Tab B-2

Sawridge Band v. Canada, 1996 1 FCR 3

Walter Patrick Twinn suing on his own behalf and on behalf of all other members of the Sawridge Band, Wayne Roan suing on his own behalf and on behalf of all other members of the Ermineskin Band, Bruce Starlight suing on his own behalf and on behalf of all other members of the Sarcee Band (*Plaintiffs*)

v.

Her Majesty the Queen (*Defendant*)

and

Native Council of Canada, Native Council of Canada (Alberta) and **Non-Status Indian Association of Alberta** (*Interveners*)

Indexed as: Sawridge Band v. Canada **(T.D.)**

Trial Division, Muldoon J. "Edmonton, September 20, 22, 23, 24, 27, 28, 29, October 4, 5, 6, 7, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, November 1, 2, 3, 4, 5, Ottawa, November 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, December 1, 2, 3, 6, 7, 8, 9, 13, 1993, March 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, 31, April 1, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 1994; Ottawa, July 6, 1995.

Native peoples " Registration " Action for declaration 1985 amendments to Indian Act, changing entitlement to registration in Band List, inconsistent with Constitution Act, 1982, s. 35 recognition of existing Aboriginal and treaty rights " Action dismissed based on s. 35(4) guaranteeing Aboriginal and treaty rights equally to males, females " No customary law, right to control membership " Prior to Treaties, Indians free to join, leave chief's people, no one ever expelled " Indian Act, 1876, Treaties extinguishing any Aboriginal right of control of membership " No treaty, statutory right of Indians to control band, reserve membership " Indians ex post facto adopting provisions of 1869 Indian Act " That marital regime for which Indians contend sometime feature of various Indian Acts not according it constitutional recognition as Aboriginal or treaty right.

Constitutional law " Aboriginal and Treaty Rights " Action for declaration 1985 amendments to Indian Act, changing entitlement to registration in Band List inconsistent with Constitution Act, 1982, s. 35 recognition of existing Aboriginal and treaty rights " S. 35(4), guaranteeing Aboriginal and treaty rights equally to male and female persons, extinguishing any right permitting Indian husband to bring non-Indian wife into residence on reserve, but forbidding Indian wife from so bringing non-Indian husband.

Constitutional law " Charter of Rights " Fundamental freedoms " Action for declaration 1985 amendments to Indian Act allowing Indian wife to bring non-Indian husband into residence on reserve interference with right guaranteed by Charter, s. 2(d) to bands and individual members to

freely associate with other individuals " Amendments justified on grounds of equality in Charter, s . 15, and s. 28 assertion Charter's rights and freedoms guaranteed equally to male and female persons.

Constitutional law " Charter of Rights " Equality Rights " 1985 amendments to Indian Act changing entitlement to registration in Band List so that Indian wives allowed to bring non-Indian husbands into residence on reserve " Validated by Charter, s. 15 on ground of equality, and assertion in s. 28 Charter's rights and freedoms guaranteed equally to male and female persons, in addition to Constitution Act, 1982, s. 35(4).

Constitutional law " Charter of Rights " Limitation clause " 1985 amendments to Indian Act permitting Indian wives to bring non-Indian husbands into residence on reserve " If infringing freedom of association under Charter, s. 2(d), justified on grounds of equality in s. 15 and s. 28 assertion Charter's rights and freedoms guaranteed equally to male, female persons.

This was an action for a declaration that certain 1985 amendments to the *Indian Act* (specifically sections 8 to 14.3) are inconsistent with *Constitution Act, 1982*, section 35. Those amendments made changes regarding entitlement to registration in a Band List. Subsection 35(1) recognizes the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. Subsection 35(4) guarantees the Aboriginal and treaty rights equally to male and female persons.

The plaintiffs alleged that prior to the enactment of section 35 on April 17, 1982, the statutes of Canada confirmed Indians' rights to determine their bands' members and did not impose additional members on the bands. They alleged that their ancestors had lived in organized societies long before any statute of Parliament or treaty and that no such statute or treaty extinguished their right to determine their own membership. They asserted that it was the Aboriginal principle and practice that, upon marriage the woman followed the man to reside in or at his ordinary residence with his tribal group. It was submitted that such an Aboriginal right either survived the treaty making, or is enshrined in the treaties. They argued that the 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, particularly "Any male person of Indian blood reputed to belong to a particular band".

In the alternative, the plaintiffs sought a declaration that the imposition of additional membership without the bands' consent was an interference with the right guaranteed by Charter, paragraph 2(*d*) of the bands and their individual members to freely associate with other individuals.

Held, the action should be dismissed.

The so-called Aboriginal and treaty rights which permitted an Indian husband to bring his non-Indian wife into residence on a reserve, but which forbade an Indian wife from so bringing her non-Indian husband were extinguished by subsection 35(4), which operates notwithstanding other provisions of the *Constitution Act, 1982.* Subsection 35(4) exacts equality of rights between male and female persons, no matter what rights or responsibilities may have pertained in earlier times. On this basis alone, the action had to be dismissed.

The assertion of English, later British, sovereignty was first formally expressed in the Hudson's Bay Company Charter on May 2, 1670. Any rights which the plaintiffs can successfully establish must have been exerted before that day and must not have been extinguished before the coming into force of subsection 35(1) of the *Constitution Act, 1982* and must withstand subsection 35(4) because the assertion of sovereignty made the Aboriginal peoples subject to laws of general application in regard to crime, property, civil administration and tort. To the extent that those general laws impinged on Aboriginal rights, the Aboriginal rights were extinguished. Those unspecified Aboriginal rights which were not the subjects of the treaties were not so extinguished and continued in existence.

The asserted right to control band membership was extinguished by *The Indian Act*, 1876, which preceded the Treaties under consideration. Complete control was taken by Parliament in the enactment of that statute and its predecessor.

The records kept by the Treaty Commissioners demonstrated 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 Treaty 7. The Government's Treaty Commissioner unambiguously asserted control over membership by the Canadian government and in consonance with the provisions of *The Indian Act*, 1876 and preceding legislation. The Indians first acknowledged loss of control and requested the Government to assert control for and on their behalf.

Examination of the texts of the Treaties indicated that there was no treaty right of Indians to control band or reserve membership. The Indians understood that to be so and 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 or was not to be paid individually.

Legislation enacted contrary to the Constitution's provisions is, to the extent of any inconsistency, of no force or effect. That the marital regime for which the plaintiffs contend was a sometime feature of various Indian Acts did not accord it constitutional recognition or affirmation as an Aboriginal or treaty right. It was always subject to repeal, and repealed it was.

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 the 1985 amendments. That is most unlikely, but the plaintiffs' position seems to forget the treaty's original *quid pro quo*. The Government 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.

The 1869 *Indian Act* provided that upon marriage to a non-Indian, an Indian woman's ties to her natal reserve were severed. Such a woman could elect to receive either a lump sum payment or to continue to collect the treaty annuity on an annual basis. If she chose the latter, she was a "red ticket" holder. That system was terminated in 1951. Not only does this demonstrate that at every turn Parliament was imposing statutory measures to assert control over the membership of Aboriginal groups even before the Treaties, but also that the plaintiffs have *ex post facto* adopted

the harshness of the 1869 statute and, asserted that that legislation expressed the Aboriginal "rule" of membership control from time immemorial.

Prior to the Treaties, the plaintiffs' predecessors had no custom of controlling their groups' or chiefs' peoples' membership. 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 chief's encampment and attach themselves to another. There was no "veto" on joining. Even those who misconducted themselves were never expelled. This freedom was the opposite of "control" of membership. There was no aboriginal right or customary laws to control membership. There was no Aboriginal or treaty right to engage subsection 35(1).

The plaintiffs have 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. Nowadays the bands receive and accept what the Government says and determines as to who is an Indian, and of which band. Parliament has over the years enacted comprehensive statutory, codified provisions governing Indian band membership. In practice, repute appears to have been repute in the eyes of a succession of government officials.

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 the 1985 amendments find section 1 justification in sections 15 and 28 which carry within the Charter the same thrust as does subsection 35(4) outside the Charter. If there be any infringement of the plaintiffs' freedom of association under paragraph 2(*d*) in the 1985 amendments, it is justified on the ground of equality as provided for by section 15 and the section 28 assertion that the Charter's rights and freedoms are guaranteed equally to male and female persons.

The 1985 amendments apply to people who were living on the day, at the time upon which it came into force. They neither compensate anyone for past exclusion nor do they purport to change anyone's status or plight as of a time in the past. The amendments seek to cure the plight of those living when the legislation came into force. The amending legislation is prospective in effect.

Statutes and regulations judicially considered

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, ss. 3, 6, 19.

An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury, S.C. 1850, c. 74, ss. IV, V, VI.

An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, S.C. 1868, c. 42, ss. 6, 9, 15, 17.

An Act to Amend the Indian Act, S.C. 1985, c. 27, s. 4.

An Act to repeal in part and to amend an Act, entitled, An Act for the better protection of the Lands and property of the Indians in Lower Canada, S.C. 1851, c. 59, s. II.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) R.S.C., 1985, Appendix II, No. 44, ss. 1, 2(*d*), 15, 25, 28.

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) R.S.C., 1985, Appendix II, No. 5, s. 91.

Constitution Act, 1930, 20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) R.S.C., 1985, Appendix II, No. 26.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) R.S.C., 1985, Appendix II, No. 44, s. 35.

Constitutional Amendment Proclamation, 1983, SI/84-102 , s. 2.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 57 (as am. by S.C. 1990, c. 8, s. 19).

Federal Court Rules, C.R.C., c. 663, RR. 337(2), 1101.

Indian Act, R.S.C. 1970, c. I-6 , s. 90(1)(*b*).

Indian Act, R.S.C., 1985, c. I-5 , ss. 2(1) "band", "Band List" (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 1), "Indian" "Indian Register" (as am. *idem*), "member of a band", (as am. *idem*), "Registrar" (as am. *idem*), 4 (as am. *idem*, s. 2), 4.1 (as enacted *idem*, s. 3; as am. by R.S.C., 1985 (4th Supp.), c. 48, s.1), 5 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 6 (as am. *idem*; R.S.C., 1985 (4th Supp.), c. 43, s. 1), 7 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 8 (as am. *idem*), 9 (as am. *idem*), 10 (as am. *idem*), 11 (as am. *idem*; R.S.C., 1985 (4th Supp.), c. 43, s. 2), 12 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 13 (as am. *idem*), 13.1 (as enacted *idem*), 13.2 (as enacted *idem*), 13.3 (as enacted *idem*), 14 (as am. *idem*), 14.1 (as enacted *idem*), 14.2 (as enacted *idem*), 14.3 (as enacted *idem*), 88.

Indian Act (The), 1876, S.C. 1876, c. 18, ss. 3, 4, 5, 11, 12, 13, 15, 16, 20, 25, 26, 27.

Indian Act (The), 1880, S.C. 1880, c. 28, ss. 12, 13.

Indian Act (The), S.C. 1951, c. 29.

Natural Resources Transfer Agreement (Alberta) confirmed by the *Constitution Act, 1930*, 20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) R.S.C., 1985, Appendix II, No. 26, s. 2, para. 12.

Revised Statutes of Canada, 1985 Act, R.S.C., 1985 (3rd Supp.), c. 40, s. 16.

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

Rupert's Land Act, 1868, 31-32 Vict., c. 105 (U.K.) R.S.C., 1985, Appendix II, No. 6.

Treaty No. 6 (1876).

Treaty No. 7 (1877).

Treaty No. 8 (1899).

Treaty of Paris (1763).

Treaty of Utrecht (1713).

Cases judicially considered

Applied:

Sigeareak El-53 v. The Queen, 1966 CanLII 70 (SCC), 1966 S.C.R. 645; (1966), 57 D.L.R. (2d) 536; 1966 4 C.C.C. 393; 49 C.R. 271; 56 W.W.R. 478;*R. v. Drybones*, 1969 CanLII 1 (SCC), 1970 S.C.R. 282; (1969), 9 D.L.R. (3d) 473; 71 W.W.R. 161; 10 C.R.N.S. 334; *Ontario (Attorney General) v. Bear Island Foundation*, 1991 CanLII 75 (SCC), 1991 2 S.C.R. 570; (1991), 83 D.L.R. (4th) 381; 1991 3 C.N.L.R. 79; 127 N.R. 147; 46 O.A.C. 396; 20 R.P.R. (2d) 50; *R. v. Sioui*, 1990 CanLII 103 (SCC), 1990 1 S.C.R. 1025; (1990), 30 Q.A.C. 287; 70 D.L.R. (4th) 427; 56 C.C.C. (3d) 225; 1990 3C.N.L.R. 127; 109 N.R. 22; *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), 1990 2 S.C.R. 85; (1990), 71 D.L.R. (4th) 193; 1990 5 W.W.R. 97; 67 Man. R. (2d) 81; 1990 3 C.N.L.R. 46; 110 N.R. 241; 3 T.C.T. 5219; *Reference Re Bill 30, An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), 1987 1 S.C.R. 1148; (1987), 40 D.L.R. (4th) 18; 77 N.R. 241; 22 O.A.C. 321; *R. v. Sparrow*, 1990 CanLII 104 (SCC), 1990 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385; 1990 4 W.W.R. 410; 46 B.C.L.R. (2d) 1; 56 C.C.C. (3d) 263; 1990 3 C.N.L.R. 160; 111 N.R. 241; *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, 1980 1 F.C. 518; (1979), 107 D.L.R. (3d) 513; 1980 5 W.W.R. 193; 1979 3C.N.L.R. 17 (T.D.); *Calder et al. v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), 1973 S.C.R. 313; (1973), 34 D.L.R. (3d) 145; 1973 4 W.W.R. 1; *Bay v. Registrar of Indians* (1976), 9 CNLC 36 (F.C.T.D.); *Delgamuukw v. British Columbia* (1993), 1993 CanLII 4516 (BC CA), 104 D.L.R. (4th) 470; 1993 5 W.W.R. 97; 30 B.C.C.A. 1; 49 W.A.C. 1 (B.C.C.A.); *R. v. N.T.C. Smokehouse Ltd.*, 1993 CanLII 4521 (BC CA), 1993 5 W.W.R. 542; (1993), 29 B.C.A.C. 273; 80 B.C.L.R. (2d) 158; 1993 4 C.N.L.R. 158; 48 W.A.C. 273 (B.C.C.A.).

considered:

R. v. Horseman, 1990 CanLII 96 (SCC), 1990 1 S.C.R. 901; (1990), 108 A.R. 1; 1990 4 W.W.R. 97; 73 Alta. L.R. (2d) 193; 1990 3 C.N.L.R. 95; 55 C.C.C. (3d) 353; 108 N.R. 1.

Referred to:

Sikyea v. The Queen, 1964 CanLII 62 (SCC), 1964 S.C.R. 642; (1964), 50 D.L.R. (2d) 80; 49 W.W.R. 306; 1965 2 C.C.C. 129; 44 C.R. 266; *The Queen v. George*, 1966 CanLII 2 (SCC), 1966 S.C.R. 267; (1966), 55 D.L.R. (2d) 386; 1966 3 C.C.C. 137; 47 C.R. 382; *Moosehunter v. The Queen*, 1981 CanLII 13 (SCC), 1981 1 S.C.R. 282; (1981), 123 D.L.R. (3d) 95; 9 Sask. R. 149; 59 C.C.C. (2d) 193; 36 N.R. 437.

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Slattery, Brian. "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83), 8 *Queen's L.J.* 232.

Tillett, Leslie, ed. *Wind on the Buffalo Grass: Native American Artist-Historians*, 1976. Reprint, New York: Da Capo Press, 1989.

ACTION for a declaration that certain 1985 amendments to the *Indian Act* (specifically sections 8 to 14.3) were inconsistent with *Constitution Act, 1982*,section 35. Action dismissed.

Counsel:

Catherine M. Twinn, Martin J. Henderson and *Philip P. Healey* for plaintiffs.

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Terrence P. Glancy for intervener Non-Status Indian Association of Alberta.

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Royal, McCrum, Duckett & Glancy, Edmonton, for intervener Non-Status Indian Association of Alberta.

The following are the reasons for judgment rendered in English by

Muldoon J.: This is a constitutional case, in which the plaintiffs sue for a declaration that key provisions of an Act of Parliament are inconsistent with parts of section 35 of the Constitution of Canada, and in particular, as enacted by the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) R.S.C., 1985, Appendix II, No. 44. Notice was duly served on the attorney general of each province (the Attorney General of Canada already being engaged on the defendant's behalf) in accordance with section 57 of the *Federal Court Act*, R.S.C. 1985, c. F-7 as am. by S.C. 1990, c. 8, s. 19 and Rule 1101 *Federal Court Rules*, C.R.C., c. 663. No provincial attorney general applied for leave to intervene herein, nor for leave to file a memorandum of facts and law and to appear by counsel and take part in the hearing.

Three interveners were, however, permitted to participate in this case with nearly the full plenitude of a party's rights, status and privileges. They were admitted to such status by order of Mr. Justice McNair, pronounced September 14, 1989 (doc. 96). At trial, the plaintiffs moved to evict the three interveners, but for the reasons given then, the plaintiffs' motion was dismissed, with costs, to consist of a counsel fee payable in favour of the defendant and each of the three interveners in any event of the cause.

At trial the plaintiffs also moved the Court to take a view "necessarily a mute, silent and uncommunicative view, for no sworn witnesses were proposed to accompany the Court" on two reserves, the Westbank in British Columbia and the Sarcee (or Tsuu T'ina) in Alberta. In addition, the plaintiffs sought to adduce the testimony, on commission, of a witness who was said to be 85 years of age, and who declined to travel by aeroplane. That compendious motion, also for reasons expressed at the trial, was dismissed on October 18, 1993, with costs to the defendant and interveners in any event of the cause.

The plaintiffs had recently before the trial dismissed their counsel of record, the latest of several, before engaging the counsel who ultimately did appear and conduct the plaintiffs' case. The Court ruled that the trial was to proceed nearly on schedule with little delay, because that switching of lawyers was the plaintiffs' own doing and they were not to be permitted to make ashes of the pre-trial case management efforts of Messrs. Justices McNair and Cullen. Accordingly, the plaintiffs' new trial lawyers, having known what they were getting into, were obliged to carry on with only minimal delay.

As it turns out, the delay which has now occurred has been largely caused by innumerable flaws in the technological marvel which was engaged, with personnel, to produce trial transcripts and exhibits' images with the speed of summer lightning on an electronic computerized monitor

screen. This delay, from the Court's point of view, has been unavoidable. The old-fashioned way would have been faster.

THE LEGISLATION

The plaintiffs' grievance is stated to reside in an Act of Parliament: 33-34 Elizabeth II, *An Act to amend the Indian Act*, S.C. 1985, c. 27, (the 1985 amendment). Section 4 of that 1985 amendment is particularly noticed in enacting new sections 8, 9, 10, 11 and 12 in the *Indian Act*, R.S.C., 1985, c. I-5.[1]*ftnote[1] In order to understand how the 1985 amendment, (Bill Cib-31) assented to on June 28, 1985, could truly amend the *Indian Act* in the R.S.C., one has to note the provisions of section 16 of the *Revised Statutes of Canada, 1985 Act*, R.S.C., 1985 (3rd Supp.), c. 40. For accuracy of reference, just this once, the 1985 amendment's true citation is *An Act to Amend the Indian Act*, R.S.C., 1985 (1st Supp.), c. 32. Because some of these provisions refer to earlier ones, and because there is an interrelationship with concurrently enacted and repealed provisions, the Court deems it convenient and not unreasonable to spill the ink necessary to set out the pertinent provisions, keeping in mind that they must find their validity, if at all, not only on the uncontested ground of the constitutional division of national and provincial powers, but also in accordance with section 35 of the *Constitution Act, 1982* as mentioned at the outset of these reasons. In some instances, the repealed provision R.S.C., 1985, c. I-5, unless otherwise indicated is recited (appearing in italics) just ahead of the bold-face provision of the 1985 amendment R.S.C., 1985 (1st Supp.), c. 32, ss. 1, 2 and 4, and amendments thereto where indicated called Bill C-31 by some. Ordinary type is utilized for unamended surviving pre-Bill C-31 provisions R.S.C., 1985, c. I-5:

2. (1) In this Act

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

. . .

"Band List" means a list of persons that is maintained under section 8 by a band or in the Department;

. . .

"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

. . .

"Indian Register" means the register of persons that is maintained under section 5;

. . .

"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

. . .

"Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;

. . .

4. (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 37 to 41, shall not apply to

(a) any Indians or any group or band of Indians, or

(b) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

(*a*) any Indians or any group or band of Indians, or

(*b*) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

(2.1) For greater certainty, and without restricting the generality of subsection (2), the Governor in Council shall be deemed to have had the authority to make any declaration under subsection (2) that the Governor in Council has made in respect of section 11, 12 or 14, or any provision thereof, as each section or provision read immediately prior to April 17, 1985.

(3) Sections 114 to 122 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.

4.1 A reference to an Indian in the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2 or a reference to an Indian in . . . various provisions listed shall be deemed to include a reference to any person who is entitled to have his name entered in a Band List and whose name has been entered therein. R.S.C., 1985 (1st Supp.), c. 32, s. 3.

4.1 A reference to an Indian in any of the following provisions shall be deemed to include a reference to any person whose name is entered in a Band List and who is entitled to have it entered therein: the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2, subsections 4(2) and (3) and 18(2), sections 20 and 22 to 25, subsections 31(1) and (3) and 35(4), sections 51, 52, 52.2 and 52.3, subsections 58(3) and 61(1), sections 63 and 65, subsections 66(2) and 70(1) and (4), section 71, paragraphs 73(*g*) and (*h*), subsection 74(4), section 84, paragraph 87(1)(*a*), section 88, subsection 89(1) and paragraph 107(*b*). R.S.C., 1985 (4th Supp.), c. 48, s. 1.

5. An Indian Register shall be maintained in the Department, which Register shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.

5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

6. (1) Subject to section 7, a person is entitled to be registered if

(*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under

subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(*d*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(*e*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(*f*) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(3) For the purposes of paragraph (1)(f) and subsection (2),

(*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(*b*) a person described in paragraph (1)(c), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that provision. R.S.C., 1985 (4th Supp.), c. 43, s. 1.

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

7. (1) The following persons are not entitled to be registered:

(*a*) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-

matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

(*b*) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered.

(2) Paragraph (1)(*a*) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

(3) Paragraph (1)(*b*) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

8. The band lists in existence in the Department on September 4, 1951 shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the List relates and in all other places where band notices are ordinarily displayed.

8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that Band.

9. (1) Within six months after a list has been posted in accordance with section 8 or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section 7

. . .

the band council, electors, adult named on list, or person concerned

may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person, and the onus of establishing those grounds lies on the person making the protest.

(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision and, subject to a reference under subsection (3), the decision of the Registrar is final and conclusive.

(3) Within three months after the date of a decision of the Registrar under subsection(2),

(a) the council of the band affected by the Registrar's decision, or

(b) the person by or in respect of whom the protest was made,

may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision,

. . .

(4) A judge referred to in subsection (3) shall

(a) inquire into the correctness of the Registrar's decision, and for that purpose may exercise all the powers of a commissioner under Part I of the Inquiries Act; and

(b) decide whether the person in respect of whom the protest was made is, in accordance with this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register.

(5) The decision of the judge under subsection (4) is final and conclusive

(6) Not more than one reference of a Registrar's decision in respect of a protest may be made to a judge under this section.

(7) Where a decision of the Registrar has been referred to a judge for review under this section, the burden of establishing that the decision of the Registrar is erroneous is on the person who requested that the decision be so referred.

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

10. *Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.*

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the Band gives its consent to the band's control of its own membership.

(2) A band may, pursuant to the consent of a majority of the electors of the band,

(*a*) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

(*b*) provide for a mechanism for reviewing decisions on membership.

(3) Where the council of a band makes a by-law under paragraph 81(1) (p. 4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(a) give notice to the band that it has control of its own membership; and

(b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(b), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

11. (1) Subject to section 12, a person is entitled to be registered if that person

(a) on May 26, 1874 was, for the purposes of An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other real property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the May 26, 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(c) is a male person who is a direct descendent in the male line of a male person described in paragraph (a) or (b);

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b), or (d); or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d), or (e).

(2) Paragraph (1)(e) applies only to persons born after August 13, 1956.

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;

(c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

(2) Commencing on the day that is two years after the day that an Act entitled An Act to Amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

(3) For the purposes of paragraph (1)(d) and sub- section (2),

(a) a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(c), (d) or (e) and who was no longer living on the first day on which the person would otherwise be entitled to have the person's name entered in the Band List of the band of which the person ceased to be a member shall be deemed to be entitled to have the person's name so entered; and

(b) a person described in paragraph (2)(b) shall be deemed to be entitled to have the person's name entered in the Band List in which the parent referred to in that paragraph is or was, or is deemed by this section to be, entitled to have the parent's name entered.
R.S.C., 1985 (4th Supp.), c. 43, s. 2

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band

List of the amalgamated band or the new band to which that person has the closest family ties, as the case may be.

12. (1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

(iv) is born of a marriage entered into after September 4, 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

(4) Subparagraphs (1)(a)(i) and (ii) do not apply to a person who

(a) pursuant to this Act is registered as an Indian on August 13, 1958, or

(b) is a descendant of a person described in paragraph (a) of this subsection.

(5) Subsection (2) applies only to persons born after August 13, 1956.

12. Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

(a) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or

(b) is a member of another band,

is entitled to have his name entered in the Band List maintained in the Department for a band if the council of the admitting band consents.

13. Subject to the approval of the Minister and, if the Minister so directs, to the consent of the admitting band,

(a) a person whose name appears on a General List may be admitted into membership of a band with the consent of the council of the band; and

(b) a member of a band may be admitted into membership of another band with the consent of the council of the latter band.

13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.

(2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect.

(3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10.

13.2 (1) A band may, at any time after assuming control of its Band List under section 10, decide to return control of the Band List to the Department if a majority of the electors of the band gives its consent to that decision.

(2) Where a band decides to return control of its Band List to the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect and shall provide the Minister with a copy of the Band List and a copy of all the membership rules that were established by the band under subsection 10(2) while the band maintained its own Band List.

(3) Where a notice is given under subsection (2) in respect of a Band List, the maintenance of that Band List shall be the responsibility of the Department from the date on which the notice is received and from that time the Band List shall be maintained in accordance with the membership rules set out in section 11.

13.3 A person is entitled to have his name entered in a Band List maintained in the Department pursuant to section 13.2 if that person was entitled to have his name entered, and his name was entered, in the Band List immediately before a copy of it was provided to

the Minister under subsection 13.2(2), whether or not that person is also entitled to have his name entered in the Band List under section 11.

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member.

14. (1) Within one month after the day an Act entitled An Act to Amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, the Registrar shall provide the council of each band with a copy of the Band List for the band as it stood immediately prior to that day.

(2) Where a Band List is maintained by the Department, the Registrar shall, at least once every two months after a copy of the Band List is provided to the council of a band under subsection (1), provide the council of the band with a list of the additions to or deletions from the Band List not included in a list previously provided under this subsection.

(3) The council of each band shall, forthwith on receiving a copy of the Band List under subsection (1), or a list of additions to and deletions from its Band List under subsection (2), post the copy or the list, as the case may be, in a conspicuous place on the reserve of the band.

14.1 The Registrar shall, on inquiry from any person who believes that he or any person he represents is entitled to have his name included in the Indian Register or a Band List maintained in the Department, indicate to the person making the inquiry whether or not that name is included therein.

14.2 (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.

(2) A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or that person's representative.

(3) A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or that person's representative.

(4) The onus of establishing the grounds of a protest under this section lies on the person making the protest.

(5) Where a protest is made to the Registrar under this section, the Registrar shall cause an investigation to be made into the matter and render a decision.

(6) For the purposes of this section, the Registrar may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as the Registrar, in his discretion, sees fit or deems just.

(7) Subject to section 14.3, the decision of the Registrar under subsection (5) is final and conclusive.

14.3 (1) Within six months after the Registrar renders a decision on a protest under section 14.2,

(a) in the case of a protest in respect of the Band List of a band, the council of the band, the person by whom the protest was made, or the person in respect of whose name the protest was made or that person's representative, or

(b) in the case of a protest in respect of the Indian Register, the person in respect of whose name the protest was made or that person's representative,

may, by notice in writing, appeal the decision to a court referred to in subsection (5).

(2) Where an appeal is taken under this section, the person who takes the appeal shall forthwith provide the Registrar with a copy of the notice of appeal.

(3) On receipt of a copy of a notice of appeal under subsection (2), the Registrar shall forthwith file with the court a copy of the decision being appealed together with all documentary evidence considered in arriving at that decision and any recording or transcript of any oral proceedings related thereto that were held before the Registrar.

(4) The court may, after hearing an appeal under this section,

(a) affirm, vary or reverse the decision of the Registrar; or

(b) refer the subject-matter of the appeal back to the Registrar for reconsideration or further investigation.

The matters in issue focus primarily on the 1985 amendments' sections 11 and 12, by contrast with their repealed predecessors, but there is significance to be perceived in the other recited provisions and their schematic purport, as will be expressed.

The plaintiffs would not have brought this action, no doubt, had they been in favour of how, they assert, it operates. Their complaints are defined by them, and rejected by the defendant and the interveners, in respective detailed pleadings.

THE PLEADINGS

Paragraph 13 of the amended statement of claim alleges that the statutes of Parliament prior to the recognition and affirmation of existing Aboriginal and treaty rights on April 17, 1982 (with a

few unstated limited exceptions) confirmed Indians' rights to determine their bands' members and did not impose additional members on the bands. The Attorney General's defence, however, denies all that, and avers those allegations are contrary to the explicit provisions of the successive Indian Acts and to the executive decisions made pursuant to that legislation. Then, the interveners, described by counsel for the Native Counsel of Canada (NCC) as *les "exclusées" sic*, pleaded, as follows:

NCC's Statement of Intervention

13. With respect to paragraph 13 of the Statement of Claim, the NCC denies the allegations contained therein.

Native Council of Canada (Alberta)'s NCC(A)'s statement of intervention.

(d) With respect to Paragraph 13 of the statement of claim, the NCC(A) states that statutes of . . . Parliament . . . prior to the entrenchment of the stated rights violated the rights of Indians by stripping aboriginal peoples of their statutory Indian status and membership in the Bands, while in other cases extending statutory Indian status and Band membership to individuals who were not aboriginal people.

Non-Status Indian Association of Alberta's NSIAA's statement of intervention

8. With respect to paragraph 13 . . . the consequences of marriage between an Indian and a non-Indian were different for men and women. To the extent of that difference, the historical record does not support:

A. the allegation that there was no imposition of members upon an Indian band without consent;

B. the difference in treatment of men and women as an aboriginal right;

C. the difference in treatment of men and women as a treaty right.

Paragraph 14 of the statement of claim alleges as follows:

14. With the enactment of an Act entitled *An Act to Amend the Indian Act*, S.C., 1985, c. 27 (the "1985 Amendment") Parliament attempted unilaterally to require Indian bands to admit certain persons to membership. The 1985 Amendment imposes members on a band without the necessity of consent by the council of the band or the members of the band itself and, indeed, imposes such persons on the band even if the council of the band or the membership objects to the inclusion of such persons in the band. This exercise of power by Parliament was unprecedented in the predecessor legislation.

The defendant avers in answer to the effect that he denies the allegation expressed in the last sentence and asserts that the 1985 amendment speaks for itself and further regarding the plaintiffs' paragraph 14, that section 91 head 24 of the *Constitution Act, 1867* 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act,*

1982, Item 1 R.S.C., 1985, Appendix II, No. 5 accords Parliament exclusive authority to legislate, and it did legislate the criteria and conditions of band membership, as well as the circumstances in which entitlement can be acquired, held, lost, revoked, regained or restored without the consent of bands or band councils.

To the defendant's statements, the plaintiffs replied and joined issue (certified record: tab 4, page 2, paragraphs 2 and 3):

2. With respect to paragraphs 5(*b*), 11, 12 and 14 the Plaintiffs say that their existence as Indians, Tribes and Bands, living in organized societies, long preceded any statute of the Parliament of Canada or treaty and that no such statute or treaty extinguished the right of such societies to determine their own membership.

3. With respect to the said paragraphs, the Plaintiffs further say that by the effect of the treaties in issue the reserve lands of the Plaintiff bands were set aside for the exclusive use of the Indians interested therein and that at no time prior to the enactment of the legislation now in issue did the Parliament of Canada enact legislation having the purpose or the effect of abrogating or limiting the rights conferred by the said treaties.

The interveners, each in its own statement of intervention, made these assertions:

NSIAA:

9. With respect to paragraphs 14 and 15 of the Statement of Claim, paragraphs 14, 15, 15(a), 15(b), and 15(c) of the Statement of Defence, and paragraphs 4, 5 and 6 of the Reply and Joinder of Issue, it is the position of the Association that:

A. the revisions to the Act by the 1985 amendment, were consistent with the legislative history of the Act and its predecessor legislation;

B. with respect to the Plaintiff Sarcee Band and those on whose behalf the Association speaks, the number of persons with acquired rights is small, and those conditionally entitled to become members are subject to the jurisdiction of the Sarcee Band to determine who shall be members pursuant to the provisions of its Band Membership Code.

NCC(A):

(e) With respect to Paragraph 14 of the Statement of Claim, the NCC(A) states that by the 1985 Amendment, Parliament attempted to correct injustices and wrongs resulting from the application of the *Indian Act* prior to the 1985 Amendment, and at the same time to enable Indian Bands to practice a greater degree of self-government.

NCC:

14. With respect to paragraph 14 of the Statement of Claim, the NCC denies that the exercise of power referred to by the Plaintiffs was unprecedented in the previous legislation.

The plaintiffs' reply states that the aboriginal people, their predecessors existed "in organized societies" and that state "long preceded any statute" of Parliament. The defendant's counsel has urged that "tribes and bands" are terms conferred by Euro-Canadians, and he preferred to designate such units as "encampments" and "camps". That explains the form of the defendant's admission first recorded in trial transcript hereinafter TT Volume 6 (TT6) at pages 615 and 618. Mr. Akman, for the defendant, is recorded thus:

MR. AKMAN: No, My Lord. If I can assist my friend Mr. Healey greatly, and I'm very pleased to do so, to the extent their position is that these camps in which they lived is synonymous with organized society, then we are quite happy to accept the proposition that these camps constituted organized societies. TT6, at page 615.

. . . I said we admit that these organized camps were organized societies. The word "society" can mean anything; it means in this case an organized camp, that's it. TT6, at page 618.

Reference to the defendant's admission, which is on an even plane with written pleadings, was made on at least a dozen more occasions during the trial and, of course, such admission is accordingly referred to in the trial transcript on those occasions.

CONCERNS ABOUT 1985 AMENDMENTS IN TESTIMONY

The foregoing review of the pleadings on how the 1985 amendment operated or was foreseen to operate, was reflected in the testimony of various witnesses. Perhaps the Court ought not to have permitted such speculative testimony, but it was not wholly inappropriate to hear from an elderly Aboriginal witness who was called and permitted to give "oral history", despite the rule against hearsay. Sophie Makinaw testified through the very excellent oral interpretation services of Harold Cardinal whom the Court praises and thanks for his manifestly first-rate, proficient and dedicated services. Mrs. Makinaw's testimony here is taken not for predictive accuracy, but for the purpose of demonstrating the plaintiffs' worst fears about the practical operation of the 1985 amendments. Mrs. Makinaw's answer was a long one, and is here only slightly abridged.

Now, when we look at this situation, it's got to be clear that we're not talking about only the woman who left our reserve since 1951 returning to our communities. Those women now have their children, and in some cases they have their grandchildren. And in many cases if they return to our reserves, they will want to come back with their husbands; they will want their husbands to return with them.

I want to talk specifically about the white husband in this instance. It is not clear that the white husband is going to be able to accept our ways and live the way we are. It may be that the white man who comes to live on our reserve will want to impose his own values, his ways which he is familiar with on us, on our communities, and I haven't really thought yet, I haven't had time to really try and determine what all the consequences of this possibility might be.

One of the problems that we're even now encountering and that's going to be aggravating if large numbers of people come back to our reserves is the fact that even now our reserves are getting over populated. I take, for example, my own situation where I live on a quarter of land, and in

that quarter of land we already have five homes. My son occupies another quarter, and in that quarter there are already three homes. We're looking at a situation, even as the situation stands where we're over populated, there may be as a consequence of the pressure that builds up from that situation a lot of conflict, a lot of aggravation. It's not that we don't want conflict, we don't want aggravation, but that may be the consequence of putting in additional large numbers of people on land that is already over-populated.

I look at the basic, even a service as basic as water, the supply of water. Even with the homes that we have on our, on our reserve now, the number of homes that we have, we are beginning to run short of water supply, and our people . . . water has to be transported to our people in order that they can have, have that kind of service, and these kind of problems will surely grow.

The question of who should live on our reserve is really a matter that should be decided by us as people who own and live on the land. That is a decision that should not be taken elsewhere or by someone else for us.

THE INTERPRETER: I've asked her to repeat again because I have missed some of her statements.

A We have reached the stage and the time where we have to take control over our own affairs and make our own decisions. We have an obligation to our children. There are many that are starting to grow up, and we have an obligation to plan for those children. Even now when we look at the question of housing, we are unable to keep up with the requirements of our growing population.

The decision on who is a member of our band or not, or who is entitled, should be made by us. We already share . . . as Cree people we already share a lot of land with, with the white people. All we retained for ourselves is what we have now in our reserves. If the white people want to give more land, more services, then they should take part of the land that was shared with them because they have an abundance of land to provide these things to these people, if that is what they want to do. We . . .

THE INTERPRETER: Before she continues her statement, there is another portion that I want to finish off in translating.

A The concern is about bringing white people into the community. If the power, the right to decide or to control who is or who is not a member, is taken away from us and placed in the hands . . . in outside hands, we have no means to control the kind of people that will come and live or that can come and live in our community. Even now we're beginning to experience a very large problem with white people or bad white people, meaning those people who come and sell drugs or engage in different kinds of illegal activities. We're already facing that problem today.

If the law changes as your question suggests and the decision is made by someone else, we'll have no means to keep those people out from our reserves. We may find them, some of them, coming to live as our neighbours or close to us, and we are going to certainly have real objections if we find that they are forced to live with people like that in our communities.

THE INTERPRETER: I think I've got all her statement now.

THE COURT: I have a question following that, if you will permit me, Mr. Healey. Is it Mrs. Makinaw's view that non-Cree wives pose less of a problem, fewer problems than non-Cree husbands?

A We . . . my difficulty is with non-Cree people or non-Cree persons because whether we're talking about a while *sic* person or a Métis, they are not familiar with our culture, they are not familiar with our ways, and when they come and live with us, they are aggressive, they want to control us. They live in a way that's different from us and often they're not honest, and that's what . . . that's a difficulty I have. TT6, at pages 633-637.

These concerns of Mrs. Makinaw were more or less the same as those earlier expressed by the other witness who gave "oral history", Mrs. Agnes Smallboy, recorded in trial transcript, Volume 3, at pages 274-277. Mrs. Smallboy was not alone in heaping guilt upon the Europeans and their present-day descendants, and this country's later immigrants, for having disturbed the "idyllic" Indian existence in this continent, but she modified that posture, perhaps without realizing such a retreat from the absolute of her mythology, thus:

Q MR. HEALEY: Agnes, you may know about the days before the white man. Can you tell the Judge if you know about things that occurred before the white man came . . . or Indians?

A If the truth is to be told, the Indian person lived in peace on this land before the white man came here or arrived.

THE COURT: Is that absolutely true?

Mrs. Smallboy, were there no conflicts at all between the Indians, no taking prisoners among the Indians?

Would you ask her, please?

THE WITNESS: It is true. There were conflicts; there were battles between the tribes. Our people would go south to go in battle with the tribes to the south of us, but that was internal to us.

THE COURT: Is that the answer?

THE INTERPRETER: Yes. Emphasis not in text; TT3, at page 279.

To say the Indians "lived in peace on this land before the white man arrived" is to say that which is not at all accurate, as Mrs. Smallboy disclosed, and as was later elaborated in Wayne Roan's testimony that the Blackfeet, "traditional enemy . . . that helped keep my population down, and I done the same for him". Tragically there are still feelings of enmity between Blackfeet and Cree young people. "We were taught that . . . " (TT7, at pages 763-764).

THE CONSTITUTION'S TEXTUAL PROVISIONS

One should return to the theme of the plaintiffs' apprehensions about the 1985 amendment which they allege to be unconstitutional and *ultra vires* of Parliament. What makes it unconstitutional and *ultra vires*, the plaintiffs say, is the existence and operation of section 35 of the *Constitution Act, 1982*which, as enacted, runs:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(This sounds curious since the Métis can hardly be thought of as "Aboriginal", having been a people only since the advent of the European people and then called "half-breeds" because of their mixed ancestry. The constitution makers indulged in history's revision here.)

About one year and two months after section 35, above-recited, came into force, it was amended as is reflected in the *Constitution Amendment Proclamation, 1983* SI/84-102 , s. 2 which added the following two subsections:

35. . . .

(3) For greater certainty in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

SUBSECTION 35(4) IS CONCLUSIVE

Given the nature and main substance of the plaintiffs' complaints (earlier above related), as understood and appreciated by the nature and main substance of the interveners' complaints against the state of the law which existed before the 1985 amendment (described in the testimony of Mary Two-Axe Early"TT48), subsection 35(4) appears to be conclusive. Without going into the plaintiffs' case further, it can be clearly seen that the marital custom, the so-called Aboriginal and treaty rights which permit an Indian husband to bring his non-Indian wife into residence on a reserve, but which forbid an Indian wife from so bringing her non-Indian husband are extinguished utterly by subsection 35(4).

The plaintiffs are firmly caught by the provisions of section 35 of the *Constitution Act, 1982* which they themselves invoke. The more firmly the plaintiffs bring themselves into and under subsection 35(1) the more surely subsection 35(4) acts upon their alleged rights pursuant to subsection 35(1) which, therefore are modified so as to be guaranteed equally to the whole collectivity of Indian men and Indian women.

If ever there was or could be a clear extinguishment of any alleged Aboriginal or treaty right to discriminate within the collectivity of Indians and more particularly against Indian women, subsection 35(4) of the *Constitution Act, 1982* is that; and it works that extinguishment, very specifically, absolutely, and imperatively. It operates "notwithstanding any other provision of this Act", that is, the *Constitution Act, 1982.*

The hardship and heartache of those women who were in effect expelled from their homes and home reserves, and even expelled from Indian status, and their grievous sense of injustice of becoming non-Indians while at the same time the "white ladies" who married male band members, became Indians, was well illustrated in the testimony of the interveners' witnesses. Subsection 35(4) is aimed at providing their relief.

That constitutional provision exacts equality of rights between male and female persons, no matter what rights or responsibilities may have pertained in earlier times. On this basis alone, the plaintiffs' action is dismissed. It is the supreme law of Canada which speaks, to end the inequality of marital status of Indian women who are subject to it. The impugned legislation could surely be supported by section 15 of the *Canadian Charter of Rights and Freedoms* being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) R.S.C., 1985, Appendix II, No. 44, too, were it not perhaps for section 25, but subsection 35(4) of the *Constitution Act, 1982* along with the other subsections of the whole of section 35 is in effect an "Indian provision" in an otherwise largely anti-racist Constitution, and it speaks deliberately and specifically to the diminution of past inequalities between Indian men and women. Thus the 1985 amendment is doubly validated by maybe section 15 and absolutely by subsection 35(4); and there is no doubt that it is within Parliament's legislative jurisdiction in regard to Indians. So, subsection 35(4) operates and commands whether pleaded or not; it cannot be evaded.

The plaintiffs put forth several other arguments in support of their position, and in justice, the Court ought to consider them all, for some are quite cogent. There are also other subjects to be considered.

ENGLISH AND BRITISH SOVEREIGNTY

(a) The HBC Charter.

The King of England, Charles II, acting in right of England (and apparently not in right of Scotland) by executive act incorporated a trading company of considerable corporate jurisdiction: "The Governor and Company of Adventurers of England trading into Hudson's Bay", hereinafter HBC. That considerable corporate jurisdiction is, for example, described in that statute of the U.K. known as the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.) R.S.C., 1985, Appendix II, No. 6 refers to the HBC's "Lands and Territories, Rights of Government, and other Rights, Privileges, Liberties, Franchises, Powers and Authorities". The HBC's incorporation was effected by means of the King's Letters Patent often referred to as the company's Royal Charter, granted on May 2, 1670. The HBC's territory was known as Rupert's Land, and it extended to:

. . . the sole Trade and Commerce of . . . all the Landes and Territoryes upon the Countryes Coastes and confynes of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid that are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State with the Fishing of all Sortes of Fish Whales Sturgions and all other Royall Fishes in the Seas Bayes Isletes and Rivers within the premises and the Fish therein taken together with the Royalty of the Sea upon the Coastes within the Lymittes aforesaid and all Mynes Royall as well discovered as not discovered of Gold Silver Gemms and precious Stones to be found or discovered within the Territoryes Lymittes and Places aforesaid And that the said Land bee from henceforth reckoned and reputed as one of our Plantacions or Colonyes in America call *Ruperts Land.*

. . .

SAVING ALWAYS the faith Allegiance and Soveraigne Dominion due to us i.e. King Charles our heires and successors for the same . . .

Also granted was the royal permission to establish courts of civil and criminal jurisdiction, among other matters and things.

In order to grant the HBC Charter in May, 1670, it is logically apparent that the Crown must have already asserted sovereignty (through, for example, Sir Thomas Button) at some earlier time, not precisely known to this Court. What is precisely known is the assertion of English (not yet British) sovereignty over Rupert's Land in early May, 1670. Ruperts Land, according to historian Norman L. Nicholson, in his work *The Boundaries of the Canadian Confederation*, (Carleton Library No. 115 and Macmillan of Canada) at page 18, is described thus:

This area has generally been taken to be the entire area draining into Hudson Bay.

And yet farther, according to Nicholson, France, from the beginning disputed the HBC's claim, but in the Treaty of Utrecht France relinquished its claims. The HBC in effect was, until 1868, the ultimate instrument of the Crown's claim of sovereignty on all of the western plains to the Rocky Mountains, at least north of the 49th parallel of latitude. The *Constitution Act, 1867*, and the *Rupert's Land Act, 1868* complete the story of the sovereignty claim, finally to be Canada's, whose many historical details are unnecessary to recount here.

(b) *The Royal Proclamation, 1763*

About half a century after the union of England and Scotland, and some eight months after the Treaty of Paris, concluded on February 10, 1763, King George III issued *The Royal Proclamation, 1763*, dated October 7 that year, R.S.C., 1985, Appendix II, No. 1. This act of the sovereign has something to do with the plains Indians and the Crown's assertion of sovereignty over the western plains.

The Proclamation firstly created four colonial governments to establish British law and order in territories ceded to the Crown by and under the treaty of that year: the governments of Quebec, East Florida, West Florida and Grenada, with general assemblies for and in each along with

courts of judicature. That Proclamation reiterated the earlier assertion of sovereignty in the HBC Charter by mentioning it in regard to lands inhabited by the Indians beyond and outside of Rupert's Land and the North West territory, thus:

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Soveriegnty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid. Emphasis not in original text.

So the Crown's sovereignty, protection and dominion, for the use of the Indians was exerted over all the lands and territories except Rupert's Land, the northwestern territories and, one infers, all the lands to the foot of the western mountains. However, in the lands beyond, which were reserved for the Indians, military officers and Indian affairs officials were permitted to follow, to seize and apprehend felons in flight from justice.

In their filed statement of fact and law, "Issue V" pages 167-168, the plaintiffs argue, despite the above-cited passage and summary that the Royal Proclamation, (a) "clearly proclaimed the right of the Indian communities to define their own membership for the purpose of dealing with the control, use, occupation and enjoyment of their lands", (b) "that a substantive and enforceable promise was made to them which has been preserved as a constitutional imperative in Canada applicable to all of them", (c) "applied to all indigenous peoples of what is today Canada (as well as other parts of North America)", and (d) (especially) "applied to the territories within which the plaintiffs are situated". (Plaintiffs' statement of fact and law, page 167.)

The author of the above-recited dithyrambic prose had read, but obviously not understood certain of Prof. Brian Slattery's works, although the latter is cited for the plaintiffs in this regard. Right on point and cited by the defendant is Slattery's "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83), 8 *Queen's L.J.* 232 which, at page 267, states:

The precise geographical extent of the Indian Territory has attracted a certain amount of academic and judicial discussion. The Supreme Court of Canada has held, for example, that the former Hudson's Bay Company Territory, Rupert's Land, was excluded from the Indian Territory. This holding is undoubtedly correct.

The case in the Supreme Court of Canada referred to is *Sigeareak El-53 v. The Queen*, 1966 CanLII 70 (SCC), 1966 S.C.R. 645, where, at page 650 it is stated:

The Proclamation specifically excludes territory granted to the Hudson's Bay Company and there can be no question that the region in question was within the area granted to Hudson's Bay Company. Accordingly the Proclamation does not and never did apply in the region in question and the judgments to the contrary are not good law.

To the present, it seems, cases of Aboriginal and treaty rights have been construing rights, or not, to occupy lands and rights, or not, to hunt and fish. This case involves neither of those. The land

and territorial cases envisage people "Indians" occupying the land or territory and themselves hunting and fishing. The statutes and proclamations never speak of Aboriginal rights operating in a vacuum. So, because *The Royal Proclamation, 1763* , specifically excludes the territory in which the plaintiffs' ancestors allegedly roamed, it also excludes contemplation of the aboriginal people, "the ancestors" who are said to have occupied it, subject to aboriginal wars, by roaming on it. The plaintiffs' counsel did not abandon the plaintiffs' erroneous written argument during his oral argument. He merely barely mentioned it as may be seen in TT57, pages 164-165. However, in reply, the plaintiffs' counsel invested *The Royal Proclamation, 1763* with some almost mystical atavism as seen in TT78 at pages 44-45, thus:

As I indicated, my Lord, in fact you can trace it right through. You can't look at Section 91(24) and Section 35 completely in isolation, my Lord.

You can start with the Royal Proclamation and the matters I took you to in the Royal Proclamation. For the purpose of this submission, my Lord, I'm not even relying on the Royal Proclamation right at this moment to ask you to make any conclusion. All I'm simply saying is that it's clear that the Royal Proclamation at least applies to some parts of the country in which there are Indian bands. At least if that's true, my Lord, you'll look at what the Royal Proclamation says and how it operates with respect to respecting the collective's decisions to surrender land which can only be given up to the Crown by way of surrendering and in no other way.

Mr. Akman says the Royal Proclamation says on its face it's only temporary. Well, it was made permanent by the time we got to 91(24). It might say it was an interim measure, but nothing happened that I could see in between, my Lord. In fact, what happened was the development of case law after 1867 which says these Indian reserves have special rights, and the 91(24) legislation is promulgated and offered to support those rights and interpreted in order to protect them.

My Lord, then we end up with Section 35, and it's all part of the same progression. My Lord, I say therefore that it's important to look to a judge of Supreme Court of Canada in a decision where the other judges accept the reasoning on that point, my Lord, where it's specifically stated, "Here is another instance of special status, and here are the competing considerations, and here is how we deal with them." Because you can't have special status and integrity of special status if you permit equalitarian norms to invade it constantly.

In order better to understand the plaintiffs' position, one notes in TT78 further along page 45, that the Supreme Court's decision in *R. v. Drybones*, 1969 CanLII 1 (SCC), 1970 S.C.R. 282, is a matter of regret for them, as stated by their counsel, thus:

So when the judges in that case or in later cases . . . I'm thinking particularly the judgment of Justice Pigeon in *Calder*, if I've got the case correct. Sorry, in *Drybones*, my Lord, I'm reminded. Not *Calder*, in *Drybones*. It's necessary to protect special status, my Lord. If you permit the values of society at large to be used as a justification to intrude upon the results of special status, then that really means there is no special status at all. That's what we're really saying, my Lord.

That's what we're talking about when we say that Indian band communities have special rights that no one else has.

Now, my Lord, in this respect, there are additional rights that my clients and other Indian communities have that no one else has. I say, my Lord, that that's a trite proposition, and I'm just going to refer you to page 47 of my factum in that respect and the material referred to there. TT78, pages 45-46.

When one understands that the plaintiffs repudiate and detest the notion of equality under and before the law, one understands the prime principle of their case: special status in *Drybones*, Mr. Justice Pigeon, whom the plaintiffs' counsel cited favourably, was one of three dissident judges. The import of the *Drybones* judgment can be perceived from the following passage in the headnote, summarizing the reasoning of Mr. Justice Hall, at page 283:

Per Hall J.: . . . The *Canadian Bill of Rights* can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.

It appears, according to Mr. Justice Macfarlane's reasons in *Delgamuukw v. British Columbia* (1993), 1993 CanLII 4516 (BC CA), 104 D.L.R. (4th) 470 (B.C.C.A.), at pages 492-493 that:

The common law will give effect to those traditions regarded by an aboriginal society as integral to the distinctive culture, and existing at the date sovereignty was asserted. The *Constitution Act, 1982* protects those aboriginal rights which still existed in 1982. Emphasis not in original text.

The Court holds, on the basis of earlier stated sequential logic, that sovereignty was asserted over Rupert's Land and even unto the foot of the western mountains at the granting of the HBC Charter on May 2, 1670, already carved out and excepted from *The Royal Proclamation, 1763*. Whatever be the Aboriginal rights which the plaintiffs claim, they must, to be such, have existed prior to May, 1670.

The point was conceded by the plaintiffs' counsel except for the year 1670 in TT79, page 51:

. . . you don't have to determine the issue in this case definitively, but for all the plaintiffs it certainly wouldn't be before 1763.

In any event . . . the evidence deals with time before the white man, aboriginal times evidence. You don't need to make that determination, my Lord, to know and to find that on the basis of the evidence before you the aboriginal right has been proven in times before the white man, in times before the assertion of sovereignty.

The Court finds that the assertion of English sovereignty, later to become British sovereignty, was first formally expressed in the HBC Charter, May 2, 1670. Any rights which the plaintiffs

can successfully establish must have been exerted before that day, and must not have been extinguished before the coming into force of subsection 35(1) of the *Constitution Act, 1982* and must withstand subsection 35(4) thereof. It must be left to others at another time to explain how the revisionists who settled upon subsection 35(2) thought that they could honestly characterize Métis people as Aboriginal people, wielding aboriginal rights. Nature has special blessings for hybrid people, the offspring of interracial procreation, as was correctly asserted by the plaintiff Wayne Roan in his testimony, TT8, at page 837. Only some determined revisionist would seek to regard Métis as being exemplars of only one of their inherently dual lines of ancestors. It will be seen, however, that conduct and lifestyle will be noted in terms of "half-breeds living the cad96Indian way of Lifecad39," in this dismally racist subject of litigation.

THE PLAINTIFFS' VIEW OF MERGER OR SUBSUMPTION OF ABORIGINAL RIGHTS UNDER AND INTO TREATY RIGHTS

In the plaintiffs' amended statement of claim (taken with other pleadings and particulars from the certified record), the following passages deal with the two kinds of alleged rights:

9. Aboriginal rights include the property rights, customary laws and governmental institutions of the aboriginal peoples which were possessed by the aboriginal peoples and retained notwithstanding the European colonization of North America.

Paragraph 9 (along with paragraph 11) of the statement of claim was found wanting by the Court and particulars were ordered on October 31, 1986. In the defendant's statement of defence it is pleaded that those particulars render paragraph 9, initially pleaded, "immaterial to the specific rights . . . defined in . . . their particulars". The interveners' statements of intervention, although directed to the content are not directed specifically to the subsumption of the pleaded rights.

The plaintiffs' amended statement of claim continues:

10. Treaty rights are the rights confirmed or obtained by Indian tribes or bands pursuant to treaties entered into with Her Majesty. The defendant admits this. These rights flowed generally to the collectivity known as the band. Typically, the signing of a treaty by an Indian band also involved the voluntary diminution by the band of specified aboriginal rights. The defendant does not plead to this because, the defendant says, it lacks specificity in relation to the plaintiffs' alleged specific rights.

11. The right of the members of an Indian band to determine the membership of the band was an existing aboriginal right prior to the signing of Treaty Nos. 6, 7 and 8. This right remained an aboriginal right on April 17, 1982.

Paragraph 11 of the plaintiffs' statement of claim was (with paragraph 9) found wanting and particulars were likewise ordered, thus:

With respect to paragraphs 9 and 11 of the amended statement of claim, the plaintiffs state as follows:

The particular aboriginal right of the plaintiff bands or their predecessors referred to in paragraphs 9 and 11 of the amended statement of claim is 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. Certified record

To these allegations, the defendant pleaded in the amended statement of defence, this:

11. With respect to paragraph 11 of the statement of claim:

a) he states that the allegations of fact as set out therein and further defined in paragraph 2 of their particulars are not substantiated by and are inconsistent with the ethnological and historical literature and documents produced and/or filed by the parties;

b) he denies the allegations of law set out therein as defined further in paragraph 2 in their particulars;

c) in the alternative, he further states that if the aboriginal right alleged by the plaintiffs ever existed it was:

i) extinguished by the said treaties and by successive Indian Acts commencing in 1876; and

ii) replaced by a statutory scheme which provided for Indian Status, band membership based on Indian Status, exhaustive membership provisions and executive decisions made within the framework of this statutory scheme.

It will be noted that, inexplicably, the defendant also does not plead subsection 35(4) of the *Constitution Act, 1982*, but, in this litigation the strong, imperative voice of the pertinent supreme law of Canada simply is not to be ignored, whether pleaded or not. Of course, it is squarely pleaded by two of the interveners, the NCC(A) and the NSIAA, in their respective statements of intervention.

Exhibit 134 contains excerpts from the examination of Wayne Roan for discovery on a page numbered 4b), question 140 and answer, with an additional answer by Bruce Starlight on behalf of the Sarcee plaintiff:

Question 140"Is the aboriginal right with respect to Band membership of the same scope and content as the treaty right? If not, what is the difference? Vol. 3, at page 267.

Answer: Yes "the aboriginal right with respect to membership was impliedly recognized by the treaty process and thus became a treaty right as well as an aboriginal right "see paragraph 12 of the amended statement of claim.

The defendant's counsel triumphantly emphasized this answer to mean that one has to look no further than the treaty's provisions in order to discern any aboriginal rights. After all, the plaintiffs' own pleading, in the amended statement of claim paragraph 10, notes that "typically,

the signing of a treaty . . . also involved the voluntary diminution by the band of specified aboriginal rights" underlining added.

The diminution of Aboriginal rights is no doubt true, but the plaintiffs pleaded, and the Court accepts, that the Aboriginal rights so diminished must be rights specified in the treaty, of course, and not all Aboriginal rights at large. The treaties, along with the various versions of the *Indian Act* which preceded the treaties here considered, all bore upon and diminished Aboriginal rights and Aboriginal lifestyle. Even the assertion of sovereignty made the Aboriginal peoples subject to laws of general application in regard to crime, property, civil administration and tort which came into force as English and British sovereignty was secured. To the extent that those general laws impinged on or extinguished Aboriginal rights to such extent they were diminished. The Aboriginal peoples are not "foreigners", but from the time of assertion of sovereignty have been subjects of the sovereign. In that regard, section 88 of the *Indian* states, almost redundantly, the evident truth of general status consequent upon the subtraction therefrom of the Indians' special status. It confirms the Aboriginal peoples' status as subjects of the Crown both specially and generally in defining the profile of the boundary between the two.

Like others, no matter how much some judges and public servants seek paternally to patronize them, the western Indians are obliged to obey the laws of land, even if such laws were unknown to their distant ancestors, so long as the law of the land does not abrogate surviving Aboriginal rights, as stated in subsection of the *Constitution Act, 1982*. Before subsection 35(1) came into force, the law of the land as enacted by Parliament could indeed extinguish Aboriginal rights, but to be clear and unambiguous about such extinguishment or abrogation, the law did not need to state that "such aboriginal rights as conflict with this law, to wit: . . . are, to such extent, extinguished". A law which had that clear effect even without those clear words was valid, if enacted in conformity with the wide purview of section 91, head 24 of the *Constitution Act, 1867*. So it was said by the Supreme Court of Canada in regard to treaty rights and state obligations thereto in *Sikyea v. The Queen*, 1964 CanLII 62 (SCC), 1964 S.C.R. 642; *The Queen v. George*, 1966 CanLII 2 (SCC), 1966 S.C.R. 267 and *Moosehunter v. The Queen*, 1981 CanLII 13 (SCC), 1981 1 S.C.R. 282.

One may legitimately draw a good analogy between the extinguishment of Aboriginal rights and what the courts say about the extinguishment of treaty rights, whenever in each instance such has occurred. Some Aboriginal rights were clearly extinguished by the three treaties invoked by the plaintiffs, but those unspecified Aboriginal rights which are not the subjects of the treaties are not so extinguished and, if not subsequently extinguished by competent legislation, including constitutional disposition, for example, subsection 35(4), they must logically continue in existence whatever they be. They are in fact referred to as "the existing aboriginal . . . rights", in subsection 35(1). An analogous extinguishment of the Number 8 treaty's implied right to hunt for commercial purposes, apart from hunting for food, was effected by paragraph 12 of the Alberta Natural Resources Transfer Agreement, as confirmed by the *Constitution Act, 1930* 20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) R.S.C., 1985, Appendix II, No. 26, s. 2. That extinguishment was declared by the majority judgment of the Supreme Court of Canada as recently as May, 1990 in *R. v. Horseman*, 1990 CanLII 96 (SCC), 1990 1 S.C.R. 901. There it was held that the 1930 Agreement's assurance of the right to hunting, trapping and fishing "for

food" only, excluded all other purposes. It is an ancient principle which states that *expressio unius est exclusio alterius*. The Court held the legislative and constitutional expression of that extinguishment was clear and unambiguous. This Court finds that there is no general subsuming of Aboriginal rights by the treaties. The treaties cover only that with which they deal. The foregoing premises all seem to be well founded on the Supreme Court's judgment in *Ontario (Attorney General) v. Bear Island Foundation*, 1991 CanLII 75 (SCC), 1991 2 S.C.R. 570.

THE TREATIES

In order to discover which Aboriginal rights were and are truly subsumed into and accordingly extinguished by the treaties, it is necessary to analyze the treaties carefully. Thereafter, if the particular Aboriginal rights which the plaintiffs contend are theirs unto this very day remain untouched by the treaties, it will be necessary to enquire whether that which the plaintiffs assert be truly an Aboriginal right is indeed such as they assert.

In effect the plaintiffs assert two Aboriginal rights. The first has to do with the plaintiffs' principal but narrower grievance, about permitting Indian women who married non-Indians to live either by remaining in or returning to the women's own reserves of residence, inevitably their natal reserves with membership retained in their natal bands. The plaintiffs claim that their present expression of the Aboriginal right which they assert stems from the Aboriginal principle and practice that, upon marriage the woman followed the man to reside in or at his ordinary residence within his tribal group, not hers. From that narrow principle, the plaintiffs assert more globally that from Aboriginal times Indian groups or encampments controlled their own membership and that such an Aboriginal right either survived the treaty making, or is enshrined in the treaties. The plaintiffs triumphantly state that control of membership is an inevitable incident of their ancestors' "organised societies", which the defendant admitted orally by counsel at trial. These are matters for subsequent analysis.

Basis For The Treaties

The racial and religious hatreds of the historical past provide only a sterile and hopeless basis for nurturing those hatreds into the present and the future. That proposition is a stunningly, obviously, eternal verity as was clear, at least until recent days, in Ireland and is still evident in the present murderous stupidities among the South Slavs in Europe and between the Hutus and Tutsi in Africa. North America was surely going to be occupied and dominated by Europeans because of historical and economic processes which were unavoidable. There is no use in mourning that fact of destiny. The only question was whether the dominant Europeans would be the French, the British or the Spanish, and in the nineteenth century it was as between the Canadians and Americans.

At this point, generally regarding the historical dynamics of human co-existence or less tolerant relationships, it is well to recognize the truth of the proposition, that in this context of public and constitutional law, and history, the respective parties' and interveners' admissions do not bear the same weight as they would, if made in a case of private law litigation. This is so because of the greater public interest, historical and constitutional dimensions of this present type of litigation.

Thus no party or intervener is empowered by mere admission to alter the country's history or its Constitution.

In this regard, as well, it is well to remember the passage written by Mr. Justice Lamer (now Chief Justice of Canada) for a unanimous Supreme Court of Canada in *R. v. Sioui*, 1990 CanLII 103 (SCC), 1990 1 S.C.R. 1025, at page 1050 where, in regard to the admission of historical documents not included in the received judicial record he wrote:

I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris J.A. said in *White and Bob* (at p. 629):

The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parcq said in *Monarch Steamship Co., Ld. v. Karlshamns Oljefabriker (A/B)*, 1949 A.C. 196 at p. 234, 1949 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches, *Read v. Bishop of Lincoln*, 1892 A.C. 644, Lord Halsbury, L.C., at pp. 652-4.

The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case.

Reference here is made to *Wind on the Buffalo Grass: Native American Artist-Historians*, collected and edited by Leslie Tillett, reprinted by Da Capo Press, New York, 1989. Its advantage is its brevity and encapsulation of the historical context as recorded by plains Indians who were the specially intended victims of "soldier blue".

Conditions south of the 49th parallel of latitude must have been much the same among the western Plains Indians as north of that boundary, the oral evidence suggests. Tillett wrote in the preface at page xi:

The brief comments attached to most of the pictures of "daily life" created by Indian eye-witnesses say enough about the life style of the Plains Indians for the purpose of this book, which is to let the pictures tell the story. It is well simply to keep in mind that the Indians (particularly the Sioux) were a nomadic people who moved their encampments to follow the buffalo, or to find fresh pasture for their ponies, or, occasionally, to relocate as a result of tribal wars. If the history of man can be simplistically understood as the change from food gathering to hunting, and then to farming and finally industry, we can see the Plains Indians as the last great hunters, living on into the industrial era.

The policy of the U.S. government was to herd the Plains Aboriginals into reserves. General Custer and his Seventh Cavalry, instruments of that policy, alternately massacred the Indian encampments of those who refused to be herded or, at least on one occasion, made peace for which the General had no authority to make and no power to enforce. It was an instance in which greed-crazed Americans sensing the presence of gold in the ground simply flooded into an acceptable reserve and pushed out the Indians, as Tillett recounts at page 50 of the book. Custer

had dreams of receiving a presidential nomination at the Democratic convention about a week after the battle which he precipitated and disastrously lost on June 25, 1876.

The author again in the preface, at page xii:

. . . Custer attacked a numerically overwhelming force of Indians with blind courage, but that blindness defeated him. He did not know how many, nor under what chiefs, the Indians were fighting. To charge into some 4,000 warriors under such inspired leaders as Crazy Horse and Sitting Bull, who were suddenly put to the test of defending their women and children from massacre by the well-armed 7th Cavalry, be it noted was madness.

The aftermath of the Battle at the Little Big Horn River had to be included in this book because it is in this aftermath that we all live. A nation of 40 million, tempered by the Civil War, and once more united in its westward expansion, was celebrating its centennial when the news of the Custer defeat was received. The idea that these ragamuffin bands could stop the spread of "Civilisation" and "manifest destiny" was impossible to accept; that they could defeat a part of the U.S. Army under the national hero, General George A. Custer, was even more incredible. And finally, the fact that the Indians had stripped and mutilated the bodies, and escaped almost unharmed, gave the "exterminate the Indians" faction all they needed. The small voices of humanity and compassion were hushed by an angry shout for revenge, a shout that echoed back to the Black Hills, where gold could make revenge profitable as well. That great leader Crazy Horse was assassinated in a most brutal and ignominious way in 1877. After that followed twelve years of rapid decline of any hope left the Indians. This emotional people of the Plains succumbed to the wild hopes embodied in the promise of the Ghost Dance. Emphasis added.

The record shows that there was a genocide party in the U.S. Congress who would have simply exterminated the plains Indians, had it prevailed. A new band of young men with apparently perverted or highly diluted consciences was recruited under the rubric of the 7th Cavalry which was sent west to seek vengeance for the original regiment's slaughter, into which Custer had stupidly (some say "courageously") led them. The massacres continued for a while longer, evoking among others, the hellish atrocities of Wounded Knee, committed by the renewed 7th Cavalry.

All of this chaos in the U.S. west, was well known to the Indians who participated in Treaties 6 and 7, if not also Treaty 8. In 1844, U.S. Senator William Allen uttered to the U.S. Senate a slogan which endured many decades, if it has indeed died away:

Fifty-four forty, or fight!

He was urging the expansion of U.S. territory northward to the 54' 40" parallel of north latitude. It was the slogan of expansionist Democrats in the 1844 presidential campaign in which the Oregon boundary issue was a burning question. The new president, Jas. K. Polk, a Democrat, in 1846 compromised with the United Kingdom on the 49th parallel. The slogan and its sentiment endured long after the compromise among many Americans in the west.

The Canadian Indians, who had declined the invitation to join with their American counterparts in the Indian wars south of the boundary, were well aware of, and made uneasy by, the violent, murderous, genocidal expansionism running rampant among many Americans. The expression "the Canadian Indians" is entirely correct for the Indians and the chiefs who spoke for them at the treaty negotiations unequivocally referred to themselves as the Queen's subjects. They expressed no doubt about that status of being subjects of the Queen whether before or after entering into the treaties. Perhaps the "handwriting was on the wall" and the Indians of the nineteenth century rationally accepted historical inevitability.

It is told in the evidence that the Commissioners' progress (followed by settlers) was accepted and proclaimed by some Crees as being as unstoppable as the flow of "the River Saskatchewan" near Fort Carleton.

There is no doubt that, in entering into the treaties they sought the protection of "and perhaps ill-advisedly "the dependence on, the Crown, as represented by Ottawa's Treaty Commissioners. Those Commissioners, unlike General Custer and his Government, did have the authority and ability to allow the Indians to live in peace, and to protect them from the Americans"7th Cavalry and whiskey traders alike.

Among the other important factors of those days inducing the Indians to seek the treaties were: disease and famine and the clearly-to-be-seen demise of the huge natural herds of bison, called buffalo, upon which the plains Indians depended for food, hides, sinew, bones and horns to maintain their unique pre-industrial lifestyle. Quite possibly the introduction by the Spanish of the horse which quickly became widespread, and the introduction by all the Europeans of the rifle and other firearms, must have contributed to the diminution of the herds. No doubt the introduction of Euro-settlers also contributed greatly to the buffaloes' disappearance.

Notice is taken of an excellent article written by a knowledgeable author, Sid Marty, about the Cypress Hills, called "Prairie Oasis". It appeared in the January/February 1995 issue of *Canadian Geographic*. Here are a few selected passages, at pages 57-58:

The original Fort Walsh was built by the North West Mounted Police in 1875 as a watchpost to deter whisky traders, but was dismantled and abandoned in 1883"not before receiving a visit from Sitting Bull and a group of Sioux warriors after their encounter with General Custer at the Little Bighorn. However, it was Farwell's Post and the massacre site, two kilometres downstream from the fort, that I had come to see . . . .

All the requisites were here: game, water, fuel wood, protection from the fierce prairie winds. So it would have seemed to Chief Manitupotis (Little Soldier) and his band of poor North Assiniboines, who had arrived starving in the Cypress Hills in 1873.

This was a sorry time on the northwestern plains. Whisky and smallpox, brought to the region by white wolf hunters (wolfers) and whisky traders, had ravaged the American Indians. By 1872, the same thing was happening in Canada as the freetraders, running from Montana before the U.S. marshall, had set up four whisky forts in the Cypress Hills.

Along with the whisky came smallpox, initiating a period of unprecedented misery as the once-prosperous Plains Indians beggared themselves to obtain the rotgut. Scores of them died in drunken fights or succumbed to disease. News of the Indians' plight, sent east by missionaries and Hudson's Bay Company factors, angered many people. Some urged Ottawa to create a police force and send it west without delay.

On April 28, 1873, Prime Minister John A. Macdonald proposed the bill that would create the police force, but no recruitment or training was undertaken. It was not until after the Cypress Hills Massacre four weeks later, and the resulting public outrage, that action was taken to make the police force a reality.

. . .

The Benton party of wolf hunters, whose horses had earlier been stolen, reliably described later as "persons of the worst class in the country," came to the aid of Hammond, who had entered the Indian camp. Fear and whisky courage were driving events on both sides. No one can say for sure who fired the first shot, but the next morning anywhere from 20 to 30 dead Assiniboines (based on white accounts), including some women and children, were sprawled in the clearing and willow bush. (Assiniboine oral history says 50 to 60 people died.)

. . .

The news of the massacre broke in Eastern Canada two months later, in a wave of nationalism and anti-Americanism. The federal government lost no time in pushing ahead with the creation of the mounted police force . . . .

The whisky traders fled the plains before the police arrived the next year. Coming as they did, long before the first settlers, the police created an atmosphere of peace and order on the Canadian frontier that was the mirror opposite of the American experience. The Cypress Hills Massacre remains an anomaly in Western Canadian history, representing a temporary extension of American frontier mentality into the North West.

The "Mounties", as it turned out, were and continued to be evenhanded peace-keepers for both the Canadian government and the Plains Indians.

So there was a *quid pro quo* inherent in Treaties 6, 7 and 8. The Canadian government wanted to open the prairies to eastern Canadian settlement" expansionism Canadian style, kept non-murderous with the help of the mounted police "and the Indians, in their straitened circumstances of that different world, wanted the protection from the settlers *inter alia* and wanted the dependent status into which they bargained themselves, seemingly "forever". (The corrosive effects of a whole people's dependence on governmental hand-outs are illustrated by documents found in Exhibit 41(18). The Government's payments work another evil, too. They are an eternal charge on the country's taxpayers, even although the dolorous conditions of the last century lie dead in the past along with its glory, if any, which cannot be now restored.)

But those conditions of that late 19th century era are well known historical facts of which the Court takes judicial notice, or to express it slightly differently, as in *Sioui*, of which the Court has "judicial knowledge".

Statutes

Apart from social and economic conditions above mentioned as the basis for the treaties were the various statutes which can be regarded as the historical continuum of the *Indian Act*. That Act precedes the Treaties which are under consideration in this litigation. The earliest such enactment found in volume I of the defendant's book of authorities (tab 3) is 13 & 14 Victoria, S.C. 1850, c. 74, dated August 10, 1850. It is called *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*. Notwithstanding its limited geographical scope, that statute was enacted by the Legislature of the Province of Canada formed by the union of Lower and Upper Canada on February 10, 1841. The aforesaid statute dealt largely with protection of the lands and personal property of "Indians and persons inter-married with Indians" including in sections IV and V taxes and statute labour and, in section VI, prohibition of liquor being provided to Indians. The Act supposed that everyone knew who was an Indian.

The next year Chapter 59 of the same Legislature on August 30, 1851, defined for Lower Canada who was an Indian *An Act to repeal in part and to amend an Act, intitled, An Act for the better protection of the Lands and property of the Indians in Lower Canada*, S.C. 1851, c. 59. Section II provided:

II. And be it declared and enacted, That for the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various Tribes or Bodies of Indians in Lower Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the Tribe or Body of Indians interested in any such lands or immoveable property:

Firstly. All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and their descendants:

Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and the descendants of all such persons: And

Thirdly. All women, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

Depending on the incidence of inter-marriage, residence and repute, section II could have legally subsumed non-Indians and Métis or half-breeds under and into the population defined as Indians. All according to the autonomous will and *ipse dixit* of the Legislature, or Parliament, of pre-Confederation Canada.

The *Indian Act* as a Basis For the Treaties

The first post-Confederation statute of Parliament to be noted in this context was *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42 (31 Vict.) assented to May 22, 1868. At hand under tab 5 of the defendant's book of authorities, Vol. I (*inter alia*), the above-cited 1868 Act includes certain pertinent provisions:

6. All lands reserved for Indians or for any tribe, band or body 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; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.

. . .

15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:

Firstly. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;

Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And

Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

. . .

17. No persons other than Indians and those intermarried with Indians, shall settle, reside upon or occupy any land or road, or allowance for roads running through any lands belonging to or occupied by any tribe, band or body of Indians; and all mortgages or hypothecs given or consented to by any Indians or any persons intermarried with Indians, and all leases, contracts and agreements made or purporting to be made, by any Indians or any person intermarried with Indians, whereby persons other than Indians are permitted to reside upon such lands, shall be absolutely void.

The comparison of section II of the 1851 Act for Lower Canada, and section 15 of the 1868 Act, immediately above, reveals that the term "band" has been added to accompany tribe or body of Indians. The description of the Indians as "allies" has been long since dropped. In 1868, also, the