CHALLENGE TO THE INDIAN ACT IN 1973

Scott Harrison

In Canada, for the government to consider an individual as an "Indian" it is required that an individual adhere to regulations and guidelines set out in the Indian Act. The criteria set out in the Indian Act have dictated according to law not only who is and who is not Indian, but it has also influenced how Indians themselves define what is and what is not Indian. That means for over one million aboriginal people in Canada this Act had and still has a bearing on their way of life. This does not deny that Indians were not or are not active participants/agents in the creation, renewal, and/or continuation of their identity and culture. It simply implies that this was one important variable that influenced the process of how Indians have seen themselves. This paper investigates the first challenge that the Indian Act had to face regarding membership issues about women at the Supreme Court of Canada in 1973, almost five years after Pierre Trudeau became Prime Minister. In this examination I have included a brief analysis of the major Indian concerns accompanying this case.[1]

Some questions that came to mind when dealing with this case include the following. What were a few important events that led up to this issue? Why did a problem arise with the status of Indian women? What was at the root of the problem?

[1] The term *Indian* was the most common term these people referred to themselves as in the 1970s, so I will use it instead of *Native, Aboriginal* or *First Nations.*

What were the underlying arguments presented by most Indian people? Were arguments about the status of Indian women based in feministic rhetoric as traditional thought has suggested? To look into these questions, I examined court cases, case comments, factums, news paper articles, Indian organization briefs and Indian newspapers from the 1970s that were related to this issue. To start with, a look at two important events that took place prior to 1973 is necessary to place the main topic in context.

The first Supreme Court case to challenge Federal law with the Canadian Bill of Rights was the *Drybones* v. *Regina* case of 1969.[2] The arguments presented in this case were as follows. Since penalties for an Indian charged with being intoxicated off a reserve under the Indian Act were more severe than those for any other Canadian citizen, they were denied "equality before law" as stipulated by the 1960 Canadian Bill of Rights. Therefore, the Court rendered inoperative section 94 of the Indian Act that dealt with liquor penalties because it was in conflict the Bill of Rights, which under section one states that discrimination based on sex, race, national origin, religion, or colour is not permitted. In relation to this, Judge Pigeon, who opposed the majority decision led by Judge Ritchie, elucidated that if the liquor section of the Indian Act is nullified by the Canadian Bill of Rights then this implied that the Canadian Bill of Rights had

[2] *Regina* v. *Drybones* (1969) 9 D.L.R. (3d) 473.

supremacy over the British North America Act (BNA).[3] Section 94 (24) of the BNA, 1867 embodies the special relationship between Indians and the federal government as it states that Parliament has absolute legislative authority over Indians and their lands. The majority ruled in November of the stated year that because the Canadian Bill of Rights had set out to impede inequality, section 94 of the Indian Act was inoperative.

In retrospect this is a seemingly important decision as is clearly described by a Canadian human rights scholar:

> A court decision, particularly in the nation's highest court, settles a specific dispute, but it also establishes principles and sets rules for future conduct. Decisions are perpetuated through their use as precedents or interpretations in subsequent cases, they influence the way the law is to be administered by state authorities and they set the standard which a law-abiding population uses to measure its behaviour. Case law, therefore, has a shaping influence on the conditions that exist in society and becomes in effect a part of the social circumstances within which further incidents and disputes will be defined.[4]

Yet still this case did not gain significant attention by the larger Indian community in Canada. There are two possible reasons I propose for this. Firstly, even before the time of the Drybones case section 94 of the Indian Act was not rigidly enforced. If follows that since it did not play a significant role in the Native community itself, invalidating this particular section of the Act was not seen as a threat to Indian communities in

[3] 9 D.L.R. (3d) 473 at p.489.
[4] James Walker, *Race, Rights and the Law in the Supreme Court of Canada* (The Osgoode Society for Canadian Legal History and Wilfred Laurier University Press, 1997), 5-6.

general.[5] Secondly, 1969 was a busy year for many of the Indian organisations in Canada as they were directly challenged by the federal government's attempt to completely revamp the relationship between status Indians (those groups that had signed treaties) and the federal government. The Indian Affairs' position paper presented in April of the same year titled *Statement of the Government of Canada on Indian Policy* became known simply as the White Paper.[6]

This paper, which was presented by the Indian Affairs Minister Jean Chrétien, was a product of Pierre Trudeau's "Just Society" and it stirred discontent among much of the Indian community in Canada. One year prior to this Indian Affairs released a booklet that stated the government's view on Indian Affairs and requested input from the Indian community with the hope that they could use their contribution to create a new Indian Act, an Act that would be better suited for the 1970s.[7] When the White Paper was released many in the Indian community were distraught, as in their eyes it did not take into account Indian views that had been so recently consulted in 1968.

[5] Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights," *McGill Law Journal* 21 (1975): 668.
[6] Canada, *Statement of the Government of Canada on Indian Policy*, presented to the First Session of the Twenty-eighth Parliament by Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development (Ottawa: Department of Indian Affairs and Northern Development, 1969). All governmental position papers that are submitted for review are called *White Papers*. It has nothing to do with skin colour or discriminatory language.
[7] The paper asked for a response to thirty four questions, two of which dealt with children's and women's status (Canada, *Choosing a Path: A Discussion Handbook for the Indian People* [Ottawa: Department of Indian Affairs and Northern Development, 1968]).

Instead it proposed that within five years the Indian Affairs section of the Indian Affairs and Northern Development would be phased out along with the Indian Act and Indians would become the responsibility of provincial governments similar to the rest of Canadian citizens. In other words, the argument of equality as they defined it meant the elimination of special status for Indian people.

The Indian Association of Alberta under direction of the president, Harold Cardinal, made a swift rebuttal to the government with the opposition paper, *Citizens Plus*, which became known as the Red Paper.[8] Even from the title of this paper we can see that he did not see eye to eye with Trudeau's 1968 campaign ideals. Cardinal was not alone in his position that the federal government had a special relationship with treaty Indians and with this relationship came responsibilities that the Indian Act upheld. This position was supported in full by the National Indian Brotherhood (NIB), which was the main national Indian organisation that had members from each provincial Indian organisation. The official response was diametrically opposed and caused even greater Indian distrust of the government. Indian Affairs Minister Jean Chrétien acted in a swift manner and announced the government's withdrawal from the White Paper

[8] Indian Association of Alberta, *Citizens Plus: A Presentation by the Indian Chiefs of Alberta to Right Honourable P.E. Trudeau, Prime Minister and the Government of Canada*, June, 1970. For other Indian arguments against eliminating special status for Indians see, Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig Ltd., Publishers, 1969).

stance and shelved it in 1971. Although the government officially abandoned their pursuit of a "just society" towards Indians, the aftermath of the sour relations it created remained. Many Indian organisations became even more skeptical of government actions and were aware of the vulnerability of their relationship. On the other end, the government was looking for a way to regain support of the organisations and to silence their voices.

The same year that the White Paper threat "officially" ceased, another issue involving the Indian Act began to arouse the attention of Indian organisations. The *Attorney-General of Canada* v. *Lavell* and *Isaac* v. *Bedard* case of 1973 became the second case heard at the Supreme Court of Canada to address discrimination and the Canadian Bill of Rights.[9] However, unlike its predecessor the Drybones case, which addressed racial discrimination, the Respondent's lawyer argued on terms of sexual discrimination and the Bill. This was the first time such an argument went to the Supreme Court since the conception of The Bill of Rights in August 1960. It is interesting to note that both the first and second case involving the Bill and discrimination challenged the Indian Act.

[9] The Bedard case was similar to that of Lavell as it dealt with loss of status. It also dealt with property rights on a reserve. The Federal Court made their decision on Bedard based on the Lavell case at the Federal Court of Appeal. Both cases were to be heard together at the Supreme Court (*Bedard v. Isaac et al*. (1971) 25 D.L.R. (3d) 551).

Following in the footsteps of the Drybones decision, Jeannette Lavell, who had lost her status as an Indian through marriage to a non-Indian, challenged the Indian Act as endorsing sexual discrimination as prohibited by the Bill.[10] Section 12 (1) (b) of the Indian Act stated that if an Indian woman married a non-Indian, she would automatically forfeit her status as an Indian along with any rights that were acquired through having status. This section by itself was not necessarily discriminatory against women if viewed on its own. Only after observing that Indian men who married non-Indians did not lose their status does the argument take form. Moreover, upon marriage to an Indian man, a non-Indian wife automatically gained status as an Indian along with any children that would result from the marriage. On the other hand, Indian women who had children through a mixed marriage would not gain status. The children of an Indian woman would only be eligible to gain status if their mother was married to an Indian man, or if the children's parents were not married.

Before examining some of the arguments and positions that took place in and around the Supreme Court proceedings, it should prove informative to briefly discuss how the case ended up at Canada's highest level of court. Jeannette Vivian Corbiere

[10] "I [Jeannette Lavell] was politically naïve enough, then, to believe that the Canadian judicial system would immediately see that the whole thing was obviously discriminatory, and delete section 12 1B as they had done in the Drybones case, concerning Indians and alcohol, and that would be that" (Jeannette Corbiere Lavell, "A Native Woman's Perspective on Equity in Canada's Legal System," *Presented in the Centre for Women's Studies and Feminist Research Distinguished Lecturer Series, The University of Western Ontario*, March 1991, 3).

Lavell was born and raised as a member of the Wikwemikong Reserve located on Manitoulin Island, Ontario on 21 June 1942. She belonged to the Nishnawbe and spoke Ojibway. Thus, she was born a registered or status Indian as then defined by the Indian Act. On 11 April 1970 at the age of twenty eight she married David Mills Lavell, a photo-journalism student at Ryerson Institute in Toronto. Less than eight months later the Indian Registrar in charge of maintaining a list of status Indians deleted her name from the Wikwemikong Band list. Within two weeks Jeannette Lavell protested the deletion of her name which also meant that her thirteen month old son, Nimke, would also not be eligible to reside on the reserve. The Registrar decided not to change their decision and informed her solicitors by a letter during the first week of January 1971. Lavell persisted and had her lawyers send a letter to the Registrar requesting to have their decision reviewed by a judge. The Registrar thereafter sent all the pertinent materials to a Judge of the Judicial District of York for review.[11]

Here Clayton Ruby, Lavell's lawyer, argued that the section of the Indian Act that stipulated that women were to lose their status was inoperative because of the Bill

[11] Ontario Reports 1972 vol.1 [York Judicial District] County Court, *Re Lavell and Attorney General of Canada* (21 June 1971), 391. For biographical information on Lavell see, Gretchen M. Bataille, ed., *Native American Women: A Biographical Dictionary* (New York: Garland Publishing, 1993), 153-154; Sherrill Cheda, "Indian Women," in *Women in Canada*, edited by Marylee Stephenson (Toronto: New Press, 1973), 58-70; Library and Archives Canada, "Jeannette Vivian Corbiere Lavell: Native Women's Rights Activist," <http://www.collectionscanada.ca/women/002026-302-e.html> Accessed on 4 March 2005.

of Rights since it denied "equality before law."[12] On 21 June, the residing Judge ruled that section 12 (1) (b) was "not inoperative under the *Canadian Bill of Rights*" because "although it is a surrender of her treaty rights it is voluntary and necessary."[13] A motion was then made to review this decision in the Federal Court of Appeal where the court made their conclusions known in October of the same year. In his concluding remarks, Mr. Justice Thurlow ruled that

> …these provisions [section 12 (1) (b)] are thus laws which abrogate, abridge and infringe the right of an individual Indian woman to equality with other Indians before the law. Though this is not a situation in which an act is made punishable at law on account of race or sex, it is one in which under the provisions here in question the consequences of the marriage of an Indian woman to a person who is not an Indian are worse for her than for other Indians who marry non-Indians and than for other Indians of her band who marry persons who are not Indians. In my opinion this offends the right of such an Indian woman as an individual to equality before the law and the *Canadian Bill of Rights* therefore applies to render the provisions in question inoperative.[14]

Therefore, with this decision Lavell was to regain her status. This court case had the ability to isolate the problem with section 12 (1) (b) and ignore the greater context of the Indian Act in general; therefore, this decision left open many unanswered questions. Some of these questions included the uncertainty of the status of children of Indian

[12] *Re Lavell and Attorney General of Canada* (1971) 22 D.L.R. (3d) 182 at p.185.
[13] 22 D.L.R. (3d) 188 at p 188.
[14] 22 D.L.R. (3d) 188 at p.193.

women who had married non-status men, non-status husbands, women that had gained status through marriage to Indian men, governmental funding to support potentially larger Indian populations, and as well, the validity of the entire Indian Act.

Nearing the end of this trial, Indian organisations started to pay closer attention to the proceedings. On 27 November 1971 the Association of Iroquois and Allied Indians submitted a position paper to Jean Chrétien. The paper stated that the decision by the Court of Appeal posed more problems for children of Indian women than it solved.[15] Due to discomfort that the White Paper had created, the Indian Affairs Minister showed signs of being supportive and willing to assist any Indian organisations that wanted to appeal the decision.[16] On behalf of the Indian organisations, the federal government soon after moved to appeal the decision. On 1 December 1971 Justice Minister John Turner said the case would be reviewed by the Supreme Court because the consequences of the decision of Lavell (and Bedard) were too serious to be outright accepted without further clarification.[17]

Between December 1971 and the first day at of this case at the Supreme Court on 22 February 1973 many Indian organisations gathered to discuss the topic. The

[15] The Association of Iroquois and Allied Indians, *Position Paper*, 21 November 1971, 63.
[16] "Glad to Hear Indians Talking Back, Chretien says," *The Globe and Mail*, 29 November 1971.
[17] Statements in the House of Commons by John Turner, Minister of Justice, House of Commons Debates, December 1, 1971, 10045. "Woman wins Appeal," *The Globe and Mail*, 2 December 1971.

National Indian Brotherhood asked for fellow Indian positions on the issue and they found that many groups had yet to do their own in depth investigation into the case. Indian newspapers across the country as well as feminist media both encouraged debate and ensured that it was kept alive.[18] When the case start date approached, the general public, as well as the Indian population, were well aware of who Jeannette Lavell was and what she was trying to do. The issue of what she was doing is where non-Indians (Canadians with European background) and Indians tended to differ in their views. While non-Indians tended to see it as a feminist movement, many Indians took it as much more than this as is shown by their involvement in this case.

The Lavell case was unique in that, unlike Drybones, it attracted a wide range of participants and onlookers to what was normally a composed Court setting. On the opening day of the case in Ottawa there were representatives from over ten provincial and national Indian organisations with their respective lawyers along with women's groups and their lawyers. Over one hundred and fifty Indians arrived at the court an hour or two early on the first day of the hearing and had to compete with around twenty lawyers and the press for seats. Harold Cardinal, president of the Indian Association of

[18] "Laval Case," *The Saskatchewan Indian* March 1972, 4; "Indian Act Must Have Supremacy," *The Saskatchewan Indian* August 1972, 9.

Alberta failed to make it in to the court room.[19] And unlike most other cases where only five to seven of the Supreme Court judges sit in at one time, all nine were present. The Court had its hands full. There was legal council for eleven associations or brotherhoods across Canada, the Native Council of Canada, and the Six Nations Band, as well as for nine individuals or organisations. Many of the organisations, which had legal status as a group, were able to obtain intervenant status which enabled them to submit their arguments as factums directly to the Supreme Court.

Most of the political organisations that opposed Lavell were male dominated. This to start gave a false impression that it was solely a fight between men and women, male chauvinism and feminism.[20] Not denying the inherent sexist attributes of the Indian Act, these organisations saw this case in terms of a much wider scope. Even George Manuel the president of the National Indian Brotherhood was sympathetic towards Lavell. Only when he heard of potential consequences of the case from lawyer Douglas Sanders did he begin to raise the issue among the provincial Indian groups.[21] The speed at which Indian organisations prepared their arguments was amazing and the

[19] "Lawyers Heard as Lavell Case Opens Before Overflow Crowd," *The Globe and Mail*, 23 February 1973.
[20] The Ottawa Journal printed an interesting cartoon where two Indians on horseback looked to the distance at some smoke signals. The chief was carrying a briefcase with a folder titled "Indian Women's Rights" was falling out of it. The second man on horseback points to the smoke signals and says to the chief "It says 'The chief is a male chauvinist pig…'" (*The Ottawa Citizen*, 7 February 1973).
[21] Peter McFarlane, *Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement* (Toronto: Between the Lines, 1993), 146.

energy level among those involved was high.

The organisations that submitted factums made several arguments, but in essence there were five main underlying ones that prevail throughout their positions. The first, and arguably the most stressed point, involved conflict between the Indian Act and the Canadian Bill of Rights and the second stated that the method of defining status does not involve unreasonable or arbitrary discrimination. Third there was fear of non-Indian men living on or having access to reserve resources. Potential dramatic increases of people eligible to live on reserves created worry about the added burden that would be placed on their resources. And lastly they wanted to illustrate that potential consequences of this case go well beyond the Indian Act itself. The last three arguments addressed scenarios that they saw as problems if the court ruled against the Indian Act. Their main arguments had very little to do with what the feminists or general public perceived as sexual discrimination and many men were even sympathetic to Lavell's cause. While court has a tendency to isolate or limit the arguments presented, the Indian organisations tried to expand the argument and put it back into context which they thought was absent in the lower court's ruling.[22]

By the time the Lavell case was appealed to the Supreme Court of Canada the

[22] See Factums of Intervenants.

White Paper had been defeated, but the underlying beliefs still resonated. The fears that the government's position paper created had not subsided. At an NIB conference in Edmonton from 8-10 August 1972 they decided, not without some disagreement, that the Bill of Rights should under *no* circumstance take precedence over the Indian Act. There was much argument involved but this was the final decision. They decided to intervene in the Supreme Court case. Since they had no native women in their organisation and they were arguing against what had been decided in the Drybones case, their arguments appeared chauvinistic and contradictory to the only other court ruling dealing with the Bill of Rights. Also at this meeting Fred Plain of the Union of Ontario Indians argued that if the Supreme Court dismissed the appeal "then the government will have achieved its long-range goal to assimilate us into its own political structure."[23]

In a letter sent to NIB for distribution across the country dated 2 February 1973, almost three weeks before the first hearing, Harry LaForme, coordinator for Association of Iroquois and Allied Indians which represented around twenty-thousand Indians, wrote the following:

> Throughout history the Indian People have struggled to maintain their identity, only to be defeated time and time again. Presently an attempt is being

[23] Sherrill Cheda, "Indian Women: A Historical Example and A Contemporary View," in *Women in Canada*, edited by Marylee Stephenson (Toronto: New Press, 1973), 68; "Indian Act Must Have Supremacy," *The Saskatchewan Indian*, August 1972, p.9.

> made to destroy the only legislation which allows us the privilege of being Indian people. I refer to the Indian Act.
>
> The Canadian Bill of Rights, or any other Bill or Act must not be allowed to supercede the Indian Act. In the Indian Act it provides the Indian people the opportunity to determine their own destiny and enables them to maintain what land and property they are still in possession of. This privilege must not be taken from them, as it is outlined in the White Paper Policy.[24]

This letter illustrates the close connection between the White Paper and Bill of Rights as perceived by official Indian views. Indians had to stand up to the Bill as they had against the White Paper several years prior.

Instead of direct government policy specifically directed at Indians, it became a battle with the Canadian Bill of Rights. Both the Bill and the Act could not operate side by side unless the clause "notwithstanding the Canadian Bill of Rights" was added to the Indian Act. An example of this idea was represented on a comic on the front page of the February 1973 edition of *The Saskatchewan Indian*. Former Prime Minister Diefenbaker covers his eyes and Lavell and a male Indian watch a blindfolded judge in anticipation as he stumbles, arm stretched out with a tag, towards a pin the donkey poster with the labels "Indian Act" and "Canadian Bill of Rights." The judge could only pick one, and it appeared the judge was not sure on what to do either. There was uncertainty for all groups involved. Indian groups were adamantly opposed to having

[24] Harry S. Laforme, Co-Ordinator, Association of Iroquois and Allied Indians, "To Our Native Brothers and Sisters," dated 2 February 1973, *National Indian Brotherhood Information Service (NIBIS)* 3.6 (February, 1973): 2.

the Bill affect any part of the Indian Act, which they saw as their only guarantee for protection and rights to maintain their culture and identity in Canada. Provincial organisations under the umbrella of NIB saw the Canadian Bill of Rights eating away at the Indian Act and thought that it would ultimately lead to its cessation, and have the same consequence as Chrétien's 1969 proposal.[25] Harold Cardinal sums up their position well when he wrote the following in a position paper presented to the Federal government: "Overturn this act and you sell out the Indians. Overturn this act, and you betray the trust of our people."[26] Not only did they try to justify the whole Indian Act in general, they also held that the sections involved in this case were also important.

In a factum that represented Indian organisations from all of Canada except New Brunswick, PEI and Newfoundland, the intervenants strongly argued that neither the Indian Act as a whole, nor the membership sections (sections 4 to 17 and 109 to113) of the Act were unreasonable. These sections "establish a rational and reasonable system serving legitimate legislative purposes…" because when dealing with special groups a line must be drawn somewhere. To illustrate this, the factum outlined four options for dealing with status and intermarriage: 1) non Indians whether male or

[25] "Factum of the Intervenants, The Indian Association et al., In the Supreme Court of Canada Between The Attorney General of Canada and Jeannette Vivian Corbiere Lavell and Between Richard Isaac et al. and Yvonne Bedard," February 1973.
[26] Indian Association of Alberta, *Indian Status in Canada*, February 1973, 2.

female are given status, 2) Indian spouses, male or female, lose their status, 3) intermarriage involves no change in status, and 4) certain intermarriages result in the whole family gaining or losing status. They go on to state that in either the first or second case the Indian population would either increase or decrease too quickly. This would cause burden on, or loss of Indian communities. Option three would involve complicated legislation and lead to problems with children of such marriages. The last option is the only one that appeared to be reasonable and rational, and it is the one that the Indian Act adopted. Their argument goes on to say that the choice of keeping the male as the head follows both social and economic commonalities of society.[27] These arguments tried to show the court that no part of the Act that defined status, including section 12 (1) (b), were unreasonable or arbitrarily discriminatory in nature. However, it should be noted that a major weakness in this argument was that even if "keeping the male as head" followed "commonalities of society," it was in essence discriminatory. This shows that the presence of sexual discrimination was present but not necessarily overt and at the same time neither was it denied.

Many Indian individuals and organisations also mentioned potential consequences of making section 12 (1) (b) inoperative. The largest worry was of having

[27] "Factum of the Intervenant, the Indian Association of Alberta, et al. in the Supreme Court of Canada on Appeal from the Federal Court of Appeal between: the Attorney General of Canada and Jeannette Vivian Corbiere Lavell," February 1973, 3-9.

external forces dictate that white men would have a right to live on reserves in greater numbers. Even if men did not gain status upon marriage they saw men as being able to use their Indian wives to gain access to reserve resources either directly or indirectly, and this would ultimately lead to faster assimilation. Sherrill Cheda asserts that it was not clear why assimilation would come quicker if men were allowed on the reserve.[28] However, many reserves were close to major urban centres, such as that of Caughnawaga near Montreal, and provided cheaper rent encouraging non Indians to live there.[29] It was not infrequent for Indians to think that if Lavell won the case then thousands of "whites" would "be allowed to live on reserves and take control of Indian lands."[30] Douglas Sanders, counsel for several Indian organisation intervenants in this case, stated that males and females of many of the tribes he was dealing with expressed the belief that the male was properly the head of the family unit. As well, it shows the general conception of the time towards the role of men, not only in Indian communities, but also of Canadian society in general at the time. They were discriminating against non-Indian men, which by default resulted in changing the role of Indian women in certain situations.

If Indian populations expanded either because women married to non Indians or

[28] Cheda, "Indian Women," 68.
[29] Rudy Platiel, "Kahn-tineta Wants Her Sister To Be Evicted," *The Globe and Mail*, 31 August 1971.
[30] "Indians Want Lawyer at Hearing on Status," *The Globe and Mail*, 11 December 1971.

their whole families were allowed back on reserves prior to ensuring federal government commitments to increase funding, then troubles on reserves would increase. Many reserves could barely provide adequate housing for those who lived on the reserves. Educational and health care resources were also in short supply. Already in short supply of resources, they would not be able to adequately cope with increased demands without further government funding and/or reorganizing whole reserves and increasing the fixed land base. Uncertainty on how they would accommodate added numbers created a lot of worry.[31] This worry encouraged the Indian organisations to look beyond the Act and find other laws that could come under similar scrutiny by the courts.

The Six Nations Indians expanded the argument beyond the Indian Act into other laws in Canada. They argued that if the Federal Court of Appeal's decision was upheld then it would also imply that various sections of the Immigration Act, the Canadian Citizenship Act, the Canadian Elections Act and the Criminal Code "must also be held inoperative."[32] They went on to say that if section 12 (1) (b) were inoperative

[31] "Factum of the Intervenant, the Indian Association of Alberta, et al.," 11;
[32] "Appellants Factum (Six Nations) in the Supreme Court of Canada on Appeal from the Supreme Court of Ontario between Isaac et al. (Appellant) and Yvonne Bedard (Respondent)," Paragraph 39 page 17. This factum was also used to support the case against Lavell as stated in "Factum of the Six Nations Indians of the County of Brant (Intervenant) in the Supreme Court of Canada on Appeal from the Federal Court of Appeal between The Attorney General of Canada (Appellant) and Jeannette Vivian Corbiere Lavell (Respondent)," February1973, paragraph 3.

then other sections that dealt with membership issues, including sections 11 to 17, would also be inoperative, and in that case those who had lost their status would still not be eligible for membership. Thus, by eliminating the desired section none of the problems being argued by Lavell would actually be solved. By complicating the issue beyond one section of the Act that Ruby and the media had deemed to be sexually discriminating, they showed that the problem was not that simple. If one section of the Indian act were changed, then much of the whole act as well as other Canadian laws needed revamping.

Those that opposed Lavell were clear that they were not satisfied with the Indian Act as it was either. Even the opposition thought that the Act was in need of change. However, they wanted to be sure the change came from within the Indian community and was a political process and not by means of external forces such as the judicial system. For example, in the Manitoba Indian Brotherhood's (MIB) position paper in opposition to the White Paper they stated that women should not lose their status upon marriage to a non-Indian, and that they should have the right to remain an Indian the rest of their life. Despite this official response in 1971 and again restating it in 1973, they joined NIB in opposition to Lavell.[33] Lavell illustrated to the MIB that Indians

[33] The Indian Tribes of Manitoba, *Wahbung: Our Tomorrows* (Manitoba Indian Brotherhood, 1971),36; The Indian People of Manitoba, *Special Report Presented To: Government of Canada*, 22

were still largely controlled by external forces which was something that they wanted to change.

Using this Supreme Court case as an impetus for initiating change, Indian organisations mainly led by the Alberta Indian Association proposed that they organize and propose a new revised Indian Act within six months based on Indian perspectives and input. The time line was important for they figured that any later than six months and the case would probably be over. It was a race against time. If they could not create a new draft to present the government before the ruling, they thought that they may lose the whole Act though unilateral judicial means.[34]

On 27 August 1973, just over six months after the initial hearing, the Supreme Court distanced itself from the Drybones case and overturned the Federal Court's ruling by a five to four decision to uphold section 12 (1) (b) of the Indian Act. Instead of the death of the Indian Act, this case represented a symbolic death of Diefenbaker's Bill of Rights. Prime Minister Trudeau's "Just Society" became slightly more complicated. In a sense, this case opened Pandora's Box in regard to the Indian Act so the apparent "win" for the NIB and its associates was not a complete victory.

February 1973, 4.
[34] "New Bill Would Be Drafted," *The Globe and Mail*, 22 February 1973; "Indian Groups To Be Consulted Before Rulings," *The Globe and Mail*, 28 February 1973.

The arguments of those in opposition to Lavell contend that the main issues at stake in the Lavell case were of controlling and maintaining Indian identity and not that of sexual or gender discrimination. For the political Indian organisations that opposed Lavell, her case was not only about sexual discrimination. Although sexism permeated the whole case and a number of the arguments presented by Indians, as seen in one of the factums, this was a rather unimportant motivational factor for both formal (those organisations that were granted intervenant status) and informal opposition. What was important was ensuring that the Indian Act did not fall prey to the Canadian Bill of Rights and that their communities would be sustainable. This case once again opened the eyes of many Indian communities to the vulnerability of the Indian Act and their own control of identity. Media during the Lavell case and contemporary knowledge would guide us to think that this was a case based primarily on sexual discrimination and feminism. However, the real underlying arguments and motivation to oppose Lavell had less to do with sexual discrimination and more to do with the debate of defining and controlling "Indianness" and ensuring that the federal government did not abandon their responsibilities in relation to the Indians of Canada that had signed treaties. Nor did they want reserve resources to become further burdened or depleted.

To view this struggle as one between feminism or sexual discrimination and

Indian rights or one of individual versus collective rights is not without merit. Yet, to do so one would miss the main point of the arguments presented in the Lavell case. Rather, the women were trying to get back their own special status as Indians, which they saw as a birth right from being Indian and not necessarily female. Many of those who opposed Lavell, on the other hand, were by no means concentrating on denying women's rights despite inherent sexist assumptions in the way the opposition presented their arguments. When Indians saw the potential to lose the Indian Act through virtue of the Canadian Bill of Rights and the previous scare of the White paper and the Drybones case, they acted in what they saw as their best interest. Every time women are involved with an issue or problem it does not mean that the main issue at stake has its roots in feminism or sexual discrimination. To do so, in the situation outlined in this paper, would take the event out of context and impose non-Indian perspectives on complex issues that revolve around status Indians in Canada.

Epilogue

After the Supreme Court reinstated the county court's decision, which in essence ruled that section 12 (1) (b) was out of reach of the Canadian Bill of Rights, dispute on this matter appears to have waned for several years. However, especially with the rise of

activism by the "Tobique Women" in New Brunswick the issue of 12 (1) (b) regained attention.[35] Supported by many of these Native women, Sandra Lovelace took the issue to the United Nations where it was ruled in 1981 that Canada was in violation of Article 27 of the International Covenant on Political and Civil Rights. The following year the government introduced the Canadian Charter of Rights and Freedoms. The Charter provided a three year grace period to ensure that all laws in Canada confirmed to its guidelines. This prompted the government to address this one section of the Indian Act. On 28 June 1985 Parliament passed "An Act to Amend the Indian Act." Commonly known as Bill C-31, this Act was retroactively put into affect April of the same year. Many bands, like that of Sawridge in Alberta, continued with the 1970s arguments that they worried about the depletion of their reserve's resources.

This amendment enables women to keep their Indian status if they marry a non-Indian and their children are eligible for status as well. However, status expires after the second generation of mixed marriages. This Bill does not affect Indian men who were married before its implementation. That means that the future generations of the children of men who are not classified as "Indians" under Bill C-31 will continue to be status Indians. Moreover, having status does not mean that women or their children will

[35] Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Group, 1987).

be able to access resources from reservations, such as cultural education. The reason for this is that band membership is decided by each band council. Now it is possible to have individuals in the Native community to be considered non-Bill C-31 with membership or Bill C-31 with or without membership. And even within Bill C-31 there are two separate classifications of Indians. In other words, it has created several different classes of Indians, and it does not necessarily address the whole perceived debate of sexual discrimination that it set out to solve. This has led to further dispute between Native communities and the government.[36]

As can be expected, the number of status Indian increased dramatically after 1985 as many Native people who lost their status applied to renew their status. Before the end of the decade more than 150,000 people gained status. But because of section 6 (2), the second generation cut off rule, the population of Native peoples will ultimately start declining.

Some people have argued that the outcome, Bill C-31, was a compromise between Aboriginal women's groups, the Assembly of First Nations (formerly the NIB),

[36] Megan Furi and Jill Wherrett, "Indian Status and Band Membership Issues," Parliamentary Research Branch, 2003, <http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm#discussiontx> (10 March 2006); Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts between Collective and Individual Rights," *Queen's Law Journal* 15.2 (Fall, 1990):279-306.

and non-status Indians, but it is difficult to see this as an equal compromise.[37] That is, as the government stated that it "repealed" all of the sexual discrimination in the Indian Act it created at the same time various new problems.[38] Pamela Paul has therefore appropriately labeled Bill C-31 as "the Trojan Horse."[39] This simple analogy goes a long way in describing how the Native community has seen the Bill. It is likely the most significant amendment yet made to the Indian Act.[40] The complexities that evolved from the 1985 amendment to the Indian Act will continue to spur future debate as it has not solved the problems it was intended to.[41]

[37] Moss, "Indigenous Self-Government and Sexual Equality."
[38] Department of the Secretary of State of Canada, *Convention on the Elimination of All Forms of Discrimination against Women, Second Report of Canada* (Ottawa: Minister of Supply and Services, Canada, January 1988), 22. Technically it did not get rid of all sexual discrimination because men who married non-Indians before 1985 are not affected by Bill C-31.
[39] Pamela M.Paul, "Bill C-31: The Trojan Horse: an Analysis of the Social, Economic and Political Reaction of First Nations People as a Result of Bill C-31," MA Thesis, The University of New Brunswick 1990.
[40] Harry W. Daniels, "Bill C-31: The Abocide Bill," <http://www.abo-peoples.org/programs/C-31/Abocide/Abocide-1.htm> (3 March 2006).
[41] Robert Robson, "The Indian Act: A Northern Manitoba Perspective," *Canadian Journal of Native Studies* 11.2 (1991): 295-331.

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