

drafting of section 17 was made easier by the content of section 15, and there was a curiously limited prohibition of intoxicants in section 9.

The next year, 1869, Parliament enacted *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6 (32-33 Vict.)*. Among its other provisions, section 6 is of interest here:

6. The fifteenth section of the thirty-first Victoria, 1868 Chapter forty-two, is amended by adding to it the following proviso:

"Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only."

So, again, Parliament promulgates its law and there is none to gainsay it. Again, Indians, no more and no less than every Euro-Canadian and every non-Indian, are bound to obey the law (for example, section 3, against providing intoxicating liquors, and section 19, false representation of enfranchisement) or endure the prescribed punishment.

Royal assent to the next pertinent statute, expressly named *The Indian Act*, 1876, was accorded on April 12, 1876, that is, just a few months before the making of Treaty 6 near Carlton on August 23, 1876 and August 28, 1876, and near Fort Pitt on September 9, 1876. Now, Parliament was exerting and extending ever more control over the constituent membership of every "tribe, band or body of Indians" and was defining what was a "band", and who was an "Indian". Section 3 of this 1876 Indian Act gave the definition of terms, thus:

3. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them, unless such meaning be repugnant to the subject or inconsistent with the context:"

1. The term "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term "the band" means the band to which the context relates; and the term "band", when action is being taken by the band as such, means the band in council.

2. The term "irregular band" means any tribe, band or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Canada, or who have not had any treaty relations with the Crown.

3. The term "Indian" means

First. Any male person of Indian blood reputed to belong to a particular band;

Secondly. Any child of such person;

Thirdly. Any woman who is or was lawfully married to such person;

(a) Provided that any illegitimate child, unless having shared with the consent of the band in the distribution moneys of such band for a period exceeding two years, may, at any time, be excluded from the membership thereof by the band, if such proceeding be sanctioned by the Superintendent-General:

(b) Provided that any Indian having for five years continuously resided in a foreign country shall with the sanction of the Superintendent-General, cease to be a member thereof and shall not be permitted to become again a member thereof, or of any other band, unless the consent of the band with the approval of the Superintendent-General or his agent, be first had and obtained; but this provision shall not apply to any professional man, mechanic, missionary, teacher or interpreter, while discharging his or her duty as such:

(c) Provided that any Indian woman marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act, except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the annual or semi-annual distribution of their annuities, interest moneys and rents; but this income may be commuted to her at any time at ten years' purchase with the consent of the band:

(d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged, and become a member of the band or irregular band of which her husband is a member:

(e) Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty.

4. The term "non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even though such person be only a temporary resident in Canada.

5. The term "entranchised Indian" means any Indian, his wife or minor unmarried child, who has received letters patent granting him in fee simple any portion of the reserve which may have been allotted to him, his wife and minor children, by the band to which he belongs, or any unmarried Indian who may have received letters patent for an allotment of the reserve.

6. The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsundered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

7. The term "special reserve" means any tract or tracts of land and everything belonging thereto set apart for the use or benefit of any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being sued, or in a person or persons of European descent, but which land is held in trust for, or benevolently allowed to be used by, such band or irregular band of Indians.

8. The term "Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown.

9. The term "intoxicants" means and includes all spirits, strong waters, spirituous liquors, wines, or fermented or compounded liquors or intoxicating drink of any kind whatsoever, and any intoxicating liquor or fluid, as also opium and any preparation thereof, whether liquid or solid, and any other intoxicating drug or substance, and tobacco or tea mixed or compounded or impregnated with opium or with other intoxicating drugs, spirits or substances, and whether the same or any of them be liquid or solid.

10. The term "Superintendent-General" means the Superintendent-General of Indian Affairs.

11. The term "agent" means a commissioner, superintendent, agent, or other officer acting under the instructions of the Superintendent-General.

12. The term "person" means an individual other than an Indian, unless the context clearly requires another construction.

4. All reserves for Indians or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions.

5. The Superintendent-General may authorize surveys, plans and reports to be made of any reserve for Indians, shewing and distinguishing the improved lands, the forests and lands fit for settlement, and such other information as may be required; and may authorize that the whole or any portion of a reserve be subdivided into lots.

11. No person, or Indian other than an Indian of the band, shall settle, reside or hunt upon, occupy or use any land or marsh, or shall settle, reside upon or occupy any road, or allowance for roads running through any reserve belonging to or occupied by such band; and all mortgages or hypothecs given or consented to by any Indian, and all leases, contracts and agreements made or purporting to be made by any Indian, whereby persons or Indians other than Indians of the band are permitted to reside or hunt upon such reserve, shall be absolutely void.

12. If any person or Indian other than an Indian of the band, without the license of the Superintendent-General (which license, however, he may at any time revoke), settles, resides or hunts upon or occupies or uses any such land or marsh, or settles, resides upon or occupies any such roads or allowances for roads, on such reserve, or if any Indian is illegally in possession of any lot or part of a lot in a subdivided reserve, the Superintendent-General or such officer or person as he may thereto depute and authorize, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant signed and sealed, directed to the sheriff of the proper county or district, or if the said reserve be not situated within any county or district, then directed to any literate person willing to act in the premises, commanding him forthwith to remove from the said land or marsh, or roads or allowances for roads, or lots or parts of lots, every such person or Indian and his family so settled, residing or hunting upon or occupying, or being illegally in possession of the same, or to notify such person or Indian to cease using as aforesaid the said lands, marshes, roads or allowances for roads, and such sheriff or other person shall accordingly remove or notify such person or Indian, and for that purpose shall have the same powers as in the execution of criminal process; and the expenses incurred in any such removal or notification shall be borne by the party removed or notified, and may be recovered from him as the costs in any ordinary suit:

Provided that nothing contained in this Act shall prevent an Indian or non-treaty Indian, if five years a resident in Canada, not a member of the band, with the consent of the band and the approval of the Superintendent-General, from residing upon the reserve, or receiving a location thereon.

13. Removal, arrest and punishment of persons and Indians, by warrant of the Superintendent-General, if they return after removal.

15. The Superintendent-General, or such officer or person as aforesaid, shall cause the judgment or order against the offender to be drawn up and filed in his office, and such judgment shall not be removed by *certiorari* or otherwise, or be appealed from, but shall be final.

16. Punishment of others than Indians of the band to which the reserve belongs trespassing on reserves "penalties for offences by trespassers" imprisonment in lieu of payment all fines paid to the Receiver-General for use and benefit of the band as directed by the Governor in Council.

20. If any railway, road, or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve be done under the authority of any Act of Parliament, or of the legislature of any province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; the Superintendent-General shall in any case in which an arbitration may be had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall

be paid to the Receiver General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian having improvements thereon.

25. No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act.

26. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding, except on the following conditions:

1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General; Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near and is interested in the reserve in question;

2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county, or district court, or stipendiary magistrate, by the Superintendent-General or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal;

27. No intoxicant to be permitted at a council of Indians.

The foregoing constitutes a lengthy example of Parliament's will regarding: "Indians, and Lands reserved for the Indians"; as stated in section 91, head 24, of the *Constitution Act, 1867*. Certain observations here, before embarking on the very negotiations for and texts of the treaties, will be pertinent to express as and among the factors which stand as the basis for the treaties.

Firstly, subsection 3.12 does not mean that Indians are not "persons": it is just a drafting technique in a racist statute to differentiate others, and set Indians apart. A more modern construct would or could have been: "non-Indians".

Secondly, it is a strongly pressed argument on the plaintiffs' part to assert that, logically they say, the reserving of tracts of land for the exclusive use, occupation and benefit of Indian bands, must mean that such bands can control whomever they will permit to come on their land, or whomever they will forbid to come onto their land; and that means, say the plaintiffs, that they enjoy an unextinguished right to control their own membership. That would sound like a logical argument if it had been the Indians who *sui generis* did all that of their own will. The control and the manner and expression of the control of the identity of Indians, the exclusion of half-breeds, the

definition of a band, the protection of reserves, the creation of an officer, the Superintendent-General, and the enactment and invocation of the criminal law which only the state can do, the subsection of both Indians and non-Indians alike to the law, civil and criminal, starting at section 3 of *The Indian Act*, 1876, enacted entirely pursuant to Parliament's heads of legislative power, all demonstrate that the plaintiffs' argument is founded on wrong premises. In fact membership, use, occupation and benefit of Indian lands was not asserted by the plaintiffs' putative ancestors and predecessors in the least degree, even before the making of Treaty 6. Those Indians of yore were all subjects of Her Majesty the Queen whose Privy Counsellors resided in Ottawa, as they well knew and understood, and as they also knew and well understood they were obliged as fully as non-Indians to obey the law. All were British subjects born in Canada, that which translates, today, to Canadian citizenship. Even the Hon. Alexander Morris who negotiated treaties on behalf of the Crown (i.e. the Government of Canada) and dealt with contemporary Indians was as much a native of North America as they. He was born at Perth (now in Ontario, then Canada West) on March 17, 1826, according to *The Canadian Encyclopedia*.

The plaintiffs' asserted right to control their own membership of their "bands" (a wholly statutory term) was emphatically extinguished by *The Indian Act*, 1876. Complete control was taken by Parliament in the enactment of that statute and its predecessors. Even if control of hunting and social groups' or encampments' membership had been a real Aboriginal right it was extinguished by most clear and unambiguous legislation before Treaties 6, 7 and 8 ever came into being. Moreover, one important aspect of the control exerted by Parliament and the Government of Canada, the exclusion of half-breeds, will be seen to have been evinced by Lieut. Governor Morris in the bargaining for Treaty 6.

The Morris Record

Conscious that the Indians had not yet developed writing, the treaty commissioners kept rather full records of what was said on each side during the negotiations. The plaintiffs' counsel, near the beginning of the trial, quoted a significant passage from the opus: *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on Which They Were Based, and Other Information Relating Thereto* by the Honourable Alexander Morris, P.C., Belfords, Clark & Co., Publishers (first printed in 1880) Toronto, hereinafter: the Morris record. That significant passage, so quoted, will be referred to later in these reasons. Although not formally exhibited, a copy of the Morris record was furnished to the Court. (without anyone's objection of course, in light of the passages cited from *Sioui* above), on behalf of the intervenor, the Native Council of Canada. Again, for emphasis, the Court states that in this quintessentially public law litigation the parties and interveners simply cannot, by their objections erase, or by their consent validate, the authentic historical record. Although the Morris record is available to be quoted and interpreted, considering its first publication as early after the events described as 1880, it is entirely neutral evidence in this context, in the sense that it is a contemporaneous historical record made and published a century before this litigation. Indeed, the plaintiffs cite extensive passages of the Morris record in Volume 2 of their brief of authorities, treaties, texts and articles.

In 1871, for example, long before Treaty 6 was concluded, the parties learned what would be each other's positions, in part, and whom "the Crown" or "the Queen" meant "Canada" not the Court of St. James. At pages 169-170 of the Morris record, reference is made to an extract forwarded to Ottawa of "a letter from Mr. Christie, then Chief Factor of the Hudson's Bay Company, and subsequently one of the Treaty Commissioners, in which, he forwarded the messages of the Cree Chiefs to Lieut.-Gov. Archibald, cad96our Great Mother's representative at Fort Garry, Red River Settlement." This extract and messages are as follows:

Edmonton House, 13th April, 1871.

On the 13th instant (April) I had a visit from the Cree Chiefs, representing the Plain Crees from this to Carlton, accompanied by a few followers.

The object of their visit was to ascertain whether their lands had been sold or not, and what was the intention of the Canadian Government in relation to them. They referred to the epidemic that had raged throughout the past summer, and the subsequent starvation, the poverty of their country, the visible diminution of the buffalo, their sole support, ending by requesting certain presents *at once*, and that I should lay their case before Her Majesty's representative at Fort Garry. Many stories have reached these Indians through various channels, ever since the transfer of the North-West Territories to the Dominion of Canada, and they were most anxious to hear from myself what had taken place.

I told them that the Canadian Government had as yet made no application for their lands or hunting grounds, and when anything was required of them, *most likely Commissioners* would be sent beforehand to treat with them, and that until then they should remain quiet and live at peace with all men. I further stated that Canada, in her treaties with Indians, heretofore, had dealt most liberally with them, and that they were now in settled houses and well off, and that I had no doubt in settling with them the same liberal policy would be followed.

Gold may be discovered in paying quantities, any day, on the eastern slope of the Rocky Mountains. We have, in Montana, and in the mining settlements close to our boundary line, a large mixed frontier population, who are now only waiting and watching to hear of gold discoveries to rush into the Saskatchewan, and, without any form of Government or established laws up there, or force to protect whites or Indians, it is very plain what will be the result.

A representative message from the Cree Chiefs of the Saskatchewan plains to Lieut.-Gov. Archibald, at Fort Garry, the message of Chief Sweet Grass, among others, ran in this manner:

Great Father, I shake hands with you, and bid you welcome. We heard our lands were sold and we did not like it; we don't want to sell our lands; it is our property, and no one has a right to sell them.

Our country is getting ruined of fur-bearing animals, hitherto our sole support, and now we are poor and want help, we want you to pity us. We want cattle, tools, agricultural implements, and assistance in everything when we come to settle; our country is no longer able to support us.

Make provision for us against years of starvation. We have had great starvation the past winter, and the small-pox took away many of our people, the old, young, and children.

We want you to stop the Americans from coming to trade on our lands, and giving firewater, ammunition and arms to our enemies the Blackfeet.

We made a peace this winter with the Blackfeet. Our young men are foolish, it may not last long.

We invite you to come and see us and to speak with us. If you can't come yourself, send someone in your place.

We send these words by our Master, Mr. Christie, in whom we have every confidence. That is all. Morris record, at pages 170-171.

The Morris record reveals that just as a clergyman, Rev. George McDougall had been earlier requested to meet with and report back about the Crees prior to the making of Treaty 6, so another clergyman, Fr. Constantine Scollen was requested to do the same regarding the Blackfeet. He wrote his report to Lieut.-Gov. Morris, dated September 8, 1876. It occupies pages 247-249 of the Morris record.

In the meanwhile, the Hon. David Laird, now Lieut.-Gov. of the North-West Territories, and police Lieut.-Col. James McLeod (known to the Blackfeet as Stamixotokon) had been, in August, 1877, appointed to be the Government's special Indian Commissioners for the purpose of making a treaty (Number 7) with the Blackfeet, Blood, Piegan, Stony and Sarcee tribes and any other Indians of the unsundered parts of the territories adjoining the U.S. boundary, east of the Rockies and adjoining the surrendered lands subject to Treaties 4 and 6. Father Scollen had reported on the straitened circumstances of the Blackfeet and had urged the Government to propose a treaty with them and the other "clans" as soon as possible.

The *Globe* newspaper of October 4, 1877 gave a detailed transcription of Lieut.-Gov. Laird's account of the negotiations and speeches of the Indians and the Commissioners. It is reported at pages 251-262 of the Morris record. Some portions of what Commissioner Laird reported are of special interest here:

On the evening of Monday I also received a message from Bobtail, a Cree Chief, who, with the larger portion of the band, had come to the treaty grounds. He represented that he had not been received into any treaty. He, however, had not attended the meeting that day, because he was uncertain whether the Commissioners would be willing to receive him along with the Blackfeet. I asked him and his band to meet the Commissioners separate from the other Indians on the following day. It was agreed that Bobtail would sign an adhesion to Treaty 6; page 257.

On Tuesday we met the Indians at the usual hour. We further explained the terms outlined to them yesterday, dwelling especially upon the fact that by the Canadian Law their reserves could not be taken from them, occupied or sold, without their consent. They were also assured that their liberty of hunting over the open prairie would not be interfered with, so long as they did not molest settlers and others in the country.

We then invited the Chiefs to express their opinions. One of the minor Blood Chiefs made a long speech. He told us the Mounted Police had been in the country for four years, and had been destroying a quantity of wood. For this wood he asked the Commissioners should make the Indians a present payment of fifty dollars a head to each Chief, and thirty dollars a head to all others. He said the Blackfeet, Bloods, Sarcées and Piegans were all one; but he asked that the Crees and Half-breeds should be sent back to their own country. The Queen, he remarked, had sent the police to protect them; they had made it safe for Indians to sleep at night, and he hoped she would not soon take these men away.

Crowfoot said he would not speak until to-morrow. Old Sun, another influential Blackfoot Chief, said the same. Eagle Tail, the head Chief of the Piegans, remarked that he had always followed the advice the officers of the Mounted Police gave him. He hoped the promise which the Commissioners made would be secured to them as long as the sun shone and water ran. The Stony Chiefs unreservedly expressed their willingness to accept the terms offered.

Fearing that some of the Indians might regard the demands of the Blood Chief who had spoken, if not promptly refused, as agreed to, I told them he had asked too much. He had admitted the great benefit the Police had been to the Indians, and yet he was so unreasonable as to ask that the Government should pay a large gratuity to each Indian for the little wood their benefactors had used. On the contrary, I said, if there should be any pay in the matter it ought to come from the Indians to the Queen for sending them the Police. Hereupon, Crowfoot and the other Chiefs laughed heartily at the Blood orator of the day.

I also said the Commissioners could not agree to exclude the Crees and Half-breeds from the Blackfoot country; that they were the Great Mother's children as much as the Blackfeet and Bloods, and she did not wish to see any of them starve. Of course the Crees and Half-breeds could be prosecuted for trespassing on their reserves. In this the Indian Act secured them. The Local Government had passed a law to protect the buffalo. It would have a tendency to prevent numbers from visiting their country in the close season. But to altogether exclude any class of the Queen's subjects, as long as they obeyed the laws, from coming into any part of the country was contrary to the freedom which she allowed her people, and the Commissioners would make no promise of the kind. *

What the popularly acknowledged chiefs averred on behalf of their people is important to note, especially the words of Crowfoot:

... Crowfoot was the first to speak. His remarks were few, but he expressed his gratitude for the Mounted Police being sent to them, and signified his intention to accept the treaty. The Blood Chief who made the large demands on the previous day said he would agree with the other Chiefs. Old Sun, head Chief of the North Blackfeet, said Crowfoot spoke well. We are not going

to disappoint the Commissioners. He was glad they were all agreed to the same terms. They wanted cattle, guns, ammunition, tobacco, axes and money. Bull's Head, the principal Chief of the Sarcees, said, we are all going to take your advice. Eagle Head, the Piegan head Chief, remarked, "I give you my hand. We all agree to what Crowfoot says." Rainy Chief, head of the North Bloods, said he never went against the white man's advice. Some of the minor Chiefs spoke to the same effect.

The Commissioners expressed their satisfaction at the unanimity among the Indians, and said they would prepare the treaty and bring it to-morrow for signature. The only difficult matter then to be arranged was the reserves. The Commissioners thought it would take unnecessary time to discuss this question in open meeting, and resolved that one of them should visit the head Chiefs at their camps, and consult them separately as to the localities they might desire to select. Lieut.-Col. McLeod undertook this duty, while I attended to the preparation of the draft treaty. He succeeded so well in his mission that we were able to name the places chosen in the treaty.

On Saturday, 22nd September, we met the Indians to conclude the treaty. Mekasto, or Red Crow, the great Chief of the South Bloods, had arrived the previous evening, or morning, on the ground, and being present, came forward to be introduced to the Commissioners.

The assemblage of Indians was large. All the head Chiefs of the several tribes were now present; only two Blackfeet and two Blood minor Chiefs were absent. The representation was all that could be expected.

The Commissioners had previously informed the Indians that they would accept the Chiefs whom they acknowledged, and now close in front of the tent sat those who had been presented to the Commissioners as the recognized Chiefs of the respective bands.

The conditions of the treaty having been interpreted to the Indians, some of the Blood Chiefs, who had said very little on the previous day, owing to Red Crow's absence, now spoke, he himself in a few kind words agreeing to accept the treaty. Crowfoot then came forward and requested his name to be written to the treaty. The Commissioners having first signed it, Mr. L'Heureux, being familiar with the Blackfoot language, attached the Chiefs' names to the document at their request and witnessed to their marks.

... I was waited upon by a deputation of Half-breeds, who presented me with a petition, expressing the hope that the buffalo law might not be stringently enforced during the approaching winter, and praying that they might receive some assistance to commence farming. With respect to the buffalo ordinance, I told them that the notice having been short, the law would not be very strictly enforced for the first winter, and in regard to their prayer for assistance to farm, I said I would make it known at Ottawa. *

The foregoing passages are only a small portion of Chapter X, The Blackfeet Treaty (No. 7) in the Morris record. That chapter is too voluminous to repeat here, but it is almost all of

importance. From these passages, the Court holds that the Indian parties to Treaty 7 clearly understood that:

a) they were dealing with the Commissioners of the Canadian government who specifically invoked "The Canadian Law" and "the *Indian Act*" whose source was mentioned by strong implication to be "at Ottawa",

b) they, being British subjects and Canadian Indians, were with the Euro-Canadian settlers equally subject to Canadian law, civil and criminal,

c) they could not exclude other persons from the surrendered lands, except their reserves,

d) they could freely pursue their hunting and fishing in the surrendered lands, unless occupied by settlers and with the influx of settlers the land available for hunting and fishing could only diminish in area,

e) they would not control the new bands' membership in terms of who was counted as an Indian and who (half-breeds) was excluded from the Treaty and the chosen reserves and annual payments.

Negotiations

Under the date of August 23, 1876 in the Morris record, at page 222 in Chapter IX about the treaties at Forts Carlton and Pitt (Treaty 6), it is written that a principal chief of the Crees present approached Governor Morris during the negotiations to ask publicly:

Mis-tow-as "I wish to speak a word for some Half-breeds who wish to live on the reserves with us, they are as poor as we are and need help."

Governor "How many are there?"

Mis-tow-as "About twenty."

Governor "The Queen has been kind to the Half-breeds of Red River and has given them much land; we did not come as messengers to the Half-breeds, but to the Indians. I have heard some Half-breeds want to take lands at Red River and joint the Indians here, but they cannot take with both hands. The Half-breeds of the North-West cannot come into the Treaty. The small class of Half-breeds who live as Indians and with the Indians, can be regarded as Indians by the Commissioners, who will judge of each case on its own merits as it comes up, and will report their action to the Queen's Councilors for their approval.

The treaty was then signed by the Lieutenant-Governor, Hon. James McKay, Hon. W. J. Christie, Mis-tow-as, Ah-tuck-ah-coop, and the remainder of the Chiefs and the Councilors. On page 228 of the Morris record, a meeting on August 28, 1876, with the Willow Indians of Duck Lake was held about 8 kilometres from Carlton House. Again it is recorded:

A request was then made that the treaty should include the Half-breeds, to which the Governor replied: "I have explained to the other Indians that the Commissioners did not come to the Half-breeds: there were however a certain class of Indian Half-breeds who had always lived in the camp with the Indians and were *in fact* Indians, would be recognized, but no others."

On page 226, regarding the same meeting as mentioned immediately above, on the same August 28, the Morris record has a quotation of Governor Morris to the Crees, thus:

One of you made a request that if he were accepted as a Chief, he should have a blue coat. I do not yet know who the Chiefs are. To be a Chief he must have followers. One man came forward as a Chief and I had to tell him unless you have twenty tents you cannot continue as a Chief.

The above three instances, among others demonstrate quite conclusively that if there were an Aboriginal right of control of membership it was conclusively extinguished at treaty time and as a condition of concluding the treaty. Governor Morris certainly asserted control over

membership by the Canadian government and in consonance with the provisions of *The Indian Act*, 1876 and preceding legislation enacted by the Parliament of Canada. Other sources of the same historic assertion of control are Exhibit 1(4), pages 36-39, and of course the plaintiffs' counsel's reading of the passages into the record in trial transcript (TT) 2, pages 81 and 82. The Government's assertion of control over band membership on reserves, and off, was unambiguously stated by statute and by Alexander Morris, the Government's Treaty Commissioner.

Having sent Rev. George McDougall in 1875 to take to the Indians of the area which, one year later, was covered by treaty, the main intentions of the Canadian government in the upcoming treaty negotiations, Governor Morris received Rev. McDougall's report, dated October 23, 1875, parts of which ran thus:

The topics generally discussed at their council and which will be brought before the Commissioner are as follows in their own language. "Tell the Great Chief that we are glad the traders are prohibited bringing spirits into our country; when we see it we want to drink it, and it destroys us; when we do not see it we do not think about it. Ask for us a strong law, prohibiting the free use of poison (strychnine). It has almost exterminated the animals of our country, and often makes us bad friends with our white neighbors. We further request, that a law be made, equally applicable to the Half-breed and Indian, punishing all parties who set fire to our forest or plain. Not many years ago we attributed a prairie fire to the malevolence of an enemy, now every one is reckless in the use of fire, and every year large numbers of valuable animals and birds perish in consequence. We would further ask that our chiefs be established by the Government. Of late years almost every trader sets up his own Chief and the result is we are broken up into little parties, and our best men are no longer respected."

...
Believing it would be satisfactory to your Honor and of service to the Commissioners, I have kept the number of all the tents visited and the names of the places where I met the Indians (... was 3,976). Morris record, at pages 174-175; emphasis added.

Clearly, a people who were experiencing the setting-up of false, puppet chiefs and social granulation "into little parties" due to the influence of traders, cannot be believed to be controlling its own membership. A people which sought governmental establishment of its own "chieftships" in order to have the state make its political and social officers have official recognition in order to avoid that people's willily-granulation at the whim and commercial greed of traders, cannot be held to be controlling its own membership. If such control were truly an Aboriginal practice, then the Indians themselves lost it without any push by the Government of Canada which truly asserted and exercised such control. Was this conclusion understood then by the Indians as this Court now understands it? It was they who first acknowledged loss (or absence) of control in the first place; and it was they who requested the Government to assert control, for and on their behalf, as in the statutes, so in the treaties.

There is an underlying, sometimes articulated premise in the jurisprudence and among certain cynical activists that the "pitiable Indians" were easy dupes for superior Euro-Canadians and needing protections which applied not only to 19th Century Indians, but also to contemporary Indians, born in the mid-20th Century. This Court finds nothing inferior, genetic, social or intellectual *inter alia* about those Indians who entered into the treaties, nor their descendants today. This Court rejects all stated or implied notions of any inferiority of Indians, whatever. That is why the Court leans against the alleged need, over a century later, of special state protection of Indians, which protection often appears to be excessive and degrading to Indians in comparison with all the other "visible" (and not so "visible") peoples who make up the tax-paying and general population of Canada. Certainly the Morris record (pages 219-228, 270-271) reveals instances of hard-bargaining and excessive demands beyond the Canadian government's Commissioners' power to yield. There is even at least one instance in which the Commissioners exceeded their authority because of the Indians' persuasion acknowledged that they were taking a risk in hoping to have their so yielding subsequently ratified by Ottawa. The courts, too, often and too much pretend that the Indians did not understand their bargained treaties.

The jurisprudence is latterly taking a little more realistic and less paternalistic view of the Indians in modern times which are so different from those of the late 19th Century. The principal opinion, it appears, was written by Mr. Justice La Forest in *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), 1990 2 S.C.R. 85, where he is recorded first at page 122 as warning that the Trial Judge, the Court of Appeal and Chief Justice Dickson in that case imparted an interpretation to paragraph 90(1)(b) of the *Indian Act* R.S.C. 1970, c. I-6, which:

... interpretation not only goes beyond the clear terms and purposes of the Act, but flies in the face of the historical record and has serious implications for Indian policy that are harmful both for government and for native people.

The passage recorded on page 130 has a certain relevance to the present case:

The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use; see the comments of Professor Slatery in his article "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753. The sections of the *Act* relating to

the inalienability of Indian lands seek to give effect to this protection by interposing the Crown between the Indians and the market forces which, if left unchecked, had the potential to erode Indian ownership of these reserve lands. This Court, in its recent decision of *Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (SCC), 1988 2 S.C.R. 654, alluded to this point when it noted, at p. 677, that the feature of inalienability was adopted as a protective measure for the Indian population lest it be persuaded into improvident transactions.

Peoples found to be in a more primitive (i.e. hunting) state of development than the others' state (i.e. industrial or post-industrial) are emphatically not inferior peoples. Their state of development might be likened by analogy to "adolescent" compared with the others' (non-Indians) "adult" state of development. But the law and treaties have protected Indians from "spreading their wings" as may non-Indian adolescents who do and always have made "improvident transactions" until a majority learned not to do so, but to conduct themselves prudently.

Mr. Justice La Forest continued at page 138:

There can be no doubt, on a reading of s. 90(1)(b), that it would not apply to any personal property that an Indian band might acquire in connection with an ordinary commercial agreement with a private concern. Property of that nature will only be protected once it can be established that it is situated on a reserve. Accordingly, any dealings in the commercial mainstream in property acquired in this manner will fall to be regulated by the laws of general application. Indians will enjoy no exemptions from taxation in respect of this property, and will be free to deal with it in the same manner as any other citizen. In addition, provided the property is not situated on reserve lands, third parties will be free to issue execution on this property. I think it would be truly paradoxical if it were to be otherwise. As the Chief Justice has pointed out in *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), 1983 1 S.C.R. 29, at p. 36:

Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens. Further in *Mitchell v. Peguis Indian Band*, La Forest, J. is recorded on page 142 as thinking that in negotiating treaties, the Crown enjoyed a "superior bargaining position", that which is not so very apparent in the Morris record. In any event, however, and despite the possibly erroneous statement of "bargaining position", the learned Judge wrote these otherwise relevant passages, recorded at pages 142-143:

Nowegijick v. The Queen

While the textual and historical arguments to be made for limiting the meaning of "Her Majesty" in s. 90(1)(b) to the federal Crown appear to me to be irretrievable, I recognize that it is necessary to ask whether the canons of construction generic to the interpretation of statutes relating to Indians change this result. These canons are, of course, those set out by the Chief Justice in *Nowegijick*, *supra*, at p. 36.

I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.

But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown; see *United States v. Powers*, 305 U.S. 527 (1939), at p. 533.

At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.

It is surely apparent that it is not eternal dependence with apartheid, but equal self-reliance, (including Canada's so-called "social safety net" for such as it is and will be) which promote the equal human dignity of all Canadians. It is difficult to understand why the courts in recent years have promoted dependence. The so-called "honour of the Crown" is surely nothing more than a transparent semantic membrane for wrapping together Indian reserve apartheid and perpetual dependence on Canadian taxpayers. This melancholy situation, being authentically historic, does nothing to support the plaintiffs' claim to control their own membership as is already demonstrated herein. It has contributed to the depression and poverty of many Indians over time.

It is unfortunate that the Morris record does not extend to the matter of Treaty 8. However, the plaintiffs, in Volume 1 of their brief of authorities, have reproduced, at tab 6, what appears to be Chapter II of *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* by René Fumoleau, McCrelland and Stewart, 1973. That chapter proclaims its subject to be "Treaty 8, 1897-1900". Here are some significant passages at pages 46-48, 50-55, 58, 60-62:

The signing of Treaty 8 must be viewed in relation to political and economic developments which were shaping the future of a young nation. The North West Mounted Police had succeeded

in bringing law and order to the prairies, thus establishing Canadian political sovereignty over the southern portion of the land which had come under the Dominion flag in 1870. Development was going ahead steadily, insured by Indian treaties and facilitated by improved transportation systems.

But opportunity in the Unceded Territories lying north of the prairies soon began to attract adventurers and settlers. Between 1896-1898 the move north was to the gold fields of the Klondike. The effect which this had on the country and on the native population was far-reaching, encompassing the responsibilities of the North West Mounted Police in patrolling and administering the Athabasca-Mackenzie District, as well as the decision to make treaty with the Indians

Yet limited knowledge of the country and of the people would militate against the treaty being of long-term benefit to either the Government or the Indians.

Treaty 8 covers a large area. It took the Treaty Commission two summers to obtain the adhesion of all of the Indians concerned. At the same time, the Half-Breed Commission was settling accounts with the Metis, thus effectively dividing the native people into two groups, Treaty and Non-Treaty Indians.

The reader may be momentarily confused by apparent contradictions in the accounts of events surrounding the signing of Treaty 8. The documents which have been used to reconstruct this period reflect the bias or interest of individuals and will necessarily differ on points of detail or interpretation. This is not to say that these differing versions do not converge at a point just beyond historical vision.

By the spring of 1897 the Klondike gold rush was on. Train-loads of gold-seekers poured into Edmonton and Vancouver from around the world. Predictions were made that 50,000 people would travel the Athabasca and Mackenzie rivers enroute to the gold field, outnumbering by far the resident population of the area. This figure was highly exaggerated, but the several hundreds who did travel these rivers did not pass by without being noticed.

By the end of 1898, 860 prospectors reached Fort Smith. Of this number about 70 returned to Edmonton or remained in the vicinity of Great Slave Lake. About 790 reached Fort Simpson. Most of these wintered near the trading posts or in shacks along the Mackenzie River. By the end of August, 1899, "529 miners and 186 boats had gone by Fort Wrigley".

Many halted their rush to the Klondike when news spread that rich gold mines existed at the eastern end of Great Slave Lake

All contemporary records indicate that this increased mining activity on the shores of Great Slave Lake was an important reason for including the area within the boundary of Treaty 8. Father Breynt noted in his diary of 1899.

Worrying about the news of rich gold mines having been discovered on Great Slave Lake, and desiring to assure its rights to the greatest part of the loot, the Government prudently hurried to send a treaty commission to deal with the Indians and to purchase from them a complete surrender of their land rights in exchange for a perpetual yearly rent and other gifts.

"Loot" may have been the best word to use, considering the grievances which the Indians had against the prospectors. Charles Mair, a member of the Half-Breed Commission of 1899, related this social problem to the Government's decision to make a treaty:

The gold-seekers plunged into the wilderness of Athabasca without hesitation, and without as much as "by your leave" to the native. Some of these marauders, as was to be expected, exhibited on the way a congenital contempt for the Indian's rights. At various places his horses were killed, his dogs shot, his bear-traps broken up. An outcry arose in consequence, which inevitably would have led to reprisals and bloodshed had not the Government stepped in and forestalled further trouble by a prompt recognition of the native's title . . . The gold-seeker was viewed with great distrust by the Indians, the outrages referred to showing, like straws in the wind, the inevitable drift of things had the treaties been delayed.

In addition to extinguishing Indian title to the land, the Government was looking for tighter control over both Indians and whites, to insure peaceful settlement and development of the land, and to promote the harmonious co-existence of Indians and whites. In the North, as everywhere else, economic considerations far outweighed all others in the formulation of Indian policy.

Modern historians agree on the motives behind the negotiations of Treaty 8:

"There were talks of railway from Edmonton to the Nelson River or to the Liard River, and thence to the Yukon. All these reasons compelled the Government to organize some kind of administration and to deal by treaty with the Northern Indians as had been done with the Prairie Indians." Bishop Grouard, *Soixante Ans d'Apostolat* p. 358.

"Since a find of minerals was liable at any time to send a rush of other and more permanent settlers there, it became necessary for the Government to get some control of the Crees, Chipewyans and Beavers in the Athabasca and Peace River countries. It was consequently decided to send a party of Commissioners in to bring these tribes into treaty relations with the Government." K. Hughes, *Father Lacombe, The Black Robe Voyageur*, 1911, p. 377.

"It was not so much to preserve order as to protect them the Indians from the Whites, who, now that the country south was fast settling, would surely encroach on their domain, that this treaty Treaty 8 was made." Sir C.E. Denny, *The Law Marches West*, 1931, p. 300.

"Large crowds of gold-seekers were then moving to the Yukon, (1898). To prevent any trouble between these foreigners and the Indian tribes whose territories they were crossing, a Treaty

commission was sent to the Great North in 1899." "A.G. Morice, O.M.I., *Histoire Abrégée de l'Ouest Canadien*, 1914, p. 130.

"Reacting first to the advent of prospectors and settlers during and after the Klondike gold rush, the department of Indian Affairs made preparations to bring under treaty the Indians of the Athabasca and Peace River districts north of Treaty 6 and south of Great Slave Lake." M. Zaslav, *The Opening of the Canadian North*, 1971, p. 224-225.

On January 4, 1897, a North West Mounted Police patrol left divisional headquarters at Fort Saskatchewan, Alberta, by dog-team. It was the first of annual patrols which would penetrate the Peace River country and the north beyond. Led by Inspector Arthur Murray Jarvis, the first patrol reached Fort Resolution on February 13, and was back at Fort Saskatchewan on April 14, having travelled more than 2,000 miles. Ostensibly the patrol was in the Athabasca District "to look into various matters such as the prevalence of destructive fires, traffic in liquor, and the allegedly wholesale setting out of poison by white trappers in the area". As the first official Government presence in the north, other than the Dominion land surveyors who had travelled the country since 1882, the police patrol would also serve to secure Canadian sovereignty over the vast land

These reports constitute the earliest and only official records of the northern districts. For the purpose of evaluating conditions affecting the signing of Treaty 8, these reports are invaluable. They describe the Indian's way of life, his complaints as increasing numbers of traders, trappers, and prospectors invade his ancestral hunting grounds, and his reactions when confronted for the first time with the enforcement of Canadian laws.

The next two patrols were led by Inspector W. R. Routledge. In the winter of 1897-1898 he reached Fort Simpson, covering 2,172 miles in 80 days. The following winter the patrol went as far as Fort Resolution, proceeding on the way back into the Peace River country which was to be included in Treaty 8. Throughout the journey the patrols were vigilant for evidence of violations of fire, liquor, poison, and game laws, faithfully recording details of irregularities.

Although relatively minuscule in volume the illegal traffic of liquor in the North was one of the first targets of the police patrols.

Routledge noted that this liquor traffic "is confined to the lower class of White hunters and Half-breeds employed on the River". During the time of the patrols the prohibitory clauses of the Northwest Territories Act were strictly enforced, e.g., "Thomas McLelland was trading liquor and causing drunkenness in the Indian camps. I tried him, found him guilty and fined him \$300 and costs."

The use of poison to kill fur-bearing animals was unknown in Indian territory until the arrival of white hunters and trappers in the Athabasca and Mackenzie Districts.

Everywhere along his route, Inspector Jarvis found evidence that poison was being used.

A few whites and half-breeds were taken to court by Jarvis, convicted of using poison, and fined \$25 or \$50. Small wonder that "the Indians were much pleased at the visit of the Police and their action towards the suppression of laying out poison". Inspector Routledge's report of 1898 indicated that "the use of poison in the North country seems to have been pretty well stamped out". It was the white trappers "who were the greatest offenders", and the departure of some for the Klondike gold fields reduced the use of poison. However, it still remained an occasional means of getting furs and a source of complaint to the Indians late in the 1930's.

In the face of the frequent misery and starvation of the Indian people, the Government's concern for preserving game seemed misplaced. Constant H. Giroux, OMI, Catholic missionary at Arctic Red River, wrote to Inspector Jarvis on July 1, 1897, and contrasted the Government's prompt action and efforts to preserve valuable animals and its apparent unconcern for the Indians. "I, at the same time, would beg of you to endeavour to get the same Government to show as much zeal in preserving the lives of human beings who are to be found therein." The police patrols of 1897, 1898 and 1899 witnessed and recorded these conditions:

Now with the presence of the North West Mounted Police, government did not seem so remote nor assistance so far away. By means of the annual patrol, the Police had gained the respect of the people, giving as it did the semblance of protection against intruders and security in troubled times. Some people at Fort Chipewyan firmly believe that their forefathers signed Treaty 8 because they were told that "the Queen will never let your children die from hunger". This might well be true.

What offer was to be made to the Metis of the Athabasca-Mackenzie District? Of prime importance was that "their acquiescence in the relinquishment of the aboriginal title should be secured." Finally, it was considered more conducive to their welfare and more in the public interest to take them into treaty than to give them scrip. Metis would be allowed to take treaty, if they so desired, on the judgment of the Commissioners who would determine which Metis would be dealt with as Indians. Those who were unwilling or not allowed would receive a scrip to either \$240 or 240 acres of land.

Two factors which could have influenced the boundaries and the timing of Treaty 8 should be mentioned here. Agitation by the Metis people of the Lesser Slave Lake and Peace River areas for recognition of their land claims could well have accelerated treaty plans since traditionally, settlement with the Metis had never preceded an Indian treaty.

This theory is more credible when comparison is made with the Yukon where, at the time of Treaty 8, political, economic, and social factors were similar to those in the Athabasca-Mackenzie area, but where there was no Metis population to be pacified.

In a similar vein, the influence of a powerful Edmonton politician, in the person of Frank Oliver, could well have been a determining factor in setting boundary lines. In promoting an all-Canada route to the Klondike, with Edmonton as the gateway, Oliver would try to draw Ottawa's attention to northern Alberta.

Treaty Commissioner James A.J. McKenna expressed his views on the reserve system in a letter to Sifton dated April 17, 1899:

... it might be desirable to give the Commissioners a freer hand. We can scarcely rely on the experience of the past in dealing with the Indians now to be treated with. When the Government negotiated for the surrender of the Indian title to the land in the organized territories, it had to deal with Indian nations which had distinct tribal organizations. The communal idea was strong and made necessary the setting apart of reserves for the continuance of the common life until the Indians could be gradually weaned from it.

The most that can be said in favour of the reserve system, however, is that reserves made it easier for the Government to control and feed the Indians in a country where it was necessary to do so. Experience does not favour the view that the system makes for the advancement of the Indians.

From what I have been able to learn of the North country, it would appear that the Indians there act rather as individuals than as a nation, and that any tribal organization which may exist is very slight. They live by hunting, and by individual effort, very much as the halfbreeds in that country live. They are averse to living on reserves; and as that country is not one that will ever be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country. The most the Indians are likely to require in the way of reserves are small fishing stations at certain points which they might desire to have secured to them.

Sifton gave the Treaty Commissioners their final instructions on the matter, on May 12, 1899. Indian people could either select reserves for their bands or hold land "in severalty". This meant

that any Indian family could have its own small reserve, apart from those of other families or bands.

The story is long and complicated. Many prominent Indians, mentioned in this case in evidence, participated in the negotiations, including Chief Keenooshayo and Councillor Moostoos. The legendary priest, Father Albert Lacombe was also prominently involved. This time, the Hon. David Laird did not show the same skill and patience which he had earlier evinced. This Treaty involved hard bargaining. The Indians appeared to have a most sophisticated appreciation of what they considered their best interests and the Commissioners appeared to be quite ill-informed and bumbling. The affidavit of James K. Cornwall (Peace River Jim) (page 74) was made to record his recollections of the negotiations. He recorded in paragraph 3 thereof that Moostoos was most persuasive in convincing the Commissioners that what was appropriate for the plains Indians, was inappropriate for the bush Indians. The Indians refused to sign the Treaty draft as read to them by Laird.

Promises were made, and it is alleged, promises were broken. It is stated that the governmental regulation of hunting and fishing was not included in the Treaty which was finally signed, but was inserted into the printed version which was later distributed.

To make a long, complicated, turbulent story concise, the chapter's summary, at page 100 serves well:

The haste of the Treaty Commissioner in securing Indian signatures on a piece of paper removes any illusions that the Treaty was a contract signed by equal partners. How to characterize it remains a question, but the fact remains that Government officials in Ottawa, who drafted the terms of the Treaty, had little knowledge or comprehension of Indians, or their way of life in the Northwest. Given the extreme physical hardships which the Indians had experienced through many winters, it is no wonder that the prospect of supplies and cash was a deciding factor for them in accepting the Treaty. The Commissioners could afford some self-satisfaction since they had overcome resistance and dispelled suspicion wherever they encountered it. They could report to Ottawa:

... it was possible to eradicate any little misunderstanding that had arisen in the minds of the more intelligent, and great pains were taken to give such explanations as seemed most likely to prevent any possibility of misunderstandings in future.

Without doubt, the support of the missionaries and the presence of the North West Mounted Police encouraged the Indians to put faith in the Government representatives. The Treaty was seen by the Indians as a friendship pact, which would permit peaceful settlement of the country; land surrender or relinquishment of title were not issues for them. However, there were certain basic assurances which they wanted from the Government: freedom to hunt, trap, fish, and move freely. When promises were given that these would be protected, the Indians accepted government assistance, satisfied that their livelihood and that of their children would not be endangered. Expedient answers and facile promises were the substance of these Treaty negotiations.

The author's assertion of unequal partners is rendered very doubtful by the author's own narrative text throughout Chapter II, above referred to. In many, if not most bargains, equal partners do not achieve all their expectations. What the Indians understood was that they would receive considerable benefits from Treaty 8. Not making a treaty would have left their very survival in acute jeopardy. Hindsight always evinces 20-20 vision, but even hindsight cannot diminish the salient *quid pro quo* which inhered in Treaty 8.

The Treaties Texts

The three Treaties under consideration here (Exhibits 126, 127 and 128: also parties' books of authorities) were predicated on the use and occupation of land in western Canada. There are of course certain ramifications which have subsequently been elucidated by jurisprudence, most notably in the area of hunting, trapping and fishing. Those ramifications are of little concern here. It must be remembered that all the treaties operate in the context of, and subject to the Indian Act of the day.

The Treaties are too voluminous to recite here, but selected passages will be considered. All begin with similar preambular recitals, and for that purpose Treaty 6 might be taken as being generally illustrative and the most extensively quoted:

Treaty No. 6

Articles of a Treaty made and concluded near Carlton, on the twenty-third day of August, and on the twenty-eighth day of said month, respectively, and near Fort Pitt on the ninth day of September . . . 1876, between Her Most Gracious Majesty the Queen . . . by her Commissioners, the Honorable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories, and the Honorable James McKay and the Honorable William Joseph Christie, of the one part, and the Plain and the Wood Crees Tribes of Indians, and the other Tribes of Indians, inhabitants of the country within the limits hereinafter defined and described, by their Chiefs, chosen and named as hereinafter mentioned, of the other part.

WHEREAS the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at meetings at Fort Carlton, Fort Pitt and Battle River, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other;

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence;

And whereas the Indians of the said tract, duly convened in council as aforesaid, and being requested by Her Majesty's Commissioners to name certain Chiefs and head men, who should be

authorized, on their behalf, to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligation as shall be assumed by them, the said Indians have thereupon named for that purpose, that is to say: "representing the Indians who make the treaty at Carlton, the several Chiefs and Councilors who have subscribed hereto, and representing the Indians who make the treaty at Fort Pitt, the several Chiefs and Councilors who have subscribed hereto;

And thereupon, in open council, the different bands having presented their Chiefs to the said Commissioners as the Chiefs and head men, for the purposes aforesaid, of the respective bands of Indians inhabiting the district hereinafter described;

And whereas the said Commissioners then and there received and acknowledged the persons so represented, as Chiefs and head men, for the purposes aforesaid, of the respective bands of Indians inhabiting the said district hereinafter described;

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded as follows, that is to say:

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:

And also all their rights, titles and privileges whatsoever, to all other lands, wherever situated, in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada;

The tract comprised within the lines above described, embracing an area of one hundred and twenty-one thousand square miles, be the same more or less;

To have and to hold the same to Her Majesty the Queen and her successors forever;

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say:"

That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them;

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred;

And further, Her Majesty agrees to maintain schools

Her Majesty further agrees with her said Indians that within the boundary of Indian reserves, until otherwise determined by her Government of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force or hereafter to be enacted to preserve her Indian subjects inhabiting the reserves or living elsewhere within her North-West Territories from the evil influence of the use of intoxicating liquors, shall be strictly enforced;

Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government;

It is further agreed between Her Majesty and her said Indians, that such sections of the reserves above indicated as may at any time be required for public works or buildings of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon;

And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken, an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date herof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territories ceded, pay to each Indian person the sum of five dollars per head yearly;

...

Provisions for agriculture and livestock raising.

It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum; and each subordinate officer, not exceeding four for each band, shall receive fifteen dollars per annum; and each such

Chief and subordinate officer as aforesaid, shall also receive, once every three years, a suitable suit of clothing

Relief of pestilence or general famine.

Medicine

And the undersigned Chiefs, on their behalf, and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen;

They promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

Taken all-in-all with the Act and the negotiations, no treaty right of Indians to control their band or reserve membership can be discerned. They understood that to be so.

Treaty No. 7

Articles of a Treaty made and concluded this twenty-second day of September . . . 1877, between Her Most Gracious Majesty the Queen . . . by her Commissioners, the Honorable David Laird, Lieutenant-Governor and Indian Superintendent of the North-West Territories, and James Farquharson McLeod, C.M.G., Commissioner of the North-West Mounted Police, of the one part, and the Blackfeet, Blood, Piegan, Sarcee, Stony, and other Indians, inhabitants of the territory north of the United States boundary line, east of the central range of the Rocky Mountains, and south and west of Treaties Numbers Six and Four, by their head Chiefs and minor Chiefs or Councillors, chosen as hereinafter mentioned, of the other part:

WHEREAS

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians inhabiting the district hereinafter more fully

described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits, that is to say:

And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocations of hunting throughout the tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by her Government of Canada, or by any of her Majesty's subjects duly authorized therefor by the said Government.

It is also agreed between Her Majesty and her said Indians that reserves shall be assigned them of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families, and that said reserves shall be located as follows, that is to say:

First "The reserves of the Blackfeet, Blood and Sarcee bands of Indians, shall consist of . . .

Secondly "That the reserve of the Piegan band of Indians shall be on the Old Man's River, near the foot of the Porcupine Hills, at a place called "Crow's Creek."

And thirdly "The reserve of the Stony band of Indians shall be in the vicinity of Morleyville.

In view of the satisfaction of Her Majesty with the recent general good conduct of her said Indians, and in extinguishment of all their past claims, she hereby, through her Commissioners, agrees to make them a present payment of twelve dollars each in cash to each man, woman and child of the families here represented.

Payments forever

Further, Her Majesty agrees that the sum of two thousand dollars shall hereafter every year be expended in the purchase of ammunition for distribution among the said Indians; provided that if at any future time ammunition became comparatively unnecessary for said Indians, her Government, with the consent of said Indians, or any of the bands thereof, may expend *fnote the proportion due to such band otherwise for their benefit.

Further, Her Majesty agrees that each head Chief and minor Chief, and each Chief and Councillor duly recognized as such, shall, once in every three years, during the term of their office, receive a suitable suit of clothing, and each head Chief and Stony Chief, in recognition of the closing of the treaty, a suitable medal and flag, and next year, or as soon as convenient, each head Chief, and minor Chief, and Stony Chief shall receive a Winchester rifle.

Provisions for livestock and agriculture.

Indians promise to be loyal subjects of the sovereign, to obey the laws of Canada and to molest no one.

Taken all-in-all with the Act and the negotiations, no treaty right of Indians to control their band or reserve membership can be discerned. They understood that to be so.

Treaty No. 8

Articles of a Treaty made and concluded at the several dates mentioned therein, in the year of Our Lord 1899, between Her most Gracious Majesty the Queen . . . by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan, and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:"

Whereas, the Indians inhabiting the territory hereinafter defined have pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

And whereas the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

And whereas the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective Bands at the dates mentioned hereunder,

the said Indians do hereby cede, release, surrender and

yield up to the Government of the Dominion of Canada, for

Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:"

And also the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

To have and to hold the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Payments forever

Teachers

Agricultural implements and livestock

Indians promise to be loyal subjects of the sovereign, to obey the laws of Canada, and to molest no one.

Taken all-in-all with the Act and the negotiations, no treaty right of Indians to control their band and reserve membership can be discerned. They understood that to be so. The disputed matter of hunting, trapping and fishing being subject to governmental regulation is shown in the version reported. As in Treaties 6 and 7, Treaty 8 foresees ever diminishing territory for hunting, trapping and fishing because it was agreed that such activities could be pursued there "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

It was quite obvious and well understood by the Indian parties to all three Treaties that the Government of Canada was thereafter to control their band and reserve membership, because the Government was committed to pay Indians forever as an eternal charge on taxpayers. Clearly the Government was committed also to control who was to be paid individually, and who was not entitled to be paid individually. The Indians were neither simpletons nor crazy. They well understood that "money talks" and that "whoever pays the piper, calls the tune". Paylists are exhibited here.

WOMAN FOLLOWS MAN

In their factum or statement of fact and law, the plaintiffs in support of their claim to nullify the impugned legislation wrote this:

33. In the case before this Court, the evidence also confirms that the plaintiff aboriginal communities have, since aboriginal times, determined membership in their territories through the practice of traditional customs, inter alia, whereby women followed their men upon marriage.

One is hardly surprised by this assertion and for two reasons: (a) after all the newly committed or married couple had to live somewhere; and (b) they would naturally live in the place from which the man went hunting, for it was the man who had to bring home the bison.

The witness Agnes Smallboy, an elder and one of the oral history witnesses, testified thus:

Q. MR. HEALEY: How did you come to be a member of the Ermineskin Band?

A. When I was young, I married into the reserve to a man who was named Pete Morin.

Q. What Indian band did you belong to before you married Pete Morin?

A. I was a member of the Sampson Band. In our language, we call it "the land of the willows".
TT3, at page 270.

Q. MR. HEALEY: Why did you leave your band and join the Ermineskin Band when you married Pete Morin?

A. I did not know the man before I married him. In our system, a woman . . . or the parents made arrangements for the marriage of their daughters. And when my parents told me that I was to go and live with this man, I obeyed my parents.

Q. Do you know what year it was that you married Pete Morin?

A. 1939 . . . or 1939, I believe, or '38.

THE INTERPRETER: She said I said "38 or 8."

Q. MR. HEALEY: Are you an elder of the Ermineskin Band today?

A. Yes.

Q. Does the woman always go with the man as you did in the Ermineskin Band?

A. Yes, that was the way it was "or has been.,

Q. Is that the Indian way today?

A. It is still the way it is today. TT3, at page 271.

Q. MR. HEALEY: . . . Do you know about cases where Indian women leave the reserve and go with non-Indians?

A. Yes, that has been the practice of women.

Q. Do you know of any women from the Ermineskin Band who left the reserve to go with non-Indians?

A. Yes, that is the way it was. When they left, they left.

Q. When an Indian woman of an Indian band decides to leave the reserve and go with a non-Indian, how do the other band members deal with that woman's decision?

A. Her parents would probably counsel her not to marry a person who is non-treaty.

Q. Why would that be so?

A. The band would probably counsel her parents not to marry a non-treaty person, or maybe her grandparents, either her grandfather or grandmother, would counsel her not to marry a non-treaty, but she would make her own decision if she left in spite of that advice.

Q. Why would that advice be given?

A. The reason she would be advised not to marry a non-treaty is because when she married she would be required to leave the reserve forever and not allowed to come back. That is why she is counselled against taking such a step.

Q. Would all such women be counselled?

A. Yes, all of the women have been told that. Even I was told that. TT3, at page 272.

Mrs. Smallboy further testified that if those native women who married non-Indians or non-treaty Indians were allowed to return with their children to the reserve, she would not agree to that, because "our reserves will be overpopulated". (TT3, page 274.)

On cross-examination, Mrs. Smallboy testified as follows:

A. We were told that if we married a white man or a half-breed, that we would lose our status. Our parents did not want us to lose our status. We were counselled against marrying white people or half-breeds.

...

Q. So you allow white women to come in to the reserve, become band members, but you want to keep out someone like Miss Wildcat, who was born, bred, and raised by Indian parents in an Indian community; is that what you're telling me?

A. That is exactly what I am saying because the arrangements that were made before the agreements that were made before was that the woman would take on the status of her husband, so that if a white woman or a half-breed woman married a treaty Indian, she would take on his treaty status; and if an Indian woman married a white man or a half-breed man, she would take on his status. That's the way it was. TT4, at pages 410-411.

It would be impossible to reconcile Mrs. Smallboy's view with constitutional subsection 35(4), if her answer described an aboriginal or treaty right. The notion of "right" is implausible, too, if Mrs. Smallboy was describing an Aboriginal practice, for it was discriminatory on the basis of

being of unequal operation as between male and female persons, since the woman took on her husband's status, but the man did not take on his wife's status, and she could not confer it on him. Whose "right" would that be? Until Bill C-31 an Indian lost band membership when he or she lost status. (There were a few whose bands had disappeared and who retained status on the general list.)

Could the successive *Indian Acts*, as recited and discussed elsewhere in these reasons, elevate Mrs. Smallboy's desired régime into an Aboriginal right? Clearly it involved no treaty right. What is the effect of statutory intervention into what is asserted to be a constitutional right?

It is well known that legislation enacted contrary to the Constitution's provisions is, to the extent of any inconsistency, of no force or effect. Remembering the words of Mr. Justice La Forest in *Michell v. Peguis Indian Band*, quoted earlier above, it must be observed that a constitutional recognition and affirmation does not constitutionalize ordinary legislation such as the women's-loss-of-membership-on-marriage-out provisions of previous, successive Indian Acts. So the law was stated by Estey and Beetz, J., in *Reference Re Bill 30, An Act to amend the Education Act* (Ont.), 1987 CanLII 65 (SCC), 1987 1 S.C.R. 1148. The accurate headnote, at page 1153, states:

Section 29 of the Charter cannot operate to protect the rights granted by Bill 30. To be protected by s. 29, the rights referred to therein must be constitutionally guaranteed. A constitutional guarantee does not attach to rights or privileges conferred by ordinary provincial statute in that rights and privileges so granted are susceptible to legislative repeal. Since the dominant word in s. 29 was "guaranteed", it was unnecessary to resolve the meaning of "by" or "under" in that section.

That the marital régime for which the plaintiffs contend was a sometime feature of various Indian Acts does not accord it constitutional recognition or affirmation as an aboriginal or treaty right. It was always subject to repeal, and repealed it was.

Now, Mrs. Smallboy's version of the notion of woman follows man was virtually the same as Mrs. Makinaw's version as revealed in trial transcript (TT5, pages 572-573, and TT6, page 633). In TT6, Mrs. Makinaw is recorded as telling much of aboriginal society, for example: that women had no independent identity, being known only as their fathers' daughters or their husbands' wives or widows (page 602); that chiefs were hereditary leaders, members of a sort of royal family (page 605); that she spoke for the chief and elder of her reserve (pages 644-645); what she observes about white men and Métis men being too aggressive (pages 636-637); how the decisions to make treaties were taken not just by the chiefs alone but by the people in council (pages 593 and 650), meaning only the men (page 603) in pre-treaty times. It was a surprise to learn that Mrs. Makinaw could read English and write a bit, and probably did not need the services of the interpreter, (to which no one objected) as recorded on page 625, and indeed, she objects to the English (and French) language use of "Indian" (*Indien*) to describe aboriginals because "we are not from India" (page 626).

The plaintiffs assert that the marital régime for which they contend is an Aboriginal right; and that Aboriginal rights are collective rights. Surely, however, the notion of "woman follows man", and is unable to confer her status upon her non-Indian husband, represent a collective right only

for men. It was and is not a right for women. If one is going to elevate Aboriginal practices into constitutional imperatives, then the Aboriginal practices of no individual identity for women, and no voice in the encampments' affairs should need constitutional recognition and affirmation, too! It is nonsense to try to keep women silent and invisible. The utterly merciless, mutilating punishment for adultery inflicted on women, compared with the trivial punishment levied against men, will be mentioned later herein. One may well ask if that terrible inequality should be recognized and affirmed as an Aboriginal right, too? Whose right would that be? The collectivity's?

One of the plaintiffs, Wayne Roan was fascinating in his testimony. He too accepted Agnes Smallboy's version of that adage "woman follows man", TT8, pages 889-890, pages 897-898, pages 899-902. Mr. Roan, on cross-examination, made this cute, crafty and, in the circumstances of this case, apparently unresponsive answer:

Q. And the second law you enunciated was that the woman follows the man?

A. That's true, that's the Indian way.

Q. And the explanation you gave for that was because the man was strong enough to clear the land, that's what you said?

A. That's the way I said it, yes.

Q. Yes. By clearing the land, what do you mean?

A. I mean by "he leads the woman. If there's any hardships" I use land because you're not going to see a woman cutting down big timbers, big trees, or handling all these things a man "that man does, that God created that man specifically to do. He created a woman to do specific things and a man to do specific things.

Q. Okay.

A. And a woman was not, was not made, created, to go chasing a buffalo 60 miles an hour, a man done that. The woman, he *sic* didn't follow the man on a horseback, but he *sic* waited out there when the man was finished what he done, and it's the woman that followed that man and finished what he started as a balance for survival. TT8, at pages 932-933.

Now the foregoing testimony truly has a poetic quality, but it says absolutely nothing about where the described activities had to be performed. The answers could well mean that the man and woman "the blissful couple could remain at her home, not his. He said that it would be preferred that Crees marry Crees (TT8, page 931). The ironic part of Mr. Roan's testimony on this score resides in the undenied fact that he himself had breached the rule he postulated by marrying a Sarcee woman whom he met at a pow-wow. Of course, Mr. Roan did not preclude Cree marriage outside the Cree people and he gave a good account of himself in testimony on this subject. Indeed Mr. Roan allowed that he would not be shocked to learn that between the late

1970s and 1985, half the marriages were between status and non-status Indians and of those 60% consisted of Indian men marrying non-Indian women. He was inconsistent, as will be shown.

Mr. Roan at first denied that his father applied to the Government for permission to transfer to the Ermineskin Band so that he could marry an Ermineskin woman. But he recanted when shown Exhibit 30(253) which, he had to admit, showed that precisely. However, he tried, unsuccessfully, in this Court's opinion, to make out that his father Lazarus Shortack was really dissembling in his reason for transfer. It did nothing for Mr. Roan's credibility:

A. That's my dad.

Q. Yeah. So . . . your mother didn't follow him the Indian way, he followed your mother to the Ermineskin Band, isn't that right?

A. Well, why did he want to transfer in to the Ermineskin Band?

Q. Beg your pardon?

A. Why did he want to transfer in to the Ermineskin Band? That is one of the reasons he gave.

Q. That's right.

A. It was the more appropriate reason at that time because you can transfer a band if you had relations, and if you had people that will say that you're a good person, that you can make contributions, and this is how my dad was approached in the band. He had some relatives in there that said he's a man, he's a carpenter, he can make contributions.

Q. Mr. . . .

A. And it was "and then these, these band members agreed that he would be a benefit to Ermineskin. But before this happened, he had problems with the Samson Band for his farming. He did not get "he felt he did not get enough help from the Samson Band, so this is one of the reasons he put on here to transfer into the Ermineskin Band. It was easy because his wife was from there, but also he had relations in Ermineskin Band.

Q. So he followed his wife, his wife didn't follow him, isn't that right?

A. He made the choice to do what was best for his wife.

Q. So I take it that your custom is not that the man follows his wife, but the man does what is best for his wife?

A. That's why his wife follows him, she trusts him.

Q. I see. But your father was the exception to that rule?

A. No. He was no exception to that rule.

Q. I see.

A. He did not get along on another reserve, so he tried another reserve where his relatives was.

Q. In fact, Mr. Roan, would you dispute the fact that many men transferred in to the Ermineskin Band to marry Ermineskin women?

A. I haven't "I've never heard of elders talk about sincerely, unless you know, but to marry, they're people that stayed together that did not marry.

Q. I see. I'm talking about marriage, now. I'm talking about men following Ermineskin women to the Ermineskin Reserve. Are you saying to me that this, your father's case, was the only one?

A. That's the one "that's the only one I know of right now.

Q. And there may be others?

A. There could be.

Q. Yes. Why is it that you know some things and you don't know other things, even though these other things are so important according to your own customs? Why is it that your elders don't talk about man following woman and only talking about woman following man?

A. Because that was their law.

Q. I see.

A. That was their custom, that was their tradition.

Q. I suggest to you, Mr. Roan, that there is no such law.

A. Why is it that you know so much on this end, you don't know anything on this side? That's what you just asked me. I can't know everything. It's the same that you can't know everything, the same as you. You can't understand everything that I say here. You're not trying to understand. You're looking for a lie, but I prayed I will not lie. The best of my knowledge of what the elders have taught me, I will tell you. But anything documented that is legal, my lawyers will take care of that. TT8, at pages 938-941.

There are a few other aspects of Mr. Roan's fascinating testimony which will be considered later herein.

As to the proposition, "woman follows man", one can appreciate from Mr. Roan's earlier above almost poetic testimony that the proposition, by him, did not take the ever-following woman

away from her family's encampment, nor did it have the effect of revoking her membership therein. This final example, still on cross-examination, confirms the observation:

A. It's just one of the laws that the woman follows "a woman doesn't just as much as a man. It's just that when she's carrying a baby on her back, it's one of the things again that the man leads the way. It's not the man that's more important, it's not the man that's, you know, much more important, you know, than the woman, that's not, that's not it. It's just the way things were. If you use common sense, you look at it, that's the way it works, that's the way he created it.

What are you trying to say? That's the "what I believe in God, that led the "the supreme being that gave me the language to identify these things. That's the way he said it. That's the way I believe it, that's the way I recognize it, and nothing you're going to say is going to change that. It is part of my way of life. It is not yours, it is my way. All I'm doing here is for you to try and understand I put into place, that's the way things worked. TT9, at pages 993-994.

One notes that Mr. Roan's testimony contains some allegorical almost poetic passages (TT9, page 993). He gives examples of women following their men through swamps and rough terrain so that the man can help the woman by making her terrestrial path smoother or safer. In testimony recorded just above the last-recited passage he did seem to acknowledge that the saying could involve a change of residence, too, (TT9, page 993), but it is not clear whether he referred to pre-statutory, and post-treaty times, or to Aboriginal times. In all talk about contacts between Indians and Europeans, verb tenses are most important. Present-day Indians, and present-day non-Indians cannot be held responsible for the sins, nor be beatified for the virtues, of their ancestors, nor of those who merely look like their ancestors. "Sufficient unto the day is the evil" (and one might add "the virtue" or "custom") "thereof". One's ancestors' virtues or guilt, if any, was theirs, and it lies in the past, unless one wants one's future to be a dismal, continuous, resolute march back into the past. It appears that in that slightly previous testimony, Mr. Roan was speaking to the recent statutory régime when he testified in terms of the non-Indian woman following her husband to his reserve. But that testimony is far from conclusive.

Elder George Ermineskin testified on the notion of "woman follows man". He was quite vague and even gave answers in chief contrary to the plaintiffs' contentions, but the Court, despite objection, permitted the witness to clarify his answers, (TT10, pages 1319-1323). He confirmed that he had heard that in pre-treaty times the Indian "lived together" (and, therefore apart) "because of" (disparate) "language groups", (TT10, page 1311). As has been seen, the Cree and the Blackfoot were mortal enemies. That enmity simply reinforced their separate existence founded on language disparity. From this evidence one cannot find "control" of membership. The disparity of language appears to have been beyond anyone's control, then as now. Until the Treaty of Wetaskawin, long after the assertion of British (and latterly Canadian) sovereignty when the Cree, Blackfoot and Sarcee ended hostilities, this evidence discloses on a balance of probabilities that, aside from myth, no one knew why there were hostilities; and without any means of keeping a written record the probabilities lead to the conclusion that myth or oral history would not yield any objectively reliable reason or knowledge of the beginning of hostilities. That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that their ancestors were ever vengeful, criminal, cruel,

mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.

In no time at all historical stories, if ever accurate, soon become mortally skewed propaganda, without objective verity. Since the above-mentioned pejorative characteristics, and more, are alas common to humanity they must have been verily evinced by everybody's ancestors, as they are by the present-day descendants, but no one, including oral historians wants to admit that. Each tribe or ethnicity in the whole human species raises its young to believe that they are "better" than everyone else. Hence, the wars which have blighted human history. So ancestor advocacy or all human characteristics, or religion, or what passes for thought. People are of course free to indulge in it "perhaps it is an aspect of human nature" but it is that aspect which renders oral history highly unreliable. So saying, the Court is most emphatically not mocking or belittling those who assert that, because their ancestors never developed writing, oral history is their only means of keeping their history alive. It would always be best to put the stories into writing at the earliest possible time in order to avoid some of the embellishments which render oral history so unreliable.

Aboriginal practices, upon which the plaintiffs would build Aboriginal rights, go out of the window, at least in one case which the plaintiffs' witness George Ermineskin did not call atypical, when money talks. His testimony was this on cross-examination, less the interjections of counsel and the interpreter:

Q. According to your practices, I take it you mean they're not married in the church or under the laws of Alberta. Is that right?

A. That's right.

Q. How long have they been living together?

A. Four years.

Q. According to your ancestors' practices, would you, in your eyes, consider them to be married according to Cree practices?

A. Yes, I would say that's how it is, because there are so many people that live that way.

Q. I take it that, according to your understanding of your ancestors' way of life, that when a woman went to live with another man in a band, she became a member of his band. Is that right?

A. When they are legally married, that's the way it is.

...

Q. And when they are not legally married, like his daughter, would she become a member of the man's band where she lived?

A. If she transferred and if the leaders accepted her, then that's the way it would be.

Q. Your daughter didn't transfer to the Samson band, did she?

A. No.

Q. Your daughter is still a member of the Ermineskin Band?

A. Yes.

Q. And she shares the per capita distributions or what other benefits are available to Ermineskin Band members?

A. Yes.

Q. So would you agree with me that even though she lives with a man from Samson Band she has not lost anything from Ermineskin Band? She is still a member of the Ermineskin Band?

A. Yes.

Q. So I take it that, in your own eyes, according to your practices, even though she lives with a man in the Samson Band, she has not lost her membership in the Ermineskin Band.

A. Yes.

Q. So a woman, according to your practices, can follow a man to his house, but she doesn't need to lose the membership of the band where her parents live?

A. No, she has not lost anything because they're not legally married.

Q. In his forefathers' days, before white man came, did a woman who went to live with a man in another band lose her membership with her family?

A. In those days, they had no problems of that kind. Like, today "I will mention that money is involved today. In the old days, people did not legally marry each other; they just took one another to live together.

Q. I take it that in the days of your forefathers, before the white man came, a man and a woman could live together wherever they wanted. Is that right?

A. Yes.

Q. Regardless of where they chose to live, either one of them could go back to the family from whence they came?

A. At that time, there was no marriage, and there was no vow, sacred vow to "involved in marriage, and people always had that freedom.

Q. In fact, Mr. Ermineskin, your forefathers were very free people, were they not?

A. Yes.

Q. There were no reserves before the white man came. Isn't that right?

A. That's right.

Q. So they travelled with whoever they wanted to travel and hunt?

A. Yes. At the time, the Cree people had their territory; the Stonys had their territory; and the Blackfoot had their territory.

Q. But within their territory.

A. No. They remained in their own territory.

Q. If he was to apply his forefathers' practices today with his daughter, could his daughter come back today and live with him?

A. If that's what she decided, then she could do that. She's just living somewhere else now. She's not legally married. TT10, at pages 1326-1331.

So Elder Ermineskin's view of woman follows man was that "legal" or "formal" marriage was not an Aboriginal practice (although some mutual commitment appears to have been inferred as a result of co-habitation); and that the woman, as a result, did not lose her membership in her natal group of followers of a particular chief, but could return and live with her own family. What one can infer from this testimony is that the non-aboriginal institution of "legal" marriage (requiring, no doubt, "formal" dissolution to break the commitment) presented an obstacle to the aboriginal freedom to return and resume membership, along with, in turn, statutory constraints already earlier herein examined.

The raiding for and kidnapping of women for wives was a not-infrequent habit or practice between the Blackfoot and the Cree was mentioned in oral testimony. Elder Ermineskin spoke of a Blackfoot woman taken into a Cree group of followers of a particular chief. He was read some of Agnes Smallboy's testimony:

A. Well, in the old days any Blackfoot woman that married, she figured it was all right not to learn the Cree language. TTI 1, at page 1366.

In regard to Elder Agnes Smallboy's testimony, Elder George Ermineskin then testified, during cross-examination by the NCC's counsel:

Q. Elder Ermineskin, do you agree that if there were Blackfoot women in a Cree camp that they, because they did not speak the Cree language, probably did not lead the Indian way of the Cree?

A. Yes, she would have a hard time.

Q. So the Blackfoot women who married them would tend to stay "live the Blackfoot Indian way?"

A. Probably.

Q. And is it probably the case that would cause problems within the Cree camp?

A. Yes. TTI 1, at page 1368.

Those disruptive problems caused by women who spoke no Cree in a Cree encampment, one infers, were tolerable enough, for, it appears that the practice was never stamped out, nor were the Blackfoot women expelled.

Also on the adage of "woman follows man", the plaintiffs called Elder David Jacobs to testify. He was 79 years of age, and a native of eastern Canada, and the Six Nations Reserve near Brantford, Ontario, a Cayuga. He came to Alberta in the 1930s. When, after he was working on the Sarcee (now called Tsuu T'ina) reserve, Alex Bull said his daughter Elsie wanted to know if David Jacobs wanted to marry her, Jacobs assented and later on they got married. This witness' giving of oral history was objected to by the defendant's counsel because the witness was not of the lineage whose ancestors lived on the western prairies and signed the treaties in issue. The Court received Mr. Jacobs' testimony because he had lived among the Sarcee for 63 years which could well be the age of a witness giving oral history, and Mr. Jacobs' 63 years was not diminished by any period of want of understanding such as infancy and childhood.

Elder Jacobs' understanding of what this case is all about, is "who decides of *sic* these people to come back, coming back to the reserves." (TTI 6, at page 2280).

A. They are the ladies that married out to the white man and signed off the reserve and took a share of money at the time.

Q. Do you know any of these people?

A. I know some.

Q. Who *sic* do you know?

A. I know Ruby Startight and I know Sophia Many Horses. And I know Marjorie Henderson. Q. Well, these people that you know, Elder Jacobs, do they have husbands and children and grandchildren?

A. They have husbands and many grandchildren that I know of.

Q. Well, when these Indian women decided to leave the reserve and marry men from the city, how would their families react to that decision?

A. They would say no. If you leave, you're gonna be gone forever. You'll lose your treaty rights forever.

Q. Why did these women leave the reserve?

A. Because the reserve is so poor at the time and they got paper to sign, collect the share. Demand their share that the band had at the time. She was paid off.

Q. Who were paid off, Mr. Jacobs?

A. They were paid off and after they signed the paper.

Q. Why were they paid off?

A. To leave the reserve, to sign off the reserve.

Q. Now do you agree that all of these people should come back to the reserve?

A. I would but I'm only one. I would only take the women that signed off. I wouldn't vote for all of them, only the one. But I'm only one. There are others.

Q. Well, who do you say, sir, should decide about these people?

A. I think the band should decide.

Q. And why do you say the band should decide?

A. Because the treaty says the money, the land is ours. And we have the privilege of saying yes or no. And we have all the say on it. TT16, at pages 2280-2282.

Once again the dependants' eternally received pay-outs are linked to the treaty in Elder Jacobs' mind. If the band could still control its own membership, and if the Government were, as it is, obliged to make payments and confer all of today's further benefits on all members, then notionally, bands could bring the taxpayers to their knees by expanding membership exponentially, without the limits even of Bill C-31. That is, of course, most unlikely, but Elder Jacobs' testimony shows how revised or forgotten is the treaty's original *quid pro quo*. Whoever

pays the piper calls the tune. The taxpayers are the eternal payers and the government, at least somewhat on their behalf, has since treaty-time called the tune of absolute, all-extinguishing control of band membership, and of who is an Indian entitled to the payments and other benefits. Elder Jacobs got it wrong, like so many others with their wished-for, or thoughtlessly accepted, historically incorrect revisions.

Each generation "inherited" its enemies. Elder Jacobs testified thus:

Q. Before the white man came, Elder Jacobs, when the Sarcee battled with the Cree, would the Sarcee allow Cree men who were defeated in battle to join their camps?

A. No.

Q. What would they do with these men?

A. Somebody would kill him. TT16, at page 2298.

This has nothing to do with control of membership, or "woman follows man". It is more a re-statement of Mr. Roan's macabre mutual Aboriginal "population control" by killing, not contraception. The plaintiffs get no solace from this, for it was not within their control; they were all willy-nilly pawns of inter-Aboriginal enmity.

Elder Jacobs was cross-examined not by the defendant's counsel who waived his right but by NCC's counsel:

Q. And the Six Nations are Iroquois, isn't that right?

A. Yeah, I am Iroquois.

Q. In the Iroquois traditions, isn't it the case that the mother is the one who decides blood lines, who decides who of the descendants are also Iroquois. Is that the case?

A. . . . I mean the men did all the council from many years back. The women had never been in council before that.

Q. Okay. And when an Iroquois woman married someone from another band *sic*, that man joined the Iroquois band. Isn't that right? . . . The Six Nations? . . . Before the white man?

A. Before the white man came, there was not Iroquois. TT16, at pages 2305-2306.

A. I believe that a treaty is always, as long as the water run and the grass grow.

Q. And you have a very good memory, Elder Jacobs, because on October the 16th, 1986, at a meeting at the Westgate Hotel, you used almost the same words?

A. Yes. TT16, at page 2308.

(Reference was made to Exhibit 38, starting at page 008317, which ought to be minutes dated October 16, 1985 (not 1986) of a Tsuu T'ina membership code workshop at the Westgate Hotel. In attendance, No. 11 is Dave Jacobs.) Exhibit 38 in the passages cited is most interesting, even although it is not without its fondly hopeful historical and legal revisionism. NCC's counsel continued:

MR. MEEHAN:

"Mr. Starlight a plaintiff herein stressed to the group that he was not against the reinstatement of women." Pursuant to Bill C-31.

Now, you have already told us that you are the same. In other words, you came to the Sarcee as a stranger. You came as an Iroquois, You came without knowing the language. You came without knowing much about the customs. And what you are telling us is that women who are Sarcee, who have Sarcee customs, who have Sarcee language, who want to stay on the reserve, that they can stay. You are in agreement with Starlight, is that right?

A. I never talked to him.

Q. But do you remember him saying that at the meeting?

A. Yes.

Q. You do?

A. Yes.

Q. And do you agree with his point-of-view?

A. Yes. In fact, we love them people.

Q. And so you agree with Mr. Starlight?

A. But we want to be the one to have the say.

Q. I realize that. But you love these people and you are in agreement with Mr. Starlight?

A. But not her children and husbands.

Q. But you're in favour of the women themselves, is that right? Just the women?

A. The husband and children"

Q. I'm not asking about the husbands and the children. I'm just asking about the women, the women that you love?

A. Yeah, only the women.

Q. Okay. Thank you. Elder Jacobs, you also mentioned that some ladies who married out signed off the reserve and took money?

A. Yes.

Q. Do you know that some of them were actually told to leave and actually forced to leave? Do you know that?

A. When they marry, they're supposed to follow the husband. And then they were kicked out if they didn't.

Q. So they were in fact kicked out?

A. Yeah. They were kicked out, police, Mounties come *sic* and took them out.

Q. 30 days in jail?

A. Yeah.

Q. In the white man's jail?

A. No, only her. White man never came in. He stayed away. Just one or two occasions where the white man went too.

Q. Okay. And they were taken off the reserve by the police?

A. Yes.

Q. Okay. Did you know "do you know that some of the ones that took money to leave, that took money to you? section 64.1 Did you know that the *Indian Act* says that for them to come back, they have to repay that money to you? section 64.1 Did you know that?

A. I heard that. TT16, at pages 2311-2314.

Elder Jacobs said that some women married out because the Band was poor (one, at least, voluntarily enfranchised) although now with oil and natural gas, and housing partly subsidized by the federal government, and new capital assets, a sportsplex, an agripalex for rodeos and a school the Band "became richer a few years back now."

Q. And things are better now?

A. And that's why everybody wants to come in. And there's a lot of . . . people are looking for their . . . birth right. TT16, at page 2317.

A. There are thousands "about six weeks ago I heard there were about 500,000 people that are ready to come in and get that paper that says, you know, treaty Indian and tax exempt, the tax exemption for gas and oil, cigarettes and oil I guess. And it seems like they're all coming for that plus if they want to, if they want to come back and get all that, there's that many, that's six weeks ago, but a lot of them, a lot of them want to come out on the reserve. TT16, at page 2318.

Elder Jacobs complained that the pressure of people who want to get in on the benefits given to Indians will grossly overcrowd the reserve.

It was then demonstrated to Elder Jacobs that, in Exhibit 32, the Band's request or consent to receiving new members was always in vain, unless the Government approved "docs. 863-869.

Elder Hilda Big Crow testified on the issue of woman follows man. She is a Sarcee (Tsuu T'ina). She, at the age of 84, has so many female descendants that she had lost count, even of how many are married. About her daughters, however, she testified:

A. . . . one's married to a Blood Indian, one's married to a Blackfoot, and one is Stony, and they're all with their husbands.

Q. Elder Big Crow, is it part of the Indian custom that the woman follows the man when she marries?

A. Yes. TT18, at page 2626.

Q. How do you know about how Indians lived in these days before the white man?

A. My grandfathers and my grandmothers told us these "told me these stories, and that's how I know those stories. TT18, at page 2627.

Q. Before the white man came, do you know what kinds of Indians lived in western part of Canada?

A. I know one tribe was our tribe, Sarcees, and maybe there was many other tribes.

Q. Do you know the names of any other tribes that were here before the white man came?

A. Stonys I know.

Q. Before the white man came, did these different Indians or different tribes speak the same language?

A. No. TT18, at page 2628.

...

Q. What would the Tsu Tina people do to an Indian man they captured in battle?

A. They will, they will kill him.

Q. What would the Tsu Tina people do to an Indian woman captured in battle?

A. Sometimes we keep them as slaves, sometimes as wives. TT18, at page 2630.

Elder Big Crow was in favour of only some of the women who married out returning as members of the Sarcee reserve, but she was adamant against receiving their children. She said that the Tsu Tina nation and not the Government should decide who is to be received or not. (TT18, at pages 2656-2657.)

She told of knowing Ruby Starlight who married Sam Fraser in 1932, and "they had about four children. They stayed and brought up their children in Ruby's father's house on the reserve for a number of years." Cross-examining counsel for the NIAA suggested that the couple were told to leave the reserve by the Indian agent, Dr. Murray, in 1951, but Mrs. Big Crow could not verify that.

The plaintiff Chief (now also, Senator) Walter Twinn testified on the theme of woman follows man. He led up to that in his direct testimony, thus:

Q. Now, these things that you're describing, were you told about these things as a boy?

A. That's right.

Q. And who would have told you most of the things you know about the history or traditions of your people?

A. I used to listen to my uncles and my father speak about them. And later on, my father started to tell me a lot of things.

Q. What would have happened if a bush Cree camp was successful and grew to be too large?

A. Well, sometimes if it was crowded, depending on the crowds, could vary probably depending on the exact area whether there was a lake or whatever, how plentiful the food was. But they would separate I understand and the chief would name someone to be the new leader or chief of it, of the other band.

Q. And that group would leave with the new chief?

A. That's right.

Q. And where would they go to live?

A. Wherever they chose where there was food.

Q. Were you told by your father about the custom of your people respecting where a couple would live after their marriage? If you had a couple from"

A. The woman always followed the man.

Q. Was that ever explained to you why that was?

A. Because of I think a territory. If I'll take for an instance a bush Cree woman married a prairie Indian, it would be difficult for that prairie Indian to make a living in the bush. It was a strange environment or vice versa. That was one of the reasonings for it. TT22, at pages. 3402-3404.

At the end of the direct examination, the Court was referred by plaintiffs' counsel to Exhibit 68, documents 438, 439, Exhibit 25, document 627.

In cross-examination by the defendant's counsel, Chief Twin was referred to the Sawridge Band's membership rules, made in response to Bill C-31, Exhibit 16 (353), pages 18-21. He testified:

Q. Now, would you tell the Court if in your view this particular band membership rules, these rules reflect your aboriginal rights and practices as you understand them?

A. Somewhat. TT23, at page 3670.

Q. Not all of it?

A. No.

Q. Well, what part of it, of these rules are *sic* in accordance with your aboriginal practices as you understand and which part is not? Could you tell the Court?

A. I think the aboriginal rules were "I said earlier where woman followed the man for the reasons that I have stated before. That's not the case anymore.

Q. No. Why not?

A. Hmm? We cannot discriminate by sex, by other degrees with any membership codes. TT23, at page 3671.

Q. Chief, I'll put it to you very bluntly. I'll say to you that all the so-called alleged membership rules, aboriginal membership rules and practices that you talk about never existed.

A. That's your opinion. You're right to your opinion.

Q. Good. Then would you please tell the Court what those rules were and practices were?

A. I think I said earlier those rules were on membership for obvious reasons on a marriage. Those people, women that followed the man and consent of a band for anyone else coming in. Those were the aboriginal rules. TT23, at page 3677.

Chief Twin then referred to the plaintiffs' expert, Dr. John Moore, who conducted tape-recorded interviews with elders, which were transcribed into Exhibit 78. The elders are recorded as not really supporting the plaintiffs' contentions, as seen in trial transcript (TT23, at pages 3681-3682, 3685). (Chief Twin averred not being present, despite being listed: he had to depart for other business.) This is discussed on page 3685, then pages 3687-3693; 3694-3701.

Now no matter who testifies to the adage "woman follows man" the meaning of it still seems uncertain. For example, it is far from certain that the woman who followed the man thereby lost her membership in her Aboriginal natal group, her chief's people. Elder Ermineskin thought not.

Most salient was the testimony given on discovery on behalf of the plaintiffs by Wayne Roan. It contradicted the testimony of Elder Agnes Smallboy, but then Mr. Roan, as a teacher of culture at Smallboy Camp, which receives and educates the Sarcee and some Sawridge and Blackfoot as well as Ermineskin Band members, was regarded as just as knowledgeable as she. Moreover, Mr. Roan was produced by the plaintiffs to give authoritative answers on discovery of their case.

Here are those authoritative answers as recorded in the discovery transcripts (DTs) Exhibit 133(1):

97. Q. According to your customs what is the meaning of the word "Band"?

A. According to my customs"

98. Q. Yes.

A. . . . there's no meaning. We don't understand the word "Band" from my customs, no.

99. Q. According to your customs, what is the meaning of the word "tribe"?

A. From my customs, we don't have no word "tribe".

100. Q. According to your customs, what do you understand by the word "nation"?

A. There's no word "nation" in my customs"meaning of the word "nation".

...

253. Q. But if he was of the same tribe, if he was a Cree, there was no reason why a woman could not bring her husband and there would be no problems becoming members of the Band sic"meaning a pre-treaty group or camp?

A. There would be no problems.

The defendant (with the interveners) is quite entitled to rely on the answers elicited on discovery. Given the vaguely disparate answers given by some of the plaintiffs' witnesses and given the fluidity of membership in Aboriginal times, the Court is satisfied that Mr. Roan's answer on discovery is quite consonant with the balance of probabilities on all the evidence before the Court. The oral history presenters mostly disapproved of the return of women who "married out" in the present post-treaty times and added to the adage "woman follows man", a corollary to the effect that she was out forever and must not return. The Court finds that if there ever had been any substance in general to the adage, the corollary, not being proved on a balance of probabilities, was not true and is not proved for the purpose of this litigation, if at all.

"Woman follows man" as understood by the plaintiffs, but not so established, is according to the plaintiffs' statement of fact and law, tab 2D, page 74, an aspect of how "the plaintiffs' Aboriginal communities have, since Aboriginal times, determined membership in their territories through the practice of traditional customs". The defendant traverses the plaintiffs' assertion. Mr. Roan spoke of instances of the reverse, the man going to reside with his wife in her community. If the asserted adage were the inflexible rule, then legend would inevitably yield some cases of dramatic conflict with that rule, but none was cited. Of course the *Indian Act* after 1869, forced the Aboriginal women into that exile and loss of membership, which the plaintiffs' witnesses wished had been the norm in Aboriginal times. Poor Aboriginal women! Neither their own Aboriginal societies, nor Parliament, treated them well, as may be seen in the "red ticket" system's development and demise, for example.

"Red Ticket" System

The "institution", or category of women called "red ticket holders" originated with the enactment of paragraph 3(3)(c) of *The Indian Act*, 1876, S.C. 1876, c. 18 (39 Vic.) (plaintiffs' statutory materials, Vol. 1, tab 11, or alternatively, defendant's book of authorities, Vol. 1, page 25), and was further clarified by sections 12 and 13 of *The Indian Act*, 1880, S.C. 1880, c. 28 (43 Vic.) (plaintiffs' statutory materials, Vol. 1, tab 13, or alternatively, defendant's book of authorities, Vol. 1, tab 10). That régime, and its operation, was amply described by several former "red ticket" holders, namely Ruby Fraser and Joyce Runge, and also in great detail by Crown witness Sandra Dolores Ginnish (read-in of Ruby Fraser's evidence in TT48, pages 106-113; Joyce Runge's oral testimony in TT30, pages 4705-4713; and hoSandra Dolores Ginnish's oral testimony in TT31, pages 159-161 and TT32, pages 60-63; also the pay list references to both Fraser and Runge, in TT73, pages 841b-85 and Exhibit 19, Vol. 4-4, pages 493-494 under Band #217).

The "red ticket holder" régime resulted from a number of growing pains in the early Indian Act legislation, as will be noted herein. In particular, 1869 marked the landmark year in which Parliament first imposed a statutory excommunication from reserve lands and benefits on Indian women marrying non-Indians (Indian Act of 1869, S.C. 1869, c. 6 (32-33 Vic.), as contained in the defendant's book of authorities, Vol. 1, tab 7, section 6). The 1869 Act was quite harsh; upon marriage to a non-Indian, an Indian woman's ties to her natal reserve were completely and irrevocably severed. This particular amendment would, much later in time and history, come to be paragraph 12(1)(b) of the *Indian Act*. Why did Parliament impose such harsh conditions on Indian women? The answer, say the plaintiffs, is simple. Parliament was simply recognizing, in legislative form, the Indian custom or practice whereby a woman, upon her marriage, always followed her man and thereby lost forever her ties to her natal band (for example, TT52, pages 9-10, TT53, pages 94, 98, 112, and 130-138, as well as the famous "Drummond Memo" and related correspondence contained in Exhibit 73, tabs 11-14 and 15-16). The purpose of this custom or practice (as allegedly encoded in the legislation), say the plaintiffs, was to allow Indian communities to control their own membership, as well as land use, and to prevent outsiders from coming into the community through marriage, especially where such outsiders would be a dangerous influence.

To the contrary, the defendant and interveners assert a different purpose behind the 1869 amendment. A number of possibilities, or reasons, were presented, including: a) to protect the reserve communities from the "marriage-in" of aggressive white males, who would take up an inordinate amount of reserve lands and resources, or were engaging in unscrupulous practices such as bootlegging liquor to the Indians or robbing them of their timber; b) to promote enfranchisement and assimilation of Indian persons; or, finally c) simply because the *Indian Act* was amended to correspond with the sexism then rampant in European law, wherein women, of all ages and status, except a "feme sole" were treated as wards or dependants of the men closest to them, be it their fathers or husbands. (Debates preceding the 1869 Act, in the defendant's book of authorities, Vol. 1, tab 6; also: TT61, pages 98-101, and 106; intervenor NSIAA's factum, page 23; TT74, pages 119-121 and 163; Exhibit 42, tab 20; intervenor NCC(A)'s factum, pages 5, 10, 35, and 38; and TT54, page 106.) As other evidence considered herein indicates, "woman follows man" was the least plausible motive.

Whatever be the reason behind the 1869 amendment, clearly, not all were happy with the change, as demonstrated by the number of complaints which resulted (for example Exhibit 44, tabs 93-94, 119 and 147; Exhibit 43, tab 67; Exhibit 42, tab 20; TT69, pages 85-100; and TT70, pages 2-3, 6-7 and 11). Parliament, however, apparently was listening to the grassroots rumblings, as noted by the Debates preceding *The Indian Act*, 1876 (as found in the defendant's book of authorities, Vol. 1, tab 8), and took action in the corresponding Act of 1876, S.C. 1876, c. 18 (39 Vict.), the result of which, as noted above, was the creation of the "red ticket holder" system.

Operation of the System

The operation of the "red ticket" régime can perhaps best be described in the words of witness Sandra Dolores Ginnish. She stated, in TT31, at pages 159-160:

Q. Now, in what connection did you come across this phrase "red ticket holder"?

A. "Red ticket holder" is a phrase that I've come across in terms of my work in the Indian registration and band list directorate. It refers to an Indian woman who had married a non-Indian man prior to 1951, who as a result of that marriage had lost her Indian status and her band membership.

However, because she was a member of a band that paid "that collected treaty annuity or interest monies, women in those circumstances had an option of either receiving a lump sum payment equaling ten years of their treaty annuities or choosing to continue to collect their treaty annuity on an annual basis.

A red ticket holder is a woman who chose to continue to receive that treaty annuity on an annual basis rather than receiving the lump sum payment.

Q. And was this option available to women who married out of the band and lost their band membership and Indian status after 1951 *Indian Act* was implemented?

A. No, it was not.

In TT32, at page 60, she indicated further:

A. The red ticket itself?

Q. Yes.

A. It would have been a card that would have been issued to a woman who had married a non-Indian and lost her Indian status and band membership, and originally it would have been red to indicate that she was no longer a member of the band but was entitled to collect treaty at the time that the treaty payment was made.

Ms. Ginnish is the Director of the Indian Registration & Band List Directorate of the Department of Indian Affairs & Northern Development. She was a wholly credible witness. (The "red ticket"

system's further descriptions: TT74, pages 172-175; TT73, pages 791b-80; TT44B, pages 53-56; TT31, pages 1591b-161; TT32, pages 60-63; intervenor NCC's factum, at page 35; Exhibit 34, page 1141; Exhibit 54, tab 157; TT70, pages 2-12; and Exhibit 74

Termination of the System

The "red ticket" system was terminated through section 15 of *The Indian Act* of 1951, S.C. 1951, c. 29 (15 Geo. VI). (defendant's book of authorities, Vol. 2, tab 3, page 320). This amendment, while not affecting the status of current red ticket holders (i.e. those red ticket holders who were still alive in 1951 would have continued to collect treaty), prevented that same régime from further perpetuating itself amongst future generations of Indian women marrying non-Indians. (Further details, also: TT44B, pages 53-56; TT65, pages 34-35; TT73, pages 79-82, and 90; and Ginnish's testimony, as noted above.)

At every turn one sees Parliament imposing statutory measures in order to assert control of membership of Aboriginal groups or a chief's people even before the three Treaties Nos. 6, 7 and 8 were negotiated: the legislation of 1869 was an instance in point, statutorily excommunicating Indian women who married non-Indians from all benefits, and leading up to the proper and/or notorious paragraph 12(1)(b) of the *Indian Act*. The Court finds that the plaintiffs have *ex post facto* adopted the harshness of the 1869 statute, and in true revisionist fashion, asserted that that Act of Parliament in 1869 expressed the Aboriginal "rule" of membership control from time immemorial. The "red ticket" accorded some compensation to the excluded women, but only until and not after 1951.

ANTHROPOLOGICAL EVIDENCE

This evidence is voluminous, coming in the main from the plaintiffs' expert, Prof. John Hartwell Moore, Professor of Anthropology, University of Florida, and the defendant's expert, Dr. Alexander von Gernet, Assistant Professor of Anthropology, Erindale College, University of Toronto. Dr. von Gernet was retained by the defendant to perform a close and scholarly critique or review of Professor Moore's *The Ethnology of Traditional Law Among Native Peoples of Canada* hereinafter called Professor Moore's "report". Did that mandate ever infuriate Prof. Moore! He blustered and made dire threats against von Gernet's professional standing at the beginning of his testimony on cross-examination (TT36B, pages 7 and 8) and immediately gave the Court a most unfavourable impression and assessment of his own (Professor Moore's) credibility in terms of professional objectivity and professional competence. In fact, the depth and care of Professor Moore's field work and conclusions left much to be desired in the Court's view of his work.

Professor Moore's report comprehends Exhibits 110, his curriculum vitae, 111(1) *The Ethnology of Traditional Law Among Native Peoples of Canada* and especially the Response of Certain Patrilocal Peoples to the Passage of the Indian Act of 1985, a summary of Professor Moore's analysis and conclusions, 111(2) Appendix B comprising Supplemental Reports on the Ermineskin Band 1879 to 1950, 111(3) Complete Data Set, 111(2) (A) Supplementary Report by Janis E. Campbell, and 111(4) Transcripts of Meetings with Plaintiff Bands. Also are various addenda marked A through E.

Dr. von Gernet's main report is exhibit 122 with five supplementary tomes Exhibits 122(A) through (E). Of the two experts Doctor von Gernet was the more impressive witness, the more careful and organized professional, and the more resilient and reasoned in cross-examination. The Court prefers his testimony wherever it conflicts with Professor Moore's report and testimony and with other witness' expression. That is far from finding that Professor Moore was all wrong.

Having perused both expert's reports and testimonies, the Court concludes that Doctor von Gernet has correctly described the pertinent custom and is supported to some extent by Mr. Roan's testimony. Doctor von Gernet mentions the Blackfoot people in his analysis only because they were originally plaintiffs herein. Part 6 of his report, Exhibit 122, is the most important and is to be read for its inherent worth and attention to detail.

In an organized society there may be, must be, various customs which impart order, regularity and consistency to daily life. One such vicious custom was described by Wayne Roan as the punishment for adultery in aboriginal times among the Cree:

These are the two words that were the ultimate words that people feared because these are the words that explain the kind of life you live, and you will be punished, either by the people, the membership, or by the natural law, itself.

THE COURT:

Was it an offence to have anything to do with someone else's husband or wife?

A. It was a serious offence. When a woman "let's start with the woman. When she went and done these things, she was married, she had a family, that embarrassed the family, the father, the brothers, and also the community or the tribe or the camp has been disgraced that something like this would happen, if it was found out, brought out in the open. And if it was "resulted in somebody getting killed or resulted in family feuds because a woman done this, the punishment was a little more severe. Her ear or nose were cut off, or one of her ears or her breast, depending on how far he *sic* went to go against the laws of the membership of the camp and the people of the camp.

And the man also, if he done this, he was a laughing stock. He was named "he was called names. And also most cases, the woman herself punished her man, or the different "or her relations. But it was an embarrassment in the end, the man became a laughing stock if it was continued.

THE COURT:

Very different punishments for the same offence.,

A. At times if a man went after another woman, then depending on the man himself, the husband of the woman would put the punishment on the man.

THE COURT:

And what would that be?

A. It could lead to death. (TT8, at page 880-881.

The agony of the woman's punishment including bleeding, infection and a slow gangrenous death as the probable result, appears worse than what "could" happen to the man. According to other witnesses, including Harley Crowchild, mutilation was the unfateful female mate's lot. He mentioned the cutting off of the tip of her nose among the Sarcees (TT15, page 2231). Pity the male adulterer. He was mocked! So, there, among other customs, was the organization of punishment for transgression of marital fidelity.

Organizing the hunt, and organizing the security of encampments are also the characteristics of an organized society. There may be certain customs and not others. The plaintiffs assert that there must naturally have been rules to control membership *ipso facto* in an organized society such as the aboriginal encampments were. Yet, the evidence in fact does not support that seemingly logical contention. Moreover, even if that contention were factual, the profile and structure of the treaties' *quid pro quo* absolutely extinguished the vaunted custom or right to control Indian membership. Such a "right", if it ever existed, was mortally wounded by the Indian Act, and then utterly extinguished by the treaties, whereby the government paid annuities to Indians, and naturally arrogated the power to specify who the paid Indians were going to be. Although the Government appeared to be very short-sighted and improvident to make payments in eternity to treaty Indians, it was not so thick-skulled as to permit the treaty Indians and friends to decide how many treaty-paid Indians would be admitted to status. The natural incidence of procreation presented enough risk to the taxpayers without vastly increasing it through Indian self-determined "naturalization". Half-breeds and Métis in significant numbers had attached themselves to Aboriginal encampments (apparently without having to be voted in, or complying with any membership control rules) and by the time Treaties 6, 7 and 8 were made, the chiefs and their people were willing to try to have the half-breeds and Métis admitted to payments, reserve lands and membership under the treaties. The Government's Treaty Commissioners had no instructions to agree to a bigger toll on the public purse, and refused the inclusion of those non-Indians. So, it is utterly unreasonable "indeed impossible" to hold that the notional Aboriginal right to control reserves' membership, that is, band membership, survived in whole or in part, unextinguished. If it ever existed, it had to be extinguished at latest by the Treaties, for absolute Government assurance of reserve lands, and concomitant Government control of band membership on the reserves were both of the essence of those Treaties.

Whether the plaintiffs' asserted right existed, is one of the issues to be resolved in this litigation. As already mentioned, the plaintiffs and the defendant have called expert witnesses on this very issue, and they have treated it most seriously.

Doctor von Gernet's report in Part 6 is most pertinent. It is replete with end-noted references to various authorities, as is the rest of his report. Here are some persuasive passages (with end-note references deleted) which the Court finds convincing.

6.5 DETERMINATION OF GROUP "MEMBERSHIP"

The plaintiffs have stated that they regard an aboriginal right as "the right of members of the said bands, under their respective customary laws, to determine membership in the bands and to veto the admission of any persons to membership in the bands". Particulars provided pursuant to paragraph 4(b) of Mr. Justice Strayer's order dated October 31, 1986. Having explored notions such as "custom" and "band", I now turn to a consideration of "membership". Dr. Moore's research casts no light whatsoever on how membership was determined among the Plains Cree, Woods Cree, Sarcee, and Blackfoot. While his report specifies the content of the alleged "traditional law", it conceptualizes such law in terms of the logic of a cultural system, and not in terms of decision-making processes. As I have indicated elsewhere (*Section 3.5 supra*) Environmental adaptations determining variations in cultural systems, the report begs the question: if "laws" about membership are generated by non-human constraints, how can membership be determined by "members" who sit in council and say yea or nay? It is one thing to suggest that someone is excluded from a group because of the way a (anthropologically-conceived) system worked, but quite another to assert that such a person is excluded through power of veto.

The identification of decision-maker(s) or an adjudicating authority is essential, not only in light of the allegations about "membership" made in the statement of claim, but also if the term "law" is to be regarded as an acceptable description of the alleged tribal regulations (see *Section 3.4 supra*). While I have suggested that it is inappropriate for an anthropologist to decide which one of a profusion of practices should serve as the "traditional" culture of a twentieth-century society, and although I have strong reservations about whether one can ascertain which one of these was practised at the date(s) the treaties were signed, I will, for purposes of argument, review the literature to ferret out any evidence on how humans (as opposed to a system) determined "membership" in a group during the pre-treaty period.

6.5.1 Ethnographic Evidence

One need not venture beyond the ethnographic literature cited in and/or appended to Dr. Moore's report to find evidence of group formation processes. Among the Blackfoot, the relatives of a male member's mother and wife, and indeed any person irrespective of gender, consanguinity or affinity, could camp with the group and affiliate themselves with a particular leader. Conversely, any member could move away to assume membership among another chief's following. At times, entire families changed group affiliation. On the whole, membership appears to have been primarily a function of economics and not blood relationships. There are no indications that the leadership made decisions about the exclusion of new or returning members. In fact, in what has been described as the "anarchistic individualism of the Plains", the leader had relatively little power; it was only after treaty that the government invested the chief with a local authority he did not previously enjoy.

A similar situation prevailed among the Sarcee. Families could either temporarily or permanently affiliate themselves with any group, and new social units could arise whenever a leader drew into his orbit several families. Leaders had no formal authority and had no means of enforcing personal wishes, except by popular support. The paylists relating to the Sarcee show that, between 1877 and 1891, there were significant inter-band movements and realignments.

According to Mandelbaum, among the Plains Cree "acceptance into band membership was a simple matter. Any person who lives in the encampment for some time and who travelled with the group soon came to be known as one of its members." There is no evidence that members executed formal decisions on inclusion or exclusion, based on some prescribed criteria. Rather, those who wished to affiliate themselves made decisions based on the prestige of the leader, or his ability to provide sufficient food.

Several independent authorities on various Cree groups confirm that there were no formal or institutionalized leaders who were charged with executive or judicial functions. While information specifically on the Woods Cree was not provided by Dr. Moore, other sources suggest that their leaders lacked coercive power. Furthermore,

Membership in the local and regional bands was flexible, varying according to the leaders' abilities, supply of game and other environmental conditions, and family realignments. There is no indication that the regional or local bands had definite territorial boundaries, and families were free to leave one and join another, permanently or temporarily, in which they had kinsmen. The flexibility of band size and composition was directly related to the environmental exploitation and seasonal adaptations.

6.5.2 Implications

The concept of "membership" is difficult to discuss in the absence of any reference to the type of group in which individuals are included or excluded. Clearly, any individual can be simultaneously a "member" of several groups representing different orders of social organization . . . each with a different basis for "membership". Moreover, if an outsider enters a group through marriage or any other social bond, they *sic de facto* become "members" of the new group by virtue of their presence in and/or contribution to the new social context, irrespective of any rules of exclusion which restrict specific "rights". . . . Furthermore, contrary to the impression left by Dr. Moore, the notion of "citizenship" is not found in anthropological discussions of the status of individuals belonging to forager groups, but is generally reserved for complex state-organized societies.

For these reasons, Dr. Moore's focus on lineality as a *criterium* for group membership is merely an artificial construct that confines the notion of "membership" to a particular theoretical abstraction. The ethnographic sources indicate that an ideal patrilineal system was not an important consideration in decisions made about group affiliation. I suggest that this also holds for the native groups which signed treaties in the 1870s. . . . I suggest that a treaty, "membership" was conceived by the Indians in terms of who was actually part of a functioning group (e.g., the social aggregates which combined in the summer around specific lakes), and not in terms of the consanguinal and affinal status of each individual.

If the ethnographic evidence cited in and/or appended to Dr. Moore's report is accepted as an accurate characterization of pre-treaty "traditions", then the Blackfoot, Sarcee, Plains Cree, and Woods Cree all had remarkably flexible social organizations, in which formal rules governing "membership" were either non-existent or seldom operationalized. Leaders certainly had far less power and local authority than they enjoyed after treaty. Furthermore, what strikes anyone who

reads the ethnographic sources, is that there is little mention of decisions made by those who were already in a group. Rather, the focus is on determinations made by individuals or families who were contemplating becoming part of a social aggregate. Hence, it seems it was up to the candidates to decide whether a particular group was suitable, or whether a certain leader had the necessary qualifications to serve their interests. This may be an indication that there were more advantages to inclusion than exclusion. These findings are in accord with what anthropologists have concluded about foraging societies in general. To reiterate Leacock & Lee's statement: such societies are characterized by "egalitarian patterns of sharing; strong anti-authoritarianism; an emphasis on the importance of cooperation in conjunction with great respect for individuality; marked flexibility in band membership and in living arrangements generally."

This flexibility proved to be an asset . . . since it facilitated regrouping to accommodate demographic upheavals and changes in subsistence. I dare say, that had leaders invoked a right to veto the admission of persons based on their gender and some type of *jus sanguinis* (law of the blood), it would not only have militated against their principles of kindness, generosity, and sharing, but may even have led to the demise of many an unfortunate straggler.

6.6 FATE OF NATIVE WOMEN WHO MARRIED EUROPEAN MEN

What impresses me as peculiar about Dr. Moore's report, is the complete absence of any discussion of marital unions between native women and European men. I say peculiar because the restoration of such women to band membership through the 1985 amendments to the *Indian Act* appears to have been one of the main reasons why the plaintiffs brought the present matter before the Court.

In this section, I turn away from "customary laws" which allegedly were "retained notwithstanding the European colonization of North America", statement of claim, para. 9 to practices which developed because of the European presence in North America. While it may never be possible to know, for example, how Ermine Skin's followers in 1878 regarded the status of a woman who married a "white" man (or whether such a union had, in fact, ever occurred among them), documentary sources do offer some general insights into such marriages among native and newcomers in Protohistoric and Historic Period Western Canada.

Given that the overwhelming preponderance of ethnohistorical documentation was produced by European men, researchers have found it a challenge to chronicle the experiences of native women. The most successful effort has been Sylvia Van Kirk's Ph.D. thesis, revised and published as *Many Tender Ties*. Van Kirk studied virtually all relevant primary sources in order to explore the role of native women in fur-trade society in Western Canada (as found in the documentary record for 1670-1870); in my opinion her work is highly relevant, and I have referred to it in the following section.

6.6.1 Marriage à la façon du pays

The success of the fur trade depended in large part on intermarriage between European traders and native women. Unlike culture contact in other parts of the world, most sexual relationships

were not merely casual encounters, but involved a distinctive marriage *à la façon du pays* ("after the custom of the country").

Among the Western Cree a marriage was seen less as a union of individuals, as a contract between two kin groups; hence, the practise of bride service, in which the couple moved to the vicinity of the wife's relations prior to the birth of the first child, so that the husband could furnish provisions for his in-laws and prove himself worthy of the new responsibilities. In its early stages, marriage *à la façon du pays* was primarily an adaptation (not a wholesale imitation) of these native practices. The natives insisted that a European trader desiring a native wife had to obtain the consent of her parents and pay whatever bride price had been determined by the girl's relations. Even the practice of polygamy was appropriated by the newcomers, since there are numerous examples of Hudson's Bay Company officials who had more than one native wife.

Van Kirk argues that these marriage bonds "helped to advance trade relations with a new tribe, placing the Indian wife in the role of cultural liaison between the traders and her kin." This was a logical extension of the important indigenous role of women in inter-group relations.

It is important to emphasize that the Indians initially encouraged the formation of marriage alliances between their women and the European traders. The Indian viewed marriage in an integrated social and economic context; a marital alliance created a reciprocal social bond which served to consolidate his economic relationship with a stranger. Thus, through marriage, the trader was drawn into the Indian's kinship circle. And in return for giving the traders sexual and domestic rights to their women, the Indians expected reciprocal privileges such as free access to the posts and provisions. The marriage of a daughter to a fur trader brought prestige and the promise of security to an Indian family. Among the Cree it became customary to reserve one or more of their daughters specifically to offer as wives "for the white People".

In light of these practices and expectations, it would make no sense whatsoever for the wife's natal group to ostracize or formally sever ties with her. In fact, maintaining such relationships are highly desirable, if not essential in a barter economy.

There is evidence that consanguinal links were maintained even after the economic advantages of the affinal ties were lost or diminished upon the separation of the mixed-marriage couple. Observers from both the Hudson's Bay Company and the North West Company reported that native women who married white men and had borne children were welcomed back into their own groups. In some cases, marriages were regarded almost as long-term loans. Husbands even deemed it proper to lend wives for periods of time ranging from a night to several years, after which the women could return, together with any children that had been born during their absence.

It is difficult to judge the repercussions of this miscegenation on native social organization. *Métissage* is perhaps the best known of the consequences. The offspring of French *Canadiens* in the North West Company and their Indian wives led a distinctive way of life as buffalo hunters on the Plains. While the Métis purposefully distinguished themselves from both Indians and Europeans, many were linguistically and culturally identical to the Cree. Other mixed-marriages formed the foundations of new Indian groups. Indeed, one of the eight, late

nineteenth-century, Plain Cree groups, identified by Mandelbaum as the Parklands People, was comprised primarily of the descendants of a Scotch trader. In the majority of cases, the effects were probably less dramatic, with periodic marital unions serving as kinship ties between autonomous native and trading post communities.

The influx of European women in the Canadian West, the first of whom arrived disguised as a boy in 1806, led to the rise of prejudices toward native females, and a reduction in the number of marriages *à la façon du pays*. More importantly, after 1870, the goals of Europeans were related primarily to the establishment of an agrarian, British society. Under these circumstances, there would have been little need for the socio-economic ties between native women and European men. Consequently, it may be assumed that, by the time of the numbered treaties, marriages *à la façon du pays*, which had characterized marital relationships between natives and newcomers for two centuries, was on the wane. Nevertheless, the frequency of these unions was still high enough to warrant specific regulation by the Canadian government.

6.6.2 Women and the *Indian Act*

The Enfranchisement Act of 1869 was the first Canadian statute to address the status of a native women who had married a non-Indian. It stipulated that such a woman was neither an "Indian" within the meaning of the Act, nor any longer a member of her band. In 1872, Ontario and Quebec Indians lobbied to have this clause amended so that "Indian women may have the privilege of marrying when and whom they please without subjecting themselves to exclusion or expulsion from the tribe. Chairman, General Indian Council (Napance) to Minister of the Interior, June 16, 1872. These pleadings were to no avail, and the consolidated Indian Act of 1876 reiterated the disqualifying provisions.

It is noteworthy that outrage over these provisions has not been confined to Indian women like Sandra Lovelace, who took the issue to the Human Rights Committee of the United Nations. Even professional anthropologists and historians have waived scientific detachment in their descriptions of the "blatant sexual discrimination" that was the Act's "most infamous feature". This is not merely a reaction within the context of a post-Charter of Rights and Freedoms understanding of gender equality and aboriginal rights. Rather, those who appreciate that a marriage *à la façon du pays* involved no diminution of a woman's status in her natal group, recognize that the disqualifying provisions of the 1869 and 1876 Acts were impositions of a society dominated by men. . . .

Dr. Moore's rash assertion that the disqualifying provisions of the 1869 Enfranchisement Act "might easily have been written by a Chief or Headman of one of the plaintiff bands" are generally "consistent with the body of traditional law" is, frankly, absurd. The statute was formulated before Canada acquired Rupert's Land and the North-western Territory from the Hudson's Bay Company, and before the first of the numbered treaties were *sic* signed with western Indians. Surely Dr. Moore would not suggest that Chiefs of the Six Nations Iroquois, who were under Canadian jurisdiction at the time, might easily have drafted such a document. As University of Saskatchewan historian J.R. Miller has observed:

The Indian Act's tracing of Indian descent and identity through the father was the unthinking application of European patrilineal assumptions by a patriarchal society; but it accorded ill with those Indian societies, such as the Iroquoian, in which identity and authority flowed through the female side of the family. All these attempts at cultural remodelling also illustrated how the first step on the path of protection seemed always to lead to the depths of coercion.

Besides, to believe that by some inexplicable historical coincidence a state-organized society introduced legislation that was virtually indistinguishable from the "laws" of the tribal cultures they were attempting to "civilize", would swell credulity to the extreme.

6.6.3 Implications

My understanding of the statement of claim is that the plaintiffs are, among other things, contesting the restoration of band membership to women, who (under the disqualifying provisions of an earlier version of the Indian Act) had been deprived of their band membership because they married non-Indians. If Dr. Moore is correct in concluding that, after a woman marries and practices patrilocality, "she is still a member of her father's band, where she was born", then I must conclude that the rest of the report has been supererogatory, since this particular issue is for the most part resolved by this one admission. The statement of claim states that "aboriginal rights" include "customary laws" of aboriginal peoples. Such customary laws presumably include the hypothesized "traditional law" concerning women and band membership. Hence, Indian women who had their rights to membership (under the alleged "traditional law") in their natal bands extinguished by the provisions of the Indian Act, have had these rights restored under the 1985 amendments to the Act. Under these circumstances, the only outstanding issue would be whether the alleged rights of the plaintiffs (under "traditional law") to determine band membership has "aboriginal" supersededness over the right of women to maintain membership in their natal bands (under the same "traditional law").

Dr. Moore has failed to cite documentary support for the contention that a woman retained "membership" in her natal group; nevertheless, in light of the evidence I have found, I am persuaded that the contention can be accepted as plausible. I cannot be certain that this had always been the case in marriages during the Prehistoric period. What I can say with confidence, however, is that during the two centuries prior to the signing of the numbered treaties, there is no evidence that native women who married European men *à la façon du pays* were ever banished from the groups in which they were born. As "women in between" they were "members" of their husbands' society as well as their native group. It was the Indian Act and not "tradition" which precluded an affiliation with the latter.

When it comes to the marriage of Indians and non-Indians, there can be no recourse to prehistoric (i.e., pre-European-contact) "traditions". By definition, such unions were confined to the Protohistoric and Historic periods. Hence, this particular practice, which originated as an adaptive response to the economic potential afforded by the contact of two groups who had surpluses of desirable trade goods, became the shared "tradition" of both natives and newcomers. While this tradition served to forge links between Indians and Europeans, the Enfranchisement Act of 1869 was intended to turn Indians into Europeans.

6.7 SUMMARY

In my opinion Dr. Moore's conclusions, which are summarized on pages 32-33 of his report, are supported neither by the documentation he provides, nor by the anthropological and historical literature I have been able to locate. He has not illuminated native cultures "at the time they were first encountered by European colonists"; he has not shown that the plaintiff groups had "traditional laws" reflecting a patrilineal-patrilocal system; and he has not shown that this system "continued" among the Ermineskin during the 1879 to 1950 period. . . .

In contrast to the rigidity and long-term persistence of Dr. Moore's hypothesized corpus of "law", the ethnographic and historical records point to flexibility in native social organization. This flexibility enabled Amerindian foraging societies to adapt to changing conditions over the course of at least 11,500 years. I suggest that what might be regarded as "traditional" or "aboriginal" is not the "custom" of a particular time during the Prehistoric, Protohistoric, or Historic periods, but, rather, this rich legacy of successful adaptation to new challenges.

The fluidity in the size and composition of foraging groups, and the lack of abstract constraints on "membership", meant that the ancestors of the plaintiff bands were able to cope with the upheavals of European contact throughout the eighteenth and nineteenth centuries. Practical realities of everyday survival displaced any ideal systems of kinship and prescribed marriage practices which, after all, are rarely found outside the anthropological imagination. If such ideal systems and concomitant "laws" had ever existed in the first place (and evidence has not been forthcoming), then, in a sense, any "aboriginal right" to operationalize them had been squelched by pragmatic necessity on numerous occasions long before the 1870s.

Among the most salient responses to the presence of Europeans was transcultural marriage. This important social bond permitted natives and newcomers to strengthen links between their respective groups. Throughout the Protohistoric and much of the Historic period, such unions invariably involved native women and European men. The native women who married out retained "membership" in their natal groups "a fact conceded by Dr. Moore, and perhaps the only important issue on which our research is in agreement. The legal provisions which disqualified such women from band membership were written during an era in which EuroCanadian society reflected patriarchal values, made little effort to learn and understand native traditions, was anxious to "civilize" Indians, and intent on transforming "Indian" from a racial to a legal category. In my opinion, the rescinding of these provisions through the 1985 amendments to the Indian Act was the correcting of an historical misconception of native practices, rather than an interference with "traditions" or "customs".

This Court adopts and ratifies the above-quoted passages from Doctor von Gerner's opinion, exhibit 122. As above noted, it is thoroughly bolstered by end-note references to support all its own internal quotations and virtually all its assertions.

The Court finds that in Aboriginal times and up to the making of the Treaties, all of the plaintiffs' predecessors had no custom of controlling their groups' or chiefs' peoples' membership. Quite the contrary. The chiefs' stature depended on how many individuals or families attached themselves to the respective chiefs. Even those born into a chief's people were free simply to walk out of the

chiefs encampment and attach themselves to another. No questions asked. One chief's loss was another's gain. If this freedom to join and depart were an Aboriginal custom, it was the diametric opposite of "control" of membership.

Truly, such was the plaintiffs' position on discovery according to Wayne Roan (DT, Vol. II, January 17, 1989) as recorded in Exhibit 133(2), page 224, question 891 *et seq.* to end of page 225. On this Mr. Roan and Dr. von Gernet were of one mind. There was no "veto" on joining. Even those who misconducted themselves were never expelled. Sophie Makinaw, giving her version of oral history, on direct examination, testified in answer to the question of dealing with someone who would not respect the camp's customs and traditions:

I have never heard of any situation where people were asked to leave or expelled from the camp because they wouldn't conform with the camp because the process of counselling, and public mockery or ridicule that was in place ensured that they eventually complied with the requirements or the rules of the camp. TT6, at page 597.

On all of this evidence, including Doctor von Gernet's opinion, this Court finds that there was no "aboriginal", (and certainly no treaty) "right of members of the said bands or chiefs' peoples, under their respective customary laws, to determine membership in the bands camps, chiefs' peoples and to veto the admission of any persons to membership in the said bands camps, chiefs' peoples". The Court holds that there were no such rights and no such customary laws as pleaded by the plaintiffs in the particulars given by virtue of Mr. Justice Strayer's order dated October 31, 1986. Those particulars express a fictitious revisionism.

"The status of an Indian and the conditions upon which an Indian is deemed to be a member of a particular band were in 1881, and still are, defined by Parliament, not by the will of a band council." So held Mr. Justice Mahoney in the case of *Bay v. Registrar of Indians* (1976), 9 CNLC 36 (F.C.T.D.), at page 42. Such was the law in 1976 and so it is today, even if Parliament, by statute, delegates powers of definition and membership criteria to band councils, as, for example, in making a membership by-law.

The foregoing being the case, there was and is no Aboriginal right to control membership which engages subsection 35(1) of the *Constitution Act, 1982*. If there were, of course, it would be subject to subsection 35(4) and would be of no force and effect to the extent it failed (as it did, if it existed) to guarantee membership and marital status equally to male and female persons.

The "custom" was entirely *laissez-faire* in regard to membership in camps or chiefs' peoples with regard to all of the plaintiffs' predecessors. There was no positive custom of law or rules or veto asserted by the Aboriginal peoples. What transpired was a vacuum compared with membership control: there was freedom to join a camp or a chief's people and no one was ever expelled. With the liberty to join a camp was the concomitant liberty to leave a camp. Clearly the plaintiffs can demonstrate no Aboriginal right, and no treaty right to engage subsection 35(1). Perhaps that custom being the utter absence of a customary law could engage subsection 35(1). Whether it be one or the other, rules or the freedom of no rules, it was no longer extant in 1982, or indeed after the treaties were made. "It" was clearly, unequivocally and necessarily extinguished by the treaties' exigencies. "It" whether customary rules or customary freedom from any rule, or any

asserted "control" was utterly annihilated by the treaties, if not by the earlier enacted *Indian Act*. Whether rules or absence of rules, no Aboriginal right either to discriminate against Aboriginal women, or to control membership at large, ever survived to enjoy the protection of subsection 35(1).

In the case of *R. v. Sparrow*, 1990 CanLII 104 (SCC), 1990 1 S.C.R. 1075, a unanimous decision of the Supreme Court of Canada, there are many principles to guide a court adjudicating cases of asserted Aboriginal rights. That case dealt with a clearly unextinguished Aboriginal right to fish and it is therefore factually and legally far removed from the present litigation, except for the general principles stated there.

The Supreme Court in *Sparrow* referred to the case of *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, 1980 1 F.C. 518 (T.D.), a decision of Mr. Justice Mahoney. The Supreme Court wrote, at page 1098:

In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, *supra*, at p. 568:

Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

The plaintiffs' counsel in argument emphasized the principles enunciated in that *Sparrow* case. The Supreme Court noted, at page 1079 that in the case of *Calder et al. v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), 1973 S.C.R. 313, Mr. Justice Hall stated (at page 404) that

"the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent i.e. the Government and that intention must be clear and plain". (Emphasis added.) The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish.

Amen. The question might well be posed however, how to apply that principle in these circumstances.

Some considerable help in interpretation and application was given by Mr. Justice Wallace, with the concurrence of Messrs. Justices Taggart and Macfarlane, a majority of the bench, in *R. v. N.T.C. Smokehouse Ltd.*, 1993 CanLII 4521 (BC CA), 1993 5 W.W.R. 542 (B.C.C.A.), another case of a conviction related to fishing. After quoting from his own reasons in *Delgamuukw v. British Columbia* (1993), 1993 CanLII 4516 (BC CA), 104 D.L.R. (4th) 470 (B.C.C.A.), at page 571 and with analysis of *Sparrow* at pages 571-572, Wallace J.A. wrote, at pages 557-558:

These passages reflect the principles of the common law which determine the criteria which activities must satisfy in order to constitute aboriginal rights. Whether, in all the circumstances, a particular activity meets the criteria is a question of fact.

...

In view of my conclusions about the scope of the aboriginal fishing rights of these claimants, it is not necessary to decide the question of whether any fishing regulations, particularly those prohibiting the sale of Indian food fish, extinguished any commercial aspect of aboriginal fishing rights in British Columbia. Nevertheless, I should respectfully say I do not agree with my colleague Justice Lambert that this question was decided in *Sparrow*. In that case, the Supreme Court of Canada confronted the argument that fishing regulations had extinguished aboriginal rights wherever, and to the extent that, they were inconsistent with the exercise of aboriginal rights. The Court rejected that argument at p. 1097:

It is this progressive restriction and detailed regulation of the fisheries which, respondents counsel maintained, have had the effect of extinguishing any aboriginal right to fish

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulation does not mean that the right is thereby extinguished. Of course, it does not follow from this that a legislative provision, made by executive act and embodied in an instrument known as "regulations", must always be taken as "regulating" and never extinguishing rights. The test for extinguishment adopted by the Court in *Sparrow* at p. 1099 was that, "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right." The Court did not deny that regulations could evince the requisite clear and plain intention to extinguish rights; indeed, the Court specifically referred to the regulations in saying that the legislation did not indicate a clear and plain intention of the Sovereign to extinguish the aboriginal right to fish.

Here, it is the cumulative effect of the legislation dating back to 1868, before the making of the treaties, in which legislation Parliament demonstrated a clear and plain intention to extinguish any Aboriginal right or custom by which the identity and definition of Indians is established, as far back as sections 6, 15 and 17 of S.C. 1868, c. 42 (31 Vict.) quoted earlier above. The clear and plain intention was clearly to establish a racist apartheid, which would be completely repulsive today, but which was clearly and plainly within the legislative jurisdiction of Parliament. So also it was the very next year in section 6 (amending section 15, above) in S.C. 1869, c. 6 (32-33 Vict.), also quoted earlier above. And so, again, Parliament's intention clearly and plainly to subsume Indian custom regarding the introduction to and the veto of membership (if such there ever was) was demonstrated. Indeed, Parliament empowered its official, the Superintendent-General, in subsection 3(10) *et seq.* of the next statute, *The Indian Act*, 1876, to regulate who might enjoy occupation of a reserve (Indians, as defined), to regulate and to veto membership. That was in 1876 before the first of the three Treaties herein was made.

Then came the Treaties, with the further safeguarding of the reserves, the surrender of vast areas of land for settlement, industry and commerce, and the eternal payment of treaty money, which

has, with collateral benefits, increased considerably until the present. The salient passages of those Treaties, 6, 7 and 8, are also quoted earlier above. It will be remembered that in order to limit the new bands' membership, the Government refused to permit half-breeds and Métis to participate in the Treaties, as the Morris record and the other historical writings amply disclose. In other words Parliament and the Government of Canada purposefully, clearly and plainly took over by statute and by treaty all control of Indian bands' membership including the admission to membership and the veto of applied-for membership. Nothing could be clearer and plainer. These facts and factors easily meet the exigencies of the principles judicially proclaimed in the *Sparrow* and the *Smokehouse* cases.

Despite all of the foregoing, that is, the legislation and the jurisprudence, the plaintiffs' counsel adamantly contended (TT79, page 31, line 6) that "you" (Parliament, the Government, the Crown) "can interfere with, but not extinguish treaty rights". Such might be unthinkable, but not impossible at least by agreement, in any event, prior to April, 1982. The submission, of course, does not take into account the extinguishment of alleged Aboriginal "rights", if any, prior to, by and because of, the Treaties themselves, as is the case here.

Because of early extinguishment of the claimed Aboriginal right, if any, the question of justification does not arise in this litigation.

REPUTE

The plaintiffs argued however that the non-existent, or at least thoroughly extinguished Aboriginal custom or alleged right of the bands to discriminate against their own women in their marital status, has been nurtured and kept alive by the early statutory definitions of who is an Indian, and particularly this ingredient:

Any male person of Indian blood reputed to belong to a particular band. Emphasis added.

Whatever was to be made of that provision in past, the plaintiffs have nevertheless failed to identify any provision of the Act, or of the treaties which, prior to April 17, 1982, or later, provides for the survival, protection or enforcement of the alleged Aboriginal and treaty rights or "customary laws" in issue, if such claimed rights ever existed at all. The testimony of Sandra Gimish and particularly her consistency on cross-examination makes an end to the question of "repute". Nowadays the bands receive and accept what the Government says and finds on who is an Indian, and of which band, according to Ms. Gimish. Parliament has over the years enacted comprehensive statutory, codified provisions about Indian band membership to the exclusion of all else.

Here, again the failure of the plaintiffs to prove, on a balance of probabilities, that which they pleaded: "customary laws to determine membership in the bands and to veto the admission of any persons to membership in the bands" brings down their not so convincing arguments on the question of repute. In practice, repute appears to have been repute in the eyes of a succession of Government officials such as the Superintendent-General and latterly the Indian Registrar. In any event this line of argument if ever valid, is now a dead letter.

If the bands with membership codes think that provisions about "blood quantum" will do what they think "repute" should have done for them, they are calling down untold agonies on themselves and their people. In the first place there is human verity in the old adage: "It's a wise child who knows his own father." There was a sad afternoon at trial herein when one of the plaintiffs' counsel insensitively sought to enlist a witness in his effort to prove that the witness was a so-called illegitimate child. As if any human being can be considered illegitimate! The person being conceived, after all, does not know who are doing it. "Blood quantum" is a highly fascist and racist notion, and puts its practitioners on the path of the Nazi Party led by the late, most unlamented Adolf Hitler. It will bring heartache, for example, to the mother of children sired by different fathers, say an Indian and a non-Indian, who may be required to go into exile rather than to exile some of her children from their siblings. The Court heard testimony to the effect that the Sarcee (Tsuu T'ina) are conjuring with the practice of "blood quantum". One hopes that people who characterize themselves as generous, hospitable and living in tune with Mother Earth and all nature, will not set out to turn some unfortunates among their number against their own grandparents.

So much for repute.

PARAGRAPH 2(d) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In the plaintiffs' amended st. of cl., they claim in the alternative, for

... a declaration that the imposition of additional members on the plaintiff bands pursuant to the said sections 8 to 14.3, both inclusive of the *Indian Act* as amended by section 4 of Bill C-31 without the consent of the bands is an interference with the right guaranteed by subsection 2(d) of the . . . Charter . . . of the bands and their individual members to freely associate with other individuals.

The provision which is 2(d) of the Charter in fact expresses the following:

2. Everyone has the following fundamental freedoms:

(d) freedom of association.

Counsel for the plaintiffs very candidly informed the Court in oral argument that he was not pressing this point nor spending much time on it "because this truly is an alternative position". His presentation gained some interest only because of his mention of subsection 35(4) of the *Constitution Act, 1982*, earlier considered to be conclusive herein, if the plaintiffs succeeded in engaging subsection 35(1). Here is what counsel said:

This only arises, . . . at all if you determine . . . that the aboriginal right was either an individual right and not a collective right, which runs counter to everything that the law says, or if you determine that 35(4) transformed aboriginal rights into individual rights for all purposes, then only in that context would this argument come to bear. . . . But in that circumstance we were

dealing on the plane of individual rights and competing individual interests only, which I submit we could not be but if we were. . . . you could have to reconcile any disposition in that respect with section 2(d) for we say in effect that that would mean that reserves were in effect consensual associations, and we say that the freedom to associate must clearly include the freedom not to associate.

If we go through the logic of that position, . . . , and there is no case precisely on point where I can say to you, ah ha, this has been dealt with here. . . .

In my event . . . we say this proposition in effect proves the point because once you would permit section 35(4) or section 15 to in effect intrude upon the nature of the aboriginal right as a collective right then you are, you have undermined it . . . and you are dealing with competing purely individual interests. And then what's the point of having a part 2 dealing with aboriginal rights? . . . If you went that route . . . I'm not saying you should, you can say, well, don't we have a right to not associate with individuals? Why should someone be able to force themselves upon you as an individual? We say that argument properly doesn't arise . . . because it can't arise unless you've already made a determination which is at odds. . . . I say you couldn't do this, only the Supreme Court could do it and it would involve a change in the law and you would have to make a determination at odds with the very nature of what an aboriginal right is. TT57, at pages 166-168.

It sounded very much like the next posture to abandoning the pleading without formally saying so.

Nevertheless, the Court is struck and persuaded by the defendant's counsel's well-researched written argument on this matter of paragraph 2(d) of the Charter. The Court adopts the defendant's submissions expressed in Part P of that party's memorandum of fact and law, pages 121-130. Fairness is one of the foundations of the Charter and if the plaintiffs invoke it, they cannot choose only paragraph 2(d). They must also accept that Bill C-31 finds section 1 justification in sections 15 and especially 28, which carries within the Charter the very same thrust as does subsection 35(4) outside the Charter.

Counsel for the intervenor, the NCC, made also some very cogent arguments on this 2(d) matter, Commencing in TT75, page 16 through to page 24, there are recorded some important passages of counsel's oral argument:

. . . . Native Council of Canada says, yes, there is a freedom of association, but not a freedom of association to exclude one's kin from statutory benefits, from Charter protection.

The Native Council of Canada is more or less a racially based organization. I say more or less because they accept people who are non-aboriginal, but more or less it is. But to take it one stage further and to say that freedom of association means you can also exclude people from statutory benefits is in this counsel's submission going one step too far. And that should be the point with regard to freedom of association.

... Discrimination is often cross-cultural and for a discriminating minority to discriminate further and internally against a small minority within itself it's still discrimination. Even if self-regulated. And even if done under the approval of freedom of association.

But once you take that into the public situation, indeed, once you take it into a statutory construct of Parliament that's a different kettle of fish. Once you get into statutory benefits that's different. That's a different situation. Freedom of association doesn't extend to freedom of disassociation from statutory benefits, particularly where you're dealing with a statutory concern.

That's our submission . . . with regard to freedom of association.

... what has occurred to date up until Bill C-31 the *Indian Act* discriminated. It was a private club for men only, and their white wives and their aboriginal wives. It's not even like the Ritz that is open to everyone (with money). It's a private club, a statutory private club that is open to men only, aboriginal men only, and their spouses.

Bill C-31 is a compromise to a complex problem. It's not a happy compromise. Practically no one if anybody was happy with it fully. But what it does represent . . . is a valid exercise of legislative power and legislative judgment. And it's a compromise, it's a compromise between the individual rights of Bill C-31 and the collective rights of the Indian bands. And part of that balancing . . . is section 10 of the Act, which gives membership control to the Indian bands. And they can bring into the band whomever they wish according to their membership code. That's part of the balancing.

Mary Two-Axe Early . . . had a piece of paper by the minister and signed by the minister of Indian and Northern Affairs representing in the letter and speaking on behalf of the Government of the Canada She is still not a band member. They won't register her on the rolls. She has no benefits. She's lucky she has a daughter who is married into the band.

The other matter that is relevant to this being a complex issue is the Crown has provided significant funds and follow-up support and follow-up study. Not everybody may be happy with the amount of money provided or the follow-up, but at least significant effort has been made. At least significant effort has been made in that regard. TT75, at pages 16-24.

The Court finds that if there be any infringement of the plaintiffs' freedom of association under paragraph 2(d) in Bill C-31, it is quite justified on the grounds of equality in section 15; and the assertion that the Charter's rights and freedoms are guaranteed equally to male and female

persons, in section 28. Moreover, the Court finds no infringement for the reasons expressed by counsel aforesaid.

RETROACTIVITY

This question engaged counsels' efforts inordinately. One must first recognize that Parliament may enact retroactive and retrospective laws if it so chooses. To venture into this topic is to venture into a semantic minefield.

The impugned legislation, called Bill C-31, operates in regard to people in whatever plight the legislation is designed to affect, who were living on the day, at the time upon which it, Bill C-31, came into force. It does nothing for those who had died before that moment. It does not compensate anyone for the past exclusion and it does not purport to change anyone's status or plight as of a past time in the past. It purports to cure the plight of those mentioned, living people as they were on the day, at the time the legislation came into force. It is of course prospective in effect. It is nothing more, and nothing less than this, and so it must be construed.

IMPACT AND COSTS

As to the impact of the legislation no precise evidence was tendered by the plaintiffs except for some of their witnesses' speculative, generalized, dire warnings. Because the Court has held in the first instance that, in regard to plaintiffs' expressed claims, they had and have no aboriginal or treaty rights of band membership control to engage subsection 35(1), impact is no concern of the Court, Parliament is free to legislate pursuant to section 91, head 24, as it has done.

As to the respective plaintiffs' resources, the submissions of their counsel (TT78, pages 53-54) raise an implication not only about impact but also about costs of this action, that the plaintiffs are not poor. Certainly, it seems that the Sawridge Band is affluent.

DISPOSITIONS AND DIRECTIONS

The sheer volume of paper generated by this 79-day trial has made it somewhat difficult for the Court to pick and choose a critical path through that much read-over mass of written materials in order to come to the Court's conclusions without doing even more injustice to Canada's forests from which came the paper on which these reasons are typed. Counsel for the parties and the interveners who principally or wholly argued their clients' cases are to be congratulated, even although inevitably there must be a winner and a loser. The Court derived a tangible benefit, even if not much mentioned herein from the interveners' witnesses and their presentations.

It was agreed by all at trial that only those exhibits mentioned specifically during the trial should be part of record on appeal, the rest would be simply kept on file.

For all the reasons expressed herein the Court makes the following dispositions of the plaintiffs' stated claims:

(a) the plaintiffs' claim for a declaration that sections 8 to 14.3, both inclusive, of the *Indian Act*, as amended by section 4 of an Act entitled *An Act to Amend the Indian Act*, S.C. 1985, c. 27, are inconsistent with the provisions of section 35 of the *Constitution Act, 1982* to the extent that they infringe or deny the right of Indian bands to determine their own membership and therefore to that extent are of no force or effect, is dismissed;

(b) the plaintiffs' alternative claim for a declaration that the imposition of additional members on the plaintiff bands pursuant to the said sections without the consent of the bands is an interference with the right guaranteed by paragraph 2(d) of the *Canadian Charter of Rights and Freedoms* of the bands and their individual members to freely associate with other individuals, is dismissed; and

(c) the plaintiffs' claim for their costs in this action, is dismissed; and

(d) costs shall follow the event such that the plaintiffs or any one or two of them shall pay to the defendant and the interveners all their respective proper costs of this action as taxed or agreed to, the said plaintiffs, as between themselves only being liable each to the other for his or their proportionate share of such costs.

The Court directs that the defendant's solicitors prepare a draft form of judgment pursuant to paragraph 337(2)(b) of the Rules, giving effect to the above reasons. The defendant's solicitors shall first circulate the draft and solicit comments from the solicitors of the plaintiffs and the interveners. This will have two salutary effects:

i) the opportunity will be presented to obtain the most felicitous expression of the judgment to be pronounced; and

ii) the parties and the interveners will have an opportunity to make any last-minute suggestions on the subject of costs.