Indian Women: A Brief History of Their Roles and Rights

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In 1838 Robert Campbell of the Hudson's Bay Company recounted meeting the Chieftainess of the Nahany, a small nomadic hunting tribe living in the Yukon Territory:

> She commanded the respect not only of her own people, but of the tribes they had intercourse with. She was a fine looking woman rather above the middle height and about 35 years old. In her actions and personal appearance she was more like the Whites than the pure Indian race. She had a pleasing face lit up with fine intelligent eyes, which when she was excited flashed like fire....
>
> At our first meeting, she was accompanied by some of her tribe and her husband, who was a nonentity .... On parting I gave her my hankerchief and all the loose nicknacks I had about me and received in return her silver bracelets.[1]

The account reveals both Campbell's racism ("fine looking" means looking like a white) and the economics of early contact (silver bracelets for nicknacks). For our purposes it illustrates that traditional Indian societies, even the northern migratory hunters, were not necessarily societies that barred women from leadership positions.

Certain of the west coast tribes and the Iroquois people now living in Ontario and Quebec had kinship systems in which descent, leadership or clan membership was determined by the female line. Lewis Henry Morgan studied the Iroquois in New York State in the nineteenth century and wrote the classic account of this tribe in 1851.[2] His studies of the Iroquois led him to draw a number of general

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[1] Wilson, *Campbell of the Yukon* (1970), 28.

[2] Morgan, *League of the Ho-de-no San-nee or Iroquois* (1966), edited and annotated by Lloyd.

conclusions about human society in later publications.[3] Frederick Engels drew primarily on Morgan's work in his classic 1884 publication, *The Origin of the Family, Private Property and the State.*[4] Engel's study has recently come back into prominence because of the contemporary women's movement. Though the Iroquois were the source of some inspiration in the search for liberation for women, in Canada, Iroquoian and other Indian women do not form a part of the contemporary women's movement.

Traditional Indian kinship systems have been involved in a number of cases in the Canadian courts in recent years. In the *Lavell* case,[5] the lawyer for one group of intervenants argued that the *Indian Act*[6] status system was simply a codification of traditional Indian kinship patterns. He based his argument on information regarding the Blackfoot kinship patterns, though in the author's view it is doubtful that the *Indian Act* codifies even that particular patrilineal system. In the *Canard* case, Mr Justice Beetz commented that Parliament could reasonably legislate to define the term "Indian" in the light of Indian customs, and went on to note that Indian customs and values were "apparently ... not proven in *Lavell* ...".[7]

Recently, in an Immigration Appeal Board case,[8] it was argued that an Indian born in the United State whose father was a citizen of the United State was entitled to reside in Canada. The basis for the claim was the fact that the appellant's mother was an Oneida Indian from Canada. Because the Oneida trace tribal and clan membership through the mother, the appellant argued that he was or should be a Canadian Indian and a Canadian citizen. While the discussion is not satisfactory, it seems clear that the Board will pay little or no attention to Indian kinship systems, just as the *Indian Act*[8a] pays little or no attention to them.

In a third recent case, tribal membership patterns were discussed

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[3] Morgan, *Systems of Consanguinity and Affinity of the Human Family* (1871); *Ancient Society; or, Researches in the lines of human progress from savagery through barbarism to civilization* (1877).

[4] Engels, *The Origin of the Family, Private Property and the State, in the light of the researches of Lewis H. Morgan* (1942), translated by West from the 4th ed.

[5] *Attorney-General of Canada* v. *Lavell* [1974] S.C.R. 1349, (1973) 38 D.L.R. (3d) 481.

[6] R.S.C. 1952, c.149 (now R.S.C. 1970, c.I-6).

[7] *Attorney-General of Canada* v. *Canard* (1975) 52 D.L.R. (3d) 548, 575 (S.C.C.).

[8] *Appeal of Melvin Greene,* Immigration Appeal Board, Toronto, April 16th, 1975.

[8a] R.S.C. 1970, c.I 6.

in the context of custom adoption.[9] An Indian man and his Caucasian wife sought to adopt an Indian child in accordance with Indian custom. Indian and Inuit customary adoptions have been legally recognized in the Northwest Territories for a number of years;[10] the *Wah-shee* case was novel only because of the race of the adoptive mother. Mr Justice Morrow described the background in the following way:

> Caroline Wah-shee is of the Caucasian race and was married to James Jason Wah-shee at Fort Rae on August 9th, 1969. Before she and her husband were married they both approached his parents and sought and obtained their blessing to the marriage. As she says, her intention to become a full member of the Indian Band was expressed in clear language at that time and has never wavered. The young couple then circulated among the groom's relatives and friends seeking acceptance as is and has always been the custom and finally the marriage was accepted by Chief Bruneau and his Band Council.

Caroline Wah-shee became an Indian and a band member within the meaning of the *Indian Act* upon her marriage. Mr Justice Morrow separated *Indian Act* band membership and band membership:

> The petitioner Caroline Diane Wah-shee was accepted by not only the Chief and Council but by the whole of the Dogrib band, she has been accepted on the Band List as shown by the card referred to above, and she was in my opinion entitled to be registered as such as the wife of a person entitled to be (and in fact registered) registered as a member of a band. (Section 11(f)). This in my opinion has had the legal effect of constituting her a full member of the Dogrib Indian Band with full status. Even without the provisions of the *Indian Act* I would have, on the evidence found her to be a full member of the band with all that entails.

It is important to note at this point that traditional patterns of the role of women were not uniform among Indian tribes. Ruth Landes' study, *The Ojibway Woman*,[11] depicts a society with strongly defined male and female roles and low status accorded to female work roles, yet even then some flexibility existed which allowed women to succeed at men's work. A study of missionary work among Indian tribes in the United States shows an interesting problem of sexual roles. Because Christianity was presented as part of a package of western European social and economic values, conversion involved western clothing and an agricultural life. This subjected the Christian Indian male to ridicule by the "pagan" Indians for having taken up women's work.[12]

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[9] *In re Wah-shee*, Supreme Court of the Northwest Territories, Morrow J., April 4, 1975, as yet unreported.

[10] *Re Katie's Adoption Petition* (1961) 38 W.W.R. 100; *Re Deborah* [1972] 5 W.W.R. 203; *Re Beaulieu's Petition* (1969) 67 W.W.R. 669.

[11] Landes, *The Ojibway Woman* (1971).

[12] Berkhofer, *Salvation and the Savage* (1965).

European colonization caused a fundamental crisis for all native groupings in what is now Canada. Women played a role in responding to this crisis. In 1850 a woman prophet travelled through the Similkameen and the Okanagan areas of British Columbia, prophesying that the coming of the whites would result in the destruction of the Indians. She warned that the whites would kill the game and destroy the Indians while pretending to benefit them:

> She called on Indians to join in a great war against the whites to drive them out. Even if the Indians were all killed in this war it would be better than living under the conditions they would have to endure, once the whites became dominant.
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> She also advised Indian people to retain their old customs and not to adopt any of the ways of the white man. To do this would be to poison your spirit. She claimed to be bullet proof and sang many war songs at her dances and meetings. She called upon Indian people to rise up and follow her in a victorious war against the whites.[13]

A study of the Indian treaties signed in southern Ontario in the years between 1763 and 1867, has shown that a number of women signed the documents. Ms Marguerite Ritchie, author of another article in this Special Issue of the McGill Law Journal, circulated a list of the women's names at a national Indian women's conference in 1972 and commented that it showed there was more democracy in North America at that point in time than in England.[14]

Initial contact with most native groups in what is now Canada occurred through the fur trade. The Hudson's Bay Company was the company of "gentlemen adventurers"; the fur-traders, French and English, were men. European women did not accompany the first European men who traded in the interior of Canada. A legal problem arose: What rules, if any, governed the relations between European men and Indian women in the fur trade milieu? The relationships were often formalized in "the manner of the country", that is, in terms of native customary law. Community sanctioned norms did not, however, need to apply to the fur trader who would in time return to "civilization", that is, to his "civilization". Colonel Steele of the North West Mounted Police noted the problem:

> Many of the gamblers in the place married Indian girls according to the customs of the aborigines, which was to give the father a present of a gun, a pony or ponies, according to the value he placed upon his daughter when he gave her to the white man in marriage. These marriages the

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[13] Land Claims Research Centre, Union of B.C. Indian Chiefs, *Freedom for Land and Culture: A Short History of the Okanagan People, 1850-1920* (1975), 1-2.

[14] Marguerite Ritchie, Q.C., then a senior advisory counsel with the Department of Justice, chaired a panel which dealt with the *Lavell* issue in 1972.

> Indians considered binding, but the white man took quite another view of the transaction and in most cases tired of their Indian wives and threw them aside when they left the place. This offense should have been severely punished, as it has a bad effect on both Indians and whites, causing them to become lax in their morals, and it was the origin of much mischief.[15]

The fur trade intermarriage problem led to the remarkable court case of *Connolly* v. *Woolrich*.[16] The case was a *cause célèbre* in its time. Connolly travelled to what is now northern Alberta in the service of the Hudson's Bay Company. In 1803 he married a Cree woman in accordance with native custom, and respected the union during his time in the west. He rose to a position of responsibility and prestige in the Company, and later retired to his home province of Quebec, taking his Cree wife and children with him. He indicated his intention to remarry the woman in a Roman Catholic ceremony. Before that intention could be fulfilled, he fell in love with a second cousin and married her. The Cree wife was removed to a convent in Winnipeg and supported there by Connolly.

The question of the validity of the first marriage was raised, after Connolly's death, in connection with his estate. He had, after all, acknowledged the Cree woman as his wife, and their relationship had had all the signs of a stable marriage. Connolly was not an irresponsible courier-de-bois, but a man of substance.

The trial judgment is a long, rambling, repetitious piece, but ultimately the Cree marriage was upheld. The Court had great difficulty ascertaining what law applied in northern Alberta in 1803: the area was beyond the lands granted to the Hudson's Bay Company in 1670; the French had been the first traders in the area; but by 1803 it was the English Hudson's Bay Company which was working the region. The judgment laboriously concluded that whether Cree law, French law, or English law applied, the marriage was valid. In the writer's opinion, a conflict of laws analysis was applied which concluded that Cree law was in force in the area in 1803, and by that law the marriage was valid. Cree divorce by repudiation would have been possible in the jurisdiction, but that option had not been exercised by Connolly before returning to the jurisdiction of Quebec and could not be exercised there.

The case was appealed to the Quebec Court of Appeal which upheld the judgment.[17] The judgments on appeal are, again, lengthy

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[15] Steele, *Forty Years in Canada* 2d ed. (1972), 109.

[16] (1867) 11 L.C.J. 197.

[17] *Johnstone* v. *Connolly* (1869) 1 R.L. 253.

and confusing. An appeal to the Judicial Committee of the Privy Council was compromised before the appeal was heard.[18]

The case is meaningless as a precedent. The marriage preceded the first Imperial or Canadian legislation for the area and preceded the date of the introduction of English law to the Northwest.[19] The case could not govern the legality of later custom marriages. Yet the federal government saw the trial judgment in *Connolly* v. *Woolrich* as a governing decision until the post-war period.

There are two other reported decisions dealing with interracial custom marriages in the context of estates.[20] These early intermarriage problems gave way to a second set of cases concerned with the validity of native customary marriages between Indians. The reported cases deal with bigamy and with the testimony of a spouse in a criminal case.

We know of two cases dealing with bigamy. In *R* v. *"Bear's Shin Bone"*[21] custom marriages were the basis for a conviction for bigamy. The bigamy sections of the Criminal Code,[22] it must be noted, do not require the "marriages" to be legally valid, so a conviction is not remarkable. But in an unreported case, referred to in archival correspondence, the British Columbia Supreme Court ruled that custom marriages were not marriages at all and refused to convict for bigamy.[23]

There are two early cases on the testimony of a spouse. In only one is there an adequate analysis of the issues. The case, *R* v. *Nan-e-quis-a-ka*,[24] occurred after the reception date in the Northwest Territories.[25] The question at issue was whether the first wife of the accused was a wife in law and therefore neither compellable nor competent to testify against her husband. Wetmore J., in his judgment, gave no date for the marriage. He ruled that if it took place before 1870, the date of the reception of English law, then it was valid by virtue of *Connolly* v. *Woolrich*. He realized that if it took place

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[18] Cross J. of the Quebec Court of Appeal in *Jones* v. *Fraser* (1886) Q.L.R. 327, 355 states that the case was appealed to the Judicial Committee of the Privy Council and "compromised by the parties, without a decision there...".

[19] July 15, 1870: *Northwest Territories Act*, R.S.C. 1970, c.N-22, s.18(1).

[20] *Robb* v. *Robb* (1891) 20 O.R. 591; *Smith* v. *Young* (1898) 34 Can.L.J. 581.

[21] (1899) 4 Terr.L.R. 173.

[22] R.S.C. 1970, c.C-34, s.254(1).

[23] P.A.C. RG 10, 6816 486-2-5, vol.18, letter of July 7th, 1906 from the Deputy Attorney-General of British Columbia to Mr Neil, Indian Agent, Alberni, British Columbia.

[24] (1889) 1 Terr.L.R. 211; the second case is *R* v. *Williams* (1921) 30 B.C.R. 303.

[25] *Supra*, f.n.19.

after 1870, *Connolly* v. *Woolrich* was not a sufficient answer. He ruled that English marriage laws, both common and statutory, were inapplicable to Indian marriages, and therefore, "a marriage... between Indians by mutual consent and according to Indian custom since 15th July 1870, is a valid marriage...". English law does not apply because the Indians "are for the most part unchristianized; they yet adhere to their own peculiar marriage custom and usages".[26] The inapplicability of English law therefore coincides with the survival of Indian custom marriages, and the fact that the marriage is a custom marriage is vital to the nonapplicability of the received English law. It appears that Wetmore J. did not recognize custom marriages *per se*, but rather consent marriages occurring in the limited situation where English law was inapplicable.[27]

The Department of Indian Affairs was concerned in the latter part of the nineteenth century with the question of the legal validity of such Indian customary marriages.[28] The Department was charged with the administration of Indian estates and needed to know legal kinship relationships for that purpose. In addition, the question of customary marriages arose in the context of treaty annuity payments. If a woman was the legal wife of a treaty Indian, she was entitled to annuity payments by that reason alone. If she was not the wife, her entitlement had to be established separately. The Departmental resolution of the problem was practical. The officials accepted the Indians' description of their marital status and accepted customary marriages as sufficient. Treaty payments were withheld so long as polygamous unions continued, prompting at least the concealment of the fact of multiple wives.

Customary marriages also engendered a great deal of concern when one of the spouses was very young. Clergy and Indian Agents repeatedly raised the question of infant marriages with the Department. The ages of the Indian girls involved ranged from nine to fourteen years. The question perceived by the government was whether the "husband" could be prosecuted under section 301 of

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[26] *Supra*, f.n.24, 215.

[27] The present status of customary marriages is discussed more extensively in the author's report, *Family Law and Native People*, prepared for the Law Reform Commission of Canada.

[28] The material in this section comes from files of the Department of Indian Affairs. The earlier material, ending in 1946, is found in the following files of the Public Archives of Canada: RG 10, vol.6816, 486-2-5, vol.18, and RG 10, vol.6816, 48-2-8, vol.18. The later material, ending in 1974, is found in the following current files of the Department of Indian Affairs: I.A. 1/18-26 and I.A. 1/18-26 vol.3.

the Criminal Code of 1906,[29] a section which made carnal knowledge of a girl under fourteen years of age an offence if the girl was not the man's wife. Clearly a prosecution would not be possible if the Indian marriage was legal.

The Secretary of the Department of Indian Affairs wrote to the Indian Agent at Alert Bay, British Columbia, in 1913, saying:

> This provision (section 301) does not meet the cases mentioned by Rev. Mr. Schindler, as the children he names were married according to the Indian custom, which is generally regarded as valid.

The Department of Indian Affairs took an official stand in a printed circular in 1914 that Indian customary marriages were legally valid. The two bases for the position were the Department's own resolution of the questions relating to annuities and estates, and reliance on the decision of the Quebec Superior Court in *Connolly* v. *Woolrich.*[30] The two sections of the circular on customary family law read as follows:

> (2) The validity of marriages between Indians contracted in accordance with the customs of their tribes has been established by the Courts, notably in the case of "Connolly vs. Woolwich and others," in 1867; nor does the fact that one or both of the contracting parties may profess adherence to Christianity affect the matter.
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> (3) It is particularly deserving of notice that the validity of Indian divorces has never been affirmed in Canada, and Indian marriages, if valid, cannot be dissolved according to Indian custom, but only in such manner as other marriages may be dissolved.

The legal analysis behind the circular is obviously slight. It misspells the name of the case (Woolwich instead of Woolrich) and cites the Superior Court judgment, not the appeal judgment. The archives' files indicate that the *Connolly* case is the source of the statement on divorce as well as the statement on marriage, although the proposition on divorce cannot be deduced from *Connolly* v. *Woolrich.* Whether or not well reasoned, the 1914 circular remained the offical position of the Department until the nineteen fifties.

In the report of *R* v. *Williams,* the Indian Agent for the Alert Bay District, Mr Halliday, gave evidence about Departmental practices:

> Mr. Halliday further gave evidence to the effect that the department of Indian affairs was obliged to recognize these marriages and did recognize them, but that five years ago instructions were sent out that Indians must in future be married according to the marriage laws of the Province, and no marriage by Indian custom entered into since that time has been recognized by the Department.[31]

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[29] R.S.C. 1906, c.146.
[30] *Supra,* f.n.16.
[31] *R* v. *Williams, supra,* f.n.24, 304.

The statement is clearly incorrect. There was no reversal of Departmental policy around 1916. In that year the Deputy Superintendent General of Indian Affairs wrote Charles Cox, Indian Agent in Alberni, British Columbia, confirming the validity of Indian custom marriages.[32] The archives' files contain correspondence from Halliday to the Department in 1911 and 1914, advocating an amendment to the *Indian Act* requiring Indians to marry in accordance with provincial laws. The Department rejected any such suggestion. The Department always took the position that Indian marriages were governed by provincial law;[33] they would not consider enacting federal legislation relating to Indian marriages.

In 1946 the Superintendent of Reserves and Trusts inquired of the Departmental Solicitor, a Mr Cory:

> ... kindly advise this Department whether we can recognize a marriage between two pagan Indians by Indian custom for the purpose of handing over to the Indian wife all the goods of her husband on an intestacy.

Mr Cory replied:

> Yes — the validity of such a marriage was established in *Connolly* v *Woolwich and Peters* in 1867.

By 1946 other events had occurred which led to a change in the Department's approach. The concerns during the second world war and the post-war period were not with annuities, estates, polygamy or child marriages, but rather with entitlement to social welfare benefits. The Department's general file on Indian marriages, which has not yet been transferred to the public archives, begins with correspondence from the Dependants' Allowance Board concerning the eligibility of the custom wives of certain Indian servicemen serving in World War II. The Judge Advocate General obtained an opinion from the Department of Justice, dated December 2, 1943, on the validity of Indian custom marriages for Dependants' Allowance purposes. This opinion, which apparently did not come to the attention of the Department of Indian Affairs for several years, did not draw on the legal opinions and authorities which had been supplied previously to the Department; nor did it make reference to the 1914 circular of the Department. The 1943 opinion, under the name of F.P. Varcoe, Deputy Minister of Justice, analysed the question solely in the light of provincial marriage statutes and referred to no case

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[32] RG 10, vol.6809, 470-2-3, vol.4.

[33] In a letter dated August 24th, 1917 Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, wrote to Rev. Arthur Barnes, stating in part:

> "The Department, however, has no control over the form of Indian marriage. This is a provincial matter."

law. It noted an Ontario curative section which validated marriages performed in intended compliance with the provisions of the provincial statute. The opinion tentatively concluded that:

> Conceivably some marriages performed according to Indian Tribal customs would, under these sections, be valid, assuming of course that the marriage in each particular case is a marriage according to our understanding of the term, namely, a voluntary union for life of one man and one woman to the exclusion of all others.

After this opinion came to the attention of the Department of Indian Affairs, there was no return to the simplistic reliance on *Connolly* v. *Woolrich*. In 1949 an internal memorandum to the Director of the Indian Affairs Branch made the following confused and self-contradictory analysis of the problem:

> The whole question of Indian marriages is complicated and clouded. Under some old judgments and opinions given many years ago by the Department of Justice Indian tribal marriages in certain circumstances may be regarded as valid. Such validity is contingent upon a ceremony by which the parties are permanently united in monogamous conjugal relationship. Even where such validity was recognized, however, it did not hold against a later marriage in accordance with the marriage laws of the province. On the other hand it is interesting to note that by some opinions given by the Department of Justice, a second tribal marriage during the lifetime of either party might be considered bigamous and also that no tribal divorce could be recognized and apparently an ordinary divorce procedure could not be invoked against tribal marriage. Marriage of one of the parties, however, under provincial law would not be bigamous.
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> The Department has recognized bona fide tribal marriages for purposes of administration. Difficulty of course is encountered in estates and other matters where persons married by tribal custom subsequently marry others under provincial law and there are children from both unions.

The memorandum suggests that tribal marriages should be considered as religious marriages which require, in addition, a civil ceremony. It refers to the Department of Justice opinion of December 2, 1943, mentioned above:

> The gist of the opinion from Justice is that the laws of the province apply although there exists some presumption in favour of validity of Indian marriages.

Two years later the same official mentioned in a memorandum:

> It is not, however, the policy of the Department to recognize as a band member a child of a mother of non-Indian status, regardless of marriage by tribal custom.

The Department arrived at a practical, if contradictory, resolution of the question in 1951. Custom marriages were recognized in the reformulation of the band membership lists, which was a major

part of the *Indian Act* revisions of 1951.[34] After that date no custom marriages were to be recognized for membership purposes. That remains the position of the Department of Indian Affairs at the present time, with the one anomaly of Longhouse marriages.[34a]

The Registrar of Indian band lists accepts Longhouse marriages performed outside the provisions of Ontario marriage legislation for membership purposes: (a) only if the marriage is between members of the Six Nations Band, and (b) only so long as no subsequent marriage occurs. This special situation reflects a confused period of controversy and meetings in the nineteen-fifties.[35]

During the present period, the major public controversy concerning Indian women has been the status system which was the issue in *Attorney-General of Canada* v. *Lavell*.[36] The status system in the *Indian Act* has a major and a minor theme. The major theme is one of according Indian status to all members of nuclear family units which have patrilineal descent from certain charter groups; the minor theme is racial. The major theme involves sexual discrimination. The male is, in effect, designated the head of the household. All members of the nuclear family take the status of the husband-father. A non-status woman gains Indian status by marriage to a status Indian man, while a status Indian woman loses Indian status by marriage to a non-status man.[37]

In the *Lavell* case all the status Indian organizations in Canada joined together in a common intervention before the Supreme Court of Canada in support of the *Indian Act* status quo. The Native Council of Canada, representing Métis and non-status Indian organizations, intervened in support of Jeanette Lavell. The intervenants on behalf of Indian women, however, were divided and poorly organized. Treaty Voice of Alberta, basically an Indian women's organization, intervened against Jeanette Lavell, arguing Indian custom. Indian Rights for Indian Women, a very loosely organized group, was not incorporated and had to settle for intervening in the names of certain individual Indian women. The male-dominated status and non-status organizations were able to respond effectively in the

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[34] S.C. 1951, c.29.

[34a] The Longhouse religion is a post-contact, non-Christian Indian religion with adherents on a number of reserves in Ontario and Quebec.

[35] This matter is discussed in some detail in the author's report, *supra*, f.n.27.

[36] [1974] S.C.R. 1349, (1974) 38 D.L.R. (3d) 481; rev'g 22 D.L.R. (3d) 188 (F.C.A.); rev'g 22 D.L.R. (3d) 182 (Ont.C.A.).

[37] *Indian Act*, R.S.C. 1970, c.I-6, ss.11(f), 12(b) and 14. The author has previously described the system in more detail: See Sanders, *The Indian Act and the Bill of Rights* (1974) 6 Ottawa L.R. 397, 406.

judicial forum, while the women's groups were not. Part of the explanation may lie in the pattern of funding of native organizations. The status Indian organizations have been funded since 1970. The policy of funding was extended to non-status organizations, and later was extended to women and youth. However, when the government began funding the women's groups, it insisted that they represent both status and non-status women. The division between status and non-status Indian people is very real. Non-Indians who downplay the division as externally imposed usually fail to realize the extent to which the division has been internalized by the Indian communities. The predecessor organization to the National Indian Brotherhood, the National Indian Council, failed because it tried to unite both status and non-status Indian people into one national organization. On top of the low level of governmental funding, the government's insistence that funded groups represent both status and non-status women divided the organizations from the start and made agreement upon any controversy concerning status virtually impossible. Such was the fate of Indian Rights for Indian Women, a separate national organization formed after the national Indian women's conference in Saskatoon in 1972. The group, which organized around support for Jeanette Lavell, was forced, as a condition of federal funding, to have equal numbers of status and non-status women at their meetings. No more effective way to stifle that organization could have been devised.

To the surprise of many, the Supreme Court of Canada did not end the sexual discrimination that had deprived Jeanette Lavell of Indian status. There is now a trilogy of Supreme Court decisions dealing with the *Indian Act*[38] and the *Canadian Bill of Rights*:[39] *Drybones*,[40] *Lavell*[41] and *Canard*.[42] It is worth noting that only once prior to the *Drybones* decision had the Supreme Court of Canada given detailed consideration to a set of sections in the *Indian Act*.[43] It is also interesting that when Parliament debated the *Canadian Bill of Rights* in 1960, there was no discussion about the possible impact of the Bill on the *Indian Act*. Furthermore, before *Drybones* there was no available body of literature dealing with the *Indian*

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[38] R.S.C. 1970, c.I-6.

[39] S.C. 1960, c.44 (see R.S.C. 1970, Appendix III).

[40] *R* v. *Drybones* [1970] S.C.R. 282.

[41] *Supra*, f.n.36.

[42] *Supra*, f.n.7.

[43] *R.* v. *Devereaux* [1965] S.C.R. 567, dealing with the internal land holding system on Indian reserves, and ss.20, 82, 31(1) and (50) of the *Indian Act*, R.S.C. 1952, c.149.

Act.[44] The absence of judicial, political and scholarly material to assist the Supreme Court, in retrospect at least, virtually ensured that there would be problems.

With regard to the *Drybones* case,[45] the liquor sections of the *Indian Act* had been terminated in most areas of Canada prior to the decision and were ineffective in the areas where they remained in force. They were an embarrassment to non-Indians, for they were one of the last public signs of racial discrimination. The issue in the *Drybones* case (apart from the issue of the legal effect of the *Canadian Bill of Rights*) was uncontroversial. The abolition of the liquor sections would create no jurisdictional or transitional problems. Their time had come, and the Supreme Court of Canada was invited to deal the death blow. The only perceived danger was the precedent involved.

In the *Lavell*[46] case the Supreme Court of Canada was asked to apply the principle of the *Drybones* decision to the membership sections of the *Indian Act.* Those sections are the most complicated provisions in the present Act. There was a kind of consensus that the liquor sections were on their way out, but there was no consensus about reform of the intricate provisions for membership. Sections 11 and 12 of the *Indian Act* are confusing lists of inclusions and exclusions. The Federal Court of Appeal, which struck down the sexual discrimination of section 12(1)(b), viewed that section in isolation from the balance of the membership sections. Because of the climate of controversy which surrounded the final appeal, the Supreme Court of Canada did not have that luxury.

The only judicial decision which has attempted to reconcile the decisions in the *Drybones* and *Lavell* cases is the judgment of Mr Justice Beetz in the *Canard* case.[47] Following Mr Justice Ritchie's decision in *Lavell,* Mr Justice Beetz suggested that federal legislative jurisdiction over "Indians and Lands reserved for the Indians... could not be effectively exercised without the necessarily implied power to define who is and who is not an Indian ...".[48] Therefore, any status system legislated by Parliament is tied into the constitution, and thus placed above the *Canadian Bill of Rights*:

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[44] The only literature of note dealing with the Indian legal questions prior to *Drybones* is Staats, *Some Aspects of the Legal Status of Canadian Indians* (1964) 3 Osgoode Hall L.J. 36; Lysyk, *The Unique Constitutional Position of the Canadian Indian* (1967) 45 Can.Bar Rev. 513.

[45] *Supra,* f.n.40.

[46] *Supra,* f.n.36.

[47] *Supra,* f.n.7.

[48] *Ibid.,* 575.

> The *British North America Act, 1867,* under the authority of which the *Canadian Bill of Rights* was enacted, by using the word "Indians" in section 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression "Indian". This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in *Lavell,* or of legislative history of which the Court could and did take cognizance.[49]

Within constitutional limits, Parliament can discriminate in defining "Indians". Racial and sexual discrimination were noted as not easy to avoid "when it is a race which has to be defined . . .".[50]

The *Canadian Bill of Rights* applies, according to the judgment of Mr Justice Beetz, not to the criteria for status but to certain of the incidents of status. Incidents not "intimately connected" with status, incidents which are "remote or indirect" can be affected by the *Bill of Rights.*[51] The liquor sections could be struck down; sections, regulations or administrative decisions which unreasonably deny the surviving widow the right to administer the estate of her deceased husband could be struck down.[52] Access to an Indian reserve is the only example given of an incident intimately connected with Indian status. That conclusion is clearly correct. The *Indian Act* basically deals with the reserve system, and the membership provisions developed in order to define those persons who have the right to live on Indian reserves.

The non-Indian perception of the *Lavell* case is that the Indian women lost. It should be remembered that Indian women were sharply divided on the issue. To many Indian women the final decision in the *Lavell* case was a victory. This should serve as a warning that non-Indian perceptions and Indian perceptions are not the same in contemporary Canada. The non-Indian perception of Indian women which has been developing over the last few years is one which describes them as doubly oppressed. For example, a Chatelaine Magazine article was entitled "Indian Women — most unequal in Canada".[53] Also, a public meeting in Vancouver organized

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[49] *Ibid.*

[50] *Ibid.*, 576.

[51] *Ibid.*

[52] Mr Justice Beetz did not strike down the appointment of a person other than the widow to administer the estate, ruling that such a challenge could only be made in the Federal Court, and not in the provincial courts, from which the appeal had been taken; *ibid.*, 583.

[53] *Chatelaine Magazine,* February 1973, 38.

by the women's movement featured four Indian women as speakers. The chairperson, in introducing them, stated:

> They are discriminated against because they are Indians. They are discriminated against because they are women. And they are discriminated against even more because they are Indian women.[54]

The same chairperson acknowledged that the women's liberation movement had centered around white middle-class interests. On the other hand, like members of the earlier women's movement, Indian women focus their analysis around their roles as wives and mothers.

Dr Sally Weaver has astutely placed the *Lavell* case in the context of boundary maintaining mechanisms,[55] a context which explains many of the Indian statements about the issue. The *Lavell* case did not simply deal with the legal definition of membership, that is, the definition of the persons able to live on a reserve. The case was seen by status Indians as dealing with the maintenance of their communities, communities whose "boundaries" were established by the *Indian Act* membership system. To the puzzlement of non-Indians, status Indians viewed the issue as a conflict between group rights and individual rights. The women's rights arguments were resisted for a cluster of reasons. There was a fear that the one change in the *Indian Act* being sought by Jeanette Lavell would prove the first step on a slippery slope and that in the end the *Indian Act* as a whole would be seriously undercut. In that way the case threatened the Indian reserve communities, which looked to the *Indian Act* for protection. This threat could not be dismissed as imaginary. The lawyer for Yvonne Bedard argued that the *Indian Act* was substantially inoperative because of conflict with the *Canadian Bill of Rights.* Mr Justice Osler of the Ontario High Court accepted such an argument in a 1973 judgment.[56]

In addition to the "slippery slope" fear, there was an anti-white bias which focused on white men rather than white women. Status Indians feared that white men, as husbands of Indian women, would come onto the reserves and take over. White wives of status Indian men were not seen as posing the same threat to the Indian reserve communities. Finally, the conservatism of Indians led both to a

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[54] "Victims of the white man's lifestyle", *Vancouver Sun,* October 11, 1973.

[55] Weaver, "Judicial Preservation of Ethnic Group Boundaries: The Iroquois case" in *Proceedings of the First Congress* (1974), Canadian Ethnology Society, Canadian Ethnology Service Paper No.17, National Museum of Man, Mercury Series 48. Dr Weaver's assistance in discussing some of the issues canvassed in this article is gratefully acknowledged.

[56] *Isaac* v. *Davey* (1973) 3 O.R. 677, rev'd by [1975] 5 O.R. (2d) 610 (C.A.); the case has been appealed to the Supreme Court of Canada.

defense of the *Indian Act* status quo and a defense of the concept that the male was properly the head of the household.

Certain differences must exist if a minority group is to survive within a dominant society. Dr Weaver suggests, bluntly, that there must be some kind of "double standard" or there will be no minority group boundaries. In the period around 1973 women's rights became a major differentiating issue between status Indians and other Canadians. The fact that the argument against Jeanette Lavell was *not* based on traditional Indian social and cultural norms seems a clear indication that Dr Weaver's analysis is correct. She comments:

> From the Six Nations' perspective the struggle before the courts testifies to the degree to which a once matrilineal and matrilocal society has internalized the boundary maintenance criteria set for it by the host society and has thereby become especially vulnerable to external control.[57]

Paradoxically, in defending the *Indian Act* status quo, the Indians were fighting external controls which were threatening to change externally determined rules which had been internalized. That paradox was stated by Indian people in terms of cultural difference, although as the Association of Iroquois and Allied Indians put it, it was a defence of "what has become Indian custom".[58] In a recent United States decision a sexually discriminatory Indian membership system was found to constitute "a break with tradition" and additionally, was found to bear no direct relationship to cultural survival. The United States District Court refused to be an "external authority" and determine whether the criteria for membership were wise. While the court was deferring to a membership system drafted by the particular Indian reserve community itself (rather than "external" national legislation, as in Canada), the decision fits well with the argument of Dr Weaver.[59]

The *Lavell* controversy produced a decision by the status Indian organizations to attempt to revise the *Indian Act*. That decision was, however, largely a defensive measure against the threat perceived in the *Lavell* litigation. With the judicial resolution of the *Lavell* case in favour of the *Indian Act*, the Indian interest in revising the Act has lessened. The status quo continues. Indian women's organizations are divided on the issue of reform of the status sections

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[57] *Supra*, f.n.55, 50.

[58] Association of Iroquois and Allied Indians, Position Paper, November 27, 1971, 63.

[59] *Martinez* v. *Santa Clara Pueblo* U.S. District Court, District of New Mexico, June 25, 1975, District Judge Meecham, as yet unreported; excerpts reprinted in Indian Law Reporter, vol.2, No.8, August 1975, 41.

of the *Indian Act*. The male-dominated status organizations have little interest in the issue. Federal politicians, until now, have deferred on the question because of the proposed revision of the *Indian Act*. Indian issues are sufficiently marginal, politically, that there seems to be a good possibility of the status quo being continued indefinitely.

Can we anticipate a women's movement within Indian communities comparable to that found in the larger Canadian society? There seem two possible views. The first would argue that the Indian communities, as culturally different collectivities, may not be drawn into such concerns. In this view the *Lavell* case was an attempt to impose norms of the dominant society on a culturally different minority, and was, no matter how well motivated, just another piece of cultural imperialism. A second view suggests that the preconditions of the women's movement do not yet exist in Indian communities. In this view, the fact that the contemporary women's movement is middle class, white and urban is not seen as accidental. Only women in such situations presently have the education, the career motivations and the economic position which can lead to participation in such a movement. The Indian reserve communities, together with other rural and poor communities, will lag behind. This argument concludes that reserve communities will change their ideas of women's roles, but at a much slower pace than urban Canada. Both views, in the end, place the *Lavell* case in the context of differing social and cultural views between Indian communities and the larger Canadian society. The two views only differ on the question of whether that difference, as it relates to the role of women, will persist or diminish.