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Continuing Federal - Provincial Committee of
Officials Responsible for Human Rights

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Agenda Item: International Covenants on Human Rights and Optional Protocol to the International Covenant on Civil and Political Rights

CASE STUDY: An Illustration of Non-Compliance

"DISCRIMINATION AGAINST NATIVE WOMEN IN CANADA"

Submitted by

The New Brunswick Human Rights Commission

MEMORANDUM OF TRANSMITTAL

The purpose of having this Case Study prepared was in part, to provide a focus for discussion on Canada's implementation of the provisions of the International Human Rights Covenants where an instance of non-compliance might be identified.

With this case before the Continuing Federal-Provincial Committee of Officials Responsible for Human Rights, this committee might be able to determine its responsibility in facilitating the resolution of a case of non-compliance. What vehicle could be used to ensure that study is given to such a problem, a problem which touches directly Federal jurisdiction but which has many related social effects in the provinces where native people live?

One might consider the possibility of the Continuing Federal-Provincial Committee establishing a special 'ad hoc' sub-committee to study, and make recommendations, on particular instances of non-compliance such as illustrated in the present case study.

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Chairman
New Brunswick Human Rights Commission

THE UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS, AND DISCRIMINATION AGAINST WOMEN UNDER THE INDIAN ACT

A. COVENANT ON CIVIL AND POLITICAL RIGHTS

The Covenant[1] is divided into six "Parts" or sections. This paper will examine only those Parts which may be relevant to the question of bringing a violation of human rights caused by the Indian Act R.S.C. 1970, c. I-6, s. 12(1)(b)[2] to the attention of the proper authorities.

Part I of the Covenant states that all peoples have the right of self-determination, and that by this right, they must be allowed to "truly determine their political status and freely pursue their economic, social and cultural development" (Art. 1(1)). Part II deals with discrimination. It states that the rights to the Covenant must be recognized by the states who are parties to it "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other legal status" (Art. 2.1), and in addition, provides that parties to the Covenant must "ensure the equal right of men and women to the enjoyment of all civil and political rights set forth" in the Covenant (Art. 3). Part II also provides that each state must adopt legislative or other measures "in accordance with its constitutional processes" to guarantee the implementation of the provisions of the Covenant in

cases where these provisions are not already guaranteed (Art. 2.2) and that any person shall have an effective and enforceable legal remedy if their rights or freedoms are violated (Art. 2.3).

Part III of the Covenant enumerates the various rights and duties which the Covenant seeks to implement and enforce. They include the right to life (Art. 6), liberty and security of the person (Art. 9), freedom of movement and residence (Art. 12), freedom of thought, conscience, religion (Art. 18) and expression (Art. 19), the right of assembly (Art. 21) and association (Art. 22), the right to vote and participate in the conduct of public affairs (Art. 25), the right to privacy (Art. 17), and to recognition as a person before the law (Art. 16). The Covenant outlines rights of children (Art. 24), of those accused (Art. 10) and those convicted (Art. 15) of criminal offences, of aliens (Art. 13) and of the right to equality before the courts (Art. 14). The Covenant also establishes duties to abolish torture, cruel, inhuman and degrading punishment (Art. 7), slavery, servitude and forced labour (Art. 8), imprisonment on the ground of the inability to fulfil a contractual obligation (Art. 11) and propaganda directed toward war and discrimination (Art. 20).

Of particular concern to the discrimination problem encountered by Indian women are the rights concerning the family, the right to equal protection before the law, and the rights of minorities.

Art. 23(1) and (4) hold that:

> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> .....
>
> States parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution."

Under this heading it might be possible to argue that an Indian woman who is forced to refrain from marrying the spouse of her choice in order to retain rights under the Indian Act for herself and her children (which she would have had had she married an Indian) violates the duty of the state to protect the family unit. The equality of rights as to marriage may also be violated in such a situation, especially when considering this Article in light of Art. 3, which ensures the equal right of men and women to the enjoyment of all civil rights.

Art. 26 grants to all persons equality before the law and the right without any discrimination to equal protection before the law. Furthermore, it also guarantees that:

> "In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

By virtue of this Article, one could argue that a breach of the

right to equal protection before the law exists in the case of Indians who choose to marry non-Indians because the law prescribes something different for men (they retain their rights under the Indian Act) than for women (they lose their rights under the Act).

Art. 27 deals with the right of minorities, and establishes that in states where "ethnic, religious, or linguistic minorities exist, persons shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess their own religion, or to use their own language". On first glance, it might appear that this Article can be used as a defence against a charge of inequality; one might say, for example, that the loss of certain rights for women marrying outside their Indian culture is an attempt to protect both the Indian minority and its reservation lands from outsiders. The intent may be laudable, but one cannot condone the method of protection which has been devised in this instance because, again, it is done in a discriminatory manner which is clearly in contradiction to Art. 3 of the Covenant (equality of males and females). It is also a violation of Art. 2(1) and, as previously mentioned, of Art. 26. --In short, if the Indians, as a minority group, are to be protected, then the government must revise its method of protecting them. Parliament must adopt a formula for their protection that does not involve discrimination between males and females.

Part IV of the Covenant establishes the Human Rights Committee. It is the body whose duty it is to see to the implementation of the provisions of the Covenant (Art's 28-39). The Committee is composed of 18 elected members who are to be both nationals of the States Parties to the Covenant, and persons of high moral character and of recognized competence in the field of human rights. The Committee members are elected for a 4-year term according to a procedure outlined in Part IV, and they are to serve in their personal capacity - that is, they are not supposed to represent or reflect the views of their state, but rather they are to act as independent persons who have made a solemn declaration to perform their functions impartially and conscientiously.[3]

Part IV places an onus on States who have ratified or acceded to the Covenant to submit reports to the Committee. The reports must include a description of the measures they have adopted which give effect to the rights recognized in the Covenant, and the reports must outline any progress the States have made in bringing into effect the "enjoyment of those rights" (Art. 40(1)). The reports must also indicate "what factors and difficulties, if any" exist which have affected "the implementation of the present Covenant" (Art. 40(2)). Each State must make its first report within one year of the entry into force of the Covenant (in Canada's case, the report must have been made by

19 August 1977), and future reports must be forthcoming "whenever the Committee so requests" (Art. 40(1)(a)(b)).

All reports must be submitted to the Secretary-General of the United Nations who must then pass them on to the Human Rights Committee (Art. 40(2)). The Committee must then study the reports and return them to the States who have submitted them. The Committee can make "general comments" on the reports, and these comments, along with the reports, must be sent back to the States concerned (Art. 40(4)).

Other United Nations bodies may receive the reports submitted by States. The Committee can choose to forward its comments and copies of the reports it has received to the Economic and Social Council (ECOSOC) (Art. 40(4)) and, after consulting with the Secretary-General, he may "transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence" (Art. 40(3)). The Committee through ECOSOC, must also submit an annual report on its activities to the General Assembly of the UN (Art. 45).

As the Committee has been given no other power to act on the reports, ECOSOC and the General Assembly are left with the responsibility of deciding what further action, if any, must be done to enforce the provisions of the Covenant:[4]

> "The Covenant on Civil and Political Rights does not state what action the Economic and Social Council can or should take when the Committee trans-

> mits to it the reports of governments and its own comments. In introducing the text on behalf of the sponsors, the representative of Pakistan said that, once the Human Rights Committee had transmitted the reports with its comments, 'it would be up to the Council to take whatever action might be necessary and to consult whatever subsidiary organs it might wish, there was therefore no need for a specific provision to that effect.' The Covenant does not confer any additional powers on the Economic and Social Council. It stands to reason that in regard to the reports and comments of the Human Rights Committee under article 40(4) the Council can take any action which it is authorized to take under the Charter, no more and no less. Under article 44 the Council also receives the (general) annual report on the activities of the Human Rights Committee which submits it to the General Assembly through the Council. The action which the Council and the General Assembly may take in these cases is not spelt out in the Covenant and is clearly left to the discretion of the organ concerned...."

The Covenant and the Optional Protocol provide for three types of procedures which were intended to promote the implementation of the rights set out in the Covenant. The first procedure was the reporting system, which has already been examined. The second procedure consisted of the right of states to complain to the Committee about alleged breaches of other States in regard to the content of the Covenant. Unfortunately, this met with such a great deal of opposition that although it is contained in the Covenant itself (Arts. 41-43), it was decided

that States must declare themselves a party to this section of the Covenant. As of December 1976 only six states have declared themselves bound by this section of the Covenant, and hence it is not yet in force.[5]

The third procedure is outlined in the Optional Protocol. It gives the Committee the competence[6]

> "to receive and consider communications from individuals who claim to be victims of a violation by a state which is a party both to the Covenant and to the Protocol of any of the rights set forth in the Covenant. When dealing with communications from individuals the Committee's task is not to offer its good offices, but to forward its views to the state party concerned and to the individual (articles 1 and 5(4) of the Protocol)."

Before an individual can submit a written communication to the Committee for consideration, it must have "exhausted all domestic remedies" (Arts. 2 and 5(2)(b), Optional Protocol). Furthermore, the Committee will reject any communications which are anonymous or which are considered to be "an abuse of the rights of submission of such communications" or which deal with matters that are not compatible with the provisions of the Covenant (Art. 3).[7]

If a submission is not rejected, the Committee will bring the communication to the attention of the State against whom the violation has been alleged (Art. 4(1)). The onus then shifts to the State to look into the situation and to attempt to

remedy any problem that might exist. The State has six months to submit in writing "explanations or statements clarifying the matter and the remedy, if any," to the Committee (Art. 4(2)).

Once the State has replied, the Committee must consider the matter "in the light of all written information made available to it by the individual and by the State Party concerned" (Art. 5(1)). This shall be done in closed meetings (Art. 5(3)), but the Committee must forward its views to both the State and the individual concerned (Art. 5(4)).

As an inducement to encourage States to correct any violations under the Covenant which have come to the Committee's attention through the petitions of individuals, the Committee must include, in its annual report to ECOSOC, "a summary of its activities under the Protocol" (Art. 6). Publication of this sort, added to the fact that the individual will receive a copy of the views of the Committee concerning his complaint is the method by which a State is to be encouraged to implement sections of the Covenant to which it has failed to adhere. The mode of implementation, therefore, is conciliatory, and it is intended that a publication of violations will act as the encouragement to force a State to implement the Covenant. Political pressure by way of sanctions, etc. can only result from decisions made later on by either ECOSOC or the General Assembly.

B. INTERNATIONAL LAW AND A CLAIM BY INDIAN WOMEN

After obtaining the consent of all the Provincial governments, Canada, on 19 May 1976, acceded to three United Nations documents: The International Covenant on Economics, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights. The three documents have been in force for Canada as of 19 August 1976 and their effect upon the nation, to quote a Department of External Affairs publication,[8] is that:

> "By acceding, Canada is legally obliged to maintain certain specified standards of human rights, as enumerated in the documents, and to report periodically on its compliance to the Economic and Social Council or to the Human Rights Committee (this is a new monitoring body established under the Covenant on Civil and Political Rights). In addition, accession to the Optional Protocol enables individuals to draw to the Committee's attention allegations that they have been victims of violations of the Covenant in Canada."

The practical significance of Canada's ratification of the three human rights documents remains to be seen. At the present time it is doubtful that anyone is aware of how the contents of the two Covenants will be interpreted, of the types of complaints which will be acted upon, or of the extent of the effect of the powers which exist with respect to the enforcement

of the Covenants. All one can say with any degree of certainty is that the international community of states, by and in large, (1) has never believed that human rights ought to be something which extends beyond the jurisdiction and control of the governments of individual states, and (2) that the right of an individual to petition an international organization to look into alleged breaches of human rights is itself, a flagrant violation of state sovereignty, which is the whole basis of International Law and of the United Nations Organization. Indeed, the reason why provisions for implementing human rights do not appear in the Charter of the United Nations and why the United Nations Declaration of Human Rights is only a Resolution of the General Assembly and not a legally binding treaty can be traced primarily to the refusal of states to give up their sovereign powers of absolute control over the people residing in their territory by placing human rights before the scrutiny of the international community.[9] One need only examine the fact that it took almost ten years before enough countries ratified the two Covenants (a minimum of 35 state accessions were required) and the Optional Protocol (10 accessions were required) in order to bring them into force to see that, even today, very few states are willing to allow the United Nations to peer into their conduct of, and the control they exert over, the people within their jurisdiction.[10]

Because the majority of states are still hesitant about obligating themselves to the authority of an international covenant on human rights, it would not be surprising to see that, for the first few years at least, only themost blatant violations of human rights will gain the critical attention of either the Human Rights Committee, ECOSOC, of the General Assembly of the United Nations.

When considering whether a complaint will attract a positive response from the Council or the Committee, one must also remember that "human rights" mean different things to different peoples. For example, most of the new members of the United Nations within the last few years have been the developing countries, and their primary concerns (as well as the concerns of their people) are with rights of a very fundamental nature. "For them, the right to food, shelter, education and medical care [is] more important than the traditional civil and political rights treasured by the West."[11] It would be interesting to see the reactions of these governments, which are mostly authoritarian in charter, to a complaint made by Canadian Indians regarding sexual discrimination in regard to housing on Indian reserves. - This is not an implication that the latter problem is not a serious one; it is merely used as an example to illustrate the disparity between what "human rights" mean to different people in different situations and to show the types of problems which the Human Rights Committee will have to face and decide to act upon.

Another problem to be considered is whether a complaint to the Committee - especially one brought by an individual under the Optional Protocol to the Covenant on Civil and Political Rights - will be deemed to fall within the scope of the rights which it is intended that the Committee protect. A great deal of the Canadian academic speculation on the matter of discrimination as to sex under the Indian Act indicates that an application will be rejected on the international level, as it has been rejected on the national level.[12]

However, this speculation is highly tenuous. It is based on a very meagre amount of information, and could be overturned in fact. A well-informed guess could only be made if one were to embark upon a major programme of research to establish how the various rights which have been outlined for protection will be interpreted. This would necessitate an examination of all the human rights resolutions and treaties presently in existence on the international level and in the major domestic jurisdictions of the world. On the international level, meetings which were held to negotiate the actual phraseology of each right would have to be examined in order to discover the intent of the draftsmen of the rights, and any case law and opinions on the matter would have to be examined. - Unfortunately, this is not an undertaking which can be made for the purposes of the present report.

To end on a more optimistic note, it is respectfully submitted that an Indian woman complaining to the United Nations of sexual discrimination under the Indian Act may have a surprisingly sympathetic audience. The problem of sex-based discrimination is something in which the United Nations has always taken an interest, and it has done a great deal of work in an attempt to combat it.[13]

FOOTNOTES

1. The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant on Civil and Political Rights have been reprinted in (1967), 6 I.L.M., pp. 360-385. All references to Article numbers, and all quotations from Articles stem from this source.

2. R.S.C. 1970, c. I-6, 2.12(1):
"The following persons are not entitled to be registered, namely:
(a) a women who married a person who is not an Indian, unless that women is subsequently the wife or widow of a person described in section 11."
- If a person is not entitled to "register", their name is either not allowed to be placed on, or else is deleted from, the Indian Register. When this occurs, the individual is either refused status as an Indian, or else she loses her status as an Indian, as the case may be. When people lose their Indian status, they lose all rights granted to them under the Indian Act.

3. Canada has been honoured in that in the first election to the Human Rights Committee, one of the 18 members chosen for the Committee was a Canadian - Professor Walter S. Tarnopolsky of Osgoode Hall Law School.

4. Egon Schwebb, "The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol", (1977), 12 Texas Int. L.J., 141 at 160.

5. Id., at 180. Before it becomes operational, ten states must declare their intention to be bound by this second procedure (Art. 41(2)).

6. Id., at 154.

7. The Committee will also reject any matter that is "being examined under another procedure of international investigation or settlement (Art. 5(2)(a)). -This proviso may apply to a petition sent in by an individual from Canada, for it is possible that the same matter may have been placed before ECOSOC by virtue of a State report in compliance with the Covenant on Social, Economic and Cultural Rights. In regard to the question of discrimination between men and women, Art. 2(2) of the Social, Economic and Cultural Rights Covenant corresponds with Art. 2(1) of the Civil and Political Rights Covenant, and Art. 3 of both Covenants are the same. Art. 10 of the Social, Economic and Cultural Rights Covenant refers to the recognition and protection of the family, as does Art. 23(1) of the Civil and Political Rights Covenant.

8. Department of External Affairs, Annual Review: 1976, 38.

9. The international community is in the rather novel position of having the Optional Protocol operative while at the same time, a section within the Covenant (Art. 41, dealing with the right of interstate complaints) is not operative. Therefore, it appears that States have chosen to permit the right of individual petition to exist, but not the right of interstate petition to exist. This is particularly interesting in light of historical fact:

> The inclusion of the provisions on the right of petition (communication) in a separate Protocol and not in the body of the Covenant, was due to the fact that some states, particularly the U.S.S.R. and its allies, are strongly opposed to the very idea of an individual's locus standi in international proceedings. The insertion in the Covenant of the provision, even though it would have been of an optional character, would have implied the recognition of the principle of the permissibility of the right of petition by all states which would be voting for, signing, ratifying or acceding to, the Covenant, including states which would have decided not to accept the right of petition as far as they themselves are concerned. The drafting of a separate Protocol made it possible to achieve the unanimous adoption of the Covenant and the adoption of the Protocol by a very great majority, against only two votes, albeit with a large number of abstentions. It should be added, however, that the Racial Discrimination Convention had been unanimously adopted the year before (in 1965) in spite of the fact that it provides for the (optional) right of petition.
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> - Egon Schwebb, supra, n. 4 at 179.

10. By 1 January 1977, 42 States had ratified the Covenant on Economic, Social and Cultural Rights, 40 States had become parties to the Covenant on Civil and Political Rights, and 15 States had ratified the Optional Protocol. James Frederick Green, "Changing Approaches to Human Rights: The United Nations, 1954 to 1974" (1977), 12 Texas Int. L.J., 223 at 227, footnote 14.

11. Id., at 228-229. See also Niall MacDermot, "The Credibility Gap in Human Rights" (1976-77), 3 Dal. L.J. 262-274.

12. The man who appears to have a virtual monopoly on commenting about Canadian Indians and their possible remedies at International Law is L.C. Green of the University of Alberta;s Department of Political Science. See the following articles written by him: "Canada;s Indians: Federal Policy, International and Constitutional Law" (1970-71), 4 Ottawa L.R.

101-131; "The Canadian Bill of Rights, Indian Rights, and the United Nations" (1974), 22 Chitty's L.J. 22-28; "Tribal Rights and Equal Rights" (1974) 22 Chitty's L.J. 97-101; "North America's Indians and the Trusteeship Concept" (1975), 4 Anglo-Amer. L.R. 137-162; "Trusteeship and Canada's Indians" (1976-77), 3 Dal. L.J. 104-135.

13. See, for example, Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chan, "Human Rights for Women and World Public Order: The Outlawing of Sex-based Discrimination" (1975), 69 A.S.I.L. 497-533.