COURT OF APPEAL OF ALBERTA

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IN THE MATTER OF THE *TRUSTEE ACT*, R.S.A. 2000, c. T-8, AS AMENDED, and
IN THE MATTER OF THE SAWRIDGE BAND *INTER VIVOS* SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS:	ROLAND TWINN, TRACEY SCARLETT, ROY TWINN, JONATHON POTSKIN AND BONNIE BLAKLEY, as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL:	Respondent
RESPONDENT:	CATHERINE TWINN
STATUS ON APPEAL:	Appellant
RESPONDENT:	OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE
STATUS ON APPEAL:	Respondent
DOCUMENT:	FACTUM OF SAWRIDGE FIRST NATION

Appeal from the Decision of

The Honourable Mr. Justice J. S. Little
Dated the 3rd day of September, 2025

FACTUM OF SAWRIDGE FIRST NATION

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PART 1 FACTS

1. The Sawridge First Nation ("**SFN**") was granted intervenor status in this appeal and on what the Trustees have chosen to call the "Threshold Question". The "Threshold Question" is the Trustees' request that the court issue a declaration:

> Affirming that notwithstanding that the definition of "Beneficiary" set out under the 1985 Sawridge Trust is discriminatory, and includes certain non-members of the Sawridge Nation, the Sawridge Trustees may proceed to make distributions to the Beneficiaries of the 1985 Sawridge Trust, including to non-members of the SFN who qualify as Beneficiaries of the 1985 Sawridge Trust.

2. While the Trustees call this a "Threshold" matter, the declaration they seek would in fact grant them a final and substantive direction in this litigation.[1] More particularly, the relief sought would give this Court's blessing to distributions based on a beneficiary definition that perpetuates one of the most notoriously discriminatory legal regimes in Canadian history, a regime that was described even at the time it was in force as "an incomparable blend of sexism and racism."[2]

3. This appeal is from the finding of the case management judge, Justice J. Little ("**CMJ**"), that the 1985 Trust is private in nature and thus immune from public policy review.[3] What this means in practice is that the 1985 Trust can flagrantly violate public policy and perpetuate discrimination against the members of the SFN into the future, under repealed legislation that has been repeatedly found by the courts of this country to violate the *Charter*.

4. The origin and history of the 1985 Trust were reviewed by this Court in its 2022 decision[4] in this matter. It is clear that the 1985 Trust was settled by Walter P. Twinn **in his capacity as Chief of the SFN**[5] and that the 1985 Trust was created from the SFN's funds, notably its oil

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[1] Application (Statement of Issues and Relief Sought), filed January 9, 2018 [SFN Extracts of Key Evidence "**SFN EKE**" at p. 028]

[2] Kathleen Jamieson, Indian Women and the Law: Citizens Minus (Ottawa: Minister of Supply and Services Canada, 1978) p. 57. **[TAB 2]**

[3] *Twinn v Alberta (Office of the Public Trustee)*, 2025 ABKB 507. ("**CMJ Judgment**")

[4] *Twinn v Alberta (Office of the Public Trustee)*, 2022 ABCA 368.

[5] *Ibid* at para 5.

and gas revenues[6].

5. It is also clear that the 1985 Trust was settled by Chief Twinn during a tumultuous time in First Nation's history. The impact of Crown policy on First Nations was facing a reckoning in light of the introduction of the *Charter*. These new realities were being grappled with by both the Crown and First Nations as a new path forward was being sought.

6. The submissions of the SFN on this appeal will lead the Court through the nature and extent of the discrimination imposed on the descendants of Sawridge by the 1985 Trust, the *sui generis* nature of the 1985 Trust, and how its background as a vehicle with a public purpose and seeded with public funds means that it must comply with public policy standards.

7. It is respectfully submitted by the SFN that the CMJ erred in law in his findings and most notably disregarded the public nature of the 1985 Trust, the historical realities faced by First Nations in Canada, and incorrectly applied legal principles that find their origin in gifts of personal wealth and which are not properly transposed to the unique nature of First Nation trusts. The effect of the CMJ's decision is to take a step backwards in reconciliation and to perpetuate the abhorrent discrimination, racism, and cultural denigration that has been inflicted upon First Nations. The issues on this appeal are significant and arguably raise matters of national importance.

PART 2 GROUNDS OF APPEAL

8. SFN relies on the summary of the facts in this Court's 2022 decision in this litigation.[7] This intervention relies on the grounds identified in the Notice of Appeal.

PART 3 STANDARD OF REVIEW

9. The usual appellate standard of review applies to decisions under the *Trustee Act*:[8] findings and inferences of fact are reviewed for palpable and overriding error; extricable legal questions in a mixed issue of fact and law, along with all pure questions of law or statutory interpretation, are reviewed for correctness; other questions of mixed fact and law are reviewed for palpable

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[6] *Ibid* at para 2.

[7] *Ibid* at paras 2-19.

[8] *Giles (Re)*, 2023 ABCA 242 at para 24.

and overriding error.

10. The SFN says that the CMJ erred in law with respect to the application of the doctrine of public policy; he made extricable errors of law in his characterization of the 1985 Trust and his analysis of its beneficiary rule or, in the alternative, palpable and overriding errors of fact with respect to the operation of the Trust. In the further alternative, if the CMJ's decision was discretionary, it was based on errors of principle and fact, for the same reasons, and also approved a breach of public policy that is so wrong as to constitute an injustice.[9]

PART 4 ARGUMENT

(a) The Racial and Sex Discrimination in the 1985 Trust

11. The 1985 Trust incorporates as its definition of "beneficiary" the discriminatory definition of "Indian" adopted by Parliament as sections 11 and 12 of the *Indian Act* revision of 1951 and continued in the 1970 consolidation.[10] It is hard to overstate how regressive this law was, even for its time.[11]

12. By 1985, there was no dispute that the *Act* discriminated by its "married out" clause – which removed status from Indian women who married non-Indian men.[12] Moreover, the discrimination in the 1951/1970 status rules did not stop at the married-out rule but was a complex mix of racist and sexist principles. For example, even Indian women who married Indian men from another band automatically lost their birth membership and were transferred to their husband's bands.[13] Sons of Indian men always had status but their daughters were excluded if they were "illegitimate."[14] Similarly, an unmarried Indian mother's children had

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[9] *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4 at para 32.

[10] SC 1951, c. 29; R.S.C. 1970, c. I-6. ("**1951/70 Act**")

[11] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 1, *Looking Forward, Looking Back* (Ottawa: Canada Communication Group, 1996) at s 9.13, "Indian Women" at 302 (text corresponding to fn. 109) ("**Royal Commission Report**") **[TAB 5]**; *Hele c. Attorney General of Canada*, 2020 QCCS 2406 at para 149. ("***Hele***")

[12] *Attorney General of Canada v. Lavell*, [1974] SCR 1349.

[13] 1951/70 Act, s. 10, 14.

[14] This is the result of the combined effect of paragraphs 11(b) and (c) of the 1951/70 *Act*, as interpreted by the Supreme Court in *Martin v. Champman*, [1983] 1 SCR 365. See the discussion of the treatment of illegitimate daughters of Indian men in *Descheneaux c. Canada (Procureur Général),* 2015 QCCS 3555 at paras 24, 92, 156 and following. ("***Descheneaux***")

status if their father was an Indian or unidentified but could lose status upon proof their father was a non-Indian.[15] The rules also sought to maintain racial purity through the adoption of the "double-mother" rule, which provided that after two generations of Indian men parenting with women born without Indian status or entitlement to, the grandchildren ceased to be Indians as of age 21.[16]

13. All of these rules ceased to apply under the *Indian Act* over 40 years ago, when Parliament first attempted to correct the discrimination through the 1985 amendments commonly referred to as "Bill C-31". However, these discriminatory rules continue to apply at Sawridge in order to determine who is a beneficiary under the 1985 Trust.

(b) The Trial Judge's Erroneous Characterization of the Beneficiary Class as Fixed in Time

14. The 1985 Trust defines its beneficiaries as follows[17]:

> "Beneficiaries" at any particular time shall mean all persons **who at that time** qualify as members of the Sawridge Band no. 19 pursuant to the provisions of the *Indian Act* R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons **who at such particular time** would qualify for membership of the Sawridge Band no. 19 pursuant to said provisions …

15. The CMJ misapprehended how the definition of "beneficiary" in the 1985 Trust functions. The CMJ described the beneficiaries of the trust as "those people who **qualified** as members of the Sawridge Band under the *Indian Act* **before the 1985 amendments**."[18] This is wrong: the beneficiaries of the 1985 Trust are the individuals – and only those individuals – who would be members of the Sawridge Band if the discriminatory rules regarding Indian status and band membership set out in the 1970 *Indian Act* were still in force today.

16. What this means is that the beneficiary class is not fixed in time but is constantly evolving – a person who is a beneficiary today may subsequently lose that status due to the application of the 1970 rules. This point can be demonstrated by considering the situation of the 20 minor

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[15] 1951/70 Act, ss. 11(1)(e) and 12(2).

[16] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at para 5 ("***McIvor***"); *Descheneaux*, *Ibid* at paras 15, 23-26.

[17] 1985 Trust Deed (Appellant's Extracts of Key Evidence "**AEKE**" at p. 003).

[18] CMJ Judgment, *supra* note 3 at para 8.

beneficiaries identified by the Trustees in 2015.[19] In all likelihood, a significant number of these individuals are no longer beneficiaries of the 1985 Trust because:

- they are female and have married someone of the wrong "race", or just the wrong band, thereby losing beneficiary status under the "married out" rule;
- their mother and grandmother are not of the right race, so they will lose their beneficiary status at 21 pursuant to the "double-mother" rule;
- they are the illegitimate children of a female beneficiary and the Trustees have determined that their father is not an Indian under the 1970 rules.

17. The CMJ's conclusion that no principle of law would prevent distribution under the 1985 Trust is dependent on his erroneous conclusion that the list of beneficiaries was fixed in time. It is this error that leads him to state that the 1985 Trust is "analogous to that found in *Taylor et al. v. Ginoogaming First Nation.*"[20] This is clearly wrong: the trust at issue in *Ginoogaming* made a distribution to beneficiaries defined as those on the band list as of a fixed date, none of whom could subsequently lose that status.[21]

18. Moreover, the situation under the 1985 Trust, instead of being analogous, is in fact directly at odds with *Ginoogaming*: in that case, those who drafted the trust deed were making every effort to avoid establishing a discriminatory system, had no reason to conclude that the post-1985 *Act* that was being incorporated by reference was discriminatory, and used simple objective criteria in the form of a fixed list determined as of a set date.[22] By contrast, those drafting the 1985 Trust were seeking to ensure discrimination could continue, knew that the 1970 *Act* they were incorporating by reference was discriminatory, and incorporated by reference statutory language that is discriminatory on its face.

19. The CMJ's misunderstanding of how the 1985 Trust works also led him to erroneously

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[19] Trustees' letter of June 1, 2015, with attached list [SFN EKE at p. 032]. SFN does not admit to the accuracy of this list – in fact, we note that this list on its face does not appear to respect the 1970 rules (by including, for example, the illegitimate female children of male beneficiaries).

[20] CMJ Judgment, *supra* note 3 at para 40.

[21] *Taylor et al. v. Ginoogaming First Nation*, 2019 ONSC 328 at paras 13, 36. ("***Ginoogaming***")

[22] *Ibid* at paras 38-39.

conclude that the existing common-law rules that invalidate private trusts on public policy grounds do not apply here.[23] In fact, the 1985 Trust violates these rules by creating conditional bequests based on conditions in restraint of marriage,[24] and by interfering with the parent-child relationship by giving the non-beneficiary father of an illegitimate child an incentive to not recognize his child.[25]

(c) The Mischaracterization of the Trustees' Role

20. The CMJ's misunderstanding of how the 1985 Trust works led him to misunderstand the nature of the Trustees' role and to conclude that: "There is nothing in the terms of the 1985 Sawridge Trust… that requires the trustees to act in a manner contrary to public policy."[26] In fact, the Trustees will be required by the trust deed to engage in significant and repeated acts of discrimination in order to determine who is a beneficiary. They will need to monitor the marital status of female beneficiaries and remove their benefits as soon as they marry a person of the wrong race or band; they will investigate the ancestry of every beneficiary and remove the benefits given to those whose mother and grandmother are racially impure as soon as they turn 21; they will give benefits to the non-Sawridge wife of one brother while refusing benefits to his sister if she has a non-Sawridge husband;[27] they will give benefits to the illegitimate newborn son of a male beneficiary and refuse benefits to his daughter from the same mother.

21. **The Trustees are legally obliged to constantly monitor the racial background and sex of the SFN descendants and their husbands and wives and to deny benefits if descendants have violated the dictates set down in 1951.** In this way, the 1985 Trust clearly requires the Trustees "to act in a way that collides with public policy"[28] which, as the Ontario Court of

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[23] CMJ Judgment, *supra* note 3 at para 34.

[24] Donovan Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters, 2021). ("**Waters on Trusts**") at 340-344 **[TAB 1]**; *Re Hurshman, Mindlin v. Hersham et al.*, (1956) 6 DLR (2d) 615 (BC SC) **[TAB 3]**. The married-out rule essentially says to female beneficiaries: "You must marry a man of the right race or not marry at all."

[25] Waters on Trusts, *Ibid*, at 347-349 [**TAB 1**]; *Re Thorne*, [1922] OJ No 451 (H.C.) **[TAB 4]**.

[26] CMJ Judgment, *supra* note 3 at para 35.

[27] Moreover, the 1951/70 *Act*, as befitting its 1950s origins, does not recognize same sex marriage and it has already been held that its language and structure are so paternalistic that the word "wife" cannot reasonably be interpreted to include "husband": *Hele*, *supra* note 11, at paras 154-155.

[28] *Spence v BMO Trust Company,* 2016 ONCA 196 at para 70. (*"**Spence**"*)

Appeal recognized in *Spence*, is where the line is crossed and the courts must intervene.[29] In effect, the Trustees will be forced to act as present-day Indian agents,[30] those tasked with implementing what is now known to be discriminatory Crown policy, enforcing and administering the now defunct provisions of the *Indian Act* and thus influencing the day-to-day affairs of Indians.

22. Even if this Court concludes that the 1985 Trust is best characterized as a simple private trust, the Ontario Court of Appeal's *obiter* in *Spence*, proposing in hypothetical terms that courts may never interfere with the terms of a private trust on the grounds of public policy, has no persuasive value when faced with the reality of the 1985 Trust. *Spence* dealt with a will that contained no explicit discriminatory language.[31] The situation here is the opposite: a trust was set up by a public official with the explicit purpose, known and admitted by all, of continuing a highly discriminatory legal regime. Moreover, the decision in *Spence* turns on the weight that the courts give to the principle of testamentary freedom, which is inapplicable in this case because Chief Walter Twinn was not setting up a trust with his own monies but with monies that he and other public officials held in trust for band members.[32]

23. A tragic part of this situation is that there is no reason to believe most beneficiaries are aware of the tenuous nature of their status. The then-minor females on the Trustees' 2015 list have likely never been told that, if they get married, they will lose their right to hundreds of thousands of dollars of social supports; the male beneficiaries have likely never been told that, if they do not marry their pregnant girlfriends, their "illegitimate" daughter will be denied a lifetime of benefits. Every year, beneficiaries of the trust are losing their beneficiary status on the basis of rules that they understandably might believe have been consigned to the past. SFN submits that it is unacceptable that people be asked to make such considerations in life choices and extremely concerning that such principles have been ratified by the Court of King's Bench of this province through the CMJ's decision.

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[29] *Ibid*.

[30] See Royal Commission Report, *supra* note 11, s. 9. "Indian Act," especially at 297-299. **[TAB 5]**

[31] *Spence*, *supra* note 28 at para 88 *et seq*.

[32] See Anthony Gatensby, "*The Legal Obligation of Band Councils: The Exclusion of Off-Reserve Members from Per-Capita Distributions*," (2013) 12:1 Indig L J 1 at 4-10. ("**Gatensby**")

(d) The Mischaracterization of the Settlor's Actions

24. The CMJ's failure to understand how the 1985 Trust works also led him to mischaracterize the legal nature of the settlor's actions and, by extension, the nature of the trust. Contrary to what the CMJ suggests, Chief Twinn's actions did not simply protect the assets of the band from being diluted by an increase in membership[33] – **rather, they operatively ensured that a significant number of the people who were already members of the band, and to whom the settlor owed fiduciary duties, would eventually lose beneficiary status**.

25. It is important to remember the factual and legal context: the office of Chief or councillor is a public office, to which public law duties apply;[34] bands are subject to the *Charter*;[35] the monies in the trust were collected by the Crown under statutory authority[36] and inhered to the band in common;[37] the only reason the monies were in separate trusts in the first place is because of legal uncertainty around whether the band itself could own property.[38] When an elected chief of a band council sets up a trust for members, the nature of their elected office imposes a fiduciary duty on them "to act in the best interests of the members, including the minors."[39]

26. When Chief Twinn established, on the eve of the coming into force of Bill C-31, a trust based on the 1970 *Indian Act*, which operatively was not in the best interests of existing unmarried female band members or existing members (male or female) who might soon be caught by the double-mother rule. Under the 1970 rules, these band members were certain (in the case of the

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[33] CMJ Judgment, *supra* note 3 at paras 36-37.

[34] *Buffalocalf v. Nekaneet First Nation*, 2024 FCA 127 at paras 19-23; *Horseman v. Horse Lake First Nation*, 2005 ABCA 15 at paras 29-30 (in dissent, but not on this point); *R v Big River First Nation*, 2019 SKCA 117 at paras 28-34.

[35] *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 at paras 57-58.

[36] Affidavit of Darcy Twin, filed September 26, 2019, para 7(f) (citing testimony of Chief Walter Twinn) [SFN EKE at p. 004]; See the 1951/70 *Act*, ss 61, 64, 66; *Indian Oil and Gas Act*, RSC 1985, c I-7 (or prior to 1977, under the *Indian Oil and Gas Regulations* adopted under the *Indian Act*); *Financial Administration Act*, RSC 1985, c F-11; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paras 10-12.

[37] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67 at paras 16-17.

[38] Bujold September 13, 2011 Affidavit at paras 7-8 [AEKE at p. 014]. Regarding this concern, see: *Afton Band of Indians et al. v. Attorney-General of Nova Scotia*, 1978 CanLII 2138 (NS SC). For the struggle that Canadian courts have had characterizing bands and band councils, see: *Montana Band v. Canada (T.D.),* 1997 CanLII 6380 (FC), [1998] 2 FC 3 at paras 20-26.

[39] *Blueberry Interim Trust (Re)*, 2011 BCSC 769 at paras 46, 53-54, 61-62; Gatensby, *supra* note 32 at 25-28.

double-mother rule) or highly likely (in the case of unmarried women) to lose their band membership in the coming years. Bill C-31, by contrast, abolished these discriminatory rules, changing for these band members a conditional and time-limited membership to an unassailable right.[40] In this context, it is wrong for the trial judge to conclude that the only real effect of the 1985 Trust is to protect the band's assets from dilution by the "C-31 women" and their descendants,[41] because in fact the beneficiary definition ripped away from existing band members the possibility of benefitting from the trust.

27. It is not that the SFN seeks to contest the *validity* of Chief Twinn's decisions made 40 years ago in the creation of the trust, rather the SFN submits that, in this context, trust law should not allow for this decision to have *discriminatory effects* in the present.

28. The CMJ was wrong to characterize the 1985 Trust as benign and understandable protection of certain interests, whose faults were cured by the 1986 Trust: the two trust are separate and the virtues of the 1986 Trust do not excuse the discrimination in the first. Further, the 1986 Trust and 1985 Trust are for different beneficiaries and hold different assets, as such, they are not properly comparable. The CMJ also erred in law by effectively establishing the principle that public officials may use private law tools to disenfranchise the people who elected them from their communal wealth: no band council has the power to violate the *Charter* by discriminating when distributing collective assets directly,[42] it should therefore not have the power to do so indirectly through a trust.

(e) Proper Characterization of the 1985 Trust

29. The issues highlighted by the foregoing analysis are that First Nation trusts and the historical realities that compelled bands to use trust structures do not neatly fit into the existing body of case law pertaining to private trusts, all of which evolves from private dispositions of private property. First Nation trusts, in many respects, are *sui generis* in nature.

30. The late Dr. Waters highlighted the incongruency in the application of the existing body of law

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[40] See the discussion of the importance for those affected of removing the double-mother rule in *McIvor*, *supra* note 16 at paras 135-143.

[41] CMJ Judgment, *supra* note 3 at paras 36-39.

[42] Gatensby, *supra* note 32 at 31.

to First Nation trusts in his learned text, and wrote that the Courts have considered First Nation trusts to be "non-charitable purpose trusts."[43] Determining whether a trust is in favor of persons or purposes requires examination of the settlor's intention based on the language used in the trust document.[44] Purpose trusts are trusts for which there is no beneficiary; that is they are not trusts where one person has an equitable entitlement to the trust funds. Funds are deposited in trust in order to see that a particular purpose is filled; people may benefit but only indirectly.[45] The recognized categories of non-charitable purpose trusts in Alberta are not closed and further categories can be created through case law.[46]

31. Equality without regard to race, gender or family status, among other grounds, is recognized "as a matter of public policy" in Alberta, which was already the rule at the time of the 1985 Trust's creation.[47] Public trusts and non-charitable purpose trusts cannot be contrary to public policy.[48] The reason for this prohibition is charitable trusts are dedicated to the benefit of the community.[49] Similarly, non-charitable purpose trusts must respect public policy because they are expected to serve purposes "considered beneficial to modern society".[50] It is this public and communal nature which attracts the requirement to conform to the public policy against discrimination.[51]

32. In *Keewatin*, the Manitoba Court of King's Bench considered a trust established for the benefit of various First Nations, which at the time were considered in law to be unincorporated associations, and decided the trust was ultimately for the benefit of the members of those bands who did not have a distinct proprietary interest in the trust property; the result was therefore

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[43] Waters on Trusts, *supra* note 24 at 356. **[TAB 1]**

[44] *Friends of the Calgary General Hospital Society v. Canada* (2000), 2000 ABQB 43 (CanLII), 258 A.R. 22, 76 Alta L.R. (3d) 111 at para. 39 (Q.B); *Gitga'at Development Corp. v. Hill* (2007), 30 E.T.R. (3d) 37, 2007 BCCA 158

[45] *Bathgate v. National Hockey League Pension Society*, (1992) 1992 CanLII 7525 (ON SC), 11 O.R. (3d) 449 at 510, 98 D.L.R. (4th) 326 (Gen. Div.)

[46] *Peace Hills Trust Co v Canada Deposit Insurance Corp*, 2007 ABQB 364.

[47] *Alberta Human Rights Act*, RSA 2000, c A-25.5; *Individual's Rights Protection Act*, RSA 1980, c I-2.

[48] *Trustee Act*, SA 2022, c T-8.1, s. 77

[49] Waters on Trusts, *supra* note 24 at 502 **[TAB 1]**;

[50] Alberta Law Reform Institute, *A New Trustee Act for Alberta,* 2017 CanLIIDocs 418 at para 851.

[51] *Canada Trust Co. v. Ontario Human Rights Commission (C.A.)*, 1990 CanLII 6849 (ON CA) page 24 and 25.

found to be a non-charitable purpose trust.[52]

33. It is notable that the 1985 Trust is fully discretionary. A fully discretionary trust is one in which the trustees have full discretion over whether, when, and to whom distributions are made among a defined class of beneficiaries. The beneficiaries have no automatic right to receive income or capital from the trust. Instead, they only have a potential benefit, as any receipt of income or capital by the beneficiary depends on whether the trustees exercise their discretion in the beneficiary's favour.[53]

34. A fully discretionary trust does not confer a true proprietary interest (ownership) in the trust assets in an individual beneficiary; it therefore does "not have beneficiaries with vested interests"[54] – they hold a "mere expectancy" or a "hope" that the trustees will exercise their discretion to pay them.[55] In this respect it is comparable to the circumstances in *Keewatin*.

35. The CMJ opined that *Keewatin* was wrongly decided. He opined the trust should have been categorized as a private trust, rather than a purpose trust, on the basis that First Nations were named beneficiaries. With respect, this finding demonstrates the CMJ's lack of appreciation of the realities faced by First Nations, notably that when *Keewatin* was decided there was significant confusion in Canadian law regarding the precise legal status of bands.

36. While the 1985 Trust has individuals named as beneficiaries, its attributes in practice are near identical to that of the trust in *Keewatin*, namely that its purpose is to benefit the members. Having incorrectly characterized the 1985 Trust as private, the CMJ would allow its rules to discriminate on the basis of race, sex and marital status in a manner that would be forbidden for a purpose trust, let alone for any public authority acting directly.

37. There is no principled basis in law why a trust established for the purpose of benefitting the membership of a First Nation should be allowed to discriminate against members in one instance and not another, simply because the beneficiaries are defined as individuals rather

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[52] *Keewatin Tribal Council Inc. v Thompson (City),* 1989 CanLII 7267 (MBKB). ("***Keewatin***")

[53] Albert Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed (Toronto: Thomson Reuters, 2019) at 19-20 ("**Oosterhoff**") **[TAB 6]**; Waters on Trusts, supra note 24 at 36 **[TAB 1]**.

[54] Alberta Law Reform Institute, *A New Trustee Act for Alberta,* 2017 CanLIIDocs 418 at para 133.

[55] *Dillon v. Dillon*, 2014 ONSC 2236 at para 283-285, *Spencer v. Riesberry*, 2012 ONCA 418 at paras 43-44; *Hudye Inc v Rosowsky*, 2020 ABQB 296 at para 199.

than as the members in general. The Federal Courts held that where council controlled distribution of funds from a First Nations trust and discriminated against those with post-1985 status, the decision was illegal,[56] but the same result was allowed at Sawridge by calling the 1985 Trust private. With respect, the CMJ erred in law by allowing form to dictate over substance. This error is contrary to public policy and amounts to an injustice as it has the effect of perpetuating discrimination amongst the SFN's present and future membership through the 1985 Trust – discrimination that would be illegal if engaged in directly by Chief and Council.

38. If the existing definition of a non-charitable purpose trust is inapplicable, then First Nation trusts established for the general benefit of their membership, whether named collectively or individually, should be considered a *sui generis* category of non-charitable purpose trusts because in any case, First Nations trusts should not be allowed to violate public policy.[57]

39. "The key to understanding the trust and its direct ancestor, the 'use', is that they are creatures of equity. That is, they were enforced by the courts of Chancery, originally on the basis of conscience."[58] The SFN respectfully submits that conscience must prevail on this appeal and the "Threshold Issue" answered in the negative.

PART 5 RELIEF SOUGHT

40. The Appeal be granted and an Order issued denying the declaratory relief sought by the Trustees on the Threshold Application and declaring the terms of the 1985 Trust to be against public policy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22nd day of December, 2025.

Estimate of time required for the oral argument: 45 minutes.

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[56] *Shanks v. Salt River First Nation #195*, 2023 FC 690 at paras 5, 59, aff'd. 2025 FCA 158.

[57] See Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust*, (Toronto: University of Toronto Press: 2000) at 144 to 162 for commentary on the dichotomy between public and private trusts and how the "dividing line is not always clear." **[TAB 7]**

[58] Oosterhoff, *supra* note 54 at 4. [**TAB 6]**

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WATERS' LAW OF TRUSTS IN CANADA

FIFTH EDITION

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administrative, and those where they are discretionary or dispositive. Ministerial or administrative duties are those involved in the running of the trust, for example, the keeping of accounts, hiring agents like solicitors and valuers. Discretionary duties may be dispositive in the case of the power to maintain out of income, or to encroach on capital, for a beneficiary with a fixed contingent capital interest, or distributive, as with a power of appointment. Distributive powers given to trustees require them to allocate the trust property among class appointees of the power. The power may be a trust power or a mere power.[72]

IX. OTHER TRUST TERMS

A. Testamentary and *Inter Vivos* Trusts

Trusts made by an individual for the benefit of his or her family, friends, or permitted purposes are either made by will, or by a deed, writing, or oral declaration to take effect in the lifetime of the creator of the trust. The testamentary trust is therefore to be distinguished from the *inter vivos* trust. In American usage, an influence registered in Canada, the latter is sometimes described as a "living trust".[73]

B. Discretionary Trusts

In Canada the discretionary trust is one in which the creator of the trust, whether by will or *inter vivos*, imposes the duty upon the trustees, or confers upon them the opportunity, to distribute income or capital among the beneficiaries described in the trust instrument or oral declaration as the trustees think fit. The discretionary trust most often will take the form of a "mere power" that, vested in the trustees, enables them as appointors to appoint among the beneficiaries, or not appoint, as they consider appropriate. That is, the trustees do not have to appoint to each named or described beneficiary. This trust, whether requiring or enabling the distribution of property, is known in the United States and sometimes in Canada as "a sprinkling trust", meaning that the trustees are authorized to distribute or "sprinkle" the trust property among the beneficiaries.

C. Protective Trusts and Spendthrift Trusts

A "protective trust" is an English term which is not widely used in Canada because no Canadian *Trustee Act* contains provision for a statutory protective trust as it exists in English legislation.[74] However, the precedent books in

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partition of the trust property in order to recover his or her property entitlement: *Chung v. Chung*, 2018 BCSC 1126 (B.C. S.C.), following *Pallot v. Douglas*, 2017 BCCA 254 (B.C. C.A.).

[72] See further Geraint Thomas, *Thomas on Powers*, 2nd ed. (London: Sweet & Maxwell, 2012).

[73] A misleading term. It is a fairly crude translation of *inter vivos* which in the term "*inter vivos* trust", is a term of art meaning a trust created by a person to take effect in his or her own lifetime. Literally the words mean, "between the living", and the contrast is with a trust created by a person in his or her will. But this does not make a testamentary trust "a dead trust"!

[74] *Trustee Act, 1925* (Eng.), s. 33. See the discussion in *Underhill and Hayton* at 302 (paras. 11.76 and 11.77).

replace the "of" with "or", and then on the question whether sale to an Anglican or Presbyterian was uncertain, said that, "although there may be circumstances where, in a particular case, it may be difficult to determine whether a person satisfies the definition, such difficulty should not prevent giving effect, if possible, to the testator's expressed intention."[79]

It would now appear that the English approach will be to ask of any language in restraint of religion whether the intent of the testator or settlor is clear, having in mind the ordinary usages of language and terminology among persons at large in society. If the average person would know clearly what was meant, the courts will not indulge in a minute examination of words employed in order to determine whether there is yet a doctrinal or more esoteric uncertainty. Since this is a construction approach that is evidently uppermost in Canadian courts today, it may be supposed that we shall see a similar judicial thinking in this country, when the occasion arises.

2. Conditions in Restraint of Marriage

A condition is *prima facie* void if its intention or tendency is to impose lifetime celibacy upon the recipient of the gift. This is known as imposing a general restraint on marriage. Such an attempted restraint is likely very rare today,[80] but at one time, among other reasons for its use, an unhappily married testator or testatrix might attempt in this way to "save" a child from the same experience; again, a testator might hope by this means to induce an unmarried daughter to continue living with and caring for elderly parents. It has never been finally decided whether a condition imposed upon a gift of realty is *prima facie* void, though it is thought to be so, but it is beyond question that a condition imposed upon a gift of personalty is in this position.[81]

(a) Question of Intention

(i) Condition Subsequent or Determinable Gift. Apart from the tendency of the gift, which will normally coincide with the intention to impose a general restraint, the question is one of intent. Has the testator sought to impose a general restraint by way of a condition subsequent, or was it his or her intention that the gift should be subject to the limitation that the donee should enjoy it as long as he or she is unmarried? If words of limitation have been employed, marriage marks the end of a determinable gift, and such a limitation is valid. At least it was the view of Kay J. in *Re Moore*[82] that the rule of the

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[79] MacAdam J. ultimately found against the clause not on the basis of its being contrary to public policy, but on the basis that it was contrary to s. 4 of the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214.

[80] See, *supra*, note 53. Today the increasing willingness of persons to enter into common-law relationships, and of intending donors to accept such relationships, no doubt accounts for the reduced incidence of such attempted restraints.

[81] The rules of construction discussed in this section on conditions in restraint of marriage apply, however, to both wills and deeds. See *Re Whiting's Settlement*, [1905] 1 Ch. 96 (Eng. C.A.) at 125; and *Re Hewett*, [1918] 1 Ch. 458 at 469. And see *Re Haythornthwaite* (1929), [1930] 1 W.W.R. 58, [1930] 3 D.L.R. 235 (Alta. S.C.) at 60 [W.W.R.].

[82] *Re Moore* (1888), 39 Ch. D. 116 (Eng. C.A.).

ecclesiastical courts concerning conditions upon gifts of personalty should not be extended to words of limitation marking out the duration of such gifts — "the doctrine did great violence to wills, and should not be extended beyond its proper limits" — and Campbell C.J. in the Prince Edward Island case of *Quinn v. Eastern Trust Co.*[83] agreed with that view. However, this would mean that words of limitation might yet be void for public policy reasons, and so, because the ecclesiastical rule does not apply, bring down the whole gift. The courts seem to have taken the view that words of limitation inherently mark out a gift as enduring until marriage, and that therefore they never constitute a general restraint on marriage.[84] This curious view means that a testator can secure by way of a determinable gift what may be in jeopardy if he or she employs a condition subsequent.

(ii) Purpose of Compelling Celibacy or to Provide for Person During Unmarried Life. Even if the language of the will or deed is construed as a condition subsequent, however, it is still open to proof that the intention of the testator or maker of the deed was not to compel the donee's celibacy, but to provide for that person during his or her unmarried life. This common law doctrine was clearly set out by Ford J. in *Re Haythornthwaite*,[85] where he followed the English case of *Re Hewett*.[86] In the former case the testator had made a gift of residue to his sister "as long as she is single. In the event of her marriage," a gift over took effect. At first sight this appears to be a restraint. However, Ford J. decided that these were words of limitation. In *Re McBain*,[87] on the other hand, where there was a gift of realty to two unmarried daughters, and the will provided that "should Jessie or Lily marry" gifts over should take place, Middleton J. held that this was a condition subsequent. Nevertheless, the learned judge found an intent to provide for each daughter until her marriage. Yet it is to be observed that courts may find subtle differences of intent. In *Re Cutter*[88] the testator left his residue to his sister for life. "In the event of the marriage of my sister," there was a gift over. Boyd C., though without the assistance of argument on the point, considered that these words constituted a condition subsequent which sought to impose a general restraint on marriage. The condition was therefore struck out, and the sister took a life estate which therefore would run its natural course.[89]

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[83] *Supra*, note 60, at 141 [M.P.R.].

[84] See *Re Hewett*, *supra*, note 81, at 465, *per* Younger J. For a stimulating Canadian discussion of the distinction between words of limitation and conditions precedent and subsequent, see Campbell C.J.'s dissenting judgment in *Quinn v. Eastern Trust Co.*, *supra*, note 60. Campbell C.J. was of the view, and so found, that words of limitation could be void for public policy reasons. Thereupon the whole gift fell.

[85] *Supra*, note 81. In *Bellinger v. Nuytten Estate*, 2003 CarswellBC 845, 50 E.T.R. (2d) 1, 13 B.C.L.R. (4th) 348 (B.C. S.C.) *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) (loose-leaf) at para. 16.63 was cited with approval for the proposition that "unless there is a gift over, the Court will consider the condition as being *in terrorem*, and void" noting that *Re Haythonthwaite* and *Kent v. McKay*, 1982 CarswellBC 187, 139 D.L.R. (3d) 318 (B.C. S.C.) are cited for this proposition.

[86] *Supra*, note 81.

[87] *Supra*, note 59.

[88] *Re Cutter* (1916), 37 O.L.R. 42, 31 D.L.R. 382 (Ont. S.C.).

[89] Should the sister die unmarried, Boyd C. considered she would have an absolute interest which would pass to her personal representatives. On the other hand it was possible that on a proper

(b) Partial Restraint — Restraint on Class of Persons Donee may Marry

What is the position where the testator or maker of a deed does not intend to impose celibacy, but rather to discourage the donee from marrying outside, or to encourage marriage into, a specific class of persons? This is the partial restraint, and because it is only partial it is valid as far as this head of public policy is concerned. Religion is most often the concern of such donors. The condition, as in *Re Curran*,[90] may require the donee, if he marries, to marry a Roman Catholic. And in that case Godfrey J. adopted the principle of English cases, which regards as valid conditions not to marry a Papist,[91] a Scotsman[92] — "though it be a gratuitous insult to a great race"[93] — or a Gentile.[94]

(c) Constraint on Remarriage of Widow or Widower

It is also well established in the English cases,[95] adopted in Canada,[96] that a condition restraining a widow or widower from remarrying cannot constitute a general restraint on marriage. That is, even if it is the intent of the donor to prevent remarriage, the condition will not be held void as a general restraint.[97]

However, another rule of the ecclesiastical courts, taken over by Chancery, becomes relevant at this point. The common law rule was that, whether the gift was of realty or personalty, if the widow or widower remarried, the gift over took effect or, in the absence of a gift over, the property reverted to the testator's estate or to the settlor. The ecclesiastical rule, on the other hand, was that, when there was no gift over in the event of marriage or remarriage, the condition must be construed as having an *in terrorem* object only.[98] Such a condition the ecclesiastical courts struck out, leaving the gift to run its natural duration.[99]

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construction the will only gave her a life interest, in which case the property would pass to the testator's next-of-kin because the gift over could never take effect.

[90] *Re Curran*, [1939] O.W.N. 191 (Ont. H.C.).

[91] *Duggan v. Kelly* (1847), 10 Ir. Eq. R. 295.

[92] *Perrin v. Lyon* (1807), 9 East 170, 103 E.R. 538 (Eng. K.B.).

[93] *Supra*, note 90, at 193.

[94] *Hodgson v. Halford* (1879), 11 Ch. D. 959.

[95] *Allen v. Jackson* (1875), 1 Ch. D. 399 (Eng. C.A.) at 403.

[96] *Cowan v. Allen* (1896), 26 S.C.R. 292 (S.C.C.) at 313; *Re Deller* (1903), 6 O.L.R. 711 (Ont. H.C. [In Chambers]); *Re Muirhead Estate*, [1919] 2 W.W.R. 454, 2 Sask. L.R. 123 (Sask. K.B. [In Chambers]); and *Hatch v. Cooper* (2001), 2001 CarswellSask 699, 41 E.T.R. (2d) 203, [2002] 2 W.W.R. 159 (Sask. Q.B.).

[97] This type of clause is still surprisingly common with the testator of the older generation who will impose such a restraint, either by way of a condition subsequent or a determinability, upon the life interest of his widow or her widower, even after a lifetime of the marriage. The thinking of the courts is presumably that he or she who has been married cannot be induced by the gift to a life of celibacy. This appears also to reflect the views of contemporary legislatures; see, e.g., the *Family Law Act*, R.S.O. 1990, c. F.3, ss. 56(2) and (3), concerning *dum casta* clauses in separation agreements, marriage contracts and co-habitation agreements. Under case law, restraints on remarriage are partial restraints.

[98] Followed in Canada in the cases cited *infra*, note 104.

[99] E.g., an absolute interest, or a life interest.

The adoption of this civil law rule by the common law courts has led to further illogical distinctions. First, as we have seen, the civil law rule does not apply where the will or *inter vivos* trust deed provides for a gift over. In such a case the restraint is valid.[100] The absence of a gift over, however, may indeed go to show that the donor was more interested in deterring the donee from marrying than in merely disposing of property; but, if the donor wishes the residuary legatee or devisee to take the property in the event of the donee marrying, a gift over does not need to be inserted.[101] Such evidence of the donor's intent can therefore be ambiguous. Second, the ecclesiastical rule affects personalty only. In the hands of Courts of Chancery, however, whose jurisdiction extended over both personalty and realty, the rule was extended to cover those cases where personalty and realty are mixed,[102] as in a trust for sale and conversion, or where they are in a blended or amassed fund.[103] These extensions have been adopted in Canada[104] though not without the expression of regret. In *Re Pashak*,[105] which concerned a gift of the testator's entire estate of realty and personalty, the condition thus being struck out as being *in terrorem*, Simmons J. said: "There is no doubt that this may defeat the plain intention of the testator." The difficulty, of course, is that there is no justification for distinguishing personalty and realty in applying this *in terrorem* rule, and when personalty is included in the gift the embarrassment of the distinction is even more obvious. Whether Courts of Chancery made the distinction any more intelligible by extending the scope of the civil law rule is open to question.[106]

Third, as Boyd C. pointed out in *Re Hamilton*,[107] the rule applies both to conditions precedent and subsequent. This means that the distinction is carried into an area, namely, conditions subsequent, which was previously untouched by civil law rules. And, fourthly, the rule applies to conditions restraining first marriages[108] as well as remarriages.[109]

The importance of the court's construction of the instrument's language thus becomes evident. If language is construed as a condition, as opposed to

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[100] E.g., *Re Deller* (1903), 6 O.L.R. 711 (Ont. H.C. [In Chambers]); *Re Muirhead Estate*, *supra*, note 96; *Crown Trust Co. v. McKenzie* (1959), 66 Man. R. 294; *Re Diver*, [1936] O.W.N. 255 (Ont. C.A.) (remarriage after divorce).

[101] This, of course, will be the familiar situation where the testator creates a trust over his or her residue, giving his widow or her widower a life estate subject to the restraint, and distributing the capital among the children of the marriage on the widow's or widower's death.

[102] *Genery v. Fitzgerald* (1822), Jac. 468, 37 E.R. 927; *Bellairs v. Bellairs* (1874), L.R. 18 Eq. 510 (Eng. Q.B.), *per* Jessel M.R.

[103] *Duddy v. Gresham* (1878), 2 L.R. Ir. 442.

[104] *Re Hamilton* (1901), 1 O.L.R. 10 (Ont. Ch.); *Re Cutter*, *supra*, note 88 (where since Boyd C. found a general restraint, the relevance of these cases is not apparent); *Re Schmidt*, [1949] 2 W.W.R. 513, 57 Man. R. 316 (Man. K.B.); *Re Pashak*, [1923] 1 W.W.R. 873, [1923] 1 D.L.R. 1130 (Alta. S.C. [In Chambers]); *Re White*, [1957] O.W.N. 465 (Ont. H.C.).

[105] *Ibid.*, at 874 [W.W.R.].

[106] For a review of the origins of this "*in terrorem*" rule see Peter G. Lawson, "The Rule Against "*In Terrorem*" Conditions: What is it? Where did it Come From? Do we Really Need it?" (2005) 25 Estate, Trusts and Pensions Journal 71. The article also compares the application of the rule in England, Canada and Australia to the United States.

[107] *Supra*, note 104.

[108] *Re Hamilton*, *supra*, note 104; *Re Cutter*, *supra*, note 88.

[109] *Re Pashak*, *supra*, note 104; *Re Schmidt*, *supra*, note 104; *Re White*, *supra*, note 104.

words of limitation, and there is no gift over, the civil law rule automatically applies, as extended by Chancery. In *Re Pashak* the gift was to the widow "as her own absolute property," but "as long as she remains my widow." In *Re Hamilton* there was a gift of income to a son, "but, if he marries to the satisfaction of and with the consent of the executors," then he should have a higher income. In *Re Schmidt*[110] the testator simply said "but in the event of the remarriage of my said wife," the gift to her was to be reduced to one half. In each of these cases the court construed the language as condition, and the condition was struck out under the *in terrorem* rule.

3. Conditions Interfering with Marital Relationship

(a) Historically

It traditionally has been regarded by the courts as contrary to public policy for a settlor by deed or will to import into the settlement conditions which are intended, or have the tendency, to separate married couples. Public policy was conceived as favouring the support and maintenance, not only of the institution of marriage, but of each individual marriage. Nor has it mattered whether the settlor is a third party, or one or both of the parties to the marriage. Even if the settlement — and the same has applied to a contract — is only concerned with a future and possible separation, public policy has condemned that provision. But, again, from the mid-nineteenth century the courts have attempted to be realistic, and they drew a distinction between property divisions which are for those who are already separated or are immediately about to separate,[111] and on the other hand which are intended to bring about a future separation or to perpetuate an existing separation.[112] The former were regarded as legitimate; only the latter were disapproved of, and the condition to such a gift struck out.

This meant that, when parties were entering marriage, or were married without there being an immediate prospect of separation, no one might make provision for either spouse against the day when there might occur a separation or divorce. So far as third party donors were concerned, it was a question of construction as to whether such a donor intended to provide in the circumstances of an existing marriage breakdown, or to interfere for his or her own ends with the marriage of others. It was possible that a donor did not intend to interfere, but, as we have said, if the tendency of a conditional gift was to do that, the condition would still be void.[113]

(b) Effect of Family Law Reform

However, rapid and profound social change following the end of the Second World War was recognized in all the common law jurisdictions of

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110 *Supra*, note 104.
111 *Re Beardmore Trusts* (1951), [1951] O.W.N. 728, [1952] 1 D.L.R. 41 (Ont. H.C.).
112 *Quinn v. Eastern Trust Co.* (1963), 48 M.P.R. 134, 39 D.L.R. (2d) 743 (P.E.I. S.C. [In Banco]).
113 *Ibid.*

jurisdictions will be changing the legal landscape. Until then, though there are many issues on which this treatise might reason as to what is or may be the law, the existing case law, so far as it is not amended or abolished by the legislatures, is the base line from which the courts will proceed to harness the "unruly horse" of public policy at a time of ongoing change and the sensitivity of current society to the dignity of individual rights.

4. Conditions Interfering with the Discharge of Parental Duties

The view taken by the courts is that the rightful place of an infant is with his or her parents, and that in regard to the child's upbringing the parents should think only of what is best for the child's welfare.

The difficulty arises in these cases, however, when there has been a *de facto* or legal separation between the parents during the settlor's[122] lifetime, and the settlor is attempting by the gift to prevent the infant living, normally after the settlor's death, with a parent whose influence the settlor considered deleterious. Just such a situation occurred in *Clarke v. Darraugh*[123] where the testator left his entire estate on trust for an infant at twenty-one, but added, "should the said [G.H.] at any time before coming of age go to live with his father, [W.H.], he is to be disinherited of the whole or any portion of my estate." Ferguson J. held the condition to be subsequent, and to be void on the grounds that the father had a legal right to have his son with him, and the son a corresponding duty. The trial judge also thought fit to note that nothing immoral was proved against the father, that nothing had been left to the father by the testator, and that no provision was made by the testator for the custody and education of the child. One is therefore impelled to ask what the situation would have been had the father been immoral, and the testator had made provision for custody and education. Do these factors mean that the interfering condition is void unless the court agrees with the settlor's assessment of the parent or parents, and the settlor has provided for the child which is to live away from his or her parents?

In *Re Gross*[124] there had been a chequered history of unhappiness. The testator's son was unhappily married during the testator's lifetime, and the son's wife had secured alimony against him. By court order the custody of the child of the marriage was then given to the testator and his wife, with limited access rights granted to the parents. After the testator's death a further court order was sought, the parents agreeing that the child's mother should have custody. The mother then divorced her husband on grounds of adultery, and later the husband died. The child remained a minor throughout these events, and after the husband's death the court made an order embodying the parents' agreement as to custody of the child. The problem with the testator's will was that he had left a considerable sum to the child payable at twenty-one, and to

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[122] The gift may be direct, of course, and not by way of trust.
[123] *Clarke v. Darraugh* (1884), 5 O.R. 140. *Wilkinson v. Wilkinson*, *supra*, note 117, was followed.
[124] *Re Gross*, [1937] O.W.N. 88 (Ont. C.A.).

be accumulated until then, "if from the date of my death my said granddaughter has been permitted to remain and has remained constantly in the custody of my wife and of my son or the survivor of them, subject only to such rights of access to my said granddaughter by her mother as I have permitted, and allowed, during the time my said granddaughter has been in the custody of my said wife and myself."

In *Clarke v. Darraugh* a similar phrase was held to be a condition subsequent, as we have seen, but in *Re Gross* the Ontario Court of Appeal construed the language as giving rise to a condition precedent.[125] The too thin line of distinction between the opposing constructions is again apparent. The effect of the finding in *Re Gross* was also fatal to the gift. If the condition was void, it brought down the whole gift with it; if it was valid, the child lost her legacy through no act of her own. However, though it would be no comfort to the child, one would at least suppose the gift failed for voidity of the condition; not so. Middleton J.A. for the court said simply: "Mr. Gross [the testator] was in control of his own estate. He chose to give to his granddaughter in certain events. His only gift was to her in those events and, as she cannot comply with the terms of the will, she cannot take."[126]

Was the court order giving custody to the testator and his wife a crucial factor? This is not mentioned in the judgment as reported, though the court, concerned as it is with the welfare of the child, does share with the parents, unlike a third party, the right to determine the child's welfare. But the court order in question was to endure only during the testator's lifetime, and the subsequent custody of the mother was in fact ratified by a second court order. So the significance of factors such as court orders upon the right of the parent to cohabit with the child, as well as the correctness of the interpretation of Mr. Gross' will, remain in question.[127]

Finally, in *Re Thorne*[128] a gift to a granddaughter on marriage or attaining twenty-one was followed by the sentence, "This however is in case she does not go to live with her mother." The child was living with her uncle at the testator's death, and the income of the gift was payable to the uncle till the child qualified for payment of the capital. If, however, the child after attaining fifteen wished to make her permanent home with her mother, the capital and income were to revert to the estate. Rose J. followed the English cases and *Clarke v. Darraugh*; the gift was "intended to compel [the child] to refuse to live with her mother, which she had no legal right to do."[129] The language also constituted a condition subsequent, and therefore, being void, was struck out, leaving the gift to vest in possession on marriage or attaining twenty-one. It will be noticed

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[125] As a gift which vested in interest on the attainment of twenty-one years, this condition was precedent. But if the gift had been construed as a gift which vested on the testator's death with postponed payment (*cf. Clarke v. Darraugh, supra*, note 123; and *Re Thorne* (1922), 22 O.W.N. 28), the condition might in its turn have been construed as subsequent.

[126] *Supra*, note 124, at 91.

[127] This is a curious decision. More time is spent in the judgment, as reported, on the effect of a condition precedent. No authority is cited in the judgment other than an English case on the effect of void conditions precedent.

[128] *Supra*, note 125.

[129] *Ibid.*, at 29.

that in this case the testator had made provision for the child during minority, unlike *Clarke v. Darraugh*, but the court took the view that there was an overriding interference with the legal rights and duties of parent and child. The Court of Appeal in *Re Gross* appears not to have considered *Clarke v. Darraugh* or *Re Thorne*.

5. Conditions in Restraint of Religious Behaviour

(a) The General Position

We have already examined[130] how the courts have handled conditions in restraint of religious behaviour in terms of their certainty or uncertainty as to what the testator or settlor intended. We now turn to the public policy issues involved. As we saw earlier, the common law takes the view that conditions requiring a donee to adopt, continue with, or eschew, a certain faith are not contrary to public policy. The testator's freedom to dispose by will of his or her assets as he or she chooses, subject only to statutory incursions upon that freedom, is also a tenet of common-law societies, and all the above conditions are seen to express the testator's selection of religious belief. The position with *inter vivos* trusts is no different; the settlor has expressed a selection. A choice is put to the donee; discrimination against freedom of religion, on the other hand, is of a less personal nature and operates over a larger area of concern.[131] The only qualification traditionally made by public policy has been that, if such a restraint contravenes an established head of public policy — that is, interference with husband and wife relations or the discharge of parental duties — it would be void for that reason.

(b) Gifts to Minors

So far as conditional gifts to persons under age are concerned, counsel in *Re Going*[132] pointed to the common law principle that any gift to an infant or minor, payment of which depends on his or her following a particular religious persuasion, is void because it tends to interfere with the duty of parents to instruct their children in religious matters solely with a view to their moral and spiritual welfare, uninfluenced by mercenary considerations affecting the young person's worldly welfare.[133] *Re Going* involved a testamentary gift to two minors, subject to a condition precedent that neither should take unless on

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[130] Above, Part II C 1 e.

[131] *Blathwayt v. Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. H.L.) at 425, 426 [A.C.], *per* Lord Wilberforce, with whom on this matter all the remaining members of the court agreed. However, in *Re Murley Estate* (1995), 130 Nfld. & P.E.I.R. 271, 405 A.P.R. 271 (Nfld. T.D.), discussed further *infra*, note 148 and accompanying text, a will clause provided that for a named person to take as heir "he must remain in one or the other main stream Christian Churches" and "never become part of lesser religious organizations", a list of which, by way of example, the will provided. Without reference to authority, Riche J. held (at 274 [Nfld. & P.E.I.R.]) that he was "satisfied that such a provision which restricts the religious affiliation of any person is, in Canada, contrary to public policy."

[132] *Re Going*, [1951] O.R. 147, [1951] 2 D.L.R. 136 (Ont. C.A.).

[133] *Ibid.*, at 148. See *Re Borwick*, [1933] Ch. 657 (Eng. Ch. Div.) at 666; *Re Tegg*, [1936] 2 All E.R. 878, 80 Sol. Jo. 552, cited as support by counsel.

"Public" trusts, it was said by the judge, referring to charitable trusts, have to conform to public policy concerns, but "private" trusts are not subject to the public policy doctrine. Distinguishing a number of post-*Leonard* court decisions that appeared to adhere to no such distinction, the appellate *Spence* court adopted Tarnopolsky J.A.'s distinction. But problems with the scope of each of "private" and "public" are at once apparent. For instance, is a trust in favour of a First Nations community, funded also by government out of taxpayer-sourced moneys, a "public" or a "private" trust? Such trusts are certainly not family trusts, like that challenged in the *Spence* case. First Nation trusts have been described by Canadian courts as human beneficiary trusts, following *Re Denley's Trust Deed*[168] and alternatively as "non-charitable purpose trusts".[169] Is a testamentary disposition to other than a *McCorkill* organization, being absolute or by way of a trust, that expressly challenges the *Charter* on discrimination, beyond the reach of public policy as a "private" disposition? Or does the express challenge make the disposition "public"?

D. Discrimination and Public Policy

Today the *Charter of Rights and Freedoms*, and, where they exist, provincial Human Rights Codes, represent a modern societal judgment in favour of equal treatment on the part of governments and private individuals towards each person, whoever that person be. But whether judges ought to be active today to strike down dispositions or the terms of dispositions because they contravene principles against discrimination or of public policy hitherto not raised by the case authorities is a matter upon which reasonable and informed persons can differ. The bases on which the courts might rule was recently considered at length by a first instance court in *Re Esther G. Castanera Scholarship Fund*.[170] A testatrix, who had spent a career in the sciences, endowed by her will the creation of scholarships in the physical sciences at the University of Manitoba, but expressly for women students. One question that arose was whether this constituted discrimination against male students. Considering and applying the distinction between a donor who seeks as a viewpoint to advance discrimination, as in the *Leonard's Foundation* case, and on the other hand a donor who intends to assist those needing support, such as women in the hitherto male-dominated physical sciences, the court approved a *cy-près* scheme which retained language stipulating women appointees. However, the court was of the opinion that there are no general rules governing these cases. Each fact situation must be examined by the court, or other decision agency concerned, in order to determine the donor's motivation, and to assess the impression the reasonable individual may draw from the

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[167] *Supra*, note 157.

[168] *Re Denley's Trust Deed* (1968), [1969] 1 Ch. 373, [1968] 3 All E.R. 65 (Eng. Ch. Div.).

[169] See chapter 14, Part II C — Part II D.

[170] *Re Esther G. Castanera Scholarship Fund*, 2015 MBQB 28, [2015] 7 W.W.R. 191 (Man. Q.B.). See also *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 BCSC 445 (B.C. S.C. [In Chambers]), which was discussed, and its reasoning on this matter adopted, by the Manitoba court.

found. The court might also make a money order. The main issue in *Rawluk* was whether the availability of comprehensive matrimonial property legislation excluded a claim based on constructive trust. It was held that it did not.[436]

In *Peter v. Beblow*,[437] a converse issue arose. The parties were unmarried cohabitants, and the relevant legislation only applied to married parties. The question was whether the implicit legislative decision was that unmarried partners should not have access to a property division regime. Again, the answer was no, and a constructive trust was imposed. This case also decided that it is no longer arguable that unremunerated work done by one partner in a relationship is, in some sense, a gift; or that public policy dictates that such work and services shall not give rise to Equitable remedies. Quite the reverse was found: the court held that work done in a domestic context is no different from work done in any other context. If there is no juristic reason for the resulting enrichment, then there will be an unjust enrichment, and one possible remedy for that is the constructive trust.[438]

Peter v. Beblow left one issue unsettled. Cory J., writing for the minority judges, would have held that it was possible for a successful plaintiff to make a constructive trust claim that was measured by the value of property or services received earlier by the defendant. This would be in contrast to the usual situation, where the claim is to a share of the assets remaining in the hands of the titled party at the time of trial.[439] McLachlin J., as she then was, wrote the majority judgment, and she disagreed with Cory J. on this point. She stated that the "value received" approach was appropriate for a monetary award; but if a plaintiff established the requirements for a constructive trust, it would properly be measured as a share of the "value surviving". The implication of this was widely understood as being that if the plaintiff sought a remedy measured by a share of the assets as they now stood, he or she could obtain it only by way of a trust claim; conversely, a personal claim—that is to say, an order for the payment of an amount of money in order to bring about restitution of an unjust enrichment—could only properly be measured by the value of the enrichment at the time it was received.

The Supreme Court of Canada returned to this question in *Kerr v. Baranow*.[440] In that case the Court clearly stated that when unjust enrichment has been established, Canadian common law courts may make a money award—one that does not impose a trust—that is calculated so as to capture a share of the assets generated during the relationship. This is a personal award, measured as a share of the value surviving. Such an award, it was held, is only appropriate where there has been a "joint family venture", and the court

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[435] *Rawluk v. Rawluk*, 1990 CarswellOnt 217, 1990 CarswellOnt 987, [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161 (S.C.C.). The possibility of a money order was also canvassed in *Sorochan v. Sorochan*, *ibid.*

[436] See however the statement in *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401 (Ont. C.A.), additional reasons 2011 CarswellOnt 8876 (Ont. C.A.).

[437] *Peter v. Beblow*, 1993 CarswellBC 44, 1993 CarswellBC 1258, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 (S.C.C.).

[438] See further the discussion in chapter 11, Part I C, for the availability of a trust remedy rather than a money order.

[439] This point is discussed in chapter 11, Part I E 1, where it is suggested that what Cory J. had in mind was an Equitable lien rather than a constructive trust.

[440] *Kerr v. Baranow*, [2011] 1 S.C.R. 269, 2011 SCC 10, 2011 CarswellBC 240 (S.C.C.).

Indian Women and the Law in Canada: Citizens Minus

by
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Contents

Chapter 1

The Status of Indian Women — Moral Dilemma or Political Expediency?

For one hundred and nine years Indian women in Canada have been subject to a law which discriminates against them on the grounds of race, sex and marital status. The Indian Act, which regulates the position of Indians in Canada, provides that an Indian woman who marries a non-Indian man ceases to be an Indian within the meaning of any statute or law in Canada.[1]

The consequences for the Indian woman of the application of section 12(1)(b) of the Indian Act extend from marriage to the grave — and even beyond that. The woman, on marriage, must leave her parents' home and her reserve. She may not own property on the reserve and must dispose of any property she does hold. She may be prevented from inheriting property left to her by her parents. She cannot take any further part in band business. Her children are not recognized as Indian and are therefore denied access to cultural and social amenities of the Indian community. And, most punitive of all, she may be prevented from returning to live with her family on the reserve, even if she is in dire need, very ill, a widow, divorced or separated. Finally, her body may not be buried on the reserve with those of her forebears.[2]

The deleterious effects of this oppressive legislation on the Indian woman and her children materially, culturally and psychologically can be very grave indeed.

No such restrictions are provided in the Indian Act for Indian men, who may marry whom they please without penalty and indeed by so doing confer on their non-Indian spouses and children full Indian rights and status.

Other Canadian women do not face such severe penalties on marriage. They may return if and when they wish to their parents' home, they are not subject to restrictions on inheritance of property, and even if married to a citizen of a foreign country they are able to confer Canadian citizenship on their children.[3]

The Indian Act is now being revised through a process of consultation between the government and the National Indian Brotherhood, but Indian women who have lost their status have been denied a voice in

these negotiations. This study, undertaken at the request of the National Committee of Indian Rights for Indian Women, is intended to document the legislation which deprives women of their Indian status, to analyze the development of this policy, and to determine the consequences for Indian women and their children. In this way it is hoped to support their efforts to regain the full equality of status with Indian men to which their Indian birth entitles them.

The particular focus of this study is derived from an examination of the present impasse between government and Indian leaders on this issue. Both sides admit that the discrimination against Indian women is manifestly unjust, but neither the government nor the Indian leaders have yet been able to agree on how this question might be resolved.

The consultative process, by way of a joint committee of the Cabinet and the National Indian Brotherhood (NIB) has been going on since 1975. But until December 1977, when the topic of band membership was briefly broached, Indian women's loss of status had not even been mentioned and had been regarded, as if by tacit and mutual consent of all concerned, as too "delicate" to discuss.[4]

Such attitudes undoubtedly had their origin in the Lavell case, which established for both sides the inviolateness of the Indian Act. The case, which became a political vehicle for both the government and the Indians, came before the Supreme Court of Canada in 1973, when Jeannette Lavell contested her loss of Indian Status under section 12(1)(b) of the Indian Act. The basis of the case (which is discussed in detail in Chapter 14) was that the discriminatory provisions of this section of the Indian Act were contrary to the Canadian Bill of Rights.

The government had just published a "White Paper" proposing that the Indian Act should be phased out.[5] But a strong Indian political front was emerging, apparently determined to wring from the government redress for past injustices. Insistence on the retention of the Indian Act was regarded as a crucial part of this strategy by the Indian leaders. As Harold Cardinal put it, "We do not want the Indian Act retained because it is a good piece of legislation, it isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. . . . We would rather continue to live in bondage under the *Indian Act* than surrender our sacred rights."[6] The Indian Act was thus transformed from the legal instrument of oppression which it had been since its inception into a repository of sacred rights for Indians. The opposition of Indian leaders to the claim of Lavell became a matter of policy to be pursued at all cost by government and Indians together because it endangered the Indian Act.

Jeannette Lavell lost her case, but the consequences were far-reaching. The issue of Indian women's status under section 12(1)(b) acquired, for many people, the dimensions of a moral dilemma — the rights of all Indians against the rights of a minority of Indians, i.e. Indian women. The case created a united Indian front on the "untouchable" nature of the Indian Act. And finally, the federal government's

eagerness to support the major Indian political associations (most of which seem to have almost exclusively male executives and memberships) against Lavell established a basis for continued government-Indian interaction, which had been in deadlock since the conflict over the government "White Paper" of 1969. The rapport generated during the Lavell case was, after a short period of gestation, to give birth in 1975 to a joint NIB-Cabinet consultative committee to revise the Indian Act.

The government gave an undertaking to the NIB that no part of the Indian Act would be changed until revision of the whole Act is complete, after full process of consultation. The result of this gentlemen's agreement has been that until very recently, a powerful blanket of silence was imposed on discussion of the status of Indian women and the topic began to assume an extra dimension. It became taboo and unwise in certain circles even to mention the subject. Despite the fact that the Indian Act continues to discriminate against them on the basis of race, sex and marital status, and is contrary to the most fundamental principles of human rights, Indian women who have dared to speak out against it have been seen by many as somehow threatening the "human rights" of Indians as a whole.

The fact that Indian women in Canada who have lost their status are expected to accept this oppression compounds and perpetuates the injustice and has clear parallels in other societies where discriminatory practices and legislation permit the victimization of one group by another.

"The concept of 'Victimization'," according to St. Clair Drake, "implies that some people are used as a means to other people's ends — without their consent — and that the social system is so structured that it can be deliberately manipulated to the disadvantage of some groups by the clever, the vicious and the cynical as well as by the powerful. The callous and the indifferent unconsciously and unintentionally reinforce the system by their inaction or inertia. The 'victims', their autonomy curtailed and their self-esteem weakened by the operation of the caste-class system, are confronted with identity problems; their social condition is essentially one of powerlessness."[7] It is also typical that in such a system any attempt by the victim to alleviate oppression is seen as an attempt to subvert the system.

The concept of "victimization" articulated above, although developed in U.S. contexts, has clear application to the historical position of Indians in Canadian society and most certainly to the position of Indian women in Canada today. Indian women have not only been historically "victimized" but they are subject to psychological pressure from both government and Indian leaders to keep silent and to accept their position as "martyrs for a cause", in fact apotheosizing their own oppression until the whole Indian Act is revised.

Each side claims that it is faced with a moral dilemma. The government insists that it would like to change the law, but that this would be contrary to the wishes of the Indian people. It has therefore

deliberately excluded the Indian Act from the provisions of the new Human Rights Act, which came into force on March 1st, 1978, thus preventing any possibility of appeal against discrimination in the Indian Act by Indian women.[8]

The Indian leaders, on the other hand, claim that their mistrust of government's intentions is so great that they cannot agree to any section of the Indian Act being changed or even temporarily suspended until the whole Act is completely revised.[9]

A curious twist to the issue has now developed. Despite the fact that section 12(1)(b) is part of an Indian Act which was developed by previous federal governments without consultation with the Indian people, and despite the fact that this kind of discrimination against Indian women was never part of Indian cultural tradition, as later chapters of this study will show, the government is now placing the onus for the continuing existence of this discrimination squarely on the shoulders of the Indians and their representatives, the NIB.

Thus we find in a nationally-read newspaper the recent headline: "Indians' leaders warned to halt discrimination against women." The article then begins, "Justice Minister Ronald Basford has warned Indian leaders that Parliament is not going to tolerate 'for too long' the discrimination against women contained in the Indian Act."[10]

The Honourable Marc Lalonde, the Minister responsible for the Status of Women, in February 1978, informed a meeting of women delegates from across Canada that the issue of discrimination against Indian women is complicated and that "Discrimination against women is a scandal but imposing the cultural standards of white society on native society would be another scandal."[11]

This "two scandals" argument is another version of the "moral dilemma", but this time discrimination against women is argued as being Indian custom and for the government to impose other values prohibiting discrimination would be scandalous.

Of the many and varied arguments that have been used to justify the continued existence of this legislation, this product of the 1970s is the most insidious.

For the Indians themselves this is now a very divisive issue. To arrive at any consensus of opinion in the near future which will be acceptable to Indians across Canada seems an almost hopeless task. Yet the longer this law remains, the more divisive and the more difficult to resolve it becomes.

Recent statements by Noel Starblanket, President of the National Indian Brotherhood, indicate a change of heart on his part, though not necessarily of the NIB. Starblanket has stated quite unequivocably that the Indian Act unfairly discriminates against women and that he does not want to see the issue buried but researched and clarified so that an equitable solution might be found.[12]

Dimensions of the Problem

In order to explain adequately the evolution of the legislation for Indian women this study takes a historical and sociological approach to the problem.

The emphasis is on the complex and changing attitudes to Indian women. The laws controlling intermarriage between Indian women and white men are put in a context of broader historical trends. By so doing it is hoped to arrive at a better understanding of the perceptions and prejudices that generated different laws for Indians and whites and Indian men and Indian women in the past, as well as their retention today.

Implicit in the analysis in this study is a more general conceptual framework in which the 1869 legislation, which first introduced a section penalizing Indian women who married non-Indians, is seen as having arisen not as a function of the reserve system and necessity to protect reserve land, but as part of the government policy of assimilation. And this is seen here as part of what may be described as a developing caste/class system in which society became more and more stratified and inequality on the basis of race and social class had become an organizing principle. The extra dimension of institutionalized sexual inequality ensured for Indian women in the mid-nineteenth century a very special place right at the bottom of this hierarchical structure.

Restrictions on marriages between races are a manifestation of a complex blend of notions based on race, class and sexual inequality. There are variations on the theme but the basic elements remain the same today as in 1869. This is most clearly demonstrated in the United States, where in many states inter-racial marriages were illegal until 1967. Even when the climate of public opinion seemed in favour of racial equality inter-racial marriage was still viewed negatively.[13]

Though (unlike the U.S. then and South Africa today) Canadian legislation has provided sanctions only for the Indian woman in the event of inter-racial marriage, the expressed views of the majority of the Canadian Supreme Court in the Lavell case indicate a similarly cautious, conservative approach to this whole question of race and sex and the deep prejudice these topics trigger in the Canadian public. It is the resultant "inaction or inertia" on the part of the Canadian public which permits the continued "victimization" of Indian women described earlier.

Each dimension of this problem — race, class and sexual inequality — is as powerful and deeply entrenched a force in Canadian society today as in the nineteenth century. The historical approach is thus implicitly intended to show also how these dimensions varied with each other over time to create specific government policies and legislation at given periods.

This approach indicates a threefold focus of inquiry:

1) Government legislation, policy and attitudes towards intermarriage between white men and Indian women,
2) Government legislation and policy for all Indians,
3) Indian tradition and Indian reaction to government policy and administration.

All of these are very broad topics and single aspects of each of them have been the subject of lengthy treatises. Nevertheless it does not seem possible to view any of these three elements in isolation and to arrive at a meaningful interpretation of the evolution of the legislation of 1869 or its subsequent elaborations. The broad approach, however, makes it possible to demonstrate that attitudes towards intermarriage and Indian women and the restrictive laws were indeed part of a much broader development in ethnic, sex and class relations in nineteenth century Canada, and it provides a basis for unravelling and refuting the arguments for the continuing oppression of Indian women today.

Chapter 2

The Indian Act View of Women

Section 11 of the amended 1951 Indian Act, which is the Act in force today, defines who is an Indian for the purposes of the Act in the following terms:

> "11. (1) Subject to section 12, a person is entitled to be registered if that person
>
> (a) on the 26th day of May 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, being 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 immovable 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 26th of May 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 descendant 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)."[1]

When the male bias in this section is then read in conjunction with section 12, which defines who is not entitled to be registered as an Indian, it becomes evident that the Act is designed to discriminate between Indian men and Indian women and that Indian women are not entitled to enjoy the same Indian rights as Indian men.

*Emphasis added.

This is most clearly set out in section 12(1)(b) of the Act which states:

> "12.(1) The following persons are not entitled to be registered, namely... (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 "person who is not an Indian" means any man who is not considered to have Indian status for the purposes of the Indian Act. The woman who marries such a person is automatically deprived of her Indian status and her band rights from the date of her marriage. In addition, an Indian woman who marries a member of another band is transferred to the band of her husband regardless of her wishes. If she moves from a prosperous band to a poor band, she may find herself deprived of monies in the form of revenues which she feels are her birthright. She also loses other rights which adhere to membership of the band into which she was born. Even if a woman does not marry, any child she may have may be deprived of Indian status if upon protest to the Registrar it is determined that the father of the child was not an Indian.[3]

Early legislation for Indians did not make such invidious distinctions between male and female Indians. The earliest Indian Acts dating from the middle of the nineteenth century were enacted to deal with Indians on reserves.[4] These reserves were created usually, though not always, as the result of treaties made with the Indians in which they ceded their lands for settlement to the British government (the Crown) in return for a portion of land — the reserve — and certain other benefits. It eventually became necessary to enact legislation detailing who was entitled to these benefits and to live on the reserves. But it was not until after Confederation, in the Indian Act of 1869, that the forerunners of the present sections 11 and 12(1)(b) setting out a separate legal regime for Indian women were incorporated in the legislation.[5] Since then, the provisions of the Indian Act relating to Indian women have become increasingly restrictive in content and more punitive in tone.

The 1869 legislation was created primarily on the basis of the Dominion Government experience with the Iroquois and Algonquin groups of Ontario and Quebec. It was only *after* the framework and much of the substance of the Indian Act were in place that it was extended uniformly across Canada in the Act of 1874 and in later Acts to include all Indians as the various provinces came into Confederation.[6] The great diversity of lifestyles and forms of social organization of the Indians west of Ontario were not considered an important factor in law-making in 1869.

The key question then remains: to what extent did the provisions of the law which related to women accord with the customary position of married women among Iroquois and Algonquian Indians for whom the law was made?

Iroquois traditional culture seems to have been fairly homogeneous and fortunately has been well documented in the contemporary accounts

of travellers and missionaries as well as by many ethnographers who have drawn on Indian as well as European sources.

To what extent this tradition could indeed be said to be that which was still strong in 1869 is more complex. Certainly the Iroquois at the Caughnawaga Reserve in Quebec, which had been set up and controlled by Jesuit missionaries in the mid-seventeenth century and since then had attracted refugees and Christian converts from many different Indian groups,[7] could be expected to have evolved a rather different kind of society from the Iroquois of the Six Nations in southern Ontario, who had their own complex and chequered history of migrations in the eighteenth century and of prolonged contact with both Protestant missionaries and the military.[8]

Nevertheless many authorities seem to agree that for many centuries before the nineteenth century and possibly for a part of that century also Iroquois society was matrifocal, descent was traced matrilineally (i.e. through women) and post-marital residence was matrilocal (i.e., after marriage the husband went to live with his wife's family). Each dwelling, traditionally a longhouse,[9] was owned by a senior woman, and in it lived her spouse, their daughters and spouses and their children. If a woman did not want her husband to continue living in her house she simply "tossed his personal effects out of the door of the longhouse" and so divorced him. The children remained with the mother. Subsistence was obtained from the practice of horticulture. Corn, beans and squash were the main crops, with the women organizing, jointly owning and working the gardens and also distributing the produce. Fishing rights also were held by the women. The men hunted, engaged in constant warfare (in historical times at least) and were usually away for long periods of time.[10]

In the political sphere the senior matrons elected and deposed the elders of the Council, the highest ruling body of the league of the Iroquois (traditionally founded in 1570). Hereditary eligibility to this Council was through the female. Goldenweiser in 1912 described the role of the women in the selection of a new chief when a chief had died thus:

> "When a chief died, the women of his tribe and clan held a meeting at which a candidate for the vacant place was decided upon. A woman delegate carried the news to the chiefs of the clans which belonged to the 'side' of the deceased chief's clan. They had the power to veto the selection, in which case another women's meeting was called and another candidate selected . . ."[11]

According to Schoolcraft the matrons also had veto powers in questions of war and peace.[12]

In 1724, Lafitau, basing his statements on personal experience and the "Jesuit Relations", made this unequivocal comment on the position of women: "Nothing, however, is more real than this superiority of the women. It is of them that the nation really consists; and it is through them that the nobility of the blood, the genealogical tree and the families

are perpetuated. All real authority is vested in them. The land, the fields and their harvest all belong to them . . . the children are their domain and it is through their blood that the order of succession is transmitted."[13]

Much of the literature relating to Iroquois women has been summarized by Judith Brown in a paper entitled "Iroquois Women: An Ethnohistoric Note". Brown's thesis is that Iroquois women's economic contribution and their control of the distribution of all food, even that procured by men, was the key to their powerful role in politics and religion.[14]

European social organization was clearly quite different from this in many fundamental respects. Though women did in fact contribute substantially to subsistence through paid labour they had little or no personal or political autonomy.[15] For most of the nineteenth century a married woman's wages and property belonged to her husband. The

unmarried minor female came under the aegis of her father or male guardian. The older unmarried females — spinsters and widows — were despised social anomalies. But if propertied they had some civil though not political rights.[16]

But what of the other major Indian group to whom the 1869 legislation applied — the Algonquians? Unlike the Iroquois they are not a homogeneous group and so it is not possible to generalize much. Theye were usually, however, hunting and gathering people, nomadic and nucleated into small independent groups with, usually, little formal political or social organization. Post-marital residence patterns and descent reckoning were very varied, it is now generally agreed. But it should be noted that until a decade ago anthropologists writing on hunters and gatherers such as the Algonquians have assumed that patrilineal descent and patrilocal residence were the most prevalent type of small community or band organization among virtually all North American hunters and gatherers prior to contact.[17]

Influential theorists who have developed typologies based on this assumption, such as Julian Steward, one of the fathers of American anthropology, and his pupil Elman Service, had grounded their theories on supposed bioeconomic premises — 1) that male dominance is innate, and 2) the greater economic importance of the male in a hunting and gathering society.[18] This was substantiated by data from the early theoretical writings on Australian Aborigines of the "father of British social anthropology", Radcliffe-Brown,[19] who worked from similar assumptions. Recent research however has shown that in most pedestrian hunting and gathering economies, including that of the Australian Aborigines and those found in Canada, gathering contributes more to subsistence than hunting.[20] In fact, in most hunting and gathering societies women contribute between 60% and 80% of subsistence.[21] Only in arctic and sub-arctic areas were the textbook examples of mammal hunters found and early typologies of forms of social organization were not based on studies of these groups.

However, even where hunting is the primary subsistence base, an anthropologist, Eleanor Leacock, writing on the Montagnais Naskapi on the basis of her own field work and information in the "Jesuit Relations" has found a strong case for matrilocal residence.[22]

Bioeconomics are thus seen to be a very shaky basis for inferring social organization.

More recently researchers have agreed that there can be no consensus on which kind of kinship or post-marital residence pattern prevailed among Algonquian hunters and gatherers pre-contact. The impact of the fur trade and European settlement on nomadic groups remains incalculable. Ethnographic consideration of social organization is therefore limited by the fact that, whatever the findings, they are most likely nothing more than, according to anthropologist Kay Markin, "a pot-pourri of adaptations to rapidly changing ecological

circumstances"[23] — territorial displacement and severe reduction in the availability of animal and vegetable resources.

Only in the 1970s, however, have social scientists begun to realize what profound implications such findings on patterns of social organization and the role of woman in subsistence have for the study of human relations. Paul Samuelson of the Massachusetts Institute of Technology has summarized very neatly the importance of this for economic analysis, for example, as well as their general acceptance in an introductory economics text.

> "From the dawn of recorded history, we find that women have played an important role in producing the G.N.P. Among human societies, as among animal species, there have been many alternative patterns of specialization with respect to foraging, herding, planting and sowing. Only in the art of warfare have men shown any unique talent — and that claim could be disputed. Indeed in many societies that anthropologists have studied, it has been women who have produced virtually all of the G.N.P., men filling at best the role of an attractive nuisance. Particularly in self sufficient agriculture, whether of Old World peasantry or New World frontier, it has been quite impossible to differentiate between the cooperative roles of men and women in producing the G.N.P. Patterns of dominance, as between patriarchal and matriarchal systems, have shown no close relation to economic organization and performance."[24]

This final sentence should be qualified, perhaps, since some recent studies have, as Judith Brown suggested in her paper, shown a correlation between the so-called 'matriarchal' systems and economic organization.[25]

In mid-Victorian Canada such notions concerning the role of women would have been given short shrift by most legislators. (These men were not likely to be impressed by Bachofen, Morgan or Engels, then writing on matriarchal societies.)[26] They had no doubts at all about "the natural order of things" and their beliefs were firmly grounded in a patriarchal system in which the ideal woman, "the lady", was a delicate, swooning ornament totally dependent on and subservient to the male, who alone was capable of working outside the home. This, of course, made the vast majority of women, the working poor in factories, in the fields, in mines and in domestic service, something less than the ideal woman, and also devalued the worth of their contribution in their own eyes as well as in the eyes of the rest of society.[27]

Thus reports in 1845 and 1880 that Indian women did much of the work and provided for their families in Upper and Lower Canada were met with surprise and generated criticism of the Indian male, who declined to take over what he saw as the woman's role but because of the effect of European settlement was unable to carry on his traditional role of hunting or warring.[28]

Those who formulated legislation for Indians in the nineteenth century were not, it would seem, given to much soul-searching about what was the custom. Indeed this was not even relevant since they

were quite convinced of the natural superiority of European culture and the decadence of most Indian traditions.

European cultural values, which served as a model for the development of the early laws relating to Indians, were based primarily on the needs of an agricultural society. The notions of private rights in land inherited through the male were an indispensible component of this system, which had as its corollary control and repression of the sexuality of the female. Only thus could it be assumed that property was inherited by the correct heir. The threat that women's autonomy posed to this system resulted in the development of a body of common law emphasizing the importance of legitimacy and the legal ownership by a husband of a wife's generative capacity. The wife was in common law the property of her husband. Work (labour for pay) and the accumulation of goods were seen as an end in themselves.[29] Christianity was held to endorse and reinforce these principles in Scripture. The Indian married woman was thus seen as an appendage to her husband whether he was Indian or white.

But these European cultural precepts of the importance of private property and inheritance through the male, along with repression of female sexuality and "work" as an end in itself — and incidentally as a male prerogative — were not customary for the Indians of Eastern Canada, for whom this legislation was devised, nor did it represent the wishes of the Indians concerned.

Indians have never been a party to formulating any section of the Indian Act. They were not consulted in 1869 nor have they ever, until now, been concerned in the drafting of legislation for Indians. As to the particular section penalizing women who "marry out", historical documents cited later in this paper show that from the beginning, Indians in the East, and then in the West as the treaties were being made, were strongly opposed to legal discrimination against Indian women and their children, who married non-Indians.

The 1869 legislation which introduced this discrimination was intended as a measure to reduce the number of Indians and halfbreeds on reserves as part of the government's stated policy of doing away with reserves and of assimilating all native people into the Euro-Canadian culture. Indeed, the whole of nineteenth century legislation for Indians was based on the assumption that Indians were to be gradually "civilized", to be assimilated by this superior culture, and that in the meantime special laws were required to regulate their transition from barbarism to this state of grace.

Assimilation meant the phasing out of separate Indian status and the gradual absorption of all Indians into the Euro-Canadian population. This was to be accomplished through a process of accustoming Indians to European lifestyles, customs, beliefs and values. The culmination of this process was the act of enfranchising. Enfranchisement meant that an Indian was no longer an Indian in law, had become civilized and was entitled to all the rights and responsibilities of other

Canadian citizens. (It was indeed not possible until 1956 to remain an Indian and be a Canadian citizen.) Euro-Canadian culture was clearly considered by Euro-Canadians in the nineteenth century, at least, infinitely superior to Indian. Indians however did not want to relinquish their own cultures and resisted assimilation as best they could.[30]

Chapter 3

Changing Attitudes to Intermarriage

In order to see how the policy of assimilation was first developed, it is necessary to go back in time to the period of early European contact with the Indians.

The two colonial powers in North America, the French and British, differed in their policies towards Indians in this early time. The French from the very beginning envisaged assimilation of the Indians as the ultimate goal.[1] The British, on the other hand, had no such objectives prior to the nineteenth century.[2] But the policy of assimilation for both the French and later the British was essentially the same and meant christianizing and "civilizing" to European cultural ideals.

Assimilation for the French, however, also included an official policy of intermarrying with the Indians to alleviate the shortage of French women and expand the new French population. Champlain in his "Voyages" of 1613 says he "promised" the Huron Indians that the French would intermarry with them.[3]

The Indians, however, didn't think this was necessarily such a good idea — Cornelius Jaenen quotes an Indian chief, Tadoussac, who replied to charges that his people were not intermarrying because they disliked the French by saying, ". . . What more do you want? I believe that some of these days you'll be asking for our wives. You are continually asking us for our children but you do not give us yours; I do not know any family among us which keeps a Frenchman with it."[4] In other words, Tadoussac didn't care very much for this one-way exchange.

A practice was then adopted of giving dowries to Indian girls to encourage stable marriages with Frenchmen, and this "Présent du Roi" had the blessing of Louis XIV.[5] But despite these efforts the policy wasn't very successful in creating more Frenchmen. Instead, children of these marriages and of more casual encounters with Indian women (which were more frequent) were usually absorbed into the mother's group.[6]

The Jesuits, a strong and influential presence in New France from the early days, had always disapproved of this policy. Their first priority was conversion to Christianity, and they did not associate it

with assimilation. The French government was aware of this and Colbert in 1668 is recorded as having warned the Intendant, Bouterone, to beware of the Jesuits' preference for racial segregation.[7] Indeed there seemed to have developed some conflict between the priorities of the State and those of the Church. The two policies nevertheless were two sides of the same coin. When government-promoted intermarriage didn't result in assimilation and Jesuit education of the children failed to gain lasting conversions to Christianity there was unanimous agreement that the Indians' way of life must change and that they should be encouraged to give up their nomadic lifestyle and become sedentary farmers before any real change could be effected. Segregation on reservations, which the Jesuits had already been experimenting with in South America, was then advocated as the most effective device for achieving this end.[8]

Thus was created the first Indian reserve — a laboratory with a missionary-controlled environment in which the desired changes in the Indians could be effected. The reservation at Sillery planned in 1635 by Jean le Jeune became the first of a long line of experiments aimed at changing the ways of the North American Indians. Other reserves soon followed at St. Maurice River near Trois-Rivières, Lorette and Sault St. Louis (Caughnawaga).[9]

The basis of the early economy of New France was the fur trade with the Indians and until 1660 the French had a virtual monopoly, controlling access to the territories in the American North and West. In 1660 this monopoly ended when the Company of Adventurers of Hudson's Bay was founded by the Royal Charter of King Charles II. The British then entered the Hudson's Bay area, built trading posts, and began to compete with the French for the trade with the Indians. After 1714, following on the defeat of the French in Europe and the Treaty of Utrecht, the British had a monopoly of the fur trade in Hudson's Bay.[10]

The policy of the Hudson's Bay Company towards Indians was quite explicitly articulated at the very beginning. Strict segregation was enjoined and neither colonization nor assimilation nor Christianization was of the least interest to the directors of the Company. They had only one motive — to make a profit. Paramilitary trading posts were seen as the most efficient way to achieve this, and men only were recruited in Britain and shipped out to serve for periods of a few years at a time at the posts.[11]

But despite all regulations to the contrary, liaisons between these men and Indian women became very frequent. During the eighteenth century there developed a recognized form of marriage "à la façon du pays" which was adapted from a blend of Indian and European custom and which might last only as long as the trader was in "Indian Country" or for a lifetime if he chose to stay.[12] And more of the men did choose to stay on as the century progressed. The children of these marriages, according to anthropologist Jennifer Brown, were defined

as Indian when they were assimilated among the Indians around the post and "English" when they had received an English education.[13]

By the turn of the century such unions were still not officially recognized by the London Committee of the Hudson's Bay Company, and in 1802 a Fort York committee wrote to the London Committee requesting it to reconsider its objection to Indian women at the Fort, emphasizing at some length their economic contribution. It was evident from this letter that intermarriage "à la façon du pays" was already well established.[14]

Indeed Indian women possessed a number of skills which made their economic contribution considerable and presence indispensable around the fort as well as on journeys. Most important were the making of snowshoes and skin clothing, the cleaning and dressing of hides and the preservation of meat — all vital to survival in the Canadian winter and skills unlikely to be part of the repertoire of the average Hudson's Bay servant.[15] Indian women also acted as interpreters, guides and ambassadors to other Indian groups.[16]

To insist on categorizing these relationships as being primarily based on the sexual exploitation of Indian women does not accord with documented facts. This view is clearly based on the old double standard of what was appropriate sexual behaviour for males and females as well as its Victorian corollary which ascribed for women a purely sexual identity and three possible roles in life: virgin, mother or whore.

Extensive evidence concerning these unions is documented in the report of the famous case of Johnstone v. Connolly of 1869.[17] This case established the legal validity of such marriages and indeed was held as a precedent for establishing the validity of all customary marriages until 1951.[18]

Most interesting in this case was that the "customary" marriage of John Connolly to an Indian woman was upheld as valid over a second marriage to a wealthy Montreal woman, Julia Woolrich, which was contracted in 1832 in a church, with all legal formalities carefully observed, but while Suzanne, the Indian wife by a customary marriage of 1803, was still alive. What was crucial in winning this case was the existence of several witnesses, fur traders mainly, who gave testimony, documenting and describing from their own experience that customary marriages were usually monogamous, undertaken freely by both parties and of long duration.[19]

About 1830, however, it was clear that such unions were being rejected by "men of station" such as Governor Simpson and his friend McTavish and the man in the case, John Connolly.[20]

Unfortunately, history has until very recently concerned itself almost exclusively with the lives and opinions of famous men and it is therefore the bleak views of Governor Simpson expressed in his influential writings which have prevailed and have created a stereotype of the

Indian woman as the exploited concubine of the white man or as a pawn of Indian men handed over to cement trading alliances with white men.

Sylvia Van Kirk, writing on fur trade women, quotes a letter written in 1825 in which Simpson demonstrated his disapproval while recognizing that customary marriage was universally accepted in fur trade society. It should be understood "in the outset that nearly all the Gentlemen & Servants have families altho' Marriage ceremonies are unknown in this Country and that it would be all in vain to attempt breaking through this uncivilized custom".[21]

He was very surprised ("appalled" according to Van Kirk) at the degree of control that the Indian and Métis women had over their white husbands. Writing in his journal of 1824-25 he made this clear: "It is not surprising that the Columbia Department is unprofitable . . . but . . . with the necessary spirit of enterprise and a disregard to little domestic comforts it may be a most productive branch of the Company's trade . . . it must be understood that to effect this change we have no petty coat politicians, that is, that Chief Facters (sic) and Chief Traders do not allow themselves to be influenced by the Sapient Councils of their *Squaws* (the emphasis is Simpson's) or neglect their business merely to administer to the comforts and guard against the indiscretions which these frail brown ones are so apt to indulge in."[22] Other epithets applied to Indian women by Simpson were "copper cold-mate", "my article" or "my Japan help-mate" (in reference to an earlier native wife, Betsey).[23] Simpson, it would seem then, not only introduced a strong emphasis on social class but a distinct note of racial prejudice which became increasingly the hallmark of Anglo-colonial relations everywhere as the nineteenth century progressed.[24]

Simpson nevertheless was in fact expressing sentiments that were to become more and more prevalent in eastern Canada as time went on. In the 1830s fur traders with social aspirations and in constant contact with a new wealthy quasi-aristocracy in Montreal society began to feel the pressure to conform. Governor Simpson, however, shocked Red River society when he returned with an upper class English bride to Red River in 1830. He had not bothered to inform either his colleagues or his Indian wife, who had borne him a child while he was away.[25]

A few other leading traders who had close contacts with eastern society soon followed his lead. But for the great majority of the men and women at the posts in the interior life carried on very much as before for quite a long time to come, though as communication improved and missionaries from the mid-1820s on began to insist on a Christian marriage ceremony the norms of eastern society slowly percolated west and through the ranks.[26]

Although it appears that the rejection of their Indian wives by such "men of station" as Connolly, Simpson and McTavish in the 1830s may be attributed as much to the character of the individuals

involved as their social aspirations, this behaviour also revealed the growing importance of adherence to contemporary European norms in Canadian society and the emergence of a complexly stratified society based both on class and ethnic group.

The same qualitative change in attitudes to intermarriage in the West noted in the mid 1820s and encouraged by Simpson and the missionaries — which, it is suggested here, paralleled profound social change in eastern Canada and Britain — was also accompanied by a fundamental change in government policy towards Indians in Upper and Lower Canada.

For most of the eighteenth century Indians in general had been treated with the cautious respect accorded allies in war and partners in trade. After 1812, however, Indians ceased to be regarded as useful allies. In eastern Canada the fur trade was gradually being replaced by agriculture as the main base of the ceremony.[27]

The Indian Department had been a military responsibility since first established in 1755[28] but in 1830 the Upper Canada administration became a civil agency.[29] As Surtees and others have pointed out, this represented an important change in policy, but the personnel in the administration remained the same. Ex-officers and veterans continued to form a large part of the administration.

The administration of the Indian Affairs Department was at first composed entirely of officers appointed as commissioners. As early as 1775, however, an elaborate structure had been put into place with a hierarchy of superintendents, deputy superintendents, agents, interpreters and missionaries. Indian bands were invited to select a spokesman, "a beloved man" to act as their intermediary with the government and important provisions relating to Indian lands, enunciated in the Royal Proclamation of 1763, were amplified. One of these was "that proper measures be taken with the consent and concurrence of the Indians to ascertain and define the precise and exact boundary and limits of the lands which it may be proper to restore to them and where no settlement whatever shall be allowed."[30]

Maintaining the boundaries on Indian lands was by this time an integral part of policy. Also reiterated were the strictures that only the Crown could buy land from Indians and that when purchases were made by the Crown they should be made at "some general meeting at which the principal chiefs of each Tribe claiming a property in such lands are present . . ." The basic formula for treaty-making with Indians was thus established very early on.

Superintendents were given power to "transact all affairs relative to Indians", thus postponing for some time the necessity for legislation for Indians.[31]

Between 1812 and 1830 the change in attitudes appears to have accelerated. Sir George Murray, who took over the Department in 1830, illustrated this change when he commented in a report: "It appears to me that the course which has hitherto been taken in

dealing with these people has had reference to the advantages which might be derived from their friendship in time of war rather than to any settled purpose of gradually reclaiming them from a state of barbarism, and of introducing amongst them industrious and peaceful habits of civilized life."[32] This "settled purpose" and all that is implied were to be the basis of future policy for Indians.

In Britain in the early nineteenth century there was a growing interest in social reform in general, the spread of evangelism, and a continuing debate over the abolition of slavery. As a logical extension of these activities a keen interest was also taken in the aboriginal inhabitants of the British colonies. Philanthropic societies, such as the Aborigines Protection Society, consequently produced several reports for their members on the state of the Indians in the North American colonies and continually lobbied the government for better treatment of Indians.[33]

Other reports, triggered by such criticisms, testify to the lack of interest in Indians in the Indian Department in Upper Canada up to 1830. The report, for example, of General Darling stated that Indians were being tricked out of their lands and possessions, that they were destitute and, as an aside, warned that they would soon turn to the Americans if the government didn't help them.[34]

The solution advocated was always the same: a Christian education, permanent settlements and agriculture were the means for bringing the Indians into a state of "civilization" when they would be on a par with other citizens. In the meantime Indians would have to be protected by the Department. But there was then a divergence of opinion on how to proceed. The Indians, it was felt, could be either isolated and then "civilized" or the same objective could be achieved by close interaction with whites of good character. Both approaches were to be experimented with.[35]

Chapter 5

Acts for Indians 1850-1867

The report of the Commission of Inquiry in 1847 prompted two Acts for Indians — one in Lower Canada, another in Upper Canada. Indians in Lower Canada (Quebec) had not been allocated reserves in the same way as those of Upper Canada (Ontario). Fixed lands had been granted to the Jesuits for reserves under their aegis by the Ancien Régime. In 1851, 230,000 additional acres of land were therefore allotted to Indians in Lower Canada "from motives of compassion".[1]

In 1850, reflecting perhaps the problem this land grant was meant to solve, a mechanism was set in place to determine who should have the right to live on Indian lands in Lower Canada.

This Act included the first statutory definition of who was an Indian — "An Act for the better protection of the Lands and Property of the Indians in Lower Canada". The relevant section of the Act reads:

> "V. And for the purpose of determining any right of property, possession or occupation in or to any lands . . . the following classes of persons are and shall be considered as Indians . . .
>
> First — All persons of Indian Blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.
> Secondly — All persons intermarried with such Indians and residing amongst them, and the descendants of all such persons.
>
> Thirdly — All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such; And
>
> Fourthly — All persons adopted in infancy by any such Indians, etc."[2]

This very broad definition was amended one year later and made slightly more restrictive. The second section — "all persons intermarried with such Indians" — was deleted, as was the section on adoption. A new section was added, permitting women who married non-Indians and their descendants to be considered Indians but excluding the non-Indian spouses of Indian women from this privilege. Indian status thus depended on Indian descent or marriage to a male Indian.[3]

In Upper Canada, on the other hand, a companion act of 1850

was entitled "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". The definition of an Indian in this Act consisted only of the statement that the Act applied to "Indians, and those who may be inter-married with Indians".[4]

A number of provisions in this Act had the consequence of making an Indian a minor at law — for example, the inability to be bonded or held responsible "for any contract whatsoever". Among other noteworthy provisions were the exception from taxation, and punishment for trespass on reserves for all "except Indians and those who may be inter-married with Indians". Presents and annuities were to be continued, though this had long been a controversial issue and efforts were continually being made to reduce the costs of the Indian Department. Indeed, in 1854, Oliphant, Superintendent of Indian Affairs, in a report to Lord Elgin recommended the reduction of the Indian Department.[5] His successor, Viscount Bury, wrote to Sir Edmund Head one year later rejecting Oliphant's scheme, pointing out the "burdens which the withdrawal of all primary assistance would entail upon the Indians".[6]

Sir Edmund Head, (a relative of Sir Edmund Bond Head) Governor of Canada after Elgin, summed up the inherent contradiction in the situation in a letter to Labouchère in the Colonial Office: "I approach the whole subject with pain and misgiving because I never feel quite confident of reconciling the perfect good faith of England towards the Aborigines with the national wish of the Queen's Government to effect the abolition of all charge on the Imperial revenue; a course which I know to be in the abstract, right and desirable in every way."[7]

Labouchère, however, made the limited extent of Department sympathy quite clear in his reply: "It has long been settled that the general presents to the Indian tribes which are in progress of annual reduction shall cease in 1858 . . . This decision will therefore remain unaltered."[8]

Attitudes in Canada were hardening in proportion to the increasing pressures of European settlement. The problems of the Indians were beginning to be viewed more and more as the result not of depredations on their land by Europeans but of Indian improvidence and lack of "progress".

In 1857 "an Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians"[9] was made applicable to both Canadas. The title clearly expresses its intent to expedite the process of "civilizing" the Indians through offering incentives to them to enfranchise. Enfranchisement was seen as a mechanism "to facilitate the acquisition of property and of rights accompanying it, by such Individual Members of the said Tribes as shall be found to deserve such encouragement and to have deserved it."[10] Ownership of property was the prerequisite for civil rights and responsibilities which were by definition indivisible from civilization.

Thus enfranchisement, that "quaint piece of legal Canadiana" as one writer has called it, first appeared in legislation, offering as inducements land in fee simple and a lump sum payment of a share of annuities and band funds.[11] Only males could be enfranchised, dependents being enfranchised with the male.

The definition of Indian in this Act for both Upper and Lower Canada was not that of the earlier Lower Canada Act, but the more inclusive designation of the Upper Canada Act: Indians or persons of "Indian blood or intermarried with Indians."[12]

At the same time, yet another Commission of Inquiry was established with very similar terms of reference to those which had been given the commissioners ten years earlier. They were to recommend:

> "1st As to the best means of securing the future progress and civilization of the Indian Tribes in Canada.
>
> 2nd As to the best mode of so managing the Indian property as to receive its full benefits to the Indians."[13]

In other words, it was accepted that the settlement of the country could only be accomplished by taking over Indian lands. The question was how best to manage this so as to protect the interests of all concerned. In addition, a positive secular programme emphasizing the benefits of civilizaton was to be initiated, encouraging Indians to give up their ties to their bands and accept in recompense property in fee simple, the sine qua non of citizenship.

Civilizing and good management then were still primary, but the report acknowledged that earlier experiments had been unsuccessful. The Commissioners concluded, "We consider that it may be fairly assumed to be established that there is no inherent defect in the

organization of the Indians, which disqualifies them from being reclaimed from their savage state". But civilization for the Indians was still "but a glimmering and distant spark".[14]

Their report of 1858 contained two recommendations of interest here and which give some further insight into the mood of the times. The first relates to Indian lands, which the Commissioners believed were too large for the number of Indians occupying them. They therefore recommended that legislation be enacted obliging Indians in future, when reserves were being designated, to accept a lot of a maximum of 25 acres per family.[15]

In addition, "the gradual destruction of the tribal organization" was recommended and its substitution with a municipal form of government.[16]

However, subsequent legislation prior to Confederation did not contain these or any substantially new provisions. But these recommendations were not forgotten, and it will be seen that virtually all subsequent legislation for Indians had three main functions:

1) "Civilizing" the Indians — that is, assimilating them (and their lands) into the Euro-Canadian citizenry;
2) While accomplishing this, the ever more efficient "better management" of Indians and their lands was always a goal to be striven for and, following on this, an important element in better management was controlling expenditure and resources;
3) To accomplish this efficiently it became important to define who was an Indian and who was not.

Yet the British North America Act (B.N.A. Act) of 1867, "an Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith", contains only seven words relating to Indians. In section 91, which gives exclusive legislative authority to Parliament for some 29 items, "Indians, and lands reserved for the Indians" is number 24 in the list, between "Copyrights" and "Naturalization and Aliens".[17]

A great deal depends on the interpretation of these seven words and the argument has been made by Kenneth Lysyk and Cumming and Mickenberg (among others) that the Indian Act "cannot affect a person's status as an Indian under the the terms of the B.N.A. Act" and that aboriginal rights cannot be affected by exclusion from the Indian Act (Inuit for example are excluded from the Indian Act) since "these rights flow from an individual's status as a 'native person' and his connection with a particular tribe (in the case of Indians) rather than from any provision of the Indian Act".[18] By this argument an Indian woman who has been subject to involuntary enfranchisement remains an Indian in law.

There is as yet, however, no definition of who is a "native person" in Canadian law who might therefore also be an "Indian" by aboriginal right under the B.N.A. Act.

Chapter 6

Better Management, 1868-1869

One year after Confederation, in 1868, "An Act providing for the organization of the Department of Secretary of State of Canada, and for the management of Indian and Ordinance Lands" consolidated previous legislation and retained virtually unchanged in section 15 the broad 1851 Lower Canada provisions regarding who was an Indian for the purposes of the legislation.[1]

One year later, in 1869, however, another Act unambiguously aimed at "better management" and tighter controls contained far-reaching changes. It was entitled "An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs and to extend the provisions of Act 31st Victoria Chapter 42" (i.e., the 1868 Act).[2] The Superintendent General of Indian Affairs (or his agent) was given very wide powers. He had the right to determine who could use Indian lands and there was a concomitant emphasis put on the holding of a licence or location ticket which indicated the right to hold a particular plot of land. He had the power to stop or divert Indian funds and annuities. Less than one-quarter Indian blood was to be a disqualification for "annuity interest or rent". Those "intermarried with Indians settling on these lands . . . without licence" were liable to be "summarily ejected". Prison terms were to be levied as well as the fines prescribed in the previous Acts for supplying liquor to Indians.

On the death of an Indian his "goods and chattels" and land rights were to be passed to his children. The wife was excluded, her maintenance being the responsibility of the children.

A council was to be elected by the "male members of each Indian Settlement of the full age of twenty-one years at such time and place and in such manner as the Superintendent General may direct." They might, however, be removed by the Governor for "dishonesty, intemperance or immorality."

If an Indian was enfranchised his wife and minor children were also automatically enfranchised.

Most significant in this paper, however, is the following amendment in section 6 concerning Indian women marrying non-Indians or Indians from other bands. "Provided always that any Indian woman marrying

any other than an Indian shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such a marriage be considered as Indians within the meaning of this Act." On marrying an Indian from another tribe, band or body, she and their children "belong to their father's tribe only."

The Indian woman was here for the first time given fewer rights in law than an Indian man. She could not vote in band elections. She could not inherit from her husband. She could not marry out of her band without penalty. Particularly punitive was the introduction of the proviso that she and her children would lose forever their Indian rights if she married a non-Indian and the possibility that she might then be obliged to leave the reserve since her husband could be "summarily ejected" at the order of the superintendent.

Section 4, however, seemed to allow a loophole allowing such women and children annuities in that it stated only that less than one-quarter Indian blood was a disentitlement to annuities. Since the Act also stated that the Indian woman marrying out "ceased to be an Indian" this was clearly ambiguous.

Section 6 of the 1869 Act, which decreed that female Indians were no longer Indians on "marrying out", was subsequently much elaborated upon. It proved to be a source of great bitterness and divisiveness among Indians and extremely difficult to administer. Nevertheless, it has not only remained firmly embedded in the Act right down to the present day but, with its numerous refinements and embellishments, it is far more restrictive than was ever envisaged even in its Victorian heyday. It therefore seems crucial here to attempt to determine if possible the rationale behind the introduction of Section 6 into the 1869 Act.

In the Lavell case of 1973, for example, the argument was advanced that this legislative enactment was devised to protect Indians and their lands, and it would seem that this argument is believed by many to carry some weight. However, there is very little in previous legislation or in such documents as the reports of special commissions to indicate that this was ever more than a very limited and qualified intention, even then the protection which was envisaged was based on assumptions (such as those embodied in the Commission of 1858 recommendations) which consciously set out to eliminate those things which Indians most prized — their communally held lands and 'tribal' way of life.

The Indians themselves objected strenuously to penalties being imposed on Indian women but were ignored. In 1872 the Grand Council of Ontario and Quebec Indians (founded in 1870) sent a strong letter to the Minister at Ottawa protesting among other things section 6 of the 1869 Act in the following unmistakable terms: "They [the members of the Grand Council] also desire amendments to Section 6 of the Act of 1869 so that Indian women may have the privilege of marrying when and whom they please; without subjecting themselves to exclusion or expulsion from their tribes and the consequent loss of

property and the rights they may have by virtue of their being members of any particular tribe."[3] The Indians' request went unheeded.

The legislation can only be understood in the social and political context of the time.

In the new Dominion of Canada only two years after Confederation there could be no blueprint for the future, but there were three clear goals, none of which could be accomplished without first displacing Indians or Métis. First, to create a united Canada coast to coast, to settle the West as quickly as possible with loyal citizens, and to both accomplish and consolidate this by means of a fast and efficient trans-Canada railway system. The ever present threat of American expansion north made this obligatory, according to historian Morris Zaslow, who comments:

> "The American westward movement, particularly after 1850 . . . made it imperative for British North Americans to match this advance by expanding west into the territories of the British Crown. Not to do so would expose those lands to the danger of being overwhelmed by the United States and would condemn the people of Canada to their present narrow limits and to a lower standard of living than their neighbours. Expansion became a national duty for Canada, a commitment with destiny."[4]

Hector Langevin, the Minister responsible for Indian Affairs in 1869, introduced the Bill in the House of Commons and stressed that its aim was to make enfranchisement less difficult, that an Indian "by his education, good conduct and intelligence would be granted a lot on a reserve which would be held by him and then his children in fee simple. This was another attempt in the direction of civilizing the Indians, and the government should try as much as possible to protect them in the first entrance," he said.[5]

Very important here though is the rationale relating to the introduction of section 6 which stated that Indian women marrying non-Indians ceased to be Indians. To get the full flavour it is necessary to quote this portion of his speech in full.

> "Again, it was found that in many tribes there was a want of proper discrimination between those who belonged to the tribe and those who came on the reserve from some other quarter. Many came in on the plea of being Indians and divided the revenues of the tribe, which, of course, impoverished them and deprived them of the means of maintaining their families. This Bill provided that, when an Indian woman married a white, as regarded her rights to the reserve, her children would not be considered Indians, but would assume the position of the father. So also an Indian woman of one tribe marrying a member of another tribe became a member of her husband's tribe. Again it has been found with reference to reserves that a good many Indians took advantage of the weakness of others and took possession of more land than they had the right to have . . . By this Bill it was provided that no Indian would be recognized as having a right to any land unless he received a location from the Superintendent of Indian Affairs. Again, the complaint was often brought against the

> Indians that they did not keep up their roads, bridges, fences and ditches. In this Bill authority was given to compel the chiefs to have their roads, etc., kept in proper order. If they failed to do so the Superintendent would provide for the work being done at the cost of the tribe."[6]

The intent of the Act is here abundantly clear — more control over Indians, more efficient and thus more economical management of Indian affairs during the transition to civilization and eventual assimilation. In the meantime Indians had to be taught "proper discrimination" of who could come on their reserves. Sharing with visiting or indigent Indians was unwise and would lead to want for all and must be discouraged. Significantly, few words are spared to explain Section 6, which deprives the Indian woman of her status. But this and the succeeding sentence, stating that an Indian woman marrying an Indian from another tribe becomes a member of her husband's tribe, follow immediately on the previous one emphasizing "proper discrimination" and the necessity for alleviating financial burdens on the reserve. Making half-Indian children no longer Indians was part of this same logic.

Indians as problems — not problems of Indians — is the tenor of the proposed Act and this is further clarified in the questions posed in the subsequent debate.

The first question in the debate came from Mr. Holton who, after describing the general provisions as "well considered", went on: "We understood the honourable gentleman to say that a white man married to an Indian would be expelled from the reserve. This could cause great hardship if applied retroactively." He asked what special provisions had been made for such cases. He made these remarks, he said, "with special reference to the Caughnawaga Reserve, in which people of the County (Chateauguay) he had the honour to represent took a very warm interest."[7]

Hector Langevin replied it was the wish of the Government to apply the rule referred to by the member for Chateauguay "only to the case of white men as misbehaved for selling liquor, or robbing the Indians of their timber . . . As regards those who were married to Indian women, and there was nothing alleged against their conduct, they received a licence to remain."[8]

This exchange, though rather confused, does indicate that the intent was not to penalize the white man who could continue to live on the reserve with his Indian wife. The expressed intent was to prevent their children, "half-breeds", from having any rights to live on the reserve.

Another member of the House, Mr. Dorion, said that he thought it was the duty of the government to try to encourage intermarriage between whites and Indians, not to discourage it. He believed it would tend to raise the character of the whole tribe. Ordinary tribunals, he believed, could deal with white men who sold liquor, etc. Mr. Langevin answered this by saying that he had been misunderstood. The govern-

ment would not and could not discourage marriage between Indians and whites and, he said, "As soon as the title of land was given to the Indians they would be in the same position on it as whites."[9]

It was other Indians who were mentioned as taking lands from Indians, and the effect on the Indian woman of section 6 was not even mentioned — "As regards her rights to the reserve her children would not be considered Indians."[10] Also, as Langevin implied in his answer to Dorion, it was envisaged that the reserves would eventually be broken up into lots held in fee simple as all Indians were enfranchised and thus assimilated. As Langevin explained, it would make no difference in the long run. Section 6 was clearly not meant as a mechanism for protecting Indians from whites.

Judging from these remarks in the House, section 6 was nothing more than a muddled attempt to achieve the greater efficiency and the easier management of budgets that it was hoped would occur when the number of Indians to be dealt with didn't keep fluctuating. There is no "malice aforethought" — in fact not too much forethought about

possible side effects at all. Was it then, like much of the legislation for Indians, nothing more than a piece of ill-considered "adhoc-ery"?[11] Were Langevin and his administrators unaware of the injurious effects of this legislation on Indian women?

More conclusive evidence on this is contained in an important paper prepared by an anthropologist, Sally Weaver, for the opposition to Lavell and Bedard in the Lavell case. Weaver's conclusion is that "If the question is asked — 'Why did the Canadian Government in 1869 legislate against the Indian woman retaining her status as Indian if she married a whiteman?' — the answer is clearly — to protect Indian land from both the occupation and use of it by whitemen married to Indian women."[12] But Langevin denied this in the House and white men continued to live on the reserves with the protection of the Department.

The documents cited by Professor Weaver in fact lend support to what are somewhat different conclusions. It is necessary however to examine these documents in some detail before this can become clear.

First of all Weaver's data show that Indians themselves were not necessarily interested or willing parties to striking women off the band registers. It would appear also that the Superintendent of Indian Affairs, Hector Langevin, the Deputy Superintendent of Indian Affairs, William Sprague, and Jasper Gilkinson, the Visiting Superintendent to the Six Nations (the main emphasis of Weaver's research was with reference to the Six Nations) had clearly had the final if not the first word in controlling band business. Also when it came to penalizing Indian females on intermarriage (and it becomes clear that such a policy was being pursued) they went so far as to assure the doubting Indians on every possible occasion that such behaviour was "customary". A letter from Hector Langevin in 1867 (two years before the legislation was even enacted) to the Chippewa Indian woman Sahga-mah-qua and her daughters illustrates this point:

> "In replying to your petition, applying for land with the Chippewas of Muncey Town in the Township of Caradoc, these remarks are made for your guidance and information. The rule appears to have been followed, and I think correctly among Indian Bands, that upon any Indian Woman marrying out from her people, she ceases to belong to them, and if her husband belonged to another Indian Band, she became a member of his Band. The same principle should prevail if she married a White Man — but as she in such a case could not elsewhere be put upon a pay list for Interest and annuity money, she should continue to receive her usual portion and her Children would likewise be entitled to shares — As to land the case is different. The Father being a White Man could have no right to Indian land, and Indian Women have only such right in land belonging to their Tribes, as they enjoy jointly with their Husbands."[13]

The 1868 Act nevertheless did not take away the Indian women's rights to hold property on the reserve but it is evident from this letter that such a policy was being pursued up to the enactment of the

legislation in 1869 which did take away land rights for the first time from women who "married out."

The vital role played by the Superintendent in explaining the "custom" as well as the drive for more control is again emphasized in this rather different item from the minutes of February 7th, 1871.

> "The Supt, said, this was just a case where he had to exercise his opinion, and for the reasons, that it would be a departure from the rule and usage so long respected and recognized. In this instance, was the fact, that Martin had some years ago sold out his possessions and bid good bye to his people, and went away to the Saugeen, and now, he does not say he will return, only desires they may be again added to the roll of the Six Nations. Therefore, he could not consent to place him or his family on the list."[14]

Weaver, in an appendix, notes that the influence of the Superintendent David Thorburn was "frequently obvious" in 1858 when decisions were being arrived at on annuities. For example if a family was away for a long time and wished to have their names re-entered on the pay list he suggested that they should first have to prove themselves of "good character and worth, to be members".[15]

Superintendent Thorburn's perception of his role as instructor on not only custom but morals is quite clear in this excerpt from Weaver's report:

> "A year later, David Thorburn in writing to R. L. Pennefather, Superintendent General of Indian Affairs (1856-1861) provides the following information on what appear to be Departmental principles which have themselves of "good character and worth, to be members."[15]
>
> "It's a definite rule for striking off absent members of a Band or Tribe. The practice is, and has been, when any member absents him or herself voluntarily, whether to a distance or to a foreign country without the Consent or Knowledge of the Band or Tribe, they are not entitled to the benefits that resident individuals are, because they share no part of the Common burdens, such as road labor, or aiding in clearing up the lands in the Settlement again. Besides we know not what their behavior may have been while so absent. There is also a practice any convicted of Crime in the Penitentiary, no allowance while so confined, or for extreme bad behaviour by setting a bad example by bringing the Tribes into discredit by word or deed. If absent in a foreign country, we can have no knowledge what they have been doing or even a distance in the Province they not infrequently join other bands and with them participate of the common benefits of the Band — the Foregoing principles have been inculcated from time to time from the head of the Department, and acted on by me. If you approve of the points laid down, or some other, it would be well to embody them into a Circular for a guide."[16]

Again citing from notes from Six Nations Band Records Weaver writes:

> "In the Council Minutes of January 20, 1870 a difference of opinion between the chiefs and the Superintendent reflects the council's opinion of the 1869 Act.
>
> "The Speaker rose and said, they did not concur in erasing this

young woman, as they had not been consulted in framing the Act passed in Parliament, and they refused to recognize it, and therefore, would retain the young woman on the list. They intended to represent their views. The Supt. pointed out, that whatever might be their objections to the Act, it was clear the clause 6 is based upon the usage and customs of the Indian tribes, and often, had the Council denounced the admission of Whitemen upon their lands, and called upon him, The Supt. to expel them."[17]

It is quite clear from this that the Indians of the Six Nations of Ontario differentiated between the depredations of undesirable white men on the reserve and penalizing Indian women.

That the Indians in Caughnawaga in Quebec were concerned and puzzled is again evident in the following letter from Hector Langevin to Sawatis Anionkui, Peter Karenho and other Iroquois Indians at Caughnawaga.

> "With reference to your Memorial of the 4th May last I have to inform you that the Act regarding Indian Affairs passed in the Year 1868 continues in force and the Act passed during the last Session of Parliament of which a Copy is enclosed does not change the Act of 1868 in any way injurious to the interest of the Indians but on the contrary by Section No. 6 it provides for excluding in future any Woman of Indian Blood who marries after the passing of this Act a man of other origin or of another Tribe or Band from continuing a Member of that Tribe or Band to which she originally belonged. Thus preventing men not of Indian Blood having by marrying Indian women either through their Wives or Children any pretext for Settling on Indian lands."[18]

The fact that Indian women were being injured was just not germane to the issue.

The documents cited in Weaver's report also underline the moral judgements which underlay decisions and how they would be applied differently to males and females. Consider for example the following remark about an Indian woman Lucinda Scott in a letter from Hector Langevin to Gilkison of August 1869, "as it appears that some two or three years since she became married to the white man George Scott and thus made the best amends in her power for her past misconduct, etc. . . ."[19]

William Sprague, Deputy Superintendent of Indian Affairs, in the Annual Report of 1870 explains the legislation of 1868 as, among other things, part of a concerted effort to guide Indians into realizing the value of holding private property. As indicated by Hector Langevin the necessity was to restrain *Indians* from "trafficking one with another" so that one or two do not end up with "two or three times as much as the proper quota".[20] Sprague also lamented the lack of laws restraining Indians from letting their lands to others to farm, which he believed "has induced the tendency to indolence and its concomitant misfortunes observable among so many of Indian blood."[21] Much the same sentiment was expressed twenty years before by the 1844-45 Report of the Investigative Commission.

Sprague seems also to be concerned on another score; that of categorizing Indians according to blood or colour and keeping the race "pure". "But it is becoming more and more perceptable that the Law should define the point beyond which persons of mixed Indian and white blood should not be regarded as Indians. I think that in justice to the Indian people with more than one fourth white blood should not be regarded as Indians but as belonging to the race giving them their predominating color."[22] This would mean presumably that the children of anyone male or female who married out would lose Indian status and that the "blood" of both Indians and whites would become more "pure" with time.

What is most evident, in summary, is that there was little consistency in the administration of Indian Affairs in Upper Canada and Lower Canada and a great deal of latitude allowed for individual officials to implement their own moral convictions and that this had been the case for quite a long time. According to a memo of 1872 from Sprague to Joseph Howe, Langevin's successor, women from the Mississaugas of Alnwick who "married out" had been excluded from the paylist, i.e., had not received annuities for 40 years (since 1832).[23] And Indians then had also protested furiously.

In 1860, according to the transactions of the Aborigines Protection Society, Mrs. Catherine Sutton, Nah-ne-Bah-Nee-Quay, an Indian woman, was so outraged at being refused her annuity that she went to London to complain and obtained an audience with Queen Victoria at Buckingham Palace. As a result she was permitted to purchase the land on which she and her family had been living.[24]

Communications between the Indians and Ottawa were usually channelled through the Agent — a department employee. If the Agent did not give his approval and assistance Indians were clearly at a disadvantage in registering complaints with Ottawa. It was thus rather difficult for Indians who perceived legal injustices to make their complaints heard and also keep abreast of the changes in the law when they had to depend on the government Agent for all information. The Agent was also in a difficult position since he was in a conflict of interest and unable to represent fairly the interests of his clients, the Indians, in complaints against his employer, the government.

As well, agents themselves were often unclear as to specific government policies and even less able to understand their rationale. In June 1869 for example George Cherrier, the agent from Caughnawaga, sent a letter to Ottawa requesting instruction on the new legislation and including a list of all the white men on Caughnawaga, twenty-eight names in all. The reply was quite brusque in tone stating that: "White men married to Indian women prior to the passing of the Act V32-33C6 (S.6) are privileged to reside on Reserves and Indian widows have received permission to allow white men to work their farms, etc." In fact all but two of the men named had a licence to live on the reserve. Many of the names have Indian names pencilled beside them (Indian

wives' names possibly). The two men without licences were Giroux, the tavern keeper, and Hébert, "a good blacksmith".[25]

On the effects of section 6 Agent Cherrier commented in 1872, "the practical effect is to promote immorality . . . An Indian widow with property cohabited with a white and the only bar to their marriage was the fact that the moment she married she would cease to be a member of the band and consequently lose her rights as an Indian and be subject to immediate eviction from the property left her by her husband." Cherrier advised the government to accede to the request of 1872 of the Indian Council "in order to allay suspicions or apprehensions . . . as to the intentions of the Government with respect to them."[26]

It is evident that even if the Indians of Ontario and Quebec did not like white men on the reserves they certainly did not approve of the government remedy and that they saw this as an attack not only on female Indians but on all Indians.

In conclusion it is clear that although Langevin was himself rather inconsistent, he shared with Sprague and their colleagues three deeply held convictions and that the statutes of 1869 and section 6 in particular embodied these principles:

1) Indians and their lands were to be assimilated. The number of Indians was to be gradually reduced. This was the final solution envisaged by everyone except the Indians and long term protection of Indian lands was logically inconsistent with this view.
2) Indians were not capable of making rational decisions for their own welfare and this had to be done by the Department on their behalf. Though Indians believed their welfare depended on their retaining as much of their lands as possible, the attainment of government goals depended on alienating Indian lands.
3) Indian women should be subject to their husbands as were other women. Their children were his children alone in law. It was inconceivable that an Indian woman should be able to own and transmit property and rights to her children.

Chapter 10

Pangs of Conscience — The Forties

In the wake of the Second World War a wave of humanism washed briefly over North America. This humanism and a revulsion from the recent revelations of man's inhumanity to man were articulated in the preamble to the 1948 United Nations Declaration of Human Rights: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people".[1]

In Canada the condition of Indians was causing some concern and in 1946 a special Joint Committee of the Senate and the House of Commons which sat till 1948 was set up with broad terms of reference: to look at Indian Affairs and the Indian Act with a view to its amendment.[2]

On the practical side, the new Family Allowance Act of 1944 and welfare legislation increased the need for more complete and careful lists of the Indians who were eligible for benefits.

The Joint Committee had not contemplated accepting representations from Indians. But they soon found themselves under pressure to engage an Indian lawyer to act as intermediary for the Indians from the Six Nations.[3]

Of the 33 M.P.s and Senators on this committee, only one was a woman, Iva Fallis. The Chairman's first remark at the very beginning of the proceedings is rather interesting and addressed to her: "I think we shall have it understood that whenever the masculine term is used it will indicate both masculine and feminine. I hope our lady member will agree to that."[4] It seems rather curious that he should have felt such a remark was even necessary. But whether or not the confusion inherent in the Indian Act as well as in its interpretation which arose as a result of this English semantic convention had been a topic of dissent is not known. This decision however was not in the interests of clarity or precision since a separate legal regime did exist for Indian women from Indian men — not only with respect to marriage and illegitimate children, but on, for example, exclusion from right to vote

in band elections and so partake in band business, rights to inherit and for a widow to administer her husband's estate.

Many of the legal disabilities for women existed as much by omission as by explicit statement in the Act, though, as has been noted throughout this paper, the latter were not lacking. The consequences of this insistence on the use of only the masculine term were unfortunate; as in the past it had led to confusion in the interpretation of the Act so also it did in the 1951 Act, which followed on the recommendations of this Joint Committee. Indeed, there is still today a strongly held belief on some reserves that women are not entitled to hold a certificate of possession, formerly called a location ticket, to land on a reserve.[5]

It is also important to note that in common law the word "man" or words of the masculine gender did not include women, as was established by a court case just after the failure of an attempt by the reformer J. S. Mill to have the word "person" substituted for the word "man" in the 1867 Reform Act.[6]

After the Joint Committee it was Senator Iva Fallis who at the very beginning of the proceedings brought up the question of Indian women losing their status through marrying non-Indians.

Her questions were put during the evidence of the first witness, Robert Hoey, Director of Indian Affairs. Hoey began by asking a crucial question: "Is it possible that in the past we have given too much thought to what might be termed the machinery of administration and not enough thought perhaps to the task for which this administrative machinery was created?"

Hoey, it is evident from his statements, subscribed to the assimilation ethic, but emphasized the merits of gentle persuasion rather than force and also the "rights" of the Indian not as applying to property rights alone, but "as a human being living in a free country".

However he criticized the definition of "Indian", which he thought was being used "somewhat loosely".

From Hoey's evidence it would seem that he saw the Indian Act as an Act which deprived people of their human rights. Nevertheless he believed that, given the existence of such discrimination, discrimination should be based on blood quantum, since, as he pointed out, an Indian could have a white mother and a white grandmother, and still be legally an Indian. This question had "disturbed" him, he said, "since entering the Department". He questioned "the moral authority of parliament . . . to deprive persons with 50 per cent or more white blood of the full rights of Canadian citizenship". He believed that a fair definition would be "An Indian is a person with 50 per cent or more native or Indian blood". It is evident that he believed that given the choice no-one would want to remain an Indian who could become a Canadian citizen.

On an Indian woman losing her status through marrying out, Hoey stated that a problem occurred when she returned to the reserve

"having been deserted by her husband or immediately following her husband's death. She is no longer an Indian in a statutory sense nor is she the responsibility of the Indian Affairs Branch. Indeed it can be said that the money voted for by Parliament is voted on the distinct understanding that it is for the welfare of Indians and cannot be spent for the relief of white citizens". Hoey evidently was inconsistent in his application of "blood" since he here makes an Indian woman white, or perhaps he thought that only in the male was the genetic composition important.

In the same vein, a short time later when revisions to the Act were being discussed in 1955, it was seriously considered whether there might not be special provisions made giving Indian status to the illegitimate male child but not female child of an Indian man and white woman.[7] This incomparable blend of racism and sexism was both a function and a product of the Indian Act.

Iva Fallis put the question about Indian women after Hoey's statements on "white" Indian women: "Am I correct in understanding from what you said a moment ago that if an Indian woman marries a white man she ceases to be an Indian yet she is not a white woman? If her husband deserts her, or dies, she is left destitute and there is no-one to look after her? That does not apply in the case where an Indian marries a white woman. It seems unjust to the Indian woman who marries a white man because neither the white people nor the Indians want her." The Chairman interrupted to say that this would be considered by the committee. Hoey said, "It is an awkward problem" and went on to other matters. The question of membership was postponed till 1947 and then to 1948. Hoey's remarks, or at least the notions on which they are premised, were incorporated in the 1951 Act, which is still in force today, in the changed wording of the definition of an Indian.

A number of representatives from bands and associations submitted briefs and gave testimony to the Joint Committee in 1946 and 1947. Most of these groups emphasized that decisions as to membership of the band should be the decision of the band and that involuntary enfranchisement should be abolished. The North American Indian Brotherhood, the Indian Association of Alberta, the Native Brotherhood of British Columbia, and the Union of Saskatchewan Indians all made strong statements on this. This was considered a major breakthrough. Indians after all had not been consulted before as to their wishes.

Some groups, the Caughnawaga Indians and the St. Regis Indians for example, called for the complete abolition of the Act.[8]

The Native Brotherhood of B.C. stated that women who had lost their status through marriage and who were deserted or widowed should be allowed to rejoin their band with their children.[9]

But very different sentiments were being expressed by the Indian Affairs Department in this memo prepared for the Committee: "It

might be contended that by the alteration of the definition of Indian by the Statute of 1876 the Dominion very substantially reduced the number of people for whose welfare it was responsible and by that action passed the responsibility on to the provinces for thousands of people, who, but for the statute of 1876, would have been a federal responsibility for all time."[10]

T. L. R. MacInnes, the Secretary of Indian Affairs, in similar vein, in a series of talks entitled "Canada's Indian Problem" worried about the cost of services to Indians and asked, "When will they [the Indians] be able to stand on their own feet? In my opinion not for a long time . . . Indeed if we are to make these people self-supporting at all, it is clear to me that we must increase rather than relax our supervision."[11]

This echoes almost exactly the recommendation of the Committee of 1844-45: "their further progress requires more enlarged measures, and more active interference."[12]

The one hundred years later Committee of 1946-48 in its final report found that the Indian Act was replete with "anachronisms, anomalies, contradictions and divergencies", and recommended "that, with few exceptions, all sections of the Act be either repealed or amended".[13]

The first recommendations were concerned with treaty rights and recognized the need for a thorough investigation of Indians' claims through a Claims Commission, the right to vote at Federal elections, improved integrated educational facilities, old age pensions, advisory boards, better cooperation with provinces where overlapping jurisdiction was a problem, and the handling of related affairs all by one Ministry.[14]

The recommendation on band membership, however, is not so enlightened in tone, and the Indians' recommendations were ignored. It reads:

> "To replace the definition of Indian which has been statutory since 1876, there must be a new definition more in accord with present conditions. Parliament annually votes moneys to promote the welfare of Indians. This money should not be spent for the benefit of persons who are not legally members of an Indian Band. Your Committee believes that a new definition of 'Indian' and amendment of those sections of the Act which deal with band membership will obviate many problems.[15]
>
> "Your Committee recommends that in the meantime the Indian Affairs Branch should undertake the revision of existing Band membership lists."

They also recommended a clarification in the "rules and regulations" of both voluntary and involuntary enfranchisement. Outside of their terms of reference they also recommended that Indian women over 21 be given the right to vote in band elections which men had had since 1869 and that the offence and penalties sections of the Act (concerning liquor among other things) be brought into conformity with the penalties imposed on other Canadians in the Criminal Code.[16]

Chapter 11

The Indian Act of 1951

It might be expected, given the interest in human rights and the lengthy deliberations of the Joint Committee, that some major changes would ensue in this the first revision of the Indian Act since 1927 but when Bill 267 was presented for first reading in the House there was a storm of protest. It was characterized as a "shamefully inadequate piece of legislation", "inept" and "a vast disappointment to friends of Indians".[1] M. P. John Diefenbaker saw it as a licence to give even more power to administrative officials than ever before, putting "shackles" on approximately 125,000 Indian people, making of the Indian "a second-class citizen under the law". "For three years", he said, "that committee sat. Now the mountain brings forth a mouse".[2]

There were some hurried three-day consultations with Indians. A Special Committee was set up and a new bill was produced. The content remained the same however, though there were some changes in wording and the Special Committee recommended that "further consideration be given to the Indian Act in two years". This Bill 79 was passed on 17 May 1951. With some amendments, this mighty "mouse" is the Act in force today, twenty-seven years later.[3]

The discretionary powers of the Minister or Governor-in-Council were once more amplified. On the other hand the more blatant discrepancies between the Criminal Code and the Indian Act were removed. There was an easing of laws on intoxicants, the prohibition on Indian ceremonies and dances was removed, the requirements of obtaining permission from the agent to travel or sell produce were also omitted. Indian women were for the first time given the right to vote in band elections.

The enfranchisement section and the membership section were greatly elaborated upon and altered. Both increased the disadvantages for Indian women who "married out". The sections dealing with estates and inheritance were also amended and adversely affect the same women.[4]

The consequences for Indian women and their children of these sections regarding membership, enfranchisement and inheritance are far-reaching, and they are completely interwoven with the effects on other Indians that such an invitation to injustice and discrimination

constitutes. The results thus affect the whole development of human relationships in Indian communities.

The membership section, in becoming vastly more elaborate, spelled out at length not only who was entitled to be registered as an Indian but also who was not. The mention of "Indian blood" was removed and the male line of descent was further emphasized as the major criterion for inclusion. The first part of this section (section 11) has already been cited here (in Chapter 2).

Further changes in section 12 which decreed who was not entitled to be inscribed in the band lists have their own strange logic and are written in the bureaucratic vernacular. This, together with Hoey's concern with "blood", is evident in the formulation of the "double mother" rule which stipulates that among those not entitled to be registered is "a person who . . . is a person born of a marriage entered into after the coming into force of this Act and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (a), (b), or (d) or entitled to be registered by virtue of paragraph (e) of section eleven 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, [a 1956 amendment added] that woman is subsequently the wife or widow of a person described in section 11".

What this means is that a child of a white or non-registered Indian mother and grandmother, who therefore has only one-quarter Indian Act "blood", is to be deprived of Indian status on reaching the age of 21. This section would apply to children whose maternal grandmothers were voluntarily or involuntarily enfranchised Indians, or Indians who were left off band lists or lived in the U.S. for over five years, or Métis who might have three Indian grandparents, as much as the children of white women. This has in fact clearly nothing to do with biology or Indian "blood" but everything to do with the Indian Act.

Though this part of the legislation has never been enforced,[5] another opportunity for divisiveness exists. It also serves to draw attention to the awesome confusion in the minds of legislators and the failure or unwillingness to accept the reality that the definition of "Indian" in the Act was primarily a creation of the Act itself, and that Victorian notions based implicitly on male "blood" as the criterion for membership were biologically unsound and historically inaccurate. Justice Bora Laskin found it necessary to emphasize this point in his dissenting opinion in the Lavell case some twenty-two years later.[6]

In a similar vein are sections concerning descendants of those who had been allotted half-breed lands or scrip, who were not to be entitled to be registered. The result of this enactment was that attempts were made by the Department to deprive whole clans of their Indian status on the basis that their forebears had taken half-breed scrip. This was so disastrous that public opinion forced it to a halt and

this was amended in 1958 allowing those at that date registered as Indians to remain so.[7]

The major change for an Indian woman who "married out" was that until this time she had to some extent had a dual status as an Indian and an ordinary Canadian citizen. Until 1951 she had usually retained the right to go on collecting annuities and band monies if she did not choose to accept a lump sum "commutation", and thus continue to be on the band list. As a result she continued to enjoy some band benefits as well as treaty rights (if her band had taken treaty), though she was no longer an "Indian Act" Indian.

Some Indian agencies had issued prior to 1951 an identity card called a "Red Ticket" to such women which identified them as Indians for the purposes of sharing in treaty and band monies.[8] Neither they nor any other Indian women were entitled to vote in band elections prior to 1951. The major disabilities therefore on loss of status prior to 1951 for Indian women who married non-Indians were that they were deprived of their legal rights to hold land on the reserve and that their children would not have Indian status. As if this were not grim enough, they were now to be subject to involuntary enfranchisement.

Involuntary enfranchisement for men, introduced first in 1920, withdrawn and then re-introduced in the 1933 legislation, was omitted from this Act of 1951 though voluntary enfranchisement for men and bands was retained.

But new clauses were now inserted in the enfranchisement section of the Act affecting Indian women who married non-Indians though the provisos that the Indian who chose to enfranchise be "capable of supporting himself and his dependents" and "capable of assuming the duties and responsibilities of citizenship" as well as the necessity of obtaining the consent of the band are conveniently set aside in the woman's case.[9] Enfranchisement for women who lose their status thus differs substantially from voluntary enfranchisement.

The Indian woman who married a non-Indian now was automatically deprived of her Indian status and her band rights from the date of her marriage. "On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor-in-Council may by order declare that the woman is enfranchised as of the date of her marriage."[10] Her prior children were not mentioned in this 1951 Act but they were erroneously enfranchised with her until 1956, when the section was amended to read "and on the recommendation of the Minister [the Governor-in-Council] may by order declare that all or any of her children are enfranchised as of the date of the marriage or such other date as the order may specify".[11] A Parliamentary Committee considering the revision to the Act in 1955 had noted that the enfranchisement section would have to be altered to include children, i.e. bring the law into line with practice "By taking no action the Governor in Council might permit some children to remain Indian

forever. It is doubtful whether this was the intention".[12] In 1967, after many complaints had been laid, those children who were erroneously enfranchised with their mothers between 1951 and 1956 were re-instated when they could be traced.[13]

It was the same committee which pondered whether the illegitimate male child of an Indian and non-Indian should have status but reached no decision. They also started off their discussions by resolving "to preserve what was done in the past".[14]

The effect of this 1956 amendment was that Indian children who lived with their mother and their non-Indian step-father after her marriage off a reserve were also enfranchised but the Minister, at his discretion, could permit those children who continued to live on the reserve to retain their status. (The Minister in the main relies on Department officials for the resolution of such matters, but what exactly the word "may" means in the legislation when referring to ministerial discretion is difficult to assess and does seem to have varied over time.)

Another amendment of 1956 to section 12 stated that the illegitimate child of a female Indian could be protested and excluded from the band within twelve months of the addition of its name to the Band List if "it is decided that the father of the child was not an Indian".[15]

What all these provisions meant in practice was that a large number of Indian children both of whose parents were Indian were also enfranchised after 1951, their sole transgression being that some of them were born illegitimate.

The many anomalies and injustices which were thus visited on the children further augmented the difficult lot of women who "married out".

The other important effects of a woman's loss of status are on the Indian woman's ability to own or inherit property on the reserve.

Many women who married before the 1951 Act chose not to accept commutation and to retain their "Red Ticket" status. This administrative inconsistency was changed by an amendment of 1956 to section 15 of the Act. "Red Ticket" women were paid a lump sum of ten times the average annual amount of all payments which they had been paid over the preceding ten years and so brought into line with the rest.[16]

All Indian women who "married out" after this date became subject to the enfranchisement procedure which occurs after an Order-in-Council has been made. This is usually declared to take effect on the date of her marriage. She is then deemed according to section 110 "not to be an Indian within the meaning of this Act or any other statute or law". On the issuing of the order of enfranchisement any property which she holds on the reserve must be sold or otherwise disposed of in thirty days. In exchange she is given twenty years of treaty money (if the band took treaty) plus "one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band".[17]

Since she is not entitled to live on a reserve and any property she inherits there is subject to be sold by the Superintendent to the highest bidder, the issuing of the order of enfranchisement is the last step before property must be disposed of.

Enfranchisement is a term which has always had a very different meaning for Indians from whites. Even the meaning given gy government has also varied somewhat over time. In general however the same ethos underlay enactments on enfranchisement — that assimilation to Euro-Canadian culture should be the ultimate goal for Indians. This goal was perceived as a privilege only to be conferred by the superior society on the Indians when they had achieved certain standards of civilized behaviour. Maintaining the Indian in a state of "wardship" without legal rights until he or she had "progressed" sufficiently to be made a full citizen (i.e., enfranchised) was considered an onerous though necessary duty.

However, most Indians unobligingly perceived enfranchisement as something to be avoided. They preferred to retain their Indian identity, culture and values despite all inducements, and, apart from the compulsory enfranchisement of professionals, very few Indians chose to become enfranchised in the nineteenth century.

The same situation persisted into the twentieth century, although the existence of compulsory enfranchisements between 1920-24 and 1933-1951 (i.e., before women "marrying out" were subject to enfranchisement) makes it rather difficult to assess this statistically. Since 1951 very few Indians have chosen to become enfranchised. Should they wish to do so, however, they are still obliged to prove their worthiness and ability to survive outside the reserve; i.e., that they no longer need to be "protected".

Indian women, on the other hand, who lose their status through marriage are not required to demonstrate that they can be self-supporting in order to be enfranchised and enfranchisement is irreversible (except if the woman is widowed or divorced and then remarries a registered Indian).

Many members of the public feel that the word "enfranchisement" today must connote some benefit for Indian women. Nevertheless they suffer as Indians because they lack educational opportunities and have to face job and other forms of discrimination to which all Indians off the reserve are subject.[18] In fact the whole idea of enfranchisement was a patent anachronism by 1951, but the term is now perpetuated as a polite fiction which disguises the blatant discrimination towards Indian women in the Act. Prior to 1951 there was no pretence that such women were "enfranchised". Department of Indian Affairs officials also seem to cherish the ability to claim that "enfranchisement refers to men too". Statistics show otherwise.[19]

If we examine Table II below we see that 5,035 women and children were subject to enfranchisement between 1965 and 1975 following on the application of section 12(1)(b). This compares with a total of 228 voluntary enfranchisements of both men and women.

That is, only 5% of enfranchisements are voluntary and 95% of enfranchisements have been of women who had no choice.

From 1973 to 1976 however the difference is even greater. There have been only 11 voluntary adult enfranchisements (3 in 1976) and 1,335 involuntary adult enfranchisements plus, in 1976, 273 women who were not enfranchised but lost their status, totalling 1,608 for 1973 to 1976.[20] The percentage of voluntary enfranchisements of women and men for these years is 0.68%. Or, to put it another way, enforced enfranchisement of women accounted for 99.32% of all enfranchisements between 1973 and 1976. Moreover, the figure for voluntary enfranchisement appears to be diminishing, going from 7 persons in 1972-73 to 3 in 1975-76.

Out of a total Indian population of some 280,000 then, four people in the past two years have chosen enfranchisement. These figures are, I believe, sufficient comment on the merits of enfranchisement as they are perceived by Indians. (See Tables I, II and III.)

TABLE I

Enfranchisements — 1955-65

Period	Adult Indians enfranchised upon application together with their minor unmarried children		Indian women enfranchised following marriage to non-Indians together with their minor unmarried children		Total number of Indians enfranchised
	Adults	Children	Women	Children	
1955-56	192	130	337	97	756
1956-57	192	145	389	113	839
1957-58	169	149	305	50	673
1958-59	138	52	612	—	802
1959-60	221	248	433	221	1123
1960-61	125	70	592	167	954
1961-62	94	47	435	140	716
1962-63	90	50	404	109	653
1963-64	40	38	287	102	473
1964-65	46	34	480	176	736
TOTAL	1313	963	4274	1175	7725

TABLE II

Enfranchisements — 1965-75

1965-66	38	18	435	147	638
1966-67	31	22	457	148	658
1967-68	62	28	470	56	616
1968-69	37	20	531	197	785
1969-70	41	19	547	107	714
1970-71	25	12	517	98	652
1971-72	14	4	[illegible]	19	304
1972-73	7	—	—*	—	7
1973-74	7	4	449	—	460
1974-75	1	—	590	—	591
TOTAL	263	127	4263	772	5425

Note: Since 1974, the enfranchisement of children has ceased.
*Enfranchisements were suspended in 1972-73 while the Lavell case was before the courts.

TABLE III
Accumulated Enfranchisements

1876 to 1918	102
1918 to 1948	4,000
Fiscal 1948 to 1968	13,670
Fiscal 1968 to 1969	785
Fiscal 1969 to 1970	714
Fiscal 1970 to 1971	652
Fiscal 1971 to 1972	304
Fiscal 1972 to 1973	7
Fiscal 1973 to 1974	460
TOTAL	20,694

All statistics obtained from D.I.A.N.D.

Since 1975, however, there have been no Orders-in-Council forcing women to enfranchise. (Remember that loss of status, which involves being struck off the register, and enfranchisement are separate procedures.) The reasons for this are unclear, but there would appear to be a developing distaste for the issuance of Orders-in-Council relating to Indians.[21] It would appear therefore that section 110, which states that "a person with respect to whom an order for enfranchisement is made . . . shall . . . be deemed not to be an Indian", and section 111 requiring the selling of property on a reserve by those who are "enfranchised" can no longer legally be enforced. Yet Indian women who marry non-Indians are still being struck off band lists and being "paid off" for their loss of Indian status.

Interestingly, the number of marriages of Indian men to non-Indian women seems to be increasing and for the years 1973 to 1976 inclusive has exceeded the number of women marrying non-Indians by 9.7%. (See graph and Table IV.)

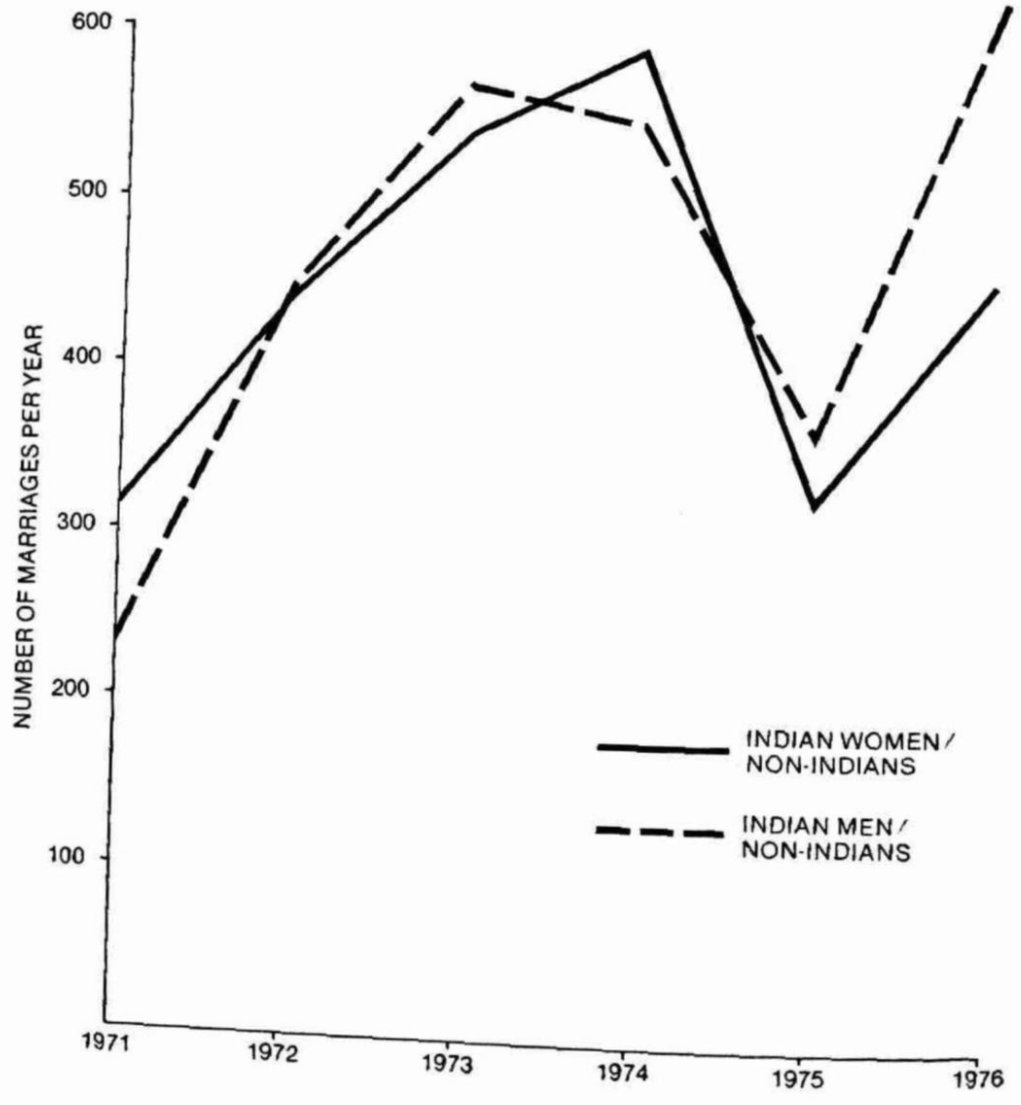
The conclusion to be drawn from all this is once more that there is one law for men and another for women and that men do not hesitate to take advantage of the double standard. Should Indian women however believe, as some do, that it is possible to conceal the fact of their marriage to a non-Indian through marriage in the city, they are not likely to be successful since the Department of Indian Affairs apparently has an arrangement with Statistics Canada and most if not all marriages of Indians are eventually reported.[22]

TABLE IV

Indian women who married non-Indians	Indian men who married non-Indians
1965 – 450	1965 – 258
1966 – 523	1966 – 273
1967 – 524	1967 – 300
1968 – 520	1968 – 341
1969 – 580	1969 – 388
1970 – 597	1970 – 414
1971 – 306	1971 – 231
1972 – 440	1972 – 442
1973 – 538	1973 – 564
1974 – 585	1974 – 544
1975 – 323	1975 – 362
1976 – 451	1976 – 611

Statistics obtained from D.I.A.N.D.

INDIAN MARRIAGES TO NON-INDIANS



Chapter 12

The Consequences of Loss of Status

Compensation

One of the arguments that Indian women who have lost their status most frequently encounter is that they have been financially recompensed for whatever they have lost.

No sum of money can ever compensate for their loss and that of their children of their culture and identity. But the fact is that in all areas save Alberta the amount they are paid on enfranchisement as their share of band funds is often negligible or nothing at all.

According to section 15 of the Indian Act, an Indian woman who is enfranchised or "otherwise ceases to be a member of a band" is entitled to receive one per capita share of band capital and revenue. If the band to which the woman belonged had also taken treaty, she is paid a sum equivalent to twenty years' treaty money — a total of between $80 (20 x $4) and $100 (20 x $5).[1]

The total amount paid out to both women and men (4,470 women through marriage — i.e. involuntary enfranchisement — and 225 women and men through voluntary enfranchisement, according to calculations which are based on D.I.A.N.D. figures), between 1966 and 1977 was $1,229,117.37. This is an average of $261.80 per person. However, averages are rather meaningless here.[2]

An Indian woman who marries an Indian from another band and thus, according to the Indian Act, becomes a member of her husband's band, is paid the difference between the per capita share of her former band and that of her new band if the share of her former band is greater.

Many of these Indian women who change bands and those who lose their status through marriage believe that even the scanty compensation allotted to them on marrying either a non-Indian or an Indian from another band is rendered still smaller than it should be by accounting procedures which do not include all band assets and investments when their share is being computed. In addition, in Alberta they believe that they are entitled to compensation for loss of royalties from the present exploitation of natural resources — gas or oil, for

example — as well as for the loss of the right to share in profits from future royalties gained from gas, oil, coal, timber, etc.[3]

These women have no way of ascertaining whether or not their suspicions that they are not being fairly treated in this are justified, since they are not permitted access to the band accounts nor are they allowed to receive any information whatsoever from the section of the Department of Indian Affairs in Ottawa which has these figures. Neither does there appear to be any appeal or investigative procedure to which the women may have recourse on this matter.

The share of band funds to which they are entitled is supposedly calculated by dividing the total band assets by the number of persons in the band. But capital investment by the band in business ventures such as a hotel, lodge or factory, or in some other assets such as farm machinery, buildings or animals on a ranch, for example, is not included. In practice then, only what is actually shown in the band's bank balance on the day the woman is enfranchised is used as the basis for the calculation of her share.[4]

The consequence of this is that even a woman from a very rich band where oil royalties may average millions of dollars per year receives a relatively small sum.[5]

Many women get nothing or only the annuity payment, which is a maximum of $100. Such is the case with many of the bands in the Mackenzie district, such as the Arctic Red River Band, which pays only an annuity of $100 and no band share. The Attawapiskat in May 1975 managed to pay out 7¢ and the annuity of $80. The Fitz Smith Band paid 1¢. Fort Franklin and the Dog Rib Rae paid nothing. In Prince Edward Island the Abegweit in December 1975 paid $4.06. In Nova Scotia in February 1967 the Eskasoni Band paid $22.40. In Quebec the Montagnais of Escoumains paid $4.45 in 1965 and in Ontario the Albany Band paid 32¢ as the per capita share.

In the middle range the Shammon Band in B.C. paid $985.95 in 1974 and $251.08 in 1976. The Spallumcheen in B.C. paid $102.12 in May 1975 and $425.22 in February 1976.[6]

These are indeed not munificent sums. One might expect a difference in Alberta, where some bands get millions of dollars in oil and gas revenues. But relative to the amount of royalties the bands may expect to have, the compensation women are paid is not excessive, though it seems large in comparison with the very small sums that women in other provinces receive. The top amount paid out in Alberta was $12,297.48 on March 1, 1976. In April, June and August of 1976 the Sampson Band paid out an average of about $12,000. The Louis Bull Band in June 1975 paid $9,190.98, but ten years before paid only $1,113.50 and in 1955 paid $419.89. The Sampson Band in 1956 paid $1,000.22. Both these bands are on the Hobbema Reserve.

Clearly the women and their children from these bands who were enfranchised ten or twenty years ago have lost a great deal in terms

of potential income for which they have not been compensated. The same may be said to be true of those who are being "paid off" today in 1978.

If we assume that, as in any other transaction in which a person is selling his or her share of an estate or business, all assets should be included, then the Indian women are being very inadequately compensated. If, in addition, unexploited rich natural resources are considered a part of these assets, compensation would also be computed based on the potential revenue which would accrue from the exploitation of these resources.

This kind of calculation is made quite frequently by energy economists such as Pedro Van Meurs, who specializes in oil and gas supply and demand evaluation and analyses.

Van Meurs has explained for the purpose of this study how a formula for compensating for loss of oil royalties might be calculated, using as a reference R. G. McCrossan's "The Future Petroleum Provinces of Canada".[7] In reserves, for example, in that region of Alberta called the Craton Margin, which stretches from Peace River to the Saskatchewan border and which in the central area covers the whole province, potential oil and gas is estimated at 121,000 barrels and 580 million cubic feet per square mile. Two-thirds of these are proven. A band should, at a conservative estimate, obtain about one-third of the gross revenue from the oil and gas in royalties, as does the Province of Alberta. A rough calculation of the oil and gas royalties based on an area roughly the size of the Hobbema Reserve near Edmonton (160 square miles) gives an average potential 19.3 million barrels of oil and 92 billion cubic feet of gas. Royalties (a possible one-third of gross value) are estimated therefore at $10 per barrel of oil and $1 per 1,000 cubic feet of gas. To estimate the share of each person, the total sum expected in royalties is then divided by the number of persons on the reserve. In this case, Van Meurs assumed a band size of 3,000. Each person might therefore expect $31,000. Converting this into a once-and-for-all cash payment at 11% discount rate in current dollars and including 6% inflation gives $15,000 per person.

Given a higher rate of inflation than 6%, this sum could be substantially higher. (See Appendix for method of calculation.)

This is only one area in which compensation is clearly inadequate. Alberta is also rich in coal and the same kind of calculations could be made based on potential royalties from this resource. Other provinces similarly could have their mineral and forest resource potential computed so that the women who are in effect forced to "sell out" are treated as fairly as possible in the circumstances.

Social and Cultural Losses

Apart from financial losses, one of the more important benefits which are lost to enfranchised women and their children is in the field of

education. In recent years the bilingual and bicultural programmes available on reserves open the door to a heritage of Indian culture to which the child of an enfranchised Indian mother does not have access.[8] About 65% of Canada's native people over thirty speak a native language so at least half of the mothers of these children speak a native language and will not have this opportunity to have their children educated in their language or culture.[9]

Indian school children are also entitled to receive all school supplies, a noon lunch supplement, sports equipment, art supplies, shop supplies, money for tours and interschool activities, as well as the payment of expenses where attendance at a special school is necessary.

Free daycare facilities and nursery schools are provided on some reserves for pre-school children.[10]

In post-secondary education there is an even greater disparity in opportunity. A status Indian, his spouse and children are entitled to post-secondary educational allowances covering tuition, books, living expenses, travel and clothing.[11] The Indian woman who has lost her status does not have this opportunity to upgrade her education and so obtain reparation for past government deficiencies in this respect nor, of course, do her children.

In the provision of housing, Indians living off reserves can qualify for a repayable first mortgage from C.H.M.C. and a forgivable second mortgage from the Department of Indian Affairs.[12]

A new Indian reserve housing policy was announced on November 18, 1976. This policy included a "front-end" subsidy of up to $12,000 per unit based on income, and other special facilities enabling Indian families, particularly in low income groups, to purchase their own homes.[13]

This programme and some of the education and other programmes have evolved fairly recently as a result of government-Indian working committees set up after the joint NIB/Cabinet committee was established in 1975.[14]

An interesting aside to this, considering that special problems exist with regard to housing for female-headed single parent families,[15] is that these decisions on housing are not seen as requiring input from women's organizations. A recent Departmental paper makes it clear that housing has been viewed as a male concern. The paper is entitled "The Indian Housing Programme and the Role of the Indian Woman" and is designed to involve Indian women in the housing programme. It states: "As a member of an on-reserve Indian community, you can play a very constructive role in housing. You may wonder how! Normally we associate building houses as a role for men."[16]

Enfranchised Indian women who are widowed or divorced may not partake of these benefits. The white widow or divorced white spouse of a status Indian male can.[17]

Other benefits from which they are excluded include: loans and grants from the Indian Economic Development Fund to start a business; exemption from taxation while living on the reserve; exemption from provincial sales tax on goods delivered to a reserve in Quebec, Ontario, Saskatchewan, Nova Scotia, New Brunswick and Manitoba (Alberta has no sales tax); free medicines to which the members of some bands — for example the Treaty Six Bands of Saskatchewan and Alberta — are entitled; hunting, fishing, animal grazing and trapping rights on and (under certain conditions) off a reserve; cash distributions derived from the sale of band assets of monies surplus to band needs. Canadian Indians may also be employed in the U.S. without a visa and have certain border crossing privileges under the United States Immigration and Naturalization Act.[18]

Psychological Effects

There are losses, however, which can never be computed and which are a consequence of the social and cultural alienation which occurs as a result of enfranchisement. These losses have not been documented.

But life histories such as the biography of Verna Patronella Johnston, "I am Nokomis, too",[19] and the autobiography of Maria Campbell, "Half-breed",[20] though not directly related to women's loss of status, do provide a good deal of information on the psychological magnitude of the problem. The enfranchised Indian woman and her children find themselves with identity problems, culturally different and often

socially rejected by white society, yet they may not participate with family and relatives in the life of their former communities.

The threat and harassment associated with eviction from the reserve have caused at least one heart attack and sudden death and severe psychological and health problems in women and children.[21] The long term effects on the traditionally close Indian family on the reserve, the disruption and misery caused where sister may turn against sister and an invidious distinction is made between brother and sister, are profound and impossible to measure.[22]

The whole process of forcible enfranchisement is one of retribution, not restitution. The extent of the penalties and the lack of compensation for the losses suffered as a result of 12 (1) (b) make this quite evident. It is, in Justice Bora Laskin's words, "statutory banishment" which is compounded by the enfranchisement order, "an additional legal instrument of separation from her native society and from her kin, a separation to which no Indian man who marries a non-Indian is exposed."[23]

Inheritance of Property and Evictions

The question of inheritance of property and the right to live on the reserve is one that has provided more opportunities for victimization than most.[24]

The Department of Indian Affairs, following mainly on the legislation of 1869, has insisted for more than one hundred years that Indian women who married non-Indians should not be allowed to remain on or return to the reserve even when widowed or separated since they are now "white".

It is clearly advantageous to have as few band members to share in band monies and resources as possible, and a temptation to the needy as well as the unscrupulous. The eviction of widowed or separated women who return to the reserve often with several small children to live in a family home has thus become common practice on a few reserves. Since these women are usually very poor, obtaining legal advice is an enormous problem.[25] They are quite clearly in an extremely disadvantaged position.

Indeed, in attempting to use property bequeathed to her in a will, as for example in the case of Yvonne Bedard or in the recent case of Cecilia Pronovost, an Indian woman may find that she has taken on not only the Band Council but the whole Department of Indian Affairs and the Department of Justice as well, the latter Department having the responsibility of advising Indian Affairs on such matters.

The case of Cecilia Pronovost is not straightforward. Perhaps for that very reason however it is particularly illuminating to study the immense problem which is faced by an Indian woman who has lost her status and has to deal with a hostile Band Council and a vast bureaucracy in Ottawa. Indeed the complexity of the case is further compounded by government departments.

Cecilia Pronovost, a separated mother of six, was born a status Indian at Caughnawaga Reserve near Montreal. She was adopted according to Indian custom and brought up by her granduncle John Charlie and his wife in their home with the daughter of John Charlie and the biological son of Mr. and Mrs. Charlie. John Charlie made a will bequeathing his property and money to his two adopted daughters and cutting off his natural son with $1 "for reasons well known to him." The will also stated that his wife should "have the right of occupancy as long as she lives."[26]

John Charlie died on July 3, 1974, and the will was approved by the Department of Indian Affairs on April 5, 1975.[27] The Department then transferred the property to the wife, Margaret Charlie, on May 7, 1975, a step which does not seem to be in accordance with the terms of the will.[28]

Margaret Charlie was at that time in a hospital which she did not leave until she died one and a half years later on December 28, 1976, without leaving a will.[29]

Cecilia Pronovost, who had been deserted by her husband, who is not an Indian, went with her six children to live in the house which was then claimed by the natural son, John. His stand was supported by the Band Council, who ordered her to vacate the house and leave the reserve.[30] The water supply for the house was cut off. The Department of Indian Affairs on advice from the Justice Department advised the band that following on a 1948 ruling of a Justice Department official, Deputy Minister Varcoe, Cecilia Pronovost could be declared not to be a beneficiary of John Charlie's estate, the house going to the wife and then the son. A request from Mrs. Pronovost's lawyer to the Department of Justice for information on this vital decision produced this response on August 15, 1977: "It is general departmental policy that legal opinions provided from Department of Justice are for department use only."[31]

Immediately after this, although the case was going through the courts, the Department of Indian Affairs transferred the property to the son, John Charlie, on September 1, 1977.[32]

The Band Council wrote to Mrs. Pronovost stating that this was a family matter and advised Mrs. Pronovost not to make the affair public.[33] The Department of Indian Affairs and the Department of Justice solemnly affirm that the fact that Mrs. Pronovost is an Indian woman who has lost her status through marriage has nothing to do with the case.[34] If one asks the question however, "What would be her position with respect to her inheritance if she had not married or had married a member of the band?", the case takes on a very different complexion. Would the Band Council and the government departments have been able to give the same unqualified support and advice to one registered Indian who is male over another who is female? Would they have considered or applied Varcoe's ruling? Even if the validated will were declared invalid,[35] would she not

be entitled to inherit from her mother as an adopted child according to section 48 (4), which states that the property of an Indian dying intestate "shall be distributed subject to the rights of the widow, if any, *per stirpes* among such issue", i.e. among his or her children.

Section 48 (16) also states: "In this section 'child' includes a legally adopted child and a child adopted in accordance with Indian custom." These few facts alone suggest that this ignoring of the rights of Cecilia Pronovost has a lot to do with her loss of Indian status and also demonstrates the complex web of oppression in which such women are caught.

1956 CarswellBC 235
British Columbia Supreme Court

Hurshman, Mindlin v. Hurshman, Re

1956 CarswellBC 235, 6 D.L.R. (2d) 615

Re Hurshman, Mindlin v. Hurshman et al.

McInnes J.

Judgment: December 14, 1956
Docket: None given.

Counsel: *D. L. Silvers*, for the applicant
W. L. Warner, for Mary Elizabeth Hurshman
R. J. Hawthorne, for The Children's Hospital
H. C. McKay, for The Loyal Protestant Home for Children

Subject: Estates and Trusts
Related Abridgment Classifications
Estates and trusts
I Estates
I.6 Legacies and devises
I.6.d Conditional gifts
I.6.d.iii Grounds for invalidity
I.6.d.iii.B Public policy grounds
I.6.d.iii.B.1 Promotion of marriage breakdown

***McInnes J.*:**

1 This is an application by way of originating summons brought on behalf of Georgia Wood Mindlin, daughter of the deceased Alfred Hurshman. The questions for determination are:

1. Whether the condition italicized below appearing in the gift to the applicant is a valid condition:

'If my said wife shall have predeceased me, or having survived me, upon her death, one-half of the Trust Fund and of any of my property and estate not then converted shall be given to my daughter GEORGIA WOOD HURSHMAN *provided she is not at that time the wife of a Jew, but if she is such at that time, the share which she would otherwise have taken and all income accruing thereon, shall be held in trust by my said Trustee until my said daughter has ceased to be the wife of a Jew, at which time her share shall be given to her. If my said daughter shall be the wife of a Jew at the time of her death, the share which she would otherwise have taken shall be added to what is to be held in trust for the charitable organization referred to in Sub-Paragraph* (c) *of this my Will.'*

2. If the answer to question 1 is in the negative, does the gift pass to the applicant free of such condition?

3. If the answer to question 2 is in the negative, then how is this gift to pass?

4. Such other directions as the Court may deem necessary to interpret and give effect to this clause.

2 The material facts in connection with the application are set out in the statement of facts filed by counsel on the application. Briefly they are as follows:

3 The deceased died at Vancouver on January 7, 1955, leaving surviving him his widow, Mary Elizabeth Hurshman, who is still living and one daughter Georgia Wood Mindlin, the applicant herein. The deceased had no other children who predeceased him.

4 The deceased made his last will and testament on July 3, 1952, and the same was admitted to probate on July 8, 1955. The applicant married one Ivan Mindlin on June 3, 1952, and is still married to Mr. Mindlin. It is perhaps significant to note that the will of the deceased was made one month to the day after the marriage of his daughter to Mindlin. By the statement of facts filed it is stipulated that the said Ivan Mindlin is by lay definition a Jew.

5 The disputed portion of the will which involves the applicant has been quoted in the questions for determination, *supra*. It should however be mentioned that in the event that the daughter is the wife of a Jew at the time of her death there is a gift over of the share which she would otherwise have taken.

6 It must be noted that it is not upon the occasion of her father's death but that of her mother which is the determining date insofar as the gift to the daughter is concerned. If at the date of her mother's death she is still married to Mindlin, which of course is a matter of uncertainty because many things may happen between now and that event, then she being married to Mindlin who by lay definition is a Jew it could be said that as it is impossible on the authorities to determine who is a Jew that the condition was uncertain and the law is that if the condition is a condition precedent to her taking and that condition is uncertain then the condition is void and the gift falls with it. See *Re Wolffe's Will Trusts*, [1953] 2 All E.R. 697 and *Clayton v. Ramsden*, [1943] 1 All E.R. 16. The provision with respect to the daughter however, does not stop there but goes on to provide that notwithstanding that she may be married to a Jew at the time of her mother's death nevertheless the gift is not forfeited but the payment thereof merely suspended until as the will says "my said daughter has ceased to be the wife of a Jew at which time her share shall be given to her". In short, if Mindlin is alive at the time of the mother's death and is still married to the daughter then in order for the daughter to inherit she must divest herself of her husband. In my view this is a condition which is directly contrary to public policy. The decision of Romer J. in the case of *Re Piper, Dodd v. Piper*, [1946] 2 All E.R. 503, is in my view directly in point. The headnote reads as follows:

> By his will the testator gave a part of his residuary estate to be held as to both capital and income on trust for such of the four D. children 'as attain the age of 30 years and do not before attaining such age reside with' their father. The children's father had been divorced by their mother before the date of the will: —
>
> Held: on the construction of the will, the condition as to non-residence was a condition precedent which, being calculated to bring about the separation of parent and child, was *malum prohibitum* and void as being against public policy, and the gift would take effect free from it.

7 At p. 505 the learned Judge quotes from Jarman on Wills 7th ed., vol. 2, pp. 1443-4, the following words:

> '... the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gifts and condition void.'

8 Then in his own words he goes on to say:

9 That statement (as contained in Jarman on Wills, 4th edn., vol. 2, p. 12), was considered in *Re Moore* by Cotton, L.J. ((1888), 39 Ch. D. 116, at pp. 128, 129).

10 Counsel for the D. children suggested that the condition as to residence was bad, as being against the policy of the law. In that he is correct, and the fact that the husband and wife had been divorced before the date of the will does not affect the

matter. The condition is expressed in terms which are calculated to bring about the separation of parent and child, and it has been recognized many times that such a condition will not be enforced. The difference between *malum prohibitum* and *malum in se* has never been very precisely defined or considered. Assistance was given, however, by *Re Hope Johnstone* where Kekewich, J., said ([1904] 1 Ch. 470, at p. 479):

> 'What is meant by a provision being void as against the policy of the law? The phrase means no more than that the provision is not enforceable by anyone or in any court.'

11 And cite:

> In the absence of direct authority I am not prepared to hold that a gift, the object of which is to keep a child away from its parent, is *malum in se*. I am quite satisfied that it is not, but, on the other hand, it is *malum prohibitum*. The position in the present case is, therefore, precisely within the statement of the law in Jarman on Wills, which I accept as accurate, with the result that the gift takes effect freed and discharged from the void condition. ...
>
> The condition is void as against public policy, the gift takes effect free from it, and each of the D. children is entitled to a share on attaining the age of 30 years.

12 I accordingly hold in the present case that the condition is void as being against public policy and that the daughter takes the gift free of the condition.

13 The words of Lord Atkin in the case of *Clayton v. Ramsden*, [1943] 1 All E.R. 16 at p. 17, where he says: "For my own part I view with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries, and should not be dismayed if the power were to disappear", are most appropriate in the circumstances here and with great respect I subscribe wholeheartedly to the sentiment expressed by that very learned Judge. I might add that any propensity toward racial discrimination has no place in this country and while it may be open to a testator to lay down the conditions upon which his children may or may not share in his bounty, yet insofar as those conditions involve racial discrimination, his language must be precise and explicit and clearly within the law if he expects the Courts to assist him in the fulfilment of his aims.

14 The costs of all parties will be payable out of the estate.

End of Document

Re Thorne

Ontario Judgments

Ontario Supreme Court - High Court Division

Rose J.

March 7, 1922.

[1922] O.J. No. 451 | 22 O.W.N. 28

(12 paras.)

Case Summary

Will — Legacy to Infant — Condition — Election — Invalidity — Condition Subsequent — Failure of, without Affecting Legacy — Legacy Payable at Majority or upon Marriage — Executors — Infant's Receipt for Legacy — Payment into Court.

1 Motion on behalf of Isabella M. Wilson, by her next friend Sarah E. Ewing, for an order determining a question arising in the administration of the estate of Thomas Stephen Thorne, deceased, as to the meaning and effect of his will.

2 The motion was heard in the Weekly Court, Toronto.

3 J. M. Ferguson, K.C., for the applicant.

4 H. L. Steele, for C. E. Thorne and Walter Thorne, executors of the will.

5 F. W. Harcourt, K.C., Official Guardian, for Florence Thorne, an infant, and for others (except the executors) in the same interest.

6 ROSE J., in a written judgment, said that the question was as to the effect of certain clauses in the will purporting to direct that, in the event of the applicant, a legatee under the will and an infant, leaving the home of her uncle W. A. Thorne, and going to live with her mother, the legacy should revert to the estate of the testator. Some of the affidavits filed raised issues as to the circumstances in which she left her uncle's home. These issues were not relevant upon this motion, and the costs were not to be increased by reason of the affidavits having been filed.

7 By clause 7 of the will, $800 was bequeathed to the applicant, the granddaughter of the testator, to be paid to her at the time of her marriage or upon her attaining her majority, whichever event should first happen - "This however is in case that she does not go to live with her mother Edith Porter, in which case the sum ... shall revert and fall in as part of my estate." By clause 9, so long as the legatee lived with her named uncle the income of the $800 was to be payable to him until she came of age or married; and, by clause 10, in the event of the legatee, after reaching the age of 15, wishing to make her permanent home with her mother "and entirely abandoning to live with her uncle;" the $800 should revert to the estate of the testator.

8 The condition that the legatee should make her home with her uncle was invalid: it called upon an infant to make an election, and it was intended to compel her to refuse to live with her mother, which she had no legal right to do: Clarke v. Darraugh *(1883), 5 O.R. 140*; Wilkinson v. Wilkinson (1871), L.R. 12 Eq. 604; Partridge v. Partridge, [1894] 1 Ch. 351. The only question, therefore, was, whether the condition was precedent, in which case the

disposition dependent on it would fail with it: In re Wallace, [1920] 2 Ch. 274, 286; or a condition subsequent, which would fail without affecting the legacy.

9 The learned Judge was of opinion that it was a condition subsequent. The gift was an immediate gift - what was postponed being the time of payment. Pending the payment of the principal, the interest went to the uncle if the legatee continued to live with him; but, if she elected not to live with him, the payment of interest stopped and the corpus reverted to the estate. The payment of the interest to the uncle was on the footing that the corpus belonged to the legatee, and it was impossible to regard the legacy as other than a vested one, or to read the condition otherwise than as a condition that the vested interest should be divested upon the happening of the stated contingency.

10 There should be a declaration that, notwithstanding the condition stated in the will, the legacy was payable on the applicant attaining the age of 21 years or marrying, whichever should first happen, whether or not, prior to the time of payment, she had lived with William Arthur Thorne or with her mother.

11 No case was cited which seemed to warrant a decision that from the words of this will there should be implied an authority to the legatee, though still a minor, to give to the executors a good receipt for the amount of the legacy; and such a declaration ought not to be made: see Halsbury's Laws of England, vol. 28, p. 541. If the executors desired it, the order might, however, contain a clause authorising them to pay the money into Court.

12 The costs of all parties should be paid out of the estate.

VOLUME

1

Looking Forward, Looking Back

Report
of the Royal Commission
on Aboriginal Peoples

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Royal Commission on Aboriginal Peoples

CANADA

Commission royale sur les peuples autochtones

To His Excellency
the Governor General in Council

May It Please Your Excellency

We have the honour to submit to you, pursuant to paragraph 10 of Order in Council P.C. 1991-1597, dated 26 August 1991, the Report of the Royal Commission on Aboriginal Peoples.

Respectfully submitted,

René Dussault, j.c.a.
Co-Chair

Georges Erasmus
Co-Chair

Paul L.A.H. Chartrand
Commissioner

J. Peter Meekison
Commissioner

Viola Robinson
Commissioner

Mary Sillett
Commissioner

Bertha Wilson
Commissioner

October 1996
Ottawa, Canada

9

THE *INDIAN ACT*

MOST CANADIANS KNOW that in 1982 our written constitution was amended as part of the process of completing the evolution of Canada as a self-governing nation. As recounted in Chapter 7, one of the 1982 amendments addressed the special constitutional status of the Aboriginal peoples of Canada – which includes the Indian, Inuit and Métis peoples – by recognizing and affirming their Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. Since then there have been several first ministers conferences with the goal of completing the constitutional renewal process by explicitly entrenching the right of Aboriginal self-government within the Canadian constitution.

In 1993 we published *Partners in Confederation*, in which we asserted that there are good reasons to believe that the Aboriginal rights referred to in section 35 include the inherent right of self-government.[1] Our conclusion was based on, among other things, the wording of the *Royal Proclamation of 1763*. As our earlier discussion showed, through that authoritative statement, the Crown offered its protection to the Aboriginal peoples as self-governing nations whose relative political autonomy and land rights it recognized.

In our view, by referring to these rights, section 35 has already entrenched them in the constitution. They need now to be implemented in an orderly and appropriate way. Many Canadians appear to agree with us. Efforts are continuing to implement the inherent right of self-government and thereby to reaffirm the special status of Aboriginal peoples within the Canadian federation.

In this context it is important to realize that the unique constitutional position of Aboriginal peoples did not originate with the 1982 constitutional amendments, important as they were. There are references throughout Canadian history to the singular place of Indian peoples, Inuit and Métis people in the collective enterprise now known as Canada. Many constitutional documents attest

to this, including, of course, the *Constitution Act, 1867* with its familiar reference to federal jurisdiction over "Indians, and Lands reserved for the Indians" in section 91(24). In 1939 the Supreme Court of Canada recognized that the term 'Indian' as used in section 91(24) also includes Inuit.[2] We are of the view that it includes the Métis people as well.[3]

The distinctive rights accorded Indian tribal nations (or First Nations, as we refer to them today) are mentioned in official documents as early as the eighteenth century. One of the most significant references occurs in the *Royal Proclamation of 1763*. Issued by King George III to confirm the special relationship between the Crown and First Nations, the Proclamation has been described by one Canadian Supreme Court judge as "the Indian Bill of Rights"[4] and by another as having legal force "analogous to the status of Magna Carta".[5] In addition to its constitutional status, this document has a powerful symbolic importance and is often cited by Aboriginal peoples in their quest to regain their relative autonomy within the Canadian federation. We discussed the nature and significance of this document in Chapter 5 of this volume and will say more about it here in the context of the *Indian Act*.

Many other constitutional documents refer to the rights of First Nations. For example, the statutes confirming the entry of Manitoba and British Columbia into Canada, the order by which Canada acquired the Hudson's Bay Company territories, federal legislation granting Ontario and Quebec additional lands in the North, and legislation giving the prairie provinces control over their resources all refer in one way or another to Indians, treaties, Indian lands and other related rights.[6] Treaties are also constitutional documents reflecting the special status of the tribal nations that signed them with the Crown. There are so many references to Indian people and Indian rights in documented Canadian history that the Pepin-Robarts Task Force on Canadian Unity acknowledged in 1979 that "native people *as a people* have enjoyed a special legal status from the time of Confederation, and, indeed, since well before Confederation."[7]

The *Indian Act* is yet another manifestation of this status. Passed originally in 1876 under Parliament's constitutional responsibility for Indians and Indian lands, it is based on Indian policies developed in the nineteenth century and has come down through the years in roughly the same form in which it was first passed. Until the 1982 amendments to the constitution, it was the single most prominent reflection of the distinctive place of Indian peoples within the Canadian federation. It too has powerful symbolic importance. In fact, when the federal government recommended in 1969 that it be repealed as part of a proposed new approach to Indian policy,[8] Indian people across Canada protested. A young Cree leader, Harold Cardinal, wrote a book that became the Indian alternative to the federal proposals:

> We do not want the Indian Act retained because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than ready to help devise new Indian legislation.[9]

Thus, and despite its symbolic importance, the distinctive place accorded Indian people by the *Indian Act* was not a privileged one. It was marked by singular disparities in legal rights, with Indian people subject to penalties and prohibitions that would have been ruled illegal and unconstitutional if they had been applied to anyone else in Canada. Moreover, and despite their direct relationship with the federal government, the majority of Indian people living on reserves could not vote in federal elections until 1960. Indian people could not manage their own reserve lands or money and were under the supervision of federally appointed Indian agents whose job it was to ensure that policies developed in Ottawa were carried out on the various reserves across Canada.

Indian people chafed within the confines of this legislative straitjacket. It regulated almost every important aspect of their daily lives, from how one acquires Indian status to how to dispose of the property of an Indian at death and much else. Many attempts have been made through the years to free Indian people from the *Indian Act* legal regime. Although usually well-intentioned, many of these efforts have been ill-conceived and badly carried out. Rarely were Indian peoples consulted on what to do to alleviate the problems posed by the *Indian Act*, and almost never were their proposals for reform taken seriously.

In many ways the history of the evolution of the *Indian Act* has been a dialogue of the deaf, marked by the often vast differences in philosophy, perspective and aspirations between Canadian policy makers and Indian people. Indian people have been consistent in calling for respect for their special constitutional status, especially in the context of the *Indian Act* and its colonial predecessors. However, Canadian officials have generally interpreted Indian proposals for reform of Indian policy as yet another indication of their need for further guidance, for even sterner measures to help them adapt to the culture and political ways of the settler society that has grown up around them.

For example, when the elective band council system was first introduced in 1869 as a way of undermining traditional governance structures, Indian nations were not easily persuaded to adopt it. Two years after passage of the legislation implementing the band council system, Deputy Superintendent Spragge is reported to have observed that Indian opposition to adopting what was clearly an alien system owed less to its cultural inappropriateness than to the fact that "the Indian mind is in general slow to accept improvements", but that "it would

be premature to conclude that the bands are averse to the elective principle, because they are backward in perceiving the privileges which it confers."[10]

Indian people have refused consistently, however, to renounce the constitutional special status that their unique place in Canadian history assures them and have resisted efforts to force them to abandon their cultures and forms of social organization to become Canadians like all others. The *Indian Act* has thus become the battleground for the differing views of Canadian officials and Indian people about their rightful place within the Canadian federation. But the battles have not been straightforward, nor have they always been overt. Much has occurred in the shadows of Canadian history, in the meeting rooms of commissions of inquiry[11] and in the halls of Parliament and the offices of federal public servants.[12] Decisions taken by bureaucrats and politicians behind closed doors, although little known in the broader Canadian society, have had a profound impact on Indian people. This impact has been experienced more often than not as oppressive and has engendered deep suspicions on the part of Indian people about the ultimate intentions of Canadian policy makers toward them.

Today the *Indian Act* is the repository of the struggle between Indian peoples and colonial and later Canadian policy makers for control of Indian peoples' destiny within Canada. The marks of that struggle can be seen in almost every one of its provisions. By examining the act, how it came about and how it continues to influence the daily experience of Indian people in Canada, much can be learned about why reform is so difficult to achieve at present. By the same token, an examination of the *Indian Act* will also show why reform or complete repeal is needed so vitally now.

It is clear that many mistakes have been made in the past. A new or renewed relationship of partnership between Aboriginal peoples and other Canadians can be achieved only through awareness of these mistakes and avoidance of the false and unwarranted assumptions that led to them. That is the purpose of this chapter.

1. The Paradox of *Indian Act* Reform

In the 1960s the Hawthorn report on Indian conditions in Canada observed that until the Second World War, "Indian reserves existed in lonely splendour as isolated federal islands surrounded by provincial territory."[13] In a real as well as a metaphorical sense, Indian communities were not part of Canada. The lonely splendour of their isolation was at once geographic, economic, political and cultural and was enforced by the special legal regime contained in the *Indian Act*. It set Indian people apart from other Canadians and, although protective of their rights, was the source of much criticism by Indian leaders and concerned Canadians alike.

In 1969, the recently elected federal government – like many other Canadians at the time – wished to eliminate the barriers that were seen increasingly as preventing Indian people from participating fully in Canada's prosperity. The government issued a white paper on Indian policy that, if implemented, would have seen the global elimination of all Indian special status, the gradual phasing out of federal responsibility for Indians and protection of reserve lands, the repeal of the *Indian Act*, and the ending of treaties. The government watchword was equality, its apparent goal "the full, free and non-discriminatory participation of the Indian people in Canadian society" on the basis "that the Indian people's role of dependence be replaced by a role of equal status".[14] Surprised by the massive and fervent opposition to this measure, the government was forced to withdraw its proposal in 1970. The *Indian Act*, largely unchanged, is still with us.[15]

Nonetheless, most still agree that progress in self-government, in economic development and in eradicating the social ills afflicting many Indian communities cannot be accomplished within the confines of the *Indian Act*. Despite being its harshest critics, however, Indian people are often extremely reluctant to see it repealed or even amended. Many refer to the rights and protections it contains as being almost sacred, even though they are accompanied by other paternalistic and constraining provisions that prevent Indian peoples assuming control of their own fortunes. This is the first and most important paradox that needs to be understood if the partnership between First Nations and other Canadians is to be renewed.

Seen in this light, the profound ambivalence of First Nations toward the *Indian Act* begins to make more sense. To shed additional light on the origins of Canada's Indian policies we must go further back into Canadian history, however. It is there that the tangled roots of the *Indian Act* and the many paradoxes it discloses can be found. The major and underlying paradox, and the key to unravelling the others, lies in the unique way Indian sovereignty has been conceptualized in Canadian legal and constitutional thinking.

2. Indian Sovereignty and the *Royal Proclamation of 1763*

Until recently, North American history has been presented as the story of the arrival of discoverers, explorers, soldiers and settlers from Europe to a new world of forest, lake and wilderness. Indian peoples have been portrayed as scattered bands of nomadic hunters and few in number. Their lands have been depicted as virtually empty – *terra nullius*, a wilderness to be settled and turned to more productive pursuits by the superior civilization of the new arrivals. In the same way, Indian people have been depicted as savage and untutored, wretched creatures in need of the civilizing influences of the new arrivals from

Europe. This unflattering, self-serving and ultimately racist view coincided with the desire of British and colonial officials to acquire Indian lands for settlement with the minimum of legal or diplomatic formalities. The view prevailed throughout the nineteenth century when the foundations for the *Indian Act* were being laid. Many Canadians may still maintain such beliefs.

We now know that this picture is simplistic and one-sided. As described in earlier chapters, Indian nations were organized into societies of varying degrees of sophistication. Many practised and taught agricultural techniques to the new arrivals and had established intricate systems of political and commercial alliances among themselves. The forests were not trackless; they were traversed by well-known trails created for trade and other social purposes well before the arrival of Europeans. Rivers and lakes served as highways and as natural boundaries between tribal nations. Many tribes were relatively large in population and had spawned smaller off-shoot tribes precisely because of population pressures. In short, there is an increasing body of evidence that Indian nations were far more subtle, sophisticated and numerous than the self-consciously 'civilized' Europeans were prepared to acknowledge.[16]

Europeans did not arrive, therefore, to an empty and untamed land. In many ways their arrival was more like an invasion and displacement of resident peoples of varying but evident cultural attainments. The arrival of the newcomers was accompanied by European diseases to which Indian people were vulnerable and that drastically reduced their populations, destroying some nations completely and weakening others immeasurably. In the face of these pressures many tribal nations broke up and were gradually absorbed by the new settler societies around them. Fearing this fate, others were forced to leave their historical homelands and to move away from the settled colonies farther into the interior, abandoning vast territories to the emerging settler society. Later, during the nineteenth and even into the twentieth century, many Canadian policy makers clung to the notion that, if Indian people were prevented from removing themselves from the cultural influences of the surrounding non-Indian society, they would eventually be absorbed piecemeal and simply disappear as distinct peoples.

As our historical review of the relationship between Aboriginal and non-Aboriginal peoples showed, from the moment of their arrival, the political and commercial manoeuvring of the various European powers drew Aboriginal nations into their conflicts, further reducing Aboriginal numbers and increasing their dependence on European trade goods and arms. Finally, after more than 200 years of trade, warfare and social interaction, the victorious British Crown attempted to stabilize relations between Indian nations and colonists. The method chosen was a public proclamation confirming the nature, extent and purpose of the unique relationship that had developed in North America between the British Empire and Indian nations.

The *Royal Proclamation of 1763* accomplished purposes already reviewed in some detail in our historical outline. Two of them are of particular significance here. First, the Proclamation drew a line separating Indian tribal lands from those forming part of the colonies. These lands were reserved for Indian peoples' exclusive use and possession. In that way the Crown hoped to remove the constant colonial pressure for lands that had pushed many tribal nations into the interior and that threatened to lead to new wars between Indian peoples and colonists.

By guaranteeing Indian lands, the Crown established itself as their protector, thereby undertaking a role that continues today. It is reflected in the reserve system, whereby separate tracts of land – whether set aside originally by the imperial Crown, colonial governments, the federal government or provincial governments[17] – continue to be reserved as Indian lands under a special legal regime that differentiates them from other lands within provincial or territorial boundaries.

A second thing the Royal Proclamation did was initiate an orderly process whereby Indian land could be purchased for settlement or development. Before that process, private individuals – land speculators and colonial officials – had often perpetrated frauds on Indian sellers and non-Indian purchasers alike. This had greatly damaged relations between Indian nations and the Crown and produced instability in commercial relations that was harmful to both Indian and colonial economic interests. In future, lands could be surrendered only on a nation-to-nation basis, from the Indian nation to the British Crown, in a public process in which the assembled Indian population would be required to consent to the transaction.

The present *Indian Act* continues to reflect the land surrender procedure first set out in the Royal Proclamation. It must be noted, however, that the federal government has failed, for reasons that will become evident later, to recognize the original "Nations and Tribes" to which the Proclamation refers and has instead substituted for them the artificial legal entities known as bands. Despite this, the land surrender provisions are the centrepiece of the entire act and the provisions most ardently defended by First Nations today.

By clearly recognizing a right to land and by mandating a formal nation-to-nation land surrender process, the Royal Proclamation did more than recognize a particular method of setting aside and purchasing land. It also recognized the autonomy of tribal nations as self-governing actors within the British imperial system in North America. Indian peoples were not mere collections of private individuals like other Crown subjects; they were distinct peoples – political units within the larger political unit that was eventually to become Canada. The early British imperial system was tripartite: it included the imperial Crown, the colonies and the Indian nations. Today, Canada is an independent state, again

represented by a tripartite system in the form of the federal government, provincial and territorial governments and Aboriginal peoples.

In 1763 it was not considered necessary to specify the precise nature of the relationship between Indian nations and the Crown. It was self-evidently one of mutual respect and mutual recognition. The Supreme Court of Canada has reviewed the nature of relations between the Crown and Indian nations during this period in Canadian history, concluding that for the British it was "good policy to maintain relations with them very close to those maintained between sovereign nations."[18]

The *Royal Proclamation of 1763* provides the first model of that early imperial tripartite relationship. It was not quite one of complete equality between sovereign nations, because by then many tribal nations had been greatly weakened and were no longer fully autonomous. By the same token, however, it was not one of subjugation, since relations in the most important areas were conducted on a nation-to-nation basis. In short, it was and remains a unique relationship that is well captured in the following passage from the Proclamation:

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...
>
> ...if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively...[19]

The paradoxical aspect of this model of relations revolves around the relationship of the Crown and tribal nations to Indian lands. The reference is to nations and tribes connected to and living under Crown protection on lands within its dominions and territories. But at the same time, the Crown cannot simply appropriate these lands; it must purchase them from the nation or tribe on a nation-to-nation basis.

This original paradox raises the dilemma of the Crown and Indian nations simultaneously having sovereign rights to the same land. Through sharing the land, they shared sovereignty in a way that was unique to the situation in North America. There were no precedents for this singular relationship. In retrospect we now recognize it as the prototype for the later federal model that emerged first in the United States and then in Canada: governments sharing the same territory, but with different or shared powers in relation to that territory.

In this relationship, Indian nations agreed to share the land with the Crown. The Crown agreed that a portion of those lands would be set aside for exclusive Indian occupation and to protect the overall relationship. In a sense, this was the original confederal bargain between them as partners. In the United States the bargain would be recast by the new republic in slightly different terms. Indian nations were not part of the United States, yet at the same time they were in a political relationship with the United States. This is the familiar 'domestic dependent nations' formula – itself a paradoxical statement – that has permitted American Indian tribes to continue, in the face of enormous centrifugal pressures, to assert their nation status up to present times.[20] In Canada, however, Crown/Indian relations took a somewhat different course.

For several generations the nation status of tribes in the British possessions was respected by imperial authorities and by the colonies. At a certain point, however, this carefully constructed and maintained model of imperial federalism began to come apart. Through a series of culturally based misunderstandings and the emergence of a radically different interpretation of the protective relationship among British and Canadian policy makers, a fundamental shift occurred that has altered the balance between the original partners in Confederation. Ethnocentric notions based on the claimed cultural superiority of the settler society prodded imperial and colonial officials to reinterpret the original bargain between the Crown and tribal nations.

More than a century of official measures aimed first at civilizing and then assimilating Indian people caused the original partnership to become completely unbalanced. This led to cultural confrontation between Canadian officials and Indian people that has evolved into political confrontation and legal challenges by Indian representatives to the assumption of political, social and cultural jurisdiction over Indian communities in Canada. The *Indian Act* reflects the imbalance in the relationship. Putting the relationship back into balance is one of the major goals of this Commission.

3. Indian Policy: Protection, Civilization and Assimilation

The early history of tripartite relations between Indian nations and the Crown in British North America during the stage of displacement can be described in terms of three phases in which first protection, then civilization, and finally assimilation were the transcendant policy goals. Although they may appear distinct from each other, in fact, these policy goals merge easily. They evolved slowly and almost imperceptibly from each other through the nineteenth century when the philosophical foundations of the *Indian Act* were being laid.

For example, the measured separation between tribal nations and the settler society implied by Crown protection of tribal lands and Indian autonomy

merged almost effortlessly for non-Indian officials into the related goal of 'civilizing' the Indians. The transition was aided by the fact that Indian people often requested or consented to official assistance in acquiring tools to adapt to the growing presence of non-Indian settlements around them. Mission schools, training in farming and trades, and instruction in Christianity were the hallmarks of this stage in the relationship. More ominously, however, new civilian Indian department officials often came to the job with attitudes marked by emerging notions of European racial and cultural superiority. They lacked the inherent respect for Indian social and political culture that had been a feature of the eighteenth century, when there was greater equality in the overall relationship between the Crown and First Nations.

For these officials, the transition to a policy of encouraging and even forcing Indian people to assimilate into colonial and later Canadian society was a short step from the civilizing policy. Often the churches and humanitarian societies – both of which called for measures to alleviate the often desperately poor conditions of Indian people and communities – assisted this transition, seeing in it the only way to save Indian peoples from what appeared at the time to be their eventual and inevitable destruction as separate entities by the social and economic forces of mainstream colonial society.

In all three phases, humanitarians, church and government officials saw themselves as supporting the original and primary policy of protection. The goal remained; only the means had changed. The measured separation desired and called for by Indian people themselves eventually came to be seen by government officials as ultimately harmful to Indian interests. To them, it simply preserved Indian people in a state of social inferiority. Indian protests against assimilative policies were interpreted as proof of their racial and cultural inferiority: they simply did not know what was good for them. The relative strength of colonial society in comparison to the increasing weakness of Indian communities was sufficient proof to Indian department officials of the inherent rightness of their perspective and ample justification for the paternalistic approach they had taken over the years.

Thus, in the years following the *Royal Proclamation of 1763*, the Crown undertaking to protect Indians and their lands from settler encroachment was an evident and paramount characteristic of the relationship between them in Upper and Lower Canada. It was somewhat different in the Maritimes, where the Mi'kmaq and Maliseet nations, former enemies of the British Crown, were not treated with the same respect by British authorities after 1763. Nonetheless, in the Maritimes, as in Upper and Lower Canada, reserves were created to further the Crown goal of protection. Indian people and their non-Aboriginal supporters were forced to petition the authorities to return to them small tracts of their own lands in the Maritimes, whereas reserves were freely offered by the British authorities elsewhere.[21]

Reserves were not new. They had been a feature of relations between the French and their Indian allies, and the practice of creating them was carried over by the British in what is now southern Ontario.[22] In this respect, the goal of maintaining a line between Indian and colonial lands was upheld. Overall responsibility for relations with Indians was lodged in the imperial Indian department, first created in 1755 as a branch of the military. But whether reserves were established or not, in all cases the clear and underlying goal of Crown/Indian relations was to secure and maintain the commercial and military alliances with tribal nations upon which the welfare of British North America still depended.

With the massive influx of settlers in the late eighteenth and early nineteenth century and the need to find additional land for settlement, the reserve policy assumed new importance. At the same time, with the establishment of peace between the United States and the British colonies, the need for Indian peoples as military allies waned. Tribal nations also became more and more impoverished as the game and furbearing animals on which they depended for sustenance and commerce disappeared. Traditional lifeways became more difficult to maintain. Many tribes and bands came to rely on the symbolic payments and gifts that accompanied formal commemorations of treaty signings and on treaty annuity payments. The result was a weakening of their relative bargaining position with the British authorities and a growing dependence upon them.

At the same time, new ideas were sweeping the British Empire. Missionaries and humanitarians, appalled at the deterioration in living conditions in areas where settlements were devastating traditional Aboriginal cultures and economies, called for action to save them. But imperial and colonial officials, imbued with notions of racial superiority, preferred new policies to assist Indian people to evolve on a European model and to become 'civilized' farmers and tradesmen. Financial pressures coincided with these trends as the colonial office in London questioned the expense of continuing to maintain Indian nations as military allies.

In the face of these pressures, the first formal inquiry into Indian conditions in Canada was undertaken by Major General H.C. Darling, military secretary to the governor general. His 1828 report became the foundation of the civilization program, outlining a formal policy based on establishing Indians in fixed locations where they could be educated, converted to Christianity and transformed into farmers.[23] The goal of this policy was to enable Indian communities to become more economically self-sufficient. This approach was influenced by an experiment by the Methodist Church with the Mississauga of the Credit River in southern Ontario. The latter had written to the lieutenant governor of Upper Canada in 1827, thanking him for his support and expressing their happiness that "flows from a settled life, industry and a steady adherence to the great commands

of the great Spirit" and their hope to "arise out of the ruins of our great fall, and become a people...like our neighbours the white people".[24]

Thus, the civilizing policy began to go forward with the establishment of additional reserves in southern Ontario, in the hope that the early success being achieved among the Mississauga would be repeated elsewhere. There was no question, however, of imposing this policy on Indian communities. Indian self-government was to be fully respected by seeking the consent of chiefs before introducing any of the proposed civilization measures. As the letter from the Mississauga indicates, at first these measures were often welcomed by Indian nations as they prepared for the future.

While this experiment was going on, another entirely different approach was being taken by the lieutenant governor of Upper Canada, Sir Francis Bond Head. After visiting every Indian community where civilizing efforts were being conducted, he concluded that Indians could not be civilized and were doomed as a race to die out over time. He proposed to relocate Indians to Manitoulin Island, where they could be protected in a traditional lifestyle until their inevitable disappearance as separate peoples. To this end he persuaded some bands to surrender their Aboriginal title to large areas of reserved lands in southern Ontario in exchange for lands on Manitoulin Island. Church groups working to convert and civilize Indians at that time were angered by his approach, since it ran counter to the liberal and philanthropic ideas then coming into vogue in Great Britain and the colonies.

Thus, in the 1830s the overlap between these policy approaches saw two distinct initiatives in operation at the same time, each favouring a different approach to protecting Indians. Darling's was to help them adjust to the demands of mainstream colonial society through measures designed to augment and eventually supplant their traditional cultures. Bond Head's was the opposite: to isolate them so they could preserve their traditional lifeways a little longer. Each one seemed to assume that, left to their own devices, Indians were inherently unable to respond to the new economic and social climate of British North America.

By the end of the decade, both experiments had failed. In the case of Darling's civilization program, Indians were not ready to abandon their traditional ways so quickly or completely. It also appears that the various church groups bickered among themselves, thereby hindering the effectiveness of the program. Bond Head's approach faltered because Indians became increasingly wary of surrendering their rights to their traditional lands. The removal policy had also aroused the opposition of philanthropic and humanitarian elements in British and colonial society, which were genuinely concerned about declining material and social conditions among Indian people.

During this period several other official inquiries were commissioned to investigate what was increasingly becoming known as the 'Indian problem'.

Each one repudiated the approach taken by Bond Head and supported the civilization policy. Only one is known to have consulted extensively with Indians regarding their views, and then only on the issue of discontinuing the system of 'presents', designed to reinforce the treaty relationship.[25] In fact, it was not until after the Second World War that any systematic effort was made to seek the views of Indian people on policy issues that affected them.

In support of the policy of protection, legislation was passed in 1839 in Upper Canada expressly declaring Indian reserves to be Crown lands and therefore off-limits to settlers.[26] By the 1840s imperial and colonial officials were impatient with what they saw as slow progress in civilizing Indians. Although imperial financial concerns were present, an element of cultural superiority and intolerance was colouring official attitudes more and more. Something similar was occurring in the United States. Alexis de Tocqueville, a French writer travelling in the United States, described the generally negative feelings and attitudes of the settlers toward Indians in terms that applied to the British colonies as well:

> With their resources and their knowledge, the Europeans have made no delay in appropriating most of the advantages the natives derived from their possession of the soil; they have settled among them, having taken over the land or bought it cheaply, and have ruined the Indians by a competition which the latter were in no position to face. Isolated within their own country, the Indians have come to form a little colony of unwelcome foreigners in the midst of a numerous and dominating people.[27]

In the United States the Indian policy was similar to that advocated by Bond Head: removal of entire tribes to more isolated locations west of the Mississippi River where they could pursue their own cultures and develop their own political institutions according to their aspirations and capacities. In Canada, yet another commission was established to study the problem. Its report would set Canadian Indian policy on an entirely different path from that taken in the United States. In most important respects, official Indian policy in Canada is still on the path set by that commission.

4. Civilization to Assimilation: Indian Policy Formulated

Established by Governor General Sir Charles Bagot, the commission reported in 1844.[28] Generally, the commissioners found that there were serious problems with squatters on Indian lands, poor records of land sales or leases, and inept official administration of band funds; that the wildlife necessary for subsistence was fast disappearing from settled areas; and that Indians generally were suffering from alcohol abuse.

To bring order to the development of Indian policy and to end the varying practices in the different colonies, centralization of control over all Indian matters was recommended. This recommendation later bore fruit, first in 1860 with the passage of the *Indian Lands Act.* It transferred authority for Indians and Indian lands to a single official of the united Province of Canada, making him chief superintendent of Indian affairs.[29] When the Province of Canada united with Nova Scotia and New Brunswick in 1867 to form the Dominion of Canada, section 91(24) of the *Constitution Act, 1867* gave legislative authority over Indians and lands reserved for the Indians to Parliament and removed it from the provincial legislatures.

To combat settler encroachments and trespassing, the Bagot Commission recommended that reserves be properly surveyed and illegal timber cutting eliminated by a timber licensing system. Indians were to be encouraged to take up farming and other trades and were to be given the training and tools required for this purpose in lieu of treaty gifts and payments. Education was considered key to the entire enterprise; thus boarding schools were recommended as a way of countering the effects on young Indians of exposure to the more traditional Indian values of their parents. Christianity was to be fostered.

The commissioners were concerned that Crown protection of Indian land was contrary to the goal of full citizenship in mainstream society. In their view, maintaining a line between Indian and colonial lands kept Indians sheltered from various aspects of colonial life such as voting (only landowners could vote at that time), property taxation, and liability to have one's property seized in the event of non-payment of debt. The Bagot Commission therefore recommended that Indians be encouraged to adopt individual ownership of plots of land under a special Indian land registry system. They were to be encouraged to buy and sell their plots of land among themselves as a way of learning more about the non-Indian land tenure system and to promote a spirit of free enterprise. However, the reserve system was not to be eliminated all at once – the transition was to be gradual, and in the meantime, no sales of Indian land to non-Indians were to be permitted.

Crown financial obligations were to be reduced by taking a census of all Indians living in Upper Canada. This would enable officials to prepare band lists. No Indian could be added to a band list without official approval, and only persons listed as band members would be entitled to treaty payments. It was recommended that the following classes of persons be ineligible to receive these payments: all persons of mixed Indian and non-Indian blood who had not been adopted by the band; all Indian women who married non-Indian men and their children; and all Indian children who had been educated in industrial schools. These recommendations were adopted in one form or another in the years after the Bagot Commission issued its report and formed the heart of the Indian status, band membership and enfranchisement provisions of the *Indian Act.*

The commissioners were also opposed in principle to the idea of a separate imperial Indian department, believing that it tended to breed dependency. However, until it could be dispensed with, it was recommended that the two branches of the existing Indian department be reunited under an official who would be located in the seat of government where broader social policy was made. This recommendation ultimately led to the creation of a more or less permanent department of government to deal exclusively with Indians and Indian lands. Today it is called the Department of Indian Affairs and Northern Development and is still located in the seat of government in the Ottawa-Hull region.

Initially, Indians were generally in favour of the Bagot Commission's proposals on education, since they still wished to co-exist with the new settler society and knew that education was the key to their children's futures. However, once the assimilationist flavour of the program became evident, opposition quickly increased. They also opposed the restrictions on eligibility to receive treaty payments. This was viewed as interference with internal band matters and as a way of ultimately reducing all payments. There was, in addition, strong resistance to the notion of individual allotment of reserve lands, as many feared – rightly – that this would lead to the loss of these lands and to the gradual destruction of the reserve land base.

Although it stopped short of endorsing forced assimilation, which would come later, there can be no question that the Bagot Commission recommended a far-reaching and ambitious program that is still in operation today. Many of the current provisions in the *Indian Act* can trace their origins to these early recommendations.

In any event, land legislation was passed shortly after, in 1850, in Upper and Lower Canada to put some of these recommendations into effect by dealing with the threat to Indian lands posed by settler encroachments.[30] It became an offence to deal directly with Indians for their lands, trespass on Indian lands was formally forbidden, and Indian lands were made exempt from taxation and seizure for debts. Similar provisions continue in the current *Indian Act* and are generally valued by Indian people, who see them as a bulwark against erosion of the reserve land base.

However, in that early legislation appears the first clear indication of the marked differences in the philosophy and perspectives of Indians and non-Indian officials. This pattern, which would be repeated throughout Canadian history right up to the present, has involved building on Indian concerns and carrying remedial measures much further than desired by Indians themselves. For example, by 1850 the presence of substantial numbers of non-Aboriginal men on Indian reserves had apparently begun to alarm some tribal and band governments. Although married to Indian women and hence part of the reserve community, these men brought with them ideas and perspectives that appeared to threaten traditional Indian culture, particularly as it affected land use. Both

1850 land protection acts defined the term 'Indian', for purposes of residency on the protected reserve land base, for the first time in Canadian history, introducing the notion of race as the determining factor. Only a person of Indian blood or someone married to a person of Indian blood would be considered an Indian.

In response to Indian concerns, that definition was narrowed in amendments to the Lower Canada legislation one year later, specifically to exclude from the definition all non-Aboriginal men married to Indian women.[31] However, non-Aboriginal women married to Indian men were still considered Indian in law. Thus, for the first time Indian status and residency rights began to be associated with the male line. Subsequent versions of the definition of 'Indian' went back and forth on the question of whether non-Indian men could acquire Indian status through marriage. By the time the first comprehensive *Indian Act* was enacted in 1876, it had become accepted policy that non-Indian men could not acquire Indian status through marriage.[32]

The next important official inquiry into the conditions of Indians in the colonies was that of the Pennefather Commission in 1858.[33] Established in response to the continuing emphasis on financial retrenchment by imperial authorities, its mandate was to report upon "the best means of securing the future progress and civilization of the Indian tribes" and "the best mode of so managing the Indian property as to secure its full benefit to the Indians, without impeding the settlement of the country."[34]

Commissioners found generally that the relationship between the Crown and Indian nations had changed a great deal over the past few years as a result of the civilization policy, with Indians slowly being weaned from dependence on the Crown. Although commissioners were optimistic about the possibility that Indians might be "reclaimed from their savage state" over time, they felt themselves forced to "confess that any hopes of raising the Indians as a body to the social or political level of their white neighbours, is yet but a glimmer and distant spark."[35] Slow progress in the civilizing program was attributed to the "apathy" and "unsettled habits" of Indians rather than to any shortcomings in the civilization policy or its administration.[36]

Ultimately, the Pennefather Commission recommended moves toward a policy of complete assimilation of Indians into colonial society. It called, for example, for direct allotment of lands to individual Indians instead of creating communally held reserves. This policy was carried out later in Manitoba in the case of the Métis people, where individual plots of land were awarded instead of collective Métis lands.[37] The commission also proposed collecting smaller bands in a single reserve, consolidating the various pieces of Indian legislation, legislating the dismantling of tribal structures, and eventually abolishing the Indian department once the civilizing efforts had borne fruit. As we will see, these recommendations were acted upon in one way or another over the years.

5. The *Gradual Civilization Act*: Assimilating Civilized Indians

Before the final report of the Pennefather Commission was published, the *Gradual Civilization Act* was passed in 1857.[38] It applied to both Canadas and was one of the most significant events in the evolution of Canadian Indian policy. Its premise was that by eventually removing all legal distinctions between Indians and non-Indians through the process of enfranchisement, it would be possible in time to absorb Indian people fully into colonial society.

Enfranchisement, which meant freedom from the protected status associated with being an Indian, was seen as a privilege. There was thus a penalty of six months' imprisonment for any Indian falsely representing himself as enfranchised. Only Indian men could seek enfranchisement. They had to be over 21, able to read and write either English or French, be reasonably well educated, free of debt, and of good moral character as determined by a commission of non-Indian examiners. For those unable to meet these criteria, a three-year qualifying period was allowed to permit them to acquire these attributes. As an encouragement to abandon Indian status, an enfranchised Indian would receive individual possession of up to 50 acres of land within the reserve and his per capita share in the principal of the treaty annuities and other band moneys.

An enfranchised man did not own the 50 acres of land allotted to him, however. He would hold the land as a life estate only and it would pass to his children in fee simple ownership upon his death. This meant that it was inalienable by him, but could be disposed of by his children once they had received it following his death. If he died without children, his wife would have a life estate in the land but upon her death it would revert to the Crown – not to the band. Thus, it would no longer be reserve land, thereby reducing the overall amount of protected land for the exclusive use and occupation of the reserve community. Where an enfranchised man died leaving children, his wife did not inherit the land. She would have a life estate like his and it would pass to the children of the marriage once she died.

Enfranchisement was to be fully voluntary for the man seeking it. However, an enfranchised man's wife and children would automatically be enfranchised with him regardless of their wishes, and would equally receive their shares of band annuities and moneys. They could not receive a share of reserve lands.

The provisions for voluntary enfranchisement remained virtually unchanged through successive acts and amendments, although some elements were modified over the years. Other developments in enfranchisement policy in subsequent legislation, such as making enfranchisement involuntary, will be described later in the discussion of the *Indian Act*.

The voluntary enfranchisement policy was a failure. Only one Indian, Elias Hill, was enfranchised between 1857 and the passage of the *Indian Act* in 1876.

His story was told in Chapter 6. Indians protested the provisions of the *Gradual Civilization Act* and petitioned for its repeal. In addition, Indian bands individually refused to fund schools whose goals were assimilative, refused to participate in the annual band census conducted by colonial officials, and even refused to permit their reserves to be surveyed for purposes of the 50-acre allotment that was to be the incentive for enfranchisement.

The passage of the *Gradual Civilization Act* marked a watershed in the long history of Indian policy making in Canada. In many ways, the act and the response it generated were precursors of the 1969 white paper termination policy in terms of souring Indian/government relations and engendering mutual suspicion. The impact of this legislation was profoundly negative in many ways.

The new policy created an immediate political crisis in colonial/Indian relations in Canada. The formerly progressive and co-operative relationship between band councils and missionaries and humanitarian Indian agents broke down in acrimony and political action by Indians to see the act repealed. Indian people's refusal to comply and the government's refusal to rescind the policy showed that the nation-to-nation approach had been abandoned almost completely on the Crown side. Although it was reflected in subsequently negotiated treaties and land claims agreements, the Crown would not formally acknowledge the nation-to-nation relationship as an explicit policy goal again until the 1980s.

By virtually abandoning the Crown promise, implied by the *Royal Proclamation of 1763* and the treaty process, to respect tribal political autonomy, the *Gradual Civilization Act* marked a clear change in Indian policy, since civilization in this context really meant the piecemeal eradication of Indian communities through enfranchisement. In the same way, it departed from the related principle of Crown protection of the reserve land base. Reserve lands could be reduced in size gradually without a public and formal surrender to which the band as a whole had to agree. No longer would reserve land be controlled exclusively by tribal governments.

The *Gradual Civilization Act* was also a further step in the direction of government control of the process of deciding who was or was not an Indian. While the 1850 Lower Canada land act had begun this process by defining 'Indians' for reserve residency purposes, this new legislation set in motion the enfranchisement mechanism, through which additional persons of Indian descent and culture could be removed from Indian status and band membership. In these two laws, therefore, can be seen the beginning of the process of replacing the natural, community-based and self-identification approach to determining group membership with a purely legal approach controlled by non-Aboriginal government officials.

Moreover, the *Gradual Civilization Act* continued and reinforced the sexism of the definition of Indian in the Lower Canada land act, since enfranchisement of a man automatically enfranchised his wife and children. The consequences for the wife could be devastating, since she not only lost her connection to her community, but also lost the right to regain it except by marrying another man with Indian status.

Finally, the tone and goals of the *Gradual Civilization Act*, especially the enfranchisement provisions, which asserted the superiority of colonial culture and values, also set in motion a process of devaluing and undermining Indian cultural identity. Only Indians who renounced their communities, cultures and languages could gain the respect of colonial and later Canadian society. In this respect it was the beginning of a psychological assault on Indian identity that would be escalated by the later *Indian Act* prohibitions on other cultural practices such as traditional dances and costumes and by the residential school policy.

6. End of the Tripartite Imperial System

Between the passage of the *Gradual Civilization Act* and Confederation several events and legislative measures cemented the change in imperial Indian policy. They included the ending of treaty presents to bands (the symbols of the alliance between the Crown and Indian nations) in 1858 and the passage of the *Indian Lands Act* in 1860. Although this legislation formalized the procedure for surrendering Indian land in terms reflective of the procedure set out in the *Royal Proclamation of 1763*, it also transferred authority for Indians and Indian lands to an official responsible to the colonial legislature, thus breaking the direct tie between Indian nations and the British Crown upon which the nation-to-nation relationship rested.

This was a clear departure from the Crown/colony/Aboriginal tripartite system described earlier. The *Indian Lands Act* legislation replaced it with another model of direct colonial/Aboriginal relations. The withdrawal of the British Crown as the impartial arbiter and mediator between the weakened tribal nations and the ascendant and land-hungry colonies was a step that would have important consequences for Indians in the future. Indians in the Canadas who were aware of the transfer of responsibility for Indian affairs from the imperial Crown to the Province of Canada generally opposed it, preferring to manage their own affairs than to be managed by the colonial government, which they distrusted and feared:

> The Imperial Govt. is unwilling to find us officers as Formerly and withdraw wholly its protection we deem that there is a sufficient intelligence in our midst to manage our own affairs.[39]

The British parliamentary select committee looking into Aboriginal issues had warned in its 1837 report against entrusting the management of Aboriginal relations to the local legislatures in the British colonies, fearing a conflict of

interest between the duty of protection and that of responding to the desires of their electors:

> The protection of the Aborigines...is not a trust which could conveniently be confined to the local Legislatures. In proportion as those bodies are qualified for the right discharge of their functions, they will be unfit for the performance of this office, for a local legislature, if properly constituted, should partake largely in the interest, and represent the feelings of settled opinions of the great mass of people for whom they act. But the settlers in almost every Colony, having either disputes to adjust with the native Tribes, or claims to urge against them, the Representative body is virtually a party, and, therefore, ought not to be the judge in such controversies; ...we therefore advise, that, as far as possible, the Aborigines be withdrawn from its control.[40]

The government ignored this advice. From that point on, the authorities entrusted with managing relations with Indian nations in Canada could no longer necessarily be described as disinterested. They were 'local' in a political as well as a geographic sense.

At Confederation, Parliament was given law-making powers over "Indians, and Lands reserved for the Indians" in section 91(24) of what was then referred to as the *British North America Act*. Indian nations as such were not recognized in this new tripartite Crown/dominion/provincial scheme.

From a certain perspective, Indian nations were outside and inside Confederation at the same time. They were outside in the sense that they were still self-governing, but inside to the extent individual Indians cared to renounce their collective identity and be absorbed into the mainstream body politic. They could in this sense emigrate to Canada without having to leave their own country.

At Confederation, the secretary of state became the superintendent general of Indian affairs and, in 1868, acquired control over Indian lands and funds through federal legislation consolidating much of the previous decade's land protection measures. The definition of 'Indian' was finalized on a patrilineal model, excluding non-Indian men who married Indian women, but including non-Indian women who married Indian men. Thus the Lower Canada rule of 1851 became national policy.[41]

7. The *Gradual Enfranchisement Act*: Responsible Band Government

Two years after Confederation the *Gradual Enfranchisement Act* marked the formal adoption by Parliament of the goal of assimilation.[42] It repeated the earlier voluntary enfranchisement provisions and introduced stronger measures that

would psychologically prepare Indians for the eventual replacement of their traditional cultures and their absorption into Canadian society.

With these provisions Parliament entered a new and definitive phase regarding Indian policy, apparently determined to recast Indians in a mould that would hasten the assimilation process. The earlier *Gradual Civilization Act* had interfered only with tribal land holding patterns. The *Gradual Enfranchisement Act*, on the other hand, permitted interference with tribal self-government itself. These measures were taken in response to the impatience of government officials with slow progress in civilization and enfranchisement efforts. Officials were united in pointing to the opposition of traditional Indian governments as the key impediment to achieving their policy goals. This new act, it was hoped, would allow those traditional governments to be undermined and eventually eliminated.

The primary means of doing this was through the power of the superintendent general of Indian affairs to force bands to adopt a municipal-style 'responsible' government in place of what the deputy superintendent general of Indian affairs referred to as their "irresponsible" traditional governance systems.[43] This new system required that all chiefs and councillors be elected for three-year terms, with election terms and conditions to be determined by the superintendent general as he saw fit. Elected chiefs could be deposed by federal authorities for "dishonesty, intemperance or immorality." None of the terms was defined, and the application of these criteria for dismissal was left to the discretion of the Indian affairs officials upon receiving a report from the local Indian agent.

Only Indian men were to be allowed to vote in band elections, thereby effectively removing Indian women from band political life. Indian women were not given the right to vote in band elections until the 1951 *Indian Act*.[44]

The authority accorded the elective band councils was over relatively minor matters: public health; order and decorum at public assemblies; repression of "intemperance and profligacy"; preventing trespass by cattle; maintaining roads, bridges, ditches and fences; constructing and repairing schools and other public buildings; and establishing pounds and appointing pound keepers. There was no power to enforce this authority. Thus, under this governance regime Indian governments were to be left with mere shadows of their former self-governing powers. Moreover, even in these limited areas their laws would be ineffective if they were not confirmed by the governor in council (the cabinet). This restricted list of powers later became the basis for the powers accorded band councils under the later *Indian Act*.

Although referred to in the legislation as the "Tribe in Council", it is clear that the elective council system was not at all tribal in the larger sense of the nations or tribes referred to in the *Royal Proclamation of 1763*. It was restricted to individual reserves and to the inhabitants of individual reserves – a group that would be described in the later *Indian Act* of 1876 as a band. There was simply no

provision for traditional groupings going beyond the individual band level. In fact, the goal of the measures was specifically to undermine nation-level governance systems and the broader nation-level associations of Indians more generally.[45]

Traditional Indian patterns of land tenure were also affected. On reserves that had already been sub-divided into lots, a system of individual property holding could be instituted by requiring that residents obtain a 'location ticket' from the superintendent general. Otherwise, reserve residents would not be considered to be lawfully holding their individual plots of land. The intention was to establish a bond between Indians and their individual allotments of property in order to break down communal property systems and to inculcate attitudes similar to those prevailing in mainstream Canadian society. This policy may have been inspired by similar efforts in the United States, where individual allotments had always been used as a method of terminating tribal existence, particularly in the period between 1887 and the early part of the twentieth century.[46] Individual land allotments were also used when lands were set aside for the Métis people of Manitoba in 1871.[47]

The *Gradual Enfranchisement Act* also provided for the first time that an Indian woman who married a non-Indian would lose Indian status and band membership, as would any children of that marriage. In a similar way, any Indian woman who married an Indian from another band and any children from that marriage would become members of the husband's band. As discussed in Volume 4, Chapter 2, which examines Aboriginal women's perspectives, the sexism that had been bubbling beneath the surface of Indian policy was now apparent and would become an element of the *Indian Act* when it was passed a few years later.

The manifest unfairness of these provisions led to Indian complaints. For example, the Grand Council of Ontario and Quebec Indians wanted the provision concerning marrying out amended so that "Indian women may have the privilege of marrying when and whom they please without subjecting themselves to exclusion or expulsion from the tribe."[48]

Originally designed for the more 'advanced' Indians of Ontario and Quebec, this legislation was later extended to Manitoba and British Columbia and eventually to all of Canada. The band and band council system of the *Gradual Enfranchisement Act* and later the *Indian Act* and all it entailed were thus made uniform throughout Canada.

8. The *Indian Act* and Indians: Children of the State

In the 1870s, Canada grew by the addition of Manitoba, British Columbia and Prince Edward Island as provinces, and by the conclusion of Treaties 1 to 7 with the Indian nations and tribes of western Canada. Treaties 8 to 11 would be

concluded in the west and north between 1899 and 1921. These important events in our national history were discussed in more detail in Chapter 6 of this volume.

In 1874 new federal legislation extended the existing Indian laws to Manitoba and British Columbia.[49] That legislation also widened earlier prohibitions on selling alcohol to Indians, making it an offence punishable by imprisonment for an Indian to be found "in a state of intoxication" and with further punishment possible for refusal by the Indian accused of drunkenness to name the supplier of the alcohol. Earlier anti-alcohol provisions had been passed expressly to protect Indians from what was then the scourge of their communities; they had been directed only at the sellers, however. The 1874 prohibition was the beginning of the creation of special offences applicable only to Indians.

In the midst of the treaty-making process going on in western Canada, the first *Indian Act* as such was passed in 1876 as a consolidation of previous Indian legislation.[50] Indian policy was now firmly fixed on a national foundation based unashamedly on the notion that Indian cultures and societies were clearly inferior to settler society. The annual report of the department of the interior for the year 1876 expressed the prevailing philosophy that Indians were children of the state:

> Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State. ...the true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.[51]

The transition from tribal nation in the tripartite imperial system to legal incompetent in the bilateral federal/provincial system was now complete. While protection remained a policy goal, it was no longer collective Indian tribal autonomy that was protected: it was the individual Indian recast as a dependent ward – in effect, the child of the state. Moreover, protection no longer meant maintaining a more or less permanent line between Indian lands and the settler society; it meant the very opposite. By reducing the cultural distance through civilizing and assimilating measures that would culminate in enfranchisement of Indians and reduction of the reserve land base in 50-acre chunks, it was hoped Indian lands would in this piecemeal fashion soon lose their protected status and become part of the provincial land regime.

In keeping with the clear policy of assimilation, the *Indian Act* made no reference to the treaties already in existence or to those being negotiated at the time it was passed. The absence of any significant mention of the treaty relationship

continues in the current version of the *Indian Act*.[52] It is almost as if Canada deliberately allowed itself to forget the principal constitutional mechanism by which the nation status of Indian communities is recognized in domestic law. The omission is curious and speaks volumes about official intentions with regard to Indian autonomy after 1876. In short, it may give rise to an inference that Canadian officials did not attach great importance to the nation-to-nation nature of the treaty relationship.

The *Indian Act* of 1876 created an Indian legislative framework that has endured to the present day in essentially the terms in which it was originally drafted. Control over Indian political structures, land holding patterns, and resource and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors. Indian policy was now clear and was expressed in the alternative by the minister of the interior, David Laird, when the draft act was introduced in Parliament: "[t]he Indians must either be treated as minors or as white men."[53] There was to be no middle road.

In general terms the 1876 act offered little that was different from what had gone before. It was much more complex and detailed, however, covering almost every important aspect of the daily lives of Indians on reserve. To facilitate the job of separating Indians from those who were not to enjoy the protection of Indian status and band membership, new definitions were provided to cover terms such as 'band' and 'reserve' in terms reflective of the policies already described.

The responsible cabinet minister was referred to in the legislation as the superintendent general of Indian affairs – a title first applied in the earlier legislation by which the new Province of Canada acquired control of Indian matters from the imperial Crown in 1860. In practice, this minister always had another, more politically significant portfolio. Thus, effective management of Indian affairs was left to the deputy superintendent general, an official who would be described today as a deputy minister.

As with earlier acts in relation to Indians, in the new *Indian Act* an Indian had to be someone "of Indian blood" or, in the case of mixed marriages, a non-Indian woman married to an Indian man. Indian women who married non-Indian men were not recognized as Indian. Thus, the exclusionary and sexist provisions described earlier found themselves incorporated into this first *Indian Act* in one form or another. In this same vein, Indian women were excluded from taking part in band land surrender decisions, since the new act restricted the procedure to "male members of the band of the full age of twenty-one years".[54] Not until 1951 would Indian women be permitted to participate in this most important band process.

Most of the protective features of earlier legislation were brought forward and made clear: no one other than an "Indian of the band" could live on or use

reserve lands without licence from the superintendent general; no federal or provincial taxation on real and personal property was permitted on a reserve; no liens under provincial law could be placed on Indian property and no Indian property could be seized for debt. All these features of the original act are still present in the current version and are credited by most Indian people with preserving the reserve land base from gradual erosion. Former president of the National Indian Brotherhood, George Manuel, supported this assessment, referring to this aspect of the *Indian Act* as follows:

> The main value of the Act from our point of view was that it was the one legal protection of our lands, and spelled out the basic rights and privileges of living on a reserve. But it also included a price tag.[55]

That price tag is discussed in more detail in the context of the many measures subsequently passed to increase federal government control and reduce the political and cultural autonomy of Indians under the *Indian Act* regime in the years between 1876 and 1951.

The 1876 *Indian Act* also carried the three-year elective band council system over from the *Gradual Enfranchisement Act* almost unchanged. Eventually, the term of office would be shortened to its current length of two years. The 1876 act repeated the list of band council by-law making powers in the earlier *Gradual Enfranchisement Act* (with one new power, that of allocating reserve land[56]), but they were still subject to governor in council confirmation. As with that earlier act, there was no power for a band to enforce these laws.

To foster individualism, the superintendent general of Indian affairs could now order that a reserve be surveyed and divided into lots and then require that band members obtain location tickets for individual plots of land. The voluntary enfranchisement provisions continued as described earlier, with two significant changes. First, an enfranchised man would receive his 50 acres in fee simple ownership at the end of the probationary period, thus making the land freely alienable right away. This provision was later changed so that no alienation could take place without the approval of the governor in council. In addition, Indians who earned a university degree or who became doctors, lawyers or clergymen were enfranchised automatically whether or not they wished to be enfranchised.

Although the *Indian Act* of 1876 applied throughout Canada, the bands of the west were excluded from many provisions (such as the elective band council system) because they were seen as insufficiently 'advanced' for these measures. They were also in the process of entering into Treaties 1 to 7 and still had sufficient military strength that it might have been unwise to attempt to subject them to federal legislation of this nature.

Thus, where a western tribe was not officially under the *Indian Act* (or the later *Indian Advancement Act* of 1884[57]) and where a treaty had been entered into, the Indian affairs department allowed Indians to hold elections under the close

supervision of the local Indian agent. In British Columbia the department often followed customary or traditional practice, while in the prairies the election practices were akin to appointments by the agent, since it was he who would usually initiate and control the entire procedure. In such cases, the agents would attempt to follow the *Indian Act* model, limiting terms to three years and otherwise ensuring that procedures similar to those followed in eastern Canada were adopted.

Indians in those parts of Canada subject to the *Indian Act* band council system refused to adopt it unless it was imposed on them. They were aware if they did adopt the system, the superintendent general of Indian affairs would have full supervisory and veto power over governance decisions made by the band. They would also be forced to concern themselves with the minor matters set out in the restrictive list of powers. Only one band is known to have adopted the *Indian Act* elective system voluntarily at the time.[58]

The 1880 consolidated version of the act created a new department of Indian affairs to replace the Indian branch of the department of the interior to manage Indian administration and to see to the appointment of local Indian agents. The new department remained under the direction and control of the department of the interior, however, with the minister of the interior being superintendent general of Indian affairs. The 1880 act also introduced a new provision denying band governments the power to decide how moneys from the surrender and sale of their lands or other resources would be spent. The governor in council thereby took the power to decide how to manage Indian moneys and retains it to this day.[59]

The 1880 consolidation also attacked the traditional band governments. Thus, where the superintendent general imposed the elective system on a particular reserve, traditional tribal leaders would no longer be permitted to exercise any powers at all. They would have to stand for election under the new *Indian Act* procedures, despite tribal or band traditions to the contrary. The new department of Indian affairs, concerned with implementing the assimilation policy, in this way showed its determination to foreclose the possibility of opposition from traditional elements on reserves by using the elective system.

Although band councils had by now been given the power to enforce their limited law-making powers, the 1880 version of the *Indian Act* required that proceedings be taken before a justice of the peace in the ordinary way before punishment was imposed. This meant that all proceedings regarding reserve events had to be taken off-reserve to a location where a justice of the peace could be found. Enforcement was all but impossible under these conditions.[60]

Aside from these few changes, the 1880 act reflected its 1876 predecessor and was the model on which all succeeding versions were erected. Although incremental amendments continued to be made to increase the power of the superintendent general and local Indian agents at the expense of bands and band councils, there was no real change in substance or approach for the next 70 years.

The only major legislative addition was the passage of the *Indian Advancement Act* in 1884, which was designed for the more 'advanced' Indians in eastern Canada and modelled on town councils.

The *Indian Advancement Act* gave the governor in council power to force bands to adopt its provisions regarding one-year elective band councils. There was to be no chief elected by the adult male electorate. Instead the elected band councillors would select one among them to be a chief councillor. For these purposes, the reserve was to be divided into electoral districts with a relatively equal number of voters. These provisions went further than those in the *Indian Act* by extending the powers of band councils into areas such as public health and by enabling band councils to tax the real property of all band members, whether held by location ticket or by an enfranchised former Indian who had received his 50 acres of reserve land.

However, and somewhat paradoxically, if the goal was to educate Indians in mainstream self-government matters, the superintendent general (typically through the local Indian agent) acquired vastly enlarged powers to direct all aspects of elections and to call, participate in and adjourn band council meetings. Although a few bands came under this act voluntarily,[61] most bands across Canada refused to adopt its provisions. The provisions of this act were later incorporated into the *Indian Act* and remained part of it until 1951.

9. The *Indian Act*: Oppressive Measures

From the passage of the first version of the *Indian Act* in 1876, amendments were brought forward almost every year in response to unanticipated problems being experienced by federal officials in implementing the civilization and assimilation policies to which they were committed. Many of these amendments eroded the protected status of reserve lands. Others enabled band governments to be brought under almost complete supervision and control. Yet others allowed almost every area of the daily life of Indians on reserves to be regulated or controlled in one way or another.

Many of the provisions, such as the prohibition on alcohol consumption, were often supported by large segments of the reserve population. However, the overall effect was ultimately to subject reserves to the almost unfettered rule of federal bureaucrats. The Indian agent became an increasingly powerful influence on band social and political matters and on most reserves came to dominate all important aspects of daily band life.

Most of these provisions and practices arose during the period between 1880 and the 1930s, when the assimilative thrust of Indian policy was at its peak. In many cases these measures were inspired by larger concerns about reducing federal government expenditures or supporting broader federal policies. For

example, much of the push for Indians to adopt farming in western Canada was prompted by a more general concern that they become more self-sufficient, so as to reduce the drain on federal expenditures. Similarly, much of the impetus for leasing 'unused' portions of reserves to non-Indian farmers and compelling surrenders of what were referred to as 'surplus' reserve lands came from broader economic policies in support of the war effort between 1914 and 1918.[62]

Many *Indian Act* provisions and practices associated with them were known at the time to be arbitrary and unfair. Others have come to be seen in that light with the benefit of hindsight. Some of these provisions and practices merit examination here to impart the flavour of the *Indian Act* regime that has coloured so profoundly the experiences of several generations of Indian people and their leaders. Thus, what follows is a review of some of the most oppressive amendments and practices in the *Indian Act* and its administration in the period up to and beyond the 1951 revision.

9.1 Protection of the Reserve Land Base

The *Gradual Civilization Act* first set the Crown on a course contrary to the procedures set out in the *Royal Proclamation of 1763* by allowing protected reserve land to be converted to provincial lands upon the enfranchisement of an Indian. The various versions of the *Indian Act* over the years continued in the same vein, permitting the piecemeal undermining and erosion of the reserve land base in many ways.

In 1894, for example, the superintendent general was given the power to lease reserve land held by physically disabled Indians, widows, orphans or others who could not cultivate their lands. Neither surrender nor band approval was required. In 1918 the superintendent general's power to lease reserve lands without a surrender was widened to include any uncultivated lands if the purpose of the lease was cultivation or grazing. This was intended to permit him to deal with the relatively large areas of western reserves that were not being cultivated intensively to support the war effort and was part of a broader national policy of encouraging Indian farmers to increase production and make reserve land available to non-Indian farmers, who had more machinery at their disposal and were therefore more efficient. When Arthur Meighen, the minister of the interior, was questioned in the House of Commons about the effect on Indians of having their best lands taken from them this way, he did not give a direct answer, replying instead that "we need [not] waste any time in sympathy for the Indian, for I am pretty sure his interests will be looked after by the Commissioner."[63]

Other reserve land use decisions were also removed from band council control. Thus, in 1894 bands lost the power to decide whether non-Indians could reside on or use reserve lands – the sole authority to do this was henceforth the

superintendent general's. The next year further amendments permitted the superintendent general to lease reserve land held by location ticket if the individual locatee wished to do so. There was no requirement that the band consent, even where the superintendent general intended to lease the land to non-Indians.

In 1919 the deputy superintendent general was given the power to grant location tickets to returning Indian war veterans, without band council consent, as part of the *Soldier Settlement Act*; the tickets were in lieu of the 160 acres of land promised veterans by the legislation. Although an intrusion into band autonomy and local self-government, this was less extreme than the scheme originally proposed – requiring Indian veterans to enfranchise if they wished to receive land under the *Soldier Settlement Act*. In the view of Deputy Superintendent Duncan Campbell Scott, this would have been a "fitting recognition of their services and...an object lesson to the other Indians".[64] The issues surrounding implementation of that act with respect to Indian veterans are discussed in more detail in Chapter 12 of this volume.

During this same period, great pressure was put on many bands to surrender portions of their reserves, usually so that the lands could then be sold to settlers or incorporated into adjacent municipalities. In response to an opposition question in 1906 regarding the 'unused' reserve lands in the west, interior minister Frank Oliver replied that the Indian affairs department was making efforts to acquire surrenders of 'surplus' Indian lands, noting in this regard that "if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for."[65] To induce such surrenders, an amendment to the *Indian Act* was passed that same year allowing up to 50 per cent of the proceeds of a surrender and sale to be distributed immediately to band members.[66]

The new provision was put to immediate use in the case of the St. Peter's reserve in Manitoba. A long and tangled history of dealings regarding reserve lands had led to serious controversy and to a subsequent recommendation by an investigating judge that the Indians be encouraged to surrender the entire reserve in order to clear up the legal problems that had arisen over the years. Accordingly, a surrender was arranged with much difficulty in 1907, upon which the judge noted that the government had "readily and cheaply got out of a nasty tangle."[67] The surrender was repudiated the next year, however, by a substantial number of band members on the basis of irregularities in the surrender process; they also asserted that they had been promised a sum of money by federal officials and had never received it.[68]

The inducements and other pressures for surrender were insufficient to satisfy the demand for additional Indian lands. Thus, public authorities were given the power to expropriate reserve land, without a surrender, in 1911. Any company, municipality or other authority with statutory expropriation power was enabled to expropriate reserve lands without governor in council authorization so long as it was for the purpose of public works. This power continues in the

current act, but now governor in council authorization is required. It has been used in the past and is strongly opposed by Indians because of its powerful invasive effect on the reserve land base. Even the threat of its use was often sufficient to force bands to comply by surrendering lands 'voluntarily'.

A good example of this provision's use and the threat of its use is provided by the relatively recent *Kruger* case in the Federal Court of Appeal. The case involved an action for breach of fiduciary obligation in the taking of two large tracts of land from the Penticton reserve in British Columbia for purposes of an airport. The first tract was expropriated in 1940 by the federal transport department, which had refused to follow the advice of Indian affairs officials who had helped negotiate a leasing arrangement instead. The second tract of land was lost through a surrender imposed by the threat of transport officials to expropriate reserve land, once again after a lengthy period of negotiation. In the second case, Mr. Justice Heald noted that transport officials "made little effort to seriously negotiate a settlement" and that "[t]heir only answer was to expropriate first and then negotiate thereafter."[69] Despite these facts, two other members of the court could not find a breach of the Crown's fiduciary obligation. Ultimately all three judges agreed, for different reasons, that the case ought to be dismissed.[70]

In 1911, another amendment to the *Indian Act* allowed a judge to issue a court order to move a reserve within or adjoining a municipality of a certain size if it was 'expedient' to do so. There was no need for band consent or surrender before the entire reserve was moved. This provision, along with the expropriation power, was subsequently referred to as the 'Oliver Act'. It was passed despite Parliament's knowledge that its implementation could lead to a breach of treaty rights. It arose in the context of a general desire among federal officials to reduce the size of many Indian reserves in order to promote development. The minister of the interior, Frank Oliver, dealt with the issue as follows:

> For while we believe that the Indian, having a certain treaty right, is entitled ordinarily to stand upon that right and get the benefit of it, yet we believe also that there are certain circumstances and conditions in which the Indian by standing on his treaty rights does himself an ultimate injury as well as does an injury to the white people, whose interests are brought into immediate conjunction with the interests of the Indians.[71]

The provision was considered necessary so that Parliament would not have to pass special legislation every time it wished to expropriate reserves adjoining towns. This had been done in the case of the Songhees reserve in British Columbia that same year (see Chapter 11 on relocations), and federal officials were seeking a more expeditious way of proceeding in such cases. The Songhees reserve had been moved from Victoria to a location outside the city in order to free up prime urban land for development.

Indians protested this provision, seeing in it an outright attack on the integrity of their reserve land base. In 1912, for instance, the Grand General Indian Council of Ontario passed a resolution condemning it.[72] Nonetheless, it was not repealed until 1951. Federal officials were able to apply this new provision almost immediately, seeking in 1915 to move a Mi'kmaq reserve in Sydney, Nova Scotia, to another location outside the city. The judge to whom the inquiry was directed granted the application, finding that it was in the public interest because "removal would make the property in that neighbourhood more valuable for assessment", since the "racial inequalities of the Indians, as compared with the white man, check to a great extent any move towards social development".[73] Similarly, the growing population of the band and the relatively small size of the reserve made it possible for the judge to conclude that it would be in the best interests of the Indians that the reserve be moved, despite the fact that they had previously indicated strong resistance to surrendering the reserve or moving to another location.

In other ways, too, Indians' control of their already small reserve land base was undermined through additional powers given to federal officials. In 1919, for example, the governor in council was authorized to make regulations allowing leases to be issued for surface rights on Indian reserves in connection with otherwise valid mining operations. This would allow such operations to make use of adjoining reserve lands where necessary in the event the band refused to surrender them. There was provision for compensating the occupant of the land over which a lease might be granted. In 1936, responsibility for Indian affairs was transferred from the department of the interior to the department of mines and resources. Two years later, further amendments clarified the leasing authority originally granted in 1919, dropping the statutory requirement for compensation.

By the time of the 1951 *Indian Act* revision, bands and band councils were no longer in a position to exercise any real control over their reserve lands beyond refusing to consent to land surrenders for sale or attaching conditions to such surrenders. This situation has continued almost unchanged to the present day. Many bands complain that the high degree of federal control over their land use decisions is preventing them from taking advantage of commercial and development opportunities in the modern Canadian economy. This issue is discussed in more detail in Volume 2 of this report.

9.2 Band Government and Law-Making Powers

In many cases amendments to the *Indian Act* gave the superintendent general further powers to control band councils. For example, in 1884 he was given the power to override a band council's refusal to consent to the enfranchisement of a band member who otherwise met the qualifications. He could also annul the election of any chief found guilty of "fraud or gross irregularity" in a band

council election and recommend to the governor in council that such a chief be prohibited from standing for election for six years. This provision was passed to counter the practice of many bands of holding sham elections and simply electing their traditional or hereditary leaders.

In 1914 the superintendent general received authority to make health regulations that would prevail over competing band council by-laws. This regulation-making power was enhanced to cover many more areas in 1936. Since these areas coincided with many of the band council law-making powers, this effectively allowed federal authorities to second-guess band councils.

In 1933 the authority of Indian agents was reinforced by an administrative directive requiring that all Indian complaints and inquiries be directed to the Indian affairs branch through the local agent. This produced the paradoxical situation of band complaints about their agents having to be directed to headquarters in Ottawa by the very agents complained about. Three years later other *Indian Act* amendments authorized Indian agents to cast the deciding vote in band council elections in the event of a tie and to preside at and direct band council meetings.

Although Indian agents began to be phased out in the 1960s, band councils still operate under the restrictive and limiting by-law making framework first developed in 1869. In the modern era, most band council by-laws are subject to either a ministerial power of disallowance or a requirement that the minister confirm them. In addition, the regulation-making authority of the governor in council may render band council by-laws irrelevant if they cover the same area as the regulation.

Moreover, subject to certain limits, recent judicial decisions have confirmed that general provincial laws may apply to Indians living on federally protected reserve lands.[74] In many situations both the provincial law and the band council by-law cover the same area. Traffic laws are a good example. So long as they do not actually conflict in a narrow constitutional sense, both sets of laws stand. This effectively undercuts band council authority and impedes the establishment of a band legal regime appropriate to the circumstances of the reserve concerned.

The limited and supervised law-making powers of bands under the *Indian Act* are a constant object of criticism by Indian people and appear to be more and more glaringly at odds with current trends toward enhanced autonomy for First Nations communities and general trends toward decentralization within the Canadian federation.

9.3 Enfranchisement

The concept of voluntary enfranchisement was given its first legislative expression in the *Gradual Civilization Act* of 1857 and remained virtually unchanged through successive versions of the *Indian Act* until relatively recently. It was not

a realistic or popular policy among Indians, most of whom had no intention of renouncing their personal and group identity by assimilating into non-Aboriginal society. Since only one Indian, Elias Hill, had been enfranchised voluntarily (see Chapter 6), federal officials decided to make it compulsory in some situations.

Thus, to the 'privilege' of voluntary enfranchisement, officials added compulsory enfranchisement in 1876 for those who obtained higher education. However, that first *Indian Act* also allowed unmarried Indian women to seek enfranchisement – ironically, one of the few examples of sexual equality in the early versions of the *Indian Act*. Given the stipulation that such a woman be unmarried, there was little possibility that her decision would affect others – unlike the case of men, whose enfranchisement would automatically enfranchise their wives and children.

In addition, the new *Indian Act* permitted entire bands to be enfranchised, a provision that the Wyandotte (Wendat) band of Anderdon, Ontario took advantage of in 1881, finally receiving letters patent enfranchising them in 1884. This move greatly encouraged subsequent generations of Indian affairs officials in their civilizing and assimilating endeavour.[75] Bands could still apply for voluntary enfranchisement until 1985. Only one other band was enfranchised voluntarily during the period when the *Indian Act* contained band enfranchisement provisions.[76]

With respect to compulsory individual enfranchisement, an 1880 amendment removed the involuntary element, thereby allowing university-educated Indians and those who had entered one of the professions to retain their Indian status if they wished. However, to prevent Indian communities from impeding worthy candidates from taking advantage of the provisions, in 1884 another amendment removed the right of the band to refuse to consent to enfranchisement or to refuse to allot the required land to the individual who had applied for enfranchisement during the probationary period. Further amendments in 1918 made it possible for Indians living off-reserve to enfranchise. This included widows and women over the age of 21. Passage of this amendment produced immediate results. The department of Indian affairs noted, for example, that in the period before 1918, only 102 persons had enfranchised, whereas between 1918 and 1920, a further 258 Indians abandoned their Indian status through enfranchisement.[77]

The most drastic change occurred in 1920, however, when the act was amended to allow compulsory enfranchisement once again. A board of examiners could be appointed by the superintendent general of Indian affairs to report on the "fitness of any Indian or Indians to be enfranchised" and, following the board's report, the superintendent general could recommend to the governor in council that "any Indian, male or female, over the age of twenty-one [who] is fit for enfranchisement" be enfranchised two years after the order.[78] This provision was repealed two years later, but reintroduced in slightly modified form in 1933

and retained until the major revision of the act in 1951. A further modification, made in 1951 and retained until 1985, allowed the compulsory enfranchisement of Indian women who married out. These matters are discussed in more detail in Volume 4, in Chapter 2 and are touched on only generally in this chapter.

A particularly compelling example of how enfranchisement was used by federal officials – the case of F.O. (Fred) Loft – is described later in this volume (see Chapter 12). A returning veteran of the First World War, Loft was a Mohawk from the Six Nations reserve at Brantford. After the war he became an effective leader and national spokesman for the fledgling League of Indians of Canada, a political organization designed to lobby on behalf of Indian concerns in Canada. His organizational activities alarmed Indian affairs officials, who were instructed not to co-operate with him in any way. After the passage of the 1920 amendment allowing compulsory enfranchisement, the deputy superintendent general of the day, Duncan Campbell Scott, threatened to use it to enfranchise Loft and thereby deprive him of credibility among status Indians in the country. Loft protested strongly and wrote directly to the superintendent general. In the interim, the involuntary element was repealed in 1922, so the threat was never carried out.[79]

Compulsory enfranchisement of Indian women who married non-Aboriginal, Métis, Inuit or unregistered Indian men was introduced in 1951 and retained until repealed in 1985 by Bill C-31. As explained in the chapter on the perspectives of Aboriginal women (Volume 4, Chapter 2), from 1951 on, enfranchisement measures under the notorious subsection 12(1)(b) of the act were directed primarily against Indian women who married men who did not have Indian status. The effects on enfranchised women and their children could be devastating. They, along with their children, would lose Indian status, the right to live in the reserve community, and even the right to treaty benefits or to inherit reserve land from family members. Compulsory enfranchisement of women led to an enormous increase in the number of enfranchised persons after the figures had remained relatively low for decades.[80]

9.4 Reserve Justice Administration

In 1881, the administration of non-Aboriginal justice was brought formally to Indian reserves by making officers of the Indian department, including Indian agents, *ex officio* justices of the peace and by extending to the reserves the jurisdiction of magistrates in towns and cities. Importantly, the department of Indian affairs now had authority to enforce its own civilizing regulations. The next year local Indian agents were given the same powers accorded magistrates. Evidently, this was a considerable extension of the powers of administrators with no previous legal training.

In 1884, yet another set of amendments allowed Indian agents, in their role as justices of the peace, to conduct trials wherever they thought necessary.

Presumably, this would allow them to conduct trials off-reserve as well. The same amendments extended the authority of Indian agents acting as justices of the peace beyond *Indian Act* matters to "any other matter affecting Indians." Given that the *Criminal Code* had not yet been enacted, this presumably included all civil and criminal matters generally – a considerable amount of jurisdiction for a civil servant. This was corrected two years later, however, to limit their jurisdiction to *Indian Act* matters.

Also in 1884, a new offence was created under the *Indian Act*, that of inciting "three or more Indians, non-treaty Indians, or halfbreeds" to breach the peace or to make "riotous" or "threatening demands" on a civil servant. In addition, the superintendent general was given authority to prohibit the sale to any Indian in the west of "fixed ammunition or ball cartridge." These measures were adopted for purely political motives – to foil the Métis and Cree peoples, who were increasingly discontented with government policy toward them.

Ultimately, of course, the other stern measures being taken against them, such as the restriction of rations to the Cree, for example, would cause them to rebel against the imposition of Canadian political authority over them in what became known as the second Riel Rebellion. Thus, the federal government criminalized Indian and Métis political protest and prevented Indians from receiving ammunition needed for hunting at a time when they were already suffering from the effects of Deputy Superintendent Vankoughnet's cost-saving policy of restricting rations to them following the drastic decline of the buffalo herds.[81] Both new offences, inciting and providing ammunition, were within the jurisdiction of the Indian agent.

Amendments to the *Indian Act* in 1890 brought Indian persons accused of certain sexual offences within the jurisdiction of Indian agents.[82] Following enactment of a comprehensive *Criminal Code* in 1892, Indian agents lost this aspect of their criminal law authority over Indians, but it was restored to them in 1894 along with jurisdiction over two additional offences, Indian prostitution and Indian vagrancy.

In describing the evolution of the powers of Indian agents, the two judges who conducted the Aboriginal Justice Inquiry of Manitoba compared the relatively more oppressive Canadian approach to bringing non-Aboriginal justice to Indians with that used on reservations in the United States:

> The Americans also sought from the outset to use the court system as a "civilizing" tool to foster their values and beliefs in substitution for traditional law and governmental structures. It was felt that this was accomplished best through the hand-picking of individual tribal members to be appointed as judges under the supervision of the Bureau of Indian affairs Indian agents. The Canadian approach was much more oppressive. All Indian agents automatically were granted judicial authority to buttress their other powers, with the result that

> they could not only lodge a complaint with the police, but they could direct that a prosecution be conducted and then sit in judgment of it. Except as accused, Aboriginal persons were excluded totally from the process.[83]

It seems clear that the justice administration powers of the agents served more to augment their already impressive array of administrative powers than to deliver Canadian justice to Indians. It is hardly surprising, then, that even today, many Indians still harbour a deep-seated resentment toward mainstream justice officials – something pointed out by most of the many recent Aboriginal justice inquiries. We dealt with these issues in some detail in our special report, *Bridging the Cultural Divide*.[84]

Today, there are no longer any Indian agents exercising judicial functions. A few Indians have now been appointed to the position of justice of the peace under the *Indian Act*, but only on three reserves.[85] Except for those reserves that have appointed by-law enforcement officers and band constables under delegated federal authority, most bands have no internal means of enforcing their by-laws or prosecuting those who contravene them. They must rely for the most part on provincial police and provincial Crown attorneys to prosecute by-law offenders in the provincial court system. Unfortunately, police and prosecutors have a heavy workload and usually intervene only in the case of criminal and serious statutory offences. As a result, bands themselves must often initiate proceedings where their by-laws have been violated, sometimes by engaging counsel to pursue such matters. This is expensive and time-consuming, unless the band is a large one with the financial resources and political will to pursue such actions.

With regard to criminal matters, the remoteness and isolation of many communities means that access to the judicial system is often limited to sporadic and hurried visits by circuit courts enforcing Canadian criminal law. Thus, the police and courts are usually unable to accommodate Indian values and concepts of justice. The results include inappropriate charging practices and convictions and sentences that do not reflect Indian views or needs. These matters have been reviewed extensively in federal and provincial Aboriginal justice inquiries over the years. Many bands see the existing justice system as a foreign one, less a protector than an enforcer of an alien and inappropriate system of law.

Effective enforcement of *Indian Act* by-laws and the most common criminal offences involves not only laying charges against offenders, but also prosecution, adjudication and sentencing. The current situation with outside police forces refusing to enforce by-laws, the limited criminal jurisdiction of *Indian Act* justices of the peace, the forced reliance on provincially and territorially administered courts, and the absence of any authority for bands to correct these anomalies means jurisdictional gaps, confusion over procedures and policies, and the continuing inability of bands to provide effectively for the safety and security of their own members.

Paradoxically, most bands have moved from a position of extremely heavy judicial control of reserve law and order matters to a situation of almost no control, except by outside forces on a sporadic basis. From a position of too much enforcement, they have arrived at one of not enough. This is just one of the legacies of the past, but it is one that has profoundly serious consequences for daily life in most reserve communities.

9.5 Attacks on Traditional Culture

In 1884 official policy turned from protecting Indian lands from non-Indians to protecting Indians from their own cultures. That year amendments to the *Indian Act* prohibited the potlatch and the Tamanawas dance. The potlatch was a complex ceremony among the west coast tribes that involved giving away possessions, feasting and dancing, all to mark important events, confirm social status and confer names and for other social and political purposes. Tamanawas dances were equally complex west coast ceremonies involving supernatural forces and initiation rituals of various kinds, many of which were repugnant to Christian missionaries.[86] A jail term of two to six months could result from conviction of any Indian who engaged or assisted in Tamanawas dances.

This was a significant development in Indian policy because it went further than merely imposing non-Indian forms on traditional Indian governance or land holding practices – it was a direct attack on Indian culture. The goal was, of course, to assist the civilization and assimilation goals of Indian policy by abolishing what a British Columbia official referred to at the time as the evil that lay "like a huge incubus upon all philanthropic, administrative or missionary effort for the improvement of the Indians."[87]

The 1884 prohibition on potlatching and the Tamanawas dance was not pursued as vigorously as its sponsors had hoped, although the arrests and harassment of potlatchers apparently had the desired effect of reducing the incidence of potlatching and Tamanawas dances or at least forcing adherents to conduct these activities in secret. The failure to pursue the ban more actively was partly because of the reluctance of the Indian agents to enforce it – not all were opposed to traditional practices such as these. Partly it was the result of an early decision by British Columbia Chief Justice Begbie that was unsympathetic to such prosecutions.[88] In British Columbia, it seems as if most of the anti-potlatching impetus came from missionaries and Christian converts among the west coast tribes rather than from government officials.[89] Thus, no one was jailed for potlatching until 1920, during a period of intense official enforcement of prohibitions on traditional cultural practices in British Columbia and on the prairies.

However, official disapproval and the pressure generated by it, harassment from the Indian agents, use of the *Indian Act* trespass provisions to evict Indians from other reserves, and mass arrests and trials did have the desired effect of eliminating or at least undermining the potlatch and other traditional ceremonies in

many cases. This was particularly so under the leadership of Deputy Superintendent Duncan Campbell Scott, who led a virtual crusade against traditional Indian cultural practices and who sponsored an amendment to the *Indian Act* in 1918 that gave Indian agents the additional power when acting as justices of the peace to prosecute the anti-dancing and anti-potlatching provisions.

Speaking at our round table on justice, British Columbia Provincial Court Judge Alfred Scow supported the conclusion that official harassment of the potlatch and other traditional ceremonies was harmful to the traditions of his people, the Kwakiutl of Vancouver Island:

> The *Indian Act* did a very destructive thing in outlawing the ceremonials. This provision of the *Indian Act* was in place for close to 75 years and what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came to this country. We had a system that worked for us. We respected each other. We had ways of dealing with disputes. We did not have institutions like the courts that we are talking about now. We did not have the massive bureaucracies that are in place today that we have to go through in order to get some kind of recognition and some kind of resolution.[90]

Following the initial ban of the potlatch and the Tamanawas, further amendments prohibiting traditional dances and customs followed in 1895. Thus, later practices associated with traditional dances, including the Blackfoot sundance and the Cree and Saulteaux thirst dance, were singled out for an outright ban. However, since the ban applied only to the giving away of property and to the wounds and other injuries that were customary for some of the participants, the dances themselves were immune from the prohibition.

Indian agents nonetheless attempted to suppress the actual dances. This led to tensions between agents and the RCMP, who were charged with enforcement, because the police were unwilling to go beyond the law to enforce departmental policy. Arrests and imprisonments did take place, however, including one in 1904 that led to a sentence of two months' imprisonment at hard labour for a 90-year-old, nearly blind man named Taytapasahsung.[91]

Because of the scandal associated with such cases and the growing popularity of stampedes and agricultural exhibitions at which Indians were increasingly invited to dance, an amendment was passed in 1914 barring western Indians under penalty of law from participating without official permission in "Aboriginal costume" in any "dance, show, exhibition, stampede or pageant." Arrests and prosecutions immediately went up, but because the offences were indictable ones, they were beyond the jurisdiction of Indian agents acting as justices of the peace. In such cases they could merely lay charges in another court. In 1918 this was corrected by bringing these offences within the agent's jurisdiction and removing them from courts outside the reserve.

In 1921, the deputy superintendent general wrote to one of his western officials, urging him in the following terms to find alternatives to what he clearly misunderstood to be a mere recreational activity:

> It has always been clear to me that the Indians must have some sort of recreation, and if our agents would endeavour to substitute reasonable amusements for this senseless drumming and dancing, it would be a great assistance.[92]

In 1933 the requirement that the participants be in Aboriginal costume was deleted from the prohibition; to attract the penalty it was sufficient that an Indian participate in the event, no matter how he or she was dressed. The apparent intent was to prevent Indians from attending fairs and stampedes without the permission of Indian affairs officials. Since the first prohibition was enacted in 1895, various means had been found by Indians and their supporters to get around the ban on dancing. This new offence seems in retrospect to have been the last desperate attempt of Indian affairs officials to enforce their anti-dancing policy.

These provisions have now been removed from the *Indian Act*. Nonetheless, and as illustrated by the comments of Judge Scow concerning the ban on potlatching, their legacy continues. Indian traditional ways have been subverted and have sometimes disappeared. This has left many Indian communities trapped between what remains of traditional ways of doing things and the fear of importing too much more of mainstream Canadian cultural values into reserve life.

9.6 Liquor Offences

The control of sales of alcohol to Indians had been a feature of colonial legislation long before the *Indian Act* and had been ardently requested by many Indian nations because of the destructive social consequences of drunkenness in Indian communities. Both before and after Confederation penal sanctions were imposed on the sellers of alcohol.

However, legislation was passed in 1874 making it an offence punishable by one month in jail for an Indian to be intoxicated on- or off-reserve. Failure to name the seller of the alcohol in question could lead to an additional 14 days' imprisonment. These provisions became part of the 1876 *Indian Act*, supplemented by the prohibition on simple possession of alcohol by an Indian on-reserve.

The later 1951 *Indian Act* revision made one exception to the provisions by allowing an Indian to be in possession of alcohol if in a public place and in

accordance with provincial law. It was still an offence to be drunk, however. No non-Indian could have been convicted of a similar offence. In the *Drybones* case the Supreme Court of Canada finally struck down the off-reserve intoxication offence for contravening the equality provision of the *Canadian Bill of Rights*.[93]

These provisions have been eliminated from the contemporary version of the *Indian Act*, and control over intoxicants on-reserve has been transferred entirely to the band and band council.

9.7 Pool Room Prohibition

In 1927 the superintendent general of Indian affairs was given the unusual power of regulating the operation of pool rooms, dance halls and other places of amusement on reserves across Canada. This was apparently to ensure that Indians would learn industriousness and would not spend too much time in leisure pursuits that were available to non-Indians. Where Indians were tempted to leave the reserve to play pool, further amendments in 1930 made it an offence for a pool room owner or operator to allow an Indian into the pool room who "by inordinate frequenting of a pool room either on or off an Indian reserve misspends or wastes his time or means to the detriment of himself, his family or household". The penalty for the pool room operator in such a case was a fine or a jail term of up to one month. These provisions are no longer in the *Indian Act*.

9.8 Sale of Agricultural Products

Amendments to the *Indian Act* in 1881 aimed to protect western Indians by prohibiting the sale of their agricultural produce except in conformity with official regulations. Anyone who purchased Indian agricultural produce without the appropriate permit was subject to summary conviction and a fine or imprisonment for up to three months. The official rationale was that this was necessary to prevent Indians from being swindled by non-Indians and to prevent the exchange or barter of agricultural products for things the agents did not consider worthwhile, especially alcohol.

However, another motive may have been the desire to reduce competition between Indian and non-Indian farmers. There are indications that in the 1880s non-Indian farmers were complaining to local Indian agents about the competition they were facing from Indian farmers, claiming it was unfair because of the government assistance to reserves.[94]

At this time, official federal policy on the prairies was explicitly to convert Indians to peasant farmers on the model of peasants of Europe. This addled policy was the brainchild of Hayter Reed, then deputy superintendent general of Indian affairs. He was imbued with a philosophy of strict social Darwinism,

convinced that social evolution could proceed only in defined stages, from savagery to barbarism to civilization. Convinced that Indian attempts to 'advance' themselves too quickly would be 'unnatural', he stated as follows:

> The fact is often overlooked, that these Indians who, a few years ago, were roaming savages, have been suddenly brought into contact with a civilization which has been the growth of centuries. An ambition has thus been created to emulate in a day what white men have become fitted for through the slow progress of generations.[95]

The requirement for a permit was also used by certain agents as more than a means to oversee transactions in Indians' interests. It was equally available as yet another tool for enforcing compliance with official policies. In this respect, the daughter of a prominent prairie Cree leader reports that her father saw the permit system as a loaded gun in the hands of the agent:

> As time went on the permit system began to evolve into a disciplinary device. If the agent did not like a certain Indian, or if an Indian did something to displease him the agent could refuse or delay indefinitely a permit enabling him to sell any of his produce or to buy needed stock, equipment or implements. Favoured Indians would get all kinds of lands and help, totally contrary to the intent of the treaties, others got nothing. With no money coming in, unable to pay his debts, properly work his land or even to feed his stock the helpless farmer had to give away his cattle and try to find work from outside farmers, which usually consisted of clearing bush or picking rocks. This was enervating, debilitating work which the farmers themselves detested. And even such work was seasonal and not always available. White people, seeing only that the Indian had stopped working and had not paid his debts, concluded that Indians were useless, lazy and unreliable. There were too many men like this on the reserves.[96]

Whatever may have been the underlying reasons for this prohibition or the uses to which it was put, one effect was to hinder Indian farmers and to make them appear less efficient or even to drive them from farming. Nonetheless, the provision was retained and expanded in successive versions of the *Indian Act* and was extended in 1941 to all Indians in Canada regarding the sale of furs and wild animals. Despite the 1951 revision and the advent of the *Canadian Charter of Rights and Freedoms* and other human rights instruments, the present version of the *Indian Act* still contains a provision prohibiting the sale of agricultural products by western Indians without official permission, although it is apparently no longer enforced.

9.9 Indian Legal Claims

In a 1927 amendment, the superintendent general acquired a powerful new weapon in his arsenal – the right to require that anyone soliciting funds for Indian legal claims obtain a licence from him beforehand. Conviction could lead to a fine or imprisonment for up to two months. Official explanations once again focused on the need to protect Indians, this time from unscrupulous lawyers and other "agitators".[97]

The true reason probably had more to do with the desire of federal officials to reduce the effectiveness of Indian leaders such as Fred Loft and of organizations such as the Allied Tribes of British Columbia and the Six Nations Council. These groups had already proven troublesome to Indian affairs officials because of their insistence that their unresolved land claims be dealt with. In fact, Indian affairs officials were actively working to have charges laid against long-time British Columbia activist Arthur E. O'Meara when he died in 1928 and were on the verge of charging Loft when, elderly and tired, he finally withdrew from the struggle for Indian rights in the early 1930s.[98]

The effect of this provision was not only to harass and intimidate national Indian leaders, but also to impede Indians all across Canada from acquiring legal assistance in prosecuting claims until this clause was repealed in 1951. The claims of most British Columbia Indians as well as those of the Six Nations are still outstanding – as are hundreds of others.

9.10 The Pass System

The notorious pass system was never part of the formal *Indian Act* regime. It began as a result of informal discussions among government officials in the early 1880s in response to the threat that prairie Indians might forge a pan-Indian alliance against Canadian authorities. Designed to prevent Indians on the prairies from leaving their reserves, its immediate goal was to inhibit their mobility. Under the system, Indians were permitted to leave their reserves only if they had a written pass from the local Indian agent. The agent would often act on the advice of the reserve farm instructor.

The pass system should be read against the backdrop of other attempts to interfere with Indian cultural life, as it was intended not only to prevent Indian leaders and potential militants from conspiring with each other, but also to discourage parents from visiting their children in off-reserve residential schools and to give agents greater authority to prevent Indians from participating in banned ceremonies and dances on distant reserves.

Although the pass system was official policy on the prairies, there was never any legislative basis for it. It was therefore nothing more than an expedient policy that arose apparently from a suggestion by the deputy superintendent general of Indian affairs to Prime Minister Macdonald in 1885.[99] It was maintained through the 1880s but had fallen into general disuse by the 1890s, although it was used occasionally in various parts of the prairies into the twentieth century. The RCMP disliked enforcing the pass system because of their fear that, if challenged, it would be found illegal by the courts and would bring their other law enforcement efforts into disrepute.

In practice the pass system was only partly effective in restricting Indian movement and was often ignored by Indians and by the agents themselves. Because it could not be legally enforced, many Indian agents simply issued passes to those who were going to leave the reserve in any event, or else they attempted to enforce the system by other means. Thus, rations and other matters within the control of the Indian agent were sometimes withheld from those who refused to comply. Another alternative was to prosecute Indians found off the reserve without passes for trespass under the *Indian Act* or for vagrancy under the *Criminal Code*,[100] both of which were within the jurisdiction of the agent.

9.11 Indian Agents

The role of the Indian agent has never been fully documented in Canadian history. This is largely because the work of these local reserve representatives of the superintendent general of Indian affairs was usually conducted in geographically remote areas, far from the scrutiny of most Canadians. Moreover, Indian affairs were, until relatively recently, well down on the list of the preoccupations of most Canadians.

Most accounts of how Indian agents conducted themselves have therefore been written from the vantage point of Indians and in the context of the many civilizing and assimilating measures that were imposed on them through official federal policy. Some of those measures and the role played by Indian agents have already been described.

Over the years the superintendent general acquired an increasingly vast array of powers to intervene in almost all areas of daily reserve life. Most of these powers were available to the agents. With their control of local administrative, financial and judicial matters, it is easy to understand how they came to be regarded as all-powerful and as persons of enormous influence in community life on most reserves. For example, in a 1958 study of Indian conditions in British Columbia, the duties of superintendents (agents) were described as follows:

> [T]he superintendent deals with property and with records, or with the recording of property. He registers births, deaths and marriages. He administers the band's funds. He supervises business dealings with regard to band property. He holds band elections and records the results. He interviews people who want irrigation systems, who complain about land encroachments, who are applicants for loans. He suggests to others that, if they are in a common-law relationship, they should get married, for, among other reasons, this simplifies the

records. He obtains information about persons applying for enfranchisement. He adjusts the property of bands when members transfer. He deals with the estates of deceased Indians. He obtains the advice of the engineering officers on irrigation systems, and the building of schools. He negotiates the surrender of lands for highways and other public purposes. He applies for funds to re-house the needy and provide relief for the indigent. He draws the attention of magistrates to factors which bear upon Indians standing trial on criminal charges.[101]

To that list, of course, must be added the justice of the peace duties and powers described earlier: the power of inspecting schools and health conditions on reserves, presiding over band council meetings and, later, voting to break a tie. In addition, and as outlined in Chapter 12, the agents were also responsible for encouraging Indians to enlist in the armed forces during the wars and for keeping lists of those enlisted for purposes of administering veterans' benefits after the wars. It is clear that their powers and influence were formidable.

In many cases, Indian agents were persons of intelligence and integrity. For example, the anti-potlatch provisions in the *Indian Act* after 1884 were often thwarted by the agents themselves, as many regarded the prohibition as misguided and harmful. In the same way, Indian agents, along with the farm instructors, were from the beginning the most vociferous in calling for an end to certain aspects of Hayter Reed's absurd agriculture policy of transforming Indians into simple peasant farmers by forcing them to use hand implements instead of machinery. Many were courageous in allowing Indians to use machinery to harvest their crops, despite the career risks this entailed.[102]

By the same token, however, some Indian agents were petty despots who seemed to enjoy wielding enormous power over the remnants of once powerful Aboriginal nations. While much of their apparent disrespect can be attributed to the profound cultural differences between them and the Indian nations they were supervising, it is nonetheless clear that the Indian affairs branch often seemed to attract persons particularly imbued with the zeal associated with the strict morality and social Darwinism exhibited by deputy superintendents general Hayter Reed and Duncan Campbell Scott.

The condescending attitudes of many agents seemed to be accurately reflected in the following observation by William Graham, a long-time prairie agent and one who was much feared and complained about:

> However, I must say, taking everything into consideration, the Indians were not bad, generally speaking. They did not thoroughly understand everything that was being done for them and were more or less suspicious by nature. The wonder is that there was not more trouble than there was.[103]

Following the return of veterans after the Second World War, Indian agents and other Indian affairs officials found themselves confronted increasingly by challenges to their authority and influence from activists. Many of the additional powers given to agents following the war were precisely to enable them to maintain their local authority. Beginning in the 1960s and at the initial insistence of the Walpole Island Band in Ontario, Indian agents began to be removed from reserves across Canada. The position no longer exists in the department of Indian affairs.

9.12 Indian Voting Rights

After Confederation, provincial voter eligibility requirements determined who could vote in federal elections and generally involved property ownership provisions that reserve-based Indians could not meet unless they enfranchised. In 1885, however, the right to vote in federal elections was extended to Indians in eastern Canada; eligibility included male Indians who met the qualification of occupying real property worth at least $50. For these purposes, reserve land held individually through location tickets would qualify.

Indians in western Canada were not allowed to vote, however, because, in the words of the minister of Indian affairs of the day, David Mills, that would have allowed them to go "from a scalping party to the polls".[104] The legislation granting the vote to eastern Indians was eventually repealed in 1898, thereby making all Indians ineligible to vote federally, since provincial laws once again governed the issue.

The First World War and the large number of Indians who enlisted altered the situation, however. Thus, in 1917 Indians on active military service were permitted to vote in federal elections, and in 1920 the federal vote was restored to two classes of Indians: those who lived off-reserve; and those (on- or off-reserve) who had served in the Canadian army, navy or air force in the First World War.

In 1944, during the Second World War, the federal government extended the federal franchise once again to Indians (on- or off-reserve) who had served in the war and to their spouses. In 1950, the federal franchise was extended further to on-reserve Indians, but only to those who waived their *Indian Act* tax-exempt status regarding personal property (which would have made them liable for income tax). In 1960, the federal franchise was finally extended without qualification to all Indians.

When the provinces dropped the property qualification and adopted universal male suffrage in the late nineteenth and early twentieth century, many provinces passed legislation explicitly to exclude Indians.[105] The provincial franchise was then re-extended to Indians at different times: British Columbia in 1949; Manitoba in 1952; Ontario in 1954; Saskatchewan in 1960; Prince Edward Island and New Brunswick in 1963; Alberta in 1965; and Quebec in

1969. Indian people in Nova Scotia were apparently never prevented from voting in provincial elections after the adoption of universal male suffrage. Newfoundland did not enter Confederation until 1949 and when it did, agreement was reached with the federal government that neither government would recognize Aboriginal people as status Indians under the *Indian Act*. Indeed, until the federal government recognized the Miawpukek Band of Conne River in 1984, there were no status Indians in the province, so the question of Indian people voting in provincial elections never arose.

Inuit were excluded from the federal franchise in 1934 but had the vote restored to them without qualification in 1950. Except for those who had identified themselves as Indians and lived on reserves as part of an Indian community, Métis people had always been considered citizens and were eligible to vote in both provincial and federal elections (so long as they met the other criteria, such as possession of property).

9.13 Indian Women

If Indian people generally can be said to have been disadvantaged by the unfair and discriminatory provisions of the *Indian Act*, Indian women have been doubly disadvantaged. This is particularly so, for example, with regard to discriminatory provisions on land surrender, wills, band elections, Indian status, band membership and enfranchisement. The Indian status and band membership system is discussed in the next section. The lingering effects of this early and sustained assault on the ability of Indian women to be recognized as 'Indian' and to live in recognized Indian communities continue to be experienced by many Indian women and their children today.

As described earlier, the first enfranchisement legislation, the *Gradual Civilization Act*, enabled any male Indian who met the qualifications to be enfranchised. His wife and children were automatically enfranchised with him, irrespective of their wishes in the matter. Unlike the husband, the wife received no allotment of reserve land upon being enfranchised. When an enfranchised man died, the land passed to the children in fee simple. The widow could regain Indian status and band membership only by marrying another Indian man.

In 1869, the *Gradual Enfranchisement Act* continued these enfranchisement provisions and added to them by providing that an enfranchised man could draw up a will leaving his land to his children – but not to his wife. By this legislation, Indian women were also denied the right to vote in band council elections. This prohibition on participation in band political matters continued through successive versions of the *Indian Act* until 1951, well after non-Indian women in Canada had acquired the right to vote in Canadian elections.

The *Gradual Enfranchisement Act* was the first federal legislation to impose serious consequences on an Indian woman who married a non-Indian. Unlike the case of an Indian man marrying out – whose non-Indian wife and children would

acquire Indian status – she would lose Indian status, and any children of the marriage would never have it. These provisions were carried forward into the first *Indian Act* in 1876 and were maintained until 1985. In the same vein, the 1876 *Indian Act* carried the Victorian emphasis on male superiority to new extremes, providing that only Indian men could vote in reserve land surrender decisions.

Amendments to the *Indian Act* in 1884 permitted any male Indian holding reserve land by location ticket to draw up a will. He could bequeath his property to anyone in his family, including his wife. However, in order for her to receive anything she had to have been living with him at his death and be "of good moral character" as determined by federal authorities. No Indian man inheriting property by will needed to meet any such criteria.

Further amendments in 1920 removed an important band council power and gave it to the superintendent general. Before that, band councils had been able to decide whether an Indian woman who had lost Indian status through marrying out could continue to receive treaty annuity payments or whether she would be given a lump sum settlement. Often a band would continue to allow women who had married out to receive treaty payments and in this way retain a link to their home communities.

Thus, while such women would no longer have Indian status as such, through band council permission they could retain informal band membership. The band and federal authorities would thus overlook their lack of status.[106] The 1951 revision of the *Indian Act*, discussed later in this chapter, went further than previous legislation in attempting to sever completely the connection between Indian women who married out and their reserve communities. A solution had to be found to the situation of Indian women who had married out but had then been deserted or widowed by their non-Indian husbands. These women did not have legal status as Indians, nor were they considered non-Indian in the same way as enfranchised women were. Rather than allow them to regain Indian status and formal band membership and with them an Indian community to go back to, federal authorities decided to provide for their involuntary enfranchisement upon marriage. They would thus lose any claim to Indian status or to formal or informal band membership.

Until then, these women had usually managed to continue to receive their treaty annuities and, in many cases, even to continue to reside in their reserve community. Before the 1951 revision it had even been the practice in some Indian agencies to issue informal identity cards, referred to as 'red tickets', to these women to identify them as entitled to share in treaty moneys. The director of the Indian registration and band list directorate at DIAND describes the system as follows:

> It would have been a card that would have been issued to a woman who had married a non-Indian and lost her Indian status and band membership, and originally it would have been red [the colour] to

indicate that she was no longer a member of the band but was entitled to collect treaty at the time the treaty payment was made.[107]

With the 1951 enfranchisement provisions, all that changed. Henceforth, an Indian woman would not only lose status but would also be enfranchised as of the date of her marriage to the non-Indian man.

Enfranchisement had immediate and serious consequences. Not only did it mean automatic loss of status and band membership, and with it the forced sale or disposal of any reserve lands she might have held; it also meant she would be paid out immediately for her share of any treaty moneys to which her band might have been entitled as well as a share of the capital and revenue moneys held by the federal government for the band. These provisions were later upheld against an equality challenge under the *Canadian Bill of Rights*, despite their characterization by Mr. Justice Laskin in the *Lavell* and *Bedard* cases as "statutory excommunication" and "statutory banishment".[108]

Red ticket women who had lost status before 1951 were dealt with in a later amendment to the *Indian Act*. They were paid a lump sum and put in the same position as Indian women who married out after 1951.

The children of these mixed marriages were not mentioned in the 1951 *Indian Act*. For a few years such children were erroneously enfranchised along with their mothers. Because there had been no legal basis for their enfranchisement, in 1956 further *Indian Act* amendments restored their Indian status. However, the same amendments authorized the issuing of orders that all or any of the children of an enfranchised woman also be enfranchised with her. This language was inserted to correct the earlier problem and to make it possible to enfranchise such children in the future. In practice, the off-reserve children of a woman enfranchised under these provisions would usually also be enfranchised, while her children living on-reserve would generally be permitted to retain their Indian status.

Thus, the discriminatory features of the *Indian Act* regarding Indian women who married out were actually strengthened following the Second World War, despite trends toward greater egalitarianism in the rest of Canadian society. It is clear in retrospect that a double standard was at work, since Indian men could not be enfranchised involuntarily after 1951 except through a stringent judicial inquiry procedure in the revised *Indian Act*. The figures for enfranchisement between 1955 and 1975 (when compulsory enfranchisements of women were ended administratively) demonstrate this, with nearly five times as many persons enfranchised compulsorily as enfranchised voluntarily.[109] Thus, the number of enfranchisements, which had been relatively small in the century following passage of the *Gradual Civilization Act*, jumped markedly after 1951.

Today many of those women and their children have been returned to status and to band membership by the 1985 amendments to the *Indian Act* contained

in Bill C-31. However, there are still large numbers of non-status Indians, the victims of earlier loss of status or of the enfranchisement provisions, who have not been able to meet the new criteria set out in the current version of the act.

At the same time, many women and their children who have recovered Indian status as a result of the 1985 amendments have been unable to secure band membership. This is because those amendments gave bands the power to control their own membership. Some bands that control their membership have refused to allow these 'Bill C-31 Indians' to rejoin the band. In other cases, people who have managed to acquire band membership have been refused residency rights on the reserve by the band council. Thus, they may now have status and band membership but be unable to return to the community or to vote in band council elections.

Moreover, the children of Indian women restored to status under the new rules in Bill C-31 generally fall into the section 6(2) category of status Indian. As discussed in the next section, this means they are inherently disadvantaged in terms of their ability to transmit Indian status through marriage.

In these and other ways, many Indian women and their descendants continue to experience the lingering effects of the history of discriminatory provisions in the *Indian Act*.

9.14 Indian Status and Band Membership

The *Gradual Enfranchisement Act* of 1869 was the first law denying Indian status to an Indian woman who married out and preventing her children from acquiring status. Carried forward into the first *Indian Act* in 1876, these provisions were maintained until 1985.

Recognition as 'Indian' in Canadian law often had nothing to do with whether a person was actually of Indian ancestry. Many anomalies and injustices occurred over the years in this regard. For example, a woman of non-Indian ancestry would be recognized as Indian and granted Indian status upon marriage to an Indian man, but an Indian woman who married a man without Indian status would lose legal recognition as Indian. Moreover, for historical reasons, many persons of Indian ancestry were not recognized as being Indians in law and were, accordingly, denied Indian status.

The status and band membership provisions, although heavily slanted against Indian women, nonetheless worked a hardship on Indians of both sexes over the years. For example, in 1887 the superintendent general was given the power to determine who was or was not a member of a band, with his decision on the matter appealable only to the governor in council. This power would ensure that those deemed ineligible for band membership could be removed more easily from a reserve community by federal authorities.[110] This provision was retained through to the 1951 amendments, when the power passed to an

official known under the *Indian Act* as the registrar. Although *Indian Act* bands have had delegated authority since 1985 to determine their own membership, they do not have the authority to grant Indian status in law – that remains with federal authorities.

The federal government, which normally funds bands through a formula based on the number of status Indian band members, does not generally provide funds to bands for persons who are not status Indians. Bands that allow people without Indian status to become band members are therefore penalized financially, since they then have to provide housing and other services to these new band members without offsetting federal payments. This is a strong disincentive to many bands, since most are poor and utterly dependent on the federal government for their funding. This means that large numbers of people of Indian ancestry who may have a connection to a band are unable to acquire either band membership or reserve residency.

In 1920 the superintendent general was given the authority to decide whether an Indian woman who lost status upon marrying out would receive her annuity or a lump sum settlement. This led to many problems, including that of Indian women who lost status but were then widowed or deserted; these women were left in a precarious and doubtful situation – neither Indian nor non-Indian in Canadian law.

During the 1946-48 parliamentary hearings on revising the *Indian Act* (discussed in more detail later), federal officials were unable to explain whether or to what extent they planned remedial action. As it turned out, the response of federal officials dealt with the situation of these women, but also served to confirm the continuing assimilative thrust of federal Indian policy. In a letter to the joint committee examining the issues, Indian affairs officials were candid regarding their motivations in the case of Indian women who married non-Indian men:

> ...by the alteration of the definition of Indian by the Statute of 1876 the Dominion very substantially reduced the number of people for whose welfare it was responsible and by that action passed the responsibility on to the provinces for thousands of people, who, but for the statute of 1876, would have been federal responsibility for all time.[111]

The 1951 version of the *Indian Act* allowed such women to be enfranchised involuntarily upon marrying out. Thus, their status was left in no doubt: under no circumstances would they be considered 'Indian' unless they subsequently remarried a status Indian man.

Although the current *Indian Act* contains no enfranchisement provisions, the status rules, as modified in 1985 by Bill C-31, are still highly problematic. Not only are they extremely complex, but like their historical predecessors, they appear to continue the policy of assimilation in disguised but strengthened form. This is because of the distinctions drawn between two classes of Indians

under the post-1985 rules. We discuss this issue in more detail in Volume 4, Chapter 2.

Subsection 6(1) of the *Indian Act* accords status to persons whose parents are or were (if they are no longer alive) defined as 'Indian' under section 6 of the act. Subsection 6(2) accords status to persons with one parent who is or was an Indian under section 6. All those who were status Indians when the new rules came into effect in 1985 are referred to as 6(1) status Indians. This includes non-Indian women who were married to Indian men at that time.

The difficulties arise for the children and grandchildren of today's 6(1) and 6(2) status Indians. For the grandchildren of the present generation of 6(1) and 6(2) Indians, the manner in which their parents and grandparents acquired status is an important determinant of whether the grandchildren have Indian status themselves. The net result of the new rules is that by the third generation, the effects of the 6(1)/6(2) distinction will be felt most clearly. Figure 9.1 shows how transmission of status works under the new rules.[112]

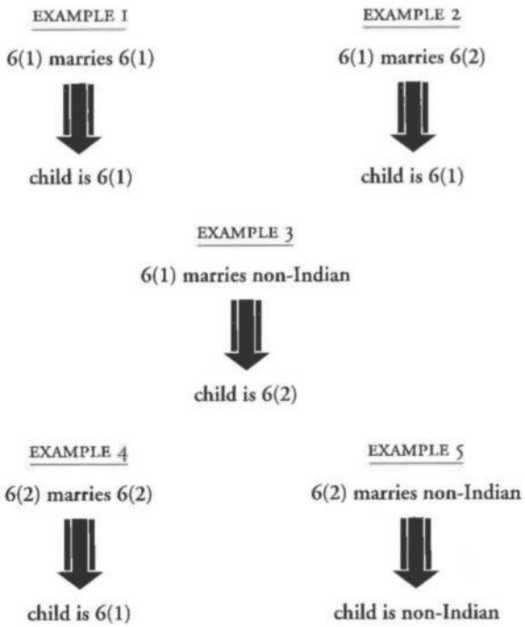
Thus, comparing examples 3 and 5, it is clear that the children of a 6(2) parent are penalized immediately if the 6(2) parent marries out, while the children of 6(1) parents are not. Figure 9.2 extends the effects of the 6(1)/6(2) difference in examples 3 and 5 to illustrate this.

It is clear that the 6(1) parent has an advantage in terms of time if he or she marries out, since the child will still be a status Indian and will have the chance to marry another status Indian, 6(1) or 6(2), in order to retain Indian status for the children of that marriage. The 6(2) parent is not so fortunate, and may by marrying out cause status to be lost within the first generation. Thus, who the children marry is crucial in determining whether status is passed on to future generations, since there is a definite disadvantage to being in the 6(2) category. Nor should it be forgotten that this has very little to do with actual Indian ancestry, since the new rules are arbitrary and are built on the arbitrary distinctions that have come down through the history of the *Indian Act* and its predecessors.

An example using siblings shows the unfairness of the new rules clearly. A status Indian brother and his status Indian sister both married non-Indians before the new rules came into effect in 1985. The children of the sister would fall into the 6(2) category at the outset, because they would only have one parent (the mother) who is a status Indian under section 6 of the current act. The children of the brother who married out before the 1985 amendments would fall into the 6(1) category, however, since both parents would be status Indians under section 6 (the non-Indian mother having acquired status under the pre-1985 rules). The brother's children would therefore start off with an advantage over their 6(2) cousins in terms of status transmission.

This has nothing to do with Indian ancestry, since the 6(1) and 6(2) children discussed in this example have exactly the same degree of Indian ancestry.

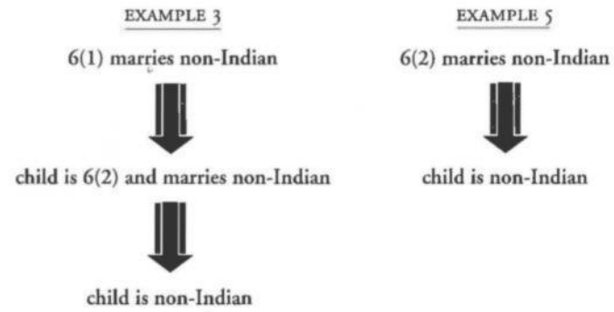
FIGURE 9.1



Each has one parent of Indian ancestry and one of non-Indian ancestry. The fact that the children of the status Indian man who married out acquired status, while the children of the status Indian woman who married out did not, is at the root of this 6(1)/6(2) distinction. Thus, the post-1985 status rules continue to discriminate as the pre-1985 rules did, except that the discriminatory effects are postponed until the subsequent generations.

Moreover, the increase in the number of persons with Indian status through Bill C-31 was a one-time event. Demographic trends show that this increase will begin to reverse itself within a few generations and that the number of status Indians will likely decline drastically. Thus, given the present rate at which status Indians marry outside the 6(1) or 6(2) category, it is predicted that, in time, many Indian communities will no longer be populated by people who fall within either the 6(1) or the 6(2) category. Material circulated by the Whispering Pines Indian Band of British Columbia in 1989 confirms this observation in more graphic terms:

FIGURE 9.2



> The Whispering Pines Indian Band is located about 25 miles outside Kamloops. Since this is where the reserve is situated, our members associate the majority of time with non-status people.... [M]arriages are 90 per cent (approx.) to non-status people. For two generations already, marriages have been this way, so the chances of children from these marriages, in turn, marrying status Indians are very slim....
>
> Actually the whole section in Bill C-31 on status has affected all Bands in Canada. The Bill was written to eliminate discrimination in the Indian Act. What it has really done is found a way to eliminate status Indians all together.[113]

Thus, it can be predicted that in future there may be bands on reserves with no status Indian members.[114] They will have effectively have been assimilated for legal purposes into provincial populations. Historical assimilation goals will have been reached, and the federal government will have been relieved of its constitutional obligation of protection, since there will no longer be any legal 'Indians' left to protect.

10. Post-War Indian Policy Reform: Everything Old Is New Again

To return to the evolution of Indian policy and the *Indian Act*, by the early twentieth century policy development had entered a new phase, as Canada attempted to come to terms with the impact of massive immigration and the effects of the First World War. Although the possibility of assimilating Indians quickly into the mainstream of a changing and growing Canadian population seemed more

remote than ever, the government nevertheless introduced many oppressive measures designed to promote assimilation and enhance the authority of Indian affairs officials in daily reserve life.

It soon became evident, however, that past policies of civilization and assimilation had failed to eliminate the collective identity of Indians. This sense of failure was compounded by the diversion of official attention from Indian policy during the depression and the war years. Far from vanishing through enfranchisement and assimilation, Indians were increasing in number, and existing reserves, with their limited resources, were less and less able to support this growth. The Indian affairs bureaucracy had no policies other than civilization and assimilation with which to cope with the continuing presence of Indian communities and their burgeoning populations. By the 1940s it had become abundantly clear that Indian affairs were in disarray.

The end of the Second World War and the creation of the United Nations unleashed a national mood of egalitarianism and a growing interest in individual human rights. This national mood coincided with public awareness of the strong contribution of Indian servicemen to the Canadian war effort, and public interest in Indian issues grew. Many called for a royal commission to review and revise the *Indian Act* and put an end to what was seen increasingly as discriminatory legislation.

In response, the federal government established a joint committee of the Senate and the House of Commons to examine the general administration of Indian affairs. Its mandate included an examination of treaty rights and obligations; band membership issues; taxation of Indians; enfranchisement; Indian voting rights; encroachment on Indian reserve lands; Indian day and residential schools; and any other matter having to do with Indian social and economic issues that ought to find a place in a new *Indian Act*. The failure of the mandate to refer to issues of importance to Indians, such as self-government and the limited power of band councils, reveals the committee's egalitarian thrust. Committee members came to the proceedings with a decided bent in this direction. The co-chairman, for example, commented as follows early in the first year of hearings:

> And I believe that it is a purpose of this committee to recommend eventually some means whereby Indians have rights and obligations equal to those of all other Canadians. There should be no difference in my mind, or anybody else's mind, as to what we are, because we are all Canadians.[115]

The challenge for the Joint Committee would be to recommend equality without forcing Indians to abandon their heritage and collective and constitutional rights.

At the outset, committee members decided as a matter of policy to hear first and foremost from government officials and experts, particularly Indian branch officials. Early on, however, they made an exception by hearing Andrew

Paull, then president of the newly formed North American Indian Brotherhood and a long-time Indian rights activist in British Columbia. His testimony was dramatic, for rarely had articulate Indian leaders been given a chance to be heard on the national stage before. Noting that the Joint Committee was not the independent royal commission that Indians and others had been calling for, Paull also emphasized the absence of Indian representatives on the committee and the fact that its mandate did not include the issues of greatest concern to Indians.

Moreover, with respect to the guiding philosophy for Indian policy, Paull challenged the Joint Committee to decide from which perspective it would deal with Indians: as wards or citizens. He also focused on Canada's abandonment of the nation-to-nation relationship of equality embodied by the treaties and on the lack of meaningful self-government on reserves. In Paull's view, the answers to these questions would determine the committee's ultimate response to other issues surrounding the overall relationship between Indians and the federal government. In short, he challenged committee members to abandon the historical assumptions underlying Canadian Indian policy in favour of a model more in harmony with Indian aspirations.

Paull's brief included several recommendations that have since become familiar: ending the Indian branch's power to determine band membership; continuing the taxation exemption; abolishing denominational schools on-reserve; decentralizing the Indian branch and generally hiring more Indians in administrative capacities; empowering band councils to act as local governments, including the power to police reserves; and granting Indians the right to vote in federal elections, with the possibility of electing their own Indian members to the House of Commons. The most important thing in Paull's view, however, was to give Indians a greater degree of control over their own lives, free of government interference.

Following Paull's testimony, a motion to permit five Indian observers drawn from across Canada to monitor committee sessions was defeated, although Indian witnesses and briefs were welcomed. This was the first time in Canadian history that the federal government made any systematic effort to consult with Indians. Indians attempted to make themselves heard. Sometimes this was with great difficulty, as it appears that on some reserves the Indian branch refused access to band funds for this purpose. As a result, most Indian evidence was in the form of letters to the committee, although several Indian bands and associations did manage to send representatives to testify on their behalf.

Indian submissions were varied, covering a broad range of issues and expressing a variety of political philosophies. Many focused on the nation-to-nation relationship and on the sanctity of treaties, criticizing the *Indian Act* regime. Others seemed to accept the general legitimacy of the *Indian Act* but called for increased band council powers. Still others appeared to accept the act to a greater extent and focused on incremental changes to particular provisions.

The range of views expressed makes it impossible to speak of a single Indian position. There was a consistent focus, however, on the political relationship between Indians and the federal government as reflected in issues such as respect for treaties and Aboriginal rights and an end to the domination of reserve life by government bureaucrats. On one issue there was virtual unanimity: the need for a greater degree of local autonomy and self-government.

Diamond Jenness, an anthropologist and senior federal civil servant, took an entirely different approach, however, and one that was more in keeping with historical assimilation policy. In retrospect, it is clear that he and like-minded non-Indian witnesses carried the day. His testimony focused on the reserve system as the aspect of Indian policy that was the greatest impediment to Indians attaining equality with non-Indians in Canadian society. Jenness proposed a 25-year plan "to abolish, gradually but rapidly, the separate political and social status of Indians (and Eskimos); to enfranchise them and merge them into the rest of the population on an equal footing".[116] The plan called for placing Indian children in provincial schools; delivering social services to Indians in the ordinary way, primarily by the provinces; having a committee study reserves across Canada with a view to abolishing them and enfranchising the inhabitants; and improving education for Indians in the North.

In 1948, giving little indication that it had heard or comprehended the views expressed before it by Indian people and their organizations, and in language reminiscent of the assumptions of an earlier era, the Joint Committee declared with respect to its proposals for reform of the *Indian Act* that "All proposed revisions are designed to make possible the gradual transition of Indians from wardship to citizenship and to help them to advance themselves."[117]

The gulf between the perspectives and philosophies of most of the Indian testimony and those of committee members is startling. It is nothing less than the difference between greater Indian self-government and the revitalized goal of assimilation. It appears that the Joint Committee simply adopted and strengthened certain aspects of historical policies, clothing them in new rhetorical garments.

11. The 1951 *Indian Act* Revision

The present-day *Indian Act* is the result of the major revision that occurred in 1951, following the Joint Committee process. It has been bolstered by a number of incremental amendments since then. Ironically, but in keeping with the tone of the non-Indian testimony to the Joint Committee, it is generally accepted that the net effect of the 1951 revision was to return Canadian Indian legislation to its original form, that of the 1876 *Indian Act*. The 1876 and 1951 versions are very similar in essential respects.

For example, although the number of powers that can be exercised by the minister of Indian affairs and the governor in council was reduced in 1951, their

authority nonetheless remained formidable, with administration of more than half the act being at their discretion. In the current version of the act, nearly 90 provisions give the minister of Indian affairs a range of law-making, quasi-judicial and administrative powers in all-important areas. In addition, another 25 provisions give the governor in council wide powers, including that of making regulations in areas otherwise covered by band council by-law authority.

Expropriation powers were significantly reduced, although where a federal or provincial law authorizes a province, municipality or local authority to expropriate land, the governor in council can still permit reserve lands to be expropriated without band consent. The *Kruger* case, described earlier, offers graphic evidence of the high-handed way this power has sometimes been used. This power is strongly criticized by Indians as a derogation from the Crown duty of protection of their land base and political autonomy.

The 1951 revision also removed the prohibition on traditional dances and appearing in exhibitions and stampedes. Somewhat paradoxically, however, Indians in western Canada still needed official permission to sell their livestock and produce, and this provision remains in the act, although it is no longer applied.

Importantly, the definition of Indian status and control of band membership remained in non-Indian hands, and the definitions were actually tightened up for financial reasons by introducing an Indian register as a centralized record of those entitled to registration as an Indian (and to the receipt of federal benefits). This enabled federal officials to keep track of reserve populations and to remove non-status Indians and others. Before this, federal officials had kept various records, such as treaty and interest distribution lists, estates administration, band membership and 'half-breed' scrip records, but had attempted no comprehensive listing of Indians.

The mention of "Indian blood", which had been a feature of the act's definition section since 1876, was replaced by the notion of registration, with a strong bias in favour of descent through the male line. At the time the new registration system was introduced, the practice according to the provisions of the 1951 *Indian Act* was to use the existing band lists as the new "Indian Register" called for by the act. These lists may have been band fund entitlement lists, treaty pay lists or similar records. Given the relative informality and lack of comprehensive documentation at the time, they were not by any means complete lists of status Indians or of those entitled to legal status as Indians.

The lists were to be posted "in a conspicuous place in the superintendent's office that serves the band", and six months were given for additions, deletions and protests before the band list was finalized as the basis for the Indian register. In addition, a general list of Indians without band affiliations was kept in Ottawa. The registrar could add to or delete names from that list, under his own authority, or from band lists through application of the status rules in the new act.[118]

The names of many people who ought to have been on the band lists or the general list were never added. They may, for example, have been away from the reserve when band lists were posted. In remote places, especially where people still practised a subsistence lifestyle, people could have been away on hunting parties, fishing or on their traplines. Such people were also the least likely to have been able to read in the first place. Some people were opposed to any form of registration, seeing it as a derogation from the historical status of Indian nations. Sometimes, it has been argued, the "conspicuous place" called for in the *Indian Act* was less conspicuous than it ought to have been. In any event, and for whatever reason, many people claim that they or their parents or grandparents were never included on these lists when they should have been and that they were prevented later from obtaining Indian status.[119]

Under the new status rules the definition of Indian was made even more restrictive as far as women were concerned. A good example is the so-called 'double mother' rule in subsection 12(1)(a)(iv), whereby a child lost Indian status at age 21 if his or her mother and grandmother had obtained their own status only through marriage. In short, someone born and raised on a reserve, whose father and grandfather were status Indians, would automatically lose Indian status at the age of 21. Upon loss of status, band membership too would be forfeited, as well as the right to continue to live on the reserve.

The double mother rule applied to all women without Indian status. Thus it included women who might have been enfranchised involuntarily or left off band lists through inadvertence or otherwise, or who were simply unable to qualify under the *Indian Act*, despite being of Indian descent. A good example of the latter situation would obtain at the Mohawk reserve at Akwesasne if the mother and grandmother in question were both from the U.S. side of the reserve. The 21-year-old grandchild would lose Indian status in Canada automatically, even though he or she might be Mohawk by ancestry, language and culture. The legal fiction involved in registration and Indian status becomes evident in such cases.

Voluntary and compulsory enfranchisement were kept in the 1951 revisions, although the compulsory element was weakened: the minister could enfranchise an Indian or a band only upon the advice of a special committee established for that purpose. If the committee found that the Indian or band was qualified and that enfranchisement was desirable, the person or band in question would be deemed to have applied for enfranchisement. According to Indian affairs officials, no band was ever forced to enfranchise through this provision, although the threat was present until enfranchisement was dropped from the *Indian Act* after 1985.

One band, however, did choose to enfranchise as a group using the voluntary enfranchisement procedures in the 1951 *Indian Act*. In 1958 the members of the Michel Band of Alberta voluntarily renounced their Indian status in

law, taking most of their reserve land in individual lots along with the proceeds of the sale of the remaining lands. The enfranchisement of this band solved one set of problems for Indian affairs officials, since it meant that there would no longer be an entity to pursue land claims based on some doubtful reserve land transactions from the past. However, it caused problems for the descendants of the enfranchised band members, many of whom regained status through the 1985 amendments. These people have Indian status but no band and no reserve to return to as a result of a decision taken nearly 40 years ago. They have no standing to pursue land claims, since the government's specific claims policy states that only the chief and council of a band can apply to enter the negotiation process.[120]

Returning to the 1951 *Indian Act*, Indian women on-reserve could now vote and, in that limited way, participate in band political life. In addition, the provision that had prohibited Indian women from voting on land surrenders was amended to permit women to participate on equal terms with men. However, the discriminatory features of the old acts regarding Indian women who married out were actually strengthened in aid of the overall assimilation policy.

The administration of Indian estates was simplified in the 1951 act to bring it more in line with provincial law. However, where Indian women who married out were enfranchised involuntarily, they also lost the right not only to possess reserve land but to inherit it. In such cases, the land would be sold to an 'Indian' and the proceeds forwarded to the enfranchised woman, even if she had divorced the non-Indian man or had been widowed before inheriting the land.

The part of the *Indian Act* incorporating the former *Indian Advancement Act* was dropped, with some elements incorporated into the provisions on band council powers. As before, the minister could impose the elective system on a band (now with two-year terms for chief and council). Band council authority was still limited, but bands that had reached "an advanced stage of development" could acquire additional powers, such as authority to tax local reserve property. The current version continues the limited band council powers but has dropped the requirement that a band be "advanced" before it is permitted to pass local property taxation and business licensing by-laws to generate revenue for band purposes.

The 1951 revision also reinforced the prohibition on Indian intoxication, making it an offence for an Indian to be in possession of intoxicants or to be intoxicated, whether on- or off-reserve. Obviously, this was far more draconian than the alcohol laws applicable to non-Indians. Ultimately, of course, these provisions were struck down by the Supreme Court. They were replaced in 1985 by band council authority to regulate alcohol questions.

One of the most significant changes concerned the new section 87 (now section 88), which incorporated provincial laws of a general nature and made them part of the *Indian Act* legal regime. Thus, whenever a provincial law dealt with a subject not covered by the *Indian Act*, such as child welfare matters,

Parliament would allow the provincial law to apply to Indians on-reserve. Through this route, the provinces made inroads into what was previously a federally protected area. Provincial laws could be prevented from applying only if they were not "laws of general application" in a constitutional sense, if there existed contrary treaty provisions, or if the *Indian Act* or its regulations or by-laws dealt with the same area and conflict arose between the provincial law and the *Indian Act* provision, regulation or by-law.

Section 88 continues in today's version of the act, giving the provinces law-making powers in areas that they would not normally be able to deal with in regard to Indians. This provision is the source of much criticism from Indians and of accusations that the federal government has almost completely abandoned its role of protecting Indian autonomy from the provinces.

12. The Modern Era: Contrasting Assumptions and Models of Self-Government

From the 1950s on, Aboriginal policy development in Canada entered a confusing stage as the continuing policies of civilization and assimilation came into increasing conflict with the desire of Indian nations to resume control over social and political processes in their own communities and with newer ideas derived from the evolution of the international indigenous movement. Thus, until 1969, assimilation was still the dominant federal policy, although by then the federal government was using terms such as 'equality' and 'citizenship' instead of the more brutal language of the earlier era. After 1969 and the disastrous white paper, described earlier in this chapter, Canada seems to have adopted a new approach and is moving toward a policy based on true nation-to-nation negotiations. However, as discussed in this section, it is less clear that the old ideas of assimilation are dead.

Following the 1951 revision of the *Indian Act*, a number of the other recommendations of the 1946-48 Joint Committee were implemented during the 1950s. For example, a co-operative effort was undertaken with the provinces to extend provincial services to Indians. Since then, of course, it has become accepted that Indians are provincial residents for purposes of service delivery. However, it also appears that the federal government has continued to accept the desirability and inevitability of Indians becoming full-fledged provincial residents.

In 1959 the federal government struck another joint parliamentary committee to examine the *Indian Act*. Indian affairs officials prepared a report, *A Review of Activities, 1948-1958*, and submitted it to the Joint Committee. It outlined progress since the last joint committee report of the 1940s. After noting the various initiatives in progress with the provinces on sharing or transferring

programs, the document indicated that, by 1959, 344 bands were using the elective system under the *Indian Act*, and 22 bands had been given authority to raise and spend band funds. More interestingly, enfranchisement figures were given that showed a vastly increased number of forced enfranchisements since 1951. For example, in the entire period between 1876 and 1948 there were 4,102 enfranchisements, while an additional 6,301 occurred after the restrictive provisions of the new act were introduced in 1951.[121] The figure for involuntary enfranchisements would continue to rise until 1975, when the practice was suspended. Although taken as a sign of progress, these figures reflect for the most part the effect of the marriage provisions, whereby Indian women who married out and their descendants lost status through automatic enfranchisement.

The 1959 Joint Committee hearings repeated to a considerable extent those of the previous decade. Thus, virtually all Indian submissions, whether from Indian associations or individual band councils, reiterated Indian concerns about reserve conditions, administrative red tape, land claims, violation of treaties, and unsettled Aboriginal land title issues. For Indians, the solutions also remained as they had been presented to the earlier committee. In particular, Indian submissions stressed the continuing need for enhanced powers of self-government and less Indian branch interference in local reserve life.

Nonetheless, as with the earlier committee, that of 1959-61 came down firmly in favour of continuing on the path of preparing Indians for full participation in Canadian society, without distinction based on their Indian descent and their special constitutional status. In short, Indians were not seen as members of more or less permanent and distinct political units within the Canadian federation. Rather, they were considered members of a disadvantaged racial minority, to be encouraged and helped to leave their inferior status behind through social and economic evolution. Reserves and Indian status were transitional devices on the road to absorption within mainstream society. Assimilation was still the goal, although it was now solidly recast in the more felicitous language of citizenship and equality:

> The time is now fast approaching when the Indian people can assume the responsibility and accept the benefit of full participation as Canadian citizens. Your Committee has kept this in mind in presenting its recommendations which are designed to provide sufficient flexibility to meet the varying stages of development of the Indians during the transition period.[122]

The Joint Committee reported in 1961, recommending, among other things, greater equality of opportunity and access to services for Indians, the transfer of education and social services to the provinces, the imposition of taxes on reserve, more social research, more community planning and development studies, a formal federal-provincial conference to begin the transfer of social services to

the provinces, the establishment of a claims commission, Indian advisory boards at all levels, and the striking of another parliamentary committee to investigate Indian conditions in seven years' time. Only one significant *Indian Act* amendment came out of this exercise: in 1961 compulsory enfranchisement for men and for bands was finally eliminated.

If this represented one model – a continuing emphasis on assimilation – the vision contained in the comprehensive Hawthorn report on Indian conditions in Canada represented what was for non-Indian reformers a radical new vision.[123] This 1966 report confirmed what had by then become obvious: Indians and their reserve communities had not been assimilated, although their "lonely splendour as isolated federal islands surrounded by provincial territory" had begun by then to be overtaken by the provincially administered welfare state emerging in Canada. Indian communities were actually increasing in population, so much so that many Indians were forced to leave the reserves for the cities. Both trends have continued. In 1967, nearly 80 per cent of status Indians lived on their reserves; today less than 60 per cent do.

The solution to the Indian problem proposed by the Hawthorn report was to abandon assimilation as a formal goal of Indian policy. Instead, and in keeping with its view that Indian communities were already part of the provinces in a jurisdictional as well as a physical sense, it proposed building on the band council system to prepare reserve communities to become provincial municipalities. The authors were sceptical about a wide-ranging Indian right of self-government, concluding that the "best Indians can hope for is the limited control and autonomy available to small communities within a larger society, plus sympathetic consideration of their common and special needs by higher levels of government."[124]

The Hawthorn report did not accept the inevitability or desirability of individual assimilation and proposed instead the concept of "citizens plus" whereby, in addition to the ordinary rights and benefits to which all Canadians have access, the special rights of Indians as "charter members of the Canadian community" would be respected. The "charter rights" of Indians were traced back to the bargain made by the historical tribal nations: in exchange for allowing non-Indian settlement of the lands, Indians would be guaranteed Crown protection and special status within the imperial system. Earlier in this chapter we described this view in terms of the imperial tripartite system, developed on the basis of the Crown undertaking in the *Royal Proclamation of 1763*.

Thus, the view of the Hawthorn report appears in retrospect to be one of collective absorption of Indians into provincial municipal structures. Indians would retain certain federal protections over their lands and would remain Indians. Nonetheless, Indians were expected to develop new and permanent links with the provinces as the historical link to the federal Crown was gradually severed in favour of what the authors believed was the inevitability of greater provincial involvement in reserve matters through program and service delivery.

Indians did not see this process as inevitable, however, and they made this clear to the next important parliamentary committee struck to examine Indian issues – the 1983 Special Committee on Indian Self-Government, chaired by Keith Penner, MP.[125] In between the Hawthorn report and the Penner report, Canada patriated its constitution from Great Britain, adding the *Constitution Act, 1982* and its recognition and affirmation of existing Aboriginal and treaty rights in section 35.

This was the context in which Indian nations formulated their views to the Penner committee. What they wanted, and what the Penner committee recommended, was the immediate recognition of Indian First Nations as a distinct, constitutionally protected order of government within Canada and with a full range of government powers. In short, their vision was a return to that of the imperial tripartite system: a status equal to that of the colonies (now provinces), with the federal Crown in the role of protector originally assumed by imperial authorities.

Thus, the Penner report proposed an active and protective federal role to recreate the original partnership that Indians have never ceased to call for. As the protector and guarantor of Indian self-government, the federal Crown would pass legislation that under normal constitutional paramountcy rules would oust the provinces from regulating anything to do with "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. Having secured a space in which to legislate exclusively for Indians, Parliament would withdraw its laws to allow the laws of federally recognized self-governing Indian First Nations to regulate matters occurring on Indian reserves.

Ultimately, the Penner committee saw Indian First Nations as equivalent to provinces. Thus, in the same way that provinces are immune from each other's law-making powers, Indian First Nations laws and provincial laws would have had no effect on each other. In the event of conflict, federal laws in the same areas would be paramount over Indian First Nations laws, as is the case with provincial laws. The federal government would support Indian First Nations programs, services and operations through a system of grants like those available to the provinces under the rules of fiscal federalism. Eventually, the whole arrangement would be entrenched in the constitution.

Neither the federal government nor the provincial governments endorsed the approach of the Penner report. Instead, in recent years they have supported legislation like the *Cree-Naskapi (of Quebec) Act*, passed by Parliament in 1984, conferring a form of delegated self-government on the Cree and Naskapi peoples of Quebec.[126] These powers, like those conferred subsequently on the Sechelt Band by the 1986 *Sechelt Indian Band Self-Government Act*,[127] resemble the municipal-style powers that the Hawthorn report saw Indian reserve communities exercising. They are most definitely not the wider powers that Indians have been seeking, which would restore them to the self-governing status they enjoyed before the *Gradual Enfranchisement Act* of 1869.

In this vein, the federal government formally adopted a Hawthorn-style municipal approach in the Community-Based Self-Government Policy of 1986. With the exception of the Yukon self-government agreements, this policy has not been a successful one. While the 1992 Charlottetown Accord, had it been adopted, would have seen constitutional recognition of Aboriginal governments as a third order within the Canadian federation, it is less clear that the powers that would have been available to Aboriginal governments would have embraced the same range of law-making authority available to the provinces. Thus, it seems clear that there is a certain continuing reluctance on the part of federal and provincial governments to embrace fully the vision of Indian nations as a true third order as envisaged by the Penner report.

13. Conclusion

In the twentieth century as in the nineteenth, it is apparent that Indian and non-Indian perspectives on the fundamental issue of the place of Indians within the Canadian federation remain to be reconciled. Although massive attempts have been made in past decades to carve out a space within which Indian self-governing powers might operate in many ways in a renewed Canadian federation, and to repeat our earlier observations about the formulation of Indian policy more generally, it has all too often been a dialogue of the deaf – neither side has heard or fully comprehended the other. Aboriginal and non-Aboriginal people, operating from the different cultural perspectives highlighted in the first seven chapters of this volume, often do not appear to be speaking the same language when they sit around the negotiating table to discuss self-government and constitutional issues.

In many ways, this difference in perspectives is captured by the way fundamental issues are typically formulated in the self-government context. For Indians the most common formulation goes as follows: "Show us in terms of international or domestic Canadian constitutional law why your assumption of jurisdiction over Indian tribal nations is justified." For the federal and provincial governments the formulation would more typically be as follows: "Show us precisely how you think your powers – inherent or delegated – will operate in the context of the current division of powers, lands and resources in the Canadian federation."

It is clear that each side starts from fundamentally different assumptions. For Indians, the original assumption that they are partners in the exercise of sharing the land of Canada and in building a society based on areas of exclusive and shared sovereignty has continued almost unabated since the time of the *Royal Proclamation of 1763*. For the federal and provincial governments, which have benefitted from the use and exploitation of the lands and resources of this continent, the assumption seems to be that Indians must make a case for themselves

as entities fit to participate as governments in their own right in the joint enterprise now known as Canada.

It is true, as Tom Siddon, a former minister of Indian affairs, has observed, that there can be no real change within the confines of the *Indian Act*.[128] However, it is equally true that even if the *Indian Act* were repealed, there could be no real change without repeal of the attitudes and assumptions that have made legislation like the *Indian Act* and its precursors possible. A royal commission cannot make laws. It can inform and recommend, however. In that role, we can call attention to the factors, attitudes and continuing assumptions that brought about the *Indian Act* and that continue to prevent progress in moving away from the restrictive *Indian Act* vision.

Those factors are to be found in past assumptions and the shadows they have cast on present attitudes. They must be recognized for what they are and cast away as the useless legacy of destructive doctrines that are as inappropriate now as they were when first conceived. If this review of the foundations of the *Indian Act* has shown these assumptions for what they are, it will have succeeded as the first step in entering a new era of partnership between governments and Indians. Paradoxically, this new partnership is also a very old partnership, indeed, older than the *Indian Act* and what it represents.

In subsequent volumes of our report we outline how we believe the renewed partnership we have called for can be implemented. In Volume 2, Chapter 3 in particular, we return to a discussion of the *Indian Act* and its future in the context of Aboriginal self-government. Before doing so, however, the full range of factors that have led to the present impasse in the relationship have to be addressed. One of the most important of these is the destructive experience for Aboriginal people of the industrial and residential schools that were so prominent a part of the civilizing and assimilation programs described in general terms in this chapter. It is to these schools and to their legacy that we now turn.

Notes

1. Royal Commission on Aboriginal Peoples [RCAP], *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).
2. *In the matter of a reference as to whether the term "Indians" in head 24 of section 91 of the British North America Act, 1867, includes Eskimo inhabitants of the province of Quebec*, [1939] S.C.R. 104, commonly referred to as *Re Eskimos*. The federal government, however, has explicitly excluded Inuit from the *Indian Act* since the 1951 revisions (S.C. 1951, chapter 29, section 4) and instead delivers federal programs and services to them through the Department of Indian Affairs and Northern Development under its mandate for northern development.

3. See, to this effect, Bradford W. Morse and John Giokas, "Do the Métis fall within section 91(24) of the *Constitution Act, 1867* and, if so, what are the ramifications in 1993?", research study prepared for the Royal Commission on Aboriginal Peoples [RCAP] (1993) and published in *Aboriginal Self-Government: Legal and Constitutional Issues* (RCAP: 1995). For information about RCAP publications and research studies, see *A Note About Sources* at the beginning of this volume.

4. *St. Catharines Milling and Lumber Company* v. *The Queen*, [1887] 13 S.C.R. 577 at 652 per Gwynne J.

5. *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313 at 395 per Hall J.

6. These constitutional documents are the *Manitoba Act, 1870*, R.S.C. 1985, Appendix II, No. 8; the *Rupert's Land and North-Western Territory Order* (1870), R.S.C. 1985, Appendix II, No. 9; the *British Columbia Terms of Union* (1871), R.S.C. 1985, Appendix II, No. 10; *The Ontario Boundaries Extension Act* (1912), S.C. 1912, chapter 40; *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, chapter 45; and the *Constitution Act, 1930*, R.S.C. 1985, Appendix II, No. 26.

7. The Task Force on Canadian Unity, *A Future Together, Observations and Recommendations* (Ottawa: Supply and Services, 1979), p. 56 [emphasis in original].

8. Department of Indian Affairs and Northern Development [DIAND], *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969) [hereafter, the white paper].

9. Harold Cardinal, *The Unjust Society, The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., 1969), p. 140.

10. Department of Indian Affairs, *Annual Report*, 1870, p. 4, quoted in Wayne Daugherty and Dennis Madill, *Indian Government under Indian Act Legislation 1868-1951* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1980), p. 2.

11. The commissions of inquiry that laid the foundation for Indian policy before Confederation are reviewed and assessed in John Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department* (Ottawa: Indian Affairs and Northern Development, 1985).

    There were six commissions of inquiry into Indian policy between 1828 and 1858, all conducted in response to what was becoming known as the 'Indian problem'. The first report was somewhat rushed and rudimentary and was prepared in 1828 by Major General Darling, military secretary to the governor general, Lord Dalhousie. It covered both Upper and Lower Canada and led to the establishment of the reserve system as official policy.

    The second was prepared by a committee of the Lower Canada Executive Council in 1837 and essentially followed the recommendations of the earlier Darling report. In 1839, the third report was prepared by Justice James Macauley and dealt with conditions in Upper Canada. It too generally supported the reserve and civilization policies of the time.

    A committee of the Upper Canada Legislative Assembly prepared the fourth report in response to Lord Durham's report on conditions in the two Canadas, arriving at conclusions similar to those of the preceding report by Justice Macauley. The fifth, and by far the most important, was the 1844 report of Governor General Sir Charles Bagot, which covered both Upper and Lower Canada. Its recommendations gave a direction to Canadian Indian policy that has endured in many respects right up to the present.

    A sixth report was prepared in 1858 by Richard Pennefather, civil secretary to the governor general. It too covered both Canadas and was the most thorough report on Indian conditions to that point.

12. The 1969 white paper (cited in note 8) was devised in secret by federal public servants and politicians. Its proposals went completely against recommendations flowing from contemporaneous and wide-ranging consultations with Indian people across Canada, leading to feelings of betrayal. For a detailed examination of the secrecy and apparent duplicity of federal policy making with respect to this initiative, see Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (Toronto: University of Toronto Press, 1981).

13. *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies in Two Volumes*, ed. H.B. Hawthorn (Ottawa: Indian Affairs Branch, 1966), volume 1, p. 344.

14. White paper (cited in note 8), p. 5.

15. In Bill C-31 (1985), the status and band membership provisions were amended to eliminate sex discrimination and to allow bands to control their membership if they wished. However, the basic philosophical premise of that section of the *Indian Act* remained unchanged from when the act was passed originally in 1876. The issue of who is recognized as an 'Indian' and which groups of Indian people are recognized as 'bands' is still under exclusive federal government control. See sections 5-14.3 of the *Indian Act*, R.S.C. 1985, chapter I-5, as amended.

16. Recent years have seen a spate of scholarly revisions of the simplistic and largely contrived story of the clash of 'civilization' and 'savagery' that was put forward by generations of narrow-minded clergymen, politically oriented propagandists and romantic frontier novelists. Two particularly powerful debunkings of these conventional histories are Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, N.C.: University of North Carolina Press, 1975); and Robert A. Williams, Jr., *The American Indian in Western Legal Thought, The Discourses of Conquest* (New York: Oxford University Press, 1990).

17. There has been no uniform pattern in Canada for the creation of Indian reserves. Some were set aside by religious orders for converted Indians, some were created as refuges by imperial or colonial authorities for Indians fleeing other areas of Canada, some were created by treaty with the Crown, some were purchased from private individuals or from a colonial or provincial government, others were

created by provincial governments after Confederation, while still others were simply recognized as such by the Crown.

The *Indian Act* itself has no mechanism for the creation of reserves. Rather, new reserves are created or, if already in existence, legally affirmed under the Crown prerogative power. After Confederation, the federal Crown was unable to use its jurisdiction over Indian lands in the *Constitution Act, 1867* to create reserves unilaterally, since after 1867 the land was vested in the provincial Crown under section 109. Joint federal-provincial action was required. The nature and conditions of that joint action are reflected in various federal-provincial agreements and vary somewhat from province to province.

For a fuller discussion of the reserve system, see Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990); and Jack Woodward, *Native Law* (Toronto: Carswell, 1994). See also Chapter 4 in this volume.

18. *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1053.

19. The most accurate text of the Proclamation is provided in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America*, Transactions and Collections of the American Antiquarian Society (Worcester, Mass.: American Antiquarian Society, 1911), volume 12, pp. 212-218. A less accurate version is reproduced in R.S.C. 1985, Appendix II, No. 1. The original text, entered on the Patent Roll for the regnal year 4 George III, is found in the United Kingdom Public Record Office, c. 66/3693 (back of roll). The complete text of the Royal Proclamation is provided in Appendix D at the end of this volume.

20. This formulation first appeared in the seminal case *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Peters) 1 (1831), and has been elaborated and refined ever since by a long and still growing line of court decisions in the United States. Academic commentators are divided on whether the courts have done justice to Indian aspirations through this verbal formula. A relatively positive appraisal is given in Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987). A more negative conclusion has been reached by Russell Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980).

21. No reserve was established in Newfoundland until 1984, since neither the federal nor the provincial government recognized the existence of a status Indian community until the Miawpukek Band of Conne River was declared to be a band by the federal government that year. The Mi'kmaq themselves claim that from 1870 a colonial 'reserve' had existed at Conne River, thereby indicating that they were a recognized Indian community. See Adrian Tanner, John C. Kennedy, Susan McCorquodale and Gordon Inglis, "Aboriginal Peoples and Governance in Newfoundland and Labrador", research study prepared for RCAP (1994).

22. Regarding the creation of Indian reserves under the French regime, see G.F.G. Stanley, "The First Indian 'Reserves' in Canada", *Revue d'histoire de l'Amérique française* 4/2 (September 1950), pp. 168-185. See also note 17.

23. National Archives of Canada [NAC], Record Group 10 [RG10], volume 5, described in Leslie, *Commissions of Inquiry* (cited in note 11), p. 20 and following.

24. NAC RG10, "An address to our Great Father, Sir Peregrine Maitland from the Mississauga Nation residing on the River Credit", 2 January 1827, quoted in Leslie, *Commissions of Inquiry*, p. 16.

25. The Lower Canada Executive Committee; see note 11.

26. *An Act for the protection of the Lands of the Crown in this Province, from trespass and injury*, The Statutes of Upper Canada to the Time of the Union, volume 1 – Public Acts (1839), chapter 15.

27. Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (New York: Harper & Row, 1969), p. 334.

28. Province of Canada, *Journals of the Legislative Assembly of Canada*, 1844-1845, Appendix EEE, "Report on the Affairs of the Indians in Canada", 20 March 1845, quoted in Leslie, *Commissions of Inquiry* (cited in note), pp. 81-96. See also John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department", in *Historical Papers 1982*, A Selection from the Papers Presented at the Annual Meeting Held at Ottawa, 1982 (Ottawa: Canadian Historical Association, 1983), pp. 31-52.

29. *An Act respecting the Management of the Indian Lands and Property*, Statutes of the Province of Canada 1860, chapter 151, section 1.

30. *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, Statutes of the Province of Canada 1850, chapter 42; *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*, Statutes of the Province of Canada 1850, chapter 74.

31. *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada*, Statutes of the Province of Canada 1851, chapter 59, section II.

32. *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, chapter 18, section 3:

> 3. The term "Indian" means
> *First.* Any male person of Indian blood reputed to belong to a particular band;
> *Secondly.* Any child of such person;
> *Thirdly.* Any woman who is or was lawfully married to such person...

33. Province of Canada, *Journals of the Legislative Assembly of Canada*, Sessional Papers, Appendix 21, "Report of the Special Commissioners..." (Toronto: 1858), quoted in Leslie, *Commissions of Inquiry* (cited in note 11), pp. 129-172.

34. United Kingdom, House of Commons, *Parliamentary Papers*, volume XLIV, no. 595, "Copies or Extracts of Correspondence between the Secretary of State for the Colonies and the Governor General of Canada respecting Alterations in the

Organization of the Indian Department of Canada" (London: 1860), p. 1, quoted in Leslie, *Commissions of Inquiry*, p. 138.

35. Quoted in Leslie, *Commissions of Inquiry*, pp. 143, 144.

36. Interim Report, Richard Pennefather to Governor General Sir Edmund Head, *Parliamentary Papers* (cited in note 34), quoted in Leslie, *Commissions of Inquiry*, p. 138.

37. The net result of these measures in Manitoba was the elimination of any system of communally held Métis land. For a more detailed discussion of Métis issues, see Volume 4, Chapter 5. See also Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan, Native Law Centre, 1991).

38. *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S.C. 1857, chapter 26.

39. NAC RG10, volume 245, part 1, Resident Agent and Secretary of Indian Affairs Letterbooks, statements of Indian leaders contained in communication from D. Thorburn to R. Pennefather, 13 October 1858, quoted in John S. Milloy, "A Historical Overview of Indian-Government Relations 1755-1940", discussion paper prepared for the Department of Indian Affairs and Northern Development, 7 December 1992, p. 61.

40. United Kingdom, *Parliamentary Papers*, Aborigines, volume 2, "Report of the Select Committee of the House of Commons on the Aborigines of the British Settlement" (1837), p. 77. See also Richard Bartlett, *Subjugation, Self-Management and Self-Government of Aboriginal Lands and Resources* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1986), p. 27.

    Very similar language was used 50 years later in *United States* v. *Kagama*, 118 U.S. 375 (1886), the leading U.S. Supreme Court decision justifying congressional plenary power over Indians as a way of protecting them from the local settler populations (p. 384):

    > They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies.

41. *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, chapter 42, section 15.

42. *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, chapter 6.

43. Department of Indian Affairs, *Annual Report*, 1870, per William Spragge. See Daugherty and Madill, *Indian Government* (cited in note 10), p. 1.

44. Even today many assert that political matters internal to bands are firmly in the control of a dominant male hierarchy that has had more than a century to consolidate its power.

45. Ultimately, this limiting focus on band-level government would be adopted by Indian peoples themselves. Thus the modern Assembly of First Nations, for example, is made up of the chiefs of the individual band governments first established in 1869 and carried forward into the *Indian Act* a few years later.

46. In *Felix Cohen's Handbook of Federal Indian Law*, 1982 edition, ed. R. Strickland et al. (Charlottesville, Virginia: The Michie Company Law Publishers, 1982), allotment is described (pp. 129-130, footnote omitted) as follows:

    > The allotment concept was not new; Indian lands had been allotted as early as 1633...
    >
    > Later, allotments were used as a method of terminating tribal existence. Allottees surrendered their interest in the tribal estate and became citizens subject to state and federal jurisdiction. During the 1850s this break-up of tribal lands and tribal existence assumed a standard pattern. Such experiments in allotment served as models for later legislation.

    The major attempt to destroy the basis of separate tribal existence in the United States occurred in 1887 with the passage of the *General Allotment Act* (25 U.S.C. ss. 331-34, 339, 341, 342, 349, 354, 381), known as the Dawes Act. It provided for compulsory allotment of communally held tribal lands. The allotment policy and process are described in Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934* (Bloomington: Indiana University Press, 1991).

47. Location tickets have been replaced on Indian reserves by certificates of possession and occupation in the modern version of the *Indian Act*, but otherwise the concept is the same.

    Section 31 of the *Manitoba Act, 1870*, R.S.C. 1985, Appendix 2, No. 8, provides for the allotment of individual tracts of land to "the children of the half-breed heads of families" as follows:

    > 31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

    For a discussion of this provision see Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Métis", *Osgoode Hall Law Journal* 29 (1991), p. 457, where he states that the section of the *Manitoba Act* granting land to Métis children "was a 'fast-track' version of the Indian enfranchisement legislation applied in eastern Canada" (p. 470).

48. NAC RG10, Red Series, volume 1934, file 3541, Chairman, General Indian Council (Napanee) to the Minister of the Interior, 16 June 1872, quoted in John Leslie and Ron Maguire, *The Historical Development of the Indian Act*, second edition (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre, 1978), p. 54.

49. *An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia* S.C. 1874, chapter 21.

50. *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, chapter 18.

51. Department of the Interior, *Annual Report for the year ended 30th June, 1876* (Parliament, Sessional Papers, No. 11, 1877), p. xiv.

52. Its sole provision in this respect is to allow treaty moneys to be paid to Indians out of the Consolidated Revenue Fund. *Indian Act*, R.S.C. 1985, chapter I-5, as amended, section 72.

53. House of Commons, *Debates*, Third Session – Third Parliament, 30 March 1876, p. 933. See also Leslie and Maguire, *Historical Development* (cited in note 48), p. 60.

    The approach of treating Indians as minors was, of course, also official policy in the United States, the basis of which can be found in the leading Supreme Court case, *Worcester* v. *Georgia*, 31 U.S. (8 Peters) 515 (1832), where the relation of the tribes to the United States is described as resembling "that of a ward to his guardian". That phrase was enlarged upon and used as justification for the imposition of unrestricted federal power over the internal affairs of the tribes in *United States* v. *Kagama*, 118 U.S. 375 (1886) at 383-384:

    > These Indian Tribes *are* the wards of the nation. They are communities *dependent* on the United States.... From their very weakness and helplessness...there arises the duty of protection, and with it the power.

54. S.C. 1876, chapter 18, section 26.1.

55. George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills: Collier-Macmillan Canada, Ltd., 1974), p. 123.

56. S.C. 1876, chapter 18, section 63. But the allocation was not valid until approved by the superintendent general, who would issue the actual location ticket under sections 6 and 7.

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

58. The Mississauga Band, by order in council in 1877. NAC RG10, volume 1079, No. 337, reference in the letterbook of the Deputy Superintendent General, 12 April 1880, quoted in Daugherty and Madill, *Indian Government* (cited in note 10), p. 4.

59. In modern times this has impeded Indian bands effectively from participating in the larger Canadian economy because of delays in getting access to their own funds for investment and development purposes.

60. The provision for the imposition of punishment continues in the present act. Where there is no local justice of the peace, it is still difficult for band councils to enforce their by-laws.

61. The Mississauga of the Credit, the Caughnawaga, the Cowichan, Kinolith, Metlekatla, Port Simpson and St. Peter's reserves, according to Leslie and Maguire, *Historical Development* (cited in note 48), p. 90.

62. A brief but excellent description of the policies underlying particular measures in the *Indian Act* is offered in Brian E. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), particularly the chapter entitled "General Aspects of Policy and Administration", pp. 37-59. For a more general perspective, see Rémi Savard and Jean-René Proulx, *Canada derrière l'épopée, les autochtones* (Montreal: Éditions de l'Hexagone, 1982), chapter 3, pp. 91-174.

63. House of Commons, *Debates*, First Session – Thirteenth Parliament, volume 132, p. 1049 (19 April 1918). See also Brian Titley, *A Narrow Vision*, p. 41.

    About two months earlier, former Indian agent and agency inspector William Graham had been appointed commissioner for greater production for the prairie provinces as part of the scheme to improve wartime agricultural production. His powers included developing a production policy for each individual reserve, leasing reserve lands to non-Indian farmers where necessary, and establishing 'greater production farms' on Indian lands expropriated under the *War Measures Act* and using Indian labour. A grant from war appropriations financed a large part of this overall scheme.

64. NAC RG10, volume 7484, file 25001, part 1, Duncan Campbell Scott to Superintendent General Arthur Meighen, 15 October 1918, quoted in Titley, *A Narrow Vision*, p. 44.

65. House of Commons, *Debates* volume 74, 30 March 1906, quoted in Titley, *A Narrow Vision*, p. 21.

66. The provision is still in the *Indian Act* (section 64(1)(a)) and is criticized by many Indian people as providing too much of an incentive to Indians to sell their homelands. See *The Report of the Commission of Inquiry Concerning Certain Matters Associated with the Westbank Indian Band* (Ottawa: Supply and Services, 1988), p. 409.

67. NAC RG10, volume 3617, file 4646-1, Chief Justice H.M. Howell, Manitoba Court of Appeal, to the Governor General in Council, 2 December 1907, quoted in Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1980), p. 113.

68. Eventually legislation was passed *(An Act relating to the St. Peter's Indian Reserve* S.C. 1916, chapter 24) to settle the matter. Even today, however, controversy surrounds the surrender, by which the band exchanged the St. Peter's reserve for its present reserve. See Daniel, *A History of Native Claims.*

69. *Kruger* v. *The Queen*, [1986] 1 F.C. 3 at 24.

70. Although Mr. Justice Heald found a breach of the fiduciary obligation, ultimately he also found that the action by the band was time-barred. Justices Urie and Stone found no breach of the fiduciary obligation in the first place. In the result, all three judges dismissed the appeal.

71. House of Commons, *Debates*, 1910-1911, volume 4, column 7827, 26 April 1911.

72. Titley, *A Narrow Vision* (cited in note 62), p. 95.

73. *Re Indian Reserve, City of Sydney, N.S.* (1918), 42 D.L.R. (Ex. C.) 314 at 316-317 per Audette J.

74. *Dick* v. *The Queen*, [1985] 2 S.C.R. 309.

75. Duncan Campbell Scott, a deputy superintendent general of Indian affairs, stated with regard to the Wyandotte (Wendat) of Anderdon that by "education and intermarriage they had become civilized"; see *The Administration of Indian Affairs in Canada* (Toronto: Canadian Institute of Indian Affairs, 1931), p. 605. The enfranchisement of the Wyandotte of Anderdon is also discussed in Bruce G. Trigger, "The Original Iroquoians: Huron, Petun, and Neutral", in *Aboriginal Ontario: Historical Perspectives on the First Nations*, ed. Edward S. Rogers and Donald B. Smith (Toronto: Dundurn Press, 1994), pp. 59-61.

76. The Michel Band in Alberta, in 1958, discussed later in this chapter (see note 119 and accompanying text).

77. Department of Indian Affairs, *Annual Report*, 1920, p. 13, quoted in Titley, *A Narrow Vision* (cited in note 62), p. 48.

78. *An Act to amend the Indian Act*, S.C. 1919-1920, chapter 50, section 3.

79. The incident, along with a brief history of Loft's activities, is recounted in Titley, *A Narrow Vision* (cited in note 62), pp. 102-106.

80. In *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Supply and Services, 1978), Kathleen Jamieson cites the following figures (pp. 63-65), all derived from statistics provided to her by the department of Indian affairs. Between 1955 and 1965, for example, there were a total of 7,725 enfranchisements, 2,276 of which were voluntary enfranchisements of men and women (1,313) and included any children enfranchised along with them (963). Thus, 5,449 people – 4,274 women and 1,175 of their children – were involuntary enfranchisements. The disparity between voluntary and involuntary enfranchisements was even more pronounced between 1965 and 1975. There were 5,425 enfranchisements, of which 390 were voluntary, including both men and women (263) and any children enfranchised along with them (127). During the same period, however, a total of 5,035 people – 4,263 women and 772 of their children – were enfranchised involuntarily under section 12(1)(b) of the *Indian Act*.

81. For a fuller explanation of this period in Canadian history and of the policies designed to prevent Indian unrest on the prairies, see John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885", in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), pp. 212-240.

82. *An Act further to Amend "The Indian Act," chapter forty-three of the Revised Statutes*, R.S.C. 1890, chapter 29, section 9, making Indian agents justices of the peace for purposes of enforcing *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, chapter 157.

83. Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1, The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), pp. 303-304.

84. RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).

85. According to the Department of Indian Affairs and Northern Development, at the time of writing this report, those reserves were Akwesasne, Kahnawake and Mashteniatsh (Pointe Bleue).

86. The potlatch and the Tamanawas dance are described briefly in Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990), pp. 5-13.

87. NAC RG10, volume 3669, file 10,691, Gilbert M. Sproat, joint federal-provincial appointee to the British Columbia Indian Reserve Commission, to the superintendent general of Indian Affairs, 27 October 1879, quoted in Cole and Chaikin, *An Iron Hand*, p. 15.

88. This case arose in 1889 and is discussed in Cole and Chaikin, *An Iron Hand*, pp. 35-36. The *Indian Act* was amended later to overcome the specific problems with the wording that Begbie had pointed out.

89. J.R. Miller describes the role of these Indian converts to Christianity in the anti-potlatch crusade in "Owen Glendower, Hotspur and Canadian Indian Policy", in *Sweet Promises* (cited in note 81), p. 329.

90. Chief Alfred Scow, Kwicksutaineuk Tribe, in RCAP, National Round Table on Aboriginal Justice Issues, transcripts, Ottawa, 26 November 1992. For information about transcripts and other RCAP publications, see *A Note About Sources* at the beginning of this volume.

91. The campaign to eradicate dancing on the prairies is related in Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994), particularly pp. 121-122, where the story of the arrest and jailing of Taytapasahsung is told.

92. NAC RG10, volume 3826, file 60, Duncan Campbell Scott to W.M. Graham, 4 October 1921, quoted in Titley, *A Narrow Vision* (cited in note 62), p. 177.

93. *The Queen* v. *Drybones*, [1970] S.C.R. 282.

94. Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-97", in *Sweet Promises* (cited in note 81), p. 360.

95. Parliament of Canada, *Sessional Papers*, volume 23, no. 12, *Annual Report for the year ended 31st December 1889*, p. 162, quoted in Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990), p. 213.

96. Jean Goodwill and Norma Sluman, *John Tootoosis* (Winnipeg: Pemmican Publications, 1984), p. 125.

97. This was the rationale of Duncan Campbell Scott, deputy superintendent general of Indian affairs at the time. In 1924 he had written to E.L. Newcombe, deputy minister of justice, requesting a legal opinion of the draft clause that eventually became section 149A of the revised *Indian Act* (R.S.C. 1927, chapter 98). See NAC RG10, volume 6810, file 470-2-3, volume 8, quoted in Leslie and Maguire, *Historical Development* (cited in note 48), p. 121.

98. The attempt to charge A.E. O'Meara is recounted briefly in Titley, *A Narrow Vision* (cited in note 62), p. 157, while that regarding F.O. Loft is told in Goodwill and Sluman, *John Tootoosis* (cited in note 96), pp. 136-137.

99. F. Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935", *Prairie Forum* 13/1 (Spring 1988), pp. 27-28.

100. NAC RG18, volume 1100, no. 134-35, from the Assistant Indian Commissioner to the Commissioner of the North-West Mounted Police, 20 September 1888; NAC RG10, volume 3285, file 60,511-1-7, p. 7, from F.H. Paget to the Commissioner of the North-West Mounted Police, 30 May 1896, quoted in Barron, "The Indian Pass System", pp. 34-35. See also Pettipas, *Severing the Ties That Bind* (cited in note 91), p. 113.

101. H.B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Vancouver: University of British Columbia Press, 1958), p. 486. See Peter Carstens, *The Queen's People: A Study of Hegemony, Coercion, and Accommodation among the Okanagan of Canada* (Toronto: University of Toronto Press, 1991), p. 88.

102. In this regard, see Carter, "Two Acres and A Cow" (cited in note 94), p. 368.

103. William M. Graham, *Treaty Days: Reflections of an Indian Commissioner* (Calgary: Glenbow Museum, 1991), p. 84.

104. House of Commons, *Debates*, Third Session – Fifth Parliament, 30 April 1885, p. 1484, quoted in Richard Bartlett, "Citizens Minus: Indians and the Right to Vote", *Saskatchewan Law Review* 44 (1980), p. 163. For a discussion of the federal and provincial franchise in relation to Indians, see also Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, volume 1 (Ottawa: Supply and Services, 1991).

105. This happened at different times in different provinces. See Bartlett, "Citizens Minus", pp. 183-184.

106. Although this put such women in a vulnerable position, they were nonetheless in a more fortunate situation than women who had actually been enfranchised through the actions of their husbands under the enfranchisement provisions of the act. Such women lost not only Indian status, but also all connection to the band. In law they were considered non-Indians, provincial residents and Canadian citizens like all others, regardless of their Indian origins and former Indian community.

107. Transcript of the evidence of Sandra Ginnesh, cited in the recent decision of the Federal Court of Canada in *Sawridge Band* v. *Canada*, [1995] 4 Canadian Native Law Reporter 121. The red ticket system is discussed in some detail in this case.

108. *A.G. of Canada* v. *Lavell – Isaac* v. *Bedard*, [1974] S.C.R. 1349 at 1386.

109. See note 80.

110. This power was used in 1942, when the Indian affairs branch investigated its band lists in the Lesser Slave Lake area and discharged 663 persons on the basis of their mixed ancestry. The protests led to the creation of a judicial inquiry conducted by Judge W.A. Macdonald of the District Court of Alberta. He found in his 1944 report that in almost half the cases the power had been used arbitrarily. See Daniel, *History of Native Claims* (cited in note 67), pp. 25-26.

111. NAC RG10, 577-127-33, volume 1A, quoted in Jamieson, *Indian Women and the Law* (cited in note 80).

112. Figure 9.1 is based on the excellent discussion of the post-1985 Indian status rules in Native Women's Association of Canada, *Guide to Bill C-31: An Explanation of the 1985 Amendments to the Indian Act* (Ottawa: NWAC, 1985).

113. Stewart Clatworthy and Anthony H. Smith, "Population Implications of the 1985 Amendments to the Indian Act", paper prepared for the Assembly of First Nations (December 1992), preface.

114. Projections in the study by Clatworthy and Smith (pp. 37-39) show that the expansion of the status Indian population will peak between 2021 and 2051 and will begin to decline thereafter, returning to its present level by 2091. A decline in the status Indian population is expected to set in then and to continue.

115. Special Joint Committee of the Senate and House of Commons appointed to examine and consider the Indian Act, *Minutes of Proceedings and Evidence* (Ottawa: King's Printer, 1946), p. 744.

116. Diamond Jenness, "Plan for Liquidating Canada's Indian Problem Within 25 Years", in Special Joint Committee, *Minutes of Proceedings and Evidence*, p. 310.

117. Special Joint Committee, *Minutes of Proceedings and Evidence*, p. 187.

118. *Indian Act*, S.C. 1951, chapter 29, section 8.

119. To this effect, see Bradford W. Morse, "The Aboriginal Peoples of Canada", in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. Bradford Morse (Ottawa: Carleton University Press, 1989), p. 1; and Linda Rayner, "The Creation of a 'Non-Status' Indian Population by Federal Government

Policy and Administration", paper prepared for the Native Council of Canada (1978), p. 6.

120. The history of the Michel Band and the origins of the land claims, to which current status Indians descended from this band apparently do not have access, is set out in Bennett McCardle, "The Michel Band: A Short History" (Ottawa: Treaty and Aboriginal Rights Research of the Indian Association of Alberta, 1981). This paper can be obtained from the Assembly of First Nations. The federal specific claims policy and its failure to address potential claims from Michel Band descendants is described in William B. Henderson and Derek T. Ground, "Survey of Aboriginal Land Claims", *Ottawa Law Review* 26/1 (1994), pp. 201-202. A report by the Indian affairs branch (cited in note 121), p. 36, states that one other band enfranchised voluntarily in the 1950s. It consisted of one family living on a reserve but is not named in the document.

121. Indian Affairs Branch, Department of Citizenship and Immigration, *A Review of Activities, 1948-1958*, pp. 8-9, 35-36. See also John F. Leslie, "A Historical Survey of Indian-Government Relations, 1940-1970", paper prepared for the Royal Commission Liaison Office, DIAND (December 1993).

122. Joint Committee of the Senate and the House of Commons on Indian Affairs, *Minutes of Proceedings*, No. 16, including second and final report to Parliament (1961), p. 605.

123. *Survey of the Contemporary Indians of Canada* (cited in note 13).

124. *Survey of the Contemporary Indians of Canada*, p. 263.

125. House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Supply and Services, 1983).

126. S.C. 1984, chapter 18.

127. S.C. 1986, chapter 27.

128. *Lands, Reserves and Trusts Review: Phase II Report* (Ottawa: Supply and Services, 1990), preface.

10

RESIDENTIAL SCHOOLS

IN THE FIRST FEW DECADES of the life of the new Canadian nation, when the government turned to address the constitutional responsibility for Indians and their lands assigned by the *Constitution Act, 1867*, it adopted a policy of assimilation.[1] As described in the previous chapter, the roots of this policy were in the pre-Confederation period. It was a policy designed to move communities, and eventually all Aboriginal peoples, from their helpless 'savage' state to one of self-reliant 'civilization' and thus to make in Canada but one community – a non-Aboriginal, Christian one.[2]

Of all the steps taken to achieve that goal, none was more obviously a creature of Canada's paternalism toward Aboriginal people, its civilizing strategy and its stern assimilative determination than education. In the mind of Duncan Campbell Scott, the most influential senior official in the department of Indian affairs in the first three decades of the twentieth century, education was "by far the most important of the many subdivisions of the most complicated Indian problem".[3] As a potential solution to that 'problem', education held the greatest promise. It would, the minister of Indian affairs, Frank Oliver, predicted in 1908, "elevate the Indian from his condition of savagery" and "make him a self-supporting member of the state, and eventually a citizen in good standing."[4]

It was not, however, just any model of education that carried such promise. In 1879, Sir John A. Macdonald's government, pressured by the Catholic and Methodist churches to fulfil the education clauses of the recently negotiated western treaties,[5] had assigned Nicholas Flood Davin the task of reporting "on the working of Industrial Schools...in the United States and on the advisability of establishing similar institutions in the North-West Territories of the Dominion." Having toured U.S. schools and consulted with the U.S. commissioner of Indian affairs and "the leading men, clerical and lay who could speak with authority on

CARSWELL

OOSTERHOFF ON TRUSTS

NINTH EDITION

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The *trust instrument*: In most situations a trust is created by a document called a trust instrument, which vests the trust property in the trustee and describes the rights and obligations of the parties to the trust. Those rights and obligations are called the terms of the trust. Typically, a trust instrument is either a deed or a will. However, not all trusts are created by an instrument, nor do they always have to be so created. The law in many jurisdictions requires that some trusts, such as trusts involving land, be evidenced by writing, while other trusts may be created orally.

The *bare*, *naked*, *simple* or *dry trust*: A trust where the trustee's only obligation is to dispose of the trust property as directed by the beneficiary. Sometimes a trust is created as a bare trust, as where a set of real estate investors simply place property "in the name of" one of them, to facilitate dealings with it. Here there is a trust, but the trustee does not have duties of investment or of maintenance; he only needs to follow the wishes of the collective.

In other cases, a trust that is not a bare trust may become one. Take a simple example of a testamentary trust, in which the testator transfers investments to the trustee to hold on the following trusts: the income is to be paid to the surviving spouse during his life; and after his death, the capital is to be divided equally among the children of the marriage. In this case, the trustee is subjected to a range of duties. Some of these are imposed by equity, such as the obligation to invest the property and to exercise reasonable care over it. Other duties may be imposed by the creator of the trust; there might be a direction to apply the income for the maintenance of the children, should they need it before they become entitled to a share of capital. Now imagine that after the trust has been running for several years, the surviving spouse dies. The only remaining duty of the trustee is to transfer the trust property to the remaining beneficiaries, the children of the marriage (assuming they are of age and otherwise capable). At that point, the trust becomes a bare trust; the duties imposed upon the trustee by equity are regarded as passive duties.[51]

A *fixed trust*: This is a trust in which each beneficiary's interest is fixed, either by amount or as a proportion of the total.

A *discretionary trust*: This is a trust in which the trustees are given a power to decide how income, capital, or both, should be distributed to a class of beneficiaries. The trustees are under a duty to appoint, that is, to pay or distribute, but they have a discretion about the amount any beneficiary will receive, or about the choice of beneficiaries, or both. While the class of beneficiaries as a whole may be said to have a proprietary interest in the trust property, no individual member of the class has an ascertainable interest because the trustee might not appoint to her.[52]

A *power*: A power is an authority to deal with someone else's property. It may exist outside a trust, such as a power of attorney or a mortgagee's power of sale over the mortgaged property; or in a trust, such as the discretionary trust.

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[51] See Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson/Carswell, 2012), at 33-35 ("Waters"). See also *De Mond v. R.* (1999), 29 E.T.R. (2d) 226, [1999] 4 C.T.C. 2007 (T.C.C. [General Procedure]).

[52] See S. Lindsay and P. Ziegler, "Trust of an Interest in a Discretionary Trust — Is it Possible?" (1986), 60 Austr. L.J. 387.

Powers contained in a trust can take a variety of forms. For example, we can distinguish between administrative and dispositive powers. The former are powers conferred upon the trustees by the trust instrument, or by law, for the better management of the trust property. Administrative powers include powers to sell, insure and invest. Dispositive powers are powers to pay or transfer trust property to beneficiaries, so that the property ceases to be held in trust, and belongs thereafter absolutely to the person who receives it. The person who creates a power is called the *donor* of the power, while the recipient is the *donee* of the power. The persons to whom the property may be appointed are the *objects* of the power. In the trust context, administrative powers are almost always given only to the trustee. As for dispositive powers, the donee is very often the trustee, but it might also be someone else, like a beneficiary. For example, a beneficiary entitled to the income generated by the trust capital during his life might be given a power to dispose of the capital at the end of her life. When a dispositive power is held by a trustee, it is sometimes called a *fiduciary power*, because the trustee's fiduciary obligations will control his use of the power.

A *power of appointment* usually refers to a power that simply allows the donee of the power to transfer property out of the trust, absolutely to one or more objects. The term *power of encroachment* is often used for a power of appointment that authorizes the donee of the power to "encroach" on the trust capital. (Some powers would only extend to the income generated by the capital, and these would not allow encroachment on the capital.) Powers can also be classified by the purpose for which the power is given: for example, powers of *maintenance* or *advancement*. These are narrower than a simple power of appointment, because these powers can only be used for the purpose for which they were granted, but there can be as many kinds of powers as the creator of the trust can imagine. All of them permit distribution of property to named persons, or among a specified class of persons.

A discretionary trust is sometimes called a trust power, but we recommend that you avoid using that term since it invites confusion.[53] While a discretionary trust contains a power, it is a power only as to selection, because it is coupled with a *duty* to distribute the entire subject matter of the power. Hence, it is really a trust. As the term is usually used, a power of appointment is not coupled with a duty to appoint, that is, the donee has a discretion whether to appoint or not. Still, such a power is sometimes called a *mere power* to distinguish it from a discretionary trust.

A power of appointment may be *general*, *special* or *hybrid*. A general power enables the donee to appoint to anyone, including himself or herself. Hence, it is usually treated as being the equivalent of ownership. A special power enables the donee to appoint to anyone among a named class of persons. A hybrid power enables the donee to appoint to anyone, save a named class of persons.

We can put these definitions into practice by taking a simple example of a family trust. Imagine that a wealthy entrepreneur is making her will. She wants to provide for the case in which she predeceases her husband. They have three children, all below the age of majority. Of course, she could simply leave all of

[53] *Cf.* Waters, footnote 50, *supra*, at 97-102, which defines a trust power as a duty to make a one-time distribution, and a discretionary trust as a duty to distribute over a period of time, both duties being coupled with a power of selection.

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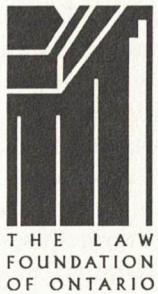

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philanthropic, or education institution (any one of these will do) that *serves the interests of a group* (that which is identified by Leonard) and that restricts *participation* to those in that same group. The only uncertainty is whether the receipt of a scholarship counts as 'participation' in the organization. As with the definition of the terms services and facilities, the answer lies in the function of this exemption. Its goal is to permit social interaction – to allow similarly situated people to come together in some meaningful way. It contemplates the promotion of group life. If so, it is unlikely that mere receipt of a bursary can be said to constitute participation in the Leonard Foundation. Recipients do not know each other and there is no publication of the names of the award winners. As far as the awarding procedures are concerned, each candidate is treated as separate and independent from all others. Even the Leonard Foundation Association no longer exists, although if it were still in operation this would not necessarily affect the validity of the bursaries. The Leonard awards derive not from that association but rather from the trust.

The Public Policy Issue

We saw in the preceding chapter that the Leonard Foundation Trust was found to be contrary to public policy by all three members of the Ontario Court of Appeal. In the minority opinion of Mr Justice Tarnopolsky, the discriminatory provisions, regardless of Leonard's underlying rationale, were said to be invalid. For the majority, Robins J.A. purported to make the recitals central to the analysis. The assertions of racial superiority in the recitals were anathema to the court; it was patent that this rendered the discriminatory terms of the trust void. Given this approach, one may ask whether the trust would have been upheld absent the statements contained in the recitals. That question is especially intriguing given that the 1916 and 1920 versions of the Leonard Foundation Trust, while containing restrictive criteria, did not include recitals outlining Leonard's theories on race, religion, and Empire. Under a rule in which the proven basis for discrimination is essential to a finding of invalidity, those deeds would have withstood a legal challenge. Indeed, a rule that places reliance on a stated rationale of racial, religious, or gender superiority would be of limited utility. Rarely will such a motivation be explicitly stated, and the present rules on the use of extrinsic evidence severely limit a court from considering evidence of motive not discoverable from the document itself.[27]

However, in my view, the judgment does not purport to lay down such a principle. Robins J.A. refused to address the question of how the law might respond to other discriminatory scholarships. The Leonard Trust was described as unique because of the extraordinary ideological precepts contained in the recitals. With a view to subsequent litigation, what the majority was endeavouring to say was this: 'Although we refrain from drawing a bright line separating valid from invalid scholarships, we are prepared to say that the Leonard trust is on the wrong side of any line that a future court might choose to draw.' The intended implication that one is meant to draw is that the *Leonard* reasons for judgment do not state that claims of (say) racial superiority are necessary to a finding of invalidity. That question is *supposedly* to be left for another day.

I emphasize the word *supposedly* because, although the majority judgment claims to avoid dealing with the validity of 'unexplained' discriminatory action, the order granted in the case reveals an inconsistency on this point. All of the discriminatory provisions in the trust, namely, those relating to race, colour, ethnic origin, creed or religion, and *sex*, were held to be void. The finding in relation to 'sex' is important because there is nothing in the recitals whatsoever concerning the trust's gender preference (that is, that no more than one-quarter of the funds were to be awarded to females). It is, of course, implicit that Reuben Leonard saw males as more deserving of his bounty than females. However, the same implication could be equally drawn about each of the other criteria, even in the absence of the explanations in the recitals. Recitals or no recitals, to have allowed the gender preference to remain would have been seen as incongruous and outrageous. Moreover, while the majority relied to some extent on the public outcry concerning the trust, the focus in the press was on the terms of exclusion, not the recitals. These did not, apparently, come to public attention.

The only reported decision since 1990 that deals with the validity of scholarships appears to adopt a narrow reading of the *Leonard* holding. The case of *Re Ramsden Estate*[28] concerned a 1994 bequest to the University of Prince Edward Island of trust funds to endow student awards. The donor expressed the wish that financial need be a factor and that academic merit not be the governing consideration. It was also the donor's wish that preference be given, if possible, to students intending to enter the ministry. The only mandated requirement was that the recipient be Protestant. When the university expressed concerns about this last criterion, the executors of the estate launched a court application for directions.

The University of Prince Edward Island is created under legislation as a non-denominational and non-political institution. By virtue of the governing statute, it may not accept a gift that is prejudicial to its non-denominational, non-political character.[29] It was held that, under the terms of the Ramsden gift, the university would be required to select among the student body on the grounds of religious affiliation alone, contrary to the statute. That being so, the question then became (as in *Leonard*) whether the gift could be varied under the *cy-près* doctrine.[30] This might have been accomplished by eliminating the religious requirement, but that was not the approach taken by the court. Instead it sought a way of modifying the terms to adhere most closely to the original intention. The identified invalidity arose from the selection of the university as the trustee; this contravened the University Act. That problem would be eliminated if new trustees, independent of the university, assumed the managerial duties, including selecting the recipients. There were already three such scholarships tenable at the university: one available to Catholics; one in which preference is to be given to Protestants or Catholics; and one requiring the holder to be of 'good Christian character.'[31] Because these are all administered by outside agencies, they did not violate the statutory prohibitions.

However, the central issue in *Leonard*, namely, the application of the doctrine of public policy to a charitable trust, was equally germane here, even taking the proposed modifications into account. The court concluded that the *Leonard Foundation* case was distinguishable because the Leonard trust 'was based on blatant religious supremacy and racism.'[32] There was no such basis for the Ramsden gift. Therefore, it was held there was no ground of public policy that would prevent the trust from taking effect, provided it was administered by a body other than the university.[33] As suggested above, it is questionable whether this is a proper reading of the *Leonard* case.

EXPLORING THE DEEPER PROBLEMS

In the preceding section, my goal was to identify ambiguities found in the *Leonard* decision. The uncertainty surrounding the holding is a product of the vexing nature of the legal problem facing the court. The difficulty of the issues at hand, and the overall indeterminacy of the law in this area, explain why the controversy took so long to bubble over and why the trust withstood the first legal challenge only to fail to run the gauntlet on appeal. Putting aside the intricacies of Ontario statute law,

and the identification of the precise ruling in the Ontario Court of Appeal judgments, it is possible to understand the *Leonard* case as exposing some important features of the legal treatment of equality in Canada.

There are several reasons why discriminatory conduct is difficult to regulate. One concerns a problem of efficacy – there are limits on the law's capacity to alter beliefs and prejudices in a meaningful way. It is unrealistic to suppose that even stringently enforced equality principles can eradicate deep-seated racial hatred. Another difficulty involves the limits of the forensic process. Proving racial prejudice that runs contrary to provincial human rights protections is often a difficult task. The presence of such a code can itself induce guarded, nuanced conduct, driving discriminatory conduct underground.[34]

Two other problems concerning equality under law are especially evident in the Leonard Foundation dispute. One concerns the way in which we measure the importance of equality against other social values. There are occasions in which the law fails to respond to acts of discrimination on the ground that the public policy costs are too high. The law provides no remedy because the losses are seen as outweighing the gains of a legal response when measured in normative or utilitarian terms. Accordingly, even in cases where it is accepted that it is possible to affect conduct through law (that is, there is no problem of efficacy), and where we know that discrimination has occurred (so that there is also no problem of proof), there are times when no action will be taken because, on balance, it is seen as counter-productive. We may, for example, allow certain forms of racist speech in the name of protecting freedom of expression.

Second, the idea of equality is itself a contested matter, so that just what we are trying to achieve when we use that term to define a social good is sometimes unclear. Principles of equal treatment under law stress the essence of human nature and the need to acknowledge the moral worth of all people. These measures also recognize that discrimination is degrading and disabling. However, this begs questions about the form of equality that societies should strive to achieve. Is the aim equality of opportunity or equality of condition? To what extent can equality be achieved by the unequal treatment of individuals and groups? What is the proper place of affirmative action in Canadian law? To what extent should the law promote, protect, or encourage difference as a value? Or, more generally, in what ways can we distinguish between pernicious and justifiable discriminatory action?

The *Leonard* case touches on these issues: the balancing of equality and other rights, and the contested meanings of equality. These are considered in turn.

Equality v. Other Liberal Values

The International Convention on the Elimination of All Forms of Racial Discrimination (1965) declares that all parties to the convention 'condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.' The convention provides also that all parties undertake 'not to sponsor, defend or support racial discrimination by any persons or organizations.'[35] Although Canada is a signatory to this instrument, there remain instances in which Canadian law chooses to resist responding to prejudicial conduct for the sake of advancing or protecting other accepted values. In the context of the *Leonard Foundation* case, or more generally, in the realm of what I have called documentary discrimination, the countervailing values include freedom of religion and expression and the rights inherent in the concept of private ownership. None of these rights exists in pure-form under Canadian law. There is inevitably a balancing or accommodation of conflicting interests, and a favouring of some of these over others.

Consider the ways in which one might exercise racial or religious preferences. At one extreme one can envision acts that are openly antagonistic to members of racial or religious groups. It is likely that most Canadians deplore the activities of organizations such as the Aryan Nations and would dread being the target of its vitriol of bigotry. For this reason, it is a crime in Canada to promote racial hatred. In addition, human rights statutes prohibit the publication of materials promoting discrimination. Here, equality values have prevailed over claims to free speech.

However, at the other end of a continuum of discrimination, one finds the exercise of preferences that are not only permitted but protected; not just tolerated, but facilitated. The constitutional right to freedom of religion is designed toward that end. At a pivotal point in the Court of Appeal ruling in *Leonard*, quoted above, Mr Justice Robins stated that the trust contravened public policy because it was predicated on notions of racism and religious superiority. To claim that one race or religion is intrinsically superior was said to be offensive to the values of a pluralistic, democratic society.[36] However, in relation to religious belief, this

statement may be misleading or wrong. A modern-day R.W. Leonard may prefer low church Anglicanism over any other type of religion. He may feel that its doctrine expresses the true word of God. Moreover, nothing will prevent him from donating money to that cause, even though this means that all other religions on earth will receive nothing from him. Even if he wished to donate to each and every religion known to him, except one, this would be permitted. Likewise, he might wish to endow an educational institution that taught the scripture based solely on specific theological principles. All of this would be sanctioned, protected, and encouraged; his donations would be tax deductible. In these instances, religious freedom would easily prevail over equality under law.

Instead of focusing on freedom of religion or speech as the countervailing values, one can understand the problem as pitting the protection of private property against the promotion of equality. This is the essence of the Leonard Foundation controversy, in which concerns over discrimination were set against the rights of private property. The support for Leonard that appeared in the press was founded on an appeal to property rights as an important liberal value. This was a dominant theme within the public debate over the Leonard Foundation Trust: almost every public defence of the Leonard Foundation contains an argument along these lines. It was said that Reuben Leonard's rights, even more than fifty years after his death, should be respected. Part of the rationale was that to do otherwise would have a chilling effect on philanthropic practice. What the discourse does not reveal is just how complex these concepts can be. The rights of property owners are limited, as one can see in the review of the authorities on discriminatory transfers presented in chapter 3. Both the judge at first instance and the Court of Appeal in the *Leonard* case saw the problem in those terms, that is, as a response, for instance, to equality concerns, the composition of the bundle of rights that constitute property ownership can be altered so as to limit the rights of transfer. Where the judgments at the two levels differ is, primarily, as to how these rights should be ordered.

This dilemma can be illustrated by reference to another continuum. At one end can be placed the well-accepted limits on property entitlements. For example, the ownership of contraband may be prohibited altogether; the possession of certain inherently dangerous objects is also heavily regulated. Some transfers are prohibited (the sale of cigarettes to children) or regulated (the sale of prescription drugs) in the public interest. However, in general, property rights are extensive: by and large,

owners are entitled to do whatever they wish with their belongings, even to the extent of destroying their property. Assume, for example, that Reuben Leonard bestowed a gift on some perfect stranger. When asked about this bewildering action, Leonard replied as follows: 'I selected him because he is white, and because I believe that he is a Protestant and of British parentage.' Even after the *Leonard* case there is no basis in law for treating this (outright) gift as invalid. Nor would it be unlawful to confer a gift on the Aryan Nations. What is more, there is a large ambit of offensive discriminatory conduct that is not contrary to human rights protections. People are entitled to decide that whites only may enter their home. In that domain, rights of ownership continue to prevail over the values inherent in equal treatment.

A host of reasons have been advanced to explain why the law confers broad powers and privileges as part of the ownership bundle. Some of the rationales for property are consequentalist. Hence it is sometimes asserted that private property rights allow for economic efficiency and therefore produce material well-being. Property allows for freedom, and it promotes privacy and full human development. Property rights are also sometimes justified as apt rewards for labour and productivity. Although all of these assertions are contentious, they nonetheless serve to fuel the powerful ideological engine of property rights in Canadian law and society.[37] As a result, when other values come into conflict with those underscoring rights of ownership, a strong case for curtailing property entitlements is often demanded.

Bearing this reasoning in mind, one can imagine a modern-day Reuben Leonard marshalling a defence along the following lines: I may express my views on racial or national preferences provided that I do not promote racial hatred or otherwise violate various statutory prohibitions. I may demonstrate my devotion to one religion by a direct donation, though by doing so I effectively discriminate against all other religions. I may destroy all of my savings or indulge in frivolous gifts as much as I wish, though no public good otherwise results. I may choose who may walk on my lawn, and in doing so I may happen to exercise preferences that my neighbours see as racist and therefore inexcusably objectionable. That being so, why is it that the law does not allow me to exercise *the very same preferences* through the instrumentality of the Leonard Foundation?

The answers given in the Court of Appeal rely upon the 'public' dimension of his so-called 'private' foundation. Mr Justice Robins emphasized what he termed the quasi-public nature of the Foundation,

a status that arose from the fact that it was a charitable trust, designed (therefore) to benefit the public. Moreover, the awards were tenable at publicly funded educational institutions. Similarly, Tarnopolsky J.A. was careful to distinguish between charitable trusts, such as the one in issue, and family trusts. The rationale for the distinction under each approach is clear: public action is to be assessed in law by reference to a different (that is, more rigorous) standard than that applied to private dealings. In a sense, even Reuben Leonard understood this way of thinking. He regarded his fortune as being held as a 'public trust.' He accepted, therefore, that a sense of public duty attended his actions. Indeed, it is ironic that this very characterization was so instrumental in defeating his 1923 scheme.

The public/private dichotomy is often invoked in legal analysis, especially in relation to human rights issues, but the dividing line between the two is not always clear. This is because the dichotomy is actually deployed in two different ways, producing not two but three categories of conduct. The public/private divide is sometimes used to separate state from non-state action. It is this use that explains why the Canadian Charter of Rights and Freedoms is not directly applicable to the Leonard Foundation Trust. As we have seen, the Charter applies to state (public) conduct. The Foundation is treated as private for the purposes of Charter analysis. The category of private conduct is further bifurcated. One speaks of acts done in the public arena and those done in private. For instance, it is understood that in a market economy resources are primarily allocated by private transactions, not by public authority. However, private enterprise in the marketplace is construed as public when compared to the private domain of the home.[38] The three categories that emerge are therefore as follows: (1) state action; (2) private conduct in the public domain (such as the conduct of private enterprise); (3) private conduct treated as being outside of the public arena (such as family life).

The effect of defining three forms of action is seen in the rules for scrutinizing conduct. With regard to equality concerns, the state is subject to the highest level of scrutiny because it is duty-bound to treat each citizen with an even hand. In contrast, citizens are permitted, indeed invited, to pursue self-interest and to exercise their personal preferences in a host of ways. Between these two realms lies conduct that partakes of both private and public elements, and it is in this region that the debate over the Leonard Foundation occurred. The initial inquiries made by the Ontario Human Rights Commission to the Leonard trustees were met with the response that the Foundation was a private trust.[39] This, of

course, is no answer to the commission's jurisdiction to investigate, since its province is the regulation of private discriminatory conduct. In this context, the term 'public' refers to actions ordinarily occurring in a public forum. This is category (2) conduct.

Even if we accept this three-part description, the dividing lines remain imprecise. This is because the private and the public are not really as separate as this above analysis suggests. Rather, they overlap. All discriminatory action regarding private property can be seen, at bottom, as state action. It is sometimes said that property is understood in the law as a set of rights created under law, and that, therefore, absent state sanction and enforcement, property rights vanish. As a result, in allowing property to be used in a discriminatory way, the state is therefore acting complicitously. On occasion this complicity is apparent: consider again the cases of *Franklin* v. *Evans* (1924) and *Christie* v. *York* (1939), which were discussed in chapter 3. Both disputes involved the refusal of services to black patrons. In both, under the law as it then stood, the legal attack on the discriminatory conduct failed. In short, any legitimate private discriminatory conduct will, by definition, receive the backing of the state. In this sense, then, all *private* property dealings have a *public* dimension. Property rights can be seen as a state delegation of the decision-making power (about property) into private hands.

This line of reasoning applies not just to the category (2) type of conduct but to category (3) as well, that is, to private action occurring in a non-public setting. Consider another situation discussed in chapter 3: a testamentary gift conditioned on the recipient adhering to a particular religious faith. We saw in that chapter that these gifts have generally been treated as valid. It was here that Tarnopolsky J.A. felt his reasoning should stop. Family trusts, as he called them, would not be subject to the rigorous rules he proposed for discriminatory scholarships. Similarly, category (3) conduct is generally thought to be outside the reach of human rights instruments.

I am not sure that these limitations make sense. First, a gift subject to a stipulation concerning religious adherence (as in the above example) is subject to legal enforcement. It is therefore public in the sense that the courts will enforce all valid testamentary gifts. And it is only private (in the category (3) sense) if we assume that the recipients of such gifts are denied the status of being members of the public at large. To put it another way, it is not clear that we should tolerate discriminatory action that affects family members to any greater extent than that tolerated in the community at large.

One answer to this issue is sometimes suggested. If a gift is given, say, from father to son, on the proviso that the son does not marry outside the Jewish religion, it is always open to the son simply to disclaim the gift. He need not sacrifice his moral beliefs concerning religious adherence because he can walk away from the 'offer' contained in the bequest. Therefore, no harm is done by allowing such a gift to stand.

My reply to this reasoning is based on an apparent extrapolation of the *Leonard* case. We know that Colonel Leonard could have chosen to destroy his fortune in a bonfire or to make an absolute gift to some person he thought to be a worthy recipient. However, having chosen to endow a scholarship, the law now demands that he adhere to a certain level of fairness. Likewise, where a testator decides to confer a conditional gift on a small set of the outside world (that is, family members), one could argue that he or she is equally bound to comply with an appropriate public policy standard. This closeness of these two situations would, perhaps, be more apparent if another example is given. Imagine a testamentary gift under which a college fund is promised 'to all the members of my family who are white, British subjects, and adherents to the Christian religion in its Protestant form. It is provided also that no more than one-quarter of the monies set aside shall be allocated to female relatives.' In assessing the 'publicness' of such a gift, the difference is purely one of degree. It is not clear to me that, if the Leonard Foundation trust of 1923 is unacceptable, such a family gift should pass muster.

Given this reasoning, the 1996 Ontario decision in *Re Fox Estate*[40] is noteworthy. The case involved an attempt by a mother to disinherit her son because, contrary to her dictates, he had married a woman not of the Jewish faith. In the purported exercise of her powers as executor under the will of her deceased husband, she diverted property otherwise destined to fall into her son's hands. The Ontario Court of Appeal, reversing the trial judge,[41] concluded that Mrs Fox had acted improperly; she had exceeded her powers as executor. Although the case fell within the context of family transfers, one member of the Court of Appeal, Mr Justice Galligan, assessed whether the dictates of public policy could serve as a discrete ground for challenging the mother's action. Drawing explicitly on the *Leonard Foundation* case, Galligan J.A. took it as now settled that it is contrary to public policy to discriminate on the grounds of race or religion. To allow the disapproval of a marriage on the basis of religion was thus 'abhorrent to contemporary community standards.'[42] In the course of argument in *Fox*, a question was posed from the bench as to whether conferring gifts expressly conditioned on marriage within

a designated faith would still be regarded as valid. In reply, it was conceded that such a condition would probably no longer be upheld.[43]

Let me summarize this last point. In the *Leonard Foundation Trust* case we see the law resolving a competition between conflicting values. In *Leonard*, a distinction was drawn between public and private action, and this dichotomy was instrumental in the reasoning in both appellate judgments. However, I find the attempt to explain the line between permissible and impermissible discrimination by relying on a distinction between private and public conduct to be unhelpful. What results from such an approach is not a bright line at all but three overlapping categories that obscure rather than clarify what the law should be.

Contested Meanings of Equality

The problem in the law governing equality discussed above pertains to the balancing of conflicting rights. The issue addressed in this section involves competing conceptions of equality. Unlike the contest between equality on the one hand and values external to it (such as property rights) on the other, the dilemma here involves a conflict contained *inside* the concept of equality itself. That problem can be described in this way: Although we live in a world in which no two individuals are or can be equal in every conceivable biological, legal, or other way, the pursuit of equality has nevertheless become an important goal. At the same time, in a multicultural society that aspires to respect and value difference, it is obvious that equality (defined as sameness) may not be a desirable end.

The tension between competing notions of equality can be found in human rights legislation. Anti-discrimination codes tend to stress the common elements of the human condition. As a result, Ontario's law mandates that in the provision of goods and services we must not take account of certain differences. We all need decent accommodation, whatever the colour of our skin or our religious beliefs. In relation to these needs, we are all to be treated as equals. Put another way, what is required by such a law is neutrality. We are being asked to ignore some considerations in the way that we treat people. That demand might encompass intentional acts that demonstrate differential treatment, as well as systemic factors that wind up producing the same result. In both situations, all that such equality rules require is that there be no correlation between our conduct and a prohibited ground of discrimination.

However, neutrality is only one way of conceiving of the idea of

equality. If, by contrast, it is considered important that each member of society enjoy certain material conditions in life, neutrality normally will not suffice. An unrestrained egalitarian might argue, for instance, that the law should ensure that each and every one of us can enjoy an equal measure of property or prosperity. A more tempered approach might suggest that the demands of substantive equality are met when, say, everyone is accorded some minimal standard of living. Rather than ignoring differences (that is, acting neutrally), people would have to be treated differently, that is, their present position would have to be assessed and reassessed until the goal of material equality (whatever the specific target may be) is achieved.

It is in relation to the pursuit of this type of equality goal that the idea of affirmative action emerges. Affirmative action occurs when some positive steps are taken in a differential way to achieve some form of equal standing. Often at work here is the appreciation that past acts of discrimination (in effect, prior breaches of the idea of neutrality) can have lasting and harmful effects. Therefore, affirmative action has been used to improve the lot of historically marginalized and disadvantaged groups. To place matters within the context of the present study, it may be observed that both Reuben Wells Leonard and advocates of affirmative action accept the privileged status of the white Anglo-Saxon males. For Leonard, it was both natural and beneficial. Affirmative action is predicated on the view that that privileged position is historically contingent and deeply damaging.

Equality, then, is multidimensional. Even so, it remains an important liberal precept, and in many ways Canadian law is committed to achieving some version (or other) of this ideal. Because equality (choose your meaning) is treated by most people as virtuous, it carries rhetorical weight: It is nowadays hard to be against equality, even though there may be vehement disagreement as to what that term should mean. Given its protean character and its popular appeal, it is understandable that equality-based arguments could be found on both sides of the Leonard Foundation controversy. Both groups felt it useful to resort to equality claims to bolster their respective positions.[44] So the Human Rights Commission alleged that the Foundation was in violation of the equal rights protections found in the Ontario Human Rights Code. Those writing in support of the Leonard Foundation argued that the scholarships should be governed by the same rules that apply to other discriminatory scholarships, such as those open only to South African blacks, Jews, persons of Greek descent, and so on. McKeown J.'s reasons

for judgment comport with this point of view. The Leonard Foundation Trust was like other scholarships that discriminated on the basis of race or nationality. The implication to be drawn from his reasons for judgment was that to strike down the Leonard Trust would be to imperil a host of other ostensibly worthy scholarships and bursaries. Again, such is the rhetorical force of the word 'equality' that both camps sought to enlist its support.

However, the reasons of McKeown J., like all of the pro-Leonard arguments that appeared in the press, adopt a 'neutrality' definition of equality. What is called for is the application of a type of 'moral algebra,'[45] one that mandates that dominant and marginalized groups be treated equally. We have just seen that this is only one meaning that can be given to the term. The pursuit of substantive equality through affirmative action was almost totally ignored in the public discourse about the Leonard Foundation. This is surprising since the concept of affirmative action has a firm footing under current Canadian law. With regard to governmental action, the Canadian Charter of Rights and Freedoms contains a basic guarantee of equality before the law. However, this is qualified by an exemption in favour of governmental action directed at the amelioration of conditions of disadvantaged individuals or groups.[46] In addition, generally speaking, provincial human rights codes, such as Ontario's, exempt certain forms of reverse discrimination.[47]

In Canada, as elsewhere, the adoption of affirmative action programs, in employment, education, and elsewhere, has been controversial.[48] At the heart of the critiques is the complaint that affirmative action is, by definition, discriminatory and therefore wrong. The argument is based on the view that the legal conception of equality should be confined to the idea of neutrality; the law should take no notice of differences (such as race or religion). Moreover, it is said that the application of affirmative action can produce harmful and unfair results. In seeking to respond to existing patterns of discrimination, it can serve to confer a benefit on those who have not in fact suffered injustice while at the same time imposing burdens on those who were not responsible for past wrongs. For instance, when an affirmative action policy is applied, the most competent members of a benefited group will receive an advantage at the expense of the most competent members of the non-benefited group. In addition, whether affirmative action is effective in pursuing equality goals is an open question; some complain that it cannot begin to address the entrenched problems of social inequality. Where it is effective, the intended beneficiaries may in time enjoy an undue advantage. As well, affirmative action can be difficult to apply, that is, it is not always easy to identify or prove the specific area of disadvantage and to construct a remedy that responds to that concern, no more and no less. Another claim is that affirmative action can be counter-productive, breeding resentment and hostility against the groups to be benefited and devaluing the accomplishments of those who have received assistance under an affirmative action program. And it is argued that affirmative action leads to mediocrity because merit factors are given subordinate importance.

I believe that it is important to employ devices like affirmative action, though it is, one must concede, a blunt instrument. Problems of application, some of which are described in the preceding paragraph, surface when endeavouring to assess the validity of discriminatory scholarships. What precisely are we seeking to ameliorate? Is it necessary to demonstrate material disadvantage in Canadian society at large? Or in the institution at which the award is tenable? Or in the program of study? In some fields, such as nursing, women have been historically over-represented. Would affirmative action be justified here? Conversely, might this be a case in which scholarships to induce men to enter nursing might be acceptable as a form of affirmative action. Just how Canadian courts will treat these issues as they relate to affirmative action scholarships and bursaries is not yet known.[49]

Is there an element of affirmative action to be found within the 1923 Leonard Trust? It was, in essence, a bursary, financial need being an absolute prerequisite. In the selection of recipients, the General Committee has always treated this consideration as central. That remains true. Hence, an argument can be made that the scholarship can be said to have a valid purpose even having regard to contemporary public policy dictates. Put another way, the trust identifies a marginalized segment of the population, namely *poor*, white, Protestant, British subjects. Viewed in this way (and absent reference to the recitals), the trust is designed to help not a dominant elite but an underclass.

Attractive at first glance, this argument must ultimately fail. The requirement of financial stringency was never challenged in the litigation and remains part of the trust. It was unassailable. That being so, the question that emerges is whether there are grounds for favouring poor white students over poor black ones, poor Protestants over poor Catholics, Muslims, or Jews, and so on. Also, one would want to know why more help should be afforded to needy men than women. It is entirely appropriate to set aside the invidious distinctions while preserving the

valid one (poverty). So, if we control for poverty, no justification exists in this instance for favouring Leonard's selected group of poor over the others. Under the scholarship program as reshaped by the court order, white, Protestant, British subjects may still apply for a Leonard award. That aspect of the original design is unaltered, and therefore that segment of Canada's underclass is still aided. What has changed is that they must now compete with a broader range of similarly situated candidates. To put it still another way, one good apple does not save the whole barrel. If it were not so, one virtuous act of charity could work to insulate other elements that are deplorable.

The English and American Experiences

My modest thesis in this chapter is that the treatment of discrimination under law is incoherent, and that when, years from now, legal historians come to examine the *Leonard Foundation* case, they will find this uncertainty to be a telling feature of the law of our times. Other evidence is also available. Consider, for example, the English and American responses to some of the issues dealt with in the Leonard controversy.

Apart from the decision in *Re Lysaght*[50] (which was discussed in chapter 3), there are no reported English decisions concerning discriminatory scholarships. Still, subsequent English developments are instructive. One concerns a revision made to the Rhodes scholarships. As we saw (in chapter 2), the Rhodes was, arguably, influential in the creation of the Leonard Foundation awards. The terms of Rhodes scholarships contain an age stipulation (candidates must be over eighteen but under twenty-five at the time the award is taken up), and they were originally restricted to men. This exclusion as to gender was removed in the mid-1970s, not by virtue of a court challenge, but under the terms of the Sex Discrimination Act, 1975, which conferred a power to delete such terms on the Secretary of State.[51] In effect, the Rhodes was rendered gender-neutral by act of Parliament.

Although such action might suggest that English law now takes a hard line on discriminatory charitable gifts, in fact the reverse is true. Under the first version of the Race Relations Act, passed in 1968, charitable trusts were partially exempt from the legislation. That act provided that the prohibitions against discrimination do not apply to charitable instruments that confer benefits on persons of a particular race, descent, or national or ethnic origin.[52] Only discrimination on the basis of colour was not exempted. The 1976 reform of the legislation continues this

approach.[53] Therefore, the charitable nature of a trust, far from attracting strict scrutiny (as in the *Leonard* case) serves as the basis for a relaxed anti-discrimination regime. A comparable provision (relating to gender) is contained in the Sex Discrimination Act.[54] It would appear that the promotion of charitable action, even at the expense of the denial of equal treatment, is the guiding principle.

As one might expect, American law has had more to say about discriminatory conduct. Although the patterns of racism and discrimination in the United States differ greatly from those in Canada, there are nevertheless a number of common elements. Hence, even though the ideology of equality is embedded in American political ideology and discourse, from (at least) the Declaration of Independence onward, it was not until the end of the Second World War that the concept became infused with significant meaning. It was only after 1945 that measures were introduced to limit discrimination in employment and in the provision of services and accommodations. And it was not until after the war that the equal rights guarantees contained in the American Bill of Rights were used effectively against state-sanctioned segregation and other race-based policies.[55]

The American jurisprudence concerning equality rights as they relate to documentary discrimination has been dominated by constitutional considerations. This can be illustrated by the law governing restrictive covenants. We have seen that in Canada the legality of racially restrictive land transfers was determined prior to the advent of the Canadian Charter, and, therefore, without regard to constitutional norms. (Moreover, it is unlikely that the Charter would be found to apply to this type of private transaction.) Instead, under Canadian law, such covenants are ineffective either because they contravene legislation (as in Ontario and Manitoba) or because they will not create an enforceable obligation in accordance with basic land law principles. Arguably, they also contravene the common law doctrine of public policy. By contrast, in the United States such covenants are subject to constitutional constraints. The judicial enforcement of such a covenant is treated as state action, thereby triggering the equality protections of the American Bill of Rights.[56]

Moreover, a broad definition of state action has allowed for the application of the constitutional protection of equality in the context of discriminatory scholarships. As a result, state action may be found when, for example, an agent of the state (such as a school or school board) assists in the selection of candidates or in the administration of the awards. In such instances, the courts have struck down awards that dis-

criminate on the basis of race, religion, and gender.[57] However, it has been held that the advertising of the awards, even coupled with the initial screening and designation of potential recipients by a university, will fall beyond the reach of the Bill of Rights.[58] That would probably be true of the Leonard Foundation. Even assuming that publicly funded schools and universities constitute state actors, their role under the Leonard Trust (in essence, dispersing the scholarship monies to the successful candidates) would not likely attract constitutional scrutiny under American law.

An expansive concept of state action in American law has thus provided a powerful weapon to eradicate discriminatory conduct. However, in those instances in which the constitution cannot be invoked, the scope for discriminatory dispositions is wide. For example, American courts, as with their Anglo-Canadian counterparts, have permitted testamentary gifts containing discriminatory provisions relating to such matters as the religious or marital preferences of a donee.[59] Moreover, when a scholarship is established through a charitable trust, and where there is no state action, challenges to the validity of scholarships based on the doctrine of public policy have generally been ineffective. In some instances, the doctrine of *cy-près* (or a comparable rule known as 'equitable deviation') has been applied to remove restrictions in instances in which the selected trustees refused to administer the gift.[60] In general, then, while the equality protections of the constitution have been accorded an extensive field, the American doctrine of public policy has been allowed to atrophy. In short, were the Leonard Foundation transplanted to American soil, it would probably not be found to be invalid, at least based on the American scholarship case law as it now stands.[61]

Under American law, little scope exists for the application of principles of affirmative action as a constitutional concept.[62] Under the equality protections in the United States constitution, racial and ethnic distinctions are subject to a standard of strict scrutiny.[63] This means, in effect, that racial discrimination will be treated as unconstitutional unless it is based on a compelling state interest and is narrowly tailored to pursue that interest. That standard applies whether or not the impugned program involves affirmative action. Remedying existing effects connected to past discrimination can furnish a sufficiently compelling rationale for state action, so long as the present effects can be linked to specific acts of past conduct. This is a stringent test. Moreover, the requirement of a narrowly tailored response establishes a hurdle that is difficult to surmount. In general, it must be shown that non-

discriminatory approaches are unlikely to work, that undue preference is not being given to the targeted group, and that the program is flexible and temporary.[64]

The 1994 ruling in *Podberesky* v. *Kirwin*,[65] an important decision on the constitutionality of discriminatory scholarships, demonstrates just how exacting the American standard can be. *Podberesky* involved a challenge to a scholarship fund at the University of Maryland at College Park. The awards were available only to African-Americans. The university defended the scholarship on the ground that it was carefully designed to remedy past discrimination. It was not until the 1960s that blacks had in fact attended the College Park campus. The university also maintained that the effects of past discrimination lingered. Evidence was presented to show that blacks remained under-represented at College Park, that graduation rates were low, that the campus was seen by blacks as a hostile environment, and that the university had a poor reputation among the local black community. Despite all of this, the scholarship was found to violate the equality protections of the Bill of Rights. What the evidence failed to disclose, in the court's view, was that the attitudes held by black students and the black community were tied specifically to past practices on campus. It was also found that the scholarships were not narrowly tailored. The data assembled by the university did not convince the court that blacks were in fact under-represented. Nor was it shown that there was a sufficient relationship between the students eligible for the awards and the type of person that had been subjected to the university's discriminatory practices in years past.[66]

Several points emerge from this brief review. The English law demonstrates a balancing of equality and property rights that is very different from the situation in Canada. Under American law, the constitution has proven to be a powerful tool to prevent discrimination by state agents, and this can affect even some charitable trusts. However, if the constitution cannot be invoked (as in the Leonard-type situation), the scope for discriminatory conduct is wider than that permitted under the *Leonard Foundation* case ruling. A narrow conception of affirmative action can adversely affect even those scholarships aimed at responding to systemic discrimination.

CONCLUSION

In this chapter I have tried to explain why the *Leonard* case is of lasting importance in the law. It is, curiously, not the clarity of the holding, not

the light that it shines, that makes the case worthy of study, but rather the complexity that it exposes. The Court of Appeal has resolved little about the scope of the common law doctrine of public policy and even less about the meaning of current human rights legislation. In effect, we have seen four different legal solutions to the Leonard puzzle: those offered by McKeown J., Robins J.A., Tarnopolsky J.A., and the Ontario Human Rights Commission. Additional perspectives are added by the English and American experiences. What is revealed by these various approaches, I suggest, is that we have so far failed to understand how to solve the principal problems at issue in the Leonard litigation. Even if it is accepted that the *Leonard* case itself was rightly decided, we still do not know how to order or balance rights of ownership against the pursuit of equality. We still cannot define comprehensively the forms of equality to which we, as a society, should aspire.

Epilogue

In the mid-1990s Charles Chan donated $4 million to endow a scholarship at the University of Alberta, his Alma Mater. The award was available to students from Tai Shan in the People's Republic of China. A story about Chan and his donation in the Edmonton *Journal* in April 1997[1] drew a letter of complaint from one reader:

> I read in *The Journal* ... that a former Chinese university student named Chen [sic], who is now a multi-millionaire, gave the University of Alberta $6.5 million in the past 18 months, including a $4–million scholarship fund 'for Chinese students who wish to train at the U. of A.' Why am I hearing nothing but a deafening silence from the liberal-left politically correct elite? Not a hint of the 'R' (racism) word anywhere.
>
> Can you imagine the resounding cries of outrage and righteous indignation from the politically correct elite if some white millionaire had set up a scholarship fund for 'white (may even include black, red pink and green) students only.'[2]

This is, of course, a variant of the Leonard Foundation controversy (about which the angry reader was apparently unaware). And it is not the only modern manifestation that connects with the life of Reuben Wells Leonard. I have presented this study as one designed to contrast social attitudes found at the beginning and end of the twentieth century. Yet it is remarkable how many current counterparts can be seen, so much so that the Leonard saga appears in some ways to be an allegory