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Marrying out and Loss of Status: The Charter and New Indian Act Legislation

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MARRYING OUT[1] AND LOSS OF STATUS: THE CHARTER AND NEW INDIAN ACT LEGISLATION

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Jeanette Lavell lost Indian status by virtue of section 12(1)(b) of the Indian Act[2] which states that an Indian woman who marries a person who is not an Indian is "not entitled to be registered" or in common parlance, loses status. In her appeal to the Supreme Court of Canada she argued violation of section (1)(b) of the Canadian Bill of Rights[3] — the right to equality before the law. In his dissenting judgement Justice Laskin, as he then was, termed the effect of section 12(1)(b)[4] "a statutory excommunication."[5] The majority upheld the section in question and proclaimed the law in Canada; but four years later, Sandra Lovelace, another excommunicant, brought her case to the United Nations Human Rights Committee.[6] The "views" of the Committee supported Sandra Lovelace.[7] The Committee found a violation of Article 27 of the International Covenant on Civil and Political Rights which reads:

Article 27

"In those States in which ethnic, religious or linguistic

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1. This term is taken from Jamieson, Indian Women and The Indian Act: Citizens Minus (1978) at 30.

2. R.S.C. 1970, c. 106.

3. R.S.C. 1970, Appendix III.

4. Supra, note 2.

5. Attorney General of Canada v. Lavell (1973), 38 D.L.R. (3d), 481; [1974] S.C.R. 1349, at 509.

6. "Communication to the United Nations Human Rights Committee from Sandra Lovelace" in Selected Documents in the Matter of Lovelace versus Canada Pursuant to the International Covenant on Civil and Political Rights, (New Brunswick Human Rights Commission, 1981) at 24.

7. "Views of the Human Rights Committee", Id., at 154.

> minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[8]

The Committee expressed its 'views' in the following words:

> "15 . . . [In] the opinion of the Committee the rights of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists."
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> 17. . . The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable or necessary to preserve the identity of the tribe."[9]

Section 15 of the Canadian Charter of Rights and Freedoms[10] guarantees equality "before and under the law" and the equal protection and benefit of the law. There may be qualifications to this right particularly as it applies to Indian people.[11] Section 15[12] itself in subsection two sets out a built-in limit. Laws which have the object of ameliorating the condition of individuals or

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8. United Nations General Assembly Resolution 2220A (XXI), Dec. 16, 1966 (Entry into force March 23, 1976).

9. Supra, note 6, at 163-164.

10. Canadian Charter of Rights and Freedoms: Part I (ss.1 to 34) of the Constitution Act, 1982 (Canada Act 1892, c.11 (U.K.), Schedule B).

11. Id., Section 25 provides that the Charter guarantees shall not be interpreted to "abrogate or derogate from any aboriginal treaty or other rights or freedoms". . . of aboriginal peoples. Section 35 of the Constitution Act, 1982 recognizes and affirms "existing aboriginal and treaty rights".

12. Supra, note 10.

groups disadvantaged by reasons of "race, national or ethnic origin, colour, religion", or "sex" are not "precluded" by subsection one[13]. The Conservative government has pre-empted the need for a searching analysis of section 12(1)(b)[14] or other Indian Act[15] status or membership sections by passing legislation, Bill C-31,[16] intended to bring the membership and status provisions of the Act in line with the section 15(1)[17] equality guarantee. It is submitted that the legislation will not stifle dissent or Charter challenges.

It is the purpose of this article to examine the meaning of "equality" as taught by such cases as Lavell[18] and Bliss[19] and to make a humble prediction of the effect of this legacy on the judicial interpretation of section 15[20] as it might apply to the Indian Act[21] amendments.[22] In so doing, we will touch briefly on the possible effects of the Indian rights provisions of the Charter and the Constitution.[23] It is hoped that this will add a real dimension to what otherwise might be an abstract analysis of patently discriminatory legislation (both as to group — Indians, and as to individuals — women).

Although others[24] have written much on the meaning of "equality before the law" as that phrase has been interpreted by courts

13. Ibid.
14. Supra, note 2.
15. Ibid.
16. An Act to Amend the Indian Act 33-34 Eliz. II, 1984-85 (Can.), Bill C-31. (Deemed in force as of April 17, 1985 - S. 23)
17. Supra, note 10.
18. Supra, note 5.
19. (1978), 92 D.L.R. (3d) 417 (S.C.C.).
20. Supra, note 10.
21. Supra, note 2.
22. Supra, note 17.
23. Supra, note 10.
24. Matas, "Indian Women's Rights" (1974), 6 Man. L.J. 195. McDonald, "Equality Before the Law and the Indian Act: In Defence of the Supreme Court" (1977), 3 Dalhousie L.J. 726. M'Gonigle, "The Bill of Rights and the Indian Act: Either? Or?" (1977), 15 Alta. L.R. 292. "Katz, the Indian Act and Equality Before the Law" (1973), 6 Ottawa L.R. 277.

examining Indian drinking rights[25] and the rights to registration or status[26], the question of Indian status, its rights and disabilities when examined in light of section 15,[27] remains largely unexplored territory.

It is perhaps unfortunate that what we know about "equality" as a legal guarantee derives from cases which have dealt with the civil and criminal disabilities of Indians. Indians have always been treated as a special class of people having a unique relationship with the federal government. Not only do Indian people have a constitutional status by virtue of the "Indian power"[28] but their treaty and aboriginal rights have been given this same status.[29] The uniqueness of the position of the status Indian and the lack of much more extensive judicial elaboration of the rights and disabilities of Indian status makes examination of special legislation like the Indian Act[30] difficult.

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24. (1974), 38 Sask. L.R. 243; "Indian Act and The Canadian Bill of Rights" (1974), 6 Osgoode Hall L.R. 397; "The Bill of Rights and Indian Status" (1972), 7 U.B.C. L.R. 81. The focus to date has been on the guarantee of treaty and aboriginal rights. See Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232; McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada (1982), 4 Sup. Ct. L.R. 255. And Lysky, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in Tarnopolsky and Beaudoin eds., The Canadian Charter of Rights and Freedoms (1982) 467.

25. R. v. Drybones (1969), 9 D.L.R. (3d) 473 (S.C.C.); [1970] S.C.R. 282. See also R. v. Hayden (1984) C.N.L.R. in which the Manitoba Court of Appeal declared inoperative section 97(b) of the Indian Act which prohibits intoxication on an Indian reserve (irrespective of place or person). As in Drybones this court applied section 1(b) of the Bill of Rights.

26. Attorney General of Canada v. Lavell, supra, note 5.

27. Supra, note 10.

28. Constitution Act, 1867, 30-31, Victoria C. 3 (U.K.), s.91(24): "Indians and Lands Reserved for Indians". See Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar. Rev. 513.

29. Constitution Act, 1982, supra, note 10, s.35.

30. Supra, note 2.

In Attorney General of Canada v. Canard[31] the Supreme Court of Canada examined the alleged discriminatory effect of sections of the Indian Act[32] allowing the Minister of Indian Affairs to appoint an administrator of a deceased Indian's estate. In upholding the challenged provision, Mr. Justice Beetz stated:

> "The principle of equality before the law is generally hostile to the very nature of status and it is no easy task to reconcile the two in Canada when the one is enshrined in a quasi-constitutional statute and the other forms part of the fundamental law of the land. This the Courts have attempted to do in Drybones and Lavell."[33]

In Lavell,[34] Mr. Justice Ritchie established a test for equality which has influenced all other decisions concerning the Canadian Bill of Rights and which will continue to influence the interpretation of section 15.[35]

The "right of the individual to equality before the law", said Mr. Justice Ritchie, meant "equality in the administration or enforcement of the law before the ordinary courts of the land".[36]

Mr. Justice Ritchie found that section 12(1)(b) of the Indian Act[37] which effects a loss of status[38] for a status Indian woman who marries a non-status male did not meet the test. He made a

31. (1975), 52 D.L.R. (3d) 548.

32. Supra, note 2.

33. Supra, note 29 at 549.

34. Supra, note 5.

35. Supra, note 10.

36. Supra, note 5 at 499.

37. Supra, note 2.

38. More precisely s.12(1)(b) results in loss of "entitlement to be registered" as an Indian. This could be followed by an order of enfranchisement (more about which see infra page 88) under section 109 which denies the woman the right to be considered "Indian" for the purposes of "any law". A distinction can be drawn between the effect of loss of status and enfranchisement. Although what rights flow from this intermediate "status" are not clear, the federal government has made no orders of enfranchisement in respect to women "marrying out" since 1975. See Jamieson, supra, note 1 at 65.

distinction between Drybones,[39] where an Indian person was subject to a criminal penalty to which no other Canadians were subject, and a law regulating the civil rights of Indians — the right to the use and benefit of reserve lands.[40] It could be inferred from Lavell[41] that "the regulation of the internal domestic life of Indians on reserves"[42] was immune from a Bill of Rights challenge.

In Bliss v. the Attorney General of Canada[43] the Supreme Court of Canada examined a Bill of Rights "equality before the law" challenge by a woman denied ordinary benefits under the Unemployment Insurance Act[44] because she was pregnant. In this case, Mr. Justice Ritchie, again found no inequality of treatment.

From Lavell[45] and Bliss[46] it could be said that schemes setting up entitlement to benefits whether they be the use of reserve land or unemployment insurance, are immune from "judicial review" so long as the government in enacting the schemes can be said to be pursuing a "valid federal objective".[47] In Lavell,[48] the objective was the discharging of obligations to manage and control Indian lands; in Bliss,[49] discharging an obligation under section 91(24) of the Constitution Act, 1867.[50]

In Light of the Charter: Section 15 Alone

Does the existence of the "Indian power"[51] then remove government decisions in relation to Indians from review under section

39. Supra, note 23.
40. Supra, note 5 at 498.
41. Id.
42. Id., at 498.
43. Supra, note 19.
44. 1971, 1970-71-72 (Can.), c.48.
45. Supra, note 5.
46. Supra, note 19.
47. Id., at 424.
48. Supra, note 5.
49. Supra, note 19.
50. Supra, note 10.
51. Ibid.

15?[52] According to one author who defends the result in Lavell,[53]

> "[To] sustain a law under section 91(24) is to find that it treats Indians with precisely that discrimination which their unique constitutional status makes appropriate. . ."[54]

According to another, the "strict scrutiny" test which the American Courts apply to legislation based on race is in the Canadian context, "untenable".[55] It is submitted that whatever the precise meaning of the equality guarantees in section 15,[56] the Canadian Courts could be expected to hold the Indian Act[57] immune from Charter challenge, unless, as might be the case with regard to status and membership rights, no reasonable justification could be given for gender based exclusion, for example, of female status Indians who "marry out". Although section 12(1)(b)[57a] has been repealed[57b] and women who marry out no longer lose status,[57c] it may be useful to look at a Charter challenge to this provision. To borrow the reasoning of Mr. Justice McIntyre in Mackay v. R.,[58] an inquiry on a section 15[59] challenge might have gone as follows:

1) Is there any inequality created by section 12(1)(b)[60] between male and female status Indians?
2) Is it created in pursuit of a valid federal objective?

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52. Supra, note 10.
53. Supra, note 5.
54. McDonald, supra, note 22.
55. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L. Rev. 131 at 149. See also Tarnopolsky, "The Equality Rights In The Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar. Rev. 242.
56. Supra, note 10.
57. Supra, note 2.
57a. Indian Act, supra, note 2.
57b. Bill C-31, supra, note 16.
57c. See infra, pp. 92-93.
58. (1980), 114 D.L.R. (3d) 393; [1980] S.C.R. 370 at 423 (D.L.R.).
59. Supra, note 10.
60. Indian Act, supra, note 2.

3) Has it been created rationally, not arbitrarily or capriciously?

Under the Charter[61] we might have to add the following additional tests:

4) Is the inequality saved by section 15(2)[62] as part of an ameliorative law?
5) Is the inequality a "reasonable limit" in a free and democratic society within the meaning of section 1[63] of the Charter?

Applying this analysis to Lavell,[64] it is clear that Jeanette Lavell's marriage to a non-status person triggered a loss of "benefit of the law". She lost status. A male status Indian marrying a non-status female would not. There can be no question that the membership provisions of the Act are, however, seeking to obtain a "valid federal objective" — the determination of those entitled to use and benefit of Indian lands.

It is difficult to know whether section 12(1)(b)[65] is "rational". The Canadian government in its submission to the United Nations Committee in the Lovelace" Communication[66] defended the legislation as protecting Indian lands from encroachment by white men in "a basically farming economy".[67] The government further argued that Indians used partileneal family relationships to determine legal claims not blood quantum.[68] Other arguments were that Indian people disagreed amongst themselves on change to the

61. Supra, note 10.

62. Id.

63. Id.

64. Supra, note 5.

65. Supra, note 2.

66. "Response of the Government of Canada to the Decision of the Human Rights Committee: in Selected Documents, supra, note 6 at 45.

67. Id.

68. This was not the case amongst the tribes of the Six Nations. See Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975), 21 McGill L.J. 656 at 657. In any case it is questionable whether kinship rather than blood quantum should determine status. In one of the briefs to the Committee submitted on behalf of Lovelace a scheme was suggested which would grant status to one who embraced

membership rules and that before changing the law, the government would have to examine the effects on the Indian community.[69]

Assuming the government's rationale were accepted, is section 12(1)(b)[70] legislation ameliorating the condition of a disadvantaged group? The whole of the early Indian Acts[71] were based on a policy of enfranchisement by which Indians, on becoming owners of land in fee simple would attain full citizenship, including the right to vote.[72] A dependent status was recognized at the very beginning. To day, however, enfranchisement instead of conferring a higher status results in a loss of rights and benefits as will be outlined below. With respect to the "reasonable limit" test, it is submitted that this may form part of the "rational connection" analysis under the third head of inquiry.

A similar analysis could be applied to all the status and membership provisions of the Indian Act.[73] Two principles underlie the former, pre C-31, rules of status: transmission of status through the male line and kinship rather than blood quantum. The following persons were entitled to be registered:

1) All Indians who were recognized as such in 1874;[74]
2) All Indians who were members of bands who signed treaties after 1874;[75]
3) All male descendants of those persons described in one and two;[76]

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68. Indian society and culture. (Selected Documents, supra, note 3 at 130). In fact the early pieces of Indian legislation adopted similar definitions. See Jamieson, supra, note 1 at 5. Also see Sanders, "Indian Status: A Women's Issue or An Indian Issue?" [1984] C.N.L.R. 30 at 35-36.

69. Supra, note 66 at 46-47.

70. Indian Act, supra, note 2.

71. Jamieson, supra, note 1 at 27 and 44.

72. The federal franchise did not come until 1960. See Bartlett, "Citizens Minus Indians and the Right to Vote" (1980), 44 Sask. L.Rev. 163.

73. Supra, note 2.

74. Id., s.11(1)(a).

75. Id., s.11(1)(b).

76. Id., s.11(1)(c).

4) All legitimate children of males described in three;[77]
5) All illegitimate male children of males described in three;[78]
6) All illegitimate children of females described in one, two and four[79] (subject to rule eight below);
7) All women married to male persons in any of the categories described above;[80]

The following persons lost status:

8. Illegitimate children of females against whom a protest was made;[81]

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77. Id., s.11(1)(d).

78. This rule results from a statutory interpretation of s.11(1)(c). In Martin v. Chapman (1983) 150 D.L.R. (3d) 638, [1983] 2 C.N.L.R. 76, the Supreme Court of Canada decided that illegitimate male children were entitled to be registered (i.e. to have status). The anomaly in this approach is highlighted by Re Froman, (1973) 2 O.R. 360 at 366 (Ont. Co. Ct.) where His Honour Judge Fanjoy stated:

> "In my opinion, s.11(1)(c) has reference only to male legitimate children. It therefore follows that there is no difference under the Indian Act between an illegitimate child of a male Indian and illegitimate child of a female Indian when the other parent is a non-Indian, subject, of course, to the fact that there is the right of protest contained in s.12(2) of the Act which applies only to the illegitimate child of a female person and has no application to the illegitimate child of a male person.
>
> . . .
>
> In my opinion, the provision for protest contained in s.12(2) is not discrimination on the basis of sex. The fact that the protest procedure is available with respect to paternity and not with respect to maternity is simply recognition of the facts of life. Maternity is always identifiable. Paternity always has a degree of uncertainty, even for legitimate issues. No Legislature can change the fundamental biological difference between men and women."

79. Id., s.11(1)(e).

80. Id., s.11(1)(f).

81. Id., s.12(2).

9) All persons twenty-one years of age whose mother and whose father's mother were not persons described in one to six above. This is called the "double mother rule". It excluded children of less than one quarter "Indian" (by kinship). For example, if the child's grandmother and mother gained status by marriage to a status Indian, the child would lose status. This has little to do with blood quantum because a pure blood Indian may, in fact, not have status at birth but gain it by marriage;[82]

10) All status female Indians who "married out";[83]

11) All persons who gave up status or enfranchised.[84] The policy behind the Indian Act[85] in terms of "raising status" is clearly seen in section 109(1) which read:

> "109.(1) On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian
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> a) is of the full age of twenty-one years,
>
> b) is capable of assuming the duties and responsibilities of citizenship, and
>
> c) when enfranchised, will be capable of supporting himself and his dependants,
>
> the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised."[86]

The grounds for equality challenges seem fairly evident: discrimination between adult males and females; discrimination between

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82. Id., s.12(1)(a)(iv).

83. Id., s.12(1)(b).

84. Id., s.109-113. A review of the various pieces of legislation providing for membership and loss of status is contained in Jamieson, supra, note 1, chapters 5 through 11. For a good summary of the status question prior to Martin v. Chapman (supra, note 78), see Imai and Laird "The Indian Status Question: A Problem of Definitions" (1982), 5 Canadian Legal Aid Bulletin 113.

85. Supra, note 2.

86. Ibid. Section 109 was repealed by Bill C-31, s. 19, supra, note 16.

male and female children; discrimination between legitimate and illegitimate children and further between illegitimate male and illegitimate female children of status males.

Restoration of Status

Bill C-31[87] which amends the Indian Act[88] provides a resolution of outstanding section 15[89] issues, by repealing rules nine and ten above. It also introduces for the first time, the concept of band control of membership. The Bill does away with the principle of transmission of status through the male line and institutes a one-quarter kinship rule — excluding second generation children of mixed status/non-status marriages. Thus a child who is fifty percent status (who has one non-status parent) can transmit status only by marrying another person who has status. Those who have lost status by reason of rules 8, 9 or 10 above would have their status restored[90] and "marrying out" no longer triggers loss of status. The double mother rule is replaced by the fifty percent kinship rule and distinctions between legitimate and illegitimate children, whatever the gender of child or parent, are eliminated.[91]

The most dramatic change, however, is the recognition of band control over membership.[92] A distinction must be made between

87. Supra, note 16.

88. Supra, note 2.

89. Supra, note 101

90. Id., s.6(1)(c). The previous Liberal government proposal, Bill C-47 is analyzed in terms of the views of Indian peoples and proposals for self government by Sanders, supra, note 57. An essential difference between the two bills is that the Liberal government would have determined future transmission of status by a one quarter descent rule with a one half descent rule to be applied to children of those reinstated. In addition, there was no provision for band control of membership.

    The proposed Amendments in Bill C-31 would also return status to children of women marrying out who had lost status by order of the Minister under s.109(2); Indians who had voluntarily given up status to secure employment; and Indians who were automatically enfranchised without their consent under sections of the Indian Act "as it read prior to July 1, 1920" by reason of their obtaining university degrees, or becoming a professional person (s.6(1)(c), (d) and (e)).

91. Id., s.6(2), s.1(1).

92. Id., s.10-14.

status, or entitlement to registration, and membership in a band. Not all status Indians are members of bands. Sections five and six of the Indian Act[93] establish lists, a general list of all status Indians and band lists, containing the names of the members of the various bands. Bands do not now have any general control over membership criteria. However, since 1981 bands have, by government invitation, been applying for exemption from rules nine and ten above. Section four of the Indian Act[94] permitted exemption by proclamation from certain parts of the Act. As of February 22, 1985 of 582 bands across Canada, 312 had secured proclamations of exemption from the effect of rule nine, the "double mother" rule and 107 from rule ten,[95] section 12(1)(b).[96]

Bill C-31[96a] establishes a two year period, June 28, 1985 to June 28, 1987, during which the following are entitled to band membership:

1) persons formerly excluded under rules 8, 9 and 10[97] above and reinstated to status;

2) persons born after April 17, 1985, both of whose parents are status band members.[98]

On June 28, 1987[99] if a band has not established its own rules for determining membership, the Department of Indian Affairs will continue to maintain the band list and in addition to those persons set out in one and two above, the following will be entered on band lists:

3) persons born at any time both of whose parents are status;[100]
4) persons born at any time, one of whose parents is a status band member.[101]

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93. Supra, note 2.

94. Ibid.

95. L.G. Smith, Registrar, Indian Affairs, letter to the author, February 22, 1985.

96. Indian Act, supra, note 2.

96a. Supra, note 16.

97. Id., s. 11(1)(c).

98. Id., s.11(1)(d).

99. Id., s.11(2).

100. Ibid.

101. Ibid.

The effect of these rules is to allow band councils a two year period to make membership codes which would prevent children born prior to April 17, 1985, to those persons who have been restored to status, from gaining band membership. The bands could also exclude from membership, persons born at anytime, only one of whose parents was status.

The Charter Revisited: In the Light of Sections 27 and 28

Questions under section 15[102] will undoubtedly continue to arise. First we will examine whether this section addresses the "real" problems raised by the Lavell[103] ruling. Second, we will take a look at possible Charter challenges to registration and membership decisions.

In Lavell,[104] the Supreme Court examined the question of loss of status without examining its consequences. This approach was probably dictated by the abstract tool used by the court -- a bill of rights -- and an unwillingness to examine the "wisdom"[105] of the legislation -- a reluctance which will, depending on one's point of view, continue to cloud interpretation of the Charter. If we look at Lavell[106] through the case of Sandra Lovelace,[107] and examine the consequences of loss of status we put into broad relief the question of whether the Charter and particularly section 15[108] can satisfy Canada's obligations under the International Covenant on Civil and Political Rights[109] and will meet continued challenges to Indian Status and membership rules.

In Lavell,[110] the Supreme Court focused on loss of use and benefit of reserve land; but did not deal with the consequences flowing from Jeanette Lavell's loss of this benefit. Upon her marriage to a non-status male, she lost a host of benefits aside from the right to use and occupancy of reserve land. Status Indian people have the

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102. Supra, note 10.

103. Supra, note 5.

104. Ibid.

105. Per Mr. Justice Ritchie in Bliss, supra, note 19 at 424.

106. Supra, note 5.

107. Supra, note 6.

108. Supra, note 10.

109. Supra, note 8.

110. Supra, note 5.

following rights:[111]

1) Use of reserve land;[112]
2) Exemption from taxation and exemption from seizure of personal and real property on reserves;[113]
3) Access to various government funded housing and education programs designed especially for native people;[114]
4) The right to vote in band elections and stand for office;[115]
5) Exemption from the application of some provincial laws;[116]
6) Generally, if the person is part of a band which signed a treaty,[117] the right to yearly payments and special rights to hunt and fish; and
7) A right to a per capita share in band assets.[118]

Sandra Lovelace was born a status Indian and had lived on the

111. This list is adopted from that set out by Sanders in "The Bill of Rights and Indian Status" (1972), 7 U.B.C.L.R. 89.

112. This right derives from the definition of a reserve as a piece of land set apart "for the use and benefit of a band", band membership and the rule that membership follows status (Indian Act, supra, note 2 s.2(1), s.11-15).

113. Indian Act, supra, note 2, s.29, s.89-90.

114. Jamieson, supra, note 1, at 70-71.

115. Indian Act, supra, note 8, s.75-77, Indian women did not gain this right until 1951 (R.S.C. 1951, c.149).

116. Id., s.88. The application depends on the extent to which the provincial law affects "Indianess" or the incidents of Indian status. See for example on the issue of the application of traffic laws, R. v. Twoyoungmen [1979] C.N.L.R. 85, 16, A.R. 413 (Alta. C.A.); (casenote by the author (1982), 5 Canadian Legal Aid Bulletin 198); on child welfare laws Natural Parents v. Superintendent of Child Welfare (1973), 60 D.L.R. (3d) 148 (S.C.C.); and labour laws Four B Manufacturing Ltd. v. United Garment Workers of America et al. (1979), 102 D.L.R. (3d) 385 (S.C.C.).

117. Band members whose ancestors were signatory to Treaty Three obtain five dollars per year and the "right to pursue their avocations of hunting and fishing throughout the tract surrended": Treaty Three (Queen's Printer, Ottawa, 1966).

118. This right would "crystallize" upon enfranchisement. (Indian Act, supra, note 8, s.15).

Tobique Reserve until her marriage in 1970.[119] Her marriage had broken up and she attempted to return to the reserve despite opposition from band members.[120] Before the Human Rights Committee, she argued violation of several sections of the International Covenant on Civil and Political Rights: Article 12 - mobility rights, Article 17 and 23 - the right to marry and protection of the family, and Article 27 - the right to enjoy one's culture, religion and language in community with other members of a minority group.[121]

The Commitee did not find it necessary to deal with any violation but that of Article 27.[122] It did not however deal directly with the political and economic losses consequent on "marrying out". In addition, the Committee stipulated that "to deny Sandra Lovelace the right to reside on the reserve was not reasonable or necessary to preserve the identity of the tribe".[123] It is submitted that the Supreme Court of Canada will have to take this broad balancing of interests approach in reviewing status or membership challenges under the Charter. Challenges to the new legislation could come from those who are of Indian blood, or Indian by culture, demanding equal treatment under section 15[124].

The courts will have to examine section 34[125] of the Constitution, which recognizes and affirms "aboriginal and treaty rights", section 25[126] of the Charter which mandates that section 15[127] must be construed so as not to abrogate or derogate from any aboriginal or treaty rights, or "other rights of freedoms that pertain to aboriginal peoples" and section 28[128] which guarantees all Charter

119. "Communication" and "Reply of Sandra Lovelace to the Observations Made and Questions Posed by the 31 July 1980 Interim Decicion of the Human Rights Committee" in Selected Documents, supra, note 6 at 147.

120. Id., at 148

121. Id., at 24 and 106.

122. "View of the Human Rights Commitee" in Selected Documents supra, note 6 at 162.

123. Id., at 164

124. Supra, note 10.

125. Supra, note 10.

126. Ibid.

127. Ibid.

128. Ibid.

rights equally between males and females. It is interesting to note that the former Prime Minister had suggested an amendment to section 25[129] to the effect that the section 25[130] rights would not derogate from the section 28[131] guarantee.[132]

Presumably, any argument justifying discrimination under the status or membership rules would have to be framed in terms of "aboriginal or treaty rights" or "other rights" of aboriginal peoples. As the treaties are silent on status or membership, the argument might be that the Indian Act[133] as amended[134] creates rights which can not be derogated from under a section 15[135] challenge. Alternatively, the rules might be defended as "ameliorative" under section 15(2).[136] In this respect, bands could argue the threat posed to "tribal identity" as a result of a potential influx of new members. This threat would take the form of increased pressures on land, housing and services and of social and cultural tensions. At least with respect to membership rules bands could argue a "sovereign immunity" from court challenge.

However, neither sovereignty, self-determination or self-government of Indian tribes or nations have been recognized in Canadian law. An Indian band acts by power delegated to it under the Act.[137] Those powers include the right to make bylaws

129. Ibid.

130. Ibid.

131. Ibid.

132. Reported in Zolotkin, "The 1983 and 1984 Consitutional Conference: Only the Beginning [1984] 3 C.N.L.R. 3 at 15; and see Constitution Act, 1982, s.35, supra, note 10. By amendment to the Act two constitutional conferences were promised to discuss issues relating to the interpretation and application of this and other sections which "directly affect the aboriginal peoples of Canada". Treaty rights were defined to include land claims and declared to apply equally to male and female persons. Constitution Amendment Proclamation, 1983, SI/84-102.

133. Supra, note 2.

134. Supra, note 16.

135. Ibid.

136. Supra, note 10.

137. Supra, note 2 and see Paul Bank v. R., [1984] C.N.L.R. 87, 2 W.W.R. 540. Belzil J.A. stated that "bands had no other source of power" (at 549).

concerning a very limited number of subjects including control and management of traffic, health needs, repair of roads, public games, fish and game and more generally, "observance of law and order".[138] It is not clear whether the power to control band membership would also be a delegated power. Bill C-31[139] does not provide a right of appeal to challenge membership decisions made by bands. It does provide such a right in respect to decisions made by the Department of Indian Affairs on questions of status or membership.[140]

In contrast to Canada, the United States recognizes Indian tribes as "distinctly, independent political communities, retaining their original natural rights".[141] In Santa Clara Peublo v. Martinez[142] an Indian woman challenged loss of membership in her tribe effected by a tribal law similar to s.12(1) (b).[143] She had "married out". The ruling, although affirming the concept of self determination by Indian tribes was based on a procedural point. The modified Bill of Rights which applies to Indian tribes provided no remedy other than by way of habeas corpus for violations of its "equal protection" clause.[144] The Supreme Court determined that this gave the tribe a "sovereign immunity" from civil suit.[145] In Canada the question under the new law will be whether the exclusion of appeal rights over band membership decisions in conjunction with "natural rights" arguments under section 25 of the Charter and section 35 of the Constitution Act, 1982 provide such immunity.

The Relevance to Legal Clinics

Will legal clinics be at the forefront of Charter challenges to Indian Act[146] legislation? Clinics will feel the tensions between assertion of individual and collective rights in deciding whether to make such challenges. Resolution will depend amongst other things

138. Id., s.81.

139. Supra, note 16, s. 14.2(1)

140. Ibid.

141. Worcester v. Georgia 6 Pet. 515 (U.S.S. Ct. 1832)

142. 98 S. Ct. 1670 (1978)

143. Indian Act, supra, note 2.

144. Supra, note 142 at 1679.

145. Supra, note 142 at 1677.

146. Supra, note 2.

on policies in respect to acting against band councils and the availability of Legal Aid Certificates to the private bar. Clinics will likely be asked to assist in documenting status claims. This role would produce the least conflict with band councils. As it is projected that 22,000 people will be eligible for restoration of status and band membership and a further 46,000 first generation children to status[147] legal clinics whatever their location in Ontario can expect some inquiries.

147. Background Notes: Removal of Discrimination From The Indian Act (House of Commons, n.d.).