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MADE BY THE *INDIAN ACT*: *LAVELL* AND THE HIDDEN STORY OF EQUALITY LAW AND JUDICIAL REVIEW

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ABSTRACT

This article explores the enmeshment of the *Indian Act* in Canada's legal order. Situated in the period between 1968 and 1974, it examines how this era shaped Canada's legal edifice and how the *Indian Act* serves as its bedrock. While the article may also contribute to the history of Canadian constitutional, Aboriginal, and administrative law, its main purpose is to demonstrate how the colonial encounter between Indigenous and settler shapes the colonial state and colonial legality. The findings are based on original archival research. The article begins with a review of the political and legal environment in the late 1960s on the *Indian Act*, discrimination, and federal Indian policy. Then I examine how the *Indian Act*, in particular its status regime, constituted a terrain for Canadian courts, policy-makers, and legal scholars to debate a justiciable meaning of equality. I analyze how the outcomes in *Drybones* and *Lavell* shook up debates about judicial review. I show how the *Lavell* case catalyzed a new configuration

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of political alliances and schisms, across racial and gender lines, with material inequities permitting the federal government to divide Indigenous resistance.

The controversy over the *Indian Act* was productive for the Canadian state. It helped jurists define and understand equality and non-discrimination and nourished debate about parliamentary supremacy and judicial review, in an era when the *Canadian Bill of Rights* was a disappointment and calls for entrenched constitutional rights were intensifying. *Lavell* was the first time the Supreme Court heard from a gamut of interveners affected by a law being challenged. The case demonstrated that public opinion pressure could be a force in the court room, not just in parliament and at the ballot box, and that judicial processes could be used to change the balance of power between settler and Indigenous political leaders. In part because the dispute about the *Indian Act* mobilized the Canadian women's movement, the government was able to transform a challenge against a discriminatory federal law into a dispute between different Indigenous constituencies. This deflected blame from the government onto Indigenous leaders, divided Indigenous political resistance, and undermined Indigenous self-determination.

Indigenous peoples gained little from the debate, litigation, and activism about sex discrimination in the *Indian Act* in the early 1970s. Instead, their demands for redress created a space for settler society to thrash out legal and political questions about equality and the proper relation between courts, the legislature, and the public. The indisputable merits of Lavell's claim have been celebrated by government and canonized in legal treatises, but Canadian law has never fully acknowledged that Canada's legal roads have been paved by Indigenous people demanding, and being denied, justice.

* * *

RÉSUMÉ

Ce texte porte sur la place complexe de la *Loi sur les Indiens* dans l'ordre juridique canadien. L'article traite de la période allant de 1968 à 1974, des années fondamentales pour comprendre l'évolution de l'ordre juridique canadien, et plus particulièrement le rôle de la *Loi sur les Indiens* comme

pierre angulaire de cet ordre. Ce texte contribue à notre compréhension générale de l'histoire du droit constitutionnel canadien, du droit autochtone et du droit administratif. Mais sa contribution principale consiste à démontrer, en se reposant sur des recherches archivistiques, que l'État colonial et la légalité coloniale sont définis par le contact entre le colon et l'autochtone. Le texte commence par un survol de l'environnement politique et juridique, la discrimination et la politique fédérale ayant trait aux indiens pendant les années 1960. Ensuite, l'article se demande comment la *Loi sur les Indiens*, et notamment le régime définissant le statut d'indien, est devenu le contexte pour un débat entre tribunaux canadiens, responsables politiques et juristes autour d'une définition justiciable de l'égalité. Enfin, l'article examine l'effet perturbateur des arrêts dans les dossiers *Drybones* et *Lavell* sur le débat autour du contrôle judiciaire. L'affaire Lavell a en effet catalysé des nouvelles configurations d'alliances politiques ainsi que des fractures suivant des divisions raciales et de genre. Le gouvernement fédéral a ainsi profité d'inégalités matérielles afin de diviser l'opposition autochtone.

La controverse autour de la *Loi sur les Indiens* a produit des effets importants pour l'État canadien. Cette controverse a en effet poussé les juristes à mieux définir et comprendre l'égalité et la non-discrimination. Elle a également nourri des débats sur la suprématie parlementaire et la révision judiciaire, alors même que les critiques de la *Déclaration canadienne des droits* rejoignaient les appels à ériger une charte des droits et libertés. C'est dans l'affaire *Lavell* que la Cour suprême a autorisé pour la première fois un grand nombre d'intervenants touchés par la loi en question. L'affaire a donc démontré que l'opinion publique avait un rôle à jouer devant les tribunaux, et pas uniquement au parlement ou pendant les élections. Pour la première fois, on a pu imaginer que le processus judiciaire pouvait servir à changer les rapports de force entre les leaders autochtones et les colons. De plus, grâce à la mobilisation du mouvement des femmes canadiennes autour de la *Loi sur les Indiens*, le gouvernement fédéral a réussi à recaractériser une requête antidiscriminatoire à l'encontre d'une loi fédérale en conflit entre groupes autochtones. Cette reformulation a permis au gouvernement de transférer la faute qui aurait du lui être attribuée vers les leaders autochtones, et ce faisant, de diviser la résistance autochtone et d'affaiblir ses revendications d'auto-détermination.

Au cours des années 1970, les personnes autochtones ont peu gagné des débats, des litiges, et de l'activisme contre la discrimination de genre qui ont été suscités par la *Loi sur les Indiens*. Au contraire, leurs demandes ont créé un espace dans lequel la société de colons a pu débattre de ses propres enjeux légaux et politiques autour de la relation entre les tribunaux, les législateurs et le public. Les mérites des requêtes de Lavell sont évidents, et l'affaire est justement fêtée par le gouvernement et valorisée par des juristes. Néanmoins, le droit canadien n'a toujours pas reconnu que l'ordre juridique canadien a été bâti par des peuples autochtones demandant justice, et se la voyant refusée.

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INTRODUCTION

THE *Indian Act* is a racist, patriarchal, and colonialist law that has killed, maimed, and dispossessed people for generations. Its predecessor was there right at Canada's founding, given to Canada by the Crown as part of its arsenal to attempt the occupation and rule of a large, populated territory. When the law was not enough to control the Indigenous inhabitants of the land, military force, starvation, and settler violence bridged the gap. The *Indian Act*, still in force today, provides the legal architecture for the governing of Indigenous life, from cradle to grave. Many have analyzed, protested, and testified to the harms done by the *Indian Act* to Indigenous life and to the lands, waters, and beings under Indigenous care. My question is not, what has the *Indian Act* done *to* Indigenous people, but instead, what has the *Indian Act* done *for* Canada?

I wrote this article for a special issue to mark the 150th anniversary of the *Indian Act*. The work intersects with a field of scholarship and action about Indian women and the *Indian Act* that is rich, nuanced, and well-developed, where the relationship between variables is over-determined. If you are interested in this article, you may already know something about any or all of the following:

- Jeannette Lavell lost her case about sex discrimination and the *Indian Act* at the Supreme Court of Canada;[1]
- Legal scholars and activists cite the *Lavell* case as an example of the failures of the *Canadian Bill of Rights* to guarantee individual rights.[2] The *Lavell* judgment is often cast in a story about the progression of rights, from the false start of the *Canadian Bill of Rights* to the triumph of the *Charter of Rights and Freedoms*;[3]

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1 *Attorney General of Canada v Lavell*, [1974] SCR 1349, 1973 CanLII 175 (SCC) [*Lavell*].

2 See e.g. Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, student edition (Toronto: Thomson Reuters Canada Limited, 2023), ch 55 at 1548.

3 For example, the Royal Commission on Aboriginal Peoples notes that "[t]he Charter accomplished overnight what the *Canadian Bill of Rights* and the *Canadian Human Rights Act* had been unable to do — motivating the government to eliminate provisions of the *Indian Act* that had been criticized for discriminating against Indian women" (see Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996) at 33.

- Bill C-31, passed in 1985, created two tiers of status Indians, thus further dividing families and communities.
- In debates leading up to Bill C-31 (1978-1985), Indigenous women's demands to return to their communities were opposed by some Indigenous people, notably status Indian organizations;
- Indigenous women who demanded sex equality in status and membership rules were decried for undermining demands for Indigenous sovereignty over community boundaries;[4]
- The UN Human Rights Committee ruled that the *Indian Act* violated Sandra Lovelace's right to culture;[5]
- Some Indigenous women campaigning to end sex discrimination were supported by white feminists;
- During and after the Bill-31 debates (1983-1985), some Indigenous women denounced feminism as a white or non-Indigenous ideology;[6]
- Most women re-instated by Bill C-31 did not return to their reserves;[7]

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4 For syntheses of these dynamics, see Joanne Barker, "Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism" (2006) 7:1 Meridians 127; Beverley Jacobs, "Gender Discrimination Under the *Indian Act*: Bill C-31 and First Nations Women" in Gayle MacDonald, Rachel L Osborne & Charles C Smith, eds, *Feminism, Law, Inclusion* (Toronto: Sumach Press, 2005) 175 at 175, 183, 191–93.

5 *Sandra Lovelace v Canada*, Communication No. 24/1977, OHCHR, 13th Sess, UN Doc CCPR/C/OP/1 (1984).

6 See Joyce Green, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood Publishing, 2007); Elaine Coburn & Emma LaRocque, "Gender and Sexuality: Indigenous Feminist Perspectives" in Manon Tremblay & Joanna Everitt, eds, *The Palgrave Handbook of Gender, Sexuality, and Canadian Politics* (Cham: Springer Nature Switzerland, 2020) 101.

7 Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1992) 4:4 Const Forum Const 110 at 113; see also John Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics" (1994) 43 UNBLJ 19 at 38.

- Some women, re-instated by Bill C-31, did not return to their reserves because they were not welcome, and some First Nations drafted membership codes to exclude them;[8]
- Some Indigenous communities have patrilineal membership and citizenship laws;
- Some communities launched litigation to prevent the re-instatement or return of women who had lost Indian status through marriage or the sharing of treaty annuities with them;[9]
- After the Bill C-31 process, there were decades of acrimony between male-led national Indigenous organizations and Indigenous women's organizations;[10]
- The political, social, and cultural saga over amending the *Indian Act* has been analyzed as a contest between individual sex equality rights and collective rights to Indigenous self-determination;[11]
- The government has lost or settled a series of *Charter* cases alleging that the status rules in the *Indian Act* discriminate on the basis of sex;[12]
- Remedial legislation after these legal losses increased the status Indian population; and,

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8 See e.g. Sébastien Grammond, "Modern Definitions of Indigenous Identity" in *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queen's University Press, 2009) 106.

9 *Sawridge Band v Canada (TD)*, 1995 CanLII 3521 (FCTTD) at 4–5.

10 Teressa Anne Nahanee, "Indian Women, Sex Equality, and the *Charter*" in Caroline Andrew & Sandra Rodgers, eds, *Women and the Canadian State* (Montreal: McGill-Queen's University Press, 1997) 89.

11 See e.g. Monique Deveaux, "Native Rights and Gender Justice: The Case of Canada" in *Gender and Justice in Multicultural Liberal States* (Oxford: Oxford University Press, 2006) 127; Caroline Dick, "Gender Discrimination within First Nations: The History and Nature of the *Sawridge* Dispute" in *The Perils of Identity: Group Rights and the Politics of Intragroup Difference* (Vancouver: UBC Press, 2011) 9.

12 See e.g. *Descheneaux c Canada (Procureur Général)*, 2015 QCCS 3555; *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827; *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153; *Gehl v Canada (Attorney General)*, 2017 ONCA 319; *Landry c Procureur général du Canada (Registraire du registre des Indiens)*, 2017 QCCS 433; *Hele c Canada (AG)*, 2020 QCCS 2406.

- There is a bill under discussion at the Senate to amend the *Indian Act*.[13]

There was a time before these events occurred. This may be as hard to imagine as not thinking about an elephant if I write "don't think about an elephant." Nonetheless, this article is an invitation to imagine a time before these events and everything that has been written about them. It is an invitation to consider how this era shaped Canada's legal edifice and how the *Indian Act* serves as its bedrock. The fact that these events happened does not mean that they were bound to happen. Although I cannot write you a counter-factual history, I can analyze the past to recover moments before discourses had congealed, battle lines had been drawn, political alliances had formed, and legal questions had been answered. You might be accustomed to proving a claim in the present by finding, interpreting, and organizing certain categories of text written in the past (laws, statutes, regulations, and judgments), and putting other categories of text to one side. This article welcomes you into a different way of reading the past: reading it today, in the present, using many categories of text, but not to prove a substantive claim about the present, confirm a pre-existing narrative, or prove a theory of the case. If you do not want to think about the past in this way, that is okay. The invitation stands.

While the article may also contribute to the history of Canadian constitutional, Aboriginal, and administrative law, I have written this legal history to demonstrate how the colonial encounter between Indigenous and settler shapes the colonial state and colonial legality. This article is not a legislative history of reforms to the *Indian Act* to end sex discrimination,[14] a normative statement about whether the *Indian Act* should exist or how it should be amended,[15] a critique of the Court's reasoning in *Lavell* and *Drybones*, a review of pre-*Charter* equality jurisprudence, a contribution to pre-*Charter* doctrine on judicial review, an addition to

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13 Canada, Library of Parliament, *Bill C-38: An Act to Amend the Indian Act (New Registration Entitlements)*, Publication No 44-1-C38-E (Ottawa: Library of Parliament, 29 March 2023).

14 Genevieve Renard Painter, "Sex Discrimination, Assimilation, and Austerity: The Untold Story of Canada's *Indian Act*, 1975–1985" (2025) 62:1 Osgoode Hall LJ 255.

15 Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011).

scholarship on the *Canadian Bill of Rights*,[16] an examination of the harmful effects of the *Indian Act* on Indigenous women, their families, their communities, and their nations,[17] an inquiry into the origins of the *Indian Act*, an exploration of the *Indian Act*'s rules on marriage as an example of the philosophical tension between individual and collective rights,[18] a study of the campaigns by Indigenous people to end sex discrimination in the *Indian Act*,[19] or an analysis of the 21st century jurisprudence about sex discrimination and the *Indian Act*.[20]

This article is an opportunity to engage with the following statements, all of which relate to the period between 1968 and 1974, the *Indian Act*, and the *Lavell* case. These statements have been under-emphasized in the extant literature, or they are original. The article's findings, developed based on original archival research, are as follows:

1. Debates about discrimination and the *Indian Act* were grist for Canada's legal mills. The *Indian Act* was the terrain in which the Canadian legal academy debated and developed justiciable meanings of equality.
2. Although judicial review of administrative action had long been a concern of judges, legal scholars, and policymakers, cases about the *Indian Act* provided a politically-neutral cloister for thinking about the perils and promise of judicial review on the basis of individual rights.
3. The *Lavell* case was the first time that so many interveners were heard at the Supreme Court, with a clear impact on the Indigenous-settler political balance of power.

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16 Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed (Toronto: MacMillian Company of Canada, 1978).

17 Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 CJLS 113.

18 Deveaux, *supra* note 11.

19 Janet Silman, *Enough Is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 1987); Nellie Carlson, Linda Goyette & Kathleen Steinhauer, *Disinherited Generations: Our Struggle to Reclaim Treaty Rights for First Nations Women and Their Descendants* (Edmonton: University of Alberta Press, 2013).

20 Mary Eberts, "*McIvor*: Justice Delayed—Again" (2010) 9:1 Indigenous LJ 15.

4. It was the *Lavell* case that generated mobilization and collaboration between the white-led women's movement and the Indigenous women's movement.
5. The federal government used litigation tactics and funding decisions around the *Lavell* case as a means of dividing Indigenous political resistance and undermining Indigenous self-determination.

This article has the following structure. First, I explain my theoretical framework and methodology. Second, I describe the legal and political environment in the late 1960s on the *Indian Act*, discrimination, and federal Indian policy. I introduce the three Indigenous protagonists in the *Lavell*, *Bedard*, and *Drybones* cases. Third, I examine how the *Indian Act*, in particular its status regime, constituted a terrain for Canadian courts, policymakers, and legal scholars to debate the meaning of equality and the realization of non-discrimination. Fourth, I analyze how the outcomes in *Drybones* and *Lavell* shook up debates about judicial review, in the era when the failings of the *Canadian Bill of Rights* were well-understood and calls for entrenched constitutional rights were intensifying. Fifth, I show how the *Lavell* case catalyzed a new configuration of political alliances and schisms, across racial and gender lines, with material inequities permitting the federal government to divide Indigenous resistance. In this article, I will talk about the *Indian Act, 1951*, and the *Canadian Bill of Rights*.[21] I will not discuss the *Indian Act, 1985*. The provisions are excerpted in an annex.

I. THEORY AND METHODOLOGY

In this section, I make explicit the theoretical framework I use to think about history, law, and settler colonialism, and I explain my archival methodology.

Settler colonialism is a structural relationship between settler and Indigenous, where both categories are constituted through conflict and interaction and neither is ontologically existent.[22] A settler state needs the antagonism of Indigenous life and legality, because the claim of

21 *Indian Act*, SC 1951, c 29; *Canadian Bill of Rights*, SC 1960, c 44.

22 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 J Genocide Research 387 at 387–90.

occupation and domination is core to the state's self-definition. Indigenous people and nations need to resist colonialism because circumstances demand it, but their political institutions and laws are free-standing of the settler state.[23] If the settler disappeared, so would "the Indigenous," leaving in its place the (formerly Indigenous) sovereign nations. In contrast, if the Indigenous disappeared, the settler state would cease to exist *as* a settler state.[24] Second only to violence,[25] law is the most powerful instrument creating and maintaining this structural relationship between settler and Indigenous.[26] Because settler jurisdiction is asserted to be supreme, Indigenous law has had less of an effect on how settler political, social, material, and legal institutions understand the settler-Indigenous relation. Believing in the efficacy of the settler state in making the world declared by settler law leads to descriptive and analytic oversights.

The law and the world are co-constituted and deeply enmeshed.[27] There is no world outside the law and its categories: there is no non-legal deck chair from which to critique or order the world. Similarly, the law is not "applied" to the world, like paint, because the law cannot be outside of the world. Legal concepts are not free-standing analytic abstractions nor are they ideals born fully-formed from natural law or reason. Concepts are not discovered by judges through jurisprudence nor are they represented or transcribed by legislators in statutes. Rather, legal concepts are created through political, social, and legal processes of dialogue, dispute, and contestation; they are inherently temporal. For example, the meaning of "sexual harassment" is created and revised through political,

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23 Audra Simpson, "On Ethnographic Refusal: Indigeneity, 'Voice' and Colonial Citizenship" (2007) 9 Junctures 67; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 13.

24 Wolfe, *supra* note 22 at 387–90.

25 Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601.

26 Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction* (New York: Routledge, 2012) at 102.

27 Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford: Stanford University Press, 2014) at 128; Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) at 6; Roderick A Macdonald, *Lessons of Everyday Law* (Montreal: Published for the Law Commission of Canada and the School of Policy Studies, Queen's University by McGill-Queen's University Press, 2002) at 3.

social, cultural, and legal processes.[28] Likewise, the category of "Indian" is created by federal statute and distributes material benefits, but it also has meaning to Indigenous people and distributes political power within Indigenous communities. Legal concepts are historical categories that can be historicized.

Canadian law has been produced through an engagement with Indigenous demands and an attempt to suppress Indigenous resistance and assimilate Indigenous lives and legalities into the Canadian state. These efforts have not been effective. To take an example on an individual scale: Celestine Gilday testified to parliamentarians that she had never heard of the *Indian Act* when she received a letter informing her she had lost status through her marriage to a white man; she simply thought, "I am a Dene and I will be a Dene until I die."[29] To take an example on a collective scale: the Indigenous population continues to grow, and Indigenous nations govern and manage more territories and resources today than they did 100 years ago. The jurisgenerative effect of Indigenous resistance is difficult to see if Canadian law is only analyzed for what it does to Indigenous people; it becomes visible by asking what the regulation of Indigenous life has done to Canadian law.

The past cannot be accessed without mediation and interpretation. The past cannot speak on its own terms and has no inherent meaning that can be revealed or exposed.[30] The past can only be narrated, in the present, as part of present-day stories.[31] The historian's task is to choose which stories to tell with the past. Some stories told with the past have been told so often they become settled truths. It bears asking why the past gets used to tell these stories. What other stories could the past tell? In legal history, this point is sometimes made to prove the indeterminacy of

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28 See generally Catharine A MacKinnon & Reva B Siegel, eds, *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004).

29 House of Commons, *Minutes of Proceedings and Evidence of the Sub-committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, 32-1, vol 1, No 5 (14 September 1982) at 5:63 (Celestine Gilday).

30 Martin Jay, "Historical Explanation and the Event: Reflections on the Limits of Contextualization" (2011) 42:4 New Literary Hist 557 at 559; Quentin Skinner, "Meaning and Understanding in the History of Ideas" (1969) 8:1 Hist & Theory 3 at 6.

31 Hayden White, "Historical Discourse and Literary Writing" in Kuisma Korhonen, ed, *Tropes for the Past: Hayden White and the History/Literature Debate* (New York: Rodopi, 2006) 25 at 31.

the past (and thus the contingency of the present).[32] But I make it to interrupt a historicist, linear, and teleological approach to the past, one which attempts to correctly order past events so that they lead to present outcomes. I offer in its stead a fracturing of the past into new fragments, mounted in new juxtapositions, in order to recognize something new in the present.[33]

Lastly, I adopt the standpoint that it is at least theoretically possible that judges, legislators, politicians, bureaucrats, leaders, lawyers, and activists all made mistakes. No actor's conduct, ideas, or tactical choices is beyond examination. It is also possible that the law does not contain solutions and that it is not the source of all problems or injustices.

A. Methodology

This article is based on empirical research in governmental, non-governmental, and Indigenous archives, doctrinal research, and research in academic publications. The doctrinal research relied upon search databases including HeinOnline, CanLII, and JSTOR. Literature review conducted for this project was supplemented by searches conducted for previous projects on related themes.

My examination of the discursive environment in which the legal academy interpreted the Supreme Court's judgements in *Lavell* and *Drybones* rests on a retrieval, reading, and analysis of every law review article reported in HeinOnline's database of Canadian legal periodicals that referenced *Lavell* or *Drybones*, published between 1968 and 1978, and every article that referenced the *Indian Act* between 1955 and 1968.

I read and analyzed the trial court, appellate, and Supreme Court judgments in *Bedard*, *Lavell*, and *Drybones*.

Press research was completed using Factiva and Google Newspapers. My searches constructed a sample of articles in local, provincial, and national newspapers that referenced the *Lavell* case, between 1971 and

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32 For a review of methodological debates in legal history, see Catherine L Fisk, "Law & Society in Historical Legal Research" in Markus D Dubber & Christopher Tomlins, eds, *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018) 479.

33 Christopher Tomlins, "After Critical Legal History: Scope, Scale, Structure" (2012) 8 Annual Rev L & Soc Science 31 at 41–43.

1973. My sample included some Indigenous-run newspapers, like the *Saskatchewan Indian*.

My findings rely on a partial sample of records from Indigenous organizations. I read and analyzed agendas, minutes, and conference proceedings of the Union of British Columbia Indian Chiefs and the Alberta Native Women's Society, as well as statements and letters from Indian Rights for Indian Women, the Native Council of Canada, the BC Indian Homemakers Association, and the Indian Association of Alberta.

Records related to the *Lavell* case were found in the University of Saskatchewan Diefenbaker Archival Collections and in the personal archives of attorneys. These records include all the factums for the parties and interveners at the Supreme Court of Canada. I analyzed a will-say by Jeannette Corbiere Lavell in 2006 in *Sawridge*. I found oral history evidence through the Osgoode Society for Legal History. In a previous project, I conducted interviews (having acquired ethics approval) which informed my analysis in this article.

I conducted textual searches in parliamentary records, using the Library of Parliament's database of Canadian Parliamentary Historical Resources. I conducted keyword searches between 1968 and 1975 in the proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution, the Senate Debates, the House of Commons Debates, the Senate Committee on Legal and Constitutional Affairs, and the House of Commons Standing Committees on Justice and Legal Affairs and Indian Affairs and Northern Development.

Through research in my archival database about 20th century federal Indian policy, I was able to consider documents written by the Department of Indian and Northern Affairs, Department of Justice, External Affairs (including embassy correspondence), Cabinet, and the Cabinet Committee on Social Policy. I analyzed all the currently accessible Minutes of Cabinet between 1965 and 1978 and made access to information requests for records from Cabinet Committees. These records are necessarily incomplete, as archival practices, classification rules, and ongoing withholding of records obstruct a complete view of internal government deliberations.

II. CONTEXT

This section is an intellectual and political history of how sex discrimination in the *Indian Act* became a problem. It wasn't a problem, and then it was. That evolution occurred in the period between 1955 and 1972, when racial discrimination *was* already a topic of concern. The change needs to be noticed for the impact of the *Lavell* case on Canadian law to be perceptible.

A. *Silence on Sex Discrimination in the* Indian Act

Until Jeannette Lavell brought her case to the Ontario courts, lawmakers and legal scholars knew little about sex discrimination in the *Indian Act*. This can be shown by looking at discussion in government, Parliament, and law reviews in the period between 1968 and 1975.

Within government, sex discrimination in the *Indian Act* was not recognized as an issue. It was certainly not a Cabinet-level issue. The only Cabinet discussion of any women's concerns took place due to the report of the Royal Commission on the Status of Women (RCSW) and the work of a resulting interdepartmental committee on the status of women.[34] Issues relating to Indigenous people appeared in Cabinet discussions exceptionally, for example, as part of the annual budget exercise or in response to punctual crises.[35] Even when the government proposed to abolish the *Indian Act* in 1969 or when the Supreme Court's ruling in *Drybones* implied that the entire *Indian Act* could be constitutionally unsound, tariffs on shirts occupied more attention in Cabinet than Indigenous issues. By the 1980s, in contrast, when pressure had mounted for ending sex discrimination against Indigenous women, both the Trudeau and Mulroney Cabinets regularly discussed the *Indian Act*.[36]

At the ministerial level, Indian women's loss of status through marriage was not a concern and not legible as a problem of sex

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34 Canada, Cabinet, *Minutes* (Privy Council Office, 10 February 1972) at 29 (Status of Women in Canada); Canada, Interdepartmental Committee on the Status of Women, *Minutes*, Meeting of 1st Interdepartmental Committee on the Status of Women (16 March 1971), Ottawa, Library and Archives of Canada (MG26 O11 vol 56).

35 Canada, Cabinet, *Minutes* (Privy Council Office, 23 December 1971) at 8, 19 (Main Estimates, 1972–73; Indian School Crisis in Alberta).

36 Painter, *supra* note 14 at 265–91.

discrimination. For example, in 1967, the Department of External Affairs was asked to assess whether the *Indian Act* might breach any of Canada's new obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.[37] These treaties prohibit sex discrimination. Legal advisers concluded that the *Indian Act* potentially breached the treaties, because it discriminated against men. They found that the rules on enfranchisement, adoption, and changing bands gave advantages to Indian women that Indian men lacked, because Indian women could shed Indian status more easily than men could.[38] The rules about the transmission of status along the patrilineal line, in contrast, were compliant because they aligned with the *Universal Declaration of Human Rights'* definition of the family.[39] In the late 1960s, no one in the Department of Indian Affairs and Northern Development categorized marriage under the *Indian Act* as a site of sex discrimination. Even after the Federal Court of Appeal ruling in Lavell's favour in 1971 and the RCSW's recommendation to amend the marrying-out rule, the Department briefed the inter-departmental Cabinet committee on the status of women with the non-committal statement that "the implications [of the decision] have not yet been determined."[40] In the Department of Justice's response to the RCSW recommendations, there was no mention of the *Indian Act* as a site of sex discrimination.[41] The 1972 report about the government's response to the RCSW recommendations included no mention of the *Indian Act* and sex discrimination.[42]

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37 G.S. Shortliffe, External Affairs, "Memorandum: Covenants on Human Rights - Discussion with Indian Affairs Branch" (2 June 1967), Ottawa, Library and Archives of Canada (RG25, vol 14958, File No. 45-CDA-13-3-1, Pt. 1).

38 Letter from G.H. Duguay, Legal Division, External Affairs to C.V. Cole, UN Division, External Affairs (6 December 1967), Ottawa, Library and Archives of Canada (RG25, vol 14958, File No. 45-CDA-13-3-1, Pt. 1) at 1–2.

39 *Ibid* at 3.

40 Department of Indian Affairs and Northern Development, Report to Interdepartmental Committee on the Status of Women (23 December 1971), Ottawa, Library and Archives of Canada (MG26 O11 vol 56) at 11.

41 Department of Justice, Report of the RCSW in Canada, Department of Justice Position Paper, (1 March 1971), Ottawa, Library and Archives of Canada (MG26 O11 vol 56).

42 Report of the Coordinator, Status of Women (Freda L. Paltiel), *Status of Women in Canada – 1972*, Ottawa, Library and Archives of Canada (MG26 O11 vol 56).

In *Parliament*, there was also little attention to the *Indian Act* and sex discrimination. There was not one mention of Indigenous women and the *Indian Act* between 1968 and 1971, save for a bill proposed in 1969 that would have allowed status Indian women to keep their status upon marriage.[43] The RCSW report recommended ending sex discrimination in the *Indian Act*.[44] But during over six hours of debate about the report, no parliamentarian mentioned this recommendation.[45]

The next mention in Parliament of women and the *Indian Act* arose in 1971, in a question about the enfranchisement of Indian women.[46] A few months later, the *Lavell* case, which was being heard at the lower court level, was specifically mentioned by a parliamentarian from Ontario.[47] Once Lavell's case was decided by the Federal Court of Appeal, parliamentary attention to the issue increased.[48] But by the time her case was heard at the Supreme Court, the issue had become so important that witnesses at the Standing Committee on Indian Affairs and Northern Development were quizzed about their views on women and the *Indian Act*.[49]

As for *legal scholars*, the Canadian legal periodicals available through HeinOnline record minimal attention to Indigenous issues between 1955 and 1968. There were only 18 articles total that mentioned the *Indian Act*. This compared to over 100 citing the *Canadian Bill of Rights* and nearly 400 mentioning "human rights". A third of the articles written about the *Indian Act* during this time span were written by the same two authors. Only one article offered an in-depth study of the legal position of status

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43 *House of Commons Debates*, 28-1, vol 8 (15 May 1969) at 8722 (Raymond Rock).

44 Canada, Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) at 410.

45 *House of Commons Debates*, 28-3, vol 4 (9 March 1971) at 4087–4120.

46 *House of Commons Debates*, 28-3, vol 3 (25 January 1971) at 2703 (Frank Howard).

47 *House of Commons Debates*, 28-3, vol 5 (20 April 1971) at 5079 (Wally B Nesbitt).

48 *House of Commons Debates*, 28-3, vol 9 (5 November 1971) at 9369 (Grace MacInnis).

49 House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, 29-1, vol 1, No 2 (22 February 1973) at 2:12–2:24 (Harold Cardinal).

Indians.[50] The solitary article about the impact of the *Indian Act* on Indigenous peoples was written by an Indigenous law student from Six Nations of Grand River.[51] Of the 18 articles that referenced the *Indian Act*, one third did so because they referenced *Drybones* as prelude to discussion of the jurisdictional impact of the *Canadian Bill of Rights* on parliamentary sovereignty.

It was not until the challenge to Lavell's victory at the Federal Court of Appeal that legal scholars began writing about the *Indian Act* as a site of discrimination. Even then, interest was limited: one article was by a law student, and the other was by the lawyer representing the National Indian Brotherhood (NIB) in *Lavell*.[52] But after the Supreme Court issued its decision in *Lavell*, suddenly everyone had something to say. Elmer Driedger, a former minister of justice, John G. Diefenbaker, former prime minister and architect of the *Canadian Bill of Rights*, and Peter W. Hogg, a leading constitutional lawyer, took to the pages of the *Canadian Bar Review* and *Chitty's Law Journal* to expound on the discrimination problems raised by the *Indian Act*.[53]

The sex discrimination in the *Indian Act* was not new; policymakers, parliamentarians, and the legal profession discovered it through the Supreme Court's decision in the *Lavell* case.

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50 See Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45:3 Can Bar Rev 513.

51 See Howard E Staats, "Some Aspects of the Legal Status of Canadian Indians" (1964) 3:1 Osgoode Hall LJ 36. When he graduated, Staats was only the second Indigenous person in the country to gain a law degree (see Law Society of Ontario, "An Interview with Howard E. Staats, Q.C." (8 July 2016), online (video): <youtube.com> [perma.cc/9A25-5AQU]).

52 See Patricia J Myhal, "Canada's Unjustified Ratification of the Race Convention" (1972) 30 UT Fac L Rev 31; D E Sanders, "The Bill of Rights and Indian Status" (1972) 7:1 UBC L Rev 81 [Sanders, "Bill of Rights"].

53 See E A Driedger, "The Canadian Bill of Rights and the *Lavell* Case: A Possible Solution" (1973–1974) 6:2 Ottawa L Rev 620; Peter W Hogg, "The Canadian Bill of Rights – 'Equality Before the Law' – A.-G. Can. v. Lavell" (1974) 52:2 Can Bar Rev 263; The Right Honourable John G Diefenbaker, "Diefenbaker on the Bill of Rights" (1974) 22:2 Chitty's LJ 68 [Diefenbaker, "Bill of Rights"].

B. *Noise on Discrimination*

The scant interest in the discrimination experienced by Indigenous women needs to be explained because discrimination, especially racial discrimination, *was* a topic of concern in the 1960s. This had not always been the case. Mainstream Canadian society had not always clamored for fundamental rights, and even less so had it been aware of Indigenous people and their demands for rights. This section describes the discursive environment on discrimination in which Lavell's case grabbed national attention.

The demand for human rights protections for Canadians came from two sources: a domestic context that had witnessed federal and provincial governments violating civil liberties during the Great Depression and World War II, and a post-war global context that saw Canada leading efforts to establish international human rights treaties.[54] Civil liberties groups wanted human rights for individuals, whereas opponents decried any limits on the supreme will of Parliament.[55] The reigning Liberals, who believed their ambitious social and economic reforms required an unbridled Parliament, rallied around parliamentary supremacy.[56] The provinces were even less enthusiastic about a federal bill of rights, as it smelled of federal encroachment on provincial jurisdiction.[57] Conservatives clamored for human rights as a means of protecting the individual from state overreach. In the stalemate, provinces began passing their own anti-discrimination legislation.

Despite popular demands for rights guarantees, Liberal governments stonewalled for a decade. It was only a Conservative victory in 1957 that caused a shift in federal policy.[58] Within a year of his election, John Diefenbaker's government tabled a federal bill of rights.[59] Once in force, the *Canadian Bill of Rights* was interpreted by judges, who found

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54 Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill-Queen's University Press, 2003) at 3–4.

55 *Ibid* at 83.

56 *Ibid* at 56–57.

57 Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008) at 21 [Clément, *Canada's Rights Revolution*].

58 MacLennan, *supra* note 54 at 108.

59 *Ibid* at 122–24.

myriad reasons to hold that a mere statute could not invalidate laws passed by Parliament.[60] Provincial human rights statutes fared no better, in part because judges balked at treating discrimination as a criminal offense.[61] For example, seventy percent of complaints under British Columbia's anti-discrimination statutes were dismissed.[62]

As evidence amassed that the *Canadian Bill of Rights* was a dead letter, the need for a constitutional amendment to protect fundamental rights became widely accepted among politicians, policymakers, and intellectuals.[63] In 1967, the then Justice Minister, Pierre Trudeau, announced his plans for a charter of rights and freedoms that would cure the frailties of the *Canadian Bill of Rights*.[64]

Though discrimination based on race and religion was increasingly outlawed in provincial statutes, sex discrimination remained commonplace and condoned. Women in the workforce continued to experience pay gaps, male-only hiring rules, and loss of employment due to marriage or pregnancy. Organized labour and human rights organizations were mostly oblivious to gender equality issues.[65] Several women's organizations campaigned against the exclusion of sex discrimination from the federal *Fair Employment Practices Act*.[66] Key to this campaign were groups like the Canadian Federation of University Women and the Canadian Federation of Business and Professional Women's Clubs, headed by Margaret Hyndman.[67] The actors in the women's movement showed little concern for the situation of minority women, however.[68]

This burgeoning women's movement demanded that the federal government investigate the status of women. After some resistance, the

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60 *Ibid* at 158.

61 Clément, *Canada's Rights Revolution*, *supra* note 57 at 25.

62 *Ibid* at 26.

63 MacLennan, *supra* note 54 at 159.

64 *Ibid*.

65 Dominique Clément, *Equality Deferred: Sex Discrimination and British Columbia's Human Rights State, 1953-84* (Vancouver: UBC Press, 2014) at 69 [Clément, *Equality Deferred*].

66 *Canada Fair Employment Practices Act*, SC 1953, c 19

67 Leslie Alexander Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada* (Montreal: McGill-Queen's University Press, 1993) at 246.

68 Clément, *Equality Deferred*, *supra* note 65 at 71.

prime minister, Lester Pearson, acquiesced to the establishment of a Royal Commission on the Status of Women in 1967.[69] The RCSW held six months of public hearings across Canada and received thousands of letters and briefs. Although the RCSW was not an advocacy priority for the Indigenous women's movement, individual Indigenous women came to give testimony.[70] Women from Caughnawaga, led by Mary Two Axe Earley, presented a brief to the Commission focusing on legal discrimination in marriage, voting rights, education, and property rights.[71] Though not lengthy, Indigenous testimony made quite an impression on commissioners.[72] The RCSW's report, issued in September 1970, offered a sweeping agenda for reform.[73] Included in it was a recommendation to end sex discrimination in the *Indian Act*.

C. Explaining Indigenous Poverty, and Difference

In 1963, the government commissioned a comprehensive study of the situation of Indians. The two-volume Hawthorn Report, completed without Indigenous input, landed on government desks in 1967 with two sobering messages.[74] First, the welfare of Indigenous people was a national scandal. Second, Indigenous people should have certain special rights on top of the normal rights and duties of citizenship. Spurred by the

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69 Jill Vickers, Pauline Rankin & Christine Appelle, *Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* (Toronto: University of Toronto Press, 1993) at 20, 26, 53.

70 Sarah Nickel, "'We Now Must Take Action": Indigenous Women, Activism, and the Aftermath of the Royal Commission on the Status of Women" (2022) 89 Lab / Le Travail 156 at 157–59.

71 Letter from Mary Two Axe Earley to Florence Bird, Royal Commission on the Status of Women (20 March 1968), Ottawa, Library and Archives of Canada (MG32 C25 vol 6).

72 Cerise Morris, *No More than Simple Justice: The Royal Commission on the Status of Women and Social Change in Canada* (Doctor of Philosophy (Sociology), McGill University, 1982) [unpublished] at 222.

73 Royal Commission on the Status of Women in Canada, *supra* note 44.

74 H B Hawthorn, ed, *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies, Parts I and II* (Ottawa: Indian Affairs Branch, 1967) at 5–6.

Hawthorn Report, civil servants amassed evidence[75] and wrote briefings about conditions of deplorable poverty, a life expectancy that was half the national average, and scandalously bad housing.[76] Frustration boiled within and beyond government.

In 1967, Prime Minister Lester Pearson, Minister of Indian Affairs and Northern Development Arthur Laing, and Minister of Justice Pierre Trudeau recommended a wholesale reform of the *Indian Act*, "which will enable the Indian people to achieve full equality of opportunity with all other Canadians."[77] The impetus for reform was that, in the government's eyes, Indian status was classified as a disadvantage or burden. The *Indian Act* was acknowledged to contain discriminatory provisions that merited repeal—namely, the rules on liquor and the sale of produce by Prairie Indians—but the rules on status and membership were not labeled as discriminatory.[78] Instead, patrilineal transmission of status was reinforced.

The solutions aired by the Pearson government for overhauling the *Indian Act* were re-animated when Trudeau became prime minister in 1968. But they did not last long. A bureaucrat in the Privy Council Office (PCO) responsible for advising on the 'war on poverty' dismantled an initial proposal submitted by Indian Affairs, because it failed to take "the bold new directions which the Trudeau government was seeking."[79]

A new direction emerged, rooted in championing individual rights to equality and opposing the Hawthorn Report's recommendation of special, additional rights for Indians. In a letter to Trudeau, Minister for Indian Affairs and Northern Development Jean Chrétien wrote that, "equality cannot exist when certain services are provided specially to one

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75 Sally M Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981) at 26 [Weaver, *Policy*].

76 Dale A Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 16.

77 Arthur Laing, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet - The *Indian Act*: Proposed Revision Thereof" (24 November 1967), Ottawa, Library and Archives Canada, (RG 25, file 45-CDA -13-3-1, pt 1) at 1.

78 Arthur Laing, Minister of Indian Affairs and Northern Development, "Memorandum to Cabinet - The *Indian Act*: Proposed Revision Thereof" (29 May 1967), Ottawa, Library and Archives Canada, (RG 25, file 45-CDA -13-3-1) at 14.

79 Weaver, *Policy*, *supra* note 75 at 87.

group of people, or to a single group."[80] In 1969, Chrétien announced in Parliament the "Statement of the Government of Canada on Indian Policy," a bold agenda intended to lead to "full, free and non-discriminatory participation of the Indian people in Canadian society."[81] The statement, dubbed the White Paper, proposed the transfer of responsibility for Indians from the federal government to the provinces, the abolition of the Department of Indian Affairs, the elimination of the legal status of 'Indian', and the reclassification of reserves as private property. Its basic message was that Indians had been barred from entry into majority society by laws defining and maintaining their difference. Repealing the *Indian Act* would end the basis for this discrimination.

A national outcry about the White Paper ensued.[82] Harold Cardinal, leader of the Indian Association of Alberta, described the proposed policy as "a thinly disguised programme of extermination through assimilation," and a repetition of the federal government's view that "the only good Indian is a non-Indian."[83] When confronted with unified Indigenous rejection of the government's proposal, Trudeau admitted, "[w]e had perhaps the prejudices of small 'l' liberals and white men at that who thought that equality meant the same law for everybody, and that's why as a result of this we said, 'well let's abolish the *Indian Act* and make Indians citizens of Canada like everyone else'."[84]

It is canon that the White Paper was a debacle in federal-Indigenous relations.[85] Less noted, however, is what the White Paper did *for* the Canadian government. The transition in federal thinking from tinkering

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80 *Ibid* at 101–03.

81 Department of Indian Affairs and Northern Development, Statement of Government of Canada on Indian Policy by Hon Jean Chrétien (Minister of Indian Affairs and Northern Development), Sessional Paper, 28-1, No R32-2469 (June 1969) at 5 [1969 White Paper].

82 Laurie Meijer Drees, *The Indian Association of Alberta: A History of Political Action* (Vancouver: UBC Press, 2002) at 168.

83 Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969) at 1 [*Unjust Society*].

84 Weaver, *Policy*, *supra* note 75 at 185.

85 The scholarship likely over-states the impact of the White Paper on Indigenous political life. Sarah Nickel, "Reconsidering 1969: The *White Paper* and the Making of the Modern Indigenous Rights Movement" (2019) 100:2 Can Historical Rev 223 at 224–27.

with Indian policy to address poverty to abolishing the entire legal regime is, of many things, a crystallization of debates within Canadian legal thought about discrimination and equality. Part 4 of the paper will examine these debates. Before doing so, let me introduce the three Indigenous people at the heart of these legal controversies.

D. Drybones, Lavell, and Bedard

As the preceding paragraphs section have described, by the late 1960s, there was increased repudiation of discrimination, but weak commitment to gender equality. There was a growing consensus about the need for constitutionally entrenched fundamental rights, but enduring commitments to parliamentary supremacy. There was increased federal concern over Indigenous poverty, and a conviction that abolishing Indian status was the remedy. The lives of three Indigenous people became a battleground for these countervailing forces. Their lives were derailed by the *Indian Act*. Their efforts to get redress challenged the legality of the *Indian Act* and transformed the discursive landscape about equality and parliamentary supremacy. In this section, I tell you something about these people and how they came to be in court.

On an early April evening in 1967, Joseph Drybones, a Tlicho man, went to the Old Stope Hotel in Yellowknife, in the Northwest Territories. He had a few drinks, enough to get drunk, but not enough to cause a disturbance. Nonetheless, he was arrested and charged. He was a status Indian, and he had violated the *Indian Act*'s rules on intoxication. Hauled before the magistrate, he pleaded guilty and was sentenced to a $10 fine or three days in prison if he could not pay the fine. He appealed the conviction, and a judge of the Territorial Court annulled his guilty plea, due in no small part to the fact that Drybones did not speak English. The appeal proceeded, instead, as a trial *de novo*, and the Territorial Court acquitted him. So did the Court of Appeal.[86] The Crown challenged the decision at the Supreme Court.

Several years later, on a reserve about 100 kilometers east of Toronto, a woman found herself homeless after a divorce, with two young children in her care. Yvonne Bedard, an Onondaga woman, had lost her status when she married a non-Indian. The relationship ended, and Bedard

86 *Regina v Drybones*, [1967] 64 DLR (2d) 260, 1967 CanLII 1255 (NWT CA).

tried to go home to a house on the Six Nations reserve left to her by her late mother. The band council told her she could not live on the reserve because she was not a status Indian. She transferred the property to her brother, but the council insisted this was impossible because she should not have inherited reserve land. Fearing an eviction, she sued the band council.[87] She won her case at the lower court, and the band council appealed.[88]

Jeannette Corbiere, a Wiikwemkoong Anishinaabe from Manitoulin Island, had made a life for herself as a young woman in the vibrant scene of 1960s Toronto. She helped to found the Canadian Indian Youth Council, along with Harold Cardinal.[89] As the Youth Coordinator at the Indian Friendship Centre, she organized for a freshly minted lawyer, Clayton Ruby, to give workshops about legal rights to young Indigenous people. She established the Toronto Native Times, a community-based monthly newspaper that circulated between 1968 and 1981.[90] Through the newspaper, Corbiere met her husband David Mills Lavell, a journalism student.[91] David Mills Lavell had been adopted as a child and had no knowledge of his genetic parents, but he did not claim Indigenous ancestry or Indian status.[92] Corbiere and Mills Lavell married in April 1970. She knew that the government would try to take away her Indian status and band membership, and she knew that the baby they were expecting

87 Cheryl Suzack, "Law Stories as Life Stories: Jeannette Lavell, Yvonne Bédard, and *Halfbreed*" in Marlene Kadar et al, eds, *Tracing the Autobiographical* (Waterloo: Wilfrid Laurier University Press, 2005) 117 at 119.

88 *Bedard v Isaac et al*, [1971] 2 OR 391, 1971 CanLII 601 (ON HCJ) [*Bedard v Isaac et al*].

89 *Sawridge Band v Canada*, 2008 FC 322, Docket No. T-66-86, (Willsay of Jeannette Corbiere Lavell, on behalf of Native Women's Association of Canada, 2006) at para 10 [*Sawridge*, Corbiere Lavell Willsay, 2006].

90 Heather A Howard, "Women's Class Strategies as Activism in Native Community Building in Toronto, 1950–1975" in Susan Applegate Krouse & Heather A Howard, eds, *Keeping the Campfires Going: Native Women's Activism in Urban Communities* (Lincoln: University of Nebraska Press, 2009) 105 at 123.

91 *Sawridge*, Corbiere Lavell Willsay, 2006, *supra* note 89 at para 4.

92 *Jeannette Vivian Corbiere Lavell v Registrar of the Indian Act*, Supreme Court of Ontario, (29 October 1970), Ottawa, Library and Archives Canada (MG 31 E98, vol 2) at 2. [*Lavell*, Supreme Court of Ontario, 1970].

would also be denied status.[93] So, through her lawyer Clayton Ruby, she filed an injunction barring the government from removing her name from the status list and band list.[94] The court said she had to wait to lose her status before lodging a protest.[95] In December 1970, she was stripped of her status and band membership. She sued the government and lost.[96] She appealed to the Federal Court of Appeal and won.[97] The government appealed the decision to the Supreme Court. Jeannette Corbiere Lavell had never met Yvonne Bedard, but their battles were linked by the courts. Between the two women, and Joseph Drybones, their cases propelled discrimination against Indigenous people onto the national stage.

III. UNDERSTANDING EQUALITY

The *Indian Act* revealed deep-seated confusion about the meanings of equality in Canadian law. Trudeau, lawyer, constitutional law professor, and advocate for an entrenched charter of rights, was genuinely astonished that Indigenous people had spurned the offer of equality based on sameness in the 1969 White Paper. At the Supreme Court, the *Indian Act* was at the center of three of the five cases about the meaning of "equality before the law" in section 1(b) of the *Canadian Bill of Rights*.[98] This section traces the impact of the *Indian Act* on the meaning of equality in Canadian law by looking at the Royal Commission on the Status of Women, the White Paper, and two Supreme Court cases, *Drybones* and *Lavell.* Canadian legal actors learned about a justiciable meaning of discrimination through engagement with the *Indian Act*.

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93 *Jeannette Vivian Corbiere Lavell v Registrar of the Indian Act*, Supreme Court of Ontario (Affidavit, 18 September 1970), Ottawa, Library and Archives Canada (MG 31 E98, vol 2) at paras 2–3, 10.

94 *Lavell v Registrar of the Indian Act* (18 September 1970), Toronto, ONSC (Notice of motion), Ottawa, Library and Archives Canada (MG31 E98, vol 2).

95 *Lavell*, Supreme Court of Ontario, 1970, *supra* note 92 at 4.

96 *Re Lavell and Attorney-General of Canada* (1971), [1972] 1 OR 390, 1971 CanLII 526 (ON Co Ct) [*Lavell* 1971 ON Co Ct].

97 *Lavell v Attorney General of Canada*, [1971] FC 347 at 353, 1971 CanLII 1984 (FCA) [*Lavell* 1971 FCA].

98 WS Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975) 53:4 Can Bar Rev 649 at 664–65 [Tarnopolsky, "Supreme Court"].

A. *Royal Commission on the Status of Women: The Limits of Formal Equality*

The report of the Royal Commission on the Status of Women provides a snapshot of the discourse about equality in the late 1960s. Having heard from everyone from business leaders to housewives, the Commission released a report advancing a Herculean reform agenda. It ranged from tax reform to the establishment of a national day care plan and the decriminalization of abortion. Although the report lacked an explicit theoretical framework for understanding gender equality, it described women as sharing common experiences of disadvantage, and it recommended reforming laws, policies, and procedures to guarantee formal equality. In contrast, the report gave little attention to issues like ending violence against women, addressing women's poverty, and protecting the rights of lesbians—issues championed by socialist and radical feminists.[99]

Indigenous women's rights made a small but conceptually revealing appearance in the report. The report described the marrying-out rule as a "special kind of discrimination under the terms of the *Indian Act* which can affect Indian women upon marriage."[100] The report stressed the material and political effects of loss of Indian status: losses of voting rights in band elections, interest in land on the reserve, capital and revenue shares, and annuities. The report concluded that the marrying-out rule was discriminatory, and it recommended that women who married should retain their status and be able to transmit status to their children.[101] For the RCSW, the marrying-out rule constituted a clear case of formal *de jure* inequality. This was a notable departure from the Hawthorn Report and the 1969 White Paper, in which Indian status was seen as a legal and material blight on Indians' lives, not a benefit.

This commitment to formal equality was not uniform among the commissioners. With regard to the report's conclusions on 'Indians and Eskimos,' Commissioner Jacques Henripin doubted the Commission was "qualified to deal with the complex problems which arise when

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99 Vickers, Rankin & Appelle, *supra* note 69 at 26.

100 Royal Commission on the Status of Women in Canada, *supra* note 44 at 237 [emphasis added].

101 *Ibid* at 237–38, 410.

attempting to introduce social and economic changes in cultures which are so very different from ours."[102] 'Difference' appears through the rubric of 'culture', rather than nation, race, ethnicity, language, or class. He did not question the Commission's competence regarding immigrant women. He said that "most of the recommendations concerning Indians and Eskimos have little to do with women in particular."[103] Thus, Henripin identified the difficulty of theorizing inequality experienced on multiple grounds and imagined some cultural 'wall' beyond the purview of an equality analysis.

Commissioner John Humphrey dissented. In his view, the framing of women as a "sociological minority group" and the recommendation that women receive special or compensatory treatment constituted clear inequality of treatment as between women and men. Humphrey argued that preferential treatment was appropriate for racial groups but in the case of women, he claimed, it "could perpetuate [their] ... present inferior status."[104]

The divergence of opinion between the report and the dissenting voices points to a fundamental tension in the understanding of equality circulating at this time. Although the report largely followed a model of formal equality, in which like are treated alike, it also acknowledged that sometimes 'special treatment' in light of 'difference' was needed to overcome the effects of discrimination. Disagreements about the merits of special treatment rest on disagreement about the causes of inequality (rooting out individual bad actors or upending systemic disadvantage). Concealed within this debate are questions about the unit of oppression (individual or group) and the metric of success (equal opportunity or equal outcome); excluded is an attention to intersectionality. Thus, it was by considering the experiences of Indigenous women and the discrimination caused by the *Indian Act* that the RCSW had to grapple with the causes of discrimination, affirmative action, and the limitations of a formal equality model.

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102 *Ibid* at 425.

103 *Ibid* at 426.

104 *Ibid* at 435.

B. The White Paper: The Problem with Special Rights

Like the RCSW, the White Paper instantiates the tensions circulating in understandings of equality and non-discrimination.[105] In its foreword, the White Paper rhetorically and typographically asserted the essence of 'Indian' identity as difference: "To be an Indian is also to be *different*. It is to speak *different* languages, draw *different* pictures, tell *different* tales and to rely on a set of values developed in a *different* world."[106] It went on to explain that this difference caused Indians' misery; hence, ending the difference would end the misery. Erasing difference became synonymous with freedom and equality with other Canadians. Trudeau advocated for the end to the special status of 'Indians,' comparing Indian status to "bricks of discrimination around the ghetto in which they live."[107] In short, the White Paper rested on the most arid version of 'same as' formal equality.

In his repudiation of the White Paper, Indian Association of Alberta leader, Harold Cardinal, argued that Trudeau's views indicated a deep misunderstanding of equality and of the Treaties. No one would deny that Indians were victims of discrimination, but the White Paper wrongly diagnosed this discrimination as coming from difference, and this difference as stemming from the *Indian Act*.[108] The Red Paper, one of the key Indigenous responses to the White Paper, insisted that "the special history, rights and circumstances of Indian People be recognized,"[109] thus invoking a recognition of difference as a condition of equality and rejecting sameness as the standard. To the claim that ending "Indian status" would end discrimination, Cardinal suggests "one needs only examine the position of the nonregistered Indians or Métis to find that their

105 Weaver, *Policy*, *supra* note 75 at xii.

106 1969 White Paper, *supra* note 81 at 2 [emphasis added].

107 J Rick Ponting & Roger Gibbins with a contribution by Andrew J Siggner, *Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada* (Toronto: Butterworths, 1980) at 27–28.

108 Cardinal, *Unjust Society*, *supra* note 83 at 133–36.

109 Indian Chiefs of Alberta, "Citizens Plus" (1970), reprinted in (2011) 1:2 Aboriginal Pol'y Studies 188 at 192.

precious supposed constitutional and legal equality has failed, almost criminally, to mean equality."[110]

The White Paper defined Indians as members of an ethnic minority, because the national and international environment had attuned the government to racial discrimination and the need to end it.[111] But once defined as an ethnic minority, 'Indians' ceased being a political category, and Indian status became a burden to be overcome through assimilation. The Red Paper confirmed that the *Indian Act* was a source of disadvantage, but insisted that treaties were the basis for special status. The White Paper, however, ignored the political subjectivity of Indian nations and the Crown's treaty obligations with those nations, staging a choice between being "a race apart ... or ... Canadians of full status."[112] In the government's model, equality was an attribute of the individual, realized through equal treatment before the law, rather than something to be analyzed systemically or experienced collectively. In the Indigenous model, the collective was entitled to equality.

C. Drybones*: Sameness as Equally Bad*

The Supreme Court weighed in on the meaning of equality in two landmark cases about the *Indian Act*. The first, *Drybones*, tested the idea that equality was defined as sameness. According to *Gonzales*, the leading case prior to the Supreme Court's consideration of the question, equality before the law simply meant that a law had to be applied to all persons "to whom it relates or extends."[113] This meant that the 'equality before the law' guaranteed under the *Canadian Bill of Rights* was satisfied if all Indians to whom the *Indian Act* applied were treated equally.

The Supreme Court in *Drybones* overruled this understanding of equality before the law. Ritchie J., for the majority, rejected the accepted definition because it meant even the most glaring racial distinction in law could be justified.[114] Equality before the law was not fulfilled simply because "all the other members are being discriminated against in the same

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110 Cardinal, *Unjust Society*, supra note 83 at 115.

111 Turner, *supra* note 76 at 22.

112 Ponting & Gibbins, *supra* note 107 at 27–28.

113 *R v Gonzales* (1962), 32 DLR (2d) 290 at 296, 1962 CanLII 348 (BCCA).

114 *R v Drybones*, 1969 CanLII 1 at 297 (SCC) [*Drybones*].

way."[115] Instead, the majority held, no group, distinguished by law, could be treated more harshly than any other group under the law. The wrong done to Drybones was that, according to the *Indian Act*, status Indians could not get drunk anywhere in the Northwest Territories, whereas non-Indians were free to get drunk at home.[116]

Although the *Drybones* decision condemned the provision of the *Indian Act* as racial discrimination, the majority and concurring opinions diverged in their understanding of equality before the law. According to Ritchie J., equality before the law would be violated if someone is punished on account of his race for something that others can do without penalty. In Drybones' case, as a status Indian, he faced a much harsher penalty for getting drunk than any non-Indian. But for Hall J., in concurrence, equality before the law was not limited to punishment, but to "whatever way that discrimination may manifest itself ... as between all Canadians."[117] This could cover even laws which accord a benefit in a differential way based on race. If Indian status was understood as a benefit, the dissenting judge, Pigeon J., and some commentators worried, the entire *Indian Act* could be labelled as discriminatory.[118]

The contours of the confusion can be stated more sharply by drawing the threads together.[119] The White Paper presumed Indian status was a legal burden or stigma to be shed, and the majority and concurrence in *Drybones* condemned Indian status as the basis for such disadvantageous treatment. But for the RCSW, and for the dissent in *Drybones*, it was possible that Indian status was a benefit which could be wanted and, thus, unfairly denied.

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115 *Ibid* at 297.

116 In the Northwest Territories, under the *Liquor Ordinance*, it was an offence for anyone to be intoxicated in a public place, but a status Indian could not be intoxicated anywhere, public or otherwise. The penalty applied to a status Indian under the *Indian Act* was more severe than the *Liquor Ordinance* (see *Drybones*, *supra* note 114 at 289).

117 *Drybones*, *supra* note 114 at 300.

118 *Ibid* at 304, Pigeon J, dissenting; Henri Brun, "La décision dans Lavell ou les bonds de la Cour suprême" (1973) 14:3 C de D 541 at 551; Paul Cavalluzzo, "Judicial Review and the Bill of Rights: Drybones and Its Aftermath" (1971) 9:3 Osgoode Hall LJ 511 at 543.

119 I owe the nuance and clarity of this point to an astute peer reviewer. I will not expand on it in great depth here as it is their idea, and I cannot cite them.

D. Lavell*: Equal to Whom, and Why Not?*

These contradictory characterizations of Indian status and their place in understandings of equality roiled judicial minds when the government appealed Lavell's victory at the Federal Court of Appeal. Her claim that the *Indian Act*'s marriage rules violated her equality rights was initially rejected by the York Judicial District County Court.[120] Unconvinced by her "emotional and militant evidence,"[121] Judge Grossberg concluded that her marriage "imposed on her the same obligations [that it] imposed on all other Canadian married females."[122] The relevant comparator was "all other Canadian married females" and, relative to them, Corbiere Lavell was treated the same, so she was equal.[123] Lavell recalled that the judge commented "about how I should be happy to no longer legally be an Indian and glad that marriage to David took me away from the terrible reserves."[124]

The Federal Court of Appeal (FCA) overturned this judgment, finding that the *Indian Act*'s status and marriage rules constituted "discrimination by reason of sex."[125] The lower and appellate courts diverged on their understanding of the appropriate comparator group. The FCA pointed to the different results of marriage for Indian women compared to Indian men and found a denial of equality before the law, as the statute infringed "the right of an individual Indian woman to equality with other Indians before the law."[126] Shortly after the FCA's decision in Lavell's favour, the Ontario High Court was tasked with ruling on Yvonne Bedard's possible eviction from her mother's home at Six Nations. It decided that the *Indian Act* provisions "[discriminate] by reason of sex with respect to the rights of an individual to the enjoyment of property."[127]

The government appealed the FCA's ruling to the Supreme Court. The victories of Lavell and Bedard seemed in line with the Court's ruling

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120 *Lavell* 1971 ON Co Ct, *supra* note 96.

121 *Ibid*.

122 *Ibid*.

123 *Ibid*.

124 For more on this speech by Jeannette Lavell, see Suzack, *supra* note 87 at 137.

125 *Lavell* 1971 FCA, *supra* note 97 at 350.

126 *Lavell* 1971 FCA, *supra* note 97 at 352.

127 *Bedard v Isaac et al*, *supra* note 88.

in *Drybones* and the apparent emerging consensus that differential treatment based on sex or race violated the *Canadian Bill of Rights*. By analysing the pleadings in *Lavell*, it is possible to infer that litigators believed that the debates about the meaning of equality had boiled down to the choice of the comparator group and the possible justifications for a distinction in law. When analysing the pleadings of the parties and interveners, it is important to remember that they were written before the parties knew the case outcome and with the hope of winning the case. I am analyzing the factums not for the truth of their contents but rather as evidence of their utterance: they indicate what lawyers at the time understood to be effective and plausible arguments in law.

Lavell and her supporters focused on the legal question of "which comparator group?" Lavell compared herself to Indian men and non-Indian women.[128] She argued that, compared to Indian men, she lost her status upon marriage and they did not, which constituted sex discrimination and, compared to non-Indian women, she lost her status upon marriage, while they lost nothing, which constituted race discrimination. For the intervener coalition led by Indian Rights for Indian Women, the relevant comparator was Indian men who married non-Indian women, and the violation was the denial of equal protection of the law compared to Indian men.[129] For the Native Council of Canada, the relevant comparison was "within the group covered by the Act," meaning between Indian men and Indian women.[130] The Anishnawbekwek of Ontario said the *Indian Act* created classifications between families based on sex, such that "Indian families are only those which have Indian husbands."[131] From the perspective of Lavell's supporters, the legally relevant comparison was to other Indians.

The Indian Association of Alberta, and other co-signers, spent little effort defining a relevant comparator group. If one was mentioned at all,

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128 *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC) (Factum, Jeannette Corbiere Lavell at paras 4-6) [*Lavell,* Lavell Factum].

129 *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC) (Factum, Alberta Committee on Indian Rights for Indian Women et al at para 1).

130 *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC) (Factum, Native Council of Canada at para 27).

131 *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC) (Factum, Anishnawbekwek of Ontario Inc at para 19).

the comparison was drawn to non-Indians, as any woman who loses Indian status through marriage "becomes equal, in law, to the general Canadian population."[132] This was not the crux of their argument. Instead, the claim was that the *Indian Act* should be interpreted as positive discrimination to protect a group with special status. Although the act drew a distinction based on sex in marriage, it was for a valid legislative purpose: "to maintain a viable reserve system and neither to deplete the Indian population nor to expand it unduly (thus placing intolerable pressure on the fixed reserve land base)."[133] Treaty Voice of Alberta, in its brief, offered another possible grounds for justified discrimination: "the customs of the Indian people are exactly the provisions set out in the *Indian Act*."[134]

In the end, however, the dispositive legal question was neither the choice of comparator group nor the potentially reasonable justification for discrimination. Instead, the Court focused on the meaning of "equality before the law" and agreed with the government's argument. Equality before the law meant "the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts."[135] Equality before the law did not require that all persons or groups of persons have the same substantive legal rights.[136] The majority concluded that section 12(1)(b) of the *Indian Act* did not breach the right to equality of treatment in the enforcement and application of the law.[137] Demonstrating that a law makes a distinction based on race, national origin, colour, religion, or sex was not proof of a breach of the equality right. Because all Indian women were treated equally when the *Indian Act* was applied to them, there was no inequality.

The judgment provoked a torrent of commentary as legal scholars strained to reconcile the judgments in *Drybones* and *Lavell*, both written by Justice Ritchie. One jurist concluded that "judicial interpretation of the

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132 *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC) (Factum, Indian Association of Alberta et al. at 19) [*Lavell*, IAA Factum].

133 *Ibid* at 6.

134 *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC) (Factum, Treaty Voice of Alberta Association at 2).

135 *Lavell*, *supra* note 1 at 1366.

136 *Ibid*.

137 *Ibid* at 1373.

right to equality before the law ... is not merely in a state of uncertainty ... but indeed in a state of profound confusion."[138] Diefenbaker decried the judgment as "squarely contrary to the intent and purpose of Parliament when it passed the Bill of Rights."[139] Walter Tarnopolsky, the eminence on the *Canadian Bill of Rights*, couched his critique in a polite lamentation of "the large number of *obiter* statements which were not necessary" for the determination of the case.[140] A leading feminist lawyer, Marguerite Ritchie, Q.C., said *Lavell* demolished women's hope that the law granted them equality with men.[141]

Reactions to the contradictory opinions on the *Indian Act* provide a window into the conceptual challenges about the meaning of equality, as they were understood by jurists in the 1970s. These efforts to understand equality were produced by the *Lavell* case and occurred in a conceptual terrain shaped by *Drybones*, the White Paper, and the report of the RCSW.

One possible reconciliation was that the Court had restricted the application of the *Canadian Bill of Rights* to race discrimination. *Drybones* was about a distinction based on race (Indian status), whereas *Lavell* was about a distinction based on sex. This was a thought experiment, because the court had already rejected this idea in a case prior to *Lavell*.[142] Most jurists recoiled at the idea of including race but excluding gender from the definition of equality. Diefenbaker, for example, deplored the implication that women "have been relegated to the position of second-class persons."[143] Implied in this exercise of sense-making, however, was the notion that discrimination can only occur along one vector: the possibility that Lavell might have faced sex and race-based discrimination does not arise.

Another attempt at reconciling the two decisions was that the inequality in *Drybones* occurred due to administration and enforcement by

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138 Robert W Kerr, "The Canadian Bill of Rights and Sex-Based Differentials in Canadian Federal Law" (1974) 12:2 Osgoode Hall LJ 357 at 357.

139 Diefenbaker, "Bill of Rights", *supra* note 53 at 71.

140 Tarnopolsky, *supra* note 16 at 150.

141 Marguerite E Ritchie, "Alice Through the Statutes" (1975) 21:4 McGill LJ 685 at 689, n 19.

142 William E Conklin & Gerard A Ferguson, "The *Burnshine* Affair: Whatever Happened to *Drybones* and Equality Before the Law?" (1974) 22:9 Chitty's LJ 303 at 308.

143 Diefenbaker, "Bill of Rights", *supra* note 53 at 71.

law enforcement authorities and the ordinary courts of the land,[144] whereas in *Lavell*, there was no discrepancy in administration and enforcement. On this theory, inequality that offended the *Canadian Bill of Rights* would be due to bias, discrimination, or bad faith of the officials or courts charged with enforcing a law.[145] Hence, since administrators treated Lavell and Bedard in the same way as all other Indian women who married non-Indians, there was no discrimination. The problem with this attempted reconciliation was that the same argument could be made for Drybones, as there was no evidence he had been treated unfairly compared to other intoxicated status Indians. The effort points to the implied difference between law 'in the books' and law 'in action,' and inequality might be argued to arise only from administrative action, not from the text of a law.

A further argument tried to uncover an implied reason for the provisions at issue in *Drybones* and *Lavell*, and a difference between them.[146] If a good reason could be identified for a classification based on the protected categories under the *Canadian Bill of Rights*, a distinction that appeared discriminatory could be justified.[147] The factums of the interveners opposing Lavell showed that they anticipated this argument and thus alleged that the *Indian Act*'s rules on marriage reflected Indigenous customs or protected Indians as a group from pressure on their territories.[148] From this can be deduced that the right to non-discrimination was already being theorized as having implied justifiable limits.

From this inquiry into the 'reasonableness' of a distinction drawn in law could be devolved the problem of whether the same test should apply for distinctions which confer a benefit and those which cause a disadvantage. This, too, was not straightforward, because it was not clear whether Indian status should be understood as a benefit or a disadvantage.[149] One claim about the impugned section in *Drybones* is that it

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144 *Lavell*, *supra* note 1 at 1372.

145 Hogg, *supra* note 53 at 275.

146 Dulcey B Fowler, "The Canadian Bill of Rights: A Compromise Between Parliamentary and Judicial Supremacy" (1973) 21:4 Am J Comp L 712 at 741.

147 Hogg, *supra* note 53 at 278–79.

148 *Lavell*, IAA Factum, *supra* note 132 at 8.

149 I owe the nuance and clarity of this point to an astute peer reviewer. I will not expand on it in great depth here as it is their idea, and I cannot cite them.

had been put in place to protect Indigenous people by mitigating the problem of alcohol abuse on reserves and that some Indigenous communities wanted the measure (in which case, if true, it should not have been struck down).[150] In a similar vein, the marriage rule in the *Indian Act* was explained as a measure to protect reserve communities from white men who would marry in and try to take over[151] or as a measure to protect a minority.[152] According to another legal scholar, the *Indian Act*'s status system could be rationalized because when the act was first established, "the legislature could have reasonably assumed that a husband was responsible for his wife and children's financial support."[153] Another commentator advocated for this search for underlying reasons because "if it is to give proper effect to the purpose of that legislation, [a court should] concern itself with the reality of equality, rather than the mere forms and appearance thereof."[154]

All this theorizing about better or more coherent jurisprudential outcomes in the pages of law reviews took place after *Lavell* was decided by the Supreme Court, on the basis of the facts recorded in the judgment, without supplementary evidence or expertise. It is doubtful the legal scholars participating in these debates had the pleadings of the parties or the interveners (with the exception of Professor Douglas Sanders, who represented the National Indian Brotherhood in *Lavell*). There was thus a scant factual record underpinning the inquiry into potentially permissible protective legislation. The interveners supporting the government pleaded a number of possible valid purposes of the *Indian Act*, but Lavell's pleadings reminded the court of the lack of authorities for determining how a court could obtain evidence to show that discrimination is "rational, necessary, or in accord with supposed historical, traditional or social considerations."[155] Hogg noted that assessing the reasonableness of distinctions requires a broad range of facts and a nuanced grasp of

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150 D E Sanders, "The Indian Act and the Bill of Rights" (1974) 6:2 Ottawa L Rev 397 ["Act"].

151 Sally M Weaver, "Judicial Preservation of Ethnic Group Boundaries: The Iroquois Case" in Jerome H Barkow, ed, *Proceedings of the First Congress, Canadian Ethnology Society* (Ottawa: National Museums of Canada, 1974) 48 at 54.

152 Sanders, "Act", *supra* note 150 at 397.

153 Fowler, *supra* note 146 at 741.

154 LC Green, "Tribal Rights and Equal Rights" (1974) 22:3 Chitty's LJ 97 at 100.

155 *Lavell,* Lavell Factum, *supra* note 128 at para 32.

policy considerations, both of which are beyond the usual wheelhouse of the trial court judge and usually the purview of the legislature.[156] This was the era in Canadian (and British) jurisprudence when legislative intent could not be proven through reference to legislative history, much less through social science evidence.[157] Thus, the question of the intention of the legislature in passing a statute like the *Indian Act*, and the reasonableness of any distinctions it created, was not an empirical question but a jurisprudential one.[158]

The upshot is that jurists debated the contours of the meaning of equality in Canadian law in a cloister, free from the messy worlds of actually existing legislative intent. Furthermore, given the composition of the legal academy, not only could jurists fabulate about plausible legislative intentions, but they could also opine about the protective or harmful effects of legislation, without input from the Indigenous people affected.[159] Only the narrow facts of the case, as recorded in the judgments, informed understanding of the impact of the challenged provisions, and thus of their possible justification.

The effect is that, in the period between the report of the Royal Commission on the Status of Women and *Lavell*, the conceptual tools to think about equality and non-discrimination were developed to solve jurisprudential problems, by judges and scholars who were (or at least could be) shielded from the practical and political realities of discrimination against Indigenous people. These realities surged into view once Lavell's challenge made it to the Supreme Court. The breadth and fervor of commentary from jurists about the court's final decision in *Lavell* indicate how much effort had already been spent on understanding equality. By the time two of Canada's legal luminaries, Walter Tarnopolsky and Gerald Beaudoin, took to the pages of the Canadian Bar Review in 1975 to write

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156 Hogg, *supra* note 53 at 279.

157 John J Magyar, "The Slow Death of a Dogma? The Prohibition of Legislative History in the 20th Century" (2021) 50:2/3 Comm L World Rev 120 at 121–23, 131, 142.

158 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 594–98.

159 Herbert Marx, for instance, made this point regarding the *Drybones* commentary (see Herbert Marx, "Federal Liquor Legislation is Hardly Justifiable as Protective of Indians—A Reply to Professor Bowker" (1972) 37:1 Sask L Rev 101 at 105).

about discrimination,[160] they could draw on jurisprudence and scholarship that had canvassed the limits of formal equality, the effects of the choice of comparator group, the controversy over special rights as a source of inequality or a solution to it, the difference between the text of the law and the administration of the law, the difficulty in identifying valid legislative distinctions, and the blind spots about intersecting forms of discrimination. That rich literature grew out of a confrontation with the *Indian Act*. Lavell and Bedard, however, still did not have Indian status.

IV. UNDERSTANDING JUDICIAL REVIEW

The question of the balance between the judicial, executive, and legislative branches was front of mind in the early 1970s. Across the political spectrum, concerns ballooned about how to effectively curtail government abuse and overreach.[161] The reason that gripped the public imagination was Trudeau's invocation of the *War Measures Act*, which suspended civil liberties in response to the October crisis.[162] But for jurists, judges, lawyers, and pundits, the question had been asked even before the 1970 October Crisis, in the debates about the passage of the *Canadian Bill of Rights*. To some, the *Canadian Bill of Rights* was meant to be a bulwark against a government that could threaten people's civil liberties; to others, it was meant to root out discrimination. That said, however one had dreamt its potential, there was no denying that the *Canadian Bill of Rights* had been ineffective. Between 1960 and 1969, it had been raised in about 50 cases and rarely found to be applicable.[163] The Supreme Court had considered it in only about 10 cases, most of which were about the criminal guarantees listed in section 2.[164] The shortcomings of the bill were so evident that by the late 1960s, numerous federal-provincial conferences had taken place about creating a constitutionally entrenched

160 Tarnopolsky, "Supreme Court", *supra* note 98; Gerald A Beaudoin, "La Cour suprême et la protection des droits fondamentaux" (1975) 53:4 Can Bar Rev 675.

161 For the debate between opponents and proponents of an entrenched bill of rights, circa 1971, see Edward G Hudon, "The British North America Act and the Protection of Individual Rights: The Canadian Bill of Rights" (1975) 9:2 Val U L Rev 273.

162 Clément, *Canada's Rights Revolution*, *supra* note 57 at 105.

163 Fowler, *supra* note 146 at 720.

164 *Ibid* at 738.

charter of human rights.[165] It was in this context that the Supreme Court heard the case of Joseph Drybones.

A. Drybones*: The Silent Catalyst*

The Supreme Court's ruling in *Drybones* upended the debate among jurists and policymakers on judicial review, parliamentary supremacy, and the protection of individual rights and freedoms. The possibility that a court could invalidate an Act of Parliament because of a rights violation was no longer a legal hypothetical. The breadth of responses can be inferred from law review commentary, newspaper editorials, and parliamentary debate. In *Drybones,* the majority of the court held that if a law cannot be interpreted so that it does not violate the *Canadian Bill of Rights*, it must be declared inoperative, unless Parliament stipulated that the law should operate notwithstanding the *Canadian Bill of Rights*.[166] The Court held that because the liquor provision in the *Indian Act* discriminated based on race, it was invalid.[167] Sidney Peck, a law professor at Osgoode Hall, had a full page editorial in *The Globe and Mail* explaining why the case was "one of the most important in the court's 95-year history."[168] Readers of the *McGill Law Journal* were advised that the "Supreme Court has modified its theory of Parliamentary supremacy."[169]

Those who wanted an effective tool to curtail legislation that might impinge on individual rights and freedoms hailed the *Drybones* judgment, describing it as "monumental"[170] and a "combination of the *Marbury* and *Brown* decisions in the United States."[171] But for skeptics of judicial review, democracy was imperiled by *Drybones*' resuscitation of the *Canadian Bill of Rights*. Dashing a centuries-old tradition in Commonwealth countries, the ruling meant unelected judges could overrule

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165 Cavalluzzo, *supra* note 118 at 518.

166 *Drybones*, *supra* note 114 at 294.

167 *Ibid* at 283.

168 Sidney R Peck, "The Supreme Court's New Supremacy", *The Globe and Mail* (14 March 1970) 7.

169 Leonard H Leigh, "The *Indian Act*, the Supremacy of Parliament, and the Equal Protection of the Laws" (1970) 16:2 McGill LJ 389 at 393.

170 Cameron Smith, "The Highest Court", *The Globe and Mail* (14 March 1970) 3.

171 Cavalluzzo, *supra* note 118 at 511.

legislation, based merely on the evidence presented by parties rather than the range of information available to the legislature.[172] The Supreme Court's Chief Justice, Cartwright, worried that every justice of the peace, magistrate and judge of the court had become a potential invalidator of statutes.[173]

The reply from proponents of judicial review was that democracy was safer after *Drybones*, because the *Canadian Bill of Rights* would safeguard individual rights from a government that might breach them. The check on executive or legislative overreach would not be confined to when laws were passed or when elections were held, but would be continuous due to the watchful oversight of courts and the lawsuits of the public.[174] Those skeptical that judicial review would yield a democratic dividend and robust protection of civil liberties argued that democracy was better defended by cultivating citizenship and making legislatures more sensitive to public opinion.[175]

These well-rehearsed doctrinal disagreements about judicial review became more vivid after *Drybones*. For example, in a debate in the House of Commons about whether Parliament should pass a law criminalizing hate speech, *Drybones* was brandished as proof that the proposed bill would be overturned for violating the rights to freedom of expression protected in the *Canadian Bill of Rights*.[176]

Between 1969 and 1974, the parliamentary supremacy vs. judicial oversight debate set off by *Drybones* went back and forth across half a dozen law reviews. But as the debate rolled on, there was a striking absence. The key question was about which institution, courts or Parliament, would better protect and defend the rights of the public.[177] But 'the public' specifically affected in *Drybones*—status Indians—was irrelevant

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172 Fowler, *supra* note 146 at 727.

173 "Bill of Rights Is First, Cartwright Tells Judges", *The Globe and Mail* (11 April 1970) 5.

174 Cavalluzzo, *supra* note 118 at 522, citing *House of Commons Debates*, 20-3, vol 4 (13 May 1947) at 3152–53 (John Diefenbaker).

175 *Ibid* at 525, citing Peter H Russell, "A Democratic Approach to Civil Liberties" (1969) 19:2 UTLJ 109.

176 *House of Commons Debates*, 28-2, No 6 (13 April 1970) at 5795 (Eldon M Woolliams).

177 I am not stating that this is the entirety of the debate about judicial review; rather, this is how the debate was framed between 1969 and 1974 in the sample of scholarship I studied.

to the discussion. Aside from a one-line description of the facts, one would be hard pressed to know that this case which upended the settled law on judicial review was about the *Indian Act* and Indigenous people. For example, in a criticism of the judgment by Pigeon J. in *Drybones*, Cavalluzzo (then a graduate student at Harvard) asked whether it should be judges or Parliament who decide on providing facilities for health and education for Indians.[178]

One might dismiss this exclusion of Indigenous perspectives as just 'in keeping with the time': in the early 1970s, white people did not think of asking Indigenous people who should decide about health or education, much less whether Indigenous people should decide. But it is not simply a historical curiosity that Indians and the *Indian Act* were irrelevant to the debate about the balance of power between Parliament and the judiciary. The discussions triggered by *Drybones* were never 'about' or 'for' Indians; instead they were about who had the final say—the courts or the Parliament—*over* Indians. The *Indian Act* was productive for the development of legal thought about judicial review because in this specific arena, debate about the legality of legislation could be had without having to listen to who the legislation affected. For those who thought judges should be able to strike down legislation, judges could be directed to infer Parliament's statutory purpose, perhaps with "biological and cultural evidence to demonstrate that liquor does in fact cause peculiar individual or social harm to the Indian,"[179] but not by actually asking anyone Indigenous for evidence. For those who advocated deference to Parliament, deference was to an institution that, in the 1960s, had a total of three Indigenous members of Parliament and no Indigenous Senators. Status Indians did not have the right to vote for federal parliamentarians until 1960. Those championing the supremacy of parliamentary will were not envisioning a Parliament where the people subjected to the *Indian Act* could protest. Whatever one's view, this could be staged as the tyranny of the majority over the minority, or judges thwarting the will of the majority, without ever having to hear the minority. Joseph Drybones himself is characterized throughout the public discourse as "drunk in a hotel"[180],

178 Cavalluzzo, *supra* note 118 at 542.

179 *Ibid* at 548.

180 *House of Commons Debates*, 28-2, No 5 (25 March 1970) at 5481 (Steven Otto).

slumped or "dead drunk [on] ... the floor"[181] and "speaking no English"[182]: literally, speechless and incapable of coherent speech. And there he remains, inert and inaudible but for the apposite charm of his name, all the way to the Supreme Court, pressing his case for innocence seemingly without a word.

Canada's legal luminaries got to hash out the majoritarian / countermajoritarian controversies in a scenario that was so devoid of anyone speaking back as the minority that it may as well have been a hypothetical exercise on the moon. That silence was generated by the *Indian Act*, and it created the space in which jurists debated judicial review and fundamental rights at a pivotal moment in Canada's legal evolution.

B. Lavell*: The Force of the Crowd*

If *Drybones* was a moment for untroubled legal cogitation over the rights of an unheard minority, Lavell's case made that minority's voice unmissable and consequential. Diefenbaker, the architect of the *Canadian Bill of Rights*, said that while statutes and courts played a large part in preserving civil liberties, the "ultimate protector of these liberties is public opinion, which when aroused ... protect[s] the rights of individuals."[183] Lavell's case gave a public face to the problem of the judicial review of legislation. Whereas few people outside the legal profession had heard of Joseph Drybones, even after his landmark Supreme Court case,[184] by the time Lavell won her case at the Federal Court of Appeal, it drew national

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181 Smith, *supra* note 170 at 3.

182 F M Auburn, "*Canadian Bill of Rights* and Discriminatory Statutes" (1970) 18:9 Law Q Rev 306 at 306.

183 John G Diefenbaker, "A Half-Century Encounter with Civil Liberties" (1973) 5:2 Man LJ 255 at 266.

184 For example, a member of parliament took it for granted that a witness—Professor Rothney, a professor of history at the University of Manitoba—would know about the *Drybones* case, but he did not (see House of Commons, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 28-2, vol 1, No 11 (13 September 1970) at 11:104 (Douglas Hogarth)).

newspaper coverage.[185] Even the British Foreign and Commonwealth Office was keeping tabs on Lavell's case.[186]

Lavell's odds at the Supreme Court looked good. *Drybones* had invalidated one section of the *Indian Act* on the basis of race discrimination; Lavell's was a parallel argument on the basis of sex, one that had already convinced an appellate court. The stage seemed set for a contest between the rights of the individual to non-discrimination and the wisdom of Parliament as the representative of the public in passing laws.

The *Lavell* case was the scene of a paradigm shift in judicial review, because the 'public' entered the stage, not cast as 'the Parliament who passed the impugned law' but as 'the people affected by the law'. This shift happened because interveners were allowed in the case. The presence of interveners transformed the Supreme Court into a theatre for the expression of a *collective* response to an alleged rights violation, rather than the expression of an individual's demands for relief. This was new. None of the *Canadian Bill of Rights* cases in the previous decade had had any interveners.[187] In the 1970s, it was unheard of for the Supreme Court to receive multiple *amicus curiae* briefs in cases of public importance, a practice then associated with US constitutional jurisprudence.[188]

Thus did the *Lavell* courtroom become a stage, not only for the parties (Lavell and the government of Canada), but for different constituencies affected by the *Indian Act*. The marrying-out rule in the *Indian Act* was not born a political controversy in Indigenous communities, it became one. The opposition and support that Lavell attracted in challenging the marrying-out rule were generated through social and political processes. Mohawk leader, Mary Two Axe Earley, was a trailblazer. She put the issue

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185 Douglas Green, "Federal Court to Rule on Ojibwa's Appeal: Loss of Indian Status on Marriage Called Discriminatory", *The Globe and Mail* (8 October 1971) 13.

186 Telegram sent from Northern Ireland to Beirut (Telex from Hayman, Foreign and Commonwealth Office (7 December 1971), Kew, UK, The National Archives (FCO 82/14)).

187 Bernard M Dickens, "A Canadian Development: Non-Party Intervention" (1977) 40:6 Mod L Rev 666 at 672–74.

188 *Ibid*; Yves LJ Fricot, "The Challenge of Legislation by Means of the *Charter*: Evidentiary Issues" (1984) 16:3 Ottawa L Rev 565 at 593–94. For more on the history of intervention and *Charter* jurisprudence, see Geoffrey D Callaghan, "Intervenors at the Supreme Court of Canada" (2020) 43:1 Dal LJ 34.

on the agenda of the RCSW. Her organization's focus on discrimination in the *Indian Act* was an outlier in the nascent Indigenous women's movement in the late 1960s.[189] The BC Indian Homemakers' Association (BCIHA), founded in May 1969, focused on needs at the reserve level, recommending, for example, that federal training programs should teach women business administration, not hairdressing, and advocating for Indigenous self-determination.[190] In November 1967, Indigenous women from Saskatchewan met about their shared concerns and agreed to focus on child welfare and education.[191] In March 1968, Indigenous women in Alberta convened. Discussion groups broached a welter of subjects, including housing shortages, alcohol abuse, poor health conditions, discrimination against Indigenous people in the cities, mistreatment by the justice system, inadequate health and sanitation services, and equality of treatment between Métis and Indians, but the conference delegates did not address the marrying-out rule in the *Indian Act*.[192] A year later, at the second Alberta Native Women's conference in March 1969, the conference focused on integrating education about Indigenous issues in the Canadian curriculum, awareness of legal rights upon arrest and incarceration, and the problems related to alcohol abuse in their communities.[193] The marrying-out rule was again not a central topic of concern. Similarly, at the BC Chiefs conference in November 1969 (attended by Harold Cardinal, then leader of the Indian Association of Alberta, and Walter Deiter of the National Indian Brotherhood), there was discussion of the *Indian Act* and the White Paper, but no discussion of discrimination against

189 Don Whiteside, *Historical Development of Aboriginal Political Associations in Canada: Documentation* (Ottawa: National Indian Brotherhood, 1973) at 11.

190 Patricia Miranda Barkaskas, *The Indian Voice – Centering Women in the Gendered Politics of Indigenous Nationalism in BC, 1969-1984* (MA Thesis, University of British Columbia, 2009) at 12 [unpublished].

191 Letter from Indian Women of Saskatchewan (Rose Ewack and Mary Ann Lavallee) to Cy McDonald, Minister of Welfare for Saskatchewan and Arthur Laing, Minister of Northern and Indian Affairs (14 November 1967), Ottawa, Library and Archives Canada (MG32-C25, vol 6).

192 Report of First Alberta Native Women's Conference, Edmonton, March 12-15, 1968 (Voice of Alberta Native Women's Society, 12 March 1968), Edmonton, University of Alberta (Special Collections) [First Alberta Native Women's Conference, 12 March 1968].

193 Mary Mark, "Plans to Use Woman Power", *Western Producer* (13 March 1969) 44, Ottawa, Library and Archives Canada (MG30-C249).

Indian women.[194] Likewise, Indigenous responses to the White Paper did not mention marriage and status or prioritize concerns about membership.

It was not until the first national Indigenous women's conference in March 1971 that the problem of Indian women losing their status during marriage even figured as an agenda item.[195] Feedback reports from provincial discussion groups at the conference raised issues including housing, education, removal of Indigenous children by welfare authorities, alcoholism, and the problem of Indian women losing their status due to marriage.[196] The need for action, notably through parliamentary advocacy, seemed uncontroversial.[197] George Manuel, president of the National Indian Brotherhood, addressed the conference delegates. He mentioned education, economic development, the Mackenzie Valley pipeline, hunting and fishing rights, and aboriginal rights, but made no remarks about the rules on status and marriage.[198] In 1971, the marrying-out rule in the *Indian Act* did not dominate Indigenous political space, nor had it become a lightning rod for controversy between men and women leaders.

Only in November 1971, at the annual meetings, did BC chiefs broach the topic of marriage and the *Indian Act*.[199] Lavell had won her case at the Federal Court of Appeal just a month earlier. The victory was profiled as a success in the pages of the *Voice*, the newspaper of the BC Indian Homemakers' Association.[200] But by March 1972, the issues of marriage, status, and sex discrimination took up far more space at the National Native

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194 BC Chiefs Conference, Resolutions (November 1969), Vancouver, Union of British Columbia Indian Chiefs Library & Archives.

195 Catherine Shorten, "Native Women's Association to Be Organized on National Basis", *Western Producer* (1 April 1971) 52.

196 *Ibid*.

197 Report of the First National Native Women's Conference (Voice of Alberta Native Women's Society, Edmonton, 22–23 March 1971), Ottawa, University of Ottawa, Archives and Special Collections, Canadian Women's Movement Archives Fonds (X10-1, Series 2, Box 152) at 42 [First National Native Women's Conference, 22 March 1971].

198 *Ibid* at Appendix III, iv.

199 Minutes of Meetings of Union of BC Indian Chiefs, Third Annual General Assembly, (16-19 November 1971) [unpublished, archived at UBCIC Library] at 57.

200 Barkaskas, *supra* note 190 at 21, citing "Mixed Marriage: Woman Keeps Status as Indian", *The Indian Voice* (October 1971) 8.

Women's Conference.[201] Lavell spoke, explaining that the crux of the matter was the legal effects of marriage: "it is only registered Indian women who lose certain rights when they marry, other women in Canada do not."[202] Some women advocated activism to end discrimination against Indian women. But others opposed that position, insisting that authority over band membership rested with band councils and that the influx of white men married to Indian women would harm life on reserves.[203]

Many non-status men also opposed discrimination in the *Indian Act*, as they lacked Indian status and Treaty rights precisely because their mothers had lost status through marriage. The Native Council of Canada underlined the self-governance dimensions of the issue, stating that "no federal or Provincial agency has the right to tell them what they are and ... divide the Indian people on the basis of their choice of marriage partners."[204]

However, after Lavell's victory at the Federal Court of Appeal, many groups led by men were much less favourable to the demands for reforming the *Indian Act* to protect women's rights to status. An editorial in the *Saskatchewan Indian* connected the *Lavell* decision to the federal "white paper assimilation policies" and suggested that "Indian organizations ... were caught flat footed ... [and not] prepared for all the implications and legal nightmare this case had brought with it."[205] George Manuel, leader of the National Indian Brotherhood, explained that, with regard to band membership, the "decision should be in the hands of the people themselves" and suggested that communities, not band councils, should be

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201 "National Native Women's Conference", *Saskatchewan Indian* (March 1972) vol 3, no 3, 2; "Lavel case", *Saskatchewan Indian* (March 1972) vol 3, no 3, 4.

202 Catherine Shorten, "Status Question Divides Indian Women", *Western Producer* (30 March 1972) 51.

203 Report of Second Annual Conference (Voice of Alberta Native Women's Society, Edmonton, 3-6 March 1969), Ottawa, University of Ottawa, Archives and Special Collections, Canadian Women's Movement Archives Fonds (X10-1, Series 2, Box 152) at 18.

204 RE: Jeannette Lavall Case (News Release, Native Council of Canada, 12 December 1972), Ottawa, Library and Archives Canada (MG30-C249, file 23) [NCC, News Release].

205 "Lavel case", *supra* note 201.

able to determine the citizenry of their people.[206] The Indian Association of Alberta took the position "that it was not the rights of women at stake. If it was decided that the *Canadian Bill of Rights* was supreme over the *Indian Act*, that decision would wipe out the *Indian Act* and remove whatever legal basis we had for our treaties."[207] Thus, by 1972, *after the FCA decision in Lavell*, discrimination against women in the *Indian Act* aroused strong, nuanced, and divergent views across Indigenous political and social life.[208]

Bringing these divergent views into the Supreme Court, via the procedural mechanism of interveners, meant that the democratic questions inherent in judicial review were no longer contemplated hypothetically, as they had been in commentary about *Drybones*. Questions like who benefited from the marrying-out rule in the *Indian Act*, or whose equality was being compared to whose, could be connected to identifiable constituencies and perhaps even answered by lawyers pleading legal briefs. By including interveners in the process, the Supreme Court could no longer listen only to an individual disputing a law and the public, defined as the government defending Parliament's legislation. The 'public' became both much broader and more directly affected by questions of whether the *Indian Act* violated equality guarantees.

The paradigm shift in *Lavell* occurred not simply from inviting different publics into the court to be heard, thus staging a life-sized diorama of the dilemmas of judicial review; the shift came from the realization that public opinion could be shaped by shaping the interveners. Before the government had even decided to appeal Lavell's victory, the Minister of Indian Affairs, Jean Chrétien, said "that he would be willing to help any Indian group wishing to appeal to the Supreme Court of Canada to

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206 Barkaskas, *supra* note 190 at 21, citing Donna Doss, "George Manuel Airs His Views on Non-Status Women", *The Indian Voice* (November 1971).

207 Harold Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Hurtig, 1977) at 110 [*Rebirth*].

208 For more on Indigenous dissensus at the time, see Carlson, Goyette & Steinhauer, *supra* note 19; Kathleen Jamieson, "Multiple Jeopardy: The Evolution of a Native Women's Movement" (1979) 4:2 Atlantis: Critical Studies in Gender, Culture & Soc Justice (2nd) 157.

reverse a recent decision of the Federal Court of Appeal."[209] He explained that he "would like this problem to be clarified."[210] When the Minister of Justice announced the government's decision to appeal, he cited the case's complexity.[211]

If the government's aim had been about clarifying a complex policy question, one might expect the government to help all interested parties. Instead, the government funded only the interveners that supported its argument about the legality of the *Indian Act*. Chrétien had figured out that judicial review for compliance with the *Canadian Bill of Rights* was an opportunity to mold and direct the 'we' which underwrote valid legislation. This could potentially shield it from the judicial hammer because once some, but not all, of 'the Indians' were in court on the government's side, there was a constituency for whom the government could be seen to be legislating and a reason for judicial deference to Parliament.[212]

Financing was the lever used by the government to influence which parts of the public would be most effectively heard in court. Funding for civic life in Indigenous communities came from the government. Beyond the reserve level, national Indigenous groups, like the National Indian Brotherhood, received core funding from the federal government.[213] Because the Department insisted that its funds could only be directed to status Indian organizations, groups that included non-status Indians and Métis were excluded from such funding.[214] These policies left Indigenous

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209 Rudy Platiel, "Willing to Help Indians Appeal, Chrétien Says: Group Objects to Ruling that Woman Wed to White Still an Indian", *The Globe and Mail* (29 November 1971) 8.

210 *Ibid*.

211 *House of Commons Debates*, 28-3, vol 10 (1 December 1971) at 10045 (Hon John N Turner) [*Debates* vol 10].

212 Please note that this is not an observation about the views of the interveners on either side, their sincerity, or their rectitude. I am simply underlining what the government accomplished by bringing these voices into the judicial process.

213 Canada, Cabinet, *Cabinet Minutes* (Privy Council Office, 14 July 1972) at 16–17 [*Minutes*, 14 July 1972].

214 Letter from Nellie Carlson and Philomena Ross, Alberta Committee on Indian Rights for Indian Women, to Otto Lang, Minister of Justice (28 March 1974), Ottawa, Library and Archives Canada (RG25-A-3-C, vol 15902, File No. 45-CDA-13-1-3).

women's groups without core funding.[215] Indigenous women lacked other sources of financing. In 1965, "78.5 per cent of all Indian households had an annual income of less than $3,000," compared with a national average income of around $6500.[216]

By the time Lavell's case reached the Supreme Court, there were 22 interveners in the case, and over half of them supported the federal government's position. Where did they come from? The National Indian Brotherhood asked the federal government to appeal Lavell's appellate court victory.[217] In *Bedard*, Indian Affairs asked the Six Nations Reserve to instigate the appeal procedure.[218] The Department of Indian Affairs provided funding for Indigenous leaders to organize conferences to discuss the issues raised by the FCA's decision in *Lavell*. Women received government funding to attend only if they supported preserving the marrying-out rule in the *Indian Act*.[219] The government's decision to appeal to the Supreme Court was announced in December 1971. By the summer of 1972, the Indian Association of Alberta, Treaty Voice of Alberta, and Iroquois and Allied Indians Association had declared their intention to oppose Lavell's victory at the Federal Court of Appeal.[220] In November 1972 at their annual meeting, the Union of British Columbia Indian Chiefs voted to ask the National Indian Brotherhood to intervene on its behalf in Lavell's case, implying that the NIB's intervention plans were already circulating among Indigenous organizations.[221] Thus, since at least the summer of 1972, the pro-government interveners had been preparing a

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215 Citizenship Secretariat, "Funding of Ontario Native Women's Association" (2 March 1972), Ottawa, Library and Archives Canada (RG6-F-4, File No. CB 9-390-59, Box 97).

216 Royal Commission on the Status of Women in Canada, *supra* note 44 at 329; Canada, Dominion Bureau of Statistics, *Income Distribution and Poverty in Canada: Preliminary Estimates* (Ottawa: DBS, 1967) at 5, online (pdf): <publications.gc.ca> [perma.cc/7DM8-CPVG].

217 P C Paul, "Executive Report" (Delivered at the Fourth Annual Conference of the Union of B.C. Indian Chiefs, Price Rupert, November 1972) [unpublished, archived at UBCIC Library] at 2.

218 Jeannette Corbiere Lavell, "A Native Woman's Perspective on Equity in Canada's Legal System" (1991) Centre for Women's Studies and Feminist Research, Working Paper No 9 at 3.

219 *Sawridge*, Corbiere Lavell Willsay, 2006, *supra* note 89 at para 23.

220 Sanders, "Bill of Rights", *supra* note 52 at 83.

221 Union of BC Indian Chiefs, *Executive Director's Report* (1972) [unpublished, archived at UBCIC Library] at 15.

coordinated slate of arguments. All but two of the pro-government interveners were represented by Douglas Sanders, who was at the time a professor at the Faculty of Law, University of Windsor.[222]

This contrasts sharply with the process and resources available to organizations supporting Lavell. The March 1972 National Indian Women's Conference finished without any consensus about whether to intervene in the *Lavell* case.[223] It was not until August 1972 that Indian Rights for Indian Women hosted a workshop to discuss a legal strategy for the case, not until 6 December 1972 that they agreed on intervening,[224] and not until 4 January 1973 that they reached a lawyer (Hyndman) who could represent them at the Supreme Court of Canada.[225] In mid-December, the Native Council of Canada decided it would intervene.[226] Each intervener application to the Court was heard individually; by early February, Hyndman's agent in Ottawa commented that the Court was "getting fed up," implying something about both the volume and novelty of the intervener requests.[227] The supporters of Lavell and Bedard all had their leave to intervene accepted only weeks before the hearing began on 22 February, on different dates between 18 January 1973 and 9 February 1973, despite being represented by the same lawyer, Margaret Hyndman.[228]

The Cabinet records about these funding decisions are functionally inaccessible due to Canada's classification regime, but, given that the government had paid for a series of conferences to discuss and circulate the views of its interveners, it seems plausible it was also paying the legal fees of their counsel. On the other side of the case, Jeannette Lavell's attorney, Clayton Ruby, had been paid out of legal aid at the trial and

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222 Sanders, "Bill of Rights", *supra* note 52 at 83.

223 See "National Native Women's Conference", *supra* note 201.

224 Recommendations and Resolutions (National Conference: Indian Rights for Indian Women, Ottawa, 6–8 December 1972), Ottawa, Library and Archives Canada (MG30-C249, File 23).

225 Letter from Christine Daniels, Alberta Committee on Indian Rights for Indian Women, to Margaret Hyndman, QC (4 January 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2) [Letter from Daniels].

226 NCC, News Release, *supra* note 204.

227 Note of phone call with John Magee [sic] (2 February 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

228 Letter from John E McGee to Margaret Hyndman, QC (9 February 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

appellate level. It took a pointed question in Parliament and an order from the Supreme Court to ensure that Lavell's costs and lawyer's fee would be covered by the government.[229] Lavell's interveners were represented pro bono by Margaret Hyndman and a junior lawyer, Francis Smookler, seconded by the North Toronto Business and Professional Women's Club.[230] The Canadian Federation of University Women lobbied the Minister of Justice to provide financial support for their intervention in support of Lavell. But the Minister of Justice refused, arguing that "Indians are the persons who will be most directly affected by the decision" and that "persons other than Indians" should not have their legal fees paid out of public funds despite their interest in the Court's decision.[231] A picture emerges of a scramble by supporters of Indigenous women to marshal the people and resources to mount an argument at the Supreme Court, against better funded and better organized adversaries.

When the hearing began on February 22, 1973, the Supreme Court was packed.[232] Twenty lawyers waited to be heard. Newspaper reporters jostled with members of the public for any seat. There were so many Indigenous representatives that some chiefs were shunted to an overflow room. Their presence was due in no small part to the NIB's decision to hold its national meeting in Ottawa to coincide with the hearings.[233] In Lavell's recollection, "most of these elders, when questioned did not

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229 *Debates* vol 10, *supra* note 211 at 10066 (Robert Simpson); *Sawridge*, Corbiere Lavell Willsay, 2006, *supra* note 89 at para 24.

230 Interview with Miss Margaret Paton Hyndman by the Osgoode Society for Canadian Legal History (March 1983 – April 1984) at 157 [Hyndman Interview]. Both Indian Rights for Indian Women and the Manitoba Action Committee on the Status of Women contacted Hyndman on the understanding that she was donating her legal services, see Letter from Daniels, *supra* note 225; Letter from S June Menzies, Chairman, Manitoba Action Committee on the Status of Women to Margaret Hyndman, QC (10 January 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

231 Letter from Otto E Lang, Minister of Justice to S June Menzies, Canadian Federation of University Women (3 January 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

232 Leone Kirkwood, "20 Lawyers Heard as Lavell Case Opens Before Overflow Crowd: Reasonable That Indian Family's Status Should Be Decided by Male Spouse, Supreme Court Told", *The Globe and Mail* (23 February 1973) at 13, online: <proquest.com> [perma.cc/8EGS-YM46].

233 Lavell, *supra* note 218 at 4.

know why they were there."[234] Indigenous women and their supporters arrived too, but they had paid their own bus fares from across the country.[235] They all bunked together at Ottawa's Château Laurier, having convinced the manager to rent them some "large rooms in which they could put a number of cots" and they "got their meals as best they could at cheap places."[236] As for the chiefs, their transportation and living expenses were funded by the government, and "they were even flown to Montreal to see a very important hockey game during the hearing."[237] When the delegation of 60 women from Indian Rights for Indian Women arrived at the Supreme Court, Nellie Carlson recalled that "[t]here were men who were swearing at us. Outright bitches, they said. That's how we were treated."[238] A police escort was needed to take the women to their seats in the Court's upstairs gallery.

Did the tumult matter to the Court's decision? The stakes were crystal clear. In *Bedard,* the judge acknowledged that his decision in favour of Bedard might mean that "virtually the entire Act must be held to be inoperable."[239] In *Lavell*, the trial judge stressed that if the provisions in the Act were "distasteful or undesirable to Indians, they themselves can arouse public conscience, and thereby stimulate Parliament ... to correct any unfairness or injustice."[240] Public conscience had, indeed, been aroused. The Globe and Mail published an editorial warning of the risk that "Women's Lib reduces the whole thing to a brawl over women's rights," asking instead if "Parliament [would] be right to please the white majority (which has the most votes) by doing what the Indian majority (which has few and scattered votes) rejects?"[241] The framing of the (male)

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234 *Ibid*.

235 Ad Hoc Committee, Ottawa, Library and Archives Canada (MG30 C249, File 23); Jenny Margetts, National Committee on Indian Rights for Indian Women, Memo to all National Committee Members (February 1973), Ottawa, Library and Archives Canada (MG30 C249, File 23).

236 Hyndman Interview, *supra* note 230 at 155.

237 *Ibid*.

238 Carlson, Goyette & Steinhauer, *supra* note 19 at 114.

239 *Bedard v Isaac et al*, *supra* note 88.

240 *Lavell* 1971 ON CoCt, *supra* note 96 at 228.

241 "In Conflict with Custom", *The Globe and Mail* (3 September 1973) at 6, online: <proquest.com> [perma.cc/48AC-BTFH].

Indian minority oppressed by the white (women's Lib) majority had thus taken hold.

When the Court ruled, observers at the time believed that the Court had been influenced by the presence of interveners and had thus opted to defer to Parliament to legislate a solution. Whether this is true or not, the reaction from legal observers illustrates the perception that judicial review could be affected by shaping the publics whose will the court had to consider. Margaret Hyndman, reflecting on her work representing the interveners in support of Lavell and Bedard, emphasized that at the hearing itself, "there were ... so many Indian organizations and Indian Councils who were there supporting the government position."[242] Diefenbaker, for his part, sarcastically commented that the outcome was "a fantastic situation ... created by the court which seemed to go out of its way to satisfy the Indian organizations which were represented in the arguments before the court."[243] The Justice Minister dismissed as "nonsense" the suggestion that the Supreme Court "sided with male chauvinist Indians against the women of the world," meaning that the question had been posed to him as such.[244] Lavell stopped short of saying that the court was "subject to political influence" but said it was "even more difficult to believe that this obvious ridiculous decision was not motivated by political pressure from the Indian Affairs Department and the National Indian Brotherhood."[245] Florence Bird, former chair of the RCSW, worried that the decision meant the government would refrain from action on sex discrimination, "since it does not want to offend the Indian men as was made evident by its treatment of women at the time the case went to the court."[246]

The *Lavell* case was thus a turning point in the debate on judicial review, but not because it dealt the death blow to the *Canadian Bill of Rights*. Rather, it taught the government that, in the struggle between the courts and Parliament, and between a minority's rights and the majority's will,

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242 Hyndman Interview, *supra* note 230 at 158.

243 Diefenbaker, "Bill of Rights", *supra* note 53 at 71.

244 Don Sellar, "A Defence of the Supreme Court", *The Windsor Star* (5 October 1973) at 8, online: <proquest.com> [perma.cc/3SV4-7EZA].

245 Lavell, *supra* note 218 at 4.

246 Letter from Florence Bird to Margaret Hyndman, QC (14 September 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

the 'public' was a critical tool that could be mobilized through—and into—the courts via interveners. Lavell and Bedard, however, still did not have Indian status.

V. EFFECTS

The *Indian Act* and, more specifically, the legal dispute over sex discrimination in the *Indian Act*, advanced Canadian law on the legal meaning of equality and the process of judicial review. This section analyzes how the *Lavell* decision changed the discursive environment and the political leverage available to the federal government, Indigenous actors, and the white-led feminist movement. This section is not an analysis of legal doctrines, but when one of the parties is asserting its rights to self-determination in a context of colonization, the political environment is also a legal environment.

A. Women's Rights Movement

Until Lavell's case, the Canadian women's movement had little to say about the *Indian Act* or discrimination against Indigenous women. The National Council of Women discussed the issue in 1969 but took little further action.[247] The Canadian Federation of University Women passed a resolution protesting sections of the *Indian Act* in 1969, spurred by a petition from Mary Two Axe Earley.[248] But that was it. There was no feminist mobilization after Lavell lost her case at first instance, and little reaction after she won at the Federal Court of Appeal.

It was only after the government challenged the Federal Court of Appeal's decision that Lavell's case even made a blip on the feminist radar. A small group of Toronto-based women lawyers realized that the government's decision to appeal showed the fragility of the *Canadian Bill of*

247 Letter from S. June Menzies, President, Manitoba Provincial Council of Women to Helen Hnatyshyn, National Council of Women (13 December 1972), Ottawa, Library and Archives Canada (MG31 E98 vol 2) [Letter from Menzies to Hnatyshyn, 13 December 1972].

248 Letter from JL Black, President, Canadian Federation of University Women to Margaret Hyndman, QC (14 December 1972), Ottawa, Library and Archives Canada (MG31 E98 vol 2); "Women Protest Sections of *Indian Act*", *The Globe and Mail* (23 June 1969) at 12, online: <proquest.com> [perma.cc/38U6-6LBR].

Rights as a weapon against sex discrimination. One activist told me that, although women's organizations could have known about discrimination in the *Indian Act* from the report of the RCSW, "they had been asleep ... the *Lavell* case was so awful that there was one of those eureka moments."[249] According to this activist, the 'eureka' of the mainstream women's movement "wasn't so much about Indian women; it was about the *Canadian Bill of Rights*; it was the death of all hope."[250] Urging immediate action after the Court of Appeal decision, another leader of the women's movement dubbed the case as "the most important court case for Canadian women since the '[P]ersons' case."[251]

Then, when the Supreme Court decided *Lavell*, the issue of discrimination in the *Indian Act* burst onto the national feminist stage. The National Action Committee on the Status of Women, which had been founded only a few months earlier, pressed parliamentarians to demand that the government suspend evictions of non-status women from reserves.[252] A fake obituary of the Canadian Bill of Rights appeared in the Ottawa Journal, "inserted for concerned minorities by women of Canada."[253] White women and Indigenous women had not worked together before, aside from the collaboration between Mary Two Axe Earley, Thérèse Casgrain, and Madeleine Parent that dated to the 1960s.[254] But after the ruling against *Lavell*, "when they [Indian women] ventured into the terrain of the *Canadian Bill of Rights*, then the groups that I was involved in took interest."[255] Women hit the streets in October 1973 for the

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249 Anonymous activist, "Interview with author" (2014) [communicated to author].

250 *Ibid*.

251 Letter from Menzies to Hnatyshyn, 13 December 1972, *supra* note 247.

252 *House of Commons Debates*, 29-1, vol 6 (12 September 1973) at 6469 (Mr R Gordon L Fairweather) [*Debates* September 1973].

253 "In Memory of Canadian Bill of Rights", *The Ottawa Journal* (5 September 1973) at 4.

254 Letter from Mary Two Axe Earley to Thérèse Casgrain (3 March 1967), Ottawa, Library and Archives Canada (MG32 C25 vol 6). In 1967, Casgrain also wrote to government ministers and officials to demand explanations for the discriminatory treatment of Indian women (see Letter from Thérèse F Casgrain to HH Chapman, Registrar, Department of Indian Affairs (25 April 1967), Ottawa, Library and Archives Canada (MG32 C25 vol 6); Letter from Thérèse F Casgrain to Pierre Trudeau, Minister of Justice (14 December 1967), Ottawa, Library and Archives Canada (MG32 C25 vol 6)).

255 Anonymous activist, *supra* note 249.

National Day of Mourning for the *Canadian Bill of Rights*, and Lavell captured the mood in describing the *Indian Act* as a "fight ... [that] involves all Canadian women."[256]

The mobilization was about gender equality, writ large. For example, Diefenbaker gave a public speech, to a standing ovation, lambasting the Supreme Court for putting "women in a secondary position."[257] Parliamentarians were receiving mail from their constituents after *Lavell* about the "legitimate aspirations of the women of Canada to have ... an entrenched bill of rights."[258] A women's centre wrote to the Minister of Indian Affairs to object to the *Lavell* decision.[259] A full page editorial ran in Chatelaine in January 1974, summarizing the contrast between *Drybones* and *Lavell* as "one law for Indian men and another for Indian women."[260] Status of Women News led its Winter 1974 issue with a eulogy for the *Canadian Bill of Rights*: "its short, valuable life was dedicated to the freedom of MAN."[261]

One commentator sarcastically congratulated the women's movement for discovering Indian women's struggles, and said he was eager to see their campaign against anti-Indian racism and housing shortages on reserve.[262] Not fair play, as the commentator was staff at the National Indian Brotherhood, but there was some truth to it. The women's movement was already under fire for focusing on the concerns of white, middle class and affluent women and disregarding demands for economic and

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256 "Status Fight Involves All Women, Indian Says", *The Globe and Mail* (23 October 1973) at 13, online: <proquest.com> [perma.cc/Z3MM-2SU6].

257 "Decision Was Wrong, Diefenbaker Says", *The Globe and Mail* (25 September 1973) at 13, online: <proquest.com> [perma.cc/Y9PY-VLY7].

258 *House of Commons Debates*, 29-1, vol 7 (8 November 1973) at 7670 (Mr R Gordon L Fairweather).

259 Letter from Marnie Clarke et al, Centre for Women, Humber College to Hon Jean Chrétien, Minister of Indian Affairs and Northern Development (2 November 1973), Saskatchewan, University of Saskatchewan, Diefenbaker Archives.

260 Doris Anderson, "Two Court Cases Where Women Lost Heavily", *Chatelaine* 47:1 (January 1974).

261 National Action Committee on the Status of Women, Status of Women News, (1974) vol 1 no 2.

262 Clive Linklater, "White Women and *Indian Act*" (7 November 1973) *News of the North* (Ottawa, University of Ottawa, Archives and Special Collections, Canadian Women's Movement Archives Fonds).

racial justice.[263] Discrimination in the *Indian Act* was a straightforward problem of *de jure* inequality that could be denounced without having to wade into complex political waters like why women were stuck in low-paid jobs or assaulted by their husbands. This problem only looked 'straightforward' to those outside the arena of Indigenous political and social life.

In the nascent women's movement, it was women lawyers who championed equality in civil, political, and legal rights. Equal pay mattered most to women who were underpaid in high-earning jobs. The person who represented the interveners in *Lavell*'s case was a corporate lawyer who, over twenty years earlier, had helped to draft the country's first equal pay statute. Margaret Hyndman, Q.C. recalled that after the government announced its intention to appeal, "other people ... wanted to come to the rescue of the Indian women, and asked me to do this."[264]

Hyndman had occasionally represented Indigenous women who had been disinherited of their property on reserve, a side gig in an illustrious career in company law. She met these clients because, for over 30 years, Hyndman had leased a cottage and 7 ½ acres within a First Nations reserve near Cape Croker on Georgian Bay.[265] Speaking of her personal relations with the "three women who looked after my place in the Reservation," Hyndman remembered them as "so loyal and so kind, so efficient."[266] Hyndman worked alongside June Menzies, a feminist leader in Manitoba and member of the National Council of Women and Canadian Federation of University Women, to coordinate non-Indigenous women's groups as interveners in *Lavell*: the North Toronto Business and Professional Women's Club and the University Women Graduates Limited (and Rose Wilhelm, a former member of the Cape Croker Band).[267] Several other women's organizations wanted to intervene, including the National

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263 Nancy Adamson, "Feminists, Libbers, Lefties, and Radicals: The Emergence of the Women's Liberation Movement" in Joy Parr, ed, *A Diversity of Women: Ontario, 1945–1980* (Toronto: University of Toronto Press, 1995) 252 at 265–66, 273–74.

264 Hyndman Interview, *supra* note 230 at 153.

265 *Ibid* at 151.

266 *Ibid* at 160.

267 Letter from Margaret P Hyndman, QC to June Menzies (21 September 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

Council of Women, but their applications were denied.[268] The Canadian Federation of Business and Professional Women's Clubs and the Canadian Federation of University Women asked Hyndman to represent them a month before any of the Indigenous women's organizations had mobilized to intervene.[269] Hyndman said she represented the organizations to show "the interests of Canadian women in equality which ought not to be restrained or taken away from Indian women."[270] She received assistance from Margaret Ritchie, Q.C., a trailblazer at the Department of Justice who had been the legal adviser to the RCSW.[271]

In short, Hyndman had existing professional relations with the leaders of the non-Indigenous associations who intervened on Lavell's behalf. But Hyndman had not met the leaders of Indian Rights for Indian Women. In a thank you note sent after the Supreme Court hearing, Jenny Margetts (Indian Rights for Indian Women) regretted that she had missed the opportunity to meet Hyndman in Ottawa.[272]

The feminist mobilizing around Lavell's case thus rested on a structure of class networks and a geography of settler-Indigenous contact in a lakefront cottage that allied Indigenous women with lawyers, professional women, and businesswomen. This complex moment of cross-race and cross-class alliance rarely figures in analyses of *Lavell*'s significance for Canadian law. For lawyers, the litigation around the *Indian Act* created a sandbox for exploring the meaning of equality and the problems of rights-based judicial review; for the feminist movement, sex discrimination in the *Indian Act* turned a floodlight on the weakness of equality protections in Canadian law. The floodlight did not generate feminist support for Indigenous women's demands for ending poverty, improving living conditions on reserves, or respecting Indigenous sovereignty. The *Indian Act* helped the Canadian women's movement by catalyzing mass

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268 Letter from Margaret P Hyndman, QC to John Magee (12 January 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

269 *Canada (AG) v Lavell*, 1973 CanLII 175 (SCC) (Affidavit, Hilda L Cryderman); Letter from JL Black to Margaret P Hyndman, QC (21 December 1972), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

270 Hyndman Interview, *supra* note 230 at 154–55.

271 Letter from ME Ritchie, QC to Margaret P Hyndman, QC (9 February 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

272 Letter from Jenny Margetts to Margaret P Hyndman, QC (6 March 1973), Ottawa, Library and Archives Canada (MG31 E98 vol 2).

mobilization for the kinds of formal equality guarantees which were particularly relevant for white, upper middle-class women.

B. Indigenous Sovereignty Movement

The Trudeau government used the outcome in the *Lavell* case and the ensuing outcry about the weaknesses of the *Canadian Bill of Rights* to reinforce its arguments about the need for constitutionally entrenched rights. Rather than standing shoulder to shoulder with the Court, backing the judgment that rescued the *Indian Act* from a direct hit, the Minister of Justice explained the judgment as based "on a technical legal question."[273] The implication was that the courts were not to blame for lacking the right tools to combat discrimination, and so better tools—like an entrenched charter of rights—had to be forged. Passing such a charter was something that the government had "long favored," but Trudeau claimed, the provinces were the roadblock.[274]

Given that the *Drybones* decision had nearly invalidated the entire *Indian Act* as racial discrimination and the government had proposed abolishing the *Indian Act* on the grounds of racial discrimination, the government's conduct in *Lavell* bears some explanation. Lavell's case seemed poised to invalidate the entire *Indian Act*. Yet the government intervened to support her opponents.

The key to understanding this moment is that the government's target was not the *Indian Act*. From the perspective of the federal government, the critical target was the underlying claim of Indigenous self-determination affecting all federal-Indigenous relations. Abolishing the *Indian Act*, through the White Paper, had been aimed at transforming Indians, a collective "race apart," into assimilated, rights-bearing individual citizens devoid of collective political power. In the late 1960s, this was essential because Indigenous identity had become an engine of political power. This was the era when Indigenous resistance became expressed in the language of sovereignty. With the rise of Red Power came rejection of assimilation into white society and refusal of accommodation with the

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273 "Not Prejudice, Liberal Ministers Say: Women Criticize, PM Defends Court Ruling", *The Globe and Mail* (25 September 1973) 13, online: <proquest.com> [perma.cc/HF4P-V9UV] ["Not Prejudice"].

274 *Ibid*.

colonial state.[275] Fighting the federal government required a unified front of anticolonial resistance. To do so meant that "our people begin to call themselves Indians instead of Crees or Saulteaux or Mohawks"[276] and understood themselves as a national collectivity, held together by a valued Indigenous identity, demanding to run their own lives.

This was expressed forcefully through a united defense of the *Indian Act* after the 1969 White Paper, but the show of strength did not end there. In the lead-up to the *Lavell* hearing at the Supreme Court, expressions of Indigenous self-determination were increasingly strident and effective. A few examples will sketch the scene. Before launching the 1969 White Paper, the federal government had hosted a year-long series of consultative meetings about amending the *Indian Act*. Indian leaders refused to talk about changes in the *Indian Act*; instead, leaders "unanimously agreed that a general declaration of intent containing the principles and spirit of the treaties and aboriginal rights would have to be adopted before any move by the federal government in the direction of new Indian legislation could be considered."[277] The Red Paper, repudiating the White Paper, opened its Preamble with an ardent defense of treaty: "[t]o us who are Treaty Indians there is nothing more important than our Treaties, our lands and the well being of our future generation."[278] In its White Paper response, the Manitoba Indian Brotherhood declared that "[t]he Indian Tribes of Manitoba are committed to the belief that our rights, both aboriginal and treaty, emanate from our sovereignty as a nation of people."[279]

The assertion of sovereignty as the basis for Indigenous nations' relationship to the federal government was not only rhetorical and political; it was also increasingly legal. For example, Frank Calder and other Nisga'a hereditary chiefs launched a case in 1967 alleging that title to their lands in the Nass Valley had never been extinguished, and so the land was still theirs. The Nisga'a lost at both the trial and appellate courts and

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275 Glen Sean Coulthard, "Introduction: A Fourth World Resurgent" in George Manuel & Michael Posluns, *The Fourth World: An Indian Reality* (Minneapolis: University of Minnesota Press, 2019) ix at xii–xiii.

276 Cardinal, *Unjust Society*, *supra* note 83 at 14.

277 *Ibid* at 126.

278 Indian Chiefs of Alberta, *supra* note 109 at 189.

279 The Indian Tribes of Manitoba, *Wahbung: Our Tomorrows* (Manitoba: Manitoba Indian Brotherhood, 1971) at 9.

appealed. The government was arguing its side of the case at the Supreme Court of Canada (in late November 1971) in roughly the same time period it decided to appeal Lavell's victory at the Federal Court of Appeal.[280] The government had no way of knowing how the Court would rule in *Calder*, but the juxtaposition shows the real legal pressure on the government from Indigenous claimants.[281]

Indigenous pressure went beyond formal political and legal channels, too. Through response papers and parliamentary testimony, Indigenous people rejected the White Paper's proposal to transfer control of Indian education to the provinces. They also occupied a school. A former residential school near St. Paul, Alberta was slated for closure. But rather than be integrated forcefully into provincial schools, the Saddle Lake, Kehewin, and Cold Lake communities wanted to run the school themselves. The federal government refused. A two-week occupation ensued, drawing widespread Indigenous solidarity and national and international media attention.[282] The result was the Blue Quills School becoming, in 1971, the first school in Canada managed and operated by Indigenous people for Indigenous children. This was followed by a declaration, in 1972, by the National Indian Brotherhood in which First Nations reclaimed the right to direct the education of Indigenous children through the creation of band-run schools.[283] In the course of this crisis, leader of the Indian Association of Alberta, Harold Cardinal, declared to a capacity audience at the University of Alberta that, "if the Federal government does not act

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280 The *Calder* case was heard in November 1971 and the *Lavell* case was appealed in October 1971 (*Calder v British Columbia (AG)*, 1973 CanLII 4 (SCC); *Lavell v Canada (AG)*, 1971 CanLII 1984 (FCTAD)).

281 The Nisga'a victory in *Calder* triggered a change of posture that underlines the strength of Indigenous leaders at this time. Immediately after the Supreme Court's decision, Chrétien briefed the prime minister that "we should not be as firm as we have been on the question of aboriginal rights" (Brief for Prime Minister, Areas of Possible Questioning (1 February 1973), Ottawa, Library and Archives Canada (MG26 O19 vol 227)).

282 CBC, "Native Awakening" (last visited 11 September 2026), online: <cbc.ca> [perma.cc/Q6A4-UKES].

283 National Indian Brotherhood, *Indian Control of Education: Policy Paper Presented to the Minister of Indian Affairs and Northern Development* (Ottawa: National Indian Brotherhood, 1972).

... then our leadership will continue to escalate our actions—even if it means every one of our leadership has to go behind bars."[284]

Direct action and escalation were not only the preserve of male-led Indigenous organizations. The efficacy of collective action, and particularly direct action, was also known to Indigenous women activists. For example, the immediate consequence of the first Alberta Native Women's Conference, in 1968, was that the day after the conference, a delegation went straight to the office of the provincial premier to submit their demands regarding health services for Indians. As a result of the Indigenous women's delegation, the premier telegrammed the prime minister to protest federal proposals to change health services.[285]

Thus, the early 1970s was an era in which Indigenous resistance, expressed in collective terms through the language of sovereignty, became a force with which the federal government had to reckon. The *Lavell* case created an opportunity to undercut this Indigenous collective unity by dividing Indigenous people internally, separating those who wanted gender equality from those who wanted self-determination, and those who had status and treaty rights from those who had been denied them. Because Lavell's demands for sex equality in a federal statute became a battle cry for the white-led feminist movement, a new front opened which allowed the government to further undermine Indigenous political power.

The outcome in *Lavell* was one that the government had both argued for, as the appellant, and materially supported, by paying eleven Indian organizations to intervene in the case. But once Lavell and Bedard lost their case, Chrétien said that the government did not want to impose "a white solution" and was thus unable to amend the *Indian Act* to address women's concerns.[286] This was the same Chrétien who, in the face of unified Indigenous resistance, had for two years refused to withdraw the White Paper. But now, when women's equality rights had been denied, the government could not possibly go against (male) Indigenous opinion. Speaking to the 1973 Liberal Party Convention, Trudeau cited his

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284 "Integration Crisis in Alberta", *The Indian News 14:5* (1971) at 1.

285 First Alberta Native Women's Conference, 12 March 1968, *supra* note 192, Appendix IV.

286 "Not Prejudice", *supra* note 273.

government's effort to abolish the *Indian Act* and the ensuing resistance from "the Indian people themselves" as proof that the government wanted equality, but it had been thwarted by Indigenous resistance. This, he explained, meant that those pushing for women's rights had a quarrel, not with the federal government, but with those Indian groups.[287] 'Those Indian groups' who had torpedoed the White Paper and quarreled with Indian women decrying sex discrimination were the same groups that the government had just paid to intervene in support of its own arguments at the Supreme Court.

This level of hypocrisy is called statecraft, because it had a purpose. After the stand-off over the White Paper, the federal government could not amend the *Indian Act* without a political process of consultation, whereby, Cabinet agreed, implementation "should proceed only if the agreement of the Indians had been clearly signified."[288] Effectively, Indigenous leaders had a veto over the *Indian Act*, meaning that sex discrimination in status could not be amended either. This harmed Indigenous women and was rooted in patriarchy. But the veto over the *Indian Act* gave power to Indigenous leaders, in a context in which they were increasingly unafraid to use it. By arguing in the *Lavell* case that the *Indian Act* could not be amended without Indian consent because it enshrined treaty relationships, the NIB had quite blatantly opposed Indian women's equality rights. There was no escaping the optics. As Cardinal recalled, "[w]e realized when we decided to intervene that we would, of course, alienate the feminist movement .... It proved one hell of a mess to get into, because no matter what we did, everyone got mad at us."[289] This "one hell of a mess," and the alliances and positions generated by the *Lavell* case, made it possible for the federal government to depict Indigenous political power as rooted in sexism and patriarchy. This characterisation had not been possible before *Lavell*.

By bringing interveners into the case, the government set the stage for a newsworthy clash between male-led Indigenous groups demanding sovereignty and Indigenous and non-Indigenous women's groups demanding gender equality. The government seeded this oppositional dynamic through funding, but it quickly took root. The *Drybones* case had

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287 Sanders, "Act", *supra* note 150 at 414, n 57.

288 *Minutes*, 14 July 1972, *supra* note 213 at 6.

289 Cardinal, *Rebirth*, *supra* note 207 at 111.

framed the *Indian Act* problem as one of an Indian man's liberties being trampled by an unfair government. Once the feminist movement entered the arena, the target shifted from "the government that passes racist laws" (*Drybones*) to "the Indians that want sexist rules on status" (*Lavell*). Without minimizing the fact that some Indigenous leaders *did* want sexist rules on Indian status, it is essential to see what the government gained from the *Lavell* case. After the judgment and the ensuing outcry, the government was able to cast the problem in the *Indian Act* not as a problem of a law passed by Canada's Parliament and administered by its officers, but as a problem between opposed Indigenous constituencies. It was no longer 'citizens vs. the government', the equation of judicial review, but 'citizens vs. citizens'. The government heavily supported one side in that dispute and then used the dispute as proof that the real cause was not the government's law, but the division of opinion within Indigenous society.

Reframing the *Indian Act* problem as a conflict among different Indigenous factions, rather than a conflict between Indigenous polities and the Canadian state, reshaped the political landscape. Indigenous leaders refusing to amend the *Indian Act* without consultation and recognition of their inherent sovereignty could now be tarred as patriarchal obstructers of women's rights. These leaders did indeed block Indigenous women's equality rights, just as the Canadian government did. But an action that had once been pretext for Indigenous sovereignty turned into pretext for patriarchy. The government won in *Lavell*, but the important victory was not about the *Indian Act*. It was about pitting Indigenous people against one another and undercutting Indigenous political power.

CONCLUSION

Sex discrimination in the *Indian Act* was productive for the Canadian state. It helped jurists define and understand equality and non-discrimination. It nourished debate among jurists about parliamentary supremacy and individual rights, thus preparing the ground for an entrenched charter. It demonstrated that public opinion pressure could be a force in the court room, not just in Parliament and at the ballot box. In part because the dispute mobilized the Canadian women's movement, the government was able to transform a challenge against a discriminatory federal law into a dispute between different factions of Indigenous societies, thus justifying government inaction to solve the underlying discrimination and deflecting blame from the government onto Indigenous leaders.

Thus did the *Lavell* case allow the government to undermine the movement for Indigenous sovereignty.

Lavell and Bedard, however, still did not have Indian status.

In fact, Indigenous peoples gained little from the debate, litigation, and activism about sex discrimination in the *Indian Act* in the early 1970s. Instead, their concerns and their litigation tactics created a space for settler society to thrash out legal and political questions about equality and the proper relation between courts, the legislature, and the public. Canada has been built through the encounter with Indigenous resistance, but the role of Indigenous people in Canada's legal development is rarely foregrounded. Jeannette Lavell has been rightly hailed as a hero, but the lesson to be learned from her case is not that the Canadian legal system has been perfected by better reasoned judgments or better protected rights and freedoms. It is, rather, that she, like other Indigenous people, had her struggles for justice instrumentalized by the government, lawyers, and civil society actors in pursuit of an agenda about individual rights and judicial scrutiny of government action. The indisputable merits of Lavell's demand for equality and non-discrimination have been affirmed in courts, in award ceremonies, and in Parliament, but not yet fully acknowledged is that Canada's legal roads have been paved by Indigenous people demanding, and being denied, justice.

ANNEX: PROVISIONS

The *Canadian Bill of Rights* guarantees equality in section 1:

> 1 It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> (c) freedom of religion;
>
> (d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

The *Indian Act* 1951 regulated many things, including the consumption of alcohol by status Indians and the acquisition, transmission, or loss of status upon marriage. For the purposes of this article, the most relevant provisions are excerpted below. I have not excerpted the provisions on legitimate and illegitimate children, band membership, or enfranchisement.

> 12. (1) The following persons are not entitled to be registered, namely,
>
> (a) a person who
>
> (i) has received or has been allotted half-breed lands or money scrip,
>
> (ii) is a descendant of a person described in subparagraph (i),
>
> (iii) is enfranchised, or
>
> (iv) is a person born of a marriage entered into after the 4th day of September, 1951, 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 11, unless being a woman, that person is the wife or widow of a person described in section 11, and
>
> (b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

94. An Indian who

(a) has intoxicants in his possession,

(b) is intoxicated, or

(c) makes or manufactures intoxicants off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.