committee impartially and conscientiously."[26]

Despite these rules providing that jurists on the Committee served impartially in their personal capacity and were not state representatives, there was sustained communication and advising between Tarnopolsky, federal officials, and Kinsella. For example, an internal memo from the Department of External Affairs suggests convening a meeting with Tarnopolsky, as his "views … would be of value in arriving at an agreed interdepartmental position on some of these issues."[27] Later on, Tarnopolsky rebuked Canadian diplomats when he felt that Canada's actions before the Committee went against the spirit of its international obligations.[28]

The Committee's procedures did not allow for live evidence before the Committee. But Kinsella was there in Geneva at the meeting of the Committee. He attended all the Committee's public meetings and worked the corridors. Tarnopolsky introduced Kinsella to the Committee members, and Kinsella lobbied them about the *Lovelace* complaint. Kinsella recalls that he was warmly received, and that his advocacy activities were seen to be pretty normal.[29] In Kinsella's recollection, it was German jurist Christian Tomuschat who "held the pen" on the Committee's decision in *Lovelace*. According to Kinsella, Tomuschat felt strongly that it should be framed as a case about culture, not gender.[30] It was only the Tunisian member of the Committee, Mr. Nejib Bouziri, who insisted that Canada had also violated equality rights guarantees. Although the decision formally records that Tarnopolsky "did not participate in the consideration of this

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[24] Thomas Buergenthal, *supra* note 15 at 342.

[25] Torkel Opsahl, *supra* note 16 at 376.

[26] United Nations Human Rights Committee, "Provisional Rules of Procedure as Adopted at the First and Second Sessions of the Human Rights Committee," Yearbook of the Human Rights Committee, vol. 1, UN Doc. CCPR/6, 1987.

[27] M.D. Copithorne, Director General, Legal Affairs, External Affairs, "Memorandum: Canadian Communications to the Human Rights Committee" (2 May 1979), in Ottawa, Library and Archives of Canada, (RG25, Vol. 14958, File No. 45-CDA-13-3-1, Pt. 6) [External Affairs, Memo, Canadian Communications, 2 May 1979] at 1

[28] Permanent Mission of Canada, Geneva, "Telex to Ottawa and New York: Cte des Dts de lHomme: Protocole Facultatif" (22 July 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3, Pt. 8)

[29] Interview, *supra* note 6.

[30] Interview, *supra* note 6.

communication or in the adoption of the views of the Committee," the records shows that Tarnopolsky played a central role in brokering access for Kinsella.[31]

The communication from Lovelace was among the first received by the Committee. At its second session, the Committee began its consideration of Communications. By 1979, the Committee had 14 communications related to Canada.[32] A Canadian official reporting from Geneva noted that, "CDA [Canada] is second best client of Cttee under Protocol."[33]

Canada's Response on the Admissibility of the *Lovelace* complaint

The HRC was not in the business of swift justice. Lovelace had filed her complaint to the UN's Human Rights Committee in December 1977, but it was nearly a year before Canada was asked for its views on the admissibility of the complaint. It would take nearly another year for federal officials to reach a consensus on the issues related to admissibility. Lovelace's complaint forced bureaucrats from the Departments of Justice, External Affairs, and Indian Affairs to work together (for the first time, by the look of it). That process exposed fundamental disagreements about the best path for amending the *Indian Act* and broader confusion about the meaning of equality in Canadian law and the nature of the government's relationship with Indigenous people.

The first notable features of these discussions is that Indian Affairs initially played no role in the deliberations over the reply to the Human Rights Committee. The Department of Justice led in drafting Canada's reply to the Human Rights Committee's request for information regarding admissibility. Justice lawyers butted heads with officials at the Department of External Affairs. Justice's opening jab in the internal government sparring match about *Lovelace* provides insight into one viewpoint within the federal government. It reveals the amount of strategic disagreement among departments, the newness of the whole issue of individual human rights complaints, and the influence of understandings of equality shaped in the *Canadian Bill of Rights* jurisprudence. The Department of Justice made the following arguments about the admissibility of Lovelace's complaint:

First, Justice's core argument was that Lovelace's complaint was inadmissible because there had been no violation of rights under the ICCPR. It amounted to a claim on the merits. Justice's draft reply argued that the *Indian Act* did not violate any of the rights in the ICCPR, notably articles 23 (protection of the family), 26 (equality), and 27 (minorities).

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[31] Geneva Permanent Mission, External Affairs, "Telex: Comite des Dts de lHomme - &e Session: Plaintes contre CDA" (17 August 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [External Affairs, Telex, 17 August 1979]

[32] Human Rights Committee, *Report*, UNGAOR, 34th Sess., Supp. No. 40 (A/34/40) (1979) at 107 [HRC Report, 1979]

[33] Letter from Permanent Mission of Canada, Geneva to Ottawa Desk, External Affairs (20 August 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3, Pt. 6) at 2

Second, the 'equality before the law' guaranteed in the ICCPR was the same 'equality before the law' in the *Canadian Bill of Rights*. On this understanding of equality, there was no discrimination if everyone within a category created by law was treated the same way. The Department of Justice referenced a definition of 'equality before the law' in an explanatory note of the UN General Assembly (A/2929), which referred not "to the substance of the law itself, but to the condition under which the law was to be applied."[34] Justice's interpretation of the ICCPR equality obligations was "that every person in Canada must be treated equally in the way in which the provisions of the *Indian Act* are applied or enforced." Since the *Indian Act* "is intended for the benefit of Indians in Canada and applies only to them" and since all women falling under the marrying out rule (section 12(1)(b)) of the Act were treated the same way, there was no violation of the equality rights in ICCPR.[35]

Third, following on from the second point, on this exact question of sex discrimination in the *Indian Act*, Canada's Supreme Court had decided the matter in *Lavell* and sanctified a narrow approach to the meaning of 'equality before the law'. Since the language of the equality clauses in the ICCPR resembled the language and purpose of the equality provisions in the *Canadian Bill of Rights*, the *Lavell* decision of Supreme Court of Canada constitutes a useful interpretive aide.

Fourth, although there was some hesitation about whether Indians were 'ethnic minorities', they were nonetheless covered by article 27 of the ICCPR.[36]

Fifth, the relationship between equality rights and minority rights was that minority rights bounded or limited the scope of equality rights: "article 27 is intended to qualify and to that extent limit the meaning that might otherwise be placed on the provisions of article 26."[37] In other words, differential treatment to protect minorities acted as a check on equality rights.

Sixth, the purpose of the *Indian Act* was to encourage Indians in Canada to enjoy their own culture.

Seventh, the marrying out rule in the *Indian Act* accorded with "long un-interrupted Indian tradition," by which Justice meant a post-European contact tradition of defending the community from intermarriage with a majority culture. This "Indian tradition" addressed "the very real threat posed by intermarriage with members of the

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[34] Letter from Alice Desjardins, Director, Advisory & Research Services, Department of Justice to Erik Wang, Director, Legal Operations Division, External Affairs (21 February 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [Justice to External Affairs, 21 February 1979] at 3

[35] Justice to External Affairs, 21 February 1979, *supra* note 34 at 3

[36] Justice to External Affairs, 21 February 1979, *supra* note 34 at 6

[37] Justice to External Affairs, 21 February 1979, *supra* note 34 at 5

majority culture,"[38] and, as such, was an example of how minority rights check the extent of equality rights.

Eighth, the Indian community's traditions and their views on the *Indian Act*'s marrying out rule were implied to be at odds with a determination that the *Indian Act* violated the ICCPR.

Lastly, Canada's reforms to the *Indian Act* were delayed by a consultative process aimed at taking account of the wishes of the Indian community in Canada. "[N]o decision can be taken on any changes to the Act without there first being sincere and serious consultation with the various segments of the Indian community in Canada."[39] The consultative process could take some time, and so "legislative proposals for amending the Act will not be forthcoming in the immediate future." [40] As characterized by Justice, the consultative process to review the *Indian Act* was:

> a delicate one that may well be jeopardized if the Committee at this time decides adverse to the Canadian position and consequently attempts thereby and without regard for their views and traditions to force certain solutions upon the Indian community with respect to the rights and status of members of that minority group in Canada.[41]

Lawyers at the Department of External Affairs disagreed with most of Justice's opening gambit. While reading Justice's interpretation of the ICCPR equality provisions, a lawyer at External Affairs scrawled in the margins that these provisions "are not interpreted in this way."[42] A battle between lawyers began.

The Department of Justice's draft reply set the stage for over six months of inter-departmental wrangling about how best to handle the *Lovelace* complaint. Canada's lengthy silence on admissibility was taken by many – most importantly, Sandra Lovelace – to mean a lack of interest or concern. But these government records reveal that the *Lovelace* complaint brought to the surface genuine confusion and disagreement between different branches of the government about the meaning of equality, the purpose of the *Indian Act*, and the nature of the government's relationship with Indigenous communities. Internal conflict translated into external inaction. Activists in Canada assailed the federal government for its lack of action.

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[38]Justice to External Affairs, 21 February 1979, *supra* note 34 at 5

[39] Justice to External Affairs, 21 February 1979, *supra* note 34 at 6

[40] Justice to External Affairs, 21 February 1979, *supra* note 34 at 6

[41] Justice to External Affairs, 21 February 1979, *supra* note 34 at 6

[42] Justice to External Affairs, 21 February 1979, *supra* note 34 at 4

External Affairs Defends Canada's International Reputation

The Department of Justice's draft reply regarding admissibility went around the departmental carousel, skipping Indian Affairs entirely. External Affairs weighted in with the view that Justice had taken the wrong tack. It was inappropriate at the stage of admissibility to make an argument on the merits about the validity of the law being challenged. Furthermore, it seemed most unwise to defend the *Indian Act* at the United Nations, since "most Canadians involved in domestic human rights activities are convinced that Section 12(1)(b) of the *Indian Act* is indeed discriminatory."[43] It would be "sufficient in this case simply to refer to the decision in the *Lavell* case."[44]

External Affairs noted the "sensitivity of the case" and inferred that the Human Rights Committee would find it significant that "the complaint was witnessed by a member of the New Brunswick Human Rights Commission."[45] The reply should "consider emphasizing the complexity and sensitivity of the issue and the necessity of ensuring that the Canadian Indian community concur fully in any amendment to the *Indian Act*."[46] Whereas Justice had implied that the Canadian Indian community was defending the marrying out rule in the *Indian Act* on the basis of 'tradition', the External Affairs approach stressed the consultative process as the barrier to amending the Act.

For the chief legal strategist at External Affairs, the relationship between minority rights and the equality provisions in the ICCPR was indeed the heart of the matter, but Justice had the relationship between the two principles the wrong way around. According to External Affairs, there was some merit in Lovelace's argument that article 27 minority rights were "conditioned by" the equality rights guaranteed in the Covenant.[47] Citing the jurisprudence of the European Court of Human Rights, the legal advisor at External Affairs states that this is "an extremely important argument which will require considerable care in terms of preparation of the Canadian response."[48] A submission made by Lovelace as a defense, almost as an afterthought, appeared to Canadian officials to be the crux of the matter.

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[43] V.M. Edelstein, Acting Director, UN Social and Humanitarian Affairs Division, Department of External Affairs, "Memorandum: Reply to Human Rights Committee re Mrs. Sandra Lovelace" (9 March 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

[44] Letter from Erik Wang, Director, Legal Operations Division, External Affairs to Alice Desjardins, Director, Advisory & Research Services, Department of Justice (1 March 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [External Affairs to Justice, 1 March 1979] at 1

[45] External Affairs to Justice, 1 March 1979, *supra* note 44 at 2

[46] External Affairs to Justice, 1 March 1979, *supra* note 44 at 3

[47] External Affairs to Justice, 1 March 1979, *supra* note 44 at 2

[48] External Affairs to Justice, 1 March 1979, *supra* note 44 at 2

Indian Affairs Weighs In: Reforms Are Under Way, A Turf War between External Affairs & DoJ

The Department of Indian Affairs played no part in Canada's reply to the *Lovelace* complaint until April 1979. When Indian Affairs chimed in, it was to state that it "had no quarrel with the legal arguments" but preferred to include its own description of the proposed remedial changes to the *Indian Act*. According to Indian Affairs, the federal government was determined to end sex discrimination in the *Indian Act*, even in the "absence of unanimous agreement among the Indian people as to how these particular sections should be changed," and cognizant of "the very profound effect any changes in this area will have on the Indian community as a whole."[49] For Indian Affairs, the barriers to reform lay outside the government in the Indian community.

These comments by Indian Affairs had little influence on the core disagreement stewing between lawyers at the Departments of Justice and External Affairs. The Department of Justice would not back down from its argument that Canada had fully complied with the ICCPR. This contention led to a turf war between the Department of Justice and the Department of External Affairs as to who had the right interpretation of international law. For both, the core issue was the meaning of the equality provisions in the ICCPR. External Affairs sought to illuminate the meaning of these provisions with reference to jurisprudence from the European Court of Human Rights. The Department of Justice preferred to make Canada's case based on the similarities between the language in the Covenant and the *Canadian Bill of Rights*. The newness of the entire exercise of human rights complaints is revealed in the fact that neither department knew which line of jurisprudence to follow.

Advisors at External Affairs took issue with the Department of Justice's obstinate defense principally because of appearances domestically: it created "concerns … as to possible misinterpretation in Canada of the government's motivation in putting to the UN a legal argument which appears to defend Section 12(1)(b) of the *Indian Act*."[50]. A revised reply suggested omitting any discussion about Canada's compliance (or lack of) with the ICCPR. Instead, Canada's reply should stress the on-going reform process and "its undertaking not to unilaterally impose upon Indians changes in legislation which affect them."[51] External Affairs described the *Indian Act* as legislation designed to protect the rights of Indians to enjoy their own culture, language, and religion, framing this right in light of article 27 of the ICCPR. This 'protective' legislation required definitions

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[49] Letter from Huguette Labelle, Assistant Deputy Minister, Corporate Policy, Indian and Northern Affairs to Alice Desjardins, Director, Advisory & Research Services, Department of Justice (24 April 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 2

[50] Letter from Verona Edelstein, Director of United Nations Social and Humanitarian Affairs Division, External Affairs to Alice Desjardins, Director of Advisory and Research Services Section, Department of Justice (22 May 1979), in Ottawa, Library and Archives of Canada, (RG 25, File No. 45-CDA -13-3-1) [External Affairs to Justice, 22 May 1979]

[51] External Affairs to Justice, 22 May 1979, *supra* note 50

of Indians and criteria for acquiring or losing Indian status. The beneficiaries of the legislation were "the minority Indian community."

This new strategy proposed by External Affairs created a further delay. By June 1979, the Human Rights Committee still had no submissions from Canada on admissibility.[52] That same month, a national election brought an end to a decade of Liberal rule.

Inter-Departmental Turf Wars, Continued

The election of a new government did not alter the stately pace of the inter-departmental process for replying to the Human Rights Committee. Indian Affairs continued to insist that any reply on admissibility contain information on the on-going reform process. It expanded the language urging for deference by the Committee:

> It is submitted that in carrying out its responsibilities under article 27 of the Covenant, Canada must proceed with due regard for the wishes of the Indian community in Canada. … [T]he desire for quick action has been, and must continue to be, balanced by an understanding and appreciation of the very basic way that such changes will affect Indian society; and care must be taken that such change is not thrust upon Indian people, but evolves with them and from them.[53]

A subsequent draft showed that Indian Affairs succeeded in shaping the language on the government's remedial action. Whereas earlier drafts penned by Justice lawyers had implied that the rules on inter-marriage were integral to "Indian tradition", the new formulation instead described the "minority Indian community in Canada" as being "historically and traditionally … desirous of maintaining their own community and 'their own culture'."[54] Between External Affairs and Indian Affairs, the rules in the *Indian Act* had become a matter of culture and the protection of ethnic minorities.

The new director of Legal Operations at External Affairs testily observed that "the response as drafted has … become self-contradictory."[55] It was incoherent to defend the

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[52] Letter from Ottawa Desk, External Affairs to Geneva Permanent Mission, External Affairs (12 June 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

[53] Letter from Huguette Labelle, Assistant Deputy Minister, Corporate Policy, Indian and Northern Affairs to V.M. Edelstein, Director, UN Social and Humanitarian Affairs Division, External Affairs (22 June 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 2

[54] Letter from Erik Wang, Director, Legal Operations Division, External Affairs to Alice Desjardins, Director, Advisory & Research Services, Department of Justice (26 June 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 3

[55] Letter from L.S. Clark, Director, Legal Operations Division, External Affairs to Alice Desjardins, Director, Advisory & Research Services, Department of Justice (9 July 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [External Affairs to Justice, 9 July 1979] at 2

Indian Act, as Justice demanded, and describe the on-going reform process, as Indian Affairs insisted. Patience wore thin at External Affairs. Furthermore, he thought that the Department of Justice was out of its depth in international law. Justice's argument was based on a document issued by the UN Secretariat in 1954. In a detailed explanation of sources for interpreting the Covenant, External Affairs provided no less than six reasons why references to this document were not admissible as supplementary means of interpretation within the *1969 Vienna Convention on the Law of Treaties*.[56] The Director of Legal Operations concluded this strongly worded letter by noting that the Secretary of State for External Affairs would meet with the Women of Tobique at the end of the month, and "therefore it becomes necessary to have this matter finalized without delay."[57]

Shortly after this exchange, the war of words between Justice and External Affairs ratcheted up the bureaucratic hierarchy. In a letter to the Assistant Deputy Minister at the Department of Justice, Barry L. Strayer, the Director General of Legal Affairs at External Affairs, M.D. Copithorne "question[ed] whether Canada should argue the issue of admissibility of this case."[58]. External Affairs' view was that the European Commission and Court of Human Rights were sources of relevant jurisprudence, because of the similarities between the ICCPR and the European Convention on Human Rights and Fundamental Freedoms and their shared origins in the Universal Declaration of Human Rights. The Canadian court's interpretation of 'equality before law' in *Lavell* was at odds with decisions of the European Court.[59] For fear of losing the argument on equality law, External Affairs advocated that the Canadian reply remain silent on admissibility and focus purely on the remedial action underway in Canada. External Affairs proposed simply adopting the position taken by Indian Affairs: namely, that Indians were a distinct and vibrant 'ethnic minority' who were to be encouraged to enjoy their own culture, and who must be consulted about changes to the *Indian Act*.

At last it became clear why Justice protested so much on admissibility – it was cover for its concerns about retroactive application. Deputy Minister of Justice Strayer delegated the reply to his head of Advisory and Research Services, Alice Desjardins, who wrote that Justice's approach was based on its understanding that "a strong case needed to be made before the Human Rights Committee, since the new government's policy in this matter was far from being clear."[60] Justice would not be swayed from its defense of

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[56] External Affairs to Justice, 9 July 1979, *supra* note 55 at 3

[57] External Affairs to Justice, 9 July 1979, *supra* note 55 at 3

[58] Letter from M.D. Copithorne, Director General, Bureau of Legal Affairs, External Affairs to B.L. Strayer, Assistant Deputy Minister, Department of Justice (13 July 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [External Affairs to Justice, 13 July 1979] at 1

[59] External Affairs to Justice, 13 July 1979, *supra* note 58 at 3

[60] Letter from Alice Desjardins, Director, Advisory & Research Services, Department of Justice to M.D. Copithorne, Director General, Bureau of Legal Affairs, External Affairs (2 August 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [Justice to External Affairs, 2 August 1979] at 2

Canada's compliance with the ICCPR, because "even if the *Indian Act* is amended to remove discriminatory clauses it is not certain how the question of retroactivity will be addressed."[61] Lovelace lost her status in 1970, before the Covenant had come into effect in 1976. Justice had elected "not to raise the non-retroactivity of the Covenant because we knew that, had we raised this point, another communication could have been made by another Indian woman who would have had standing."[62] The *Lovelace* case "is in fact a class action which carries with it the case of every Indian woman excluded from the operation of the *Indian Act* before and after August 19, 1976."[63] Justice was concerned that if the Committee found Canada in breach of the Covenant on the Lovelace facts, "any remedial action will need to have retroactive effect."[64] Retroactive application was the reason Justice fought its Pyrrhic battle to avoid any admission of discrimination.

Secondary to these concerns was the Department of Justice's view that Canada had not violated the ICCPR, because the discrimination on the basis of sex took place "in the pursuance of a valid objective of protecting minorities."[65] According to the Department of Justice, a 'dose' of sex discrimination was permissible to achieve the objective of protecting minorities. External Affairs had an inverse interpretation of the relationship between equality rights and minority rights. The lawyers continued to spar over the correct authorities in interpreting the ICCPR provisions. It was not even clear which body of law was relevant, to say nothing of which interpretation was correct.

External Affairs eventually accepted the concerns of its Department of Justice counterparts regarding any admission on the merits, despite the embarrassment to Canada of defending a law that it had publicly admitted needed amendment because it was discriminatory.[66]

The *Lovelace* case: Admissible before the Human Rights Committee

This hard-fought consensus among government departments came too late. On 14 August 1979, the Human Rights Committee decided that Lovelace's complaint was admissible, noting in its decision that Canada had failed to make any submissions, despite two extensions on the deadline.[67] Tarnopolsky reported confidentially that the

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[61] Author Unknown, External Affairs, "Memorandum for the Minister [External Affairs]: Sandra Lovelace" (29 June 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 2

[62] Justice to External Affairs, 2 August 1979, *supra* note 60 at 3

[63] Justice to External Affairs, 2 August 1979, *supra* note 60at 3

[64] Justice to External Affairs, 2 August 1979, *supra* note 60 at 3

[65] Justice to External Affairs, 2 August 1979, *supra* note 60 at 2

[66] Letter from M.D. Copithorne, Director General, Bureau of Legal Affairs, External Affairs to Huguette Labelle, Assistant Deputy Minister, Corporate Policy, Indian and Northern Affairs (16 August 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

[67] Sandra Lovelace v. Canada (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), Decision on Admissibility (19 September 1979) [Lovelace, Decision on Admissibility (19 September 1979)]

fact that Canada had not made submissions on admissibility had clearly been prejudicial to Canada.[68]

The Government of Canada submitted its pleadings on admissibility, even though they had become moot, because "the Committee may well consider it to be a satisfactory response on the part of Canada, sufficient to dispose of this case."[69] The reply on admissibility contained the text proposed by Justice, without comments on the question of admissibility and the text proposed by Indian Affairs on remedial action. The section on remedial action was forthright about the Government's public declaration to amend the *Indian Act* during the next session of Parliament, even in the absence of an agreement with Indian groups.[70] It removed the lengthy discussion of the 'domestic' consultative process on *Indian Act* reforms, as advocated by External Affairs. As in all the drafts, it mentions article 27 and describes Indians as a distinct and vibrant 'ethnic minority' and notes the importance of not thrusting changes on Indian people.[71]

Two months elapsed before Canada received official notification of the decision by the Human Rights Committee on the admissibility of Lovelace's complaint.[72] Canada had until April 1980 to make submissions on the merits.[73]

Interpreting the Rights in the ICCPR

As the admissibility drama finally reached its denouement, Canadian diplomats in Geneva held a meeting with Jakob Moller, Chief of Communications at the Human Rights Division at the UN. Moller headed up the administrative and technical support to the Human Rights Committee. Moller informed the diplomats that the Committee had concluded that the absence of a reply from Canada meant Canada had decided not to contest admissibility. The diplomats clarified to Moller that Canada's lack of a reply was caused by inter-departmental disagreement, further hampered by a lack of knowledge on practice and jurisprudence on interpretation of the Covenant's provisions. Moller replied that the Committee "tended to follow practice of the European

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[68] External Affairs, Telex, 17 August 1979, *supra* note 31

[69] J.S. Nutt, External Affairs, "Memorandum for the Minister: Sandra Lovelace" (20 August 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 1

[70] Huguette Labelle, Assistant Deputy Minister, Corporate Policy, Indian and Northern Affairs, "Memorandum: DIAND's Input to the Response of Canada to the Communication of Sandra Lovelace" (4 September 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 2

[71] Sandra Lovelace v. Canada (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), "Response of the Government of Canada to the Communication of Sandra Lovelace" (20 August 1979) Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3, Pt. 6)

[72] Lovelace, Decision on Admissibility (19 September 1979), *supra* note 67

[73] Letter from Secretary General, UN Office at Geneva to Permanent Representative of Canada to the UN (5 October 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

Commission on Human Rights partly because Cttee had some of same members."[74] The Committee's decision on the admissibility of the complaint was unlikely to be affected by a government's intention to change the legislation at issue. The meeting also broached the substantive issue of the meaning of the "principle of equality before the law" and whether Canada could prevail on the *Canadian Bill of Rights* argument that there was no inequality if all in a class were equally disadvantaged by a law.[75] Moller replied that "he would find it surprising for country like CDA to use Lavell argumentation in UN forum" and furthermore that a decision about constitutionality by a domestic court was irrelevant to the interpretation of an international instrument. The Committee, he said, would likely be influenced by the jurisprudence of the European Court of Human Rights.[76]

Canadian officials complained to Jakob Moller that they were hampered by lack of knowledge about the meaning of the Covenant's provisions and the practices of the Human Rights Committee. The 18 members are likely to have shared these sentiments. As Moller said, some members of the Committee fell back on their experience in other human rights tribunals. Lawyers in the Canadian government referenced the travaux preparatoires of the ICCPR and statements issued by the UN Secretary-General about the ICCPR, and Committee members are likely to have done the same.

Yet, the travaux preparatoires of the ICCPR contain a resounding silence regarding the relationship and potential conflicts between rights of women to equality and rights of minorities. Self-determination of peoples was acknowledged in the very first article of the ICCPR. This resulted from the campaigning of the Third World and the changed voting patterns caused by decolonization.[77] It was also Soviet bloc insistence that led to the inclusion of minority rights in the ICCPR, but at the expense of minorities' claims for self-determination. The self-determining peoples of article 1 were pointedly not the groups tarred with article 27's depoliticizing label, 'minorities'.

Rights protecting individuals from discrimination served as a brake on the sovereignty-based, potentially state-fracturing claims for group rights of self-determination.[78] The claims of Indigenous people were largely invisible during the ICCPR negotiations or, when visible, were framed as questions of development and assimilation, not self-determination.[79] Women, as individuals, gained in rights to non-discrimination as

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[74] Geneva Permanent Mission, External Affairs, "Telex: Communications to Human Rights Cttee" (20 September 1979), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [Geneva Mission, Telex, Communications, 20 September 1979] at 2

[75] Geneva Mission, Telex, Communications, 20 September 1979, *supra* note 74 at 4

[76] Geneva Mission, Telex, Communications, 20 September 1979, *supra* note 74 at 4

[77] Marc J Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: M. Nijhoff, 1987).

[78] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (Kehl, Germany: N.P. Engel, 1993) at 649.

[79] Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities* (New York: United Nations, 1979) E/CN.4/Sub.2/384/Rev.1, UN Sales No. E.91.XIV.2 at par. 188-190.

individuals.[80] The debates on equality rights introduced the shadowy figures of 'ancient traditions' and 'cultural practices', invoked by states to explain their incapacity for a quick end to gender discrimination.

One of the most important elements of the drafting history of the ICCPR is an absence. Although anxieties multiplied about equality rights and minorities, none of them were about the tensions between equality rights and the rights of minority groups. A phantom of that tension appeared through the use of the rhetoric of 'tradition', 'religion', and 'custom' with regard to gender equality – concepts which evoked a backward, non-secular Other. Concepts like 'custom', 'culture', and 'tradition' were not attached to a political actor.

The relationship between individual equality rights and minority rights became articulated later, through the deliberations of the Human Rights Committee in *Lovelace*. Through the *Lovelace* complaint, the rights of women to equality came to be seen as politically and substantively in tension with the rights of minorities. 'Minority' became linked to words like 'culture' and 'tradition', which were then put in tension with 'equality rights' of individual women.

Canada Replies: Now, Indian Affairs Defends the *Indian Act*

As the admissibility ship had sailed, Canadian officials turned their attention to replying to the merits of Lovelace's complaint. Substantive progress did not take place until January 1980, when the Department of Indian Affairs proposed a new tack.[81] In summary, Indian Affairs proposed to defend the *Indian Act* based on historical circumstances, present-day concerns to protect Indian land, and lack of agreement among Indian communities. This language would find its way into Canada's final submission to the Human Rights Committee, so it bears careful scrutiny.

Prior Indian Affairs formulations had connected the issue of *Indian Act* amendments on marrying out to article 27 of the ICCPR through the idea that the *Indian Act* was protective legislation aimed at a distinct and vibrant 'ethnic minority.' Under this new formulation, an obligation of consultation appeared. Because changes to the *Indian Act* would affect who had Indian status, this change could not be taken without prior consultation of "various segments of the Indian community."[82] Canada's understanding of its obligations under article 27 shifted slightly from protection to consultation. But, simultaneously, consultation became a defense of Canada's lack of progress on amendments.

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[80] Tuyfal Choudhury, "The drafting of Article 26 of the *International Covenant on Civil and Political Rights*: Part 1" 7:5 Eur Hum Rights Law Rev 591.

[81] Huguette Labelle, Assistant Deputy Minister, Corporate Policy, Indian and Northern Affairs, "Memorandum: DIAND's Input to the Response of Canada to the Communication of Sandra Lovelace" (21 January 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [Indian Affairs, DIAND Input to Response on Lovelace, 21 January 1980]

[82] Indian Affairs, DIAND Input to Response on Lovelace, 21 January 1980, *supra* note 81

The draft reply explained that the 19th century *Indian Act*s "were enacted to provide protection for Indians and Indian lands from non-Indians. It became necessary to define who was an Indian to be more definite about who had a right to occupy land."[83] Non-Indian men were considered a threat to reserve land. An Indian woman lost status on marriage to a non-Indian to ensure that she and her non-Indian husband would not live on reserve. This accorded with views about the position of women in non-Indian society at that time. Furthermore, "land became more of an emotional issue, not only because of the real threat to a limited land base, but also for what it came to symbolize … an indicator of Government's overall relationship with Indians."[84] Because of this alleged connection between the membership sections and the protection of the land base, "until the last decade, there was little demand by Indian groups, or any move by the Federal Government, to amend the status sections of the *Indian Act*."[85] This statement overlooked the federal government's role in the land grab and the evidence of Indigenous opposition to the male-biased membership rules throughout the late 19th and early 20th centuries.

The draft reply canvassed the wide range of views about proposed reforms to the *Indian Act*, including that: 1) Indians should not have any special status, 2) the *Indian Act* made Indians second-class citizens, and 3) the government was right to amend the Act. The authors of these views were not specified. Only one set of groups was named: the National Indian Brotherhood (NIB) and its 15 member associations. The NIB had stated that Indian men and women should be treated equally, that women who had lost status should be compensated, that Indian governments should determine who was an Indian, and that an increase in the number of Indians should come with an increase in the resource base of Indians. It was among the member associations of the NIB that disagreements reigned. Some groups didn't want any changes because the exclusion of women protected their culture and land base from erosion by non-Indians, while others wanted the *Indian Act* to define membership, rather than Indian governments. The government's reply said nothing about the views of Indigenous women's organizations or non-Indigenous women's organizations. The implication was that the amendment process was complicated because of this cacophony of views, the consequences on Indian communities, and the fact that "there are families in which some will be status Indians and others will not." [86] The government was committed to amending the *Indian Act* but taking great care due to the impacts on Indian society. Colleagues in External Affairs replied that this approach was satisfactory.[87]

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[83] Indian Affairs, DIAND Input to Response on Lovelace, 21 January 1980, *supra* note 81 at 2

[84] Indian Affairs, DIAND Input to Response on Lovelace, 21 January 1980, *supra* note 81 at 2

[85] Indian Affairs, DIAND Input to Response on Lovelace, 21 January 1980, *supra* note 81 at 2

[86] Indian Affairs, DIAND Input to Response on Lovelace, 21 January 1980, *supra* note 81 at 3

[87] L.S. Clark, Legal Operations Division, External Affairs, "Memorandum: Human Rights Committee Lovelace Communication" (24 January 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

For Indian Affairs, then, the barriers to reform lay in the lack of consensus among Indian groups and the need for careful consultation with communities that stood to be heavily impacted. The delay was 'out there', beyond government, and a result of the government's solicitude for the Indians.

A Consensus Among Departments

Shortly before the federal election on 18 February 1980 that returned Trudeau and the Liberals to power, the Department of Justice circulated a draft reply on the merits of the *Lovelace* complaint. Lawyers at External Affairs and Indian Affairs had reached an agreement, but Justice stuck its oar in yet again. Justice proposed additional language about how the government's concern about mixed marriages between status and non-status Indians reflects its concern for the Covenant's protections of the family. Furthermore, the purpose of the *Indian Act* accorded with Article 27 of the ICCPR, as the "Indians are an ethnic and linguistic minority in Canada,"[88] and the *Indian Act* sought to enhance their ability to enjoy their own culture.

The reply included the language drafted by Indian Affairs about the history and purpose of the *Indian Act*, the consultative difficulties surrounding amendments, and the lack of consensus on directions of proposed reforms. But an official at External Affairs simplified the story, removing the reference to "the general public" and the longer list of differing views, to focus only on the discord among the Indian associations that form the National Indian Brotherhood.[89]

External Affairs disagreed with Justice's characterization of the *Indian Act* as fundamentally aimed at protecting article 27 cultural rights. Rather, the Act's central aim was the historical goal of protecting Indians and Indian lands from non-Indians, which would emphasize "the point that the definition of 'Indian' has consequences for the material or property interests of persons who fall within that category."[90] Likewise, the lawyer from Indian Affairs stated

> The *Indian Act* never mentions linguistic or cultural rights and their enjoyment. The Act talks of land, membership, and a few special rights which can be related to land (taxation). It may

[88] Alice Desjardins, Director, Advisory & Research Services, Dept of Justice, "Note to Interdepartmental Committee on the Lovelace Case" (15 February 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [Justice, Interdepartmental Committee Note, 15 February 1980] at 3

[89] Justice, Interdepartmental Committee Note, 15 February 1980, *supra* note 88 at 4

[90] Letter from L.H. Legault, Director General, Bureau of Legal Affairs, External Affairs to Alice Desjardins, Director, Advisory & Research Services, Department of Justice (29 February 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1), at 2

> provide a basis for cultural and linguistic identity, but that is an indirect benefit.[91]

According to Indian Affairs, the government protected Indian land, land was an integral part of Indian culture, and the protection of land came to be seen by the Indians as the protection of Indian culture. Both External Affairs and Indian Affairs argued that references to rights to the family should be removed, as the problem with the *Indian Act* was precisely that it separated families.

The Department of Justice circulated a revised reply, taking on board many of the comments. The draft reply defined "Indians as a minority in Canada" and described the purpose of the *Indian Act* as "to enhance their ability and opportunity to 'enjoy their own culture … (and) to use their own language'."[92] The story of lack of consensus outside government was simplified to the lack of consensus among member associations of the National Indian Brotherhood. Over the opposition of Indian Affairs, the draft maintained the language on rights to the family. It added a new line pledging that the *Indian Act* would be amended in the next session of Parliament.[93] This commitment was deleted in the final version, which was sent to the Human Rights Committee on 4 April 1980.[94]

The Human Rights Committee Dialogue with Canada on its ICCPR Report: Indigeneity as a Minority Problem

While the inter-departmental consultations about *Lovelace* limped on, officials were busy drafting Canada's first report about its compliance with the *International Covenant on Civil and Political Rights*. Canada's report and the discussion of the report at the HRC show how officials in External Affairs and Justice were thinking about the issues raised by the *Lovelace* complaint. The ICCPR report is not merely substantively connected, however. The same officials handled both the *Lovelace* complaint and the ICCPR report. For example, Barry Strayer, Assistant Deputy Minister at the Department of Justice,

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[91] Letter from Huguette Labelle, Assistant Deputy Minister, Corporate Policy, Department of Indian Affairs to Alice Desjardins, Director, Advisory & Research Services, Department of Justice (11 March 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 2

[92] Alice Desjardins, Director, Advisory & Research Services, Department of Justice, "Note to Interdepartmental Committee on Lovelace Case: Response of Government of Canada to Decision of Human Rights Committee dated 19 September 1979 in the Matter of Sandra Lovelace" (12 March 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [Justice, Memo: Government Response, 12 March 1980] 2

[93] Justice, Memo: Government Response, 12 March 1980, *supra* note 92 at 2

[94] Sandra Lovelace v. Canada (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), "Response of the Government of Canada to the Decision of the Human Rights Committee Dated 19 September 1979 in the matter concerning Sandra Lovelace" (4 April 1980) Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

"played a central role in the preparation not only of the Canadian report but also the Government replies to communications concerning Canada."[95]

Canada's first report to the ICCPR was submitted on 18 April 1979, while the war raged between lawyers about the admissibility of the *Lovelace* complaint. The report analyzed each article of the ICCPR and gave information about relevant federal and provincial laws. There are three key observations to draw from the report.

First, Canada asserted that "Canada has been working to abolish discrimination by reason of sex" and cites the provisions in the *Canadian Bill of Rights* on equality before the law and equal protection of the law "shall be enjoyed without discrimination."[96] It discussed changes to the *Citizenship Act*, which, in 1976, changed the law from a patrilineal regime for the transmission of Canadian citizenship from father to child (and not mother to child), but omitted mention of sex discrimination in the *Indian Act*.[97]

Second, the report asserted that the *Lavell* case had defined the meaning of equality before the law. The case was about "the concept of equality" defined as "the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts of the land."[98] It summarized the court's conclusion that the *Indian Act*'s rules on status did not contravene the principle of equality before the law. The report noted, in passing, that, "Whatever may be said about this decision, the Government of Canada has undertaken to revise the *Indian Act*, including the various sections dealing with Indian status, and has taken measures to ensure that this revision is done only after consultation with the Indians."[99]

Third, *Lavell* was taken to be a case about sex discrimination, not Indigeneity or Indian status. The case was omitted from the report's discussion of Indigenous people. Indigenous people appear in the report in its discussion under article 27, on ethnic, religious, or linguistic minorities. The Canadian government interpreted its article 27 obligations as centered on the protection and encouragement of 'cultural life' of Indians as 'minorities'. The Department of Indian Affairs sought "to maintain and develop Indian culture in Canada," through "Indian cultural enrichment programs."[100] Indigenous peoples appeared, under article 27, as in need of aid. This contrasts with the discussion under article 26, in which Indigenous people appeared as participants in consultation on revisions of the *Indian Act*.

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[95] External Affairs, Memo, Canadian Communications, 2 May 1979, *supra* note 27 at 2

[96] United Nations Human Rights Committee, "Initial Reports Submitted by States Parties under Article 40 of the Covenant - Canada," CCPR/C/1/Add.43 (Vol. I) (10 May 1979) [Canada ICCPR Report, 10 May 1979] at 12

[97] Canada ICCPR Report, 10 May 1979, *supra* note 96 at 15

[98] Canada ICCPR Report, 10 May 1979, *supra* note 96 at 105

[99] Canada ICCPR Report, 10 May 1979, *supra* note 96 at 106

[100] Canada ICCPR Report, 10 May 1979, *supra* note 96 at 108

The Human Rights Committee considered Canada's initial report during a committee meeting in March 1980. A Canadian diplomat introduced the report, and then the Committee members posed questions, going through the Convention and the report, article-by-article.

Indigenous peoples and equality issues were raised at several points. With regards to equality rights under article 3, Committee members "appreciated that considerable progress had been made in legislative instruments to ensure equality between men and women."[101] There was no mention of the *Indian Act*. The discussion of family rights under articles 23 and 24 focused on laws on the age of marriage in Quebec and on illegitimate children. The discussion on equality rights under article 26 raised the obligation to ensure equal protection under the law, not just before the law, but the Committee made no specific mention of the *Indian Act* problem (despite the fact that *Lavell* was mentioned in Canada's Initial Report under article 26).

With regard to the Covenant's protection of the right of self-determination, some members asked for more information on the right of secession, "with special reference to the recent decision to hold a referendum in Quebec and the possibility for the Indians and Eskimos as well to hold such a referendum."[102] For some Committee members, Indigenous peoples were plausible claimants of a right to self-determination under the Covenant.

The fact that the Committee's discussion of Indigenous peoples took place largely under article 27 indicates that Indigeneity had been filed as a 'problem' of minority status. The Committee asked for more information on "general Canadian policy on indigenous inhabitants … on whether Canada sought to strengthen ethnic identity or to assimilate minorities into the general population."[103] The common theme of the Committee's questions was the protection of (presumably vulnerable) Indigenous populations, and some Committee members "observed that Indians were referred to in rather pejorative terms and [they] cited what appeared to them as signs of distinction between Indians and Canadian citizens."[104] During this round of questions, the Committee asked "what would be the legal status of an Indian woman whose name had been struck off the Indian register."[105] The questions were framed not as equality problems, but as problems of minority status.

In its replies to the Committee, Canada declined to make any comment on the potential rights to self-determination of Indigenous peoples referred to in Canada's report.[106] No mention was made in the discussion of equality rights of Indigenous peoples. Instead,

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[101] HRC Report, 1979, *supra* note 32 at 34, para. 161

[102] HRC Report, 1979, *supra* note 32 at 35, para. 159

[103] HRC Report, 1979, *supra* note 32 at 38, para. 176

[104] HRC Report, 1979, *supra* note 32 at 38, para. 176

[105] HRC Report, 1979, *supra* note 32 at 38, para. 176

[106] HRC Report, 1979, *supra* note 32 at 40, para. 181

the discussion of Indigeneity took place entirely under article 27. The representative gave a brief "history of the development of the status of Indians in Canada in the light of the special relationship that had existed between them and the Canadian authorities following the adoption of the Constitution of 1867."[107] Canada's representative stated that various bodies had been established over the years for exchanges of views between the Government and representatives of the Indians on proposed changes to the *Indian Act*. The representative concluded the discussion of article 27 by stating that "the Eskimos of Canada … had, together with Indian and Metis, recently been invited to participate in federal meetings to discuss possible constitutional changes for the better protection of native rights."[108] No mention was made of the issue of the rights of Indian women who married non-Indians.

In short, by March 1980, after an encounter with international law, Canada was spinning 'Indigeneity' as a question of minority rights under article 27 and entirely avoiding the sex discrimination dimensions of its policies towards Indigenous people. A year earlier, before all the internal debates about the *Lovelace* complaint, Canada had been unsure whether Indigenous people even belonged under the article 27 classification of 'ethnic minorities'. Canada had been sure, however, that the marrying out rule raised problems of sex discrimination. Ironically, the *Lovelace* complaint was instrumental in shifting the marrying out rule from a gender equality problem to a cultural minority problem.

Lovelace Replies to Canada

Sandra Lovelace had another chance to tell the Committee what her case was about, through her response to Canada's reply on the merits. Lovelace's reply came in two parts, as explained in the cover letter by Donald Fleming, Assistant Professor of Law at the University of New Brunswick. The first part consisted of Lovelace's hand-written, paragraph-by-paragraph rejoinders to the statements made in the Canadian government submissions. Lovelace's hand-written notes had been transcribed, verbatim, for ease of reading. The second part of the document was "a more formal document which has been drafted by request on behalf of Mrs. Lovelace."[109] It was Kinsella who decided to send Lovelace's hand-written notes to the UN to make the case more human – she had not known they would be seen by anyone.[110] Lovelace's notes stand out from the rest of the documentary record of the complaint in their tone and material presentation. As such, they invite a closer, more materialist reading than I have given to the rest of the material on the *Lovelace* complaint. I draw on questions and analytic techniques from

[107] HRC Report, 1979, *supra* note 32 at 43, para. 195

[108] HRC Report, 1979, *supra* note 32 at 44, para. 196

[109] Sandra Lovelace v. Canada (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), "Additional Information and Observations by and on behalf of Sandra Lovelace, Part A & B" (20 June 1980) University of Saskatchewan, Native Law Centre (online: <https://www.usask.ca/nativelaw/un-human-rights--first-nations/sandra-lovelace-v.-canada-1977-1981.php> [Lovelace, Additional Information, 20 June 1980] at 2

[110] Suzette Couture, "Is this woman an Indian?", *Today Mag* (29 November 1980).

historical anthropology to conduct this closer examination, without denying that there is room for similarly artefactual analysis of other documents in the archive.[111]

Lovelace's hand-written reply extends to seven single-spaced pages. The first three pages are written in a loose cursive script. Pages four and five appear in block handwriting. Pages six and seven are also in cursive, but in handwriting that appears to be different from the first three pages. The physical presentation of the document suggests that more than one person was involved in writing the document, a reasonable inference given the number of women who worked together on the *Lovelace* complaint. The hand-written replies and the verbatim transcriptions include abbreviations, rhetorical questions, an expletive, and numerous unconventional uses of capitalization, spelling, punctuation, and grammar. The textual presentation of Lovelace's reply stands in sharp contrast to the legal brief in the second part of the document. This legal brief contains dozens of double-spaced paragraphs, Roman numeral headings, 22 footnotes, and indented single-spaced quotes from 'off-stage' documents. It is presented in grammatically standard English, with the tone and style of a legal brief.

The documents sent to Geneva were thus something of a chamber orchestra of voices: Sandra Lovelace, un-named others writing or transcribing alongside Lovelace, two law professors, one of whom was now Chairman of the Human Rights Commission, and the secretarial assistants who typed the documents, visible through their lower-case insignias. Another voice is referenced but not directly heard: the Government of Canada. Lovelace's comments are a paragraph-by-paragraph rejoinder to Canada's submissions. For Lovelace's reply to be comprehensible, it must be read alongside the Canadian government's submission to the Human Rights Committee. The government's words provide the co-text for Lovelace's words. Lovelace (and others?) hand-wrote a reply to the Government of Canada. The capital letters, under-lining, word choice, firm language, and colorful vocabulary make palpable her anger and impatience. The writing in her hand draws attention to the bodies behind these pages. An early news report about the *Lovelace* case had wrongly reported that Lovelace would get a 'hearing' before the Committee, and Canadian officials scurried to correct any impression that there would be live evidence.[112] But, Lovelace's handwritten reply goes some way to performing such a hearing. We see her writing, imagine her speaking, and hear the verbal structure of a claim to justice. The presence and authority of a listener – the Human Rights Committee – renders audible a drama of Indigenous-colonial dialogue as a claim for justice.

Lovelace's reply contained several themes, including her opinion of Canada's conduct regarding her complaint, the correction of factual inaccuracies in Canada's reply, and

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[111] Matthew S Hull, "Documents and Bureaucracy" (2012) 41:1 Annu Rev Anthropol 251; Annelise Riles, *Documents: artifacts of modern knowledge* (Ann Arbor: University of Michigan Press, 2006).

[112] Erik Wang, Director, Legal Operations Division, External Affairs, "New Brunswick Indian Woman's Complaint to Human Rights Committee: Globe and Mail Report" (20 April 1978), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

the presentation of alternative interpretations of historical or current events. The document, which I quote and present verbatim, opened with the words:

> It is clear by the poor preparation and contant that very little effort and little understanding has gone into the responce from Canada to the U.N. complaint by myself Sandra Nicholas Lovelace. If this is an indiction of Canadas attitude about the importance of this issue than judging from the sloppy inept way in which it has been prepared I can only surmize that Canada does not take this complaint seriously.[113]

She noted that Canada should have replied by March 1979 but failed to do so until recently. Lovelace argued that Canada lacked any real commitment to preventing discrimination and amending the *Indian Act*. Ten years of discussions amounted to nothing; "If Native women had not rebelled there would no intent to change the *Indian Act* at present."[114]

She objected to the federal government's characterization of the purpose of the *Indian Act*. It was not about protecting "culture, relegion, and language of the Indian people." Rather, Lovelace wrote, "[t]he intent of the *Indian Act* was to assimulate the native people in CANADIAN SOCIETY." Canada's excuse "is a Red Herring."[115] As evidence of the real intent of the *Indian Act*, Lovelace asked why non-Indian women gained status when they married Indian men. She disputed Canada's justification for patrilineal transmission of status:

> The reasoning behind the statement that says that white men were more of a threat is irrational because all non-Indians were a threat male and female. The white man would take the land and the white women would gradually melt down the Native Culture.[116]

If the government's intention had been to protect Indian lands from encroachment by white men, she argued, "the present Reserves would have a much Larger Land bases. If there is a Fear today that the Land base on Indian Reserves will continue to shrink then the gov't itself is Responsible For this Fear."[117]

The Government of Canada's reply had described Land as "an emotional issue" for Native people. Lovelace clarified that the land base "shrank because of increase in white population and resulting theft of reserve lands. Emotional issue because of the greediness of white settlers for Indian land. Land symbitized two different values for

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[113] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 5

[114] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 10

[115] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 10

[116] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 12

[117] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 14

two different cultures."[118] Lovelace put both whites and Indians together in the terrain of emotion, whereas the Government's reply had called forth a stereotype of the overly-emotional, not-quite-rational Native.

In response to the paragraph from the Government reply that asserted the Government's intention to amend the *Indian Act* since the mid-seventies and referred to its funding of Indian Rights for Indian Women, Lovelace replied:

> Bullshit! The Govt had no intention of changing the *Indian Act* until political pressures forced them to Consider it. I.R.I.W. funding starting 1979, as a result of political pressures created during and after Native Women's Walk. There has been no Continuous funding.[119]

Lovelace criticized the Government's approach to the process for amending the *Indian Act*. Grass-roots people were not consulted and "only the All-male National Indian Brotherhood was consulted."[120] She questioned the government's good faith in holding off *Indian Act* amendments due to lack of agreement among Indigenous people. The government:

> is therefore being democratic in Not wanting to Arbitrarily impose its will on the Native population. There has Never been A Reluctance on CANADA's part to impose its will wherever it is economically 'Necessary'. … CANADA is pushing development in the North At this moment And in the process imposing its will on the Native population however on this complaint it says piously that it CANNOT do so in this CASE.[121]

The real reason for the delay, according to Lovelace, was government refusal to spend money on more status Indians and larger reserves. Lovelace was emphatic that the discrimination in the *Indian Act* should not be blamed on Indigenous people, although she noted that "band Councils discriminate against certain Individual."[122] "The Govt created this problem and the Indian Comm. NOT be required to solve it."[123]

In their physical presentation and contents, Lovelace's hand-written pleadings show that the Committee reached its decision based on a wide spectrum of arguments delivered in a range of registers. Lovelace attacked many of the empirical assertions of the Canadian government. Moreover, she emphatically rejected Canada's defense about

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[118] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 12

[119] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 18

[120] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 14

[121] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 16

[122] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 18

[123] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 1 at 18

lack of amendments based in consultation with Indigenous peoples. She laid the blame squarely on the shoulders of the federal government – not on Indigenous people.

The second part of Lovelace's submissions consisted of a detailed legal brief. The brief showed that the government moved from a commitment in its September 1979 reply to legislate "at the next session of Parliament … to resolve the difficulties that have resulted from its application" to a commitment in April 1980 to introduce, at an unspecified time, "legislation that would amend section 12(1)(b) of the Act in a way that resolves as many as possible of the difficulties caused by the provision."[124] The reply summarized the complaint as one of

> a situation wherein a state has acceded to the validity of a complaint against it but, by virtue of its indecisiveness or lack of genuine desire to determine when and to what degree it must remedy the difficulties caused by the problem, it has refused to affect a remedy.[125]

The reply suggested diplomatically, "it seems obvious to conclude that the state in question is waiting for an external impetus which will give it direction to act in a positive and remedial manner."[126]

Lovelace's reply aimed to refute Canada's justifications or rationalizations for its failure to amend the *Indian Act*. The government had repeatedly mentioned the need for consultation with Indians. But in its April 1980 submissions, the government seemed to argue that it "will not amend section 12(1)(b) of the *Indian Act* until there is virtually unanimous concurrence among all Indians that the required changes take place."[127] Lovelace's brief argued that lack of consensus could be a permanent bar to revision, as "the division among native people on the question of status is a long-standing one."[128] Lovelace's brief took the opposition among Indigenous organizations at 'face-value' rather presenting it in the political context of the 1969 White Paper's threatened repeal of the *Indian Act* or the on-going constitutional negotiations about Indigenous self-government. Lovelace's reply put distance between the government's consultation of Indians and its obligations under the ICCPR:

> The Human Rights Committee and particularly the Government of Canada, are reminded that the Indian people are not responsible

[124] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 3

[125] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 6

[126] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 6

[127] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 8

[128] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 9

> for ensuring the adherence in Canada of the rights enumerated in the United Nations Covenant on Civil and Political Rights.[129]

Lovelace's reply questioned the empirical bases for Canada's justifications for failure to amend the Act. The government's reply ignored "the numerous studies which have been made and the many solutions which have been proffered as a result of intensive research." For example, Canada asserted that Indian families were traditionally patrilineal, but, according to Lovelace's reply, "many Indian communities were matrilineal in nature." The government contended that dissent about the *Indian Act* was relatively recent, but Lovelace pointed out that "males dominate the Indian leadership and spokesman positions" and that, before the *Canadian Bill of Rights*, "no legal recourse existed for any Indian to challenge the *Indian Act*."[130]

The brief concluded by summarizing the human rights denied to Lovelace, "basic rights which, were she a male instead of a female, she would not be denied"[131]: her rights to equality (art. 26), her rights to her family (art. 23), and her rights as a member of a minority (art. 27).

Interim Decision by Human Rights Committee

The Human Rights Committee met to discuss individual complaints during its session in July 1980 and reached an Interim Decision regarding the *Lovelace* complaint on 31 July 1980.[132] The key paragraph of the Interim Decision stated that:

> the relevant provision of the *Indian Act*, although not legally restricting the right to marry as laid down in article 23 (2) of the Covenant, entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man and may in fact cause her to live with her fiancé in an unmarried relationship. There is thus a question as to whether the obligation of the State party under article 23 of the Covenant with regard to the protection of the family is complied with. Moreover, since only Indian women and not Indian men are subject to these disadvantages under the Act, the question arises whether Canada complies with its commitment under articles 2 and 3 to secure the rights under the Covenant without discrimination as to sex. On the other hand, article 27 of the Covenant requires States parties to accord protection to ethnic and linguistic minorities and the Committee must give due weight to this obligation. [my underlining]

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[129] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 9-10

[130] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 12-13

[131] Lovelace, Additional Information, 20 June 1980, *supra* note 109, part 2 at 14

[132] Sandra Lovelace v. Canada (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), Interim Decision (31 July 1980) [Lovelace, Interim Decision (31 July 1980)]

The decision begins by articulating the problem as a question of Lovelace's rights related to marriage and non-discrimination, under articles 23, 2, and 3. Up to this point, this is a case about an individual woman fighting sex discrimination in a statute. But the case pivots in the paragraph cited above, when the Committee mentions states' obligations to protect ethnic minorities. The Committee's "on the other hand" refers to a paradigm, off-stage but familiar enough to be prepositionally introduced, in which a woman's individual rights are conceptually opposed to a minority's rights. The clause does not only point to that conceptual opposition, but it produces it, syntactically. In one sentence, Indigenous peoples enter international human rights law as minorities in need of state protection and, simultaneously, are positioned in a relation of 'otherness' to women's equality rights. This balancing act would come to cast a long shadow.

Lovelace Replies to the Interim Decision

On 2 December 1980, Sandra Lovelace replied to the Human Rights Committee's request for further information, following its Interim Decision.[133] The 44-page reply was drafted by her legal advisers. It devoted several pages to a discussion of the domestic remedies pursued by Indigenous women who had lost status through marriage. As part of this review, it considered the *Canadian Bill of Rights* and the Court's decisions in *Drybones* and *Lavell*.[134] It explained the legal effects of shielding the *Indian Act* from review under the *Canadian Bill of Rights*, concluding with a discussion of the exemption of the *Indian Act* from the federal *Canadian Human Rights Act*. In other words, women like Lovelace had no domestic remedies.

Lovelace's legal team responded directly to the defense offered by Canada about sacrificing some equality rights in order to protect a minority. They addressed the remarks in the Interim Decision that States Parties are "under an obligation to accord protection to ethnic and linguistic minorities" and that this can provide a justification for violation of other rights in the Covenant. In contrast, "Lovelace maintains that the obligations as outlined in Article 27 need not be carried out in a manner which conflicts with the rights as outlined in the Covenant,"[135] citing the Travaux Preparatoires of the Covenant in support of this point. The submission compared the quandary before the Committee to the problem experienced by Canadian judges, as follows:

> the difficulty of formulating an alternative method of determining Indian status while still protecting the Indian minority, seems to have provided so considerable a barrier to the minds of judges,

[133] Letter from Donald J. Fleming, Assistant Professor of Law, University of New Brunswick to Jakob Moller, Chief, Communications Unit, Division of Human Rights, UN (2 December 1980), Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3, Pt. 8)

[134] Sandra Lovelace v. Canada (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), "Reply of Sandra Lovelace to the Observations Made and Questions posed by the 31 July 1980 Interim Decision of the Human Rights Committee" University of Saskatchewan, Native Law Centre (online: <https://www.usask.ca/nativelaw/un-human-rights--first-nations/sandra-lovelace-v.-canada-1977-1981.php> [Lovelace, Reply to HRC Observations & Questions] at8

[135] Lovelace, Reply to HRC Observations & Questions, *supra* note 134 at 31

> that they chose to permit a violation of human rights to continue rather than criticize and render inoperative legislation which was repugnant to basic rights and freedoms.[136]

The reply answered the questions of the Human Rights Committee about the number of marriages and the legal basis for residence on reserve. The reply pointedly supplied statistics for out-marriage for both Indian women and Indian men, noting however that "numbers should not be factor in determining the rights of individuals." Lovelace's reply asserted that fear that "a sudden influx of non-Indian men into the Indian communities would constitute a threat to the Indian minority" should not "determine whether the human rights of Indian women have been violated by the Government of Canada."[137] This fear should be ignored, not simply because of the formal protection of an individual's rights, but for other considerations including that forcing Indian women to leave their communities on marriage itself constitutes "a considerable loss to that minority group both in social and cultural terms and in terms of family and blood relationships."[138] The reply specified that the on-going process of patriating the Constitution and inserting constitutional protections of human rights "should not be considered in the present case.""[139]

In sum, Lovelace's reply described the rights violations at issue as both violations of individual equality rights and collective minority rights. She disputed the notion that some equality rights had to be sacrificed for the protection of a cultural minority.

Final Decision by the Human Rights Committee

On 30 July 1981, the Human Rights Committee reached its decision in the *Lovelace* complaint. It concluded that Canada had violated Sandra Lovelace's rights under the ICCPR. The Committee's decision reshaped Lovelace's claim in several ways. Lovelace's initial communication alleged violations of rights concerning the family (23), gender equality and equal protection before the law (2, 3, and 26), and minority rights (27).[140] Lovelace had referred to the rights of minorities (27) to defend against the potential argument by the Canadian government that the *Indian Act* regime was intended to protect minorities.[141]

But the Committee decided that the complaint was precisely about Lovelace's rights as a member of a minority group: "the essence of the present complaint concerns the continuing effect of the *Indian Act*, in denying Sandra Lovelace legal status as an Indian,

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[136] Lovelace, Reply to HRC Observations & Questions, *supra* note 134 at 21

[137] Lovelace, Reply to HRC Observations & Questions, *supra* note 134 at 33

[138] Lovelace, Reply to HRC Observations & Questions, *supra* note 134 at 33

[139] Lovelace, Reply to HRC Observations & Questions, *supra* note 134 at 38

[140] *Lovelace* complaint, *supra* note 17 at 2-3.

[141] *Lovelace* complaint, *supra* note 17 at 4.

in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve."[142]

The Committee decided that it could not rule on the grounds of sex discrimination because Lovelace had married before Canada had ratified the ICCPR.[143] But as the violation of her right to culture was an on-going violation, the violation fell under the ambit of the ICCPR once Canada had ratified it. The HRC's decision implied that the marrying out provision could be found to violate the ICCPR on the grounds of sex discrimination if a future case was brought by a woman who had married after the ratification of the treaty.

Lovelace's complaint ended up being about violation of minority rights, not a case about sex discrimination, or marriage and respect for the family, or Indigenous self-determination. For the Human Rights Committee, the most significant matter was that "the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity'."[144] It was Lovelace's 'cultural attachment' to her band, not her equality rights, which were threatened by the marrying out rule.

In short, a complaint that started in a small town in New Brunswick as a dispute about incompetent government emerged from the UN as a problem about minorities. Or, an Indigenous woman leader who went to the United Nations with a political problem came home with a cultural one.

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[142] Sandra Lovelace v. Canada (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), Decision (30 July 1981) [Lovelace, Decision (30 July 1981)] at para. 13.1.

[143] An individual opinion was appended to the main decision, by Mr. Nejib Bouziri. Bouziri's opinion asserts that Lovelace's equality rights have been breached, as the provisions of the *Indian Act* are discriminatory, particularly as between men and women. See *supra* note 142, Appendix

[144] Lovelace, Decision (30 July 1981), *supra* note 142 at para. 13.1.

10. Concessions on the *Indian Act* and a Delegation to the Queen

Introduction

In May 1979, the Liberal Party was ousted in an election. On 4 June 1979, Joe Clark succeeded Trudeau as the head of a minority Conservative government – but only, it would turn out, for a nine-month stint in office. Jake Epp became the new Minister of Indian Affairs.[1] Flora MacDonald took over as the Secretary of State for External Affairs.[2] MacDonald, a trailblazing politician with feminist commitments, had been the Opposition Critic for Aboriginal Affairs and had worked as a consultant for the Royal Commission on the Status of Women.[3] During Clark's tenure, national chiefs mounted a successful delegation to London. They advanced the argument that Britain could not sever its constitutional authority over Canada without respecting its treaty obligations with 'Canada's Indians', who remained, nonetheless, the Queen's faithful allies. Indigenous women from New Brunswick joined with women from Montreal for a historic march on Ottawa to demand repeal of the marrying out rule in the *Indian Act*. The march led to the first explicit attempt to trade some equality rights for Indigenous self-governance. The Clark government acquiesced somewhat on *Indian Act* reforms, but continued to deny Indigenous people a place at the constitutional negotiating table.

Indigenous Leaders Lobby in London

In 1978, Trudeau had tabled a draft of the Constitution that had raised alarm bells among Indigenous people. Indigenous people had no seat at the bargaining table, and the draft Constitution contained no affirmative recognition of Aboriginal rights. The National Indian Brotherhood had threatened to take the matter to the Queen. They did so, with a lobbying trip to England in July 1979. The historic all-chiefs delegation sought to remind the British government of its treaty commitments to Indians and ask the Crown to defend Indian interests during the Canadian constitutional negotiations. The chiefs positioned their claims in opposition to those of Quebec separatists: they were seeking a place as a founding order of government, not their own state.[4]

The ground for this trip had been prepared a few years earlier, when a delegation of Cree from Treaty 6 and Treaty 7 territory went to London on the centenary of the

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[1] Jake Epp (1939–), Progressive Conservative from Manitoba, was elected to the House of Commons in 1972 and served as Minister of Indian Affairs and Northern Development (1979–1980) and Minister of Health and Welfare (1984–1989, Brian Mulroney PM).

[2] Flora MacDonald, (1926–2015), Progressive Conservative from Nova Scotia, was elected to the House of Commons in 1972 and became Canada's first female foreign minister (June 4, 1979 – March 2, 1980, Joe Clark, PM). In Mulroney's Cabinet, she was Minister of Employment of Immigration (1984–1986) and Minister of Communications (1986–1988).

[3] Caroline Andrew & Manon Tremblay, *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) at 161.

[4] Douglas Sanders, "Aboriginal Rights: The Search for Recognition in International Law" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 292 at 297.

treaties, "to remind the Queen respectfully of their rights guaranteed by her great-great-grandmother."[5] The 1976 delegation was led by Chief Eugene Steinhauer, cousin of Kathleen Steinhauer, a leader of the non-status Indian women's movement in Alberta. Already in 1976, Cree leaders were concerned by the proposed changes to the Canadian constitution.

The 1979 delegation was made up of 340 Indian chiefs, led by NIB president Noel Starblanket. Four women were included in the Manitoba chiefs' delegation, and two women were on the steering committee planning the delegation.[6] The delegation's objective was:

> to ask that the Queen, the government of the United Kingdom and the Imperial Parliament refuse to patriate the Canadian constitution unless (a) the Indian people of Canada have been full and equal participants in the formulation of the request for patriation, and (b) the amended constitution will guarantee the legitimate political and legal rights of the Indian people.[7]

Endorsements and support for the All-Chiefs' Delegation came from far and wide, including the Canadian Bar Association and the Canadian Union of Public Employees (CUPE). The Union of Nova Scotia Indians, representing the Mi'kmaq Nation, the Manitoba Indian Brotherhood, and the Federation of Saskatchewan Indians (FSI) prepared petitions appealing to the Queen to ensure respect of the treaties in the Canadian constitution. They cited the treaty in which the Queen said "the promises we make will be carried out as long as the sun shines above and the water flows in the ocean."[8]

The National Indian Brotherhood stressed that "the original peoples of Canada are not seeking separation from the Canadian Confederation."[9] The petition by the Federation of Saskatchewan Indians began with a restatement of the Indians' "dedicated and unwavering allegiance to Your Majesty and to the Crown"[10] and, in contrast to "the Government of Province of Quebec …we have always recognized your Majesty as the

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[5] Philip Howard, "The children of the plains pin their hopes on the Queen", *The Times* (8 July 1976) 16.

[6] Manitoba Indian Brotherhood, "Report on Chiefs' Constitutional Visit to London, England" in National Indian Brotherhood, *Portfolio: Report on the Visit to England of the National Indian Brotherhood* (Ottawa, 1979) at 13.

[7] Letter from Noel Starblanket, National Indian Brotherhood to Her Majesty Queen Elizabeth II (4 July 1979) National Indian Brotherhood, *supra* note 6.

[8] Union of Nova Scotia Indians, "A Petition by the Indian People of Canada to the Her Majesty, Queen Elizabeth II, the Government of the United Kingdom, and the Imperial Parliament", *Ibid*.

[9] Letter from Noel Starblanket, National Indian Brotherhood to Rt. Hon. Margaret Thatcher M.P. (6 July 1979), *Ibid*.

[10] Federation of Saskatchewan Indians, "Paper for Trip to England: Appendix in Support of National Indian Brotherhood Presentation", *Ibid* at 1.

Head of State and we continue to do so to this day."[11] The FSI asked "whether the British Crown and your Parliament of the United Kingdom can, in good conscience, associate itself at this time with compliance with an even further delegation of trust and responsibility to a national government which has so blatantly involved itself in a breach of the trust already delegated to it."[12] In his speech to the House of Commons, Noel Starblanket argued that

> [w]hen Great Britain dismantled the British Empire it gave back the land to the original owners in the continents of Africa and Asia, including the right to establish their own Constitutional arrangements. This was not the case in British North America. … [W]hen the United Kingdom cut its colonial ties with Canada in 1867, it failed to extinguish all aspects of colonialism in Canada.[13]

The delegation's audience with the Queen was blocked by Canadian officials.[14] Nonetheless, the delegation met with the leader of the opposition, James Callaghan, MP, one hundred members of the House of Commons and House of Lords, the Archbishop of Canterbury, various high commissioners, a senior official in the Foreign Office, and a dozen NGOs.[15] Six members of the delegation assembled at Buckingham Palace to deliver gifts and a letter and meet with one of the Queen's advisors.[16] Bruce George, Labour MP, hosted the delegation's visit to the House of Commons, stating in his speech that "I can understand why this Government would not wish a meeting with the Provisional IRA, the PLO or Red Brigade, but you are ardent admirers of this country with whom you have signed sacred treaties."[17] In the House of Lords, the Earl Grey lodged a question about the lack of an official reception of the Chiefs' delegation, informing the Lords of a situation

> where the original inhabitants of Canada – their forefathers – signed binding treaties and agreements with the designated representatives of the Crown … The Indians are not asking the British or the Canadian government to allow them to secede from Canada and form a new independent State, as has been hoped for

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[11] Federation of Saskatchewan Indians, "Paper for Trip to England: Appendix in Support of National Indian Brotherhood Presentation", *Ibid* at 3.

[12] Federation of Saskatchewan Indians, "Paper for Trip to England: Appendix in Support of National Indian Brotherhood Presentation", *Ibid* at 7.

[13] Statement by Noel V. Starblanket, President of the National Indian Brotherhood to Members of the British House of Parliament and House of Lords (2 July 1979), *Ibid* at 3–4.

[14] Letter from Noel Starblanket, National Indian Brotherhood to Her Majesty Queen Elizabeth II (4 July 1979) National Indian Brotherhood, *supra* note 6.

[15] Douglas E Sanders, "The Indian Lobby" in Keith G Banting & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy, and the Constitution Act* (Toronto: Methuen, 1983) 301 at 306.

[16] Union of Nova Scotia Indians, "Trip to England" (nd) National Indian Brotherhood, *supra* note 6.

[17] Speech delivered by Bruce George, MP, 3 July 1979, Westminster Hall, *Ibid*.

> by French influences. There is a problem that needs solving and the British government are involved.[18]

Through the work of Chiefs' delegation, the UK charity Survival International declared its unanimous support for the cause. BBC World Service radio coverage of the visit was broadcast to 40 million people worldwide.[19] Reporting in the British newspapers dwelled on the delegations' grey suits and beaded vests and congratulated Chief Starblanket for "speaking with meticulous control."[20] The trip had been a demonstration of Indigenous self-governance capacities, a reminder of the Crown's treaty obligations, and an effort to distinguish assertion of Indigenous self-governance from the outright, seditious claims of Quebec separatists. Indigenous peoples' sought their place as sovereigns within a renewed confederation.

Indigenous Women March on Ottawa

While the All Chiefs' delegation was lobbying in London, the Women from Tobique, New Brunswick organized a protest march on Ottawa. Caroline Ennis, lead organizer, said, "We wanted to raise public consciousness about Native women's problems, and mainly the walk was over housing."[21] The Native Women's March was coordinated by a group of twenty-eight Tobique women, under the leadership of Sandra Lovelace and Caroline Ennis. Women came from across Canada, and marched from Oka, Quebec to Ottawa, between 14 and 19 July 1979.

The Native Women's March brought national media attention to sex discrimination in the *Indian Act*. The women talked to the press about housing and poverty. But, according to Lovelace, the press framed the march as being about the marrying out rule.[22] The Canadian Human Rights Commission issued a statement supporting the women. The NIB said they supported the women's quest for sex equality but feared that the federal government would use the protest to distract from constitutional reform.[23] A NIB representative approached the organizers of the women's march with a deal: "If you'll back our position on the Constitution, we'll back your walk."[24] Against the

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[18] United Kingdom, House of Lords, Official Report of Parliamentary Debates (Hansard), Vol 401, No 33 (25 July 1979) at 2000-1 (Earl Grey).

[19] Letter from Bill Hawkins, Industrial Communications Ltd., to Clive Linklater, National Indian Brotherhood (10 July 1979) National Indian Brotherhood, *supra* note 6.

[20] "Across the wide Atlantic or via the District Line: Gareth Parry on a probably doomed attempt by 340 Canadian Indians to win British support for improving their constitutional lot", *The Guardian* (3 July 1979), online: <http://search.proquest.com/hnpguardianobserver/docview/186108086/citation/7D8E9517CE1F4CA1PQ/1?accountid=12339>.

[21] Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto, Ont.: Women's Press, 1987) at 152.

[22] *Ibid* at 160.

[23] Monique Begin, "The Canadian Government and the Commission's Report" in Caroline Andrew & Sandra Rodgers, eds, *Women and the Canadian State* (Montréal: McGill-Queen's University Press, 1997) 12 at 96.

backdrop of the constitutional process, the NIB sought to trade gender equality rights against self-governance. Understanding the idea of a trade between these two concepts requires the contextual frame of the constitutional negotiations.

The Native Women's March also crystallized the tensions between Indigenous groups. The Women of Tobique saw the NIB as Ottawa insiders. They derided the women from NIB for coming to meet them "in their high heels, fancy clothes, the kind of fancy tee-shirts the NIB used to give out."[25] Instead, the Women of Tobique joined forces with Indian Rights for Indian Women (IRIW). They were invited to speak at a national meeting of IRIW. At this meeting, NIB chief, Noel Starblanket, rose to refuse support to the Women of Tobique, only to be publicly contradicted and humiliated by IRIW president, Jennie Margetts.[26] The Women of Tobique also felt excluded by the Native Women's Association of Canada. For example, Shirley Bear of the Tobique Women joined NWAC in 1974, but felt that "the woman who was running it enjoyed doing the whole thing, never shared anything with anyone."[27] The Women of Tobique remained at the margins of the Indigenous women's movement. In fact, what they remember most from their lobbying trips to Parliament was "being so hungry" – a sign of how distant the Women of Tobique were from the better funded corridors of power in Ottawa.[28]

Clark Acquiesces on the *Indian Act* and the Constitutional Process

The Native Women's March on Ottawa got the attention of the Prime Minister and the Minister for Indian Affairs. Prime Minister Clark met with the women and promised that the *Indian Act* would be revised to re-instate women. In Ennis' recollection, Clark held the NIB responsible for the Act not being changed, but said that his government would forge ahead regardless of the NIB's opposition.[29] Clark made good on his word.

A few short weeks after the Native Women's March, Indian Affairs officials completed a draft act to amend the *Indian Act*.[30] The draft Act provided that no one would acquire or lose entitlement to registration through marriage. Only the first generation of children of mixed status/non-status marriages would have status. The act retained the existing regime regarding illegitimate children: in the case of a protest about paternity, an illegitimate child could only retain status if it was proven that her father was an Indian. In this regard, Indian status remained rooted in descent along the male line. Band councils could make by-laws to provide for granting membership in the band to anyone

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[24] Silman, *supra* note 21 at 159.

[25] *Ibid* at 151.

[26] *Ibid* at 174.

[27] *Ibid* at 102.

[28] *Ibid* at 191.

[29] *Ibid* at 164.

[30] Department of Justice, "Confidential Draft No. 1 - An Act to Amend the *Indian Act*" (26 July 1979), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-27))

– whether they were entitled to registration as status Indians or not. In a briefing to band council chiefs, the government signaled its commitment to ending sex discrimination and recognizing Indian self-government.[31] The government invited Chiefs' responses on the proposed reforms before putting them before Parliament.

Meanwhile, on the constitutional front, the Clark government agreed to allow Indigenous involvement in the constitutional reform process, over the misgivings of many provinces. However, they would only be consulted on matters that had clear legal impact on Native people.[32]

This concession on the constitutional process was not a sign of the Clark government's enthusiasm for inherent rights of self-government. In fact, the government's position was that the call for self-governance could be addressed through amendments to the *Indian Act*, rather than through constitutional reform. In November 1979, the Cabinet considered proposed amendments to the *Indian Act* that would address "[t]he desires of Indian people and of Government for Indians to become self-reliant by assuming greater authority and responsibility for their own affairs."[33]

Clark's Tenure: Short but Significant

Under the Clark government, the issues of self-governance and women's equality emerged as serious political questions, though without rising to the level of full-blown constitutional problems. The preferred approach to these questions viewed them through the lens of reforms to the *Indian Act*. The marrying out rule had come to be understood as an affront to women's right to equality. Ending sex discrimination in the *Indian Act* came to stand in for the full realization of Indigenous women's rights, despite the fact that women's rights activists had also identified housing and poverty as serious concerns. In spite of a historic lobbying effort in London, Indigenous leaders had made little progress in framing self-governance as a fundamentally constitutional question. Like its Liberal predecessor, the Clark government insisted that the recognition of self-government should flow only through *Indian Act* reforms.

[31] Letter from Jake Epp, Minister of Indian Affairs and Northern Development to Chiefs (27 July 1979), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-28))

[32] Sanders, *supra* note 15 at 307.

[33]Letter from Jake Epp, Minister of Indian Affairs and Northern Development to Walter Baker, Deputy Prime Minister (14 November 1979), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-29))

11. The *Charter*, the Constitution, and Canadian Sovereignty

Introduction

The Clark government lost a no-confidence vote in December 1979. The Liberals, again led by Trudeau, regained power in February 1980. The Constitution was the main political priority of the re-elected Liberal Party. Before turning to the detailed narrative, I first summarize how reforms to the *Indian Act* aimed at addressing demands regarding self-governance and sex discrimination became entwined in the constitutional reform process. As the Human Rights Committee deliberated on its views, the *Lovelace* complaint increased pressure on the government for action on sex discrimination in the *Indian Act*. In addition to turning the *Indian Act* into a highly visible public issue, the complaint brought together the white-led women's movement and the Indigenous women's movement. The federal government insisted that its hands were tied because amending the *Indian Act*'s marrying out rule would violate the government's duties to protect Indian culture and imperil Indigenous self-governance demands. Whereas the marrying out problem had previously been framed as a gender equality problem, Trudeau's rhetoric now turned the marrying out problem into an issue of protecting cultural and minority rights.

Understanding this transformation requires attending to the high stakes negotiations over the Constitution. An issue that had once been seen to demand a negotiated political solution became a question of how (white) equality rights would save (brown) Indian women from (brown) Indian men. In the jaws of a secessionist movement in Quebec, the Liberal agenda sought to solidify the ground of Canadian sovereignty and consolidate national unity around a *Charter of Rights and Freedoms*. Disagreements arose over whether the new Constitution would contain entrenched Aboriginal rights—indeed, whether Indigenous people would play any role in the constitutional negotiations at all—and, given the disappointing outcomes under the *Canadian Bill of Rights*, over the scope of equality rights. Eighteen months of negotiations saw equality and Aboriginal rights coming in and out of the *Charter* like cats on a cold winter night. Public hearings about the Constitution and *Charter* sharpened the contours around equality rights, Aboriginal rights, and Indigenous self-governance. The NIB argued that membership in Indigenous communities was a matter of sovereignty, and thus it withheld comment on its views on ending sex discrimination in the *Indian Act*. The white-led women's movement championed robust equality rights in the *Charter* and held concerns that the recognition of Aboriginal rights would be used by Indigenous leadership to uphold sex discrimination in band membership. Only Indigenous women demanded gender equality rights, Aboriginal rights, *and* respect for Indigenous self-determination. The cause of the constitutional entrenchment of Aboriginal rights suffered a blow in the British Parliament, tasked with making the ultimate decision on the patriation of Canada's constitution. Yet while a parliamentary committee in Britain found no legal obligations owed by the Crown to Indigenous people, many British lawmakers supported the cause of 'Canada's Indians'. Canada's constitution was on the rocks.

The white-led women's movement launched a campaign to strengthen equality rights in the *Charter*. Many in the women's movement became concerned about a late entry in the

Charter race: a clause protecting multiculturalism. At a national conference, women expressed fears that the multiculturalism clause might undermine gender equality rights. Their examples of such fears included sex-segregated education of Muslim children, female genital mutilation, and Indigenous men hiding their sexist attitudes behind claims of Indigenous self-governance. The discursive evolution in the women's movement reframed sex discrimination in the *Indian Act* as a reflection of Indian cultural values, thus erasing both the federal government's role as author of the rule and the influence of white patriarchal culture. Debates in the women's movement over the content of the proposed *Charter* transformed a political conflict over jurisdiction to decide band membership into a question of fundamental and opposing rights.

Equality rights and Aboriginal rights were yoked in the *Charter* in more ways than one, though. The federal and provincial governments at last broke the stalemate through a constitutional deal that included the deletion of both Aboriginal rights and a free-standing gender equality. In response, the women's movement lobbied hard to recover the gender equality clause. They succeeded. Entirely inadvertently, their victory led to the reinsertion of the Aboriginal rights clause, but with one significant modification. Though this has been largely forgotten, the equality rights of Indigenous women were thus at the very core of Canada's constitutional drama.

Change in Staff

Trudeau began his new administration with a massive reorganization of Cabinet appointments. John Munro became Minister of Indian Affairs and Northern Development, a position he held until the government fell in June 1984.[1] Jean Chretien, who had led Indian Affairs through the thicket of *Indian Act* reforms in 1969, was given the even more bramble-filled patch of the Constitution, as new Minister of Justice. He would head Justice from 1980 to 1982, to be relieved by Mark MacGuigan. Mark MacGuigan was Secretary of State for External Affairs from 1980 to 1982, then replaced by Allan MacEachen, from 1982 to 1984.[2] The former executive director of the Royal Commission on the Status of Women, Monique Begin, became Minister of National Health and Welfare. The ministers responsible for the status of women were Lloyd Axworthy (1980-1981) and Judy Erola (1981-84).[3]

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[1] John C. Munro (1931-2003), originally from Ontario, was a lawyer. He was first elected to the House of Commons in 1962 and served in Trudeau's first Cabinet. His political career came to a grinding halt in 1991 over allegations, which were dismissed, of taking illegal campaign kickbacks.

[2] Mark MacGuigan (1931-1998), originally from Prince Edward Island, was a law professor at Osgoode Hall Law School and the University of Toronto and dean at the University of Windsor. He was elected to the House of Commons in 1968. He was appointed Minister of Justice from1982 to 1984. He became a judge on the federal Court of Appeal. Allan MacEachen (1921-), originally from Nova Scotia, was elected to the House of Commons in 1953 and served in the Pearson Cabinet and the Trudeau Cabinet. He was appointed to the Senate in 1984 and served as Opposition Leader until 1991, retiring from the Senate in 1996.

[3] Lloyd Axworthy (1939-), originally from Saskatchewan, served in the Legislative Assembly of Manitoba before being elected to the House of Commons in 1979. He was in the Cabinet under Jean Chrétien from 1993 to 2000, with responsibility for Human Resources Development and Canada and later as Minister of

Indian Act

Whereas the Clark government had signaled a firm intention to make prompt amendments to the *Indian Act*, Trudeau's government slowed the pace. The official reason was that the *Indian Act* could not be amended without the consent of Indigenous people. For example, at a hearing before the UN Human Rights Committee in April 1980 on the *Lovelace* complaint, the Canadian government explained that its lack of action on reforms to the *Indian Act* stemmed from its commitment to "protecting Indian culture", minimizing "harm to Indian families", and honoring Indians' deep-rooted sentiments for the land.[4] In spite of a commitment in principle, "no quick and immediate legislative action could be expected."[5]

Lovelace's complaint to the Human Rights Committee was a source of considerable pressure in the first few months of the newly reinstated Liberal government. Canada's defense of the *Indian Act* before the Committee triggered vociferous condemnation by Indian Rights for Indian Women (IRIW). IRIW wrote to the Permanent Mission of Canada to the United Nations to demand retraction of this "inaccurate, superficial and mendacious misrepresentation unworthy of a nation that has long prided itself as a champion of human rights in the international arena."[6] The group blasted John Munro, Minister of Indian Affairs, stating that its members "were appalled by the position of Canada … in this document … filled not only with half-truths, inaccuracies and contradictions, but in some cases with distortion of the facts."[7] The historical explanation of the *Indian Act* prepared by Indian Affairs was chock-full of errors, starting with the fact that many Indian societies had been matrilineal until patrilineal systems were imposed by Canada's *Indian Act*. In IRIW's view, the vast majority of Canadian government policy has been aimed at taking away land and assimilating Indians, not protecting them. IRIW deplored the lack of consultation with Indigenous women. Furthermore, IRIW was outraged to have been used as evidence of Canada's commitment to Indigenous women. The $50,000 given to IRIW in the last year did not

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Foreign Affairs. Judy Erola (1934-), originally from Ontario, worked in radio and television before being elected to the House of Commons in 1980. She served on the Trudeau Cabinet as Minister of State for Mines, Minister responsible for the Status of Women, Minister of Consumer and Corporate Affairs, and Minister of State for Social Development.

[4] *Sandra Lovelace v. Canada* (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), "Response of the Government of Canada to the Decision of the Human Rights Committee Dated 19 September 1979 in the matter concerning Sandra Lovelace" (4 April 1980) Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) 3.

[5] *Lovelace v. Canada*, (1981) Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 at para. 5 [*Lovelace*].

[6] Indian Rights for Indian Women, "Presentation to the Permanent Mission of Canada to the United Nations - Lovelace Complaint" (23 May 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 3

[7] Indian Rights for Indian Women, "Presentation to the Honourable John Munro, Minister of Indian Affairs - Lovelace Complaint" (23 May 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) [IRIW to Munro, Lovelace Complaint, 23 May 1980] at 1

amount to be being "funded for years"; it was a tiny sum "compared to the millions going to Indian male organizations."[8] IRIW supported Lovelace's claim that the *Indian Act* contravened article 27 of the ICCPR, while clarifying that the most important element of the article 27 right to culture was that it was enjoyed "in community with other members of their group."[9] Exclusion from community was a specific harm experienced by women. The group argued that individual rights could not be disentangled from collective rights to community membership.

IRIW coordinated broad and cross-national support for Lovelace by Indigenous women. Evidence of the breadth of support appeared in IRIW's letters to the government, as they were hand-signed by 21 Indigenous women, identified as officers, board members, and members of Indian Rights for Indian Women from every province and territory of Canada. Included on the list were two women from Tobique who had led the Women's March and the campaigning in support for Lovelace: Sharon E. Paul and Andrea Bear Nicholas. Both Paul and Nicholas were listed as Board Members of IRIW.

Building from their base in the Indigenous women's movement, IRIW sought the support of the white-led women's movement. A lobbying campaign was spearheaded by NACSW. IRIW's excoriating analysis of the government's reply on *Lovelace* formed the basis of this lobbying effort.[10] Letters whizzed to Cabinet ministers, opposition leaders, and parliamentarians, demanding consultation with Indigenous women's organizations and the amendment of Canada's official response.[11] Local non-Indigenous women's groups participated in the letter-writing campaign, including Women's Political Action Groups from Saint John and Fredericton, New Brunswick.[12]

At its 1980 annual meeting, the Advisory Council on the Status of Women adopted a recommendation on the *Lovelace* complaint, requesting that the Canadian government withdraw its response to the United Nations and present a plan for an immediate end to sex discrimination in the *Indian Act*. The recommendation framed the violations in the *Lovelace* case as a violation of rights under Article 27 of the ICCPR. The president of the

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[8] IRIW to Munro, Lovelace Complaint, 23 May 1980, *supra* note 7 at 4

[9] IRIW to Munro, Lovelace Complaint, 23 May 1980, *supra* note 7 at 4

[10] Indian Rights for Indian Women, "Sample 'Letter to your MP' on Lovelace Complaint" (23 May 1980), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 712, File 9)

[11] Letter from Jenny Margetts, Indian Rights for Indian Women to Lynn Macdonald, NACSW (23 May 1980), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 712, File 9)

[12] Letter from Fredericton Women for Political Action to Mark MacGuigan, Secretary of State for External Affairs (9 June 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

ACSW, Doris Anderson, demanded an explanation from Mark MacGuigan, Minister for External Affairs.[13]

Elected officials and members of parliament also weighed in. A member of parliament described the *Lovelace* case as an indication of the depths to which Indian Affairs in Canada had fallen, putting Canada in the same elite group as "the Soviet Union, Chile, and Idi Amin's Uganda."[14] Senator Florence Bird, former chair of the Royal Commission on the Status of Women, asked Minister Munro for information about the housing crisis on the Tobique Indian Reserve and the status of revisions to the *Indian Act*. Richard Hatfield, Premier of New Brunswick, wrote to Trudeau to express his support for the amendment of the *Indian Act*, given that "Native women have a strong case, as documented in the communication before United Human Rights Committee."[15] Shirley Dysart, member of the Legislative Assembly of New Brunswick, wrote to Minister for External Affairs MacGuigan to state that the New Brunswick Liberal Caucus supported the Native women of Canada, "mindful of the communication submitted by one of our New Brunswick Native women, Sandra Lovelace. … It is our view that such a position is completely congruent with the policy of social justice endorsed by the Liberal Party of Canada."[16]

The NDP's Aboriginal Affairs Critic, Jim Manly, moved in the House that Indigenous women be included as part of the official Canadian delegation to the World Conference on Women. The motion did not pass. Sandra Lovelace did end up attending the World Conference on Women, but only through the good graces of Conservative MP, Flora MacDonald.[17]

Flora MacDonald, now the Conservative critic on Foreign Affairs, put a searching question about the *Lovelace* complaint to Prime Minister Trudeau during question period. As the Human Rights Committee was about to consider the complaint, MacDonald asked whether the Prime Minister would immediately take steps to remove the marrying out rule from the *Indian Act*. She called for reforms in light of "the first time that Canada's record of human rights has ever had to be questioned by the United

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[13] Letter from Doris Anderson, President, Advisory Council on the Status of Women to Mark MacGuigan, Secretary of State for External Affairs (27 June 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

[14] *House of Commons Debates*, (17 July 1980) at 3012 (Lorne Greenaway MP)

[15] Letter from Richard Hatfield, Premier of New Brunswick to Pierre E. Trudeau, Prime Minister (2 June 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1) at 2

[16] Letter from Shirley Dysart, MLA, New Brunswick Legislature to Mark MacGuigan, Secretary of State for External Affairs (16 June 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

[17] Letter from The Native Women of Tobique to Eymard Corbin, MP (3 September 1980), in Ottawa, University of Ottawa, Archives and Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 1, Box 635, File 9) at 2

Nations," and the embarrassment awaiting Canada's delegate at the upcoming World Conference of the United Nations Decade for Women.[18]

On 17 July 1980, at the World Conference on Women, Canada signed the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW), a day after Axworthy, Canada's official representative at the conference, urged delegates that "We have no choice but to move ahead with determination."[19] On 31 July 1980, an interim decision by the Human Rights Committee signaled that the *Indian Act* would be found to breach Canada's human rights obligations.[20] The timing couldn't have been worse. Discrimination against women in the *Indian Act* had become "a very public issue."[21]

In the context of this avalanche of criticism, a coalition of female senators and members of parliament called for an immediate suspension of the policy of de-registering women who married out.[22] Minister Munro caved in and offered an interim compromise. The Department of Indian Affairs would suspend the operation of the marrying out rule and the double-mother rule upon the request of the band councils. The requirement for band council requests was in keeping with the Minister's view that "Indian government implies that the elected governments make important decisions affecting their Band members."[23]

The introduction of ministerial suspensions of sections of the *Indian Act* constituted the first tangible response by the government to the demand for gender equality. Because the marrying out and double-mother rules would only be suspended by the federal government at the request of band councils, the policy pitted women's equality rights against band councils' powers.

Understanding the connection between equality rights and band council powers requires grasping the thread connecting the 1969 White Paper, *Lavell & Bedard*, and the 1979 All-Chiefs' Delegation demanding Aboriginal rights in the Constitution. The defeat of the 1969 White Paper remained fresh in the government's memory as an example of the consequences of trampling over the wishes of the male-led Indigenous organizations. Thus, Trudeau publicly insisted that the delay in *Indian Act* reforms was caused by 'the Indians' and the government's desire to respect their 'cultures'. During a meeting with

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[18] *House of Commons Debates*, (7 July 1980) at 2587 (Flora MacDonald MP)

[19] "Women's victimization must go, Axworthy says", *Globe and Mail* (16 July 1980) 10.

[20] *Sandra Lovelace v. Canada* (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), Interim Decision (31 July 1980)

[21] Lorne S. Clark, Legal Operations Division, External Affairs, "Memorandum: Lovelace Communication to the U.N. - Correspondence" (20 June 1980), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15902, File No. 45-CDA-13-1-3-Lovelace, Pt. 1)

[22] Coalition of Senators and MPs referenced in *House of Commons Debates*, (20 October 1980) at 3859 (Hon. Judy Erola)

[23] Indian and Northern Affairs Canada, "Press Release: Government Ready to Lift Discrimination" (24 July 1980), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-31)) at 3

the National Action Committee on the Status of Women (NACSW) in February 1980, Trudeau glibly asserted that taking out one clause of the *Indian Act* was "easy, if the Indian people want it."[24] The problem was that

> every time I would meet with the National Indian Brotherhood or heads of bands, they would say, 'well, we're working towards it but we're not ready for it'. …We are prepared to change the law. It's the men who run it and who have not been prepared to do it. The Indian men who have not been prepared to do it.[25]

According to Trudeau, "[t]he *Indian Act* is that way because the Indian men wanted it that way and they still want it that way today."[26]

He repeated this view in the House of Commons. Trudeau explained that the lack of action on the *Indian Act* was caused by the government's desire to respect Indian culture: "We all recognize Indians as having a culture of their own and having a right to preserve that culture."[27] By 'Indians', he did not mean the Indian women pushing for reforms to the *Indian Act*. The White Paper fracas had taught him "that it was not wise even to go in a progressive direction over the heads of Indian leaders themselves."[28] He thought that a UN decision in *Lovelace* might "help persuade the Indian leaders themselves that they should be moving in this direction. But I am satisfied that our minister is trying to do it with their consent, rather than ride roughshod over some of their traditions."[29] Trudeau compared the negotiations with Indian leaders with the protracted negotiations with provinces over the patriation of the Constitution and his readiness to proceed unilaterally if necessary.

In short, whereas the seventies had begun with the marrying out rule as a problem about discrimination against women, it was now a rule charged with the NIB's claims of sovereignty, on one side, and the federal government's deference to supposed cultural traditions, on the other side. It had become a culture problem, rather than an equality problem. Neither side paid heed to the Indigenous women's claims to be as invested in sovereignty as Indigenous men. Nor did they notice that if there were any "cultural" foundations to the *Indian Act*'s status rules, they lay in Western patriarchal traditions of coverture and patrilineal citizenship.

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[24] Kay Macpherson, "National Action Committee Meeting with Pierre Trudeau, Leader of the Liberal Party, during the Election Campaign of 1980 - Transcript" (12 February 1980), in Ottawa, University of Ottawa, Archives and Special Collections, Canadian Women's Movement Archives Fonds (X10-1, Series 1, Box 65) [Macpherson, NACSW-Trudeau Meeting, 12 February 1980] at 2

[25] Macpherson, NACSW-Trudeau Meeting, 12 February 1980, *supra* note 24 at 2, 4

[26] Macpherson, NACSW-Trudeau Meeting, 12 February 1980, *supra* note 24 at 4

[27] *House of Commons Debates*, (7 July 1980) at 2588 (Rt. Hon. Pierre Trudeau) [*Debates,* Trudeau, 7 July 1980]

[28] *Debates,* Trudeau, 7 July 1980, *supra* note 27

[29] *Debates,* Trudeau, 7 July 1980, *supra* note 27

The First Phase of Constitutional Negotiations

Discrimination in the *Indian Act* was the least of Trudeau's worries at this point. In May 1980, the people of Quebec nearly voted to secede in a popular referendum.

The patriation of Canada's constitution and the passage of an entrenched bill of rights had been one of Trudeau's long-running goals, dating as far back as his term as Minister of Justice in 1967. By patriating the Constitution, Canada would sever the last remnant of Canada's status as a Dominion of the British Empire. It would be the first major change to Canada's relationship to the British Crown since the 1931 *Statute of Westminster*. A constitution would put Canada's sovereignty on surer footing. Trudeau was thus more than vexed when Quebec separatism raised its ugly head, threatening both Canadian unity and the constitutional exercise.

The victory of the separatist party led to fears that the constitutional agenda was in jeopardy. Trudeau stormed ahead with an accelerated timetable in the form of a two-phase strategy. The first stage took place over the summer of 1980. It included 12 issues, and 'Aboriginal issues' were not among them. This was awkward because, in April 1980, Trudeau had promised Indigenous leaders that they would have a place at the constitutional table on matters that directly affected Indian people.[30] In fact, Trudeau had appealed directly to them for their support in the constitutional process:

> The native peoples of this country have been, from the very beginning of our partnership, among the most committed nation-builders in the land. Your loyalty to Canada, your love for this land, have often put the white man to shame. We need that loyalty now, more than ever before. We need you to put your extraordinary will to survive as a people at the service of a nation whose survival is threatened.[31]

The threat referred to by Trudeau was Quebec separatism, which he named as "your struggle as much as the white man's."[32] As the first slate of issues was deemed not to be 'specifically native questions', Indigenous leaders were denied a place at the negotiating table.[33] Chretien, Minister of Justice, "saw the idea of Indian groups as a third order of government in Canada as a 'non-starter' in constitutional discussions."[34] Indigenous leaders were outraged by the betrayal.

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[30] Office of the Prime Minister, "Press Release: Notes for Remarks by the Prime Minister at a National Conference of Indian Chiefs and Elders" (29 April 1980), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-33)) [Trudeau Speech at National Chiefs and Elders Conference, 29 April 1980] 12

[31] Trudeau Speech at National Chiefs and Elders Conference, 29 April 1980, *supra* note 30 at 12

[32] Trudeau Speech at National Chiefs and Elders Conference, 29 April 1980, *supra* note 30 at 13

[33] Douglas E Sanders, "The Indian Lobby" in Keith G Banting & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy, and the Constitution Act* (Toronto: Methuen, 1983) 301 at 310.

[34] *Ibid* at 311.

By the end of summer 1980, negotiations between the federal government and the provinces about the constitutional reform had failed to yield any consensus. The Trudeau government climbed down and offered a proposal to mollify provincial concerns.[35] If the provinces could be placated, Trudeau hoped to take the constitution directly to the British Parliament for ratification of the amending legislation. To do so, Parliament would need to pass a resolution on amending the constitution, which would be transferred by Canada's federal government to the British government for a rubber stamp of approval by the British Parliament.[36] This quick and unilateral plan would prove to be wishful thinking.

A First Draft of the Constitution and *Charter*

On 2 October 2 1980, the government unveiled a draft resolution for the amendment and patriation of Canada's constitution. I will focus on the provisions relevant to our story. Among the *Charter*'s manifold provisions were clauses about equality rights and Aboriginal rights. There was also a 'limiting clause' that created boundaries around the rights granted in the *Charter*. The text of the proposed clauses is as follows:

TABLE 1 – EXTRACTS FROM PROPOSED *CHARTER* AND CONSTITUTION, AS TABLED, 6 OCTOBER 1980[37]

1. The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in its subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of governance.

15. (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

24. The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.

As proposed in October 1981, the draft Constitution offered no affirmative recognition of 'aboriginal rights'. Aboriginal rights appeared merely as a factor relevant to aid in the interpretation of *Charter* rights. Despite Trudeau's rhetoric about respect for Indigenous leaders, the draft *Charter* did not recognize Indigenous rights or self-governance. Indigenous participation was not essential for the constitutional renewal process. The

[35] James B Kelly, Governing with the *Charter*: Legislative and Judicial Activism and Framers' Intent (Vancouver, B.C.: UBC Press, 2005) at 61.

[36] Edward McWhinney, *Canada and the Constitution, 1979-1982: Patriation and the Charter of Rights* (Toronto; Buffalo: University of Toronto Press, 1982) at 48.

[37] "Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, tabled in the House of Commons and Senate, 6 October 1980," in Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: a Documentary History* (Toronto; London: McGraw-Hill Ryerson, 1989) at 743–761.

inference to be drawn was that the 'Indian problem' could be dealt with through *Indian Act* reforms.

On the equality front, the draft constitution promised equality in the administration of the law, but nothing more. Doris Anderson, then president of the Canadian Advisory Council on the Status of Women, concluded that "it was immediately evident to the Council and to women that the wording in the crucial clause that dealt with women and discrimination was identical to the Bill of Rights, which had been useless."[38] The draft was nearly identical to the provision in the *Canadian Bill of Rights* that had so betrayed Jeannette Lavell, Yvonne Bedard, and the cause of gender equality. Furthermore, section 1, the limitation clause of the *Charter*, was cause for alarm. Among feminist lawyers, it was dubbed the "Mack truck clause", because of the size of the loophole it offered.[39] Despite divided opinions about the importance of the constitutional exercise for the women's movement, the draft *Charter* "had so many flaws that it frightened people and mobilized women … into action."[40]

The Minister responsible for the status of women added fuel to the fire in the women's movement. During his address to a NACSW conference in October 1980, Lloyd Axworthy ignored the women's concerns and "asked that they make a 'leap of faith' and trust that the federal government knew what was best for women."[41] His patronizing replies persuaded many who had been on the fence about the Constitution that a strong feminist response was necessary.

Indigenous Reaction to Exclusions from the Constitution and *Charter*

Indigenous groups hit back in protest at their exclusion from the constitutional negotiations and the weakness of the rights offered. The Union of BC Indian Chiefs declared a state of emergency:

> All the Proclamations, Agreements, and Treaties and contracts which ensure that our Aboriginal Rights are written into the most powerful laws of the land stand to be wiped out. … There is no time to develop lengthy strategies. The battle is right upon us. Our survival as Indian Nations, Governments, Tribes, as Indian people will be determined in the next few months.[42]

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[38] Interview with Doris Anderson, quoted in Laura Bonnett, *Toward a More Inclusive Concept of Citizenship: Women and the 1981 Ad Hoc Constitutional Conference* (M.A. (Canadian Studies), Carleton University, 1997) [unpublished] at 45.

[39] Penney Kome, The Taking of Twenty-eight: Women Challenge the Constitution (Toronto, Ont.: Women's Press, 1983) at 33.

[40] Chaviva Hošek, "Women and the Constitutional Process" in Keith G Banting & Richard Simeon, eds, *And No One Cheered: Federalism, Democracy, and the Constitution Act* (Toronto: Methuen, 1983) 280 at 286.

[41] Kome, *supra* note 39 at 34.

[42] "State of Emergency: Trudeau's Constitution would wipe out Aboriginal Rights", *Indian World* (October 1980) 4.

The Union of BC Chiefs organized a 'Constitution Express', a train *Charter*ed from Vancouver to Ottawa that gathered over 1000 people over the course of the cross-country trip. The UBCIC declared that "Trudeau has acted all along as if our aboriginal rights are already extinguished. He is railroading his Constitution through, a steam locomotive that won't stop. … Only another locomotive can stop this ruthless machine he has set in motion."[43] Two trains forming the Constitution Express arrived in Ottawa in November 1980; they resumed their journey in December 1980 to lobby for support at the United Nations in New York. The UBCIC filed a lawsuit in Canada asking for a judicial declaration that Indian consent was necessary before the constitution could be patriated.[44] The UBCIC also submitted a petition to the Russell Tribunal, a private tribunal organized by Bertrand Russell and hosted by Jean-Paul Sartre.[45] The Russell Tribunal rendered its decision on 1 December 1980, finding that Canada guilty of genocide and stating that "a constitution … cannot be imposed on Indian people without authentic participation."[46] In November 1980, the National Indian Brotherhood opened a lobbying office in London and issued its Declaration of the First Nations, stating their right "to govern ourselves and the right to self-determination."[47] In September 1980 Alexander Denny submitted a communication on behalf of the Mi'kmaq people to the United Nations Human Rights Committee, alleging that the Government of Canada had denied and was continuing to deny the Mi'kmaq the right to self-determination, in violation of the *International Covenant on Civil and Political Rights*.[48] Throughout this fervent reaction, Indigenous women's groups had little success in getting their voices heard at the constitutional negotiating table or in the advocacy work by the male-led national organizations.[49]

Special Joint Committee

As a result of public hue and cry, Trudeau reluctantly agreed to consultation and deliberation on the draft constitution. An all-party, Senate-House Special Joint Committee (SJC) on the constitution was struck. It was supposed to meet for one month, but the deliberations stretched from the end of October 1980 to mid-February 1981. The hearing covered the gamut of constitutional rights questions. In particular, the SJC

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[43] *Ibid*.

[44] "BC Bands Take Trudeau to Court", *Indian World* (October 1980) 5 at 5.

[45] Union of BC Indian Chiefs, *Submissions to the Russell Tribunal* (November 1980)

[46] Ben Vermeer, ed, *Archive of the fourth Russell Tribunal: on the Americas* (Brill Publishers, 1986); "Man's unmaking", *The Guardian* (3 December 1980), online: <http://search.proquest.com/hnpguardianobserver/docview/186232690/citation/4526F45570D34ABAPQ/1?accountid=12339>.

[47] "A Declaration of First Nations", online: *Assembly of First Nations* <http://www.afn.ca/en/about-afn/a-declaration-of-first-nations>.

[48] *A.D. v. Canada,* Communication No. 78/1980 (29 July 1982), U.N. Doc. CCPR/C/OP/1 at 23 (1985) (On 26 July 1984, the Human Rights Committee held the communication to be inadmissible as the author of the communication had not proven he was authorized to act as a representative on behalf of the Mi'kmaq tribal society).

[49] Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto, Ont.: Women's Press, 1987) at 197.

became a forum for debate about Indigenous views on sex discrimination and self-governance and provided a stage for focused lobbying on the equality rights guarantees in the draft *Charter*. A total of 914 individuals and 294 groups made submissions to the committee.[50] The SJC's hearings considerably strengthened the rights protections in the constitution, including the addition of a provision recognizing aboriginal and treaty rights and a revision of the provision on equality rights.[51]

Seventeen of the 104 groups who appeared before the Committee represented Indigenous peoples.[52] Nearly all the Indigenous groups sought the constitutional entrenchment of Aboriginal and treaty rights, and they felt that the mention of Aboriginal rights in the proposed draft was too limited.[53] The president of the Native Women's Association of Canada, Marlene Pierre-Aggamaway, expressed NWAC's commitment to the right of Aboriginal people to determine their own form of government and the rights of Indigenous women to be protected from discrimination based on sex:[54]

> We, the aboriginal women of this land, are making representation to the Government of Canada to declare the sovereignty of our peoples and to serve notice that we intend to relate to Confederation as equal partners with the Federal and Provincial Orders of Government.[55]

NWAC's constitutional concerns included inherent rights to self-determination, rights to retain culture and language, rights of Aboriginal women to participate in political decision-making, and freedom from sex discrimination.[56] NWAC saw the active participation of Indigenous women in the process of establishing Indigenous self-governance as the key to ensuring sex equality.

IRIW also presented recommendations at the SJC. They supported strong equality rights in the *Charter* and argued that the Constitution should not infringe upon Aboriginal and treaty rights. They too advocated Indigenous self-governance and Indigenous control

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[50] Kelly, *supra* note 35 at 64.

[51] Kelly, *supra* note 35 at 65; Douglas Sanders, "An Uncertain Path: The Aboriginal Constitutional Conferences" in Joseph M Weiler & Robin M Elliot, eds, *Litigating the Values of a Nation: the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 63 at 63.

[52] Stephen J. Fogarty, *Special Joint Committee on the Constitution: Statistical Account of Written Submissions*, (Ottawa: Research Branch, Library of Parliament, 26 January 1981)

[53] David W Elliott & David W Elliott, *Law and Aboriginal Peoples in Canada* (Concord, Ont.: Captus Press, 2005) at 76.

[54] Senate and House of Commons, Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution of Canada, 2 December 1980 at 17:64 (Marlene Pierre-Aggamaway, Native Women's Association of Canada) [SJC, Pierre-Aggamaway, 2 December 1980]

[55] SJC, Pierre-Aggamaway, 2 December 1980, *supra* note 54

[56] SJC, Pierre-Aggamaway, 2 December 1980, *supra* note 54

over membership decisions, but they were more cautious than NWAC about its application. IRIW wanted the possibility of appeals from band council decisions, to "ensure that band council decisions regarding membership are consistent and fair."[57] IRIW anticipated resistance by some communities to the return of reinstated women, a resistance which they maintained was based in the colonial effects of the *Indian Act*, not the sexism of band chiefs.[58]

Parliamentarians grilled the NIB on their views about sex discrimination in the *Indian Act*. The NIB said that, in principle, it opposed discrimination, but they objected to the whole line of questioning on procedural and jurisdictional grounds: "We do not believe any government has the right to determine who are Indians, especially the Canadian government. We do not believe that they have the right to determine who is an Indian."[59] The NIB refused to take a position on repeal of the marrying out rule, on the basis that "this whole membership question should be determined by the band or by the tribe itself."[60]

The issue of the application of the *Charter* to the *Indian Act* was raised. One Senator argued that the enforcement of the equality guarantee in the *Charter* would force the repeal of the marrying out rule in the *Indian Act*.[61] Lawmakers did not raise this as a problem of band control over membership.

The white-led women's movement also made its views known. Some women did not want an entrenched *Charter* of rights, believing that this offended parliamentary supremacy and handed enormous power to the courts. The Francophone Quebec women's groups did not participate in the SJC, as they were highly skeptical of the entire process of constitutional revision and patriation.[62] Many Quebecois women preferred to tie their fortunes to a provincial government that not only defended Francophone language rights but included a wide range of economic, social, and cultural rights in its provincial bill of rights.[63] On the other side were those who believed that an entrenched *Charter* would tackle the poor state of many provincial laws regarding women's rights.

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[57] Senate and House of Commons, Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution of Canada, 2 December 1980 at 17:90 (Barbara Wyss, Indian Rights for Indian Women) [SJC, Wyss, 2 December 1980]

[58] SJC, Wyss, 2 December 1980, *supra* note 57

[59] Senate and House of Commons, Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution of Canada, 16 December 1980 at 27:101 (Del Riley, National Indian Brotherhood) [SJC, Del Riley, 16 December 1980]

[60] SJC, Del Riley, 16 December 1980, *supra* note 59 at 27:102

[61] Senate and House of Commons, Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution of Canada, 2 December 1980 at 17:80 (Florence Bird MP)

[62] Bonnett, *supra* note 38 at 55.

[63] Hošek, *supra* note 40 at 283.

This diversity aside, there were common themes across the submissions by the women's movement. One concerned the equality provision: it had to be revised to guarantee substantive equality, not just equality before the law.[64] The limitation clause (the 'Mack Truck clause') was much too broad and, in any case, it was argued, guarantees of equality should never be the subject of limitations. Some lawyers pressed for a preamble or statement of purpose establishing gender equality as an inviolable principle of the Constitution. Others were concerned that the draft clause protecting the "existing rights or freedoms that pertain to the native peoples of Canada" would be used to uphold the 'existing right' to sex discrimination in the *Indian Act*.[65] Women's groups were concerned about the individual equality rights of Indigenous women. None of the Anglophone women's groups spoke about Indigenous self-government, nor did they speak of the collective claims underpinning Quebec's demands for a special role in the renewed Confederation.[66] The debate boiled down to a defense of white liberal notions of equality from the twin threats of 'cultural difference' and 'unfettered government'.

The Special Joint Committee created a political space for the articulation of both women's rights and self-governance claims as constitutional matters. NWAC and IRIW rejected the notion of a dichotomy between women's rights and self-governance. The NIB continued to deny the legitimacy of any federal role in the determination of Indigenous identity. The white-led women's movement articulated its perceptions of a two-pronged threat to individual equality rights: first, by a government permitted to limit equality rights, and second, by collective groups who could use cultural rights as a justification for sex discrimination.

The Kershaw Committee of the UK Parliament

While the Special Joint Committee listened to the views of hundreds, another parliamentary committee across the Atlantic was hard at work. Britain held ultimate responsibility for approving Canada's constitution, so hearings about the matter began in the Foreign Affairs Committee of the British House of Commons. Dubbed the Kershaw Committee, it heard testimony from British legal experts and Canadian officials.

The British government had initially hoped that the British Parliament would wave the Canadian constitution through. Thatcher, the British prime minister, had promised Trudeau that Britain would not block Canada's efforts to free itself from British rule.[67] But she had made this promise before the provinces announced their opposition to the *Charter of Rights and Freedoms* and the process of unilateral patriation. Now, given

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[64] *Ibid* at 287.

[65] National Association of Women and the Law, "Women's Human Right to Equality: A Promise Unfulfilled" (November 1980) Submitted to the Special Joint Committee on the Constitution at 16

[66] Bonnett, *supra* note 38 at 52.

[67] Secretary of State for Foreign and Commonwealth Affairs (UK), "Memorandum to Cabinet: The Canadian Constitution" (11 November 1980), in The National Archives (UK) (CAB/129/210/19) [UK Cabinet Memo, Canadian Constitution, 11 November 1980]

provincial opposition, Britain was caught in a bind between listening to the provinces' pleas about democratic rights in a federal state or "maintaining good relations with Canada – an important Commonwealth country."[68] In a briefing for Cabinet, the Foreign and Commonwealth Office fretted that "to go back now on what the Canadians will regard as our undertakings over patriation would be to invite a major row."[69]

Thankfully for Thatcher, Trudeau's dreams of unilateral patriation hit a reef at the Kershaw Committee. This eased the worries in Downing Street. In its January 1981 report, the Kershaw Committee concluded that the federal government could not constitutionally patriate the constitution against the opposition of eight provinces.[70]

The Kershaw Committee Report also scuttled the plans of Indigenous leadership. Building on their experience in 1979 of the All Chiefs Delegation, Indigenous leaders had mounted a big campaign to urge the British Parliament to block the patriation of Canada's Constitution in defense of the interests of Canada's 'original inhabitants.' The Kershaw Committee's conclusion did not help the Indigenous position. Indigenous leaders advanced an argument that the Queen owed a continuing duty to Indigenous people, by virtue of 18th and 19th century treaties. The Kershaw Committee disagreed, finding instead that "all relevant treaty obligations insofar as they still subsisted became the responsibility of the government of Canada with the attainment of independence, which was at the latest with the *Statute of Westminster* in 1931."[71]

Though they found no succor in the legal opinion of the Kershaw Committee, Indigenous groups rejoiced in rising levels of support among British parliamentarians. British Prime Minister Thatcher is said to have warned Trudeau that the *Canada Act* could be in trouble in the British Parliament due to the 'Indian question.'[72] Trudeau was under heavy pressure to give Indigenous people due recognition in the revised Constitution.

January 1981 Proposals

In light of the wide range of criticism aired through the Special Joint Committee, the government tabled a revised version of the *Charter* in January 1981. The revisions had addressed some of the concerns of the women's movement.

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[68] UK Cabinet Memo, Canadian Constitution, 11 November 1980, *supra* note 67

[69] UK Cabinet Memo, Canadian Constitution, 11 November 1980, *supra* note 67

[70] Silman, *supra* note 49 at 314.

[71] UK, HC, "Foreign Affairs Committee, First Report, Session 1980-81: The British North America Acts: The Role of Parliament", Vols I and II (HC42) (21 January 1981)

[72] Douglas Sanders, "Aboriginal Rights: The Search for Recognition in International Law" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 292 at 298.

The clause on equality now included more kinds of equality: "equality before the law", "equal protection", equality "under the law", and the "equal benefit of the law."[73] This addressed many problems stemming from the courts' interpretation of the *Canadian Bill of Rights*' guarantee of 'equality before the law' in *Lavell & Bedard*. But the limitation clause did not shield equality rights from limitation, nor was there any preamble making equality rights absolute. To the alarm of the women's movement, the revised proposal now included a new clause on multiculturalism. The clause made multiculturalism an aid to interpreting the other rights in the *Charter*.

TABLE 2 – PROPOSED CANADIAN *CHARTER* OF RIGHTS 1980, 1981	
Proposed *Charter* as Tabled, 6 October 1980	Revisions Tabled on 12 January 1981[74]
1. The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in its subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of governance.	1. The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
15. (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.	15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex or age.
	26. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The draft tabled on 12 January 1981 had made no substantive improvements to the constitutional recognition of Aboriginal and treaty rights. In response to strong public pressure, the federal government reversed its position on Aboriginal rights in the Constitution.[75] On 28 January 1981, an amendment was made to "recognize and affirm" aboriginal and treaty rights and reference the *Royal Proclamation of 1763*. Provinces protested, as they were unsure about the meaning of aboriginal rights and their impact

[73] Kome, *supra* note 39 at 41.

[74] Table drawn from "Consolidation of Proposed Resolution and Possible Amendments as Placed Before the Special Joint Committee by the Minister of Justice, January 12, 1981" in Bayefsky, *supra* note 37 at 765–784. [Bayefsky, Constitution and *Charter* Consolidation, 12 January 1981]

[75] Roy Romanow, "Aboriginal Rights in the Constitutional Process" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 73 at 79.

on the scope of provincial legislative jurisdiction. In return for the inclusion of Aboriginal rights in the constitution, Indigenous leaders agreed to stop lobbying the British Parliament to vote against the patriation of the Constitution. Though the draft language contained no response to the demands for Indigenous self-governance, "it was seen as a dramatic reversal of policy. Indian, Inuit and Metis leaders declared they were beginning a new era in which they would at last take control of their own destiny."[76]

Some dubbed this the shortest treaty in history. A few days later, the federal government introduced an amendment making Aboriginal rights provisions subject to bilateral agreement between federal and provincial governments.[77] Indigenous leadership rejected the proposed changes, and although they were withdrawn by the government, the taste of betrayal lingered.[78] The incident provoked the unraveling of a united national Indigenous front in the constitutional negotiations. The UBCIC accused the NIB of being too soft.[79] The Indian Association of Alberta withdrew from the NIB.[80] The western Indigenous leaders demanded a clause in the Constitution making amendment of the Constitution conditional on the consent of Aboriginal groups. This was out of the question, most of all to the provinces.[81] The federal government had lost any hope of negotiating with one organization representing the voice of Indigenous nations.

Ad Hoc Conference on Women and the Constitution

Meanwhile, on the gender equality front, a major row had erupted between the federal government and leaders of the women's movement. The head of the Canadian Advisory Council on the Status of Women (CACSW), Doris Anderson, resigned after being undermined by the Minister for the Status of Women, Lloyd Axworthy. Axworthy had unilaterally canceled a conference organized by NACSW and CACSW to discuss the draft constitution. Feminists in Toronto decided to stage the conference on their own steam. But NACSW lacked the unity in its ranks to be able to organize the conference or lead the charge on the government. Late in January 1981, a break-away group formed. It was made up of a dozen lawyers split between Toronto and Ottawa, including past presidents of NACSW, Kay Macpherson and Laura Sabia, and the young lawyer, Marilou McPhedran.

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[76] Sanders, *supra* note 33 at 315.

[77] William F Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: University of Saskatchewan, Native Law Centre, 1987) at 9.

[78] Sanders, *supra* note 33 at 315.

[79] Letter from Union of BC Indian Chiefs to National Indian Brotherhood (13 January 1981), in Toronto, York University, Clara Thomas Archives and Special Collections, Michael Posluns Fonds (1989-020/017, File 17)

[80] Sanders, *supra* note 33 at 316.

[81] *Ibid* at 315.

Named the 'Ad-hockers', the group pulled off a historic conference on 14 February 1981 that brought one thousand women to Parliament Hill in Ottawa.[82] The majority of people attending the conference were Anglophone, middle or upper class, able-bodied women.[83] A number of Indigenous women attended under the aegis of Indian Rights for Indian Women and the Native Women's Association of Canada. The major Francophone groups from Quebec did not attend. There were Francophone women from outside Quebec, however. Political views spanned the spectrum from Conservative to Communist. Only two women of color were present.[84]

The Ad Hoc Conference on Women and the Constitution had profound impacts on equality rights in the *Charter*. Given the diversity of views in the women's movement, tensions bubbled during the Conference. Two specific points of disagreement around Indigenous rights and multiculturalism merit particular attention here. Negotiations over the Constitution gave new contours to gender equality rights and Aboriginal rights. The *Charter* brought the rights into a legal relationship with one another and sharpened the tensions between them. The conference refused to recognize the claims of inherent Indigenous self-governance and did not even hear claims of Quebec sovereignty. Neither were seen by the white Anglophone women's movement as relevant to the feminist constitutional project. The conference rejected recognition of any form of rival sovereignty while remaining blind to the Canadian federal sovereignty framing the conversation.

Tensions of this nature were already evident during the planning of the Conference. The organizers had drawn up a list of topics for discussion at the Conference, and they sought speakers for each topic.[85] In her planning notes, conference organizer Marilou McPhedran starred "Native women" as a "problem."[86] McPhedran recalled that the older generation of NAC leadership felt personally invested in Mary Two Axe Earley's campaign against the Indian Status.[87] But, beyond their connections to Two Axe Earley and Indian Rights for Indian Women, leaders in the Ad-hockers were not personally connected to many Indigenous women activists in the broader Indigenous women's movement. There was a scramble to figure out who knew any Indigenous women and how to reach them. Notes by McPhedran show that some names were struck off the list of potential speakers because "they would only argue for full authority to bands" – in other words, they would argue for the sovereignty of Indigenous governments.[88] It was

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[82] The detailed story of the Ad Hoc Conference has been told in Kome, *supra* note 39.

[83] Bonnett, *supra* note 38 at 68.

[84] *Ibid*. 67

[85] Kome, *supra* note 39 at 54.

[86] Marilou McPhedran, "Planning Notebook, Conference on Canadian Women and the Constitution" (1 February 1981), in Toronto, York University, Clara Thomas Archives and Special Collections, Marilou McPhedran Fonds (S00409, 2007-020/003) [McPhedran Ad Hoc Conference Notebook, 1 February 1981]

[87] Interview by author with Marilou McPhedran (McPhedran requested non-anonymity)

[88] McPhedran Ad Hoc Conference Notebook, 1 February 1981, *supra* note 86

a pithy summary of the Manichean view that those who argued that bands should have authority over band membership were proponents of Indigenous sovereignty and thus opposed to individual gender equality rights. Rose Charlie, the leader of the BC Indian Homemaker's Association, was one person struck from the list because it was assumed she would make a strident case for collective Indigenous sovereignty.[89] In addition to leading the BCIHA, Charlie had played a pivotal role in the founding of the UBCIC and participated in the delegation of Indigenous leaders presenting the Red Paper rejecting the 1969 White Paper. A spot on the conference agenda was given to the president of the Native Women's Association of Canada, Marlene Pierre-Aggamaway. McPhedran was informed that "IRIW [was] not represented by NWAC."[90] Though not added to the roster of speakers, Jenny Margetts, leader of Indian Rights for Indian Women, was invited to attend, along with Pauline Harper, from Indian Rights for Indian Women in Toronto. They contacted a staff member at the National Indian Brotherhood to invite her to be a resource person. McPhedran's notes from her phone conversation indicate that she declined for the reason that "the control has to be in hands of Indian people. 12(1)(b) is almost red herring vis-à-vis Constitutional issue."[91]

Despite these efforts at stage management, Indigenous sovereignty was dramatically asserted at the Ad Hoc Women's Conference. As the conference aimed to produce resolutions about the *Charter* and Constitution, organizers had solicited draft resolutions beforehand. One resolution concerned sex discrimination in the *Indian Act*, and organizers anticipated it would pass without much debate given how much lobbying NACSW had done on the *Indian Act* in the seventies. But, when NWAC leader Pierre-Aggamaway rose to speak in support of the *Indian Act* resolution, NWAC had re-drafted the resolution to make a strong declaration of Indigenous self-governance rights. The resolution covered Indigenous sovereignty to negotiate as partners with the federal government, the need to retain Aboriginal cultures, customs, languages and heritages, recognition of Aboriginal self-government and treaty rights, the right to self-determination of citizenship, protection of the rights of Aboriginal children, the right of Native women to participate in Native decision-making process, and protection of Native women under the *Charter*.[92] Pierre-Aggamaway asserted that "our struggle is so crucial to the survival of our peoples, our children and our future generations, that we will do whatever is necessary to reach our goals.[93]

NWAC's surprise resolution "threw the meeting into chaos."[94] The chaos arose because the resolution asked the de facto voice of the women's movement to support the Indigenous movement's demands for respect of Aboriginal and treaty rights in the

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[89] McPhedran Ad Hoc Conference Notebook, 1 February 1981, *supra* note 86

[90] McPhedran Ad Hoc Conference Notebook, 1 February 1981, *supra* note 86

[91] McPhedran Ad Hoc Conference Notebook, 1 February 1981, *supra* note 86

[92] As summarized by Bonnett, *supra* note 38 at 111.

[93] *Ibid* at 112.

[94] Kome, *supra* note 39 at 58.

Constitution. This implied the rights of both Indigenous men and women, and their rights as part of a collective, not as individuals. Furthermore, at least one participant interpreted the resolution's use of the phrase 'any means necessary' as NWAC's potential endorsement of violence.[95]

Chaos multiplied once the other Indigenous women at the conference rose to attack NWAC's proposed resolution. Jenny Margetts, president of IRIW, argued that "Aboriginal women should deal more specifically with Aboriginal women's rights, rather than the rights of Aboriginal people in general."[96] A woman from Tobique, New Brunswick supported the comments by Margetts. The Indigenous women's movement seemed split in two.

Opposition to the collective claims to Indigenous self-governance was not unanimous, however. A few socialist-feminists spoke in favor of the recognition of Aboriginal self-governance rights, on the basis of their understanding of group oppression, class struggle, and solidarity within and between groups.[97] A Francophone Quebec woman drew the parallel between Indigenous people and the Quebecois, arguing that the Conference "should not discuss the 'sovereignty of Indian Nations' unless it was prepared to discuss Quebec's distinct society status" – a conversation that the white-led, federalist-leaning women's movement had made very clear it was not prepared to have.[98]

As delegates streamed out to lunch, McPhedran convened an emergency meeting in the hallway between Marlene Pierre-Aggamaway (NWAC) and Jenny Margetts (IRIW). IRIW was threatening to walk out of the conference in protest. McPhedran remembered their conversation in the hallway:

> My memory of that is standing in the hallway, feeling like I was going to throw up, watching these two women with a lot of dignity but deep, deep conviction on each side. I remember my impression which was I felt the presence of the Indian Brotherhood in the discussion very, very strongly. And I remember a feeling, sort of a visceral patriarchy, not any more sophisticated than that. And I was very, very focused on saying to them, 'You have the choice to make here, and we are making history here, and please don't leave this conference. … Can we come up with an agreement here? We can take it back in and make the proposal.' … I have no memory of a walk out. … I guess it worked.[99]

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[95] Bonnett, *supra* note 38 at 112.

[96] *Ibid* at 113.

[97] *Ibid* at 115.

[98] *Ibid*.

[99] Interview by author with Marilou McPhedran

McPhedran had her finger on a common belief in the women's movement about the male-led Indigenous organizations. McPhedran felt that the NIB had leaned on the NWAC leadership to press the case for Aboriginal self-governance in the Constitution.[100] Few white women believed that Indigenous women would ever see any slice of self-government. Furthermore, one organizer recalled, "we frankly do not believe that power put into the hands of … Native men is going to be any good for Native women."[101] They feared that any recognition of Aboriginal self-government would result in the transfer of power to Indigenous men, not women. They did not understand the importance of self-governance or inherent sovereignty to Indigenous women themselves. But they did think they knew what was best for Indigenous women.

After much conflict and debate, the Conference tabled the NWAC resolution but did not ever vote on it. The drama of the NWAC resolution further widened the gulf between the different factions of the Indigenous women's movement. It also confirmed beliefs in the white-led women's movement that it was necessary and possible to choose between individual equality rights for Indigenous women or Indigenous sovereignty.

The fear of the collective rights of 'multicultural' groups did another lap at the conference during debates about the new clause in the *Charter* on multiculturalism. This second lap exposed that discrimination against Indian women had mutated squarely into a 'cultural problem'. To understand the multiculturalism controversy, a brief mention is required of the limiting clause, dubbed the 'Mack Truck clause'.

Conference delegates agreed that the *Charter* needed a preamble defining its purpose to be the guaranteed and non-limitable right of gender equality. This purpose clause would be immune from the limitations provided for in clause 1. As a summary briefing explained, the "specific concern for women is that the present limitations clause [clause 1] … does not provide that certain rights, including the rights to equality, regardless of sex, can NEVER be derogated from, even in time of emergency."[102]

Another resolution recommended that the proposed language on multiculturalism be moved to this preamble and made subordinate to the principle of gender equality.[103] Failing to address the problems around the multiculturalism clause was described as "UNACCEPTABLE."[104] Analysis of the audio recording of the conference concluded that "feminists argued that most sexual discrimination faced by women was culturally-

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[100] Interview by author with Marilou McPhedran

[101] Interview with R. Billings, in Bonnett, *supra* note 38 at 112.

[102] Organizing Committee of Ad Hoc Conference on Canadian Women and the Constitution, "Summary of Resolutions Passed at the 'Ad Hoc Conference on Women and the Constitution' which Deal with Required Amendments to the Proposed *Charter of Rights and Freedoms*" (15 February 1981), in Toronto, York University, Clara Thomas Archives and Special Collections, Marilou McPhedran Fonds (S00409, 2007-020/002, File 9) [Ad Hoc Conference Resolutions Summary, 15 February 1981] at 2-3

[103] Ad Hoc Conference Resolutions Summary, 15 February 1981, *supra* note 102 at 1-2

[104] Ad Hoc Conference Resolutions Summary, 15 February 1981, *supra* note 102 at 9

based, and feared that practices such as genital circumcision of girls might be upheld by the courts under the clause."[105] A pre-conference briefing argued that the multiculturalism was unnecessary because concerns related to multiculturalism were covered by the equality clause's prohibitions of discrimination on the basis of race or ethnic origin. This draft multiculturalism clause was a clear threat to women's equality rights because:

> By including a further section on multiculturalism which is called (and worded as) an INTERPRETATION clause and which REQUIRES that all other clauses (including section 15) be interpreted IN LIGHT of clause 27, a POSSIBLE CONFLICT is set up between cultural values on the one hand and the right to equality on the other.
>
> Since cultural values are often used to JUSTIFY discrimination against women (as for example in the case of section 12(1)(b) of the *Indian Act* which is said to be necessary to preserve the Indian culture), clause 27 may be used to UNDERMINE women's guarantee of equality in section 15. For example, members of the Moslem faith could argue that the right to freedom of religion guaranteed as a fundamental freedom in clause 2 must be interpreted so as to allow separate schools for Muslim girls since this is central to their religion which is in turn central to their cultural traditions and heritage. The result would be that Muslim girls would be treated differently from others on both the grounds of race (as compared to other races) and of sex (as compared to Muslim boys.)
>
> … This problem could be overcome by inclusion of a Purpose Clause in the Constitution … Such a clause would mean that any cultural practice which discriminated against either sex would be struck down.[106] (typography as in original)

Discussions of the lobbying strategy around the multiculturalism clause included fears that "if genital mutilation case here, the parents have much stronger chance of protecting their rt. [right] to this practice."[107] Deborah Acheson of the National Association of Women in the Law (NAWL) identified the multiculturalism clause as a "major area of concern" for NAWL, because

> it is clear to us that this clause leaves it open for religious groups or cultures where it is impossible to distinguish religion from the

[105] Bonnett, *supra* note 38 at 94.

[106] Ad Hoc Conference Resolutions Summary, 15 February 1981, *supra* note 102 at 8-9

[107] McPhedran Ad Hoc Conference Notebook, 1 February 1981, *supra* note 86

> culture to argue that certain of their customs, even though discriminatory, must be upheld. An example would be separate schools for Islamic women … [A]n argument would be made that under the rights and freedoms of religion their right to so-do would be subordinate to the rights guaranteed under Section 15.[108]

The white-led women's movement had thus separated 'culture' from 'religion' and identified 'culture' as a potent threat to gender equality. It bears recalling that the list of conference speakers did not include any Muslim or otherwise 'multicultural' women.[109] It also bears noting the women's movement now understood section 12(1)(b) in the *Indian Act* to be a problem of 'cultural values' – whereby the 'culture' impugned is 'Indian culture', not white settler patriarchy. This was a big shift from the early seventies, when the women's movement had seen section 12(1)(b) as a problem of federal statutory discrimination. The Royal Commission on the Status of Women had explicitly distinguished the sex discrimination in the *Indian Act* from the 'cultural' issues that were beyond its ken.

These empirical and historical considerations aside, the controversy over equality, Indigenous sovereignty, and multiculturalism at the Ad Hoc Conference is a significant flexion point in the story. The white-led women's movement had long been afraid of or mystified by a multicultural 'other'. But, now, multicultural groups threatened to have their rights not just sanctified in the *Charter* but also turned into checks on the other rights in the *Charter*. The *Charter* had created a new terrain, and conflicts about ideas or concepts had acquired new material qualities, turning political tensions into questions of fundamental and opposing rights. The combination of Indigenous opposition to *Indian Act* reforms and Trudeau's rhetoric about culture had transformed the marrying out rule in the *Indian Act* into a question of cultural rights. This shift in understanding by the women's movement reveals that Trudeau's speeches about the Indians and their traditions had hit the mark. The Indians were now to blame for sex discrimination in the *Indian Act*.

The Women's Movement Lobbies for Equality Rights as Trump

A massive lobbying and letter-writing campaign kicked off after the Ad Hoc Conference. In spite of the drama at the conference, the Native Women's Association of Canada was included as one of fourteen organizations that met with Lloyd Axworthy right after the conference. But Pierre-Agammaway made no bones about the distrust separating the white-led women's movement and the Indigenous women's movement.[110] From

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[108] Deborah Acheson, "Summary of Position Statement of National Association of Women and the Law (NAWL)" (19 February 1981), in Toronto, York University, Clara Thomas Archives and Special Collections, Marilou McPhedran Fonds (S00409, 2007-020/002, File 9) at 2

[109] Ad Hoc Committee of Canadian Women, "Constitutional Conference: Capsule Biographies of Panelists and Chairpersons " (14 February 1981), in Toronto, York University, Clara Thomas Archives and Special Collections, Marilou McPhedran Fonds (S00409, 2007-020/002, File 8)

[110] National Action Committee on the Status of Women, "Meeting with Lloyd Axworthy and Fourteen Women's Organizations - Transcript" (16 February 1981), in Ottawa, University of Ottawa, Archives and

NWAC's perspective, the white-led women's movement had offered token assistance to IRIW and the Women of Tobique after the *Lavell & Bedard* decisions, but they had been disingenuous in their support to the Indigenous women's movement as a whole. She doubted "whether there is a sincerity on the part of the Council."[111]

Through a month of meetings in Ottawa, leaders sought to secure an amendment to clause 1 of the *Charter* to make sexual equality rights inviolable. They were unsuccessful, so they moved their attention to a campaign for a freestanding gender equality right that would guide the courts' interpretation of rights. An 'override' interpretive provision would ensure that equality rights trumped all the other rights in the *Charter*. The million-dollar word became 'Notwithstanding'.[112] 'Notwithstanding' sounds like a shield but, placed at the beginning of a constitutional clause, it became a sword, as it turned the clause into a weapon against the rest of the rights in the *Charter*. After hours of arguing with Department of Justice officials, leaders succeeded in getting a draft clause that would give gender equality rights an 'over-ride' status.[113] Clause 28 read, "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."[114]

April 1981 Agreement

A slate of amendments to the draft Constitution and *Charter* were moved in the House in late April 1981. Among the amendments passed unanimously on 23 April 1981 was section 28. However, this secure footing for gender equality rights would soon give way.

The other amendment passed in late April 1981 concerned Aboriginal rights. Despite the shortest treaty in history and the resulting disintegration of a coordinated Indigenous position on the Constitution, the original proposal for a dedicated clause affirming Aboriginal rights made its way back into the draft Constitution. The draft now contained a non-derogation, interpretation clause (clause 25) and a positive recognition and affirmation of Aboriginal and treaty rights (clause 34).

Special Collections, National Action Committee on the Status of Women Fonds (X10-24, Series 3, Box 712, File 4) [NACSW-Axworthy Meeting Transcript, 16 February 1981] at 43

[111] NACSW-Axworthy Meeting Transcript, 16 February 1981, *supra* note 110 at 44

[112] Judy Rebick, *Ten Thousand Roses: the Making of a Feminist Revolution* (Toronto: Penguin Canada, 2005) at 149.

[113] Amy Gill, *In Their Finest Hour: Deciphering the Role of the Canadian Women's Movement in the Formulation of the Charter of Rights and Freedoms* (M.A. (History), University of Ottawa, 2010) [unpublished] at 171.

[114] "Consolidation of Proposed Constitutional Resolution Tabled by the Minister of Justice in the House of Commons on February 13, 1981, with the Amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981" in Bayefsky, *supra* note 37 at 820–836.

TABLE 3 – PROPOSED *CHARTER OF RIGHTS AND FREEDOMS*		
Proposed *Charter* as Tabled, 6 October 1980	Version Tabled on 12 January 1981[115]	Version Tabled on 24 April 1981
24. The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any <u>other</u> rights or freedoms that exist in Canada, <u>including any rights or freedoms that pertain to the native peoples of Canada.</u>	25. The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of (a) any aboriginal, treaty or other rights or freedoms that may pertain to the aboriginal peoples of Canada including any right or freedom that may have been recognized by the *Royal Proclamation* of October 7, 1763; or (b) any other rights or freedoms that may exist in Canada.	25. The guarantee in this *Charter* of certain rights and freedoms shall not be construed so <u>as to abrogate or derogate from</u> any aboriginal, treaty or other rights or freedoms that <u>pertain</u> to the aboriginal peoples of Canada including (a) <u>any rights or freedoms that been recognized by the *Royal Proclamation* of October 7, 1763</u>; or (b) <u>any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement</u> 34. (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

<u>Provinces Appeal to the Courts</u>

While these various versions of the *Charter* were coming on and off stage, many provinces had taken to the courts to block the federal government's plan to secure the British Crown's approval of the new constitution without provincial consent. Provinces

[115] Bayefsky, Constitution and *Charter* Consolidation, 12 January 1981, *supra* note 74

argued that there existed a custom requiring provincial consent to any amending statute. Manitoba, Quebec, and Newfoundland filed suits in their provincial courts of appeal about the constitutionality of the federal government's plan.[116] The federal government won in the Manitoba appellate courts in February 1981 and in the Quebec appellate court in mid-April 1981. Only Ontario and New Brunswick approved of the proposed resolution; eight provinces opposed Trudeau's unilateral patriation plan.

It became politically untenable to ignore the provinces. Trudeau agreed to ask the Supreme Court for its advice on the procedure for constitutional amendment and the need for provincial consent.[117] Five days after Parliament passed the resolution to amend the Constitution in late April 1981, the Supreme Court of Canada began hearing the Constitutional Reference case. The case consolidated all the provincial lawsuits challenging Trudeau's plan for unilateral patriation of the Constitution. The Court's deliberations had the government on tenterhooks.

Supreme Court decision on Provincial Consent to the *Charter* and Constitution

The constitutional ship languished in the doldrums of the Supreme Court until 28 September 1981. The Court ruled that the federal government could not unilaterally amend the Constitution of Canada without the consent of the provinces.[118] The judgment produced considerable confusion, as there was no clear majority position.[119] The Court mandated the government to get wider approval to patriate the Constitution. But it weakened the bargaining power of the provinces, because the decision indicated that if federal-provincial agreement was not obtained, the government could proceed with unilateral patriation.[120] Nevertheless, Trudeau's plans for quick, unilateral patriation had hit heavy seas.

Indigenous leadership tried to exploit the political confusion and raise further support for the constitutional protection of Indigenous rights. Under the umbrella of the UBCIC, leaders from British Columbia, along with 150 supporters, flew to Paris, London, and the Vatican City to build international support.[121] A second Constitution Express delegation left on 1 November 1981, for a whistle-stop advocacy campaign through Germany, Holland, Belgium, and the UK.

Striking a Constitutional Deal

In order to meet the Court's mandate, Trudeau gathered the provincial premiers together in early November 1981 to try to hash out a compromise. The deals and

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[116] *Reference Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1 (Man. C.A.); *Reference re Amendment of the Constitution of Canada*, 118 D.L.R. (3d) 1 (Nfld C.A.)

[117] McWhinney, *supra* note 36 at 79.

[118] Re: Resolution to amend the *Constitution* [1981] 1 S.C.R. 753.

[119] McWhinney, *supra* note 36 at 90.

[120] Kelly, *supra* note 35 at 77.

[121] Sanders, *supra* note 33 at 319.

betrayals that took place over these days have been combed over by other scholars.[122] Here, I draw out the strands of relevance to the constitutional protection of equality rights and Aboriginal rights.

The deal-making compromise, reached on 5 November 1981, was that provincial legislatures and Parliament would have a constitutional right to override the *Charter*'s legal, fundamental, and equality rights. Any override would have to be reviewed every five years. Dubbed the notwithstanding clause, this clause (section 33) offered a mighty weapon to provinces bent on defending their jurisdictional turf. The deal was struck without the participation of Quebec's Premier René Lévesque.

The compromise rescued the Constitution and the *Charter* from the provinces' chokehold. But the deal put *Charter* rights – including equality rights – at the mercy of the legislature. Legislatures could simply opt-out of the *Charter*'s guarantees by prefacing a new law with reference to the override power.

If equality rights were wounded in the late-night negotiations, Aboriginal rights were struck a fatal blow. The federal government had gone in to the negotiation with a *Charter* that included the recognition of Aboriginal rights in clause 34. But by the end of the night, the section on Aboriginal rights had been deleted. The premiers from Alberta and British Columbia felt that Aboriginal "rights were insufficiently defined to know what the provinces' responsibilities might be."[123] It seemed to many provincial governments that, by Aboriginal rights, many Indigenous groups insisted on full Indigenous sovereignty.[124] It was also the case that there was no unified 'Aboriginal position' that could be answered to, but rather a combination of radical and more conciliatory positions.[125] All four western provinces objected to the constitutional entrenchment of Aboriginal rights.[126] The agreement contained merely a promise to hold a constitutional conference for the eventual identification and definition of Aboriginal rights.[127]

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[122] Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013); John Finnis, "The Coxford Lecture Patriation and Patrimony: The Path to the *Charter*" (2015) 28:01 Canadian Journal of Law & Jurisprudence 51; Frédéric Bastien, *The Battle of London: Trudeau, Thatcher, and the fight for Canada's Constitution* (Toronto: Dundurn, 2014); Neal Carter & Patrick James, "'Grab the Signatures and Run': Federal Unity Strategy in Canada from the Referendum to Patriation" (2009) 3:2 International Political Sociology 194; Peter H Russell, *Constitutional odyssey can Canadians become a sovereign people?* (Toronto; Buffalo: University of Toronto Press, 1993); Robert Sheppard, *The National Deal: the Fight for a Canadian constitution* (Toronto: Fleet Books, 1982); Keith G Banting & Richard Simeon, *And no one cheered: federalism, democracy, and the Constitution Act* (Toronto; New York: Methuen, 1983); McWhinney, *supra* note 36.

[123] Sheilagh M Dunn, *The Year in Review 1981: Intergovernmental Relations in Canada* (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1982) at 33.

[124] Romanow, *supra* note 75 at 79.

[125] McWhinney, *supra* note 36 at 99.

[126] *Ibid.* at 99.

[127] "First Ministers' Agreement on the Constitution, November 5, 1981," in Bayefsky, *supra* note 37 at 904.

The Campaign for Aboriginal Rights and a Non-derogable Guarantee of Gender Equality

The deal had won a fragile peace between the provinces and the federal government. But it was met with battle cries from Indigenous and feminist leaders. Indigenous people were now faced with a draft constitution that had substantial provincial support but lacked any recognition of Aboriginal rights. A new group, the Aboriginal Rights Coalition, composed of the Native Council of Canada, Inuit Committee on National Issues, NWAC, the Dene Nation, and the Council for Yukon Indians, came together to lobby the provinces. NWAC's participation in the lobbying efforts shows the commitment of Indigenous women to the constitutional recognition of Aboriginal rights. The NIB was on its own. The more radical leaders from British Columbia, operating under the umbrella of the UBCIC, were away lobbying in Europe. Public demonstrations took place in Ottawa, Vancouver, Edmonton, and in nine other Canadian cities.

The outrage was equally fierce regarding women's equality rights. The 'Notwithstanding' clause had disemboweled women's hard-fought equality rights. Minister for the status of women Erola mutinied and organized the opposition to the deal from her own office. Trudeau did not improve matters when he stammered in the House of Commons that he had no idea whether the section 28 sex equality clause was subject to the override. As Hosek put it, "While Quebec's right to veto and native people's aboriginal rights had clearly been traded away, women's rights were so invisible to the government that for several days they did not even know whether or not they, too, had been traded."[128]

The women's movement swung into a nation-wide lobbying effort to free the equality rights in the Constitution from the override provision. A decade of lobbying and consciousness-raising groups had yielded a deeply embedded, cross-national movement capable of besieging political leaders.[129] All hands were on deck. Even the Quebec feminists, who had been boycotting the Anglophone women's movement and the whole constitutional exercise, convinced the Quebec Premier Réné Lévesque to help in rescuing section 28 from the reach of the override clause.[130] All the provincial premiers but one bowed to the pressure from the women's movement.

It was only Allan Blakeney, the NDP premier from Saskatchewan, who held out on the women's demands regarding section 28. He was opposed to an entrenched *Charter*, in general, on the basis that it would hand power to the courts. On women's rights, specifically, he feared that constitutional equality rights "would actually hurt women,

[128] Hošek, *supra* note 40 at 292.

[129] Kome, *supra* note 39 at 89.

[130] Gill, *supra* note 113 at 178.

by hampering affirmative action programs and by disallowing, for example, an elderly woman from advertising for a female boarder."[131]

But the pressure from the women's movement was formidable, and Blakeney very much wanted to see Aboriginal rights in the draft Constitution. Roy Romanow, Minister of Intergovernmental Affairs for Saskatchewan, informed Minister of Justice, Jean Chretien, that Saskatchewan might agree to the women's demands on section 28 if the provisions on Aboriginal rights were back on the table.[132] Blakeney's argument was that in agreeing to rescue gender equality rights from the purview of the override clause, provincial premiers had re-opened the constitutional deal. If the deal was going to be re-opened, then this was a chance to "place first priority on protecting the interests of Canadians of native origin."[133]

This idea had been floated before but shelved given the staunch opposition of William Bennett, BC premier, to any constitutional recognition of Aboriginal rights. But now the stakes were different. Chretien went to work on Bennett on an Aboriginal rights clause. They reached a compromise to address provincial concerns over the unknown scope of Aboriginal rights. The Aboriginal rights clause was re-inserted into the draft Constitution. But it now had a significant limitation: it no longer referred to "aboriginal and treaty rights" but to "*existing* aboriginal and treaty rights."

A new draft of the Constitution and *Charter* was put before the House of Commons on 20 November 20 1981.[134] On 23 November 1981, the House of Commons agreed unanimously to the amendments to shield gender equality rights from the reach of the override clause.[135] On 26 November 1981, the House of Commons voted to add the provision on existing Aboriginal and treaty rights.[136]

The clause "recognizing and affirming existing Aboriginal and treaty rights" was flatly rejected by the NIB, the Inuit Council on National Issues, and the Native Council of Canada. They felt that the word 'existing' drastically curbed their rights and torpedoed

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[131] Kome, *supra* note 39 at 93.

[132] Gill, *supra* note 113 at 179.

[133] Dunn, *supra* note 123 at 34.

[134] "Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, as altered by the November 5, 1981, First Ministers' Agreement on the Constitution," in Bayefsky, *supra* note 37 at 906–920.

[135] The provision is as follows:

> 28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[136] The provision is as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

the development of a fuller definition of Indigenous self-governance. Indigenous leaders mistrusted Canada's intentions regarding meaningful recognition of Aboriginal rights. Specifically, they feared that their wishes for self-governance would be undercut by a local Indian government bill that modeled Indian governments after municipalities.[137] Indeed, Minister for Indian Affairs Munro had presented just such a bill to Cabinet in October 1981.

On the women's side, protecting section 28 from the override clause had become the defining issue of the women's movement. But this campaign had swallowed many of their other priorities. As one activist said, "the multiculturalism clause remains problematic, since there is no statement that gender equality overrides cultural practice."[138] Furthermore, section 15 was the only provision subject to a three-year moratorium before coming into force. Women in Canada had to wait until April 1985 for their equality rights to actualize. This gave the government several years before the marrying out rule in the *Indian Act* would fall under the *Charter*'s hammer.

On 2 December 1981, the House of Commons adopted the final revised constitutional resolution. Indigenous leaders swung their attention to the British Parliament and courts, as the last venue for preventing the patriation of the Constitution. Lobbyists were in London continuously through to March 1982. In November 1981, the Indian Association of Alberta had filed an action in the British courts arguing that treaties with the Indians had been signed with the Crown and that therefore the Indians remained the Crown's responsibility.[139] The British Court of Queen's Bench denied the claim on 9 December 1982. The Indian Association of Alberta appealed the judgment, and the British government was forced to wait for an appellate decision before proceeding with debate on the Canada Bill. By this point, a strong Indigenous lobby had gained supporters in Parliament, and "the official Opposition had made it clear that they would be unable to maintain a helpful attitude towards the Bill if Second Reading were taken before the Court delivered its judgment."[140] The litigation proved to be a last gasp, as the Indian Association of Alberta lost at the British Court of Appeal in January 1982.[141] On 10 December 1981, a second case was brought in the British courts by the Union of British Columbia Indian Chiefs, the Four Nations Confederacy in Manitoba, and the Grand Council of Treaty 9 in Ontario. The case claimed that Indigenous nations were part of the Dominion of Canada and had not been consulted on the constitution.[142]

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[137] Sanders, *supra* note 33 at 322.

[138] Hošek, *supra* note 40 at 295.

[139] The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Chiefs of Alberta, [1982] 2 All E.R. 118 (C.A.) [UK Case, Indian Chiefs of Alberta, 1982]

[140] Cabinet, "Conclusions of a Meeting of the Cabinet" (14 January 1982), in The National Archives (UK) (CAB/128/73/1)

[141] UK Case, Indian Chiefs of Alberta, 1982, *supra* note 139

[142] *Manuel and Others v. Attorney-General; Noltcho v. Attorney-General*, [1982] 3 W.L.R. 821 (C.A.)

In the British House of Commons, debate of the Canada Bill began on 17 February, and in the House of Lords, over 80% of the debate on patriation of Canada's constitution concerned 'Indian rights'. During the second reading of the Bill, British MP David Ennals pleaded that Parliament should not pass the *Canada Act* until the British courts had rendered judgment on the litigation brought by chiefs from the UBCIC, Manitoba, and Ontario.[143] It was all fine words, though. No matter the sympathies towards Indigenous people in Canada, it was difficult for the British Parliament to oppose or amend a bill that had achieved strong provincial support without being seen to be meddling in Canada's internal affairs.[144] The *Canada Act*, the bill to patriate Canada's constitution, was passed by the British Parliament on 17 April 1982. Canada's constitution had come home.

The Constitution, Equality Rights, and Aboriginal and Treaty Rights

Through the constitutional patriation process, the marrying out rule became a site of tension among four countervailing forces: a demand for constitutional recognition of Aboriginal rights, a blockade of those rights by provinces jealous of their jurisdiction, a campaign for strong gender equality rights, and a plea for both Indigenous equality rights and Indigenous self-governance. The marrying out rule had already been cloaked in cultural robes by the UN's Human Rights Committee. Through the negotiations over the *Charter*, these cultural vestments were bedecked with the ribbons and lace of fundamental rights. Indigenous national organizations had only minimal success in seeing Aboriginal rights constitutionally recognized and found little purchase in efforts to convince the British Crown to respect treaties with the Indians in the patriation of the Constitution. The white-led women's movement, in contrast, was more successful, securing a robust and freestanding equality right. Its hard-fought campaign for this right was spurred in large part by women's fears that a *Charter* right concerning multiculturalism might leave equality rights subservient to cultural tradition, and its paradigmatic example of this risk was the marrying out rule in the *Indian Act*. The rule had mutated from a problem of federally-created sex discrimination into a question of a 'cultural minority' defending patriarchal, sexist membership rules in the name of cultural values. When the constitutional compromise between the federal and provincial governments sacrificed both the freestanding gender equality right and Aboriginal rights, the stakes were raised sky-high. The feminist campaign to recover the freestanding equality clause led, accidentally, to a last-ditch rescue of Aboriginal rights in the Constitution, but only those rights 'existing' at the time of patriation. Indigenous leadership denounced the constitutional deal as it foreclosed on the possibility for the further evolution of Indigenous rights, namely, self-governance rights.

In a twist of political fate, Canada ironically owes its constitutional recognition of Aboriginal rights to the white women's movements fears of multiculturalism. These

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[143] UK, HC, *Parliamentary Debates*, vol. 18 (16 February 1982) at 148 (David Ennals MP)

[144] Behiels, Michael, "Aboriginal Nationalism in the Ascendancy: The Assembly of First Nations' First Campaign for the Inherent Right to Self-Government, 1968-1987", Presentation at the Conference on Twentieth Century Canadian Nationalisms, Massey College, Toronto (2001).

fears were, in turn, based on concerns that Indian men would use the *Charter*'s protection of multiculturalism to justify continued sexism in determining the membership of Indigenous communities – a cultural framing of the problem traceable, in turn, to the Human Rights Committee's decision in *Lovelace*. In short, the equality rights of Indigenous women were at the heart of Canada's constitutional negotiations, the definition of the equality and Aboriginal rights protected in the *Charter*, and the efforts to achieve full Canadian sovereignty from the British Crown.

12. Amending the *Indian Act:* Human Rights, Cost-Cutting, & Self-Governance

Introduction

While the political brinkmanship continued over the Constitution, amendments to the *Indian Act* became inescapable. As the Department of Indian Affairs developed iterations of possible reforms to the status rules in the *Indian Act*, the central decision points came into focus: whether reforms should be retroactive, and whether the children of mixed Indian/non-Indian marriages should have status. The cost of an expanding status Indian population was the main criterion against which different options were evaluated. Band control over membership was never seriously contemplated as part of proposed reforms to the status rules in the *Indian Act*.

Both then and since, the impetus for these reforms was named as Canada's need to comply with the Lovelace decision and its concern to respect rights that would be guaranteed in the *Charter of Rights and Freedoms*. Internal government deliberations about the reform process paint a different story. On the one hand, responding to censure from the Human Rights Committee in Lovelace was much less important than safeguarding Canada's reputation and leadership in the development of international women's rights law, as codified in the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW). On the other hand, the *Charter of Rights and Freedoms* was not only less than a meaningful goad for immediate government action on the *Indian Act*, but exactly the opposite. The Minister of Justice was perfectly happy to let the government run down the clock until the *Charter* came into force, since *Charter*'s equality provisions would then automatically invalidate the status rules in the *Indian Act*. The government's deliberations on amendments to the Indian status rules were shot through with tactical planning about how to undercut the movement for recognition of Indigenous sovereignty in the on-going constitutional drama. One proposal to this end concerned local self-governance. Quite apart from the amendments on sex discrimination, the Minister of Indian Affairs suggested offering band councils a measure of control over local-level governance, in a proposal that explicitly denied inherent Indigenous sovereignty. The Minister of Indian Affairs thought that offering something to local band council leaders would drive a wedge between moderates at the band level and the hard-liners in national level leadership who insisted on Indigenous sovereignty.

Lovelace, CEDAW, and Pressure to Revise the *Indian Act*

Officials in the Department of Indian Affairs continued to tinker with possible reforms of the *Indian Act*, all of which began with the frank acknowledgment that the current regime was discriminatory because it "define[s] descent through the male line."[1] It has become accepted wisdom that the government revised the *Indian Act* in order to comply

[1] A. Beauregard, Policy Advisor, Corporate Policy, Indian and Northern Affairs, "Briefing: Membership" (22 June 1981), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-37)) at 1

with the Human Rights Committee's decision in Lovelace.[2] Analysis of the government's deliberations reveals that the Human Rights Committee's condemnation in Lovelace was a driving force behind the amendments, but not in the ways that people think. Discussions about ratification of CEDAW, in the shadow of the *Lovelace* decision, exposed a rift within Cabinet about the urgency of *Indian Act* reforms. The Human Rights Committee's decision in Lovelace did not force the government out of its torpor regarding *Indian Act* amendments. Instead, the more important drivers were the ratification of CEDAW and the maintenance of Canada's leadership and reputation on the international stage.

An outline of possible amendments drafted in October 1981 framed the reform efforts in the context of the Lovelace complaint. It asked what Lovelace meant and what should be done in its shadow. Recall that in *Lovelace*, the Committee concluded that Canada had violated Sandra Lovelace's rights under the ICCPR, not on the grounds of sexual equality, but on the rights of membership of minorities and denial of culture.[3] The 2 October discussion paper notes that while the Human Rights Committee:

> did not rule on Lovelace's allegation concerning s.12(1)(b) (since Lovelace had lost her status before Canada had ratified the Convention on Civil and Political Rights in 1976), they did consider the continuing effects of her marriage and found that Canada was in breach of article 27 of the Covenant since, after her marriage broke up, she was not allowed to be recognized as a member of her band and to enjoy her culture in the community of that band.[4]

This reading by Indian Affairs constituted an adroit severing of the decision. It read the Committee's decision as not about the marrying out rule, but as about the "continuing

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[2] See, for example: John Claydon, "Application of International Human Rights Law by Canadian Courts, The" (1981) 30 Buff L Rev 727.Richard H Bartlett, "Indian and Native Law" (1983) 15 Ottawa L Rev 431. At 491, Jules Deschenes, "Le role de la Sous-Commission sur la lutte contre la discrimination et la protection des minorites" (1985) 2 Rev quebecoise de droit int'l 215., Peter Kirby, "Marrying out and Loss of Status: The *Charter* and New *Indian Act* Legislation" (1985) 1 JL & Soc Pol'y 77., M J B Jones, "Sexual Equality, the Constitution and Indian Status: A Comment on S. 12(1)(b) of The *Indian Act*" (1984) 4 Windsor YB Access Just 48. John P Humphrey, "Preventing Discrimination and Positive Protection for Minorities: Aspects of International Law" (1986) 27 C de D 23. Jose Woehrling, "Constitution Canadienne et la Protection des Minorites Ethniques, La" (1986) 27 C de D 171. Camille Jones, "Towards Equal Rights and Amendment of Section 12(1)(b) of the *Indian Act*: A Post-Script to Lovelace v. Canada" (1985) 8 Harv Women's LJ 195 at 213. Anne F Bayefsky, "Human Rights Committee and the Case of Sandra Lovelace, The" (1982) 20 Can YB Int'l L 244. Noel A Kinsella, "Some Dimensions of Human Rights Standards and the Legislative Process" (1998) 47 UNBLJ 147.

[3] *Sandra Lovelace v. Canada* (Communication No. 24/1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981), Decision (30 July 1981).

[4] John C. Munro, Minister of Indian Affairs and Northern Development, "Discussion Paper for Cabinet: Amendments to Remove the Discriminatory Section of the *Indian Act*" (2 October 1981), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-40))[MIAND, Discussion Paper: *Indian Act*, 2 October 1981] at 5.

effects" of Lovelace's marriage and the fact that Lovelace was "not allowed to be recognized as a member of her band and to enjoy her culture in the community of the band."[5] Thus described, the problem was spatially located at the band level, in the arena of culture, community, and the personal 'effects' on Lovelace, rather than being located at the federal, legislative level of a specific section of the *Indian Act*.

The *Lovelace* complaint then re-appears in the discussion paper's analysis of the retroactivity of the amendments to the marrying out rule. It asserts that the HRC found that "Canada has an international obligation, at a minimum, to reinstate Sandra Lovelace and women in the same position as Sandra Lovelace."[6] But the text of the decision shows that the HRC made no formal statement about remedy. This 'reading in' suggests the extent of concern within Indian Affairs about retroactivity – a concern that had been hammered home through the Department of Justice's valiant arguments on the inadmissibility of the *Lovelace* complaint.

The federal government was not driven to reforms by an obligation to comply with the non-binding decision of the Human Rights Committee, nor simply by the resulting public embarrassment. The real problem was that condemnation of Canada's rights record in *Lovelace* cast a pall over Canada's upcoming ratification of the Convention on the Elimination of all forms of Discrimination (CEDAW). For Cabinet ministers and career diplomats, appearances mattered more than legal obligation. It was CEDAW ratification that increased the pressure on the government. And, as I explain later on, it was the promise of the *Charter*'s equality provisions that relieved this pressure.

Even before the Human Rights Committee issued its decision in *Lovelace*, the Department of Justice had figured out that "the main problem relating to ratification of the Convention [CEDAW] … is the *Indian Act*," specifically the "provisions of that Act that clearly discriminate against women, particularly, section 12(1)(b)."[7] In the case of a negative finding by the Committee on *Lovelace*, "the ratification by Canada of this Convention prior to modification of the *Indian Act* might be viewed with some skepticism in international circles."[8] Conversely, Canada's ratification of CEDAW would signal that "Canada has taken action to amend all laws that do not provide for the equality of men and women, including the *Indian Act*."[9] This put the government in a bind. *Indian Act* amendments were not going to happen overnight, but, as the Secretary of State advised the Minister of Justice, "In view of the role played by Canada

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[5] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 5.

[6] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 37

[7] Letter from Jean Chretien, Attorney General of Canada to Francis Fox, Secretary of State (9 July 1981), Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 2) at 1

[8] Department of Justice, "Task Force on the Ratification of CEDAW - Discussion Paper" (25 June 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 2)) [Justice, Discussion Paper: CEDAW Ratification, 25 June 1981] at 1

[9] Justice, Discussion Paper: CEDAW Ratification, 25 June 1981, *supra* note 8 at 6

initially in drawing up the Convention, there is some expectation both at home and broad for Canada to ratify at an early stage."[10]

It was important for Canada to ratify CEDAW because once the Convention came into force on 3 September 1981, parties to the Convention would elect a Committee of experts. If Canada wanted to be a member of this Committee "during the important period when the Committee will be considering the interpretation of the Convention,"[11] Canada needed to ratify the Convention promptly. If it failed to ratify, Canada stood to lose a well-earned place in the Committee: it was a "logical contender for membership on the Committee as merited by the leading role taken by Canada in the work leading to signature of the Convention."[12]

For officials at the Department of External Affairs, the *Lovelace* complaint was a diplomatic disaster largely of the government's own design. An official from External Official observed that "The issue, which should have been resolved within a year dragged on over three years. The Committee tried to give Canada the opportunity to put its house in order and thus avoid a negative judgment."[13] Furthermore, the official stated:

> The opinion against Canada is the first case in which a western government has been found in breach of the Covenant. It seems imperative, therefore, that Canada not proceed to ratify another international treaty, and one which focuses explicitly on women's equality, without concurrent action on the *Indian Act*.[14]

Worse still, the USSR would be quick to capitalize on the Lovelace decision as evidence of Canada's mistreatment of indigenous peoples.[15] And Canada was not out of the woods: the issue had turned into a 'class complaint' by all those Indian women who had

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[10] Letter from Francis Fox, Secretary of State to Jean Chretien, Minister of Justice and Attorney General of Canada (26 August 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3))

[11] Letter from Enid Page, Coordinator, Federal-Provincial and Inter-departmental Committees, Human Rights Directorate, Secretary of State to Edythe I. MacDonald, General Counsel, Public Law, Department of Justice (24 August 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3)) [Page to MacDonald, 24 August 1981] at 3

[12] Page to MacDonald, 24 August 1981, *supra* note 11 at 3

[13] V.M. Edelstein, Director, UN Social and Humanitarian Affairs Division, External Affairs, "Memorandum: Ratification of the International Women's Convention" (1 September 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3)) [Edelstein, Memorandum: Ratification, 1 September 1981] at 3

[14] Edelstein, Memorandum: Ratification, 1 September 1981, *supra* note 13 at 3

[15] Edelstein, Memorandum: Ratification, 1 September 1981, *supra* note 13 at 3

lost status, and other cases alleging human rights violations were already in the pipeline.[16]

The urgency of CEDAW ratification prompted a high-level meeting between the five ministers with a direct stake in the issue: Chretien (Justice), Munro (Indian Affairs), Axworthy (Status of Women), Fox (Secretary of State), and MacGuigan (External Affairs). MacGuigan, Minister for External Affairs, "stressed the extreme embarrassment which the Lovelace decision has caused for Canada internationally."[17] The position of the Minister of Justice was that "the *Charter of Rights and Freedoms* would take care of the *Indian Act* by automatically rendering the offending sections inoperative."[18] Minister of Indian Affairs Munro said he was willing to bring forward amendments to end discrimination in the *Indian Act* but thought this should be done "at the same time as the Indian self-government amendments."[19] Munro ducked and dived about the timing of amendments and stressed, furthermore, that *Indian Act* amendments "may have substantial financial implications. The cost of program changes will be in the millions and if the government looks at increasing the land base to compensate the bands, the cost may escalate to as much as $50 million per year."[20] All the Ministers but Munro concluded on the need for immediate action.

A memorandum on CEDAW ratification was prepared for discussion at Cabinet. The memo described the embarrassment and confusion that would result if Canada could not ratify a Convention it had fought so hard to draft. As leader of a fifteen-member drafting group, a Canadian diplomat had "presided over the work of the 'like-minded' group which succeeded in bringing about the adoption of the Convention, in December 1979, over the objections of some countries opposed to equal rights for women."[21] Several CEDAW articles required immediate action by parties to the Convention, notably the obligation to initiate action to end discrimination against women. Canada had a handful of statutes in need of amendment to comply with this obligation, but the *Indian Act* was by far the largest problem. Given the *Lovelace* complaint, "to ratify this new Convention without some strong indication that amendments to the *Indian Act* will be enacted forthwith would, it is submitted, damage Canada's credibility, both

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[16] Letter from Office of the Under-Secretary of External Affairs to P.M. Pitfield, Clerk of the Privy Council (10 August 1981), in Ottawa, Library and Archives of Canada, (MG26 O19, Vol. 114, File 3)) at 1

[17] Christine Blain, Status of Women Canada, "Summary of Meeting of Ministers" (4 September 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3)) [Blain, Summary, 4 September 1981] at 2

[18] Blain, Summary, 4 September 1981, *supra* note 17 at 1

[19] Blain, Summary, 4 September 1981, *supra* note 17 at 2

[20] Blain, Summary, 4 September 1981, *supra* note 17 at 2

[21] Francis Fox, Secretary of State; Secretary of State for External Affairs, "Memorandum to Cabinet: Proposed Ratification of CEDAW" (10 September 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3)) [Fox, Memorandum: Ratification of CEDAW, 10 September 1981] at 2

internationally and nationally."[22] Even if Canada decided to postpone ratification of CEDAW, this would "not postpone the need to find an immediate solution to the *Indian Act* problem as a Canada is already in violation of its international obligations in this connection and concern among Canadian women's groups is mounting in this regard."[23] The memorandum proposed two options, depending on whether the *Charter* came into force. The Constitution and *Charter* were, at this point, still with the Supreme Court, for the ruling on whether the provinces could block patriation. The central recommendation was that Cabinet should agree to ratify CEDAW.

The issue of CEDAW ratification was remanded to two Cabinet sub-committees, convened in the week of 28 September 1981. Preparatory meetings were held. An official at External Affairs lamented that the Minister of Indian Affairs, "may continue to seek to maintain total flexibility on the timing of any eventual amendments to the *Indian Act*."[24]

Meanwhile, officials at the Department of Indian and Northern Affairs were drafting proposals for potential amendments to the *Indian Act*, the details of which I will discuss later on in this chapter. Both these policy proposals – on CEDAW and *Indian Act* amendments – were considered by sub-committees of Cabinet on 24 September 1981 and 1 October 1981. Representatives from External Affairs pushed for early ratification of CEDAW, a plan that won the support of the Justice, the Secretary of State, and Status of Women. The representative from Indian Affairs, however, argued that "Cabinet should also consider at the same time a memorandum setting out the problems and financial costs of amending the *Indian Act*."[25] Minister of Justice Chretien held the view that "financial arguments could not constitute a valid justification for not amending the *Indian Act*," but he also felt that the Cabinet could delay discussion of the *Indian Act* issue until the Supreme Court's decision on the Constitution. Chretien believed that

> the adoption of the *Charter* of Rights could place the Government in a credible position in the matter of the ratification of the Women's Convention and obviate the necessity to amend the *Indian Act* at least for the time being.[26]

The second sub-committee, on 1 October 1981, discussed the Memorandum to amend the *Indian Act*. Munro proposed to deal with sex discrimination in the *Indian Act*, but he raised several problems:

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[22] Fox, Memorandum: Ratification of CEDAW, 10 September 1981, *supra* note 21 at 5

[23] Fox, Memorandum: Ratification of CEDAW, 10 September 1981, *supra* note 21 at 6

[24] Letter from J.J. Dupuis, Assistant Under Secretary of State, Bureau of United Nations Affairs, External Affairs to Under-Secretary of State for External Affairs (16 September 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3)) at 1

[25] Letter from F.E.K. Chandler, Acting Director, UN Social and Humanitarian Affairs Division to Secretary of State for External Affairs (5 October 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3)) [Chandler to Secretary of State, 5 October 1981] at 1

[26] Chandler to Secretary of State, 5 October 1981, *supra* note 26 at 2

> 1) high financial costs estimated at … $226 million in one year;
>
> 2) unilateral imposition … on the Indians without consultation;
>
> 3) … need to purchase additional land to accommodate more persons on the reserves could cause conflicts with the Prairie provinces …;
>
> 4) effect … on yet unsettled comprehensive claims by Indian bands in British Columbia, the Yukon, and Quebec, and;
>
> 5) effect which the amendments might have on the question of individual rights of Indians as opposed to collective rights of the Indian bands.[27]

Three of the five considerations relate to the financial burden on the government. Explicit Indigenous opposition to ending sex discrimination in the *Indian Act* was not listed as a factor. Given these considerations, Munro thought it impossible to deal with the *Indian Act* and CEDAW simultaneously. The committee summarized the impasse on CEDAW and the *Indian Act*: "a decision to ratify [CEDAW] and not to amend [the *Indian Act*] would have unfortunate international consequences while a decision to ratify and amend would entail domestic problems including the possible opening of a second front of controversy with the Indians."[28]

The Cabinet Committee on Social Development met a week later. It considered both the issues of CEDAW ratification and *Indian Act* amendments. Minister Munro carped that, in spite of the opposition of Indian political organizations to the proposed amendments,

> [h]is department had to forge ahead … as a result of requests made by other departments (including the Department of External Affairs) to delete the discriminatory provisions from the *Indian Act* … in connection with Canada's intention to ratify the CEDAW.[29]

Munro cautioned that fundamental realities needed to be faced, namely: financial consequences, the need for a consultation mechanism with the Indians, and "the attitude of the Indians. The Government which already has problems in regard to the Constitution should not antagonize the Indians by amending the Act without

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[27] Chandler to Secretary of State, 5 October 1981, *supra* note 26 at 2

[28] Chandler to Secretary of State, 5 October 1981, *supra* note 26 at 3

[29] Cabinet Committee on Social Development, "Minutes" (9 October 1981), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-42)) at 3

consultation."[30] The battle over the constitution had set the interests of Indian Affairs against those of External Affairs.

Some Ministers supported the External Affairs call for quick ratification of CEDAW, linked to quick amendments of the *Indian Act*. The Minister of Labour reported on international meetings in which "the USSR was able to use our alleged discrimination against Indians in attacking our human rights stance."[31] But Munro succeeded in convincing the majority of ministers that it was best to delay any reforms to the *Indian Act*. Notably, "[c]onsiderable concern was expressed by a number of Ministers on the financial implications of amending the *Indian Act*."[32] According to the Minister of Justice, Chretien, reforms were not essential because the *Charter* of Rights would solve the *Indian Act* problem within a maximum of three years anyway. Only the Minister of National Health and Welfare, Monique Begin, "found great difficult in moving rapidly on the *Indian Act* before the Indians themselves consciously agreed to changes in the Act."[33] The Cabinet Committee on Social Development decided that a firm commitment could not be given on amending the *Indian Act*, "because the option related to discrimination against women … and Indian self-government required further consideration."[34]

The full Cabinet met and agreed to the ratification of CEDAW without any firm commitment on the timing of *Indian Act* amendments, and Canada ratified CEDAW on 10 December 1981 without amending the *Indian Act*. External Affairs had lost that round. And Indian Affairs had bought more time.

The First Serious Draft of *Indian Act* Reforms: How to End Sex Discrimination on the Cheap

These debates about the relationship between CEDAW ratification and *Indian Act* amendments concerned a set of proposals presented to Cabinet by Indian Affairs in September 1981.[35] For the first time, Indian Affairs spelled out in detail the options for amendments to end sex discrimination in the *Indian Act*.

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[30] Letter from F.E.K. Chandler, Acting Director, UN Social and Humanitarian Affairs Division, External Affairs to Secretary of State for External Affairs (9 October 1981), in Ottawa, Library and Archives of Canada, (RG25-A-3-C, Vol. 15919, File No. 45-13-4-6, Pt. 3)) [Chandler to Secretary of State, 9 October 1981] at 1

[31] Chandler to Secretary of State, 9 October 1981, *supra* note 30 at 2

[32] Chandler to Secretary of State, 9 October 1981, *supra* note 30 at 2

[33] Chandler to Secretary of State, 9 October 1981, *supra* note 30 at 2

[34] Cabinet Minutes, 9 October 1981, *supra* note 29 at 5

[35] John C. Munro, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet: Amendments to Remove the Discriminatory Sections of the *Indian Act*" (25 September 1981), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-38)) [MIAND, Discussion Paper: *Indian Act*, 25 September 1981] at paras. 8 and 9.

The proposal contemplated changes to Indian status rules for the future. No one would gain or lose status through marriage. Those who married Indians would not gain status, but they would gain the right to live on reserve and vote in band council elections. The children of mixed marriages (status/non-status) would have status, resulting in an immediate doubling of the status Indian population. Children would not have status if they had one parent and one grandparent on the Indian side.[36] This proposal was compared to the existing "double-mother clause" and the "quarter blood concept to define Indianness."[37] It was explicitly described as a limiting clause: "it would be about 40 years before the effect of the cut-off clause would start to control the continual increase in the status Indian population."[38] The second-generation of mixed marriage would nevertheless have the right to live on reserve. With regards to retroactivity, the proposal suggested that all those living who had involuntarily lost status and their descendants would be re-instated. The proposal toyed with the idea of giving band councils control over membership decisions but thought better of it.

A further discussion paper, presented to Cabinet on 2 October 1981, refined and expanded on these policy option.[39] (This discussion paper also mentioned the Lovelace complaint, in ways that has already been discussed in the opening section of this chapter). The 2 October proposal was similar to the first proposal in terms of transmission of status but offered more details about the rights of the non-Indian spouse married to a status Indian. As this person would gain neither status nor band membership, there were concerns about whether he or she could live on reserve or participate in band governance; several permutations of those rights were proposed.

The most significant development concerned the children of mixed marriages. There were now three schemes on the table for children of mixed marriages: they would not have status but could live on reserve, they would have status, or they would have status only if they had ¼ blood (i.e. at least one Indian grandparent). With regards to retroactivity, the discussion paper gave two options: reinstate all those living who had involuntarily lost status, or reinstate all those living and their descendants. Indigenous control over Indian status and band membership was mentioned but not recommended.

The following table summarizes the proposal:

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[36] MIAND, Discussion Paper: *Indian Act*, 25 September 1981, *supra* note 35 at para 21

[37] MIAND, Discussion Paper: *Indian Act*, 25 September 1981, *supra* note 35 at para 21

[38] MIAND, Discussion Paper: *Indian Act*, 25 September 1981, *supra* note 35 at para 21

[39] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 7.

<table>
<tr><td colspan="3">TABLE 4 – PROPOSED AMENDMENTS TO THE INDIAN ACT – 2 OCTOBER 1981</td></tr>
<tr><td colspan="3">Option 1 Indian control of who is an Indian (not recommended)</td></tr>
<tr><td colspan="3">a) Indian status to anyone identified by bands as an Indian

OR

b) Bands define band membership, Federal government decides Indian status, but band funding is based on the number of status Indians</td></tr>
<tr><td colspan="3">Option 2 Government Control of who is an Indian</td></tr>
<tr><td rowspan="2">For the Future</td><td>Marriage between an Indian and non-Indian</td><td>Children of Indian and non-Indian parents</td></tr>
<tr><td>No change in Indian status due to marriage

Non-Indian spouse may / may not have right to live on reserve and/or right to vote in band council elections</td><td>a) no Indian status (but minors could live on reserve)

OR

b) all have Indian status

OR

c) Indian status up to ¼ blood (second-generation cut-off)

OR

d) Indian status based on calculating actual blood quantum (but from the base-line that anyone who was Indian before the reforms would count as 100% blood quantum, including non-Indigenous women who acquired Indian status through marriage)</td></tr>
<tr><td>For the Past</td><td>Reinstate all living individuals who had lost status involuntarily

OR

Reinstate all living individuals who lost status involuntarily AND ...</td><td>… their children</td></tr>
</table>

This first round of policy proposals demonstrated that the government's overriding concern in passing legislation to reform the *Indian Act* was not ending sex discrimination but, rather, minimizing the cost to the federal government of an ever-expanding roster

of status Indians. The federal government provided funding and programs only for status Indians. Amendments to remove discrimination threatened to increase costs by increasing the number of status Indians and increasing costs to cover "additional services, most significantly where the on-reserve populations are affected."[40] A second source of costs would be "the need for additional land being acquired for certain reserves" to accommodate an increased population.[41]

That fiscal considerations were paramount is most visible at two key decision-points about how the rules on Indian status should be changed:

> 1) the registration of children of mixed (status/non-status) marriages and
>
> 2) the retroactive application of reinstatement reforms.

1) Descendants of Reinstated People

Controlling the cost entailed by a continually increasing population of status Indians was the government's main reason for proposing a cut-off after two generations of inter-marriage between status and non-status people. In discussing the attribution of status to children of mixed marriages, the government contemplated three options for the attribution of status to children of mixed marriages:

> Option 1 – not registered, but minor children could live on reserve with their status Indian parents
>
> Option 2 – registered (regardless of whether status acquired from the male or female side)
>
> Option 3 – if both one parent and one grandparent on the Indian side were non-Indian, not registered

Option 1 would lead to a decrease in the number of status Indians, but because minor children could live on reserve with their Indian parents, it would not decrease the number of people on reserve and implied "no decrease in costs."[42]

Option 2 was more permissive but it "would lead to a continual increase in the Indian population" and to "a continual increase in costs over time."[43]

Option 3, a 'one-quarter blood system', "would … limit the ability of Indians to pass on their status."[44] The "advantages would be that it limits the future growth of Indian

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[40] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 45

[41] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4at 45

[42] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 27

[43] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 29

[44] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4at 29

population and would limit the growth of pressure on scarce band resources. It would still mean an increase in costs to Government, but not as major" as the other proposals.[45]

2) Retroactive Application / Reinstatement

Indian Affairs knew that assuring equality in the future would provide little remedy to the Indigenous women pressing for change. But the department also knew that retroactive implementation of the Act fanned the fears of inestimable and never-ending cost increases. The problem regarding retroactivity was that although "there is a temptation to limit the numbers of people eligible to offset the financial and social impacts, … there seems to be no fair way to limit those eligible to be reinstated."[46] S a result, the quest to minimize the cost of *Indian Act* reforms lay in the future, on the question of children of mixed marriages, not in the past, in the status of those who were already victims of discrimination. The rights to status of these two groups – future children of mixed marriages and already born victims of discrimination – would continue to be the main terrain of dispute about how to reform the Act.

Minister of Indian Affairs Munro was explicit with Cabinet colleague that reforming the *Indian Act* came with a hefty sticker price. His speaking notes in preparation for the Cabinet discussion listed the first "Crucial Point" as "[a]lthough the amendments involve substantial financial implications, the Government should not reject the proposals on primarily financial grounds."[47] Munro explicitly made the link between financial implications and a cut-off clause in the transmission of Indian status: "The important decision is whether to have a cut-off clause or not. To have no cut-off will have tremendous future implications for the bands and the Government in relation to resource requirements and land base."[48] As already mentioned, when the Cabinet Committee on Social Development voted against immediate reforms to the *Indian Act*, it was in light of concerns about the considerable financial costs of amendments.

In fact, Trudeau admitted publicly that cost was the determinative factor on the question of *Indian Act* reforms. At a meeting convened by NACSW, Trudeau responded to remarks by a representative from Indian Rights for Indian Women. Trudeau said that was willing to listen to the women on rights like "calling … yourself an Indian", but now "[y]ou want money too. I just can't give that commitment."[49] Trudeau could not see

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[45] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 31

[46] MIAND, Discussion Paper: *Indian Act*, 2 October 1981, *supra* note 4 at 37

[47] Paul M. Tellier, Indian and Northern Affairs, "Memorandum: Speaking Notes for Minister - Removal of Discriminatory Aspects of the *Indian Act*" (8 October 1981), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-41)) [Tellier, Speaking Notes, 8 October 1981] at 1

[48] Tellier, Speaking Notes, 8 October 1981, *supra* note 47 at 3

[49] Kay Macpherson, "National Action Committee Meeting with Pierre Trudeau, Leader of the Liberal Party, during the Election Campaign of 1980 - Transcript" (12 February 1980), in Ottawa, University of Ottawa, Archives and Special Collections, Canadian Women's Movement Archives Fonds (X10-1, Series 1, Box 65)) [Macpherson, NACSW-Trudeau Meeting, 12 February 1980] at 2

> how a government can sort of increase the size of the reserves, particularly when they're surrounded by privately-held lands and I quite honestly can't see why the Government would be pouring more money into the reserves so that your children would be given an incentive to go and live on the reserve and get free services that my children can't get.[50]

Cabinet anxieties about the cost of reform were not helped by the fact that Indian Affairs could only offer wildly fluctuating estimates. An initial briefing note in June 1981 came up with a cost estimate that ranged from a low of $3.2 million to a high of $42 million. A September 1981 estimate put the cost between $312.2 million to $556.7 million. The memo spoke of "far-reaching financial implications" and "the need of additional funds to purchase more land."[51] A week later, the cost estimates for the same proposal had diminished but the range had increased, to somewhere between $182.8 million and $519.1 million.[52]

Self-Governance, the Constitution, and Undermining Federal-level Indigenous Leaders

At the same time as the Department of Indian Affairs was devising reforms to the status rules in the *Indian Act*, it was also developing policy proposals on self-governance. Indian Affairs did not think that band control over membership decisions should be included in reforms to address sex discrimination in the *Indian Act*. The issues were not linked. This was because Indian Affairs was working on a separate legislative scheme to promote local Indian government, a scheme that was in turn aimed at strengthening the government's hand in constitutional and land claims negotiations with Indigenous leaders. The Minister's speaking notes in preparation for Cabinet discussion reminded that "band control of membership is being contemplated in proposals for Indian government legislation which implies a strong possibility of different rules for membership and status among bands opting for Indian government."[53] The "Indian Local Government" legislation was already in draft, and a detailed discussion paper was put to Cabinet on 13 October 1981.[54] The proposal provided for an optional system

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[50] Macpherson, NACSW-Trudeau Meeting, 12 February 1980, *supra* note 49 at 3

[51] MIAND, Discussion Paper: *Indian Act*, 25 September 1981, *supra* note 35 at paras. 24 and 28.

[52] John C. Munro, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet: Amendments to Remove the Discriminatory Sections of the *Indian Act*" (1 October 1981), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-39)) at para. 41

[53] Tellier, Speaking Notes, 8 October 1981, *supra* note 47 at 2

[54] John C. Munro, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet: Legislation Respecting an Optional System of Indian Band Government" (13 October 1981), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-43)) [MIAND, Discussion Paper: Indian Band Government, 13 October 1981] at 3

of Indian band self-government, in an effort to "remove the paternalistic authority of the Government in relation to the exercise of band powers."[55]

Minister for Indian Affairs Munro had spent the first part of his mandate in extensive consultations with Indigenous leadership about their views on self-governance (at the same time that Trudeau had shut them out of negotiations on the constitution). According to Munro's summary of these consultations, Chiefs had stressed that the constitutional entrenchment of Aboriginal and treaty rights should come before any further discussion of changes to the *Indian Act*. Legislative changes to the *Indian Act* should "legitimately come only from the Indian people themselves."[56] Instead of revising the *Indian Act*, chiefs thought the government might fruitfully propose alternative ways to "recognize the authority of the Bands to be responsible for their own social, economic, political, and cultural development."[57]

Munro ignored most of this feedback about Indigenous participation in developing any self-government legislation. He instead ran with an idea providing for optional local self-governance. The proposal would allow bands to opt in to a process where they could draft a constitution, vote on it by referendum, and then send it to Ottawa, where "the Minister would have to determine which powers will be exercised. This would depend on the Band's experience in given areas and the training undertaken."[58] Bands would have to meet criteria of 'self-governing competence' before even being permitted to embark on this constitution-drafting exercise. At the end of it, they would remain under the thumb of Ministerial oversight. There was little difference between this proposal, the mid-sixties busloads of white community development workers to teaching Indians about self-governance, and the 1884 *Indian Advancement Act*'s grooming of band councils with the potential for the "future exercise of municipal privileges and powers."[59]

The proposal was explicitly developed to increase the government's leverage in the constitutional negotiations. Although "internal native self-government" had been included in the second phase of constitutional negotiations, the Department of Indian Affairs did not think this would temper demands for constitutional recognition of the inherent sovereignty of Indian governments. Those most ardently defending Indian sovereignty were those groups also objecting most strongly to any statutory strengthening of Indian band governments. Conversely, there were some bands that might be mollified with a statutory, rather than constitutional, grant of self-government. As it was not clear how the constitutional process would unfold, Minister Munro proposed making an offer on band government in order to "hold open the

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[55] MIAND, Discussion Paper: Indian Band Government, 13 October 1981, *supra* note 54 at 9

[56] MIAND, Discussion Paper: Indian Band Government, 13 October 1981, *supra* note 54 at 11

[57] MIAND, Discussion Paper: Indian Band Government, 13 October 1981, *supra* note 54 at 11

[58] MIAND, Discussion Paper: Indian Band Government, 13 October 1981, *supra* note 54 at 19

[59] *An Act for conferring certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers, 1884*, S.C. 1884, c. 28 [Indian Advancement Act].

Government's options on the constitutional front."[60] An offer of limited band governance offer might appeal to the less militant advocates of inherent Indigenous sovereignty, thus splitting the ardent Indigenous sovereigntists from the moderates.

Conclusion

As 1981 drew to a close, the Canadian government ratified CEDAW, without having amended the *Indian Act*, much to the chagrin of Canada's diplomatic corps. A consensus had begun to form in government that the tough questions regarding *Indian Act* reforms were in two areas: the status rights of as-yet-unborn children with Indian and non-Indian parents, and the rights to status of those who were already victims of the discriminatory rules in the *Indian Act*, namely women who had lost status through marriage and their children. In evaluating the various models for a new system of Indian status, cost was the paramount concern. Debates at this stage were less about how to reform the *Indian Act*, than when. Some, including the Minister of Justice, suggested simply waiting for the *Charter*'s equality provisions to come into force, thus knocking out the sex discrimination in the *Indian Act*. The *Charter* was prophesied as a powerful weapon that would smite problems that had become unsolvable politically. But the *Charter* promised one further and more important advantage. By automatically invalidating the sex discrimination in the *Indian Act*, the *Charter* would strip Indigenous leaders of the leverage they had gained by making amendments on the marrying out rule conditional on the broader renegotiation of the whole government-Indigenous relationship – a renegotiation that had now migrated into the constitutional arena. The Minister of Indian Affairs proposed a further weapon for the battle against Indigenous sovereignty, in the form of local governance legislation that was designed to cut off the ardent sovereigntists leading the Indigenous rights movement from their political base in the more moderate band council leaders. The development of amendments to the *Indian Act* was thus deeply imbricated in the federal government's ongoing war against Indigenous sovereignty.

[60] Tellier, Speaking Notes, 8 October 1981, *supra* note 47 at 15

13. The 'Indian Problem' after the *Charter* and the Constitution

Introduction

The dust had settled on the Constitution and the *Charter*, and Canada had ratified CEDAW while looking the other way on the *Lovelace* complaint. And yet the 'Indian problem' remained unresolved. The *Indian Act*'s marrying out rule had emerged from the constitutional journey as an instantiation of a fundamental tension between individual gender equality rights and the collective rights of cultural minorities. This reframing occurred, in large part, as a result of the white-led women's movement's lobbying for ironclad gender equality rights and its concerns that the *Charter*'s multiculturalism clause would dilute those rights. On their way through the constitutional valley, almost everyone ignored the voices of one group – the Indigenous women invested in gender equality rights and Indigenous sovereignty in equal measure.

The *Charter of Rights and Freedoms* promised to invalidate the marrying out rule and create a legal vacuum on the rules for attributing Indian status. Concrete proposals hit the table. The contentious joints in a redesigned system of Indian status were the transmission of status between generations, the reinstatement of children of women who had lost status, the rights of non-Indians living on reserve, and the responsibility of band councils for reserve residents.

Bureaucrats in Indian Affairs, Cabinet ministers, members of Parliament, and Indigenous political leaders debated these reforms using the discourses that had shaped the terrain of Indigenous-state relations over the prior decade. As the threads weaving through these disparate discourses drew closer and closer together, the conceptual and political room for maneuver shrank. The strongest, thickest thread became the idea that the heart of the problem in the *Indian Act* was the tension between individual equality rights and the collective rights of a cultural minority. This formulation had been articulated in Trudeau's excuses for federal government inaction, in the Human Rights Committee's invocation in the Lovelace complaint of the right to culture, and in the constitutional debates about the relationship between gender equality rights and Aboriginal rights. Now, it became the ordering dichotomy in debates about the *Indian Act*. Indigenous control over band membership decisions became the key battleground: was band control over membership a sign of government concern for the collective rights of a cultural minority or the answer to Indigenous demands for respect of inherent sovereignty? The important thing about this battle is that it had nothing to do with whether women should submit to sex discrimination, much less with whether some sex discrimination was required in order to achieve band control over membership.

Relations between the federal government and Indigenous political leaders had deteriorated dramatically as a result of the constitutional manhandling of Aboriginal and treaty rights. Though the Constitution contained a hard-fought recognition of those rights, many Indigenous people felt that those rights were meaningless, as they were limited by the word 'existing' and contained no substantive guarantee of self-governance. The Constitution mandated a series of conferences between the federal government, the provinces, and Indigenous organizations to define the meaning of

'existing' Aboriginal and treaty rights. Indigenous leaders used this conference to push hard for a constitutionally entrenched right of self-governance. They were galvanized by a parliamentary report that strongly urged the federal government to recognize the inherent sovereignty of Indigenous nations. As the conference yielded little progress on self-governance, the NIB and the Native Women's Association of Canada declared a truce between the male-led Indigenous movement and the Indigenous women's movement, in order to achieve progress on both self-governance and women's equality rights. But the federal government ignored their proposal and shelved Parliament's recommendations on self-governance. Instead, it tabled *Indian Act* amendments that both perpetuated sex discrimination and denied effective band control over membership. The federal government gestured in the direction of recognizing Indigenous self-governance, but the content of its self-governance agenda was explicitly crafted to counter the Indigenous movement's demands for Indigenous sovereignty. In June 1984, the drama-filled relationship between equality rights and Indigenous self-governance reached a tragic endpoint. In two bills – one on sex discrimination, the other on self-governance – the Liberal government executed a two-pronged attack aimed at defeating the movement for Indigenous sovereignty, once and for all.

Using Indian Self-Governance to Undermine Indigenous Sovereignty

Although the constitutional negotiations had disappointed the Indigenous sovereignty movement by limiting Aboriginal and treaty rights with the word 'existing', the words 'Indigenous self-governance' were still on the negotiating table. Each side meant something radically different by the phrase. The federal government thought self-governance could be granted through federal statute. Indigenous nations thought self-governance was inherent; as such, it was only capable of recognition and was not for the federal government to grant or create. Its proper place was in the Constitution, next to all the other varieties of sovereign authority that underpinned the Canadian state.

Minister of Indian Affairs, Munro had a long-running interest in the self-governance file. In October 1981, he had introduced a sketch of a new Indian self-governance policy, and in January 1982, he tabled a plan to create an optional system of Indian Band government.[1] The scheme for opt-in local government was rejected by Indigenous leadership for many reasons, starting with the federal government's unilateral development of the policy.[2] For Munro, Indian self-governance was politically connected to the constitutional process and the issue of sex discrimination in the *Indian Act*, and he played these issues off one another.

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[1] John C. Munro, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet: Consultation Strategy on Eliminating Discrimination from the *Indian Act*, on Strengthening Band Government, and Related Issues" (15 July 1982), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-46)) [MIAND, Consultation Strategy, 15 July 1982] at 7

[2] Letter from John C. Munro, Minister of Indian Affairs and Northern Development to Pierre E. Trudeau, Prime Minister (6 December 1983), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-63)) [Letter from Munro to Trudeau, 6 December 1983]

In July 1982, Munro asked Cabinet to approve a strategy that explicitly linked these policy portfolios. The initial plan had been to advance separately on two fronts: legislative amendments on sex discrimination and policy dialogue on self-governance. Munro asked Cabinet to radically reconsider this strategy. Provinces had heard that the federal government was discussing Indian self-governance legislation, and they were angry that Indigenous leadership knew the rough outline of this legislation while the provinces were in the dark.[3] This increased pressure on Indian Affairs to make public their Indian self-governance strategy. But, in the meantime, the pressure on the government regarding sex discrimination in the *Indian Act* had led to a consensus that the matter had to be dealt with promptly. In June 1982, the Cabinet had referred the sex discrimination issue to a parliamentary committee to hold hearings and receive submissions in advance of legislative amendments.[4]

Munro believed that self-governance and sex discrimination were "of interest in the main to the same group of people,"[5] and he suggested a single parliamentary committee to address both topics. But the plan to join the issues of sex discrimination and self-governance was more than just a measure to save time and money. Section 37 of the Constitution promised a series of conferences to discuss the definition of Aboriginal and treaty rights. The first conference was scheduled for April 1983. Munro was certain that Indigenous leaders would use the constitutional conference to press their case for recognition of inherent self-governance. He also thought that this constitutional talk was far removed from the day-to-day concerns of band council leaders. By running consultations on draft self-governance legislation before the constitutional forum, Munro hoped to show that the "Government is making a genuine effort to resolve issues in this area" and douse the self-governance fires at the band level.[6]

Munro did not convince Cabinet of this strategy. Ministers, instead, felt that it would expose the government on two fronts, as parliamentary consultation on self-governance would be running I parallel to a constitutional conference on the same topic.[7] Furthermore, the Assembly of First Nations had made it clear that they would not accept any form of 'local Indian government'. Munro's idea of statute-based local governance seemed doomed to fail.

Munro did not give in. In an appeal of the Cabinet's decision in early August 1982, Munro made plain his tactical plan. Munro argued that:

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[3] MIAND, Consultation Strategy, 15 July 1982, *supra* note 1 at 7

[4] Cabinet Committee on Social Development, "Minutes" (21 July 1982), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-49)) [Cabinet Minutes, 21 July 1982] at 10

[5] MIAND, Consultation Strategy, 15 July 1982, *supra* note 1 at 9

[6] MIAND, Consultation Strategy, 15 July 1982, *supra* note 1 at 13

[7] Cabinet Minutes, 21 July 1982, *supra* note 4

> [w]ith the Constitution exercise, the government was dealing primarily with native organizations and on the matter of aboriginal rights. He considered it important to keep another option open as leverage; … if all eggs were put into the Constitution basket, there would be no other route for exerting discipline on the Native groups, if events did not proceed well on the Constitution front. He further suggested that, as the proposal was to give Indians more control at the band level, the initiative also maintained the government's contact with the people rather than solely at the corporate association level.[8]

Referring the matter of Indian self-governance to a parliamentary committee would create the impression of consultation and keep the Indigenous leaders busy. By promising more power to those at the band level, a vague and modest offer of self-governance would undermine the influence of national Indigenous organizations. In any case, "the government would be quite free not to accept the Committee's report."[9] Austin, the Minister of State, agreed with this analysis, observing that "[m]any bands had remained outside the passionate pleas surrounding the Constitution, and that they simply wished to advance their own self-government in terms of economic development."[10]

Trudeau, the Prime Minister, was the more cautious voice. He thought that a parliamentary committee on Indian self-governance might overshadow the sex discrimination issue, the one issue that the government had publicly promised to address. He was wary of anything that might commit the government one way or the other on self-governance, especially as no one knew what the constitutional conference would produce. Trudeau also worried that commitments to self-governance might constrain the government's options in on-going negotiations in the North, where there were no defined land rights or reserves. On this point, Minister of State Austin suggested that advancing local Indian self-governance through legislation might actually help in the North, as "each group would have to negotiate the area it would govern, and this would strengthen government's hand. … There might be merit in supporting small claims settlements instead of several mega settlements."[11]

The voices in favor of running parliamentary hearings on both sex discrimination and Indian self-governance carried the day, with the compromise that Parliament would be

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[8] Cabinet Committee on Priorities and Planning, "Minutes" (3 August 1982), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-51)) [Cabinet Minutes, 3 August 1982] at 5

[9] Cabinet Minutes, 3 August 1982, *supra* note 8 at 5

[10] Cabinet Minutes, 3 August 1982, *supra* note 8 at 6

[11] Cabinet Minutes, 3 August 1982, *supra* note 8 at 7

asked to issue the report on sex discrimination before the self-governance report.[12] The Cabinet referred the question of Indian Band government to a parliamentary committee.

The founding of two parliamentary committees on sex discrimination in the *Indian Act* and Indian self-governance was driven by a desire to drive a wedge between local leaders and national Indigenous associations and gain leverage in on-going land claims and resource development negotiations in the North.

Plans to Remove Sex Discrimination from the *Indian Act*

To assist in consultation with Indigenous communities about the planned legislation to remove sex discrimination from the *Indian Act*, the Department of Indian Affairs prepared a public report. The report laid out the same policy options that had been discussed internally since October 1981. The key change from proposals that had been kicking around for decades was the separation of the band council's membership list from the federal government's list of status Indians. The options under review were as follows:

TABLE 5 – COMPARISON OF POLICY OPTIONS IN INDIAN AFFAIRS PUBLIC CONSULTATION DOCUMENT

Option	Status Decided by	Band Membership Decided by
1	Indian Band Council	Indian Band Council
2	Federal Government	Indian Band Council
3	Federal Government, unless Band Council decides both Status & Membership	Federal Government, unless Band Council decides both Status & Membership
4	Federal Government	Federal Government

[12] Cabinet Minutes, 3 August 1982, *supra* note 8 at 8

The key decision points, according to the public consultation document, were:[13]

TABLE 6 – DECISION POINTS IN INDIAN AFFAIRS PUBLIC CONSULTATION DOCUMENT		
	Treatment of Non-Indian spouses of Indians	**Treatment of Descendants of Indian and non-Indian Individuals**
For the Future	Should a non-Indian married to an Indian have the right: • To live on reserve? • To participate in band level politics?	Four options: • no Indian status (but minors could live on reserve) • all have Indian status • Indian status only for those with two or more Indian grandparents (¼ blood/second-generation cut-off) • Indian status based on calculating actual blood quantum (but from the base-line that anyone who was Indian before the reforms would count as 100% blood quantum, including non-Indigenous women who acquired Indian status through marriage)
For the Past	(Presumed: Reinstatement of all living individuals who had lost status involuntarily)	Should reinstatement also extend to the children of individuals who had lost status involuntarily?

The report admitted that "[t]he criteria for defining Indian status (and therefore membership in a band) discriminate on the basis of sex and marital status since they are based on a patrilineal and patrilocal system."[14] Because the coming into force of the *Charter* would render the discriminatory provisions of the *Indian Act* inoperative, the "Government would like to amend the Act before this occurs."[15] The principle guiding

[13] I use the odious term 'half-blood' and 'quarter-blood' as they were the terms used by those inside and outside government in discussing these reforms.

[14] Indian and Northern Affairs Canada, "Public Report: The Elimination of Sex Discrimination in the *Indian Act*" (1 August 1982), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-50)) [MIAND, Public Report: *Indian Act* Amendments, 1 August 1982] at 2

[15] MIAND, Public Report: *Indian Act* Amendments, 1 August 1982, *supra* note 14 at 1

the proposals was that "[a]mendments will not discriminate on the basis of sex or marital status."[16]

Despite the government's obligations to status Indians, the document strongly implied that bands would bear the costs of increasing membership rolls. The government stated that, even though the children would have Indian status, it is "the bands [that] would have to provide for an increasing Indian population over time."[17] The emphasis on band responsibility also appeared in the document's discussion of a limiting clause in the case of two generations of marriage to non-Indians. This option, similar to a "quarter blood rule", would "limit the future growth of Indian population and would reduce the pressure on scarce band resources."[18]

Let them have Parliamentary Hearings and Consultations

This public consultation document on *Indian Act* amendments was the basis for testimony by Indigenous leaders at the Parliament's sub-committee on sex discrimination in the *Indian Act*. The hearings began in September 1982, lasted five days, and resulted in a hastily prepared report. The public hearings began with angry exchanges between government ministers and parliamentarians about responsibility for the slap-dash treatment of such a major issue.[19] It was through these hearings, set against the backdrop of the Constitutional process, that the question of authority to decide band membership came to be firmly entrenched as the defining sign of Indigenous self-determination.

The Assembly of First Nations (AFN) (the new name of the National Indian Brotherhood) argued strongly that the question of sex discrimination was a question about band membership, and membership of Indigenous communities was a matter for band governments, not the federal government. The AFN, along with many of the other national associations, was still smarting from their failure to secure the constitutional recognition of inherent Indigenous sovereignty. Any element of sovereignty became worth fighting over – starting with foundational questions about community membership.

In a sign of the influence of the *Lovelace* decision, Indigenous leaders, for the first time, framed their opposition to women's reinstatement as a conflict between individual and collective rights. Professor Douglas Sanders, legal adviser to the AFN, used the *Lovelace* decision to justify band control over membership:

> If the goal is tribal survival – and that is a goal, I remind you, which was accepted as legitimate by the Human Rights Committee

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[16] MIAND, Public Report: *Indian Act* Amendments, 1 August 1982, *supra* note 14 at 4

[17] MIAND, Public Report: *Indian Act* Amendments, 1 August 1982, *supra* note 14 at 13

[18] MIAND, Public Report: *Indian Act* Amendments, 1 August 1982, *supra* note 14 at 14

[19] Douglas Sanders, "The Renewal of Indian Special Status" in Anne F Bayefsky & Mary A Eberts, eds, *Equality rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 540 at 549.

> in the Lovelace case – then it would seem obvious that the tribes or bands are in a better position than Parliament or the courts will ever be to determine the criteria that will best ensure tribal survival. [20]

Similarly, in arguing that their right to police the boundaries of their communities, the Federation of Saskatchewan Indians asserted that "if you deal with the individual right [to equality] in isolation from the collective right, part of the collective right being the right of men and women to form their own governments and to determine their own policy on citizenship questions."[21]

There was also opposition to the idea of band control of membership. The Native Women's Association of Canada and the Native Council of Canada demanded that those who had been expelled from bands due the *Indian Act* be restored to their communities before band councils acquired control over membership decisions. They argued that band governments, as they currently existed, did not represent all Indians.

The sub-committee's report concluded that no one should gain or lose Indian status as a result of marriage, that status and band membership should not be based on sex, and that no one should involuntarily lose status.[22] The following table summarizes the sub-committee's recommendations regarding Indian status:

[20] House of Commons, Standing Committee on Indian Affairs and Northern Development, Report of the Sub-Committee on Indian Women and the *Indian Act*, (1 September 1982) [Indian Women and the *Indian Act* Report]

[21] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 8 September 1982 at 1:89 (Sol Sanderson, Federation of Saskatchewan Indians)

[22] Indian Women and the *Indian Act* Report, *supra* note 20

TABLE 7 – SUB-COMMITTEE RECOMMENDATIONS FOR TRANSFER AND RETENTION OF STATUS THROUGH MARRIAGE AND PARENTAGE		
For the Future	Marriage between an Indian and non-Indian – rights of the non-Indian spouse	Children of Indian and non-Indian
	Should have the right to live on reserve	Children of one Indian parent (1/2 blood) should have status and band membership Children of two generations of mixed marriage should not have status (1/4 blood) … but the question of membership was referred to the Committee on Indian Self-governance
For the Past	Reinstate all living individuals who had lost status involuntarily to both status and band membership list	Grant status and band membership to the children (1st generation only) of those who had lost status involuntarily

It did not address the supposed conflict between women's rights and self-governance and the question of control over band membership lists, instead remanding these issues to the Parliamentary committee on self-governance.

The parliamentary hearings on sex discrimination in the *Indian Act* constructed the question of band membership of re-instated people as an issue of self-governance. While the AFN and others argued that band governments had jurisdiction over membership determination, NWAC and the NCC challenged the legitimacy of band governments as authentic representatives of their communities. Their nuanced position was reduced to the idea that Indigenous women and non-status Indians opposed Indigenous self-governance in general, rather than opposing unaccountable and unrepresentative band councils. Both sides made jurisdictional protests.

In September 1982, Parliament began the promised hearings on self-governance, under the umbrella of the House of Commons Standing Committee on Indian Affairs and Northern Development. The committee on self-government included Indigenous people who had been seconded from national Indigenous organizations, as ex-officio members.[23] It was chaired by Liberal MP Keith Penner. The committee took over a year to conclude its investigation and issue its report.

[23] Anne-Marie Mawhiney, *Towards Aboriginal Self-Government: Relations between Status Indian Peoples and the Government of Canada* (New York: Garland, 1994) at 62.

Gender Equality and Indigenous Sovereignty: the March 1983 Constitutional Conference

Section 37 of the Constitution mandated that a constitutional conference to discuss "the identification and definition of the rights of those peoples to be included in the Constitution of Canada."[24]

The first section 37 constitutional conference took place in March 1983. The AFN agreed to participate in the constitutional conference to the dismay of the staunchly sovereigntist western chiefs. Many of the western chiefs broke with the AFN as a result and boycotted the constitutional conferences.[25] Band councils, the AFN, and organizations representing the Inuit and Metis were invited. All Indigenous women's groups were excluded because they were a "special interest" group.[26]

The main issues on the agenda were Aboriginal self-governance and gender equality. The negotiations resulted in no progress on the constitutional recognition of Indigenous self-governance as an "existing Aboriginal and treaty right," largely because the provinces blocked recognition of a vague right.[27] In fact, from the perspective of some national Indigenous organizations, they lost ground at the conference, due to developments on Indigenous women's gender equality rights.

The perceived loss of ground on Aboriginal self-governance rights happened due to a festering legal question mark over the state of Indigenous women's gender equality rights in Constitution. Because the sections on Aboriginal rights were not located in the *Charter* but in a separate section amending the *British North America Act*, those rights were not bounded by the *Charter*'s equality guarantees (sections 15 and 28). The federal

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[24] *The Constitution Act, 1982*, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. provided that:

> s.37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

[25] Behiels, Michael, Aboriginal Nationalism in the Ascendancy: The Assembly of First Nations' First Campaign for the Inherent Right to Self-Government, 1968-1987, Presentation at the Conference on Twentieth Century Canadian Nationalisms, Massey College, Toronto (2001) at n35.

[26] Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians 127 at 141.

[27] Douglas Sanders, "An Uncertain Path: The Aboriginal Constitutional Conferences" in Joseph M Weiler & Robin M Elliot, eds, *Litigating the Values of a Nation: the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 63 at 63.

government proposed amending the section on Aboriginal rights to ironclad the equality rights of Indigenous women.[28]

The federal government proposed the following addition to section 35(1)[29]:

> 35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The AFN opposed this addition. They had already seen their inherent rights limited in the Constitution by the word 'existing', and they were not about to see them limited any further. They argued that the "aboriginal rights" recognized in s.35(1) included the inherent right to self-government and that sexual equality rights were implicit in self-government.[30]

Despite lacking a formal seat at the table, Indigenous women's groups lobbied for the gender equality clause. Sandra Lovelace, Mary Two Axe Early, and Donna Philipps spoke as part of provincial government delegations.[31] The Native Council of Canada offered one of its seats at the table to the Native Women's Association of Canada.[32] All the Indigenous women who spoke at the conference argued in favor of Aboriginal self-governance and argued, agreeing with the AFN, that sexual equality was indeed a part of Aboriginal rights. They took aim at the band councils and chiefs who were blocking women's return to their communities, asserting that "true traditional Indian governments were not male chauvinist and would not prevent women from retaining their birthrights."[33]

The Inuit and Native Council of Canada supported women's claims that gender equality was a self-government issue and should be recognized through a constitutional amendment. Eventually, the leaders of the four national organizations (the Assembly of First Nations, the Inuit Committee on National Issues, the Métis National Council, and

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[28] Richard Dalon, "An Alberta Perspective on Aboriginal Peoples and the Constitution" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 83 at 93; Sanders, *supra* note 19 at 555.

[29] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11) provides that:

> S.35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed of

[30] John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nations Politics" in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: the Impact of Charter Rights on Canadian Law and Politics* (Toronto; Buffalo: Published in association with the Centre for Constitutional Studies, University of Alberta, by University of Toronto Press, 1997) 169 at 173.

[31] Lilianne Ernestine Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: the Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987* (Saarbrücken: Verlag Breitenbach, 1991).

[32] *Ibid* at 152.

[33] *Ibid*.

the Native Council of Canada) agreed to the addition of section 35(4). The 1983 *Constitutional Accord on Aboriginal Rights* included the amendment on gender equality.[34]

The AFN's opposition to the clause was based in the notion that a constitutional recognition of gender equality rights diminished the sovereignty rights asserted by Indigenous nations. This had been said many times in the course of debates about amending the *Indian Act*. But the Constitution had changed the terms and tenor of the debate. It had become a claim of substantive legal gain and loss. Once "Aboriginal and treaty rights" had been proclaimed by the Constitution, rights to self-governance became things to be defended or encroached upon. Before, the AFN had bargained with the federal government, trading some women's rights for some self-government. Now, the AFN used spatial, material metaphors to make its argument that equality rights were 'contained within' the concept of aboriginal rights. What was once a political chip to be traded had become a legal category, a place to be fought over on imagined legal territory.

Penner Report on Self-Governance

While the government fielded these demands for constitutional recognition of inherent self-governance rights, the Special Committee on Indian Self-Government was in the midst of hours of parliamentary hearings on the question. The Committee tabled its report in November 1983. The Penner Report recommended the establishment of a bilateral process to arrive at a new relationship between the federal government and Indian First Nations. It did not propose any new legislation but outlined general principles toward building consensus between the two governments. The Penner Report recommended an approach to recognizing self-government outside either the *Indian Act* or the section 37 constitutional conferences. The federal government would "recognize" a range of Indian First Nations' governments and negotiate specific arrangements on jurisdiction and funding with each of them.[35]

On the question of band membership, the Report asserted that "it is the rightful jurisdiction of each Indian First Nation government to determine its membership, according to that government's own particular criteria."[36] The report made no recommendations regarding status or band membership, thus offering no reply to the Sub-Committee's deferral of the question of the band membership rights of descendants of children of mixed marriages. The Report recommended that the federal government use a General List to provide status to people who are Indian for purposes of federal programs but were not members of any Indian band.[37] The Committee made plain that adding to band membership rolls would have significant resource implications: "Any

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[34] *Constitution Act*, 1982, as am. by *Constitutional Amendment Proclamation*, 1983, SI/84-102, reprinted in R.S.C. 1985, App. II, No. 46

[35] House of Commons, Minutes of Proceedings and Evidence of the Special Committee on Indian Self-Government, 7 October 1983 [Penner Report]

[36] Penner Report, *supra* note 35

[37] Penner Report, *supra* note 35

reinstatement of members mandated by the federal government should include a review to determine the additional resources necessary to cover the needs of reinstated people."[38]

The report of the Penner Committee was welcomed by Indigenous people, as it gave the impression of a real change in the terms of the conversation.[39] It portended a recognition of Indigenous nations as an order of government and a process towards building a new federal-Indigenous relationship. For Minister of Indian Affairs Munro, the report, "impressive in its depth and breadth of vision," offered an exciting opportunity.[40] It had created a climate of good will that would allow bilateral negotiations with Indigenous leaders, outside of the framework of constitutional recognition of rights. Munro wrote to Trudeau advocating a ringing endorsement of the policy directions signposted by the Penner Report. It was not to be.

Amending the *Indian Act* to Remove Sex Discrimination

Meanwhile, the Department of Indian Affairs was forging ahead with proposals to address sex discrimination in the *Indian Act*. In February 1984, the Minister of Indian Affairs circulated a highly detailed discussion paper of the options available for amendments to the *Indian Act*. It built on the options first articulated in October 1981 and the report of the parliamentary committee on the *Indian Act*. Several new factors had been identified, including the question of whether those Indian women who had lost status would be entitled to compensation or retroactive payment of lost benefits and whether the land base would need to be increased to accommodate those returning to reserves. Indian Affairs proposed that, going forward, Indian status would cut off after two generations of marriage to non-Indians (a ¼ blood rule). For the past, women who had lost status would be given back their Indian status and be put back on the membership lists of their original bands. Their children, but not their grandchildren, would get Indian status, but not band membership.[41] The question of compensation remained to be discussed.

The Minister responsible for the Status of Women strongly protested this proposal. In Erola's view, it was unacceptable that the children of re-instated women would not

[38] Penner Report, *supra* note 35

[39] Richard Price, "Comment" (1986) 2:2 Native Studies Review.

[40] Letter from Munro to Trudeau, 6 December 1983, *supra* note 2 at 3

[41] David Crombie, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet: Amendments to Eliminate Discrimination Based on Sex From the *Indian Act* and Proposals for the Reinstatement of Individuals who Lost Status and Band Membership Due to Discriminatory Sections of the *Indian Act*" (9 February 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-264)) at pp. 49-51.

receive band membership automatically.[42] After all, their cousins (the children of male Indians who had married non-Indians) had both status and membership.

The draft policy was amended. The children and grandchildren of re-instated women would gain both Indian status and band membership. Now, Erola thought the proposal had drastically overshot the mark, because by giving status to the grandchildren (1/4 blood): "the estimated range of costs to the federal government would be so prohibitive as to render the entire proposal to eliminate discrimination unacceptable to my Cabinet colleagues. In such an event, the reinstatement of full and half-blood persons would again be delayed."[43] The cost of amendments was a central preoccupation in Cabinet. The policy was revised again before being put to Cabinet. The following table summarizes the changes in the proposals:

TABLE 8 – SUMMARY OF PROPOSED POLICY CHANGES, 1984		
9 February 1984	For the past	The children of those who involuntarily lost status (i.e. ½ blood from one generation marriage of Indian & non-Indian) would acquire Indian status and be placed on a General List (but not on band membership list)
27 February 1984	For the past	The children of those who involuntarily lost status (½ blood from one generation marriage of Indian & non-Indian) and their grand-children (¼ blood from two generations of marriage of Indians & non-Indians) would acquire Indian status and band membership
6 March 1984	For the Past	The children of those who involuntarily lost status (i.e. ½ blood from one generation marriage of Indian & non-Indian) would acquire Indian status and band membership

The dispute over the retroactive scope of the *Indian Act* amendments came to a head in a Cabinet meeting convened two days before the Constitutional Conference. Munro continued his dogged campaign for the joinder of the issues of self-governance and sex discrimination, while the rest of the Cabinet stressed the need to limit the financial costs of reforms. Munro advocated introducing legislation on sex discrimination and self-governance at the same time, because to do otherwise would "be perceived by Indian organizations as a betrayal … indicating that the Government was more committed to

[42] Letter from Judy Erola, Minister Responsible for the Status of Women to Jack Austin, Minister of State for Social Development (16 February 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-68))

[43] Letter from Judy Erola, Minister Responsible for the Status of Women to Pierre E. Trudeau, Prime Minister (16 February 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-69))

the *Indian Act* amendments than to the Indian self-government bill."[44] But other ministers argued that it would take some time for the self-government bill to be developed, and the delay would expose the government to "a massive campaign on the *Indian Act*" by the National Action Committee on the Status of Women, as "[w]omen, including Indian women, regard tying the self-government legislation to the amendments to the *Indian Act* as an 'end run' by Indian men who want to retain the power to define band membership."[45] Campaigning by the women's movement was thus key to the framing of the problem as a conflict between Indian men and Indian women.

Debate ensued about the reinstatement of those who had lost status as a result of the *Indian Act*. Cabinet discussed a proposal that women should be reinstated to band membership lists, but their children should go to a General List and only be moved to band lists with band consent. Differences in rights to band membership would leave inequality between the children of men and women who had married non-Indians, and Munro thought, "Indians would allege that the political responsibility for correcting the wrong originally caused by whites was being unfairly placed on Indian shoulders."[46] Trudeau proposed moving the problem forward a generation, by reinstating children to band membership and giving status to grandchildren, but not band membership. This proposal retroactively gave Indian status to quarter-bloods, which was in the long run the "much more costly" option.[47]

The final proposal agreed by Cabinet and announced in March 1984 was that, for the future, both 1st and 2nd generation children of Indian/non-Indian marriages would have status and band membership and that, for the past, status and band membership would be returned to all those who involuntarily lost status and their children (1st generation). Table 9, as follows, recapitulates the March 1984 proposal.

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[44] Cabinet Committee on Priorities and Planning, "Minutes" (6 March 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-71)) [Cabinet Minutes, 6 March 1984] at 25

[45] Cabinet Minutes, 6 March 1984, *supra* note 44 at 25

[46] Cabinet Minutes, 6 March 1984, *supra* note 44 at 26

[47] Cabinet Minutes, 6 March 1984, *supra* note 44 at 30

TABLE 9 – PROPOSED *INDIAN ACT* AMENDMENTS, MARCH 1984	
For the Future	No gain or loss of status through marriage
	Non-Indian spouses would have the right to live on reserve
	Children (1st generation) and grandchildren (2nd generation) born from Indian/non-Indian marriages would have both status and band membership
For the Past	Status and band membership would be returned to all those who involuntarily lost status and their children (1st generation)

The proposal did not heed to the Minister of Indian Affairs' concerns about the Indigenous leadership's reactions regarding band membership, but it did answer the concerns of the Minister for the status of women that the children of reinstated women should be automatically granted band membership. On the political scoreboard, women's equality was up, and Indigenous control over membership was down.

The 1984 Constitutional Conference and Self-Governance

Two days later, the campaign for Indigenous self-governance suffered even further losses. At the March 1984 Constitutional Conference, the federal government stated that any recognition of the inherent bases for Indigenous self-governance was out of the question. Trudeau agreed to talk about bilateral self-government agreements with Indian nations, but ultimate decision-making power about Indian self-government remained with the federal government.[48]

Though called 'self-government', Trudeau's offer of bilateral agreements offered little power to Indigenous nations. The resulting governments would have been delegated bodies, just like municipalities. The idea that Indigenous self-governance was comparable to a municipality's powers entirely missed the claim of an inherent, pre-existing, and un-extinguished sovereignty. At a more practical level, a government founded on delegated authority was on shaky ground, as a subsequent federal law could take away the authority at any time.[49] All four national aboriginal organizations rejected the federal government's proposal. Everyone left the Conference no further ahead on self-governance.[50]

At the 1984 conference, Trudeau mentioned the government's intentions to amend the *Indian Act*, in light of the coming into force of the *Charter* in April 1985. Trudeau did not

[48] Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform, and Canadian Statecraft* (Montreal, Quebec: Institute for Research on Public Policy, 1986) at 438.

[49] David C Hawkes, Negotiating Aboriginal Self-Government: Developments surrounding the 1985 First Ministers' Conference (Kingston, Ont.: Institute of Intergovernmental Relations, 1985) at 16.

[50] David W Elliott & David W Elliott, *Law and Aboriginal Peoples in Canada* (Concord, Ont.: Captus Press, 2005) at 158.

talk about the sex discrimination amendments as incorporating any of the concerns related to self-government.

Indigenous national organizations made clear their distaste of these developments. In May 1984, Munro informed Cabinet that the *Indian Act* proposals agreed by Cabinet in March had been virtually unanimously rejected. Indigenous leaders did "not oppose removal of the discriminatory provisions of the *Indian Act* … [but] Indians do not want membership criteria imposed upon them."[51] "Indian leaders" were "concerned that it now looks like they oppose … removal" of sex discrimination in the *Indian Act*,[52] but in fact, they opposed the "violation of their treaties, which set aside reserve lands for Indian use" implied in the federal government's decision that non-Indians married to Indians would live on Indian reserves.[53] And they did not understand how the government's unilateral decisions about band membership could be reconciled with its lofty words about self-government.[54]

Furthermore, the proposals were a "threat to the socio-cultural integrity of Indian communities," given that children and grandchildren of women who had married out would return to reserve and "be unable to speak the language or appreciate the cultural values of the Indian community."[55] This cultural defense was mounted by Indigenous leaders on the basis of the recognition in *Lovelace* of Indigenous people as a cultural minority requiring protection. Minister of Indian Affairs Munro concurred: if Canada was bound by article 27 of the ICCPR to "preservation of identity" of Indigenous communities, "it would seem that bands are in the best position to determine criteria that will ensure tribal survival."[56] In the question over band membership, a position had emerged that combined the federal government's responsibility for sex discrimination in the *Indian Act* with Indigenous self-determination and the protection of a vulnerable cultural minority.

In addition to the problems on authority over band membership, Indigenous leaders protested that the government had made inadequate provisions for expanding the land base to ensure room on reserve for returning band members. Furthermore, it made no allowances for a specific group of reserves in Alberta drawing major revenues from oil and gas on their reserve lands. These were the same bands where, soon after the

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[51] John C. Munro, Minister of Indian Affairs and Northern Development, "Addendum to Memorandum to Cabinet: Amendments to Eliminate Discrimination Based on Sex from the *Indian Act* and Proposals for the Reinstatement of Individuals who Lost Status and Band Membership due to Discriminatory Sections of the *Indian Act*" (10 May 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-73)) [MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984] at 7

[52] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 7

[53] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 7

[54] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 7

[55] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 11

[56] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 13

discovery of oil and gas deposits in the fifties, band members who were 'half-breeds' had been expelled, leading to a national outcry from civil libertarians and the Canadian Bar Association. The combined membership of these 12 bands amounted to 5% of the national status Indian population; these 12 bands held about 90% of the combined national wealth of all bands. In one band of 44 members, individuals received annual per capita distributions of $13,522 (in 1982 dollars); the influx of new members under the proposals "would represent a consequent 300% dilution to the per capita value of the band's members individual shares."[57] The chiefs of these bands were highly influential leaders in the Indian Association of Alberta.

To respond to these concerns, Minister of Indian Affairs Munro advocated the following changes in policy:

- Bands would acquire control over band membership decisions. They would be permitted to draft membership codes that would be reviewed and approved by the federal government to ensure compliance with non-discrimination guarantees in the *Charter*.
- For the future, children of two generations of mixed marriage would have status (1/4 blood).
- For the past, the children of those who had lost status involuntarily (one generation of mixed marriage (½ blood)) would have status, but not the grandchildren. This would have to be defended from the criticism that "we are perpetuating in part the very discrimination the amendment legislation was intended to abolish."[58]
- There would be a two year delay between the reinstatement to status and the return of people to band membership lists and reserves, giving time to develop required infrastructure in communities.
- The government would set aside funds to buy land for those bands that faced genuine need due to over-crowding.
- The serious problem of dilution of individual share value would be referred to a parliamentary committee.[59]

Cabinet considered the values that would underpin the proposed band membership codes. The Deputy Minister of Indian Affairs argued that "bands would be designing their membership codes so as to protect the homogeneity of their culture. For instance, if a half-blood could prove his ancestry, but had no cultural identification with the band,

[57] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 17

[58] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 35

[59] MIAND, Memorandum: Addendum to *Indian Act* Proposals, 10 May 1984, *supra* note 51 at 35-39

he would likely be refused membership."[60] For Status of Women Minister Erola, this was precisely the problem with granting bands power over membership codes:

> The argument by Indian women that it was difficult to bring up a child according to Indian cultural values when they were forced to live off reserve. The criteria would therefore be discriminatory because some people could be kept out of bands for reasons over which they had no control, and were, in fact, the result of their original loss of status.[61]

Munro put this case to Cabinet on 15 May 1984 and lost. Munro stressed the political linkage between legislation amending the *Indian Act* and policy proposals for self-governance. The AFN had signaled it would agree to a wide class of people being reinstated as status Indians, provided that bands retained control of band membership decisions. Munro assured Cabinet members that his proposal regarding band membership was not an incarnation of full-throated Indigenous sovereignty. The measures he proposed were so studded with tough controls and appeal mechanisms that the federal government would maintain de facto control, while "giving bands the feeling of control that they wanted."[62]

But even the 'feeling of self-governance' was too much. Minister for the status of women Erola reminded everyone that "women … perceived the AFN's insistence on connecting self-government legislation and the *Indian Act* amendments as an effort to stall the latter."[63] Munro's pleas pushed Trudeau to make his views quite clear on Indigenous self-governance grounded in inherent sovereignty: it was entirely out of the question. Trudeau said "the AFN was primarily interested in Indian self-government and … its position on the question of control over band membership and reinstatement under the *Indian Act* was related to that objective, more than to the merits of the issue itself."[64] Despite his repeated public statements that the fault lay with Indians clinging to their 'cultural traditions', Trudeau knew that the AFN was not in favor of sex discrimination in band membership or Indian status. He refused to give any ground to the AFN. He tabled Munro's proposals, stating that

> the Government had known that it would have to choose between the Indians' and the women's lobbies when it came to the final

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[60] Cabinet Committee on Priorities and Planning, "Minutes" (15 May 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-80)) [Cabinet Minutes, 15 May 1984] at para. 11

[61] Cabinet Minutes, 15 May 1984, *supra* note 60 at para. 11

[62] Cabinet Minutes, 15 May 1984, *supra* note 60 at 22

[63] Cabinet Minutes, 15 May 1984, *supra* note 60 at 22

[64] Cabinet Minutes, 15 May 1984, *supra* note 60 at 23

> decision on amending the *Indian Act*. The Indians had been slow to realize that public pressure was against them.[65]

No one mentioned the Indigenous women who were also campaigning for self-governance grounded in inherent Indigenous sovereignty.

The next agenda item before Cabinet was draft self-governance legislation providing for bilateral negotiations between Indian nations and the federal and provincial governments, leading to an eventual Indian First Nation Governments.[66] Here, too, Munro's plans were torpedoed. At every consultation meeting across the country about the self-governance proposals, Indigenous leaders "expressed the need to constitutionally entrench the right to self-government."[67] Trudeau regarded the self-governance proposals as "revolutionary; the Government had therefore to move tentatively and experimentally," rather than with the haste recommended by Munro.[68] Regarding the revolutionary characterization of the proposals, Munro assured that the proposal was "more like a provincial/municipal relationship, though using this phraseology was inadvisable" and the government would maintain "clear financial control."[69] The draft legislation began with reference to *Royal Proclamation* of 1763, not because it was a binding treaty but because, Munro assured his colleagues, "such a reference would have a symbolic value to the natives."[70]

But Trudeau had lost all patience with talk of treaties, self-governance, and Indigenous sovereignty. The Cabinet minute records Trudeau stating that "the Government recognized Indians as being part of the Canadian nation; the sooner it was clear to the Assembly of First Nations (AFN) that the Government was not being taken in by their 'incremental, creeping separatism', the better."[71] Trudeau had no intention of engaging in anything named a 'bilateral process', as "he was not willing to grant the attributes of equality to … the AFN."[72] The Indians refused self-governance modeled on municipal powers, but, Trudeau said, "in municipal/provincial relation, there was a clear hierarchical order. What the Indians wanted was a form of equality between themselves and the Government, and this was unacceptable."[73] Furthermore, Trudeau,

> rejected the notion publicized by Indian leaders that Indians were a colonized people … and reiterated that the Government's goal

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[65] Cabinet Minutes, 15 May 1984, *supra* note 60 at 24

[66]Cabinet Minutes, 15 May 1984, *supra* note 60 at 31

[67] Cabinet Minutes, 15 May 1984, *supra* note 60 at 62

[68] Cabinet Minutes, 15 May 1984, *supra* note 60 at 25

[69] Cabinet Minutes, 15 May 1984, *supra* note 60 at 26

[70] Cabinet Minutes, 15 May 1984, *supra* note 60 at 24

[71] Cabinet Minutes, 15 May 1984, *supra* note 60 at 25

[72] Cabinet Minutes, 15 May 1984, *supra* note 60 at 25

[73] Cabinet Minutes, 15 May 1984, *supra* note 60 at 26

> was the eventual integration of Indians into mainstream society … He was not willing to characterize this process as 'decolonization', or to set up governments that pretended to equality with the Government of Canada.[74]

This was the same Trudeau who had pushed ardently in 1969 for the abolition of Indian status and the assimilation of Indigenous people into white Canadian society, the same Trudeau who had unleashed the military in response to violence by militant Quebec separatists, and the same Trudeau who had cut down the Quebec secession movement by brokering a constitution that united the country. It was a constitution for one country and one sovereign. Some might toss about phrases like self-governance; Trudeau would brook no rival sovereignties.

The self-governance proposals were tabled. The Cabinet agreed to authorize the drafting of legislation to amend the *Indian Act*. None of Munro's recommendations regarding band membership were accepted. The only major changes he secured were that financial arrangements would be made to address the needs of bands receiving new members and a two-year waiting period would be put in place to before newly reinstated members would acquire band membership and be allowed to return to reserve.[75]

The AFN and NWAC Broker a Truce

Within a day of these confidential Cabinet deliberations, the Assembly of First Nations held a special legislative assembly in Edmonton. The Constitutional Conference had finished with more talk about self-governance, but no self-governance. Draft amendments to the *Indian Act* circulated to Indigenous leaders in March 1984 showed no consideration of Indigenous demands for control of band membership. The AFN realized it would have to soften its stance on the sex equality amendments in the *Indian Act* if it wanted to make any progress on self-governance. The AFN and the Native Women's Association of Canada struck a deal, dubbed the Edmonton Resolution, in order to form a united front against the government. NWAC agreed that newly reinstated people could be restored to a General list, rather than being restored directly to a band list. In return, AFN pledged to campaign for the repeal of discriminatory provisions from the *Indian Act* and the reinstatement of all generations who had lost status under the *Indian Act*.[76] The AFN would stop holding women's equality rights to ransom in their quest for self-governance, and NWAC would throw their weight behind

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[74] Cabinet Minutes, 15 May 1984, *supra* note 60 at 26

[75] Cabinet Committee on Priorities and Planning, "Record of Cabinet Decision" (29 May 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-82))

[76] Assembly of First Nations, "Resolution 2: Resolution to Remove Discrimination against Indian People by *Indian Act*" (17 May 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-113)); Assembly of First Nations & Native Women's Association of Canada, "Statement on Bill C-47" (1 June 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-114))

the campaign to get constitutional recognition of Indigenous self-governance.[77] Neither the Native Council of Canada nor IRIW were party to the deal.

The compromise lacked unanimous support. The Indian Association of Alberta walked out of the assembly, arguing that the AFN had capitulated without any guarantees from the federal government on band membership.[78] Later, NWAC acknowledged that Indian Rights for Indian Women "may not agree to the position."[79] IRIW were in fact outraged, as denying women automatic band membership made women second-class citizens: Indians in the eyes of the federal government, but without a right to be members of their communities.[80] The Women of Tobique felt that the "interim band list" would put people in limbo, and the compromise was a sign that NWAC had been co-opted by the men running the AFN.[81]

In response to the Edmonton Consensus, Munro announced he would reconsider the *Indian Act* amendment legislation and the demands of Indian leaders – in spite of the consensus that had been reached the day before in Cabinet. He floated options like a generous financial package for bands who would be highly impacted by returning members and additional land grants.[82] However, he made no concessions on band membership.

The Edmonton Consensus was a political deal between the Indigenous women's movement and the male-led national Indigenous organization. It strengthened the idea that Indigenous women's equality rights could be traded against Indigenous self-governance. But it did not represent a fundamental or conceptual balancing of these two ideas.

Bill C-47

On 18 June 1984, the government introduced legislation in Parliament to end sex discrimination in the *Indian Act*.[83] The bill (Bill C-47) was based on the proposal agreed in Cabinet in March, confirmed again in mid-May, and panned by Indigenous leaders. The legislation was tabled a little more than a week before the summer recess. Given the political sensitivity of the *Indian Act* issue, criticism raged about the delay in tabling the

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[77] Krosenbrink-Gelissen, *supra* note 31 at 160.

[78] Communications Branch, Press Monitoring Service, Indian and Northern Affairs Canada, "CP Wire Service " (18 May 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-115))

[79] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 17:78 (Marilyn A. Kane, Native Women's Association of Canada)

[80] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 27 June 1984 at 18:42 (Jenny Margetts, Indian Rights for Indian Women)

[81] Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto, Ont.: Women's Press, 1987) at 204.

[82] "Munro to reconsider changes over *Indian Act* sexual bias", *The Globe and Mail* (19 May 1984) 3 at 3.

[83] Bill C-47, *An Act to amend the Indian Act*, 2nd Sess., 32nd Parl. 1984.

legislation and the short window for debate in Parliament. Government fingers were quick to point to the Indians and their intractable disagreements.

But the delay in tabling the legislation probably had more to do with election campaigns and political careers. In late February 1984, Trudeau had announced his retirement from politics, as polls indicated the Liberal Party could not win an election with him as leader. The Liberal party was in the throes of a leadership race, and Munro, Minister of Indian Affairs, was tipped second or third to win that contest. Munro did not prevail at the early June Liberal Party Convention. But, commentators at the time suggested he had slowed the pace on the *Indian Act* bill in order to hold on to crucial votes from a handful of Indian and Inuit Liberal MPs and dodge the unflattering barrage of criticism awaiting him from the Indigenous leadership.[84] Munro had left a little over a week to debate and pass legislation on an issue that had dogged the Liberals since 1969 and had become front-page news.

Bill C-47 provided that, for the future, status would not be affected by marriage. For the future, children of marriages between Indians and non-Indians, up to two generations (one quarter blood), would have status and band membership in the Indian parent's band. Non-Indian spouses and children would have the right to live on reserve with the Indian band member, but any other rights related to reserve life would require a band council resolution. For the past, the bill proposed to reinstate women and their children who had lost status as a result of marrying out. People who were re-instated would be put on a general list. Within two years, these people would be entered onto the band list corresponding to the band list from which they had been omitted or deleted. In short, status would be conferred automatically, but band membership would take place after a two-year waiting period. No provision was included for band control of membership.

With the exception of the two-year waiting period, this was the same proposal agreed to by Cabinet in March 1984 and panned by all Indian chiefs throughout Munro's round of consultations. This table summarizes the Bill C-47 proposals:

[84] Jeff Sallott & Mail Reporter, "Ottawa moves to eliminate *Indian Act* sex discrimination", *The Globe and Mail* (19 June 1984) 1.

TABLE 10 – BILL C-47 PROPOSALS, JUNE 1984	
For the Future	No gain or loss of status through marriage
	Non-Indian spouses would have the right to live on reserve
	Children and grandchildren born from Indian/non-Indian marriages would have both status and band membership (1/4 blood rule)
For the Past	Status and band membership would be returned to all those who involuntarily lost status, and their children (1/2 blood rule)
	All re-instated people would be put on a general list and moved to their band membership list within two years

In introducing the legislation, the government described Bill C-47 as located within an opposition between individual and collective rights. As Minister Munro put it,

> On one hand, there is the right of women to be treated equally with men; on the other hand, Indian bands want to be able to decide, without outside interference, who is and who is not a member of an Indian band. This latter position is recognized as being a key power of Indian nation governments.[85]

The AFN was clear that Indian band councils should hold self-government power.[86] The Coalition of First Nations, the western arch-sovereigntists who had split from the AFN, flatly rejected any federal jurisdiction over citizenship and residency matters within Indigenous nations.[87] NWAC described "the fundamental aboriginal right of each first nation to define its citizenship," thus highlighting the nation as the holder of sovereignty.[88] But, as a sign of its support for the AFN, reached through the Edmonton Consensus, NWAC recommended that "band councils … determine … membership."[89]

The Native Council of Canada, the representative of non-status Indians and Metis, underlined the fact that Metis and non-status Indians had "the right to self-governance"

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[85] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 17:9 (Minister Munro).

[86] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 17:73 (Wally McKay, Assembly of First Nations)

[87] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 19:52 (Al Lameman, Coalition of First Nations)

[88] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 17:68 (Jean Gleason, Native Women's Association of Canada)

[89] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 17:69 (Jean Gleason, Native Women's Association of Canada)

just like status Indians. The NCC saw the *Indian Act* amendments as inextricably linked to planned self-governance legislation for status Indians, asking "Is it just by chance that self-governing mechanisms designed specifically for status Indian bands are being legislated into existence on the eve of constitutional meetings to discuss self-government for Metis and non-status Indians?"[90] The NCC drew lawmakers' attention to the fact that "many of our constituents are victims, not only of the legislation [the *Indian Act*], but of band councils who took advantage of that legislation to exclude our people from their heritage," adding that "there are Indian bands in this country who will go to any extreme to maintain their present political power structure."[91] The NCC were not opposed to Indigenous self-governance. They were opposed to the actions of some band councils empowered under the *Indian Act*.

Indian Rights for Indian Women stressed that Indigenous identity was a birthright, not a matter to be given or taken away by the federal government. And IRIW supported the "principle … that native communities should have control over their own affairs, including membership."[92] Their concern was that some bands would be incapable of developing band membership codes in a proper and just manner, particularly in bands holding oil and gas revenues, and they wanted provisions for appeal of band membership decisions.[93]

In short, none of the major Indigenous groups spoke against Indigenous sovereignty or in favor of sex discrimination. Some spoke against governance by band councils.

Hearings on the bill exposed the fact that Bill C-47 failed to completely eradicate sex discrimination in the rules on Indian status. For the future, the act provided for transmission of status up to two generations of marrying out (a ¼ blood rule), but for the past, status was only transmitted to one generation. The act decreed that when the new rules began, anyone who had status would be counted as a 'full-blood Indian' – even the white women who had acquired Indian status through marriage. The result was that, in the case of an Indian woman who married out, lost status, and then had her status reinstated, her children would have Indian status, but it would end there. In contrast, if her brother married a non-Indian woman, both he and his wife would be counted as Indians, their children would be full-blood, and their grand-children and great-grand-children would have Indian status. The amendment still conferred an advantage to those who traced their Indian status along the male line.

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[90] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 27 June 1984 at 18:20 (Smokey Bruyere, Native Council of Canada)

[91] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 27 June 1984 at 18:21 (Smokey Bruyere, Native Council of Canada)

[92] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 18:41 (Jenny Margetts, Indian Rights for Indian Women)

[93] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 June 1984 at 18:40 (Jenny Margetts, Indian Rights for Indian Women)

The vote at the House of Commons was preceded by lengthy debate among parliamentarians, many of whom were dissatisfied with the bill. One MP pointed out that every single witness who appeared before the Committee was dissatisfied with the bill.[94] Concerns were raised about the effects of increasing the population of status Indians, notably the potential dilution of the per capita value of capital and revenue funds. Band impact studies had been slipshod, financial cost estimates were vague, and the government had made no guarantees regarding additional land to accommodate reinstated and newly registered Indians. The general list and the delay in acquiring band membership amounted to the creation of another variety of second-class, non-status Indian. The NDP reluctantly consented to the bill but argued that the whole process exposed the desperate need for constitutional entrenchment of the aboriginal right to self-government.[95]

Bill C-47 was passed by the House of Commons on 29 June 1984. It did not get through the Senate. It was blocked by Senator Charlie Watts, former spokesman for the Inuit in the constitutional negotiations, at the behest of the AFN and NWAC.[96] The AFN and NWAC claimed the defeat of Bill C-47 as a victory: to the AFN, because they had defended their authority over band membership, and to NWAC, because the Act would have perpetuated a patrilineal system of Indian status. In contrast, the NCC and IRIW had pulled hard for Bill C-47. The collaboration between the AFN and NWAC over Bill C-47 drove the last nail in the coffin in NWAC's relationship with the NCC and IRIW.

Self-Governance Legislation

On the last day of Parliament, the government also tabled its bill on self-governance. Bill C-52, *An Act relating to self-government for Indian Nations* (Bill C-52). It did not make it past first reading.[97] Given the imminent election, it was a largely symbolic move to ventilate government views on self-government. Analysis of the bill elucidates the federal government's understanding of the relationship between ending sex discrimination and advancing self-governance.

The bill made no affirmative recognition of the inherent sovereignty of Indian nations. Instead, the bill's preamble merely noted aboriginal peoples' "special place in Canadian society in the context of the Canadian federal system."[98] The self-governance bill would have granted very limited powers to Indian governments. It proposed the recognition of Indian Nations, through a process that included a referendum among members approving the bid for recognition and the drafting of a written constitution for the Indian nations.[99] The bill included exacting detail regarding the mandatory contents of

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[94] *House of Commons Debates*, (29 June 1984) at 5332 (John McDermid MP).

[95] *House of Commons Debates*, (29 June 1984) at 5331 (Jim Manly MP).

[96] Krosenbrink-Gelissen, *supra* note 31 at 164.

[97] Bill C-52, An Act relating to self-government for Indian Nations, 2nd Sess., 32nd Parl. 1984 [C-52].

[98] Bill C-52, *supra* note 97.

[99] Bill C-52, *supra* note 97 at arts. 3(2) and 6.

constitutions of would-be Indian nations, and it empowered the government to appoint an administrator if the minister judged that the Indian government had abused its powers, was in serious financial difficulty, or could not perform its functions.[100]

The bill made no explicit mention of women's rights or equality issues. However, a concern about women's rights was implied in the provisions of the bill mandating that constitutions had to "provide for the protection of individual and collective rights."[101] Indian Nation governments would have to include, among their founding objectives, the commitment to "protect and enhance individual and collective rights of the members of the Indian Nation."[102] The laws of the Indian Nation would have to conform to the *Charter* and any international human rights covenant signed by Canada.[103] Bill C-52 would have reduced the canvas of Indigenous self-governance to a paint-by-number exercise.

Given the decade of demands regarding self-governance and the disappointments of the section 37 constitutional conferences, Parliamentarians were dismayed that the bill to end sex discrimination had offered no recognition of band control of membership.[104] Minister of Indian Affairs Munro said that because the government had proposed the bills on self-government and sex discrimination at the same time, Indigenous people would grasp the connections and feel both concerns had been addressed.[105] But, between the two bills, the connections between the two issues would have mollified no one. Bill C-52 claimed to give Nations control over membership, but bands could not override the reinstatement provisions passed in Bill C-47. Indian Nations would have had to accept re-instated women and their children, as they would have acquired rights to membership under the reforms to the *Indian Act*. The overall effect, nonetheless, would have been to marshal the women's equality issue to undercut the grant of self-governance.

Conclusion

If Bill C-47 and Bill C-52 were a trade between women's equality rights and Indigenous self-governance claims, Indigenous self-governance got a very short end of the stick. Or, if women's equality rights and Indigenous self-governance were in any way balanced against one another, the balance had thudded squarely on the side of women's equality rights. The fact that these two policy agendas ran side-by-side invited some political give and take, most notably in the truce agreed by the AFN and NWAC to join forces in their campaigns for respect of equality rights and inherent sovereignty. The drafting of

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[100] Bill C-52, *supra* note 97 at art. 26(1)

[101] Bill C-52, *supra* note 97 at art. 6(b)(vi)

[102] Bill C-52, *supra* note 97 at art. 15(b)

[103] Bill C-52, *supra* note 97 at art. 28

[104] *House of Commons Debates*, (29 June 1984) at 5330 (Warren Allmand MP); *House of Commons Debates*, (29 June 1984) at 5331 (Jim Manly MP)

[105] *House of Commons Debates*, (29 June 1984) at 5338 (Minister Munro)

proposals to amend the *Indian Act* and the debates in Parliament caused the threads in the tapestry of this drama to knot every more firmly together. A key thread tightening that knot was Trudeau's utter refusal of Indigenous self-governance, in keeping with his views on Quebec separatism and a united Canada. Several alternative and competing discourses unraveled in the process, nearly falling away from the tableau entirely. The most important of these threads was the one held by Indigenous women, claiming both their equality rights and their rights to Indigenous self-governance. The Liberal government had failed to amend the *Indian Act*, but it succeeded in irrevocably shaped the terms of the debate.

14. From Politics to Fundamental Rights: the 1985 *Indian Act* Amendments

Introduction

After an almost uninterrupted reign dating to 1963, the Liberals were unseated in an election in September 1984. Led by Brian Mulroney, the Progressive Conservatives won the election on a promise of sweeping change.[1] The Liberals had failed to amend the *Indian Act* to end sex discrimination and had denied any constitutional recognition of Indigenous rights to self-governance. The new prime minister, Brian Mulroney, promised to repeal sex discrimination in the *Indian Act*, as part of his campaign commitments.[2] The pressure for *Indian Act* amendments increased as April 1985, the date of coming into force of the *Charter*'s equality provisions, loomed larger on the horizon. Mulroney appointed David Crombie as the new Minister of Indian and Northern Affairs and John Crosbie as Minister of Justice.[3] Here is a summary of the end of the *Indian Act* amendment story.

The Conservative government broke new ground in tackling the *Indian Act* amendments, by proposing the creation of two distinct classes of Indian status. Those with first and second class Indian status would have different legal entitlements to transmit status to their children and grandchildren and different rights to band membership. Nonetheless, the new system still gave an advantage to those who traced Indian status to an Indian grandfather. The second paradigm-shifting prong of the proposal gave bands the right to develop their own membership codes. Women who had lost status due to sex discrimination would regain status and band membership. But, their children would not be returned automatically to band membership lists; their band membership would be conditional on approval by the band council. Cost was the defining logic underpinning these reforms: the measures allowed the government to curb the growth of the status Indian population and reduce the number of status Indians living on reserve.

This was innovation in its own right, but there was more. The debates about this new policy direction were carpeted with language about balancing individual rights against collective rights. The Liberals had argued you had to pick a side. The Conservatives said that these rights could be reconciled, provided that each side gave a little. The legislation did contain some actual balancing of interests, in the form of concessions to Indigenous demands for control over band membership. But any balancing act occurred

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[1] Brian Mulroney (1939-), from Montreal, Quebec, was a lawyer; he made an unsuccessful bid for the Conservative Party leadership before the 1979 election.

[2] Letter from Chaviva Hosek, President, National Action Committee on the Status of Women to David Crombie, Minister of Indian Affairs and Northern Development (22 November 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-105))

[3] David Crombie (1936-), a Red Tory, was the hugely popular mayor of Toronto from 1972 to 1978. He served as Minister of Health and Welfare in the Conservative federal government led by Joe Clark (1979-1980). John Crosbie (1931-) pursued a career in Newfoundland before being elected to the House of Commons in 1976. He served as Minister of Finance in the Conservative federal government led by Joe Clark (1979-1980).

on the question of whether children of reinstated women would automatically become band members. Sex discrimination in the rules on the transmission of status was unconnected to the balancing act proposed in the new scheme. But Mulroney's administration routinely conflated the issue of transmission of status with the question of band control over membership.

This rhetoric about self-governance informed the on-going constitutional conferences for the definition of 'existing' Aboriginal and treaty rights. Mulroney had begun his mandate with great enthusiasm for the constitutional entrenchment of self-governance, but this right was again skewered by a provincial veto from British Columbia and Alberta. For Indigenous leaders, the constitutional road seemed to have ended and, with the coming into force of the *Charter*, any leverage they had regarding the *Indian Act* had evaporated. Recognition of self-governance in the *Indian Act* was all that was left on the table, leading some Indigenous leaders to double down on the rhetoric of Indigenous sovereignty and adopt more extreme positions.

The amendments to the *Indian Act* claimed to substantively balance two fundamental rights – women's equality rights and Indigenous self-governance. This formulation adopted the discursive move from politics to rights birthed in *Lovelace* and nurtured in the *Charter* debates. The Conservative government made one further discursive move through the introduction of a narrative of 'balancing competing rights'. This balancing discourse was then deployed by the government to justify the perpetuation of sex discrimination. The Liberals had said they couldn't end sex discrimination, much as they wanted to, because their hands were tied, first by a need to consult the Indians and, later on, by their need to respect the Indians' cultural rights. The Conservatives bested them. They argued not just that they could not end sex discrimination in the status rules in the *Indian Act*, but that they were forced to perpetuate sex discrimination in the name of respect for Indigenous self-governance. This argument was wildly successful, despite being an astounding distortion of the facts on the ground. Indigenous people testified before Parliament on their views about the government's proposed legislation. Almost no one was in favor of continued sex discrimination, and almost no one was against Indigenous self-governance. Several people opposed the continuation of sexist, unaccountable rule by band councils propped up the federal government. Everyone was afraid that the federal government would leave cash-strapped band councils to cover the costs of people returning to their communities. When news of a high-level Cabinet task force hit the newspapers, the underlying logic of the Conservative's new *Indian Act* became shockingly clear. A plan was well underway to eliminate the entire Indian problem, in just the ways Trudeau had promised in the 1969 *White Paper*. The legislation amending the *Indian Act* passed in spite of the scandal.

Development of a New Direction on the *Indian Act*

Minister Crombie went to work immediately on the sex discrimination problem. A briefing from bureaucrats at the Department of Indian Affairs brought the minister up to speed. The briefing summarized efforts over the past decade to address the problem and concluded that the main obstacles were concerns about potential costs. Potential costs depended on "how many people want to become status Indians and how many

want to live on reserve"[4] and whether to guarantee funding to reserves and additions to the reserve land base. At the upper end, the price tag for reform had mounted to $3 billion.[5]

The options regarding retroactive reinstatement were summarized for Minister Crombie by his legislative assistant, Teresa Nahanee. Prior to working for the minister, Nahanee had been involved in political campaigning by Indigenous people, written editorials on Indigenous land claims, and participated in the 1979 Native Women's March on Ottawa.[6] Amidst the welter of considerations in reforming the Act, Nahanee zeroed in on the core issues:[7]

For the future: Should the transmission of status be cut off after:

> 1. One generation of Indian/non-Indian marriage (1/2 blood rule), or
>
> 2. Two generations of Indian/non-Indian marriage (1/4 blood rule)?

For the past: With regard to those who had lost status as a result of marrying out, should there be:

> 1. no reinstatement,
>
> 2. reinstatement of women who lost status (but not their children)
>
> 3. reinstatement of women who lost status and their children, and their grandchildren, or
>
> 4. reinstatement of everyone (all generations) who lost status because of sex discrimination?[8]

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[4] Staff, Indian and Northern Affairs Canada, "Briefing for Minister: Removal of Sexual Discrimination from the *Indian Act*" (1 September 1984), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-95)) [Briefing for Minister re. Sexual Discrimination and the *Indian Act*, 1 September 1984] at 4

[5] Briefing for Minister re. Sexual Discrimination and the *Indian Act*, 1 September 1984, *supra* note 4 at 3

[6] Teresa Nahanee, "What Do Land Claims Mean to Indians?", *Saskatchewan Indian* (30 August 1975) 5.

[7] F.R. Drummie, Associate Deputy Minister, Indian and Northern Affairs Canada, "Memorandum for the Minister: Removing Discrimination from the *Indian Act*" (11 January 1985), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the plaintiff (P-40)) [INAC, Memorandum re *Indian Act*, 11 January 1985] at 4

[8] Theresa Nahanee, Legislative Assistant, Office of the Minister of Indian and Northern Affairs, "Memorandum for the Minister: S.12.1.b" (10 January 1985), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the plaintiff (P-38))

A First Draft of Indian Act Amendments

In early January 1985, a draft memo spelled out the government's new direction on *Indian Act* reforms. It addressed the options regarding Indian status for the past and the future. The memo outlines four policy options, all of which would have provided for status to transmit up to ¼ blood quantum.

TABLE 11 – POLICY PROPOSALS, *INDIAN ACT* AMENDMENTS, 11 JANUARY 1985	
Option 1	• For the future, "eligibility for both status and band membership could be based on blood quantum criteria ranging from half blood to any degree of status Indian descent. A quarter blood-cut off would appear to be a reasonable criterion consistent with the preservation of cultural integrity within communities."[9] • For the past, there would be no reinstatement for those who had lost status. • The 'no reinstatement' option would "dramatically reduce the costs associated with amending the Act."[10] • Bands would not have the right to determine their membership.
Option 2	• For the future, it would be the same as Option 1. • For the past, status would be given to those who had lost status involuntarily and to their children, to a cut-off of one half blood. • Bands would not have control over their membership lists, but there would be a two-year grace period to allow bands to make preparations for returning band members.
Option 3	• For the future, as in Option 1, status would be attributed up to a quarter blood ancestry. All status Indians would be put on a General List. • For the future, bands would be empowered to develop their own membership codes and determine their band membership. • The government would not force band councils to put anyone on band lists • Option 3 "embodies the main features of the Edmonton consensus" between the AFN and NWAC.[11]
Option 4	• For both the past and the future, bands would have complete control over who has Indian status and who has band membership. • It would require the federal government to "consider funding bands on the basis of the population resident on reserve … perhaps best be implemented as part of a more comprehensive scheme for recognizing Indian self-government." [12]

[9] David Crombie, Minister of Indian Affairs and Northern Development, "Draft - Memorandum to Cabinet: Removal of Discrimination from the *Indian Act*" (11 January 1985), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the plaintiff (P-39)) [Crombie, Draft Memo to Cabinet re *Indian Act*, 11 January 1985] at 13

[10] Crombie, Draft Memo to Cabinet re *Indian Act*, 11 January 1985, *supra* note 9 at 13

[11] Crombie, Draft Memo to Cabinet re *Indian Act*, 11 January 1985, *supra* note 9 at 15

[12] Crombie, Draft Memo to Cabinet re *Indian Act*, 11 January 1985, *supra* note 9 at 17

The 11 January 1985 proposal was a significant innovation from all previous suggestions for reforming the Indian At. Its most significant innovation was the addition of "Option 3", which proposed to give bands new powers over band membership. Option 3 represented the broad principles behind the Edmonton Consensus between the AFN and NWAC, agreed in May 1984.

Cost was the primary criterion by which these options were evaluated. Deputy Minister F.R. Drummie stressed the relationship between cost and the scope of reinstatement, given the current economic climate:

> the Prime Minister wrote before Christmas to all Ministers stressing the precarious deficit situation facing the government, and reiterating the government's central policy themes of 'further reducing the deficit' and 'removing obstacles to growth'. In this context, the estimated cost to implement reinstatement 'to the second generation' (or to 'one-quarter registered Indian ancestry') is alarming.[13]

The Deputy Minister estimated that the recommended approach to reinstatement could cost as much as $1 billion.[14] These estimates were alarming because they would require "a dramatic increase in funding for Indians within the fiscal framework, at the expense of other Ministers' priorities" and it would mean that no further funds would be available for other departmental priorities like self-government.[15]

Retroactive reinstatement was the cause of the ballooning cost estimates, and bureaucrats searched for the reinstatement scenario that would minimize costs. The minimal scenario would involve "restricting reinstatement to those who lost status and their children (i.e. ½ blood rather than ¼ blood)."[16]

The second lever in the machine that affected costs was services and benefits owed to status Indians, whether on or off reserve.[17] The policy scheme considered giving bands control over membership, but the federal government would refuse to accept financial responsibility for non-Indians living on reserve, even if band rules permitted them to be resident on reserve.[18] The memorandum concluded that "the Cabinet's final policy decision on reinstatement will be shaped by financial more than any other considerations."[19]

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[13] INAC, Memorandum re *Indian Act*, 11 January 1985, *supra* note 7 at 1

[14] INAC, Memorandum re *Indian Act*, 11 January 1985, *supra* note 7 at 2

[15] INAC, Memorandum re *Indian Act*, 11 January 1985, *supra* note 7 at 2

[16] INAC, Memorandum re *Indian Act*, 11 January 1985, *supra* note 7 at 2

[17] INAC, Memorandum re *Indian Act*, 11 January 1985, *supra* note 7 at 3

[18] INAC, Memorandum re *Indian Act*, 11 January 1985, *supra* note 7 at 5

[19] INAC, Memorandum re *Indian Act*, 11 January 1985, *supra* note 7 at 6

New Direction: Two Classes of Indian Status & Control over Band Membership

Based on these considerations, the initial proposal was heavily revised in a memo dated 24 January 1985, yielding significant changes in the policy direction. After small modifications, this proposal was put to Cabinet in a memo dated 30 January 1985.

The first significant change was that advancing self-government emerged as one of the objectives of reforms of the *Indian Act*. This objective joined the other goals: "conformity with the Canadian *Charter of Rights and Freedoms*," "redress [of] past discrimination," and "end[ing] sexual discrimination."[20]

Second, the options on the table were winnowed down to two. The earlier draft had contained four options, each with a possibility for transmitting status up to a ¼ blood registered Indian ancestry. Now, the Department of Indian Affairs proposed only two alternatives:

[20] David Crombie, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet: Removal of Discrimination from the *Indian Act*" (24 January 1985), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-132)) [Crombie, Cabinet Memo, *Indian Act*, 24 January 1985] 3

TABLE 12 – *INDIAN ACT* AMENDMENT PROPOSAL, 24 JANUARY 1985	
Option 1	For the future, a new scheme would create two classes of Indian status depending on genealogy. Those in the first class could pass on their Indian status regardless of the status of the other parent. Those in the second class could pass on their Indian status only if the other parent had Indian status. De facto, it was a ½ blood rule. For the past, there would be no restoration of status. Bands would have no power to determine membership. The memo advises that though this option would "satisfy basic *Charter* requirements to remove discrimination, while avoiding the influx of 'new' residents onto reserves by many bands," it would "be seen as a form of continuing discrimination."[21]
Option 2	• For the future, a new scheme would create two classes of Indian status depending on genealogy. • Those in the first class could pass on their Indian status regardless of the status of the other parent. • Those in the second class could pass on their Indian status only if the other parent had Indian status. De facto, it was a ½ blood rule. • For the past, those who lost status unfairly would be restored to status and band membership • For the past, the children of those who lost status unfairly would be restored to status. • For the past, the children of those who lost status unfairly could apply for band membership but it would not be guaranteed nor granted by the federal government. • Bands would gain the power to determine their own membership.

The proposal regarding Indian status was a paradigm shift. Since the Crown's first definition of 'Indian' in 1850, there had only ever been one legal category, 'Indian'. A person either had Indian status, or she did not. The government here proposed a two-class system of Indian status. Those with first class Indian status could pass on their Indian status to their children no matter the status of the other parent. Those with second class Indian status could only pass on status if the other parent had either first or second class Indian status.

[21] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note *supra* note 20 at para. 22

The doctrine of 'acquired rights' prevented the government from taking away anyone's Indian status. As a result, the non-Indian women who had acquired Indian status only through marriage under the prior regime entered this new regime as first class Indians. The children of these women had two first class Indian parents and could thus pass their first class Indian status to their children. If these first-class Indian children married non-Indians, they could pass status to the grandchildren, who became second-class Indians.

On the other hand, a woman who had lost her Indian status as a result of marriage acquired first-class Indian status. Because her husband was non-Indian, her children had only one first class Indian parent and, thus, were entitled to only second class Indian status. If these second-class Indian children married non-Indians, the grandchildren would not have either first or second class Indian status. In the following chart summarizing the new scheme, the scenario under the old *Indian Act* appears on the row, and the effects of the rules on re-instated women appears in bold:[22]

TABLE 13 – TRANSMISSION OF STATUS UNDER *INDIAN ACT* PROPOSAL, 24 JANUARY 1985					
Prior Regime	*Indian Man + Indian Wife (by lineage or marriage)*	***Indian Woman who lost status by marriage + Non-Indian Man***	*Indian man + Indian daughter of Indian man*	*Indian daughter of Indian man + Indian daughter of Indian man*	*Non-Indian Son of Indian woman + Non-Indian woman*
Status of Parents (proposal)	Class 1 Indian + Class 1 Indian	**Class 1 Indian + Non-Indian**	Class 1 Indian + Class 2 Indian	Class 2 Indian + Class 2 Indian	Class 2 Indian + Non-Indian
Status of Children	Class 1 Indian Child	**Class 2 Indian Child**	Class 1 Indian Child	Class 1 Indian Child	Non-Indian Child
Status of Children's Children (with Non-Indian)	Class 1 or 2 Indian Grandchild	**Non-Indian Grandchild**	Class 1 or 2 Grandchild	Class 1 or 2 Grandchild	Non-Indian Grandchild

The proposed two-class system gave people the status of 'Indian' while curbing the inter-generational growth of the number of status Indians. Within one family, grandchildren would have different status depending on whether their Indian

[22] The legislation does not use the terminology 'Class 1' or 'Class 2'. Those who had what I am describing was 'Class 1' status were registered under art. 6(1) of the *Indian Act*, those with Class 2 status under art. 6(2).

grandparent was a woman or a man. Although all references to blood quantum were removed, the underlying logic of blood quantum remained. And the strongest 'blood' remained the blood of an Indian grandfather.[23] The sex discrimination in the *Indian Act* had not been cured.

The proposal regarding band membership was also a paradigm shift. The government proposed to grant broad powers to bands to determine their own membership. Existing band members would be able to agree, through majority election, to assume control over the band's membership list. The band council would develop a new membership code, and existing band members would vote on the proposed code. The process offered bands the opportunity to develop codes that reflected their own understandings of identity and citizenship. The only restriction imposed on the content of these new membership codes would be that codes could not expel existing band members nor exclude the women who had lost band membership as a result of marrying out. The band membership codes could, however, excluded the children of reinstated women. As this exclusion would reduce "by two-thirds the number eligible to get band membership by direct federal action," the exclusion would mollify Indigenous leaders concerned about floods of people returning to reserve.[24] Furthermore, bands would have control over whether non-Indians could live on reserve.

Bands would have a two-year window in which to develop these membership codes. If they chose not to develop their own codes within that window, all who had regained Indian status would also regain band membership – meaning both the women who had lost status through marriage and their children. The proposal, that is, gave bands a two-year window in which to vote to exclude the children of women who had married out. If those children were excluded, reserves would remain mostly populated by people who traced their Indian status along the male line.

The cost estimates had been massively reduced since the first proposal on 11 January. References to adding to the land base of reserves were deleted, in favor of taking only the "minimum action required" to "meet the essential housing and infrastructure needs."[25] The cost estimates assumed that 80% of those who lost status would want it back and 70% of their children, but only 10% to 20% of those taking up status would return to live on reserve, due to "band control of residency, lack of on-reserve housing and facilities, and poor employment opportunities on reserve."[26] The first proposal had given a maximum figure of $1 billion; this policy package came with a maximum cost of $420 million.[27]

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[23] DN Sprague, "The New Math of the New *Indian Act* 6(2) + 6(2) = 6(1)" (1995) 10:1 Native Studies Review 47.

[24] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at 2

[25] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at para. 40.

[26] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at para. 46

[27] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at para. 47

The other significant innovation was rhetorical: the discussion paper was carpeted with language about *balancing*. For example, the discussion paper said that the *Indian Act* problem had been "characterized as solely an 'individual equality issue' and conversely as an 'Indian collective rights issue.' It is both. Successful resolution must balance carefully these two dimensions."[28] The direction proposed aimed at "balancing all sides of the issues fairly."[29]

Thus described, the 'balancing' consisted of weighing 'individual equality' against 'Indian collective rights'. The subtext is that some equality had to be sacrificed in order to protect collective rights. But, sex discrimination remained latent in the government's new system of two classes of Indian status. Any 'balancing' of 'competing interests' would occur over the question of the band membership of the children of reinstated women. The issues of who would get status and whether it would be after one or two generations of inter-marriage were not sites of any 'balancing'.

But the government routinely conflated these issues to create the impression that denying Indian status to some was necessary to appease Indigenous concerns about control over band membership. For example, in the proposed public relations strategy, the Department of Indian Affairs spun the decision to deny automatic band membership rights to the children of reinstated women as necessary to avoid tripling the population impact and undermining band control of membership.[30] This messaging was not coherent with the government's own assumptions. The new regulatory scheme presumed that bands would control on-reserve residency, thus allowing them to check the flow of people back to the reserve. The government also presumed that only 10 to 20% of the people who had the option of returning to reserve would do so. The only bands that would, in fact, gain from the denial of automatic inclusion of first generation descendants were the wealthy bands from Alberta whose per capita shares would be diluted. But by talking about population impact, the statement tapped into fears in Indigenous communities that reforms would cause already poor communities to be overrun by returning Indians. It served as a dog whistle to signal the federal government's respect for the demands of oil-rich and powerful Alberta bands. It was designed to generate Indigenous support for denying automatic band membership to the children of reinstated women.

Why would the federal government want to discourage band membership of the children of reinstated women? The real worry was not the number of people with band membership or simply the number of status Indians, but the number of status Indians with band membership *living on reserve.* Given band control over membership, bands could and would admit whomever they wanted as members, irrespective of the person's status as an Indian. The most expensive status Indian was the status Indian living on reserve, because she would be entitled to the full spectrum of services for status Indians

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[28] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at para. 6

[29] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at para. 56

[30] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at para. 56

and the government's budget to the band would have to include this person in calculating the band's operating budget. By the same token, the federal government would have to spend little on the non-status person permitted to live on reserve as a result of a band's power over its membership list, and this non-status person would not figure in the federal government's calculations of the band budget. The government anticipated that band councils would end up covering services for non-status residents out of its existing budget:

> Since inter-marriage with non-Indians is widespread (about half of Indian marriages), it is very likely that most bands will permit non-Indian spouses and children of Indian band members to live with them on reserve. In some cases, non-Indian band members may be accepted as well. The existing federal government policy of financing services for Indians only would continue ...[31]

Limiting access to band membership permitted the government to minimize costs. It was a bonus that it appeared to signal government concessions to Indigenous self-governance demands. The balancing act between women's rights and Indian self-governance took place by denying children of reinstated people an automatic right of *band membership*. Absent from the balancing act were the rights to Indian *status* of the grandchildren of women who had lost status through marriage. It was a windfall that, by conceding to Indigenous self-governance demands, the government could talk about balancing individual and collective rights and then conceal the perpetuation of sex-based discrimination behind that 'balancing act'. It continued the by now decade-old practice of blaming sex discrimination on the Indians.

The Minister of Indian Affairs recommended pursuing the scheme (Option 2) that combined a new two-class system of Indian status with band control of membership. The recommendation to Cabinet described the proposal as a balance between "women's demand to have those who lost status and band membership get them back" and "a concrete step towards Indian self-government."[32] Cabinet agreed. Bill C-31 was drafted and introduced in Parliament on 28 February 1985. Bill C-31 received its second reading by 1 March 1985 and then went to the Standing Committee on Aboriginal and Indian Affairs for seven weeks of hearings.

The Conservative Position on Indigenous Self-Government

While bureaucrats in Indian Affairs were busy toiling over new genealogies of Indian status, preparations were well underway for the first section 37 Constitutional Conference. During the two constitutional conferences under the Liberals, millions of Canadians had watched Indigenous political leaders articulate their position on land rights, self-governance, and sovereignty. The 1983 Constitutional Conference had raised high hopes about the efficacy of the forum, as it had concluded with several

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[31] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at para. 34

[32] Crombie, Cabinet Memo, *Indian Act*, 24 January 1985, *supra* note 20 at 2

constitutional amendments, including one on gender equality rights. The 1984 conference was, in contrast, a crashing failure, and the conference ended in suspicion about the government's real intentions regarding self-government.[33] It was unclear what direction Mulroney would take.

The first sign of the Conservative party position on the constitutional recognition of Indigenous self-governance occurred in December 1984. It shocked many: "the new government was even … more supportive of aboriginal self-government than was the former administration."[34] The government proposed that at the 1985 constitutional conference, an agreement would be reached on whether to entrench self-government in the constitution or sign a political accord outside of the constitution.[35] Either way, self-government rights would be recognized. The identification and definition of these rights would occur through bilateral (federal-Indigenous) or trilateral (federal-provincial-Indigenous) negotiations. Between December 1984 and March 1985, the federal government negotiated with each of the provinces. By March 1985, the constitutional entrenchment of the right to self-government was supported by the federal government and four provinces (Ontario, New Brunswick, Manitoba, and the Northwest Territories). That right would be given effect through a series of negotiated agreements at the local and regional levels.[36] The federal government lacked sufficient provincial support for a constitutional amendment, however. Alberta and British Columbia were the most vocally opposed to constitutional recognition.

The 1984 Constitutional Conference began on 2 April 1985. The four national organizations had seats at the table: the Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Inuit Committee on National Issues, and the Metis National Council. Indigenous women were again denied a formal seat at the table. The AFN gave one of its seats to the Native Women's Association of Canada (NWAC).

Mulroney opened the conference with the statement that its objective was the "protection of the principle of aboriginal self-government in the Constitution."[37] Mulroney presented the federal government's plan for constitutional recognition for self-government, where those rights are defined in subsequent negotiated bilateral or trilateral agreements.[38]

On the Indigenous side of the table, the AFN and the Native Council of Canada were opposed to the proposal, but willing to negotiate. The AFN disliked the idea that the constitutional right to self-government was encumbered by external negotiated

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[33] David C Hawkes, *Negotiating Aboriginal Self-Government: Developments surrounding the 1985 First Ministers' Conference* (Kingston, Ont.: Institute of Intergovernmental Relations, 1985) at 10.

[34] *Ibid*.

[35] *Ibid* at 14.

[36] *Ibid* at 17.

[37] *Ibid* at 20.

[38] *Ibid*.

agreements. For the Native Council of Canada, a constitutional recognition of self-government was meaningless without parliamentary representation for non-status Indians and a land base. The Inuit Committee on National Issues (ICNI) and the Metis National Council were more supportive.[39]

As the provinces aired their reactions, it became clear that there was no hope for an agreement about a constitutional amendment. Alberta, British Columbia, and the Yukon strongly objected to the proposal. A revised proposal was advanced by Minister Crombie: it freed governments from a constitutional obligation to negotiate the bilateral and trilateral agreements, effectively giving provinces a veto over Aboriginal self-governance.[40] It implied a constitutional right of self-governance explicitly stripped of the details that would give it life. Thus phrased, the final proposal met with the approval of seven provinces. It was rejected outright by the AFN. The prime minister abruptly adjourned the meeting, without a deal on aboriginal self-governance.

In preparation for the conference, NWAC had informed Mulroney that NWAC was willing to drop its demands for a constitutional amendment to section 35 to guarantee sexual equality rights. Section 35, the section protecting "existing Aboriginal and treaty rights," had come to be seen by Indigenous leadership as an inviolable sanctum of Indigenous sovereignty. Instead of seeking an amendment to this section, NWAC would be satisfied with some modification in other sections of the constitution, for example, as part of the section 28 guarantee that sex equality rights were non-derogable.[41] In spite of this offer, the federal government tabled an amendment to clarify the provisions relating to gender equality rights in section 35 Aboriginal rights. For reasons that remain opaque, this proposal was never discussed, and nothing came of any constitutional amendments regarding Aboriginal rights and gender equality.[42] The sequence of events was, nonetheless, a sign of the tight collaboration between the AFN and NWAC for advancing their shared goals.

Although Mulroney had advanced a more supportive rhetoric about self-governance, the policy recommendations ended up looking very much like those under the Trudeau administration. Provinces would have retained a de facto veto power over Aboriginal self-governance.

Indigenous nations were no further ahead in their battle for recognition as a third order of government. The *Charter*'s equality provisions were about to come into force, in April 1985, meaning they would lose any leverage they had on the *Indian Act* amendments. This raised the stakes for some measure of progress on self-governance in the *Indian Act*.

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[39] *Ibid* at 20–22.

[40] *Ibid* at 29.

[41] Lilianne Ernestine Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: the Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987* (Saarbrücken: Verlag Breitenbach, 1991) at 167.

[42] Hawkes, *supra* note 33 at 28.

Bill C-31 in Parliament

Meanwhile, the government's proposed reforms to the *Indian Act* were being picked over in Parliament. Through seven weeks of hearings, lawmakers and Indigenous political leaders expressed their opinions on the new policy direction in the *Indian Act*.

Before analyzing the reaction to the draft bill (Bill C-31) by lawmakers and advocates, I will recap the government's proposal. For the future, no one would gain or lose status through marriage. Indian status would become either of a first or second-class variety. Those with first-class Indian status could pass status to their children, those with second-class status could not (unless the other parent also had first or second-class Indian status). Women who had lost status by marrying non-Indians would regain status as first-class Indians, and they would regain rights to band membership. Their children would acquire second-class Indian status. For a period of two years after the passage of the act, their children's rights to band membership would be determined by the band. Bands were empowered to write their own membership codes, and they could admit members who were not status Indians. However, bands' discretion about their membership codes was not unlimited. Bands could not draft membership codes to specifically exclude women who had been re-instated as a result of the proposed amendments (Bill C-31). Bands had increased by-law powers to regulate residency on reserve.

Minister of Indian Affairs Crombie described the bill as aimed at eliminating two historic wrongs: discriminatory treatment based on sex and government control of membership in Indian communities.[43] Bill C-31 bundled the self-governance and gender equality agendas into one piece of legislation. After a long tug of war between the struggle for constitutional recognition of Indigenous people's inherent sovereignty and the elimination of sex discrimination in the *Indian Act* reforms, those two struggles became articulated in one bill as issues that could be balanced against one another. During the years of struggle on both these issues, various political trades had taken place – as in, for example, the Edmonton Consensus reached by the AFN and NWAC. But the new bill went further than political horse-trading. It claimed to substantively balance the issues. And it was by claiming an unavoidable balancing of irreconcilable rights that the government got away with perpetuating sex discrimination.

'Balance' became the government's touchstone word in describing the policy proposal. As Crombie stated in his introduction of the bill, "I believe the Bill constitutes a balanced approach to a complex issue, and above all, in my view it is fair to both individuals and bands."[44] During his last pitch for the bill in the House, Minister Crombie argued that

[43] *House of Commons Debates*, (1 March 1985) at 2644 (Hon. David Crombie)

[44] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 7 March 1985 at 12:8 (Hon. David Crombie) [SCIAND, Crombie, 7 March 1985]

> [a]fter all the debate, Bill C-31 is, I say with some modesty, a careful balance between two just causes, that of women's rights and that of Indian self-government. If either of those two causes had triumphed, it could only have been at the expense of the other. Therefore, this bill avoids both those extremes. No one gets 100 per cent of what they sought, but each group gets something that is vitally important to them. There was no other fair path to follow.[45]

Thus described, there were two opposing groups: the women who wanted individual equality rights, and the Indians who wanted collective rights to self-government. Neither could be wholly satisfied, and a reconciliation was needed between individual and collective rights.

This balancing of rights was described by the minister as taking place in the treatment of the children of the women who reacquired Indian status. These people would be granted Indian status, but not automatic band membership. Minister Crombie admitted that, because they would not automatically have band membership, "they will be different from their cousins, but this goes back to the question of balance and fairness."[46] He said that giving automatic band membership to the children made a mockery of band control over membership. But, the government's internal documents indicate that officials thought "many bands will extend membership to first generation descendants."[47] The government's proposal gave band councils the power to put people on those lists themselves by drafting their own membership codes. In other words, the balancing was not about who was on the band membership list, but rather about who got to decide.

The key issue exposed by Crombie's comments about band membership is that the exercise of 'balancing' took place in the debates about the band membership rights of first generation descendants. The problem regarding the transmission of *status* between generations was that it continued to advantage those who traced their Indian status along the male line. Lawmakers and Indigenous advocates pointed this out. The government incessantly pleaded its 'balancing act' argument to justify this discrimination as necessary to achieve a compromise. The debates over the bill show that saving money was the real logic underpinning the legislative scheme.

Sex Discrimination in a System of First and Second Indian Status

Lawmakers were aware that the new system for two classes of Indian status continued discrimination. Sheila Finestone MP stated that, "[i]t is totally unacceptable to me, and to most women, to divide families according to different status of transmittable rights to

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[45] *House of Commons Debates*, (12 June 1985) at 5686 (Hon. David Crombie)

[46] SCIAND, Crombie, 7 March 1985, *supra* note 44

[47] Staff, Indian and Northern Affairs Canada, "Briefing for Minister: Questions & Answers for the Minister of DIAND on Bill C-31" (1 March 1985), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-143)) at 2

offspring."[48] Senators Fairbairn and Marchand spoke of the continuing discrimination caused by inequality between men and women in the ability to transmit their status directly beyond first generation children.[49] For both Finestone and Keith Penner MP, transmission of status was fundamental to the equality rights being protected under the proposed bill.

When Finestone put the issue directly to Minister Crombie, he admitted that Indian status continued to pass preferentially along the male line:

> Mrs. Finestone: Second generation descendants from the female will not have the same right as second-generation descendants from the male.
>
> Mr. Crombie: That is right. The only way they can become status Indians is to be back involved in the marrying of status Indians.[50]

The Committee heard hours of testimony from over thirty groups interested in the question of ending discrimination in the *Indian Act.* Twenty-three of the thirty-three groups who testified stated, unequivocally, that Bill C-31 continued gender discrimination because it prevented women who had married out from transmitting status to their grand-children.

Almost no one advocated the perpetuation of gender inequality in status rules. Only three groups made arguments that gender inequality was traditional in Indigenous communities. The Coalition of First Nations and Treaty Six Chiefs Alliance stated that the Cree had a tradition that women would follow the man, upon marriage, but they specified that this was not a justification for sex discrimination in the federal government's law. Only Marianne Lavallee, speaking for the Federation of Saskatchewan Indian Nations, seemed to justify sex discrimination, by arguing that the creator ordained that men should be in a position of precedence.[51] There is no evidence that any Indigenous group specifically asked for the continuation of gender discrimination in the attribution of status under the *Indian Act*. On the 'status' side of the equation, there was no Indigenous group holding anything to be balanced.

Penner challenged Minister Crombie directly on the government's spurious or at best muddled argument of balancing interests. Penner said he could follow Crombie on the principle of respecting band autonomy by not forcing new members on their lists.

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[48] *House of Commons Debates*, (11 June 1985) at 5619 (Sheila Finestone MP)

[49] *Senate Debates*, (17 June 1985) at 1044 (Hon. Joyce Fairbairn); *Senate Debates*, (17 June 1985) at 1046 (Hon. Leonard Marchand)

[50] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 13 March 1985 at 14:22 (Sheila Finestone MP & Hon. David Crombie)

[51] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 28 March 1985 at 28:32 (Marianne Lavallee, Federation of Saskatchewan Indian Nations)

Penner had, after all, chaired the parliamentary inquiry on self-governance. But Penner could not understand why the government refused to restore full and transmissible status to all who had lost status, without giving band membership. Crombie summarized, "you are restoring status but not membership."[52] Though he understand the distinction drawn by Penner, Crombie never explained why the government could not just grant first-class status to all who were acquiring status under the bill.

Jim Manly MP emphatically rejected the government's defense. His comment is quoted at length to show how clearly parliamentarians understood the discrimination being perpetuated by the bill:

> We are talking about discrimination that exists right now between a brother and a sister. … right now we are talking about the transmission of status whereby some people have been robbed of their status in the past, and we are not saying giving them an opportunity to transmit status to their children equal to that which we have given males who married non-Indians. … If a male is married now to a non-Indian and he has children, they have full status under the *Indian Act* and they can transmit status. If his sister or his brother marries and has children after this act comes into effect, there is a difference from what it is for the brother. But it is the same situation for both the male and the female. At present, the situation is not the same for the male and the female. I am saying let us at least clean up the present situation.[53]

Amendments were proposed by several MPs to address the discrimination rooted in descent along the male line. Manly, Penner, and Finestone all proposed amendments that would have given the children of women restored to status the same class of Indian status as was held by the children of men who had never lost status. Penner proposed giving Indian status to anyone recognized by bands as band members.[54] An internal government document explaining these amendments concluded that accepting these amendments would "enlarge the group eligible for restoration of Indian status and band membership" and "increase the costs to the federal government."[55] In Parliament, the

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[52] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 23 April 1985 at 34:47 (Keith Penner MP & Hon. David Crombie)

[53] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 23 April 1985 at 34:54 (Jim Manly MP)

[54] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 23 April 1985 at 34:47 (Jim Manly MP)

[55] Staff, Indian and Northern Affairs Canada, "Briefing Note on Bill C-31" (6 June 1985), in Descheneaux c Canada (Procureur général) (2015), QCCS 3555, JE 2015-1378 (CS) (Evidence submitted by the Attorney General of Canada (D-212)) [INAC, Briefing Note on Amendments, 6 June 1985] at 23

government opposed all the amendments enlarging the class of people eligible for status because it "would require additional public spending."[56]

All the motions for amendments that would have increased in any way the number of status Indians were ruled out of order. The government cited rules of Parliamentary procedure that forbade a member of parliament from adding expenses to a bill. In spite of heated protests about the legal validity of the procedural argument from several seasoned MPs, the Chairman supported the government's procedural argument, blocking all amendments that impacted the total financial outlay associated with the bill.[57] In effect, the government's first offer was its last offer.

Indigenous Self-Governance and the Rights to Band Membership of Women and their Descendants

The government's claim to be reconciling competing interests held more water on the issue of rights to band membership. Here, there was genuine disagreement among Indigenous groups. Although some groups came down in favor of giving band membership back to women who had married out and others opposed it, both sides of the debate framed their concerns around the notion that identity and community membership were elements of Indigenous sovereignty, and not for the federal government to decide. In short, just as there was no one arguing *for* sex discrimination, there was no one arguing *against* Indigenous sovereignty.

The majority of Indigenous people who testified at the hearings advocated for *both* the end to sex discrimination and the recognition of Indigenous rights to self-governance. A minority (eight groups) opposed granting status and band membership to women who married out and their descendants, because they were concerned with the flooding of their reserves and the obligation to share their oil and gas wealth with these new members.[58]

Indigenous groups said that Indigeneity was rooted in culture and community, not in a legal label given by the federal government. Indigenous sovereignty was the foundation of this claim: for example, the statements that "no bill is going to tell whether I am an Indian or not"[59] and "born an Indian, die an Indian, regardless of government status

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[56] INAC, Briefing Note on Amendments, 6 June 1985, *supra* note 55

[57] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 23 April 1985 at 34:49 (Warren Allmand MP)

[58] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 20 March 1985 at 21:9 (Mary Lightning, Indian Women of Treaties 6, 7, and 8); 21 March 1985 at 22:27 (Joe Bull, Treaty Six Chiefs Alliance); 21 March 1985 at 22:42 (Roy Fox, Blood Tribe); 26 March 1985 at 25:8 (Catharine Twinn, Treaty Eight Group).

[59] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 19 March 1985 at 19:18 (Ron George, United Native Nations Organization of BC)

determination."[60] This position drew a distinction between status and band membership: status was for the government to decide, band membership was a matter of Indigenous sovereignty. The only Indigenous women's group that argued against the government's right to determine who was a status Indian were the Women of Tobique. They took the more hardline position that the determination of status as well as membership should be made by Indigenous people themselves, and they rejected the proposal that the federal government should be allowed to decide who was an Indian.[61]

This consensus among most groups about Indigenous jurisdiction over identity eroded around the question of whether bands should be forced to include re-instated women as members. Nearly everyone (26 of 33 groups) agreed that women who had married out should get back their Indian status. But there was much less consensus over whether these women should automatically receive band membership.

Indigenous women's groups (with the exception of the Women of Tobique) and the Native Council of Canada argued that women should be automatically re-instated, rather than giving bands any say over that decision. The women and non-status groups insisted that women become band members before bands embarked on the process of developing and voting on their own membership codes. They were trying to be included in the conversation about the definition and governing of their communities. The groups arguing for automatic re-instatement were not arguing against Indigenous self-governance. Quite to the contrary, the most ardent expression of a commitment to self-governance was a demand for inclusion in the self-governing polity.

All the other groups felt that the determination of band membership was a question for bands, not for the federal government. They felt that the sovereignty of Indigenous bands was eroded by the government's decision that women would automatically receive band membership. Understanding this position requires the context of the section 37 Constitutional Conferences. The hearings on the Bill were taking place after the 1985 Constitutional Conference. By the time the Bill was sent from the Committee back to the House, the second phase of the 1985 Constitutional Conference had taken place. The second phase of meetings had confirmed that a constitutional recognition of Indigenous self-governance was not coming any time soon. For the stalwart defenders of Indigenous sovereignty, control over band membership was all there was left to fight for. The constitutional train had ground to a halt. Even though, compared to the Liberals, the Conservative government had made a significant concession by offering bands the power to draft their own membership codes, this was not enough. By demanding the exclusion of the reinstated women and children, a minority of Indigenous groups were pressing for further concessions from the government.

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[60] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 26 March 1985 at 24:80 (Ardith Cooper, Professional Native Women's Association).

[61] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 14 March 1985 at 16:44 (Shirley Bear, Women of the Tobique Reserve)

The extent of divisions on this question reveals that the heart of the debate about Bill C-31 was the dispute with the federal government about the meaning of Indigenous self-governance. Both the male-led groups and the Indigenous women's groups shared a deep commitment to Indigenous self-governance: they disagreed about who should be seated at the governing table.

The other issue revealed in the debate on automatic reinstatement is the deep distrust among Indigenous representatives about existing band councils. For those who demanded automatic reinstatement of women to band lists, the band membership issue was about whether band councils could be trusted. As Carole Ennis put it, "[w]e were never against self-determination, but the AFN used self-government as an excuse. It is dangerous, too, when most chiefs aren't able to handle the little power they have responsibly."[62] The band councils were empowered under the *Indian Act* and were not synonymous with Indigenous governments that continued to operate in many Indigenous nations under Indigenous law. For example, George Watts of the Nuu-chah-nulth distinguished between "male-dominated councils elected under the *Indian Act*" and "hereditary councils."[63] The Women of Tobique said they feared that many bands, if given the power, would refuse band membership to women who had regained status, but they also said they were ardent advocates of Indigenous sovereignty.[64]

It was the federal government who insisted that band councils were the legitimate governments of their communities and the appropriate vessel for this meager crumb of Indigenous sovereignty. After all, the federal government had worked assiduously throughout the late 19th and early 20th centuries to oust those Indigenous governments – in which, in many nations, women played central roles – and replace them with councils elected by a male-only electorate.

Two important conclusions follow from this analysis of the Bill C-31 debates. First, the real divisions of opinion among Indigenous groups concerned women's automatic rights to band membership and the band membership rights of their children. Denying Indian *status* to the children and grandchildren of reinstated women was not at issue in the debate about respect of Indigenous sovereignty. Second, those who opposed automatic band membership for returning women felt the policy violated Indigenous sovereignty. But those who wanted women automatically restored to band membership were not against Indigenous sovereignty; they were against their band councils. The common thread running through all these diverse positions was a deep distrust of government – whether the federal government or band councils.

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[62] Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto, Ont.: Women's Press, 1987) at 235.

[63] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 12 March 1985 at 13:13 (George Watts, Nuu-chah-nulth Tribal Council)

[64] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 14 March 1985 at 16:50 (Caroline Ennis, Women of the Tobique Reserve)

The government insisted that the "competing interests" at play were between women's rights and Indigenous self-governance. But several Indigenous people testified before the committee that the only real tension was between "justice and money."[65] They expressed their fears that band membership rolls would increase without any corresponding increase in support from the federal government. Of the thirty-three groups who testified, only three groups omitted to mention the potential resource shortfall. Some groups, like the Coalition of First Nations, explained their opposition to automatic reinstatement as partly due to their concerns about limited space on reserve and the shortages of resources to meet health, education, and housing needs of existing and new members.[66] Others, who were in favor of re-instatement, argued that money should not determine whether women could be re-instated and that, in any case, it was the federal government who should pay.[67] Whether for or against Bill C-31, Indigenous groups evinced a deep distrust about who would be left to shoulder the financial burdens associated with remedying discrimination in the *Indian Act*.

There was much concern and confusion among witnesses and parliamentarians over the connection between funding to bands and the number of band members – a core concern of many band councils. Even the minister was confused. Minister Crombie informed lawmakers that "any member of the band is fully funded, and the band is fully funded with respect to the services provided. … Funding is based on the band."[68] Manly followed up by painting the scenario in which the majority of a band was made up of non-status Indians, due to the combined effect of permissive membership codes and the operation of the new rules on transmission of status. Crombie replied that this was "a theoretical possibility which I think would probably take a couple of generations … but it is not an imminent or practical that one has to deal with."[69] Seizing the implication of Manly's question that there could be bands without status members, Crombie assured Manly that the bill provided that levels of band funding would take account of non-status members.[70] His lead adviser, James Lahey, was gesticulating wildly at this point. It was simply not true. The government had no intention of paying for people recognized by bands as band members. The bill made it entirely possible for bands to

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[65] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 19 March 1985 at 18:8 (Mr. Louis (Smokey) Bruyere, Native Council of Canada)

[66] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 12 March 1985 at 13:34 (Bill Traverse, Brotherhood of Indian Nations)

[67] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 14 March 1985 at 16:56 (Caroline Ennis, Women of the Tobique Reserve)

[68] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 13 March 1985 at 14:14 (Hon. David Crombie)

[69] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 17 April 1985 at 31:12 (Jim Manly MP & Hon. David Crombie) (SCIAND, Crombie, 17 April 1985)

[70] SCIAND, Crombie, 17 April 1985, *supra* note 69

end up with a large membership list including non-status people, without any commitment from the government that funds would be guaranteed to cover services for both the status and non-status members of the band.

Several parliamentarians pushed repeatedly for commitments in the Act itself that the mandate would be funded. Crombie would give his word, but no words in the bill: "you and the committee have my commitment today that the government will provide sufficient funding to implement this legislation."[71]

Warren Allmand, former Minister of Indian Affairs, moved an amendment specifying financial commitments to assist bands in welcoming new members on reserve.[72] The government blocked the amendment, again succeeding in ruling it out of order because it involved additional undefined public spending.[73] Bands were entirely correct in fearing that the government would pass legislation without any mandated financial support to back it.

"The Buffalo Jump of the 1980s"

Crombie's brave assurances about federal funding were hard to believe as they came on the heels of an embarrassing leak about a secret federal task force. Mulroney began his mandate as prime minister with a promise in the 1984 Throne Speech to "end unnecessary and costly duplication" in government services.[74] The Prime Minister appointed the Deputy Prime Minister, Erik Nielsen, to head a ministerial task force charged with a cost-cutting review across all government programs. The Nielsen Task Force undertook a massive trawl through government to identify ways to reduce waste and duplication, streamline programs, and yield significant cost savings. The Task Force's terms of reference asked whether programs for 'Native people' existed "because they are native or because they are poor and disadvantaged."[75] Thus, the Task Force worked under the same philosophical banner as the 1969 White Paper: the fundamental attribute of 'Indians' was their 'needs', not their rights, and their 'needs' were rooted in the debilitating status of 'Indian'. Almost no one in the Department of Indian Affairs participated in the task force.

The Nielsen Task Force submitted its recommendations to Cabinet on 12 April 1985.[76] It reviewed federal spending on 'Natives' and concluded that 40% of the federal outlay went to services that would normally be covered by provincial and municipal

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[71] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 7 March 1985 at 12:10 (Hon. David Crombie)

[72] House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 23 April 1985 at 34:11 (Warren Allmand MP)

[73] INAC, Briefing Note on Amendments, 6 June 1985, *supra* note 55 at 54

[74] Sally M Weaver, "Indian Policy in the New Conservative Government, Part I: The Nielsen Task Force of 1985" (1985) 2:1 Native Studies Review 1 at 7.

[75] *Ibid* at 8.

[76] *Ibid* at 36.

governments and another 35% went to discretionary social services.[77] In terms of opportunities for cost-cutting, it was an embarrassment of riches. The task force called for the dismantling of the Department of Indian Affairs and the dispersal of its diverse policy mandates to other departments, the provincial governments, and Indian band councils. Services to Indians on reserves would be redesigned to cover only the bare minimum, on a user-pay model, in order to discourage Indians from staying on reserve. The funding directed towards federal-level Indigenous organizations would be terminated and redirected to local band councils. At the community level, bands would have more responsibilities for programs and services, but no additional financing.[78] In short, the "proposal meant, in effect, that DIAND and its minister would be put into receivership and that Indian self-government would be shaped by the central bureaucratic agencies."[79]

Richard Price, a senior manager in the Department of Indian Affairs, leaked the Nielsen report. Price, an ordained United Church Minister, said, "I did what I did as an act of conscience, as a Christian, and a commitment to the people I've worked with; the Indian people I've worked with."[80] On the morning of 18 April 1985, the front page of the national newspaper screamed, "Drastic Cuts Proposed to Native Programs."[81] Indigenous leaders were swift in their denouncement – all they needed to do was dust off the press lines they had used in response to the 1969 White Paper.

The government was caught off guard by the leak. Worse still, the government's own Minister of Indian Affairs told the press scrum that he had never even seen the report.[82] A picture emerged of a secret Cabinet plot, under the prime minister's blessing, to at last eliminate the 'Indian problem'. Mulroney's integrity was on the line, as he had made grand gestures about support for Indigenous self-governance during the Constitutional Conference just a fortnight earlier. Mulroney was forced to swiftly repudiate the task force's recommendations, distance himself from Nielsen, and promise that no cuts would be made to the Indian Affairs budget.[83]

Opposition MPs in the House of Commons feasted on the scandal. New meat was served up in early May when the full Task Force report made its way into the hands of Jim Fulton, NDP critic on Indian Affairs. Leader of the NDP, Edward Broadbent, demanded an explanation in the House. The AFN took the trouble of sending the report

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[77] *Ibid* at 12.

[78] *Ibid* at 15–16.

[79] *Ibid* at 17.

[80] "Fired civil servant won't be prosecuted; Ottawa declines to pursue man accused of leaking cabinet paper", *The Gazette* (7 September 1985) A7.

[81] Kirk Lapointe, "Federal report calls for 'economic readjustment' Drastic cut proposed in native programs", *The Globe and Mail* (18 April 1985) P.1.

[82] Richard Price, "Comment" (1986) 2:2 Native Studies Review at 71.

[83] *Ibid* at 71–72.

to all 579 band council chiefs across the country.[84] The new leak revealed that the Task Force referred to its own report as the 'Buffalo jump of the 1980s'.[85]

Criticism rained down on Prime Minister Mulroney and Deputy Prime Minister Nielsen. Minister Crombie came out smelling like roses, as he had seemed as astounded as the rest of the country by the Task Force revelations. With the duplicitous Mulroney on one side and the clueless Crombie on the other, Mulroney's empty words about constitutional recognition of self-governance were easily juxtaposed against Crombie's earnest promises to gingerly advance self-governance through *Indian Act* reforms. The leak of the Nielsen Task Force made it seem like self-governance in the *Indian Act* was the only self-governance left to hope for. The alternative had only been narrowly dodged: no Indian Affairs and a financial siege of any Indians left living on reserve.

Crombie had asked Parliament and Indigenous leaders to 'trust him' that there would money to back the reforms to the *Indian Act*, and already impoverished band councils would not be left holding the baby. But it now seemed that those who controlled the coffers had long planned otherwise. Parliamentarians in both houses held his feet to the fire. Manly stated:

> In April, Members of Parliament and the Indian people first learned … of … the Conservative's secret report on how they could make cuts in Indian Affairs and other native programs. The Indian people … wonder very seriously how much the Government's commitment to provide financing for their needs really means.[86]

During Senate debate, Fairbairn said:

> the Indian people are not about to accept with blind faith assurances from the minister that they will be no worse off as a result of this bill, and why should they? … especially after we had a peek at the leaked documents … We are in a period of restraint, of deficit cutting, of pulling back and of shifting from government to the private sector. Let us be perfectly clear that none of that philosophy must – indeed none of it can – apply to the Indian people, either in terms of regular government financial assistance or certainly as a consequence of this bill.[87]

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[84] Weaver, *supra* note 74 at 17.

[85] Stephen Bindman, "Natives may lose funding. Secret cabinet report urges $311-million cut", *Ottawa Citizen* (8 May 1985) A1. A buffalo jump was a technique used by Indigenous people to hunt buffalo by herding them and then driving them off the side of a cliff.

[86] *House of Commons Debates*, (12 June 1985) at 5692 (Jim Manly MP)

[87] *Senate Debates*, (17 June 1985) at 1044 (Hon. Joyce Fairbairn)

Notwithstanding this pressure, Crombie stood firm. There were no substantial changes to the overarching approach to reforms first proposed in early March 1985, and no promises regarding funding. Bill C-31 was passed by the House of Commons and Senate before receiving royal assent on 28 June 1985. For all the talk of balance and reconciliation, no one was happy with the outcome.

Conclusion

Throughout the decades of debates about the *Indian Act*, the federal government had pointed fingers at quarrelsome Indians. But the debates over the 1985 amendments to the *Indian Act* show considerable consensus among Indigenous people. The majority of Indigenous groups advocated for *both* for an end to sex discrimination and for respect of the Indigenous right to self-governance. The majority of Indigenous groups protested that the amendments did not end gender discrimination with respect to Indian status. A majority of groups argued that women who had lost status as a result of marriage should be re-instated. Everyone agreed that Indigenous communities were best placed to decide about the meaning of Indigenous identity. Everyone shared the goal of Indigenous self-governance. People disagreed about whether women who had married out and their children should be included in that self-governing polity. While it is true that sexism and greed animated the position of some groups who opposed the reinstatement of women and children, this does not erase their genuine commitments to Indigenous self-governance. To describe the wealth of opinions among Indigenous people as a conflict between Indian men and Indian women is a radical over-simplification for which there is little evidence. The federal government treated a position championed by 12 oil-rich bands, whose combined members represented 5% of the status Indian population, as wholly coterminous with the view of the status Indian population as a whole. The Conservative government turned the diversity of opinion among Indigenous people into a weapon against them, through an entirely spurious claim that some dose of sex discrimination in the rules on the transmission of status was necessary to achieve some measure of Indigenous self-governance. This argument was a smokescreen behind which the government hid another agenda. The historical development of the legislative scheme, the stalwart resistance to any amendments that would have increased the number of status Indians, and the revelations of a secret task force to dismantle Indian Affairs completely all pointed to a government hell bent on saving money. The government's purpose in reforming the *Indian Act* was not balancing rights, but balancing the budget.

15. Epilogue

Introduction

The epilogue to the 1985 amendments of the *Indian Act* unfolds, first, in the lives of Indigenous people and, second, in Canada's grey and airless courtrooms, presided over by judges with their knowing, bitter smiles. I conclude the story with a discussion of the social impacts of the 1985 reforms, before turning to the key cases challenging the constitutional validity of the 1985 amendments. As these cases have been framed as violations of *Charter* rights, this chapter includes a précis of *Charter* equality jurisprudence and the central importance of legislative history in a *Charter* claim. To understand how judges craft a legislative history, I analyze the techniques and conventions of statutory and constitutional interpretation of legislative history. With these building blocks in place, I analyze the version of legislative history of the amendments to the *Indian Act* told in the courts and by the federal government. I then use the dissertation's historical, political, and social narrative as a foil against this judge-made legislative history. By drawing this contrast, I make some theoretical conclusions about the kind of history that gets written in the courts of a settler colonial state with incomplete sovereignty. It is in the courts – and only in the courts – that Canada succeeds in its telling of a partial history, a history that justifies its own sovereignty and forecloses the resistance that comes from rival sovereigns.

The Aftermath of the 1985 Amendments to the *Indian Act*

The amendments to the *Indian Act* in 1985 constituted the most fundamental changes to Indian status and band governance since confederation. Its impacts continue to course through Indigenous communities. The 1985 amendments resulted in a total incremental growth of the status Indian population to about 174,500, a 35% increase compared to the previous *Indian Act*.[1] The bill added new members to bands without providing bands with sufficient additional resources to meet their needs, particularly with respect to housing and post-secondary education.[2] Though women were legally entitled to return to their former bands and reserves, they faced prejudice and discrimination when they returned home.[3] Only 2% of reinstated Native women were able to return to their reserves after the 1985 amendments.[4] Children from mixed families experienced ridicule, people were shunned from their communities and prevented from accessing key

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[1] Clatworthy, Stewart, "Impacts of 1985 Amendments to the *Indian Act* on First Nations Populations" in Daniel J K Beavon, Jerry Patrick White & Paul S Maxim, eds, *Aboriginal Conditions Research as a Foundation for Public Policy* (Vancouver, B.C.: UBC Press, 2003) 63 at 70.

[2] Brian A Crane, Robert Mainville & Martin W Mason, *First Nations Governance Law* (Markham, ON: LexisNexis/Butterworths, 2006) at 129.

[3] Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal, Que.: McGill-Queen's University Press, 2009) at 117.

[4] Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1992) 4 Const F 110 at 113.

services, and newly registered women felt unwelcome and isolated.[5] People who regained status were pejoratively referred to as 'Bill C-31 Indians', using the name of the bill that legislated the 1985 amendments. Indigenous people also refer to one another using the articles in the bill creating either first or second class status, as in "He's a 6(2) Indian." The Department of Indian Affairs anticipated that the vast majority of bands would rush to take control of their membership lists by developing their own membership codes. In fact, the federal government retained control over the membership lists of 60% of bands. So much for the 'feeling of self-governance' promised by the *Indian Act* amendments.

Although the 1985 amendments produced a substantial short-term growth in the status Indian population, in the long-term, the status Indian population will continue to decline due the combined effect of the 2nd generation cut-off and the rates of marriage between status Indians and those without status. A demographer estimated that, given the 1985 amendments, the registered population would peak after two generations and after three generations, non-status Indians would form the majority of the population.[6] In the long term, the rules in the *Indian Act* would "lead to the extinction of First Nations as defined under the *Indian Act*."[7]

Thus, the 1985 amendments to the *Indian Act* continued and expanded the bleeding off of status Indians from their communities that began in the 19th century. Whereas before only women could lose status for marrying non-status Indians, now both women and men face restrictions on their ability to pass on status to their children.[8] The 1985 amendments made Indian status much harder to pass on. Indigenous leadership had been fearful that the repeal of the *Indian Act* announced in the 1969 White Paper would end Indian status, but instead, the same extinction is now likely through the operation of the rules on the transmission of Indian status. By some estimates, without the century of policies that expelled Indigenous women and children from their communities, there would have been between one and two million status Indians in Canada.[9] In 2011, there were about 600,000 status Indians in Canada.[10]

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[5] John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nations Politics" in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: the Impact of Charter Rights on Canadian Law and Politics* (Toronto; Buffalo: University of Toronto Press, 1997) 169 at 177.

[6] Clatworthy, *supra* note 1 at 73.

[7] *Ibid.* at 88.

[8] Bonita Lawrence, *"Real" Indians and Others: Mixed-blood Urban Native peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004) at 64.

[9] *Ibid* at 56.

[10] Statistics Canada, "2006 Aboriginal Population Profile", online: <http://www12.statcan.ca/census-recensement/2006/dp-pd/prof/92-594/details/Page.cfm?Lang=E&Geo1=PR&Code1=01&Geo2=PR&Code2=01&Data=Count&SearchText=Canada&SearchType=Begins&SearchPR=01&B1=All&Custom=.>.

The wearying battle for reforms to the *Indian Act* irrevocably shaped the contours of the Indigenous political landscape. The Edmonton Consensus between the AFN and NWAC had only very temporarily patched up the wounds dividing the AFN and Indigenous women's organizations. Indigenous women's groups protested that they were denied a seat at the negotiating table in constitutional negotiations about an Aboriginal right to self-government.[11] It came to a head in a Supreme Court case in which the Indigenous women's movement demanded federal funding and a seat at the table in the third phase of constitutional negotiations.[12] The Indigenous women lost at the Court, but they made their point forcefully enough that NWAC is now recognized as one of the National Aboriginal Organizations in direct consultative relationship with the federal government.[13] Today, the rift between the AFN and NWAC has healed.

The 1985 amendments angered and disappointed people on all sides. Pushback was swift. One response came from the oil-rich bands in Alberta. The 1985 amendments forced them to accept the return of women who had married out, thus immediately diminishing the value of their shares from oil and gas revenues.[14] Under their newly conferred powers over band membership, they drafted a membership code explicitly excluding reinstated 'Bill C-31 women', the women reinstated under the 1985 amendments. The Sawridge Band challenged the constitutional validity of the entire legislative scheme, alleging that the obligation to accept reinstated women violated the right to determine membership implied in the existing Aboriginal and treaty rights' protected by the Constitution. The case was acrimoniously fought by parties on all sides and ended, at long last, by the Supreme Court's denial of leave to appeal in 2007.[15]

Another response came from Sharon McIvor. McIvor had been denied status under the old *Indian Act*, and she was reinstated with second-class status by the 1985 amendments. She was just finishing law school at the time. In 1989, the Department of Indian Affairs denied status to her son, Jacob Grismer. McIvor filed suit in the BC County Court. Seventeen years and several grandchildren later, in 2006, McIvor's case was heard at first instance by the British Columbia Supreme Court. The court struck down the status provisions of the *Indian Act*. The federal government appealed the court's judgment. In 2009, the British Columbia Court of Appeal concluded that the *Indian Act* continued to discriminate on the basis of sex by denying status to the grandchildren of women who

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[11] Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16 Can J Women & L 106.

[12] *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627

[13] Mary Eberts, "Women as Full Citizens: Addressing the Barriers of Gender and Race in Canadian Constitutional Development" in Irma Sulkunen, Seija-Leena Nevala-Nurmi & Pirjo Markkola, eds, *Suffrage, Gender and Citizenship: International Perspectives on Parliamentary Reforms* (Newcastle: Cambridge Scholars, 2009) 376 at 404.

[14] For an extensive analysis of the case and the surrounding politics, see: Caroline Dick, *The Perils of Identity: Group Rights and the Politics of Intragroup Difference* (Vancouver: UBC Press, 2011).

[15] *Sawridge Band v. Her Majesty the Queen and Tsuu T'ina First Nation v. Her Majesty the Queen*, 2007 CanLII 2922 (SCC)

had been reinstated under Bill C-31. The judgment's remedy was framed very narrowly, leading McIvor to petition for leave to appeal to the Supreme Court of Canada. The government cross-petitioned, but it did not pursue its appeal. In 2010, McIvor submitted a complaint under the Optional Protocol to the Human Rights Committee monitoring Canada's compliance with the ICCPR.[16] The Human Rights Committee has not issued yet its views on the complaint.

In 2010, in order to comply with the judgment of the BC Court of Appeal, the federal government amended the registration rules in order to give status to grandchildren born after 1951 of Indian women who had regained status under Bill C-31.[17] The remedial legislation was crafted so narrowly that it provided justice only to only those individuals whose genealogy was exactly the same as the situation raised in the McIvor case. The government was again criticized for continuing gender discrimination and dodging fundamental questions about Indigenous control over community membership decisions.

A further lawsuit was launched in the Quebec provincial courts. The Abénakis of Odanak and Wolinak charged that, despite the 2010 amendments, the *Indian Act*'s status rules continued to discriminate on the basis of sex. By preserving the rights of the women who had acquired status by marriage, the amendments had created a new advantage arising from past sex discrimination. The grandchildren of men who married non-Indian women would always be entitled to status, but the grandchildren of women who had married non-Indians could not have status unless another grandparent was also a status Indian. In 2015, the Quebec Superior Court agreed and gave the federal government 18 months to revise the *Indian Act*.[18] The federal government appealed the judgment, and the matter is pending.

The Abénaki are a community with reserves in central Quebec. The majority of their members do not live on reserve, and there is a high level of intermarriage with the surrounding non-Indian community. The long century of status rules in the *Indian Act* has had a particularly forceful impact on communities living in close proximity to non-Indian communities. A demographic expert estimated that, within about 100 years, no child born in an Abénaki community will have the right to Indian status. In 1985, Minister Crombie brushed off the idea of Indigenous communities without any status Indians as a largely hypothetical possibility that did not need to be addressed. It is, in fact, exactly what is happening under the current *Indian Act* rules.

Compliance with the *Charter*'s Sex Equality Guarantees

Throughout most of the 20th century, the battle over sex discrimination in the *Indian Act* was fought politically. Post-*Charter*, it has been fought in the courts, which have then

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[16] *McIvor & Grismer v. Canada*, Communication No. 2020/2010 (24 November 2010) (Communication to United Nations Human Rights Committee)

[17] Bill C-3, *Gender Equity in Indian Registration Act,* (assented to 15 December 2010) S.C. 2010, c. 18

[18] *Descheneaux c Canada (Procureur général)* (2015), QCCS 3555, JE 2015-1378 (CS)

tossed the problem back to the legislature to pass remedial amendments.[19] The cases about the status rules in the *Indian Act* have framed the problem as one of sex discrimination that violates the *Charter*'s guarantees of sex equality in section 15. The legislative history of the *Indian Act* proves to be a lynchpin in the judicial decision. Before turning to the crucial place of legislative history in such cases, I briefly canvas the structure of a section 15 equality claim.

Section 15 of the *Charter* confers on individuals a right to equality before and under the law and a right to the equal protection and benefit of the law without discrimination. Sex is one of the prohibited enumerated grounds. These rights guaranteed under section 15 are not absolute. They are subject to the limitations provided for in section 1: the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." As a result of the limitation clause in section 1, a *Charter* decision unfolds in the following manner. First, courts determine whether a particular right (i.e. section 15) has been infringed. The burden of proof is on the plaintiff alleging a *Charter* breach. Second, the courts consider whether that infringement is justified. The burden of proof shifts to the government.

The combined effect of section 1 and section 15 means that much depends on a determination of legislative objective. Determining legislative objective is an exercise of statutory interpretation. Canadian jurisprudence has settled on what has been described as the "modern principle" of statutory interpretation:

> There is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[20]

This approach marries two opposing schools of thought: the textualist approach (which asserts reliance on only the plain meaning of the words) or the intentionalist approach (which puts more weight on discovering the intention of the legislature). Both the words in the statute and the intention of the legislature matter. The jurisprudence toggles back and forth between these approaches, framing purpose in a way that is coherent with the court's desired outcome. When a judgment describes an impugned statute's legislative purpose, that purpose is not so much discovered by the court as created.

When a law is being challenged on the grounds that it violates the *Charter*'s equality provisions, legislative objective comes up in two places in the legal analysis. First, legislative objective is a factor in determining whether there has been a violation of the

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[19] For discussion of the relationship between the courts and the legislature under the *Charter of Rights and Freedoms*, see James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver, B.C.: UBC Press, 2005); Hogg, Peter and Bushell, Allison, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall Law Journal 75; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills, Ont.: Oxford University Press, 2001).

[20] Elmer A Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1983) at 87.

right to non-discrimination (s. 15). Second, legislative objective appears in the test to determine whether the violation of the right is justifiable (s. 1).

The first consideration of legislative objective takes place under the tests for determining whether there was a violation of the equality guarantee in section 15.[21] Under the 'correspondence factor', a court evaluates "the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others."[22] This leads the court to assess whether a statute had a legitimate purpose and whether it was reasonable to base legislation on a listed or analogous ground of discrimination (like gender or race) in order to accomplish that purpose.

The second consideration of legislative objective comes up under the limitation clause (section 1). Section 1 permits a balancing between the guaranteed rights in the *Charter* and competing societal values. It allows a government to argue that although the impugned law violates a *Charter*-protected right, the law should be upheld. There are four components of this justification argument. First of all, the limitation of a *Charter* right must serve a "pressing and substantial objective." A second set of criteria evaluates whether the means (the impugned legislation) are proportionate to the ends (the pressing and substantial objective). The proportionality assessment considers whether there is a rational connection between the limitation and objective, whether the right is impaired as little as possible, and whether, all things considered, the objective of the impugned legislation is sufficiently important to justify the extent of the infringement. In short, if the government can demonstrate that a law was passed to further an objective that is consistent with "the values of a free and democratic society" and directed to "the realization of collective goals of fundamental importance", the law may be upheld even though it has been found to violate a *Charter*-protected right.[23] The section 1 test turns on the definition of the legislative objective.

Asking a court to invalidate a law because it violates an individual's *Charter* right amounts to asking the court to second-guess the legislature. Debates before and after the entry into force of the *Charter* sounded the alarm about the power this hands to the courts.[24] The majoritarian critique of rule-by-judge called for deference to the decisions of elected assemblies. Canada's *Charter* jurisprudence is responsive to these calls for deference. One response manifests on the question of legislative objective. There are certain matters in which courts will tend to defer to the choices made by legislatures. As Webber summarized,

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[21] The Supreme Court has since moved away from the tests outlined in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 SCR. 497, in *R. v. Kapp,* [2008] 2 SCR. 483, but these were the relevant tests when *R. v. McIvor* was considered.

[22] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 88.

[23] *R. v. Oakes*, [1986] 1 SCR. 103.

[24] Critique and analysis of such fears are the bread-and-butter of legal and sociolegal scholars in most common law jurisdictions. See, e.g., Ran Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).

> [w]here the issues are polycentric and require that the interests of a large number of parties be balanced against each other … or the legislatures must allocate scarce resources among multiple needs, the courts will exercise considerable deference to the choices made by the legislature as long as those choices appear to be reasonable.[25]

If the impugned legislation tried to reconcile the competing interests of many parties and a lot of money was at stake, the government has a better shot at winning its section 1 argument. The law may violate a *Charter* right, but it should be allowed to stand. But section 1's consideration of legislative objective does not provide the government with an all-powerful trump card. There are some grounds for deference that are not allowed. Notably, the government cannot justify a *Charter* breach by arguing that it was simply too expensive to respect *Charter* rights.[26] The courts grant deference to the government only in times of "exceptional financial crisis."[27]

Canada's Defense of Continuing Sex Discrimination in the *Indian Act*

Between the room for maneuver offered by statutory interpretation rules and the *Charter* jurisprudence, the government has a clear interest in arguing that an impugned law was developed in a highly complex, deeply political, cash-starved environment in which hard choices had to be made. When policy is criticized or change is slow to happen, most politicians will leap at the opportunity to blame it on someone else or on the hazards in the surrounding political and economic environment. The context of a section 1 *Charter* defense magnifies that impulse. The more diverse the political factions and the more complex the regulatory scheme, the more chance the courts will defer to the legislature's decision. In contemporary litigation about the *Indian Act*, the federal government has painted exactly this picture in describing the legislative history of the *Indian Act*.

In *McIvor*, the case launched by Sharon McIvor, the trial judge concluded that in crafting the amendments to the *Indian Act*, the government was engaged in an "exercise of mediation between divergent and competing interests."[28] The federal government protested the decision to the appeal court. In its pleadings, the government argued that the trial court had entirely misunderstood the "highly complex nature of the challenge

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[25] Jeremy H A Webber, *The Constitution of Canada: a Contextual Analysis* (Oxford: Hart Publishing, 2015) at 187.

[26] *Schachter v. Canada*, [1992] 2 SCR 679 at 709; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at para. 283.

[27] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 381 at para. 75.

[28] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at para. 298 [McIvor 1st Instance, 2007]

Parliament faced in amending the *Indian Act* in 1985."[29] Furthermore, the trial court had failed to situate the legislation in the context of "the need to allocate resources in areas as disparate as aboriginal claims implementation, self-government, education, and northern political development."[30] The government's defense pursued the same tactic pioneered in 1985: it conflated the issues of Indian status and band membership. The trial court had given little weight, the government argued, to the fact that "The bands' vocal opposition to reinstatement was a real consideration for Parliament, especially because one of the goals of Bill C-31 was to promote autonomy,"[31] leaving the impression, again, that the majority of bands were justifying sex discrimination in status rules in the name of Indigenous sovereignty. Thus described, the trial court's major error was that it "failed to take into account Parliament's need to balance competing objectives."[32]

Although the courts have (to date) rejected the government's defenses and held that the *Indian Act*'s status system violates the *Charter*, courts have accepted the government's version of the legislative history. Because much of the legislative history is considered a finding of fact, judgments refer back to the initial trial court rendering, rather than undertaking their own review of the evidence. In a related case in the Quebec Superior Court, *Descheneaux*, the trial court judge inserted, word-for-word, the legislative history as rendered by the British Columbia Court of Appeal in *McIvor*. The British Columbia Court of Appeal's judgment in *McIvor* presented its own summary of the legislative history, largely parroting the trial court's picture of 'competing interests'. It stated that:

> [t]here was simply no consensus among First Nations groups as to who should be reinstated to Indian status, and as to what the future rules governing status should be. Some groups were fearful that a sudden reinstatement to status of a large number of persons might overwhelm the resources available to Indian bands, or dilute traditional First Nations culture. In addition, there was a strong movement among First Nations groups to seek a level of control over band membership. Pressures aimed at a higher degree of self-government made it difficult for the government of the day to impose a new regime by legislation.[33]

The court of appeal's basis for this conclusion was the legislative history offered by the trial court in McIvor. The court saw no reason to "detail all of the various positions

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[29] *McIvor v. Canada (Registrar of Indian and Northern Affairs)* 2009 BCCA 153 (Factum of the Appellant (Registrar, Indian and Northern Affairs Canada, The Attorney General of Canada) at 17) [McIvor CA, Government Factum].

[30] *Ibid*.

[31] *McIvor CA*, Government Factum, *supra* note 29 at 18

[32] Ibid.

[33] McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153 at para 27 [McIvor CA, 2009]

taken by different aboriginal and governmental groups," as this had been ably covered in the trial court judgment.[34] In short, the telling of legislative history matters, and it seems more than likely that, at least for the Canadian courts, the definitive version of this history has been told.

Legal Techniques to Divine Legislative Intent

When it comes to the *Indian Act*'s status rules affecting women, the courts might only get one version of that history: the version told by the trial court judge in McIvor. In the trial court judgment in McIvor, a huge effort went into re-telling the legislative history of Bill C-31, both by the parties and the trial judge and her staff. Almost a quarter of the judgment is devoted to historical analysis. The analysis goes back to pre-contact times, includes evidence from academic experts, and carefully weaves together parliamentary records and Cabinet documents. Before analyzing the history as told by the Court, it is worth considering the knowledge practices governing this judicial exercise in writing history. What information nourishes a court's search for legislative purpose?

I will start by considering the evidence available to the judge. Until recent times, anything beyond the four corners of the bill was out of bounds in the exercise of interpretation of legislative intent. Even preambles, headings, marginal notes, and tables of content were deemed to be 'extrinsic' to the law.[35] Information related to the development of a law was excluded, for philosophical and practical reasons. The practical reasons for excluding evidence of legislative history center on concerns about the administration of justice. Compiling legislative history is time-consuming and expensive for litigants, it results in an enormous volume of evidence for trial judges, and judges are arguably working outside their area of core competence when they try to make sense of it all. The central philosophical concern is about the subject intending the legislation. Many individuals speak their minds in the process of drafting a bill. It might defeat democracy to privilege the minister's views over the backbencher's; it might defeat reason to prefer the Minister's political exhortations over the opinions of the bureaucrat who designed the complex regulatory scheme at issue. This is where magic, metaphysics, and legal fictions come in handy, as courts tend to "think of the legislature as an abstract corporate entity, the Queen in Parliament, whose only means of expression is duly enacted legislation."[36] The King finds his two bodies imprisoned in the words of the statutes of the modern administrative state.[37]

That laws are made of slippery words is the most common justification for the inclusion of extrinsic aids to determining legislative intent. All statutes are vulnerable to "the chronic underdeterminacy of language [and] problems arising from vagueness and

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[34] *McIvor CA*, 2009, *supra* note 33 at para. 28

[35] Ruth Sullivan, Elmer A Driedger & Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Markham, Ont.: Butterworths, 2002) at 467.

[36] *Ibid* at 487.

[37] Ernst Hartwig Kantorowicz, *The King's Two Bodies: a Study in Mediaeval Political Theology* (Princeton, New Jersey: Princeton University Press, 1957).

incoherence."[38] The muffled words and silences of the law are to be clarified by resort to more words and more context – a move that is both temporal (the historical development of the law) and spatial (the breadth of speakers involved in making a law).[39]

In Canada, these theoretical and practical issues blocked the consideration of extrinsic evidence of legislative intent until late in the 20th century. The move towards including evidence of legislative intent began with constitutional law cases in the 1970s and continued apace.[40] Initially, this evidence could only be used to show context and could not be adduced to explain the meaning of a statute. Even this constraint fell by the wayside, when the Supreme Court of Canada decided that "[p]rovided that the court remains mindful of the limited reliability and weight of *Hansard* evidence, it should be admitted as relevant to both the background and the purpose of legislation."[41] A study in 2012 concluded that evidence of legislative history is now so routine that courts no longer justify their citation of it.[42]

The result is that judges pondering legislative intent now consider parliamentary debates, reports of commissions of inquiry, expert reports, and scholarly publications as evidence of the social, political, or economic context in which legislation was passed.[43] Evidence of external context is relevant to understanding the 'mischief' that legislation aimed at. A common source is the Hansard, the published transcripts of proceedings. Trailing behind an enacted bill is a long, long caravan of words: parliamentary debates, committee reports, submissions by witnesses, and speeches by ministers and parliamentarians. Less visible but often more voluminous are the words written and re-written by bureaucrats in the development of the law and the debates in Cabinet over which option should be put before Parliament. Although a wide range of materials are admissible, their consideration by the courts remains bounded by standard evidence criteria of relevance and reliability. By admitting into evidence such documentation, judges acquire knowledge of the information and opinions that were before the legislature during the passage and design of a bill.[44] Though these documents cannot be taken as proof of their contents, they can elucidate the understandings underpinning legislative intent.

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[38] John James Magyar, "The Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation" (2012) 33:3 Statute Law Rev 363 at 367.

[39] The implication might follow that proof of ambiguity is required before any extrinsic evidence of legislative intention can be considered. However, this implication stems from a textualist, plain meaning approach. The requirement of ambiguity has been abandoned in Canada in favor of an obligation on judges to interpret a statute's purpose. See Stephane Beaulac, "Recent Developments at the Supreme Court of Canada on the Use of Parliamentary Debates" (2000) 63 Sask L Rev 581 at 616.

[40] *Re Residential Tenancies Act*, [1981] 1 SCR 714; *Re: Anti-Inflation Act*, [1976] 2 SCR 373

[41] *R. v. Morgentaler,* [1988] 1 SCR 30 at para. 484

[42] Magyar, *supra* note 38 at 374.

[43] Sullivan, Driedger & Sullivan, *supra* note 35 at 468.

[44] Beaulac, *supra* note 39.

In Canada, changes in the admissibility of legislative history came in on the coattails of *Charter* jurisprudence. In these *Charter* cases, the legislative history of enactments has been used to show both legislative purpose[45] and the broader context in which legislation was debated.[46] The state of the law is clear. Judges are now allowed to consider a massive volume of evidence, and all the evidence serves the goal of clarifying legislative intention.

Conventions of statutory interpretation cause the relevant evidence to balloon even further. It is a presumption of statutory interpretation that "The legislature is presumed to know all that is necessary to produce rational and effective legislation."[47] This presumption covers knowledge of all of the existing law, the relevant jurisprudence, practical affairs about the administration of the state, and anything contained in briefs and reports tabled in the legislature. As the Supreme Court stated, "[a]n integral aspect of discovering Parliamentary intention is the precept that Parliament must be taken to be aware of the social and historical context in which it makes its intentions known."[48] The inference that follows is that the judge, tasked with assessing legislative intent, must also be presumed to know "the social and historical context" and "all that is necessary to produce rational and effective legislation."

Beyond this mountain of knowledge, a judge also knows all facts of which judicial notice may be taken. In its most demure form, judicial notice relieves the parties of submitting evidence to prove facts of common knowledge, like the name of the prime minister. But, it is also an evidentiary rule that gives judges considerable scope for knowing things that were not entered in evidence, allowing judges to correct for the unjust silences in the trial record. Courts have judicially noticed racism in the police force[49] and "such matters as the history of colonialism, displacement and residential schools."[50]

Thus, the judge writes her account of legislative history armed with mountains of hard-to-get documentation about internal government deliberations, a wall-to-wall record of Parliamentary proceedings, including submissions by external parties, presumptions of total knowledge by the legislature, and a power of judicial notice to swoop up whatever might be left out. The techniques of evidence and interpretation construct a judicial field of awareness rivaling omniscience, over an archive of a scope that would delight historians from Leopold von Ranke to Quentin Skinner on down.

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[45] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1371-72

[46] *M. v. H.*, [1999] 2 SCR 3 at 181-82 and 186-91; *Thibaudeau v. Canada*, [1995] 2 SCR. 627 at 708.

[47] Sullivan, Driedger & Sullivan, *supra* note 35 at 154.

[48] *Willick v. Willick*, [1994] 3 SCR 670 at 699

[49] *R v. S. (R.D.)* [1994] N.S.J. No. 629

[50] *R. v. Ipeelee*, [2012] 1 SCR 433

A Judge's History of Ending Sex Discrimination in the *Indian Act*

So, what kind of history does a putatively omniscient judge write? I have attempted to answer that question by contrasting history written in McIvor against one possible alternative. The trial court in McIvor stated that the government was engaged in an

> exercise of mediation between divergent and competing interests in relations to the issues surrounding band membership and entitlement to live on reserves. Those competing interests, as discussed earlier in these reasons, were the desires of those who lost membership rights to regain band membership and the right to live on reserves, and the desire of bands for increased control over their own membership.[51] [emphasis added]

The judgment's summary of the early historical context emphasizes that the concept of Indian status was created by the government and endowed with great significance. In describing the lead-up to the 1985 amendments, the judgment talks about two movements for reform, one focused on women's rights and the other on self-government for Indigenous communities. The judgment presents these positions and the actors who supported them as distinct and substantively opposed. The judgment accepts the government's account of a contest between competing ideas. The construction of an opposition between individual women's rights to equality and collective rights to self-governance permits the arguments about the need for balancing competing interests, the lynchpin of *Charter* analysis.

There are alternative versions of the legislative history. I have suggested that the marrying out rule in the *Indian Act* was the site of a long-running battle with the federal government for the constitutional recognition of Indigenous people as a third order of government in Canadian confederation. The federal government and Indigenous political organizations waged the battle for Indigenous sovereignty on the terrain of women's equality rights. By contrasting the judge-made history and the history I have developed in these pages, it is possible to develop some theories about the kind of history written by judges deciding *Charter* cases.

First, the judgment's account of the legislative history ignores the role of the constitutional negotiations as the political framework in which Indigenous women's equality rights were disputed. When the constitutional patriation process began, a clause on Aboriginal rights in the draft constitution became a new terrain for recognition. Implied in the concept of 'Aboriginal rights' was the notion that a constitutional guarantee of rights would bring greater self-determination of Indigenous communities. But the meaning of self-governance was unclear. Indigenous women's groups argued for Indigenous self-determination. They also argued for an explicit constitutional protection of their equality rights. The white-led women's movement chimed in with their support. The women's movement prevailed in their campaign for a

[51] *McIvor 1st Instance*, 2007 at para. 298.

freestanding gender equality right (section 28). Section 28 was itself birthed in the fears of the white-led women's movement that multicultural groups – namely, 'Indians' – would use *Charter* rights protecting multiculturalism as a justification for continuing sex discrimination within bands. The strength of the women's lobby for section 28 was, completely accidentally, one of the reasons that Aboriginal rights were reinserted into the Constitution. For its part, the AFN argued that any qualification of 'Aboriginal rights' trenched on inherent sovereignty. They resisted an explicit proviso that Aboriginal rights were limited by equality guarantees. This was a redeployment of a decade-old argument that the *Indian Act*, as a manifestation of Aboriginal rights, could not be amended to guarantee sex equality without the consent of Indigenous people.

When the AFN realized that the constitutional process was not yielding any concrete recognition of self-governance rights, it released its chokehold on amendments to the *Indian Act* and agreed to a truce on Indigenous women's equality rights. The deal brokered between the AFN and NWAC helped to produce the idea that equality rights could be traded against some measure of self-governance. But the deal was a political compromise, not any kind of substantive, legal balancing of rights. When the Conservative government collapsed the self-government and women's rights agendas into one bill, a political trade between the two issues transformed into a substantive reconciliation of rights. That this should even look like a reconciliation was only thinkable because further constitutional recognition of a right of self-governance seemed hopeless. Women's individual equality rights and collective Indigenous self-governance were distinct political goals, sometimes working in unison, sometimes working at cross-purposes. The frame of the Constitutional patriation process is fundamental to understanding how these rights came to be regarded as in tension and capable of being balanced against one another. By omitting the role of the Constitutional deliberations, as in the Court's rendering of legislative history, the tensions are taken at face value, which gives them a substantive and intrinsic hue.

Second, the court accepted the government's claim that the *Indian Act* amendments constitute a balance between competing and divergent interests. The legal formulation of 'interests' encourages envisioning social movement actors as clearly distinct from one another and as having stable and clearly competing positions. The 'balancing' metaphor encourages treating the sides of an issue as diametrically opposed, by definition situated on opposite ends of a scale. The metaphor further invites the construction of the 'interests' as substantively and conceptually opposed. This move to substance, often accompanied by the language of rights, obliterates the political.

An alternative reading of the historical evidence suggests an almost unending array of complexity, and it points to the conclusion that the conflict between 'interests' was not substantive and intrinsic, but politically and socially constructed. The deal struck in the *Indian Act* was a marriage of political horse-trading and discursive and conceptual shifts taking place in negotiations over constitutional rights and judicial decisions. For all the talk of balancing, there is almost no evidence that anyone was ever on the 'No Indigenous self-governance' side of the scale. Indigenous women were not against self-governance, provided that it didn't mean continued rule by patriarchal band councils. Most bands advocated for ending sex discrimination in the *Indian Act*. Many groups

were against the federal government selling them short financially. They were against their governments, whether federal or band-level, failing to deliver on the promise of fair and accountable government. 'Indigenous women's rights' and 'self-governance' cannot be analytically separated from one another, much less counter-balanced; they were co-constituted through the process of re-defining Canada's sovereignty.

Indigenous political actors made sophisticated and nuanced political arguments that were anything but diametrically opposed to the arguments of their opponents. For example, most Indigenous women's groups argued for both the end to sex discrimination and the recognition of Indigenous self-governance. Furthermore, alliances between Indigenous leaders, Indigenous women leaders, and women's rights advocates were shifting, complex, often instrumental, and sometime a bit ugly. Organizations were far from stable, often fighting rear-guard actions to maintain legitimacy within their own constituencies. The National Indian Brotherhood, and later the AFN, rarely enjoyed the unanimous support of status Indians. The Indigenous women's movement began in unity, fractured, and reassembled, with tense alliances and relations between the Native Women's Association of Canada and Indian Rights for Indian Women. The National Action Committee on the Status of Women combined so many diverse forms of feminism that the movement's major profound impact on the Constitution was steered by a tiny splinter group of Toronto lawyers. This dizzying complexity and shimmering contingency is lost by reducing the political context to a dispute between 'Indians' and 'women'. This is frustrating for empirical reasons alone. But, more importantly, the fact that quarreling Indians get the blame for a century of sexism in a white man's law stands as an unrivaled example of the epistemic violence of colonialism.

Third, the picture produced from the vantage point of *Charter* review is of a stable, calm, and collected government, trying to 'balance issues' and 'reconcile competing interests.' But a look at the evidence about amending the *Indian Act* reveals that the early 1980s were heady times. There was a lot at stake, huge uncertainty, and enough political plotting to cause a civil servant to leak Cabinet documents because his conscience demanded it. It is unlikely that anyone in the federal government or Parliament could see above the fray. But the *Charter*'s techniques for understanding legislative intent construct the legislature as above and outside the political melee, omniscient, and most certainly rational. The telling of history by the court tames the wilder moments of our past, the interstices when neither the possible nor the likely outcomes were clear.

Aside from the risk of flattening contingency, simplifying complexity, and continuing epistemic violence, telling the history through the lens of *Charter* review produces one further, powerful effect. It is through the court's telling of legislative history that the law achieves what has eluded the Canadian government since confederation. The rival sovereignties roaming the expanse known as Canada are herded, branded as 'cultural' or 'minority' groups, and penned into the corral of a united Canadian sovereignty. A history attentive to complexity shows a story replete with eruptions of rival sovereignties. In a monotonous landscape of racist, sexist colonial dispossession, these moments stand out as gleaming peaks of contingency – when competing sovereignties insisted that things could have turned out differently. Consider that moment when a

Francophone woman from Quebec rose to support an Indigenous woman's plea for Indigenous self-determination, briefly yoking together Quebecois and Indigenous demands for a place in confederation. Recall the Women in Tobique who went to the international human rights system, rather than to the Canadian courts, for a remedy to a grievance that began in their exclusion from local political life. Think of Jeannette Lavell who, when she agreed to marry, had already decided she would fight Canada's laws expelling her from full participation in her nation of birth. Or remember that Canada nearly did not wrest its constitution from the British Crown due to petitions from 'Canada's Indians' for the Queen's respect of her treaty obligations. These rival sovereignties insist on speaking in an imperfect tense: 'We, the Shuswap, the Cree, the Anishinaabe, the Mohawk, the Maliseet, ... were once and have since been governing ourselves under our own laws.' The history told by the law transforms this continuous imperfect speech into the past tense, as historical backdrop, or into the present tense, contained within an already actualized Canadian sovereignty under the rubric of 'existing' Aboriginal rights.[52] Just like lightning striking – a noun only possible through a verb – the perfection of Canadian sovereignty flashes up, fleetingly, through the law's speaking and telling of history. Told through the lens of *Charter* review, the court's history tidies up radical eruptions of rival sovereignties into questions of balancing competing interests. As a technology for producing history, the law tames Canada's historical record in ways that give rise to a perfected, completed sovereignty – one that can appear to exist only in the law's speech.

[52] Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford, CA, 2014) at 74–78, 133–136; Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction* (Milton Park, Abingdon, Oxon; New York: Routledge, 2012) at 59–62; Jacques Derrida, "Declarations of Independence" (1986) 7:1 New Political Science 7.

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