THE INDIAN ACT AND THE BILL OF RIGHTS

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The Canadian Indian Act [1] is one example of special legislation for an indigenous minority. Extensive legislative provisions exist in New Zealand, [2] Australia [3] and the United States, [4] as well as in Canada, to deal with indigenous minorities. At various times such legislation has been challenged as in conflict with egalitarian principles. The two kinds of enactments which are likely to come into conflict with special legislation for an indigenous population are land reform legislation and individual rights legislation.

The examples of conflict involving general land reform legislation come from outside the common law jurisdictions. Land reform following the Mexican Revolution in 1916 terminated special legislative provisions for Indians in that country. [5] Land reform during the occupation of post-war Japan terminated special legislative provisions for the indigenous Ainu minority. [6]

The examples of conflict involving general human rights legislation are the United States, New Zealand and Canada. Current talk of a Bill of Rights in Australia may raise the question in that country.

In 1868, the fourteenth amendment was added to the United States constitution promising the "equal protection of the laws". The United States Courts repeatedly exempted Indian reserve communities from the application of the fourteenth amendment and, indeed, the whole of the Bill of Rights, although it was a part of the constitution. They did this on the basis that

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[1] CAN. REV. STAT. c. I-6 (1970)

[2] The Maori Affairs Act, N.Z. STAT. c. 94 (1953) as amended, is the basic statute, but a number of additional statutes exist such as the Maori Trust Boards Act, N.Z. STAT. c. 37 (1955), the Maori Vested Lands Administration Act, N.Z. STAT. c. 60 (1954) and the Maori Housing Act, N.Z. STAT. c. 34 (1935).

[3] Aboriginal affairs in Australia has been a subject for state legislation, and varying statutes exist in each state on the subject. Federal jurisdiction exists for the Northern Territory.

[4] The closest equivalent to the Canadian Indian Act in the United States is the Indian Reorganization Act, 25 U.S.C.A. § 477 (1934). There is a degree of regional variation and a multitude of specific bills in each session of Congress quite surprising to a Canadian observer.

[5] *See* National Indigenous Policies: Canada and Mexico, (Department of Indian Affairs, unpublished, 1971).

[6] Cornell, *Ainu Assimilation and Cultural Extinction: Acculturation Policy in Hokkaido*, 3 *Ethnology* 287 (1964).

the reserve communities retained certain powers rooted in the original sovereignty of the Indian nations in pre-colonial times. By this theory, the tribal councils and tribal courts derived their powers from a source separate from the United States Constitution and, for that reason, were not governed by it. To an observer from outside the United States, the rationale appears to be conceptual rather than factual. The tribal councils and the tribal courts of the American Indian reservations are structured by constitutions approved by the federal government and brought into force under federal legislation. The extent of federal legislation and administrative activity does not seem appreciably different from the Canadian situation.

A case which vividly illustrates the approach of the United States courts to the Bill of Rights and Indian Reservations deals with freedom of religion and the use of peyote. The Native American Church is an Indian religious organization which uses peyote as a sacrament. There is authority that state narcotics laws cannot prohibit or restrict the use of peyote by members of the Native American Church for religious purposes as that would involve an interference with freedom of religion.[7] The Navaho Tribal Council prohibited the possession of peyote on the reservation. The United States Court of Appeal (Tenth Circuit) held that the constitutional protection of freedom of religion did not apply as a restriction on the legislative power of the Navaho Tribal Council. The prohibition on the reservation was upheld.[8]

In the post war period there developed some concern in the United States about the fact that the individual guarantees of the Bill of Rights did not apply to Indian communities. There were congressional hearings on the question. Then, in 1968, Congress moved rapidly to enact a Civil Rights Act in the wake of the assassination of Martin Luther King. An "Indian Bill of Rights" was included in the 1968 Civil Rights Act, a variant of the constitutional Bill of Rights.[9] One of the changes, for example, was the omission of any rule against the establishment of religion. This was done to accommodate some of the pueblo communities of the American southwest which have theocratic governments. The 1968 Indian Bill of Rights has revived the issue of egalitarian values and special Indian legislation. Though the courts will continue to refuse to apply the constitutional Bill of Rights to Indian reserve communities, it is difficult to see how they can avoid applying the legislative Indian Bill of Rights to those same reserve communities.

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[7] People v. Woody, 61 Cal.2d 716 (1964); 394 P. 2d 813; Comment, 17 STAN. L. REV. 494 (1965); UNITED STATES COMMISSION ON CIVIL RIGHTS, AMERICAN INDIAN CIVIL RIGHTS HANDBOOK (1972).

[8] Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

[9] 25 U.S.C.A. §§ 1301-1341 (1969 Supp.). *See* Reiblich, *Indian Rights under the Civil Rights Act of 1968* 10 ARIZONA L. REV. 617 (1968); The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 HARV. L. REV. 1343 (1969). UNITED STATES COMMISSION ON CIVIL RIGHTS HANDBOOK (1972). There was some indication that the courts might have reversed the traditional exemption or reserve communities from the Bill of Rights, an issue which may now be irrelevant: Colliflower v. Garland, 342 F.2d 369 (10th Cir. 1965).

There is fairly extensive litigation at the present time in the United States on the implications of the Indian Bill of Rights. [10]

In 1971, New Zealand enacted its Race Relations Act, designed to combat discrimination in that country. [11] The apprehensions and submissions of Maori organizations were not sufficient to secure amendments to the legislation. Ministers of the government did make assurances that Maori political, social and cultural institutions would not be affected. Questions were raised, at least in Maori minds, that the government was interested in terminating the four Maori constituencies and other special Maori institutions. [12] In submissions to the government, the New Zealand Maori Council emphasized that the special institutions should not be considered merely as transitional features of New Zealand society. [13]

In 1960, the Parliament of Canada enacted the Canadian Bill of Rights. [14] The parliamentary debates of the time indicate that none of the members of Parliament anticipated the issues that would arise about the Bill and the Indian Act. In the years immediately after 1960, it appeared that the courts were not going to give any force to the document. This led to renewed suggestions that a Bill of Rights be entrenched in the Canadian constitution, a position adopted by the government of Prime Minister Trudeau. [15]

In 1969, two events occurred which brought the contradiction between egalitarian principles and the Indian Act into sharp focus. In June of that year, the Minister of Indian Affairs, Mr. Jean Chrétien, tabled the government's "Statement on Indian Policy" in Parliament. The basic operative concept in that document was the notion of legal equality. To accomplish that end, the Indian Act was to be repealed. The federal government would get out of the Indian business. There would be a gradual transference of responsibility to the provinces with transitional federal funding.

The Indian reaction was strong and almost immediate. The Indians interpreted the document as an attack on the reserve system. The perennial Indian preoccupation with defending the reserve system and insisting upon federal jurisdiction led to sustained opposition to the government's policy statement. The year that followed was an intense period of Indian political

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[10] The citations of reported decisions available to the author are: Dodge v. Nakai, 298 F. Supp. 17 and 26 (1968); Lefthand v. Crow Tribal Council, 329 F. Supp. 728 (1971); Longcassion v. Leekity, 334 F. Supp. 370 (1971); Luxon v. Rosebud Sioux Tribe, 337 F. Supp, 243 (1971); Pinnow v. Shoshone Tribe Council, 453 F.2d 278 (1971), *affirming* 314 F. Supp. 1157 (1970); Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51 (1972); Settler v. Lameer, 419 F.2d 13311 (1969); Settler v. Yakima Tribal Court, 419 F.2d 486, (1969); Solomon v. LaRose, 335 F. Supp. 715 (1971); Spotted Eagle v. Blackfeet, 301 F. Supp. 85 (1969).

[11] For a discussion of the Race Relations Act and race relations in New Zealand see *McKean* (ed.), ESSAYS ON RACE RELATIONS AND THE LAW IN NEW ZEALAND (1971).

[12] See Ryks, *The Race Relations Bill*, 2 TE MAORI 5 (October-November, 1971) (official journal of the New Zealand Maori Council).

[13] See Both, Submissions on Major Issues 2 TE MAORI 39 (October-November, 1971).

[14] Can. Stat. 1960 c. 44.

[15] See TRUDEAU, A CANADIAN CHARTER OF HUMAN RIGHTS (1968).

activity. There was a sense of threat which unified Indians nationally. By the summer of 1970, each province and territory had an organization purporting to represent the status Indian population of the area. All of these organizations were members of a loose national federation, the National Indian Brotherhood.

The Indian political opposition to the government's policy statement was successful. In the spring of 1970, the Indian Chiefs of the Province of Alberta, supported by the other provincial and territorial organizations, met with Prime Minister Trudeau and certain members of the federal cabinet. They presented the Alberta "Red Paper" called "Citizens Plus." The title reflected the claim for special status basic to the paper. It was a reply to the government's policy statement, and in response, Prime Minister Trudeau officially abandoned his government's policy statement.

It was not clear, however, that Mr. Trudeau or his government had in fact altered their basic approach to Indian policy. Mr. Trudeau's suspicion of anything that could be labelled special status, a suspicion rooted in his political history in the Province of Quebec, undoubtedly continued to influence his views. The general Canadian assumption that reserves are part of the problem and not part of the solution continued in the minds of most people. The views of the Department of Indian Affairs probably did not change. The ideas in the white paper were not new in 1969, but represented long standing thinking of the Department. Government programs to integrate Indian children into provincial schools and to integrate Indian reserve communities into other provincial programs continued after 1970. They were part of a well established post-war policy. These programs, modifying the "exclusive" federal role in relation to Indian reserve communities, continued. The accelerated and explicit challenge to special status contained in the 1969 white paper was gone.

A second event in 1969 went largely unnoticed in Indian communities in Canada. It was the decision of the Canadian Supreme Court in *Regina v. Drybones.*[16] The provision in the Canadian Bill of Rights guaranteeing "equality before the law" was employed by the Court to render inoperative section 95 of the Indian Act, a section making it an offence for an Indian to be drunk off a reserve. The case originated in the Northwest Territories. The Court compared the liquor ordinance of the Northwest Territories (itself a "law of Canada" [17]) and section 95 of the Indian Act. The Court concluded that Joseph Drybones was subject to harsher penalties than a non-Indian for the same behaviour. Mr. Justice Ritchie, writing the majority judgment,

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[16] Sup. Ct. 282 (1969).

[17] The Canadian Bill of Rights applies to "every law of Canada" by § 2. In § 5(2) the expression "law of Canada" is defined to mean:

> an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule, or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

referred to the opinion of Mr. Justice Tysoe in the decision of the British Columbia Court of Appeal in *Regina v. Gonzales*.[18] Mr. Justice Tysoe had stated that the words "the right of the individual to equality before the law" meant:

> a right in every person *to whom a particular law relates or extends*, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends, and a right to the protection of the law.

Mr. Justice Ritchie rejected the reasoning of Mr. Justice Tysoe, commenting that it would permit the "most glaring discriminatory legislation against a racial group."

There appear to be three limitations which the courts could impose upon the impact of the Canadian Bill of Rights: (a) the fact that it only applies to a "law of Canada" precludes any comparison of federal laws and provincial laws, (b) it does not prohibit remedial or compensatory legislation which favours a disadvantaged group and (c) it does not forbid reasonable classification of groups in the pursuit of legitimate legislative goals.

Mr. Justice Ritchie was careful in the *Drybones* case to state and restate that the discrimination resulted from comparing two "laws of Canada." This raised the question whether the *Drybones* case would have been decided the same way if it had come from a province rather than from a territory. If the case had arisen in a province the only way the court could have found inequality would have been to compare the provisions of the Indian Act with provisions of provincial laws dealing with liquor. Since the Canadian Bill of Rights only applied to federal laws, would the courts rule that federal legislation was inoperative because of an inequality that came from a comparison of federal and provincial laws? That kind of inequality, surely, was a natural result of the federal system and could not be blamed specifically on the federal legislation any more than it could be blamed specifically on the provincial legislation.

The second possible limitation on the impact of the Canadian Bill of Rights was suggested by Mr. Justice Ritchie, when he emphasized that the Indian Act section involved in the *Drybones* case treated Indians "more harshly" than non-Indians. He seemed to be suggesting that harsher treatment was necessary before the Bill of Rights would be effective to render discriminatory legislation inoperative. The basic provisions of the Indian Act deal with rights to reserve land. It would not be reasonable to suggest that Indians are treated more harshly than non-Indians because they have real property rights of a kind that non-Indians do not have. If anyone is treated "more harshly" it is non-Indians. This kind of "reverse discrimination" or "positive discrimination," (the picking out of a group for special, beneficial treatment), would be acceptable as remedial legislation.

The third possible limitation on the impact of the Canadian Bill of

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[18] 37 W.W.R. (n.s.) 257, at 264 (B.C. 1962).

Rights is the notion that reasonable distinctions between groups are permissible. United States courts have long ruled that "equal protection" is not denied by laws which treat groups differently if the difference is based on a reasonable classification serving a legitimate legislative purpose. Although in 1969 abuse of alcohol was probably a more pervasive problem in Indian communities than in non-Indian communities, no one was prepared to argue that there was some fundamental difference between Indians and non-Indians that justified a continuing discrimination in relation to alcohol. In point of fact, the liquor sections of the Indian Act had largely been phased out for most Indian communities in Canada by that time. It was, therefore, not surprising that there was no attempt to justify section 95 of the Indian Act on the basis of an American style doctrine of reasonable classification. Reasonable classification might, however, be a limitation on the impact of the Bill of Rights in future cases.

The next cases were two District Court decisions involving an Indian with the cryptic name Whiteman. In *Regina v. Whiteman (No. 1)*,[19] the Indian was charged under section 97 (then 96) of the Indian Act. That section makes it an offence for a person to be found with intoxicants in his possession on a reserve. There were three basic differences between this case and the *Drybones* case: (a) the case arose in a province and not in a territory, (b) the offence took place on a reserve, (c) the offence could be committed by any person, whether an Indian or not.

It was argued on behalf of Whiteman that the section really dealt only with Indians because only Indians lived on reserves. District Court Judge McClelland stated:

> it was suggested that s. 96(b) may be likened to a statute which makes it an offence for anyone to be in possession of a rosary in a Roman Catholic Cathedral. Such a statute would purport to apply to all Canadians, but its effect would be discriminatory against Roman Catholics by reason of their religion. Other examples might be statutes making it an offence for anyone to have in his possession copies of the Talmud, or Koran.[20]

The Court ruled that the section did not pick out Indians for special treatment but applied to Indians or non-Indians. The Court also noted specifically that the *Drybones* case dealt with a territorial ordinance, while, in the case at bar, the other provision for the same behaviour was found in a provincial statute.

The resolution of the case involved the character of an Indian reserve as a special jurisdictional unit, separate from the province in which it is situate. The Court concluded:

> When all persons in an area under the exclusive control of the Parliament of Canada are subject to the same laws and penalties, regardless of colour, race, religion or creed, can it be said that there exists any inequality before the law?[21]

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[19] [1971] 2 W.W.R. 316 (Sask. Dist. Ct. 1970).
[20] *Id.* at 318.
[21] *Id.* at 320. All persons within a particular Indian reserve would be subject to

Since all persons on Indian reserves are subject to section 97, the Court concluded that no discrimination existed. How could you compare section 97 of the Indian Act to the Saskatchewan Liquor Act when the Saskatchewan legislation did not apply on Indian reserves? The Saskatchewan Liquor Act was legislation for a different jurisdiction and as irrelevant to the case as the liquor laws of New Zealand.

In the second *Whiteman* [22] case the offence involved was being drunk off the reserve. Whiteman had been charged under the Liquor Act of Saskatchewan, rather than under section 95 of the Indian Act. Although District Court Judge McClelland had recognized in the first *Whiteman* case that the *Drybones* case dealt with a territorial ordinance compared to a section of the Indian Act, the Judge did not make any reference to that distinction in *Whiteman (No. 2)*. He simply stated that section 95 was inoperative in *Drybones* and was inoperative in the case before him as well. Whiteman was, then, properly charged under Saskatchewan law.

Mr. Justice McClelland raised a second question in passing. He queried whether the Parliament of Canada had jurisdiction to legislate about the conduct of an Indian off a reserve on a subject matter, like liquor, otherwise within provincial legislative jurisdiction. He made no ruling on that constitutional issue, confining his decision to the inoperative character of section 95 because of the Canadian Bill of Rights.

In the summer of 1972, the Manitoba Court of Appeal decided the case of *Canard v. Attorney-General of Canada.* [23] This case dealt with the wills and estates sections of the Indian Act. Alexander Canard was a status Indian who was living off the reserve at the time of his death. According to the judgment, the only asset of the estate was a law suit arising out of the motor vehicle accident which caused his death, and which occurred off the reserve. Special sections in the Indian Act deal with the estates of status Indians. [24] The will of an Indian can be set aside by the Minister of Indian Affairs. Administration of the estate will be handled by a person appointed by the Minister and the estate will not be processed in the regular courts. The Indian Act provides, however, that the estates sections of the Indian Act only apply to an Indian who is "ordinarily resident" on a reserve, unless the Minister otherwise orders. [25] There was a factual confusion in the *Canard* case as to whether Alexander Canard was "ordinarily resident" on a reserve at the time of his death. On the assumption that he was, the Minister appointed one Rees to administer the estate. On the assumption that Canard was not ordinarily resident on a reserve at the time of his death, Mrs. Canard

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the same law, but it is not correct to say that all persons within federal jurisdiction over "Lands reserved for the Indians" are subject to the same laws. Section 98 of the Indian Act provides for the band to hold a referendum which can result in the blanket prohibition of possession of intoxicants on the reserve being ended. Neighbouring reserves may have different laws about possession of intoxicants as a result of § 98.

[22] Regina v. Whiteman (No. 2), 13 Crim. Rep. (n.s.) 356 (Sask. Dist. Ct. 1970).

[23] 30 D.L.R.3d 9 (Man. 1972).

[24] At §§ 42 to 50.

[25] *Id.* at 4(3).

was appointed administratrix of the estate of her husband by a court pursuant to Manitoba legislation. Two law suits were then begun on behalf of the estate, law suits arising out of the motor vehicle accident which caused his death. It became necessary to determine who was the proper administrator of the estate in order to determine which law suit was properly brought. At trial, Mr. Justice Matas ruled that Alexander Canard was not ordinarily resident on the reserve, and therefore the Indian Act did not purport to apply.[26] He ruled that the widow was properly administratrix of the estate. The Manitoba Court of Appeal ruled that although Alexander Canard had died off the reserve, he was ordinarily resident on the reserve. Therefore, the Indian Act purported to govern the estate. The Court then dealt with two additional issues. Firstly, the Court examined the question whether the federal government had legislative jurisdiction to deal with an estate such as the one before them. Secondly, the Bill of Rights question was examined.

Mr. Justice Dickson concluded that the estates sections of the Indian Act were constitutionally valid. He stated that they

> are strictly within the subject of Indians. The "subject of Indians" embraces everything reasonably having to do with Indians, not excluding the disposition of their effects.[27]

Having concluded that the sections were valid, in constitutional terms, Mr. Justice Dickson then went on to rule that they denied Mrs. Canard equality before the law, and were inoperative because they were in conflict with the Bill of Rights. He was fully aware of the argument that inequality could not be found for Bill of Rights purposes by comparing federal and provincial laws:

> I accept that this case cannot be decided merely on the strength of the *Drybones* decision. I also recognize the validity of the argument advanced in the *Drybones* case that the question of whether a piece of federal legislation has been rendered inoperative should not rest upon the law of any Province or territory, for its operation would then vary from Province to Province and from time to time. But I do not think that is the situation with which we are faced in the present case. In the present case we have a situation in which the Parliament of Canada has said in effect "because you are an Indian you shall not administer the estate of your late husband". Parliament has thereby in a law of Canada placed a legal road-block in the way of one particular racial group, placing that racial group in a position of inequality before the law. The inequality does not arise through conflict between a federal statute with a provincial statute. It arises through conflict between the *Bill of Rights* and a federal statute. The *Bill of Rights* has capacity to render inoperative, racially discriminatory legislation, whether or not there be provincial legislation touching the subject-matter.[28]

The reasoning is not convincing. Discrimination cannot exist in a vacuum. People are discriminated against only in comparison to the treatment accorded to other people. Mr. Justice Dickson misdescribes the *Drybones* situation by

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[26] Canard v. Attorney-General of Canada, [1972] 4 W.W.R. 618 (Man. Q.B. 1972).

[27] Canard v. Attorney-General of Canada, 30 D.L.R.3d 9, at 16 (Man. 1972).

[28] *Id.* at 22-23.

suggesting that a comparison cannot even be made with territorial laws. He then goes on to find the Indian Act sections discriminatory without having any alternative provisions for other people with which he feels able to compare the Indian Act sections.

Mr. Justice Ritchie in the *Drybones* decision did not say that inequality could not be found by a comparison of federal legislation with provincial legislation. He merely emphasized that the case before him was a situation where the inequality resulted from two laws of Canada. It was still open to the courts to discuss the question whether federal legislation might be inoperative if there was inequality resulting from a comparison of federal and provincial legislation.

Inequality could be ended by a ruling rendering the federal legislation inoperative, at least in a double aspect area where provincial law would, as a consequence of the inoperative character of the federal legislation, apply to the person. After section 95 of the Indian Act was declared inoperative in the *Drybones* case, territorial liquor laws would have applied to Joseph Drybones and any other Indian off a reserve in the Northwest Territories. On the usual interpretation of constitutional jurisdiction over Indians, if the estates sections of the Indian Act were inoperative for Indians off reserves, (because they treated Indians off reserves more harshly than non-Indians off reserves), then provincial estates laws would apply to Indians off reserves. [29] The inequality would be ended by the ruling that the federal sections were inoperative, and no hiatus would occur. Such a resolution of the issues was not possible in the first *Whiteman* case, because a declaration there that the federal law was inoperative would not have had the result of making provincial laws apply, since provincial liquor laws cannot apply, of their own force, on Indian reserves. [30]

The question whether any limitations existed on the impact of the Bill of Rights on the Indian Act was unclear after the *Canard* decision. By that time the Federal Court of Appeal had already ruled in the *Lavell* [31] case that section 12(1)(b) of the Indian Act, dealing with the status of Indian women married to non-status husbands, was inoperative. That decision was hitting at membership, a fundamental part of the Indian Act system. In comparison, the *Canard* case and the cases dealing with the liquor sections were dealing with provisions of limited significance to the basic scheme of the

[29] Perhaps the clearest decision on the question of the application of provincial laws to Indians, a separate question from the application of provincial laws to or on Indian Reserves, is the early Ontario Court of Appeal decision in Rex v. Hill, 15 Ont. L.R. 406 (1907). The general constitutional rule is largely codified by § 88 of the Indian Act. On this question, see Lysyk, *The Unique Constitutional Position of the Canadian Indian*, CAN. B. REV. 513, at 535 551 (1967).

[30] Sections 96 and 98 of the Indian Act, which provide for the ending of some of the liquor provisions for Indians, lead to a situation of incorporation of provincial liquor laws by reference. Possession of intoxicants ceases to be an offence against the Indian Act if the possession is in compliance with provincial laws. The charge, however, will clearly not be under provincial liquor law, but under the Indian Act, though the defences will be found in provincial, not federal legislation.

[31] Lavell v. Attorney-General of Canada, [1971] F.C. 347, 22 D.L.R.3d 188.

Indian Act. In July, 1973, Mr. Justice Osler of the Ontario Supreme Court handed down judgment in an injunction case coming from the Six Nations Reserve.[32] He ruled that the reasoning of Mr. Justice Dickson in the *Canard* case, and of Mr. Justice Pigeon in his dissenting judgment in the *Drybones* case, "compels the conclusion that for all practical purposes the entire Act must now be held to be inoperative." The effect of the Indian Act, he concluded, was to treat Indians as Indians differently from other people, and therefore, the Act constituted discrimination on the basis of race. It appeared that the basic contradiction between the Indian Act and the Bill of Rights might finally be resolved in favour of the Bill of Rights.

Three cases have dealt with the Bill of Rights and the membership sections of the Indian Act. Early in 1973, Mr. Justice Fanjoy of the Ontario County Court rendered judgment in *In Re Froman.*[33] The section of the Indian Act in dispute was section 12(2). It provided that if a status Indian woman bore an illegitimate child, the registration of that child as a status Indian could be protested within twelve months after the name of the child was placed on the band list. If upon the protest it was decided that the father of the child was not a status Indian, the name of the child would be removed from the band list. The protest would be heard by the registrar appointed under the Indian Act to deal with membership. It was argued that the protest section was discriminatory on the basis of sex, and therefore inoperative because in conflict with the Bill of Rights.

To understand the issues in the *Froman, Lavell* and *Bedard* cases, it is necessary to briefly describe the membership sections of the Indian Act. Sections 11 and 12 establish a charter group, by defining three separate categories of people who are included in the legislative category of Indian, and by defining five categories of people who are excluded from that legislative category. The first group included as part of the charter group, are Indians who were Indians as defined in the first Indian statutes after confederation, the acts of 1868 and 1869.[34] The second group are people who were defined as Indians by reason of the treaty process since 1874.[35] The third included group are members of bands which have been declared by the Governor in Council to be bands for the purposes of the Indian Act.[36] In

[32] Isaac v. Davey, [1973] 3 O.R. 677.

In the summer of 1970 certain members of the Six Nations Band of Indians occupied the Council House belonging to the Band. The members of the elected Band Council, headed by Chief Richard Isaac, obtained an interim injunction prohibiting those Indians who had occupied the Council House from again occupying the building. The defendants, who opposed the elected band council system, argued that the elected Band Council had no legal validity because Six Nations was not a reserve and also because the Indian Act was totally inoperative because of conflict with the Bill of Rights. Mr. Justice Osler examined the history of the Six Nations Reserve and concluded that it was not a reserve within the meaning of the Indian Act. He went on to say that in case he was wrong on that point, he would rule on the question of the impact of the Bill of Rights on the Indian Act.

[33] [1973] 2 Ont. 360 (Brant County Ct.).

[34] At § 11(1)(a).

[35] At § 11(1)(b)(i).

[36] At § 11(1)(b)(ii).

many ways, the history of Indian policy in Canada is encapsulated in these provisions. Prior to confederation, Indian policy was handled by the different colonies which later united to form Canada. The policies were not uniform, and, essentially, what the federal government did, after 1867, was to disrupt as little as possible the system already in existence prior to 1867. The first group, therefore, included in the charter group, who were Indians by the open ended legislative definition of 1868: "All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians . . ." [37] After the transfer of the Hudson's Bay Company territories and the Northwest to Canada in 1870, the federal government began its historic treaty making period in the Indian areas of the Northwest, presently Manitoba, Saskatchewan, Alberta and the Northwest Territories. A result of the treaties was the preparation of annuity lists, lists of people entitled to be members of bands and entitled to receive annuities under the treaties. Those lists form the charter group of status Indians in the prairies and the Northwest Territories. After 1874, there are areas of the country in which Indian policy became established, but in which no treaties were made. Those areas are British Columbia, the Yukon and Northern Quebec. Bands are created in those areas by governmental decision.

Given the charter group created in the provisions of section 11, there are certain exclusions which are set out in section 12(1)(a). Any person who received or was allotted half-breed land or money script is excluded. [38] Land allotments and script payments were made from 1870 into the early years of this century, pursuant to the Manitoba Act [39] and the early Dominion Lands Acts. [40] The people receiving the lands or money script received them as individual family units, and not as part of Indian bands. They elected, by receipt of the lands or script, to be classed under the statutes as "half-breeds", and not as "Indians". Those terms are administrative terms and do not necessarily describe the blood content or descent of the people involved.

The second group to be excluded are people who have been enfranchised, that is, who have voluntarily terminated Indian status. [41]

The third group to be disqualified is described in section 12(1)(a)(iv), a section not widely known even in Indian communities. For convenience, this section may be described as establishing the "double-mother rule." If a person is born of a marriage entered into after the fourth day of September, 1951, and the person's mother gained Indian status by marriage and the person's father's mother gained Indian status by marriage, then the child loses Indian status at the age of 21 years.

The next exclusion is section 12(1)(b), the section challenged in the

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[37] An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indians and Ordnance Lands, Can. Stat. 1868 c. 72, § 15.

[38] Section 12(1)(a)(i) and (ii).

[39] Stat. Can. 1870 c. 3, § 31.

[40] Stat. Can. 1879 c. 31, § 125(e).

[41] Section 12(1)(a)(iii).

Lavell case. Status Indian women who marry a man who is not a status Indian, lose status on marriage.

The fifth exclusion is the exclusion in section 12(2), the exclusion dealt with in the *Froman* case. The illegitimate children of status Indian women are excluded if their registration has been protested, and if upon the protest it is decided that the father of the child was not a status Indian.

The group of people defined by the inclusions and exclusions is perpetuated over time by a patralineal descent rule. If you are a descendant of a status Indian man, or if you are the spouse of a status Indian man, you have the status of that man. [42] It is only in the situation of illegitimacy that Indian status can derive from the mother and then, of course, subject to the protest provisions of section 12(1) & (2).

It was argued in the *Froman* case that the protest of illegitimate children was discriminatory on the basis of sex, in that the illegitimate child of a status Indian man would have Indian status whereas the status of the illegitimate child of a status Indian woman was subject to protest. The County Court ruled that the argument misconstrued the Indian Act sections. The meaning of the term "descendant", in section 11(1)(c) of the Indian Act, was legitimate descendant. Therefore, the illegitimate child of a status Indian male could not obtain status under the Indian Act, because of status Indian paternity alone. An illegitimate child can only trace status through the mother. By section12(2), if there is a protest, the illegitimate child of a status Indian mother will lose status if it is established that the father was not a status Indian.

His Honour Judge Fanjoy resolved the issue in the case by seeking to discover the underlying rationale for the section. This seems the only Canadian decision in which the notion of reasonable classification is invoked as a possible limitation on the impact of the Canadian Bill of Rights. Judge Fanjoy states:

> The general scheme of the *Indian Act* must be considered. One of its general objects is to preserve Indian reservations and benefits to Indians and to no one else. I would go so far as to state that these rights are intended to be confined to full-blooded Indians. This proud and dignified race is thus given some opportunity to retain its identity and culture in the face of the onslaught by an alien society on its way of life.
>
> In my opinion, the provision for protest contained in s. 12(2) is not discrimination on the basis of sex. The fact that the protest procedure is available with respect to paternity and not with respect to maternity is simply recognition of the facts of life. Maternity is always identifiable. Paternity always has a degree of uncertainty, even for legitimate issue. No Legislature can change the fundamental biological differences between men and women. These differences as they affect children have been recognized through the centuries by the common law and in recent years by child welfare legislation in all the Provinces of Canada. [43]

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[42] Section 11(1)(c), (d), (e) and (f).
[43] [1973] 2 Ont. 360, at 366-367 (Brant County Ct.).

His Honour Judge Fanjoy saw section 12(2) as sustaining the racial purity of the group defined as Indians by the Indian Act. Although he correctly assessed the rationale for section 12(2), he seriously misunderstood the scheme of membership in the Indian Act as a whole. It is not adequate to describe status Indians as a racial group. [44] There are full-blooded Indians who are excluded from the statutory group, and there are certain wives of status Indian men who are included in the statutory group although they have no Indian descent. The Indian Act membership system, by using the male as head of the household to determine the status of the nuclear family unit, employs a kinship system of membership rather than a racial or blood system of membership. [45] There are, however, some exceptions to the basic kinship orientation of the membership sections. One exception is section 12(2). Another exception is the treatment of adopted children. The adoption of a non-status child by a status Indian couple does not alter the status of the child. Conversely an Indian child does not lose Indian status because of adoption by non-status parents. [46] A third deviation from the kinship orientation of the membership sections is the 'double-mother rule' in section 12(1)(a)(iv).

His Honour Judge Fanjoy was, therefore, facing the problem of finding an underlying rationale for a membership system which itself was not internally consistent. He saw the rationale of the particular section before him, but he failed to understand the system as a whole.

In the *Lavell* and *Bedard* cases, the kinship character of the system was challenged. That is the dominant, (though not the exclusive), rationale for the membership sections in the Indian Act. Section 12(1)(b) was challenged as constituting discrimination on the basis of sex, for only a status Indian woman lost status by marriage to a non-status spouse.

In August of 1973, the Supreme Court of Canada handed down judgment on the combined appeals in the *Lavell* and *Bedard* cases. [47] Mr. Justice Ritchie, who had given the majority judgment in the *Drybones* case, delivered the majority judgment for himself, the Chief Justice and Justices Martland and Judson. Mr. Justice Pigeon concurred in the result.

Mr. Justice Ritchie began his analysis by considering the meaning of

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[44] This is a difficult point for most people to appreciate. Although the point was made in written and oral submissions to the Supreme Court of Canada in the *Lavell* and *Bedard* cases, Mr. Justice Laskin refers to the two women as having been born "full blooded" Indians, though the only information before the court was that both had been born with Indian status: page 3 of his judgment.

[45] This distinction is discussed more fully in a previous article, Sanders, *The Bill of Rights and Indian Status*, 7 U.B.C.L. REV. 81 (1972).

[46] Adoption, like divorce, is not mentioned in the membership sections and neither affect Indian status. The application of provincial adoption laws to status Indian children has recently been challenged and His Honour Judge Tyrwhitt-Drake, a Local Judge sitting as a Judge of the Supreme Court of British Columbia, ruled on May 10th, 1973, in *In The Matter of Birth Registration No. 67-09-022272* that provincial adoption laws could not apply to status Indian children. The matter is presently under appeal.

[47] Attorney General of Canada v. Lavell, August 27, 1973, as yet unreported.

section 91(24) of the British North America Act, the section giving Parliament legislative jurisdiction over "Indians, and Lands reserved for the Indians." In his opinion, that jurisdiction could not be

> effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for Indians". The legislation enacted to this end was, in my view, necessary for the implementation of the authority so vested in Parliament under the constitution.

Mr. Justice Ritchie links a statutory definition of membership to the mandate for Indian legislation in section 91(24) of the British North America Act.[48] This, in itself, does not resolve the question of sexual discrimination, for on what grounds could it be suggested that section 91(24) impliedly mandated a sexually discriminatory statutory definition?

Background material was presented to the Court describing the complex history of the legislative determination of Indian status. The membership sections, as we have seen, are a pandora's box of distinctions, differences, inclusions and exclusions, only some of which are sexually discriminatory. If one form of discrimination was struck down, many other forms of discrimination could be alleged in future litigation. In response to this dilemma, Mr. Justice Ritchie exempted all legislation based on section 91(24) of the British North America Act from the impact of the Canadian Bill of Rights. Legislation, such as the Bill of Rights, could only alter legislation dealing with "Indians, and Lands reserved for the Indians" if it did so explicitly.

One question remained to be resolved. What of the Supreme Court's judgment in the *Drybones* case? It appears that the balance of the judgment is concerned with the distinction of the *Drybones* case, and that Mr. Justice Ritchie's comments about the meaning of "equality before the law" must be understood in that light.

Mr. Justice Ritchie made the following statement about the meaning of the phrase "equality before the law":

> The relevance of these quotations to the present circumstances is that "equality before the law" as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land *as administered by the ordinary courts*, and in my opinion the phrase "equality before the law" as employed in section 1(b) of the *Bill of Rights* is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land. This construction is, in my view, supported by the provisions of subsections (a) to (g) of section 2 of the Bill which clearly indicate to me that it was equality in the administration and enforcement of the law with which Parliament was concerned when it guaranteed the continued existence of "equality before the law".

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[48] The task of defining the term 'Indians' could have been left to the courts and the constitutional scope of the term employed in federal legislative activity. Mr. Justice Ritchie does not consider that as an alternative. Although it is a logical alternative, it is at variance with the history of Indian legislation and policy in Canada. In real terms it is not an available alternative at this point in time.

Mr. Justice Ritchie later stated:

> The fundamental distinction between the present case and that of *Drybones*, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s. 12(1)(b) of the *Indian Act*.

In both of these portions of his judgment, Mr. Justice Ritchie uses the phrase "the ordinary courts of the land." He speaks of the "administration and enforcement of the law" but he clearly means that substantive legislative provisions can be struck down by the Bill of Rights. He is affirming the decision in *Drybones* that discriminatory statutes are not to be enforced. He says that Indian women are not discriminated against in the "administration and enforcement of the law before the ordinary courts of the land" by section 12(1)(b) of the Indian Act. Of course, the membership sections of the Indian Act are not sections that get people into court. Section 95, the section rendered inoperative in the *Drybones* case, is a section which can only be enforced by getting people into court. It is a penal section, a criminal section, and takes people into the ordinary courts of the land to have a law enforced against them which picks them out as a distinct group for special treatment.

It appears, therefore, that Mr. Justice Ritchie's argument about the meaning of equality before the law is tied into his basic distinction of the *Drybones* case and the *Lavell* case. He stated that section 95 of the Indian Act was criminal legislation. It was not legislation justified, constitutionally, as flowing from section 91(24) of the British North America Act. He stated:

> A careful reading of the Act discloses that section 95 (formerly 94) is the only provision therein made which creates an offence for any behaviour of an Indian *off* a Reserve and it will be plain that there is a wide difference between legislation such as s. 12(1)(b) governing the civil rights of designated persons living on Indian Reserves to the use and benefit of Crown lands, and criminal legislation such as s. 95 which creates an offence punishable at law for Indians to act in a certain fashion when *off* a Reserve. The former legislation is enacted as a part of the plan devised by Parliament, under s. 91(24) for the regulation of the internal domestic life of Indians on Reserves. The latter is criminal legislation exclusively concerned with behaviour of Indians *off* a Reserve.

Criminal law is the kind of law which takes people into the ordinary courts of the land. Such legislation is subject to the Bill of Rights. Criminal legislation which denies the rights and freedoms protected by the Bill of Rights is not to be enforced. The legislative provisions dealing with the property and civil rights of Indians and reserve communities found in the Indian Act are mandated by section 91(24) of the British North America Act. Those provisions, he ruled, can only be altered by express federal legislation.

It has been suggested that the decision in the *Lavell* case has been a blow to the women's cause nationally in Canada. While the case is certainly

no victory for women's rights, it is clear that Mr. Justice Ritchie confined his reasoning to legislation constitutionally justified by federal jurisdiction over Indians. The case would, therefore, not be a precedent for arguments about discrimination against women in fields such as criminal law, taxation, immigration, or indeed, any other field of federal legislative jurisdiction other than Indians.

The *Lavell* decision may raise some questions as to the scope of federal legislative jurisdiction over "Indians, and Lands reserved for the Indians". Mr. Justice Ritchie, at a number of points in his judgment, described federal legislative jurisdiction as relating to the internal regulation of the lives of Indians on reserves. Lysyk, in his pioneering article on Indian law questions, noted the tendency for the courts to blur the two separate heads of jurisdiction in section 91(24), and speak as if they were a single head of jurisdiction. [49] It is not necessary to assume that Mr. Justice Ritchie has fallen into the error described by Lysyk. For the federal government to have legislative jurisdiction over Indian activity off a reserve, it is clear that the specific activity must have some connection with the fact that the person is an Indian. In *Regina v. White,* [50] the British Columbia Court of Appeal, in a judgment specifically upheld by the Supreme Court of Canada, [51] ruled that the federal government had legislative jurisdiction over Indians hunting off reserves. Mr. Justice Davey stated that the rights were rights peculiar to Indians. Hunting is, of course, the traditional economic activity of Indian people, and it is natural to describe Indian hunting activity as having an Indian character. In the *Canard* case, the question of federal legislative competence was considered in relation to the estate of an Indian who died off a reserve with an estate located off a reserve. Mr. Justice Dickson, as we have seen, stated that the subject of Indians embraced everything "reasonably having to do with Indians", and felt that the estate in question met that requirement. In the *Drybones* case, as suggested earlier, no acceptable argument could be made that inability to control alcohol was a peculiarly Indian phenomenon. Therefore, the constitutional assertion of Mr. Justice Ritchie, that section 95 of the Indian Act was not justified as legislation relating to Indians, is logical and is a conclusion which need not have disruptive effects on other areas of Indian legislation. The conclusion does not affect the liquor sections dealing with activity on reserves, as the basis of jurisdiction for those sections is jurisdiction over reserves, not jurisdiction over Indians. [52]

The status Indian organizations in Canada perceived a threat to the whole of the Indian Act as a result of the cases dealing with the Canadian

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[49] Lysyk, *The Unique Constitutional Position of The Canadian Indian,* 45 CAN. B. REV. 513, at 514 (1967).

[50] 52 W.W.R. 193, at 197 (B.C. 1964).

[51] 52 D.L.R.2d 481 (1966).

[52] It can be noted that the sections dealing with liquor on reserves prohibit everyone from breaching their provisions, while the sections dealing with liquor off reserves only purport to apply to Indians. Section 94 makes it an offence for any person to sell liquor to an Indian off a reserve or to "any person on a reserve". Section 95 deals with Indians off reserves. Section 97 deals with persons on reserves.

Bill of Rights. They intervened in the *Lavell* and *Bedard* cases, explicitly, not to defend the particular status system already in existence in the Indian Act, but to defend the Indian Act as a whole. [53]

The Manitoba Indian Brotherhood stated in a report to the government of Canada, dated February 22, 1973:

> This week the Supreme Court of Canada is hearing the Lavell and Bedard Cases which involve the status of Indian women within the meaning of the Indian Act. It is our position in Manitoba and it is stated in WAHBUNG.
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> — "An Indian woman should remain an Indian for the rest of her life whether she marries an Indian or a non-Indian.
>
> — The responsibility for decision of membership should lie with the communities themselves, and the individual concerned."
>
> In 1967 the Federal Government passed the Bill of Rights. It was intended to be a forward thinking statute entrenching certain rights of individuals in our Canadian life. The effect of the Bill of Rights in fact as was disclosed in the judgment of Regina versus Drybones and the lower court decisions in Bedard, Lavell, Canard, is that the Bill of Rights can affect the Indian Act.
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> If the Supreme Court of Canada rules in favour of Bedard and Lavell then the Indian Act is threatened. We can not be subjected to the day to day whims of the courts. It is Parliament that gave us the Indian Act and it is Parliament that should keep the Indian Act. We do not mean that the present Indian Act is adequate or workable. It is outdated. There must be a new Indian Act which recognizes the needs of the Indian People. [54]

The Union of Nova Scotia Indians passed a resolution in September, 1973, stating, in part,

> that the blame for the Lavell case and its outcome rests exclusively with the Federal Government because of the reluctance to advance the Indian requests for a full review of the Indian Act and that this should be made clear to the non-Indian population of Canada at large. [55]

The resolution criticized the existing membership sections of the Indian Act and criticized the Department of Indian Affairs for failing to provide funding to Indian organizations for an Indian project to draft a new Indian Act.

The National Indian Brotherhood passed a resolution on the question on September 27th, 1973. After stating that the organizations had intervened in the *Lavell* and *Bedard* cases to defend the Indian Act as a whole, the resolution states:

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[53] Part II of the factum of the Indian Organizations stated, in part: "The Indian organizations have not intervened in the *Lavell* and *Bedard* cases to support the details of the present status system in the *Indian Act*. There is a widespread feeling among the Indian organizations that the *Indian Act* must be substantially revised. The Indian organizations submit that any such revision is properly the task of Parliament . . ."

[54] Special Report Presented To: Government of Canada, From: The Indian People of Manitoba, February 22nd, 1973, Manitoba Indian Brotherhood, Winnipeg. pages 2 and 3. The reference to WAHBUNG is to a published position paper of the Manitoba Indian Brotherhood, October 1971.

[55] Resolution passed at the Board of Directors Meeting of the Union of Nova Scotia Indians, held in Digby, Nova Scotia, September 14-16, 1973.

> The Indian organizations have realized for many years that there are a number of inequities and inequalities in the present membership sections of the Indian Act. There are substantial problems about the status of adopted and illegitimate children, about the effect of marriage and divorce on Indian status and about the powers of local band communities to have a voice in relation to questions of membership. Indian organizations have been aware that the present provisions have worked many hardships on individual Indian people. There is hardly an Indian family in Canada that has not been affected by the inequities of the present membership system.
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> Because of the interrelationship and complexity of all the membership sections in the Indian Act, the Indian organizations are convinced that a piecemeal approach to revision of the membership sections is not possible. Any reform of the Indian Act must be done in a complete and integrated fashion and must be done by Indian people for Indian people. Thorough discussions are being held with Indian communities in all parts of Canada in order to prepare specific proposals for reform. A program of discussions and consultations is now in progress.
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> One goal of the project to revise the Indian Act is the formulation of a fair, equitable and just system of membership, a system fair both to individual Indian people and fair for the Indian reserve communities.

These resolutions demonstrate a concern on the part of the organizations not to be publicly labelled as sexist, a concern also shared by the federal government. It is of some interest that the Minister of Indian Affairs suggested to a women's delegation, which visited him after the *Lavell* decision, that they should have supported him in 1969 when he presented the "Statement on Indian Policy" in the House of Commons. The logic of the women's position, he said, was the logic of the government's position in 1969. The logic of the government's abandonment of their proposal, in 1970, was the logic of the Supreme Court of Canada in the *Lavell* case.[56] Prime Minister Trudeau, too, in response to questions about the *Lavell* decision, has harkened back to the "equality" his government proposed in 1969.[57]

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[56] Description by Mr. Chrétien to representatives of the National Indian Brotherhood on September 27th, 1973 of a meeting which took place on September 24th, 1973.

[57] Remarks of Prime Minister Trudeau at the accountability session of the Liberal Party Convention, Ottawa, September 14, 1973. Mr. Trudeau first referred to the failure of the constitutional meetings to agree on the entrenchment of a Bill of Rights. This he describes as the failure of the first "corrective action" his government wanted to take. He then stated:

> We have tried something else when the constitutional Bill of Rights didn't work. We brought in the policy paper on Indians. Our colleague Jean Chrétien back in 1969 indicated to the Indian people themselves that we were prepared to abolish the Indian Act entirely, indeed to abolish even the Minister as a Minister of Indian Affairs. And he often quotes this as a very rare example of a minister prepared to legislate himself into annihilation. But it was put to the Indian people and indeed to all Canadians that we are prepared to abolish the Indian Act and to say that Indians will be Canadians like everyone else. And it's the Indian people themselves who said: wait a minute, hold your horses, we don't want you to go so fast. Therefore the two efforts that we made to find the corrective action that you suggest were blunted, in one case by the politics of federal-provincial relations and in the other case by the will of the Indian people themselves—which is something which I submit is not negligible even for those among you who are pushing for women's rights. Your quarrel is not with the federal government, as I have indicated by these two examples.

It seems likely that the controversies surrounding the government's policy statement in 1969, and the controversies surrounding the Bill of Rights and the Indian Act may have healthy long term consequences. Without those debates, it is doubtful that any modernization of the Indian Act by Indian people could have been anticipated. Modernization of that legislation is desirable for a number of reasons, not the least of which is to end sexual discrimination. The legislation has a negative impact on economic development on reserve communities. A new act hopefully would not. Substantial confusion exists about the internal land holding system on reserves, and about the application of provincial laws on reserves. As an example, the complex questions relating to driving laws on reserves could not have been intended by the drafters of the Act and regulations.

It appears clear that there will continue to be an Indian Act in Canada. Egalitarian legal notions will continue to stop short of undercutting the basic legislative structure of Canadian Indian policy. Indian communities have frequently felt threatened by the larger community in Canada. In the years since 1969 they have perceived two attacks on the Indian Act and the reserve system, one political and one judicial. With those threats gone, it may be possible for the Indian organizations to take the initiative and define the specific legislative scheme which they see as desirable. That kind of "consent of the governed" would be a unique achievement in national and international terms.