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# BOOMERANG OR BACKFIRE? HAVE WE BEEN TELLING THE WRONG STORY ABOUT LOVELACE V. CANADA AND THE EFFECTIVENESS OF THE ICCPR?

ANDREW M. ROBINSON \*

What effect, if any, do international human rights treaties have on domestic policy – and further – how would we know? This article seeks to begin to answer these questions by introducing a methodology to assess the impact of international human rights treaties on domestic policy. The article illustrates the efficacy of this methodology through a case study concerning the International Covenant on Civil and Political Rights (ICCPR) and, more specifically, the Human Rights Committee's (HRC) view in *Lovelace v. Canada*. (UN 1981) *Lovelace* concerned sexually discriminatory rules in Canada's Indian Act governing marriage and access to Indian status.

In assessing the impact of *Lovelace* upon Canadian public policy, I consider two possible narratives. One popular, if not universally accepted, narrative basically reflects Keck and Sikkink's boomerang pattern, by which nongovernmental actors leverage political change at home by utilizing international actors and organizations to put pressure on their government. (1998: 12-13) According to this narrative, *Lovelace* "... led to legislative change by the Canadian Parliament", (Kaufman and Roberge 2003: 10) which removed sexually discriminatory sections from the Indian Act in 1985. This story has been repeated by the federal government,<sup>1</sup> legal commentators, (Moss 1989-1990: 294; McKay-Panos 2003); aboriginal scholars (Boldt and Long 1985: 173) and non-governmental organizations. (MADRE 2005) Stories such as this, which present Canada as complying with the views of international human rights bodies, contribute to the credibility of Canada's foreign policy of promoting human rights internationally. (DFAIT 2005)<sup>2</sup> In contrast to the boomerang pattern, a second narrative, which I will call the "backfire", presents the efforts of nongovernmental actors as having effects quite different from, even the opposite of, what they had intended. This narrative presents the federal government as using *Lovelace* to weaken the position of domestic aboriginal organizations to achieve its own objectives.

Thus, by applying the methodology advanced in this article, we discover that the impact of *Lovelace* on Canadian domestic politics was more complex, and paradoxical, than is generally understood. On the one hand, we find that the boomerang pattern narrative which suggests that *Lovelace* led to the 1985 amendments to the Indian Act cannot be supported. On the other hand, something in the nature of a backfire does appear to have occurred. We observe that the federal

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<sup>1</sup> In 1990, a Canadian representative told the HRC "... his Government believed that it had taken effective action in integrating into domestic policy the views that the Committee had adopted under the Optional Protocol. A prime example had been the Government's response to the views of the Committee in the *Lovelace* case." (UN 1990: para. 38)

<sup>2</sup> This connection is reflected in the language of a (no longer extant) description of "The Canadian Approach" on a Department of Foreign Affairs website: "... Canada does not expect other governments to respect standards which it does not apply to itself". (Cited in Norman 2001: n. 1)

government appears to have used a clever strategy to exploit weaknesses in the ICCPR's compliance system to help it achieve a policy outcome that it had been seeking for some time. In considering why this strategy succeeded, lessons are drawn about the importance of transparency and publicity for human rights treaty systems.

This article, then, should be of interest to readers for any or all of the following reasons: as a description and application of its methodology (sections 1 and 2); as a challenge to reconsider the impact of *Lovelace* (section 2); and finally, as a lesson in how boomerangs can backfire and how this might be avoided. (section 3).

## **ASSESSING THE EFFECTIVENESS OF HUMAN RIGHTS TREATIES**

This paper employs a multilevel governance framework to assess whether a treaty has had a determinative effect on domestic public policy. While it is true that many objectives are associated with international human rights treaties – encouraging education, information transfer, shifts in legal and political consciousness, individual responsibility, and behaviour change<sup>3</sup> – I chose to focus on determinative effects on public policy for three reasons.

1. While a treaty may have many domestic effects, determinative effects are most likely to be open to observation and analysis.
2. Determinative effects are clearly linked to the enhancement of individuals' enjoyment of human rights.
3. As the case study illustrates, by seeking determinative effects, we are likely to gain insight into other important effects as well as the processes by which human rights treaties influence domestic policy.

Given our focus on determinative effects, the multilevel governance framework has much to recommend it. As an approach to understanding supranational governance, it assumes "... that authority and policy making influence is shared across subnational, national and supranational levels". (O'Brien 2002) It is attractive because it requires us to focus on vertical relations between domestic political systems and the ICCPR system, and to ask empirical questions about effectiveness. Effectiveness, of course, has to be operationalized: effectiveness in terms of what? I take my cue from Brown (2002) when he writes: "The fact of multilevel governance exists. The more important question may be what difference does it make? Do policy outcomes differ from those that would be made by national governments acting without supranational governance...?" I like this formulation because it focuses attention on what we are interested in – effects on domestic policy – while avoiding debates about whether such effects constitute limitations on national sovereignty. One thing I would add to Brown's formulation is that we also want to know whether the difference in policy outcomes was positive, in the sense that domestic policy became more consistent with the aims of the treaty, or negative, in the sense that it became less consistent.

To make this assessment, I have developed an analytical methodology based upon the work of Ronald B. Mitchell. Mitchell's methodology has to be adapted, as he is concerned with assessing the effectiveness of environmental treaties in addressing intentional oil pollution at sea and his work is situated within a global governance framework, which, as O'Brien notes, differs from multilevel governance by focusing on horizontal relations between international regimes, multinational corporations, and international civil society at the system level. This said, his work provides a useful analytical approach and, perhaps more importantly, a rich analytical language

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<sup>3</sup> I thank one of the anonymous reviewers for noting these alternative objectives.

for assessing the effects of international treaties. Of particular value is the distinction he draws between compliance as "... an actor's behaviour that conforms to a treaty's explicit rules" and treaty-induced compliance as a subset of compliant behaviour, which refers to "... behaviour that conforms with such rules *because of* the treaty's compliance system". (1996: 5, emphasis in original) This reminds us that the mere fact of a positive policy change does not necessarily demonstrate that a treaty has been effective.

To operationalize this distinction, I follow Mitchell by assuming that treaties do not affect policy outcomes, and designing my analysis so as to identify "... empirical evidence ... of the type needed to falsify this assumption". (1994: 18) A successful falsification must contain three elements: a correlation between the requirements of a treaty and subsequent compliant state behaviour; evidence that demonstrates how the treaty "... could have led to the observed change in behavior"; and a demonstration "... that the treaty rule, rather than other factors, caused the chain of events involved". The final element requires consideration of rival explanations and the effect of exogenous factors. (1994: 22-23) Only where all three elements can be established can we conclude that a treaty has had a determinative effect (that is, it was effective). While it might be nice to translate these elements into a step-by-step process that could be applied in all cases, this does not appear possible. Rather, as I illustrate in the next section, the elements must be tailored to fit the nature of each particular case.

### **CASE-STUDY: THE ICCPR AND LOVELACE V. CANADA**

In this section I do two things. First, I apply the three elements of Mitchell's general analysis to consider whether *Lovelace* had a determinative effect on Canadian public policy. Second, in the process, I continue adapting Mitchell's methodology for application to the ICCPR, drawing only upon those aspects of his methodology and of the ICCPR treaty-monitoring system that are relevant to addressing this question.

#### **Correlation Between Treaty and Compliant Behaviour**

The first step in any attempt to falsify the assumption that a treaty has had no effect on public policy is to identify policy changes that constitute *prima facie* examples of the treaty having had an effect. As Manzer has observed, there are a number of places one can look for evidence of such changes in the Canadian case: "... judicial protection of rights in the common law; legislative protection of rights in public statutes; and entrenchment of rights in the constitution". (1988: 35)

The basic facts regarding *Lovelace* provide such *prima facie* evidence. Sandra Lovelace was born and raised a status Indian on the Tobique reserve in New Brunswick. Having married, and subsequently divorced, a man who was not a status Indian in 1970, she lost her Indian status under Indian Act section 12(1)(b). This section had a discriminatory effect: if a status Indian man married a woman who did not have Indian status, he retained his status and his wife and any subsequent children acquired it; if a status Indian woman married a man who did not have status, however, she lost her status and could not pass it onto her children. Further, as only status Indians could reside permanently on reserve as a matter of right, Ms. Lovelace lost this as well.

Canada ratified the ICCPR in 1976. In December of 1977 Ms. Lovelace communicated her claim to the HRC that section 12(1)(b) violated a number of rights under the ICCPR. In 1981 the HRC issued its view that section 12(1)(b) violated ICCPR Article 27 rights of persons belonging to ethnic, religious or linguistic minorities. While I will discuss the substance of the HRC's view in more depth below, the key point was that it said that denying Ms. Lovelace

Indian status, and thus the right to reside on her home reserve, was unjustified because it was not "... reasonable, or necessary to preserve the identity of the tribe". (*Lovelace*, para. 17) In 1985 Canada enacted Bill C-31, which, among other things, amended the Indian Act by repealing and replacing section 12(1)(b). As Bill C-31 was enacted four years after the publication of *Lovelace*, this appears to represent the ICCPR having affected Canadian public policy.

### **Evidence That the Treaty Could Have Been Responsible**

The second element in a falsification of the assumption that a treaty had no effect is evidence that the treaty could have been responsible for the policy change. If no causal connection can be established, then we cannot rule out the possibility that the change was coincidental. To consider how to demonstrate such a connection I draw upon Mitchell's analysis of the causes of compliance and noncompliance, including his model of the treaty compliance system.

To argue that a treaty caused a policy change, we need a theory of how treaties generate compliance. This presupposes assumptions about the causes of non-compliance. Mitchell suggests three:

- preference, where a state ratifies a treaty, has the capacity to comply, but chooses not to;
- incapacity, where a state is willing to comply, but does not because it lacks the administrative, financial, technological, or other means to do so; and
- inadvertence, where a state takes "... actions sincerely intended and expected to achieve compliance but nonetheless fail[s] to meet treaty standards." (1996: 13)

Given this account of non-compliance, treaties are assumed to generate compliance in one of two ways: through positive inducements designed to address incapacity and inadvertence by providing financial incentives, technology transfers, or education to "... clarify treaty requirements and identify strategies for compliance"; or negative sanctions, the threat or use of which is intended to "... make the expected costs of violation exceed those of compliance". (Mitchell 1996: 14) Where a treaty has not been a factor in removing such impediments to compliance, we must resist the conclusion that it affected public policy.<sup>4</sup>

This raises a further question: where should we look for evidence that a treaty has helped remove an impediment? Mitchell's answer is found in his model of how treaties can affect domestic policy: the compliance system. A compliance system is "... that subset of the treaty's rules and procedures that influence the compliance level of a given rule". Mitchell divides the compliance system into three parts: the primary rule system, the compliance information system, and the non-compliance response system. The compliance system is crucial since, as Mitchell notes, "... these three systems provide a framework for identifying the source of such variance in inducing compliance". (1996: 17) Before turning to *Lovelace*, we must consider the meaning of each part of the compliance system in general and as it applies to the ICCPR.

The primary rule system "... consists of the actors, rules and processes related to the behaviour that is the substantive target of the regime". It is reflected in the definition of the

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<sup>4</sup> As described in this paragraph, this methodology may appear to treat the state as a coherent and unified actor. (I thank one of the anonymous reviewers for pointing this out.) Whether this is Mitchell's intention or not, it is certainly not mine. Nothing about this methodology precludes incorporating analytical models that disaggregate the state (e.g., Coleman and Skogstad 1990) where this is required to make sense of the facts in the case. This might be necessitated, for example, where a state's noncompliance is due to a preference or incapacity arising out of internal conflicts – between, for example, different departments, branches, or federal levels of government. It just so happens that the federal government's position concerning the issues raised by *Lovelace* shows such consistency – across both Liberal and Progressive Conservative governments and between political and bureaucratic actors – that no such disaggregation is necessitated.

problem, the choice of solution, and the institutions that will be put in place to achieve the solution. This, in turn, determines who and which activities will be regulated, the changes in behaviour that will be required, the cost of such changes, the exogenous factors that will come into play, the degree of transparency of the overall system, and the degree of specificity in requirements. (Mitchell 1996: 17-19) The ICCPR's primary rule system designates states party to the treaty as the actors to be regulated. Its rules include a list of civil and political rights which states are expected to respect in their relations with persons within their jurisdiction. The ICCPR's chief solution to human rights violations is to place primary responsibility on states to "... adopt such legislative or other measures as may be necessary to give effect to the rights recognized in [the ICCPR]" and to provide remedies to any person whose rights or freedoms have been violated (Article 2).

The compliance information system "... consists of the actors, rules and processes that collect, analyze and disseminate information regarding the instances of, and parties responsible for, violations and compliance". (Mitchell 1996: 17) The more it maximizes transparency, the more it contributes to inducing compliance. "Transparency refers to both the amount and quality of the information collected on compliance or non-compliance by the regulated actors as well as the degree of analysis and dissemination." A key assumption is that for actors to be influenced by the non-compliance response system, they "... must know that their choices will not go unnoticed". (19) The central actor in the ICCPR's compliance information system is the HRC, and the information system that concerns us is provided by the ICCPR's First Optional Protocol (OP). The OP allows the HRC to "... receive and consider communications from individuals who claim to be victims of [ICCPR rights] violations by that State Party" (Article 1). After considering written submissions from state and communicant the HRC issues its opinion as to whether a violation has occurred. While the legal status of these views is uncertain, the HRC has used them to propose remedies for violations including compensation, the release of a prisoner, and changes in legislation. (Joseph, Schulz, and Castans 2000: 14) One way that this system could help induce compliance is that by finding a violation, the HRC could remove from a state "... the excuse of inadvertence and misinterpretation." (Mitchell 1996: 19)

The non-compliance response system "... consists of the actors, rules, and processes governing the formal and informal responses undertaken to induce those identified as in non-compliance to comply". Possibilities include providing positive inducements such as funds, information, or technology and enforcing negative sanctions. (Mitchell 1996: 17, 20-23) Human rights treaties are notoriously weak in this regard. Unlike trade agreements that can authorize economic sanctions to punish violators and environmental agreements that can be enforced through specific reciprocity - "... promising to comply if others comply and threatening to violate if others violate" (Mitchell 1996: 16) - the ICCPR provides no strong means of enforcement.

This does not mean that the non-compliance response systems of human rights treaties cannot induce compliance; few international organizations have the power to enforce their rules without the cooperation of states or civil society actors. As Oran Young argues, compliance is possible without enforcement and, where enforcement is required, it is not necessary that international organizations acquire the powers traditionally associated with governments to carry it out. (Young 1999: Chapter 4) The primary way the HRC may induce compliance is by influencing public opinion, both domestic and international. To acknowledge this, however, we must modify, or at least clarify, Mitchell's methodology. Mitchell says that compliant behaviour should not be treated as treaty-induced where the treaty "... provides international legitimacy

which increases domestic political support enough to enable the government to implement a desired but otherwise unattainable policy”, or where the state acts out of fear of “adverse public opinion, domestically or internationally”. (1996: 7-8) Clearly, if this was applied to human rights treaties few, if any, would be found to be effective. I believe this can be addressed without sacrificing analytical rigour by focusing on the origin of changes in political support and public opinion. If changes that alter a state’s preference or enable it to overcome its incapacity have their origin in a treaty’s compliance system, this should be considered treaty-induced; if the origin lies elsewhere, then it should not.

This discussion draws our attention to the fact that dissemination is the weakest aspect of the ICCPR’s compliance system. Many of the HRC’s hearings and deliberations are conducted behind closed doors and its main reporting requirement is the submission of an annual report to the United Nations General Assembly through the Economic and Social Council. (ICCPR Article 45) While the HRC has published representative collections of its views in response to communications under the OP, and most of its other views are accessible on the Internet, dissemination has not been the HRC’s strong suit.

Returning to the impact of *Lovelace*, the Canadian government itself suggested that there was a connection between Bill C-31 and the ICCPR’s compliance information system. For instance, when C-31 was introduced in the House of Commons, then-Secretary of State for External Affairs, Joe Clark, (1985) reminded his listeners of the HRC’s view and said, “... by having the House adopt this Bill, Canada will meet its obligations and eliminate that discrimination”.

### **Evaluation of Rival Explanations**

So far, the evidence supports the first two of the three elements required to falsify the assumption that Bill C-31 did not represent *Lovelace* having a positive determinative effect on Canadian policy. We must now consider the third, and most complex, element: the evaluation of rival explanations. As Mitchell suggests, this requires seeking evidence to rule out the possibility that the state would have acted as it did “... even absent positive inducements or negative sanctions”. (1996: 9) In other words, we must be careful to “... avoid attributing causation to [treaty] rules in cases in which other factors are responsible for changes in compliance”. (Mitchell 1994: 66)

As regards human rights treaties, the most relevant rival explanations concern what Mitchell calls compliance as independent self-interest. This generally occurs either where treaty rules are “... brought in line with existing or intended future behaviours, and not vice versa” or where the state’s motivation to comply is derived from factors outside the compliance system. Where either cause can be established, we cannot call a policy change treaty-induced compliance. (1996: 7-9) With respect to *Lovelace*, the most important rival explanation is that the federal government was going to arrive at the policy represented in Bill C-31 irrespective of Ms. Lovelace’s communication. We will assess this rival explanation by asking four questions, any of which, if answered in the affirmative, would falsify the assumption that *Lovelace* had no effect on the policy outcome. These are: Did *Lovelace* put Indian Act section 12(1)(b) on the political agenda? Did *Lovelace* change the federal government’s position? Did *Lovelace* affect the timing of the outcome? Did *Lovelace* influence the shape of the policy?

**Did *Lovelace* put Indian Act section 12(1)(b) on the political agenda?** *Lovelace* did not put Indian Act section 12(1)(b) on the political agenda; it had been there long before Ms. Lovelace sent her communication in 1977. In August 1968 a federal minister had raised the issue with Indian leaders; (*The Globe and Mail* 1968) in almost every session of Parliament from 1969

to 1979 a private member's bill had been introduced calling for the section's repeal; the 1970 report of the Royal Commission on the Status of Women had called for the section's repeal (Jamieson 1978: 80); and a 1971 government discussion paper on the Indian Act had presented options for addressing the issue. (Canada 1971)<sup>5</sup> The event that had the greatest effect, however, was the decision of Jeannette Lavell to challenge her loss of status under the section as a violation of the sexual equality provisions in the 1960 Canadian Bill of Rights. After Lavell won at the Federal Court of Appeal in October 1971, section 12(1)(b) had become a national issue.

**Did Lovelace change the federal government's position?** *Lovelace* did not change the federal government's position on the issue; its position appears to have been fairly consistent since at least 1974. To properly understand this position, we must examine the competing pressures the government faced from key players in what we might call the Indian-status policy community.

A good place to start is with the federal government's response to the Federal Court of Appeal's decision in *Lavell*. Had the government chosen not to appeal this decision, the issue might have been settled in 1971. As it turned out, the Supreme Court overturned *Lavell*, thus reinstating the *status quo*. After deciding to launch the appeal, the Justice Minister offered this justification in the Commons:

This is a very important case, Mr. Speaker. It is important with respect to women's rights and the status of women upon marriage; it is an important case with respect to Indians as a group and as a people; and it is an important case because it places a further interpretation on the application of the Canadian Bill of Rights with regard to the concept of 'equality before the law.' (Turner 1971)

Reflected in this statement are key actors and issues in the Indian-status policy community: women and sexual discrimination; Indians and aboriginal rights; and as originator of both the Indian Act and the Canadian Bill of Rights, the federal government. To understand the federal position requires considering these actors, their positions, and their relative strength.

The women's position was promoted by various native and non-native women's groups. These groups had very different stakes in the issue. Non-native women's groups, such as the Advisory Council on the Status of Women and the National Action Committee on the Status of Women, defined their demands for repeal of the section primarily in terms of sexual equality. (Bell 1973; Hosek in Canada 1985: 5) The main group representing non-status Indian women in the 1970s, Indian Rights for Indian Women (IRIW), had been formed by women who supported Lavell in her court case. As its name indicates, IRIW viewed the issue as a matter of fair access to Indian status and rights. This perspective is reflected in Lavell's characterization of her "... battle as more a question of human rights, than of women's rights. 'We are not even asking for equality with Indian men,' she said. ... 'Everyone should be legally an Indian, if they are an Indian. If they are white, they should be white'." (Platiel 1973) Finally, the Native Women's Association of Canada [NWAC], the major status Indian women's group, appears to have felt the pull of both sexual equality and Indian self-determination. Its position is illustrated by Marlene Pierre-Aggamaway: "... When I was the president of [NWAC], I was criticized by some for the stand I took, which was that Section 12(1)(b) must be removed from the Indian Act, but there is something more integral to our survival, and that is the entrenchment of aboriginal and treaty rights in the constitution." (1983: 68) Despite their differences, all the groups desired the removal of sexual discrimination from the Indian Act. Their influence is suggested by the

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<sup>5</sup> While no author is attributed to the document, the Minister of Indian Affairs acknowledged that his Department had published it. (Chrétien 1973: 8665)



decision of Noel Starblanket, president of the National Indian Brotherhood, to urge provincial Indian organizations to take public stands on the issue because "... so much pressure was being applied to the federal government by women's groups that if Indian organizations did not make their position known soon, 'the government will attempt to force one on us'." (White 1978)

Most status Indian organizations, led by the national umbrella group the National Indian Brotherhood (NIB), defined the issue in terms of aboriginal and treaty rights. This is understandable; twice since 1969 Indians had faced the prospect that the Indian Act, and with it Indian status, might be eliminated without their consent. In 1969 the federal government had issued a white paper that had proposed repealing the Indian Act and removing all references to Indians from the Constitution. (DIAND 1969) In 1971 the *Lavell* case had raised the possibility that the courts might interpret the Canadian Bill of Rights to invalidate the Indian Act. (Whyte 1974: 29) In this context, the NIB had developed a nuanced position; while it was in favour of eliminating sexual discrimination from the Indian Act, it opposed unilateral federal action. This position was supported by a number of reinforcing arguments.<sup>6</sup> First, the NIB was opposed in principle to the federal government amending the Indian Act on any matter without first consulting and receiving the approval of Indians. The NIB won an important victory on this front in February 1975 when the federal cabinet agreed not to introduce any changes to the Indian Act without first having them "... cleared through a joint meeting of the National Indian Brotherhood executive council and the cabinet committee especially set up to meet with the Brotherhood council." (Cardinal 1979: 49) Second, many Indian bands claimed the power to determine their membership as an aboriginal right. (Platiel 1971) Third, since at least 1973 the NIB had rejected what it called "... a piecemeal approach to revision of the membership sections," (Sanders 1974: 414) calling instead for the removal of all forms of discrimination from the Indian Act. Fourth, and perhaps most importantly, the status Indian leadership feared that if the federal government were allowed to deal with sexual discrimination first, it would lose interest and never get around to revising the Indian Act in ways important to Indians. (David Ahenakew in Canada 1982: Issue 1: 66-7) While, in retrospect, this position appears to have been based on legitimate concerns, it did not serve status Indian organizations well in the court of public opinion; it was criticized in some quarters as a strategy of holding Indian women hostage or using them as pawns, by attempting to leverage the federal government's embarrassment over section 12(1)(b) to get attention paid to other demands. (Hurst 1978; *Winnipeg Free Press* 1980)

The other major player in this policy community was the federal government, as represented primarily by the cabinet. The government's explicitly acknowledged position seems to have been intended to portray it as an honest broker; while its declared policy since 1974, (Munro 1974: 187) and repeated by every Minister of Indian Affairs thereafter, was to end the sexual discrimination, it also claimed an inability to act because of its commitment to consult with Indian organizations. This argument was invoked, for example, by the Minister of Justice in 1977 to defend the government's decision to exempt the Indian Act from the application of the new Canadian Human Rights Act: "... making the discrimination illegal under the human rights bill would be seen as unilateral government action interfering with the Indians. ... and could hurt consultations with the National Indian Brotherhood. ... Indians must eliminate the discrimination themselves through consultation on reform of the Indian Act." (*Winnipeg Free Press* 1977)

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<sup>6</sup> Other reasons, not so easily reconcilable with repeal of section 12(1)(b), included fears that the return of women and their children who had lived off reserve for a long time would undermine cultural traditions and further dilute already meagre resources available for housing and services.

Two additional factors also appear to have influenced the government's position, but were not acknowledged so explicitly. One was the financial implication. Money was involved because any change to the rules that would increase the number of status Indians would increase the cost of providing benefits to status Indians. And further, since Indian status and band membership overlapped at the time, Indians who regained their status would also regain the right to reside on reserve, potentially increasing federal obligations to provide housing and other benefits only available to on-reserve Indians. Thus, as Sally Weaver noted "... when the government began to examine seriously the options for changing the legislation, the overriding fiscal policies in Ottawa were recasting the issue from one of principle to one of pragmatic financing". (1983: 75-6) There is abundant evidence to support the suggestion that financial and demographic implications were always key factors when the government considered this matter.<sup>7</sup>

The other factor that appears to have influenced the government's position is that the obvious' solution – simple repeal of the section – was not practical. Section 12(1)(b), as was noted by learned commentators, was only one part of the complex set of rules that constituted the Indian status and band membership system in Canada; (Sanders in Canada 1982: 5: 17; Fleming in Canada 1982: 2: 87-95) for instance, reinstating Indian women who had lost their status raised further questions concerning the rights and status of the non-Indian spouse, of the children resulting from the mixed-marriage, and of subsequent generations who, of course, might themselves marry people with or without status. Thus, any serious attempt to repeal the section would require rethinking the entire status and band membership system.

In sum, the government's position was basically fixed before Ms. Lovelace sent her communication. It wanted to respond to women's groups and remove a source of acute embarrassment, but its willingness to amend the Indian Act was constrained by concerns about cost, complexity, and opposition from status Indian organizations.

**Did Lovelace Affect the Timing of the Outcome?** Even if *Lovelace* did not put Indian Act section 12(1)(b) on the agenda and it did not change the federal government's position, it may still have had an effect by affecting the timing of the policy change: that is, the change may have occurred sooner than it would have otherwise. To understand this possibility, we must consider a further aspect of the Indian-status policy community that appears to have contributed to the government's failure to act.

Besides the daunting complexity of the task, another reason the government failed to act appears to have been the conflicting nature of the demands made by key players in the policy community. It was not that any of the key players favoured sexual discrimination, for none did. Rather, it was the competing and, at least partially, mutually exclusive nature of their demands.

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<sup>7</sup> For instance, within days of Lavell's 1971 victory in the Federal Court of Appeal, a Department of Indian Affairs official suggested that a decision to reinstate might affect as many as 5,000 women. (*The Globe and Mail* 1971) In 1978, the Department of Indian Affairs released a series of discussion papers on amending the Indian Act in which it estimated the additional numbers of women and children who would be eligible for Indian status under its proposals and noted that since "... federal funds are limited, the effects of adding beneficiaries will have to be borne in mind." (DIAND 1978) Following Lovelace's 1981 victory at the UN, a cabinet document was leaked which urged the government to end sexual discrimination, but warned that the cost could "... range from a low of \$312.2 million to a high of \$556.7 million". (*Halifax Chronicle-Herald* 1981) A 1982 discussion paper described options which were eventually incorporated into Bill C-31 as allowing "... the Government to have some kind of control over its expenses" and as limiting "... the future growth of the Indian population and [reducing] the pressure on scarce band resources." (DIAND 1982: 6, 14) During the third reading debate of Bill C-47 in June of 1984 (a failed Liberal bill similar to C-31), the Minister of Indian Affairs said "... the horrendous expense" was one of the reasons the government decided not to extend reinstatement to Indian status beyond "... people who lost their status plus one generation." (Munro 1984)

Status Indian organizations were willing to resolve the sexual discrimination issue, but only after the federal government dealt with other key concerns, including ceding them control over defining their membership. Indian women who had lost their status wanted the federal government to reinstate them and their children before it gave bands control over membership. Non-native women's groups were almost exclusively concerned with sexual discrimination.

The cumulative effect of these demands may be described as something akin to a policy logjam. On the one hand, as Sally Weaver suggested, by 1977 the federal government was under extreme pressure to address the sexual discrimination issue. (1993: 102) On the other hand, while the federal government may have desired to do this, it does not appear to have been inclined to expend the time and political capital to actually achieve it: this would have required either opening up the whole Indian Act, as the status Indian organizations demanded, or moving forward over their resistance, as many women's groups were demanding. The result, as Sanders observed in 1975, was that federal politicians "... deferred on the question because of the proposed revision of the *Indian Act*. Indian issues are sufficiently marginal, politically, that there seems to be a good possibility of the status quo being continued indefinitely." (1975: 672) It is in this logjam, and, more precisely, in the fact that sufficient pressure was added to break it, that we find the possibility that *Lovelace*, and thus the ICCPR, may have had an effect.

Despite this very real possibility, I am compelled to conclude that, while *Lovelace* may have added to the pressure that made federal action possible, it was not the determining factor. The real determining factor, I believe, was the potential financial implications flowing from the enactment of the Constitution Act, 1982 and its Charter of Rights and Freedoms. While the new Constitution Act was proclaimed in 1982, the application of the equality rights provision (section 15) was delayed for three years to allow governments to adjust their legislation. The federal government took the position that once the section 15 guarantee of sexual equality came into effect on April 17, 1985, the courts would find Indian Act section 12(1)(b) unconstitutional. I believe concern about this deadline, which the government set for itself, and not the *Lovelace* decision, was the key determinant of the timing of the policy change. If this assessment is correct, then the major motivation for Bill C-31 was not treaty-induced compliance with the ICCPR, but an exogenous change in Canada's constitutional structure.

Before explaining my reasons, I will discuss and reject two possibilities that would be consistent with *Lovelace* having had a determinative effect on the timing. The first might be phrased like this: while the ultimate timing of Bill C-31 was determined by the enactment of Charter, one of the federal government's objectives in designing the Charter was to ensure that it would make Indian Act section 12(1)(b) unconstitutional, thus bringing Canadian policy into compliance with *Lovelace*. There are at least two good reasons for doubting this. First, as several contemporary commentators noted, it is not at all clear from the final language of the Charter that it would have had this effect on Indian Act section 12(1)(b). (Zlotkin 1983: 47; Schwartz 1986: 334; Hosek 1983: 295; Dalon 1985: 103) Had rendering Indian Act section 12(1)(b) unconstitutional been a priority, surely the drafters would have made the relationship between the relevant sections (15, 25, 28) more clear. A second reason for rejecting this hypothesis is that the drafters did not treat the elements of the constitutional package that were most relevant to the section 12(1)(b) issue as a priority. For instance, after the final constitutional negotiations in November 1981 the Prime Minister was unclear on the constitutional status of the section guaranteeing sexual equality (section 28) and the final section recognizing aboriginal and treaty rights (section 35) contained no provision on sexual equality. (See Hosek 1983; Sanders 1983)

Another possibility that would be consistent with *Lovelace* having had a determinative effect involves the 1983 First Ministers Conference on Aboriginal Constitutional Matters. This conference produced a constitutional amendment that added a statement on sexual equality to Section 35.<sup>8</sup> This would constitute evidence of *Lovelace* having had a determinative effect if it could be shown that the federal government desired this amendment to ensure that section 12(1)(b) would be found unconstitutional. Again, I will suggest two reasons for doubting this. First, the federal government said that it did not want the amendment. I have found no reason to doubt the sincerity of its claim that the amendment was unnecessary because existing guarantees in the Charter were sufficient. (Canada 1983: 223) I accept that the amendment was made to satisfy concerns being pressed by the Native Council of Canada, the Native Women's Association of Canada, and the Inuit Committee on National Issues. (Gaffney, Gould & Semple: 44; see, also, e.g., Gottfriedson in Canada 1983: 253) Second, it is not at all clear that the final wording of the amendment – it refers to ‘existing aboriginal and treating rights,’ not the Indian Act – would actually have clarified the constitutionality of section 12(1)(b). (Dalon 1985: 67)

This brings us to a crucial question: if the federal government really believed that the courts would find Indian Act section 12(1)(b) unconstitutional when Charter section 15 came into effect in 1985, why did it take on the very troublesome task of amending the Indian Act? In the remainder of this section, I consider two distinct, but not mutually exclusive, possibilities.

The first, which is consistent with the hypothesis that *Lovelace* had an effect, is that the government wanted to resolve the matter so as to address the embarrassment it was experiencing as a result of *Lovelace*.<sup>9</sup> This is suggested by a statement of the Minister of Indian Affairs at the 1983 constitutional conference: “... even if we waited for the charter and put up with the injustice for that period of time, to take effect, it would do nothing for the Sandra Lovelace case, because it would not be retroactive, that is our legal advice.” (Canada 1983: 229) While this may have been part of the reason, I cannot accept that that was the government's primary motivation. As the Minister himself noted, if the courts did not make their decision retroactive, it would always be open to the government to address this with legislation at a later date. Further, given all the years the government had deferred to act, there is something distinctly odd about the claim that now that the government was sure the situation would be addressed by the courts, it felt compelled to legislate.

A second possibility is that the government did not want the matter to be decided by the courts. The hypothesis here is that the government was motivated by concerns about cost containment. Given uncertainty about the application of the Charter to section 12(1)(b), it was possible that a court might have imposed a remedy requiring very costly amendments to the Indian Act. A worst-case scenario, from the cost-containment perspective, would have had the court recognize the ability to share Indian status with one's spouse as an aboriginal right and then

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<sup>8</sup> Section 35 (4) reads: “Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

<sup>9</sup> This hypothesis would be more convincing if it could be established that the government was actually experiencing such pressure. While one gets the impression that this was the case from Hansard and domestic news reports, there is a surprising dearth of references, critical or otherwise, in the international press. Searching LexisNexis, ProQuest, *The New York Times*, *Le Monde*, and the *Sydney Morning Herald*, my research assistants could find only six stories between 1980 and 1985. The ambiguous status of external pressure is also suggested by Professor Donald Fleming who told a 1982 Commons committee that while a Canadian colleague of his who worked as a judge on the European Court of Human Rights felt the situation was a “... severe embarrassment, [his] colleagues at External Affairs seem to think this thing could possibly hold on for years and years and years.” (Canada 1982: 2: 99-100)

insist that this right be enjoyed equally by male and female Indians. Since constitutional interpretations are very difficult for governments to undo after the fact, pre-emptive action would have been implicated. While I have found no evidence that this specific scenario was being considered, there is plenty of evidence that the linkage between rules governing Indian status and financial implications was on the minds of federal policy makers.<sup>10</sup>

In short, the evidence suggests that the timing of Bill C-31 was determined by concerns associated with the constitutional deadline of April 1985, not by *Lovelace*.

**Did Lovelace Influence the Shape of the Policy Outcome?** To this point, the evidence suggests that *Lovelace* did not put the issue of section 12(1)(b) on the political agenda, it did not change the government's position on the issue, and it had little or no effect on the timing of the government's action. This still leaves open the possibility that *Lovelace* had a determinative effect by influencing the eventual shape of the policy. This does not, however, appear to have been the case.

This can be demonstrated by comparing the HRC's view in *Lovelace* to the federal government's policy as reflected in Bill C-31. We can begin by noting the key elements in *Lovelace*. First, the HRC decided that as Ms. Lovelace had married a non-Indian, and thus lost her Indian status, before Canada ratified the ICCPR in 1976, it could not rule on the factor that caused her to lose her status (i.e., sexual discrimination) (para. 10). Second, despite this, the HRC decided that it could consider "... the continuing effect of the Indian Act," which was that Ms. Lovelace was denied the right to reside on her reserve. (para. 13.1) Third, it considered the most applicable right to be found in ICCPR article 27 which reads (para. 13.2): "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Fourth, even though Ms. Lovelace was not considered a status Indian under the Indian Act, the HRC decided that she was a member of the Tobique Maliseet band for the purposes of article 27 because "... [p]ersons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain those ties must normally be considered as belonging to that minority within the meaning of the Covenant". (para. 14) Fifth, while the HRC accepted that restrictions on the right of residence may be consistent with article 27 (para. 15), it said "... that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole". (para. 16) Thus, finally, given the circumstances particular to Ms. Lovelace's case, denying her the right to reside on the reserve could not be considered "... reasonable, or necessary to preserve the identity of the tribe [and thus] to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27". (para. 17) The crucial aspect of this view was summarized by Professor Donald Fleming who said the HRC had found Canada to be "... in violation of the protection to ethnic and linguistic minorities because it has deprived one member of an ethnic and linguistic minority from the right to associate with others of that same ethnic and linguistic minority. The fact it happened to be a woman is irrelevant." (Canada 1982: 2: 104)

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<sup>10</sup> For instance, addressing aboriginal leaders at the 1983 first ministers conference, Prime Minister Trudeau said, "If ... you want to have a tribal membership, I think it is for you to decide and for us to accept, providing we don't have to pay the consequences of what you decide ...". (Canada 1983: 262) See also comments of the Minister of Indian Affairs in Canada 1982: 1: 25.

This key element of the HRC's view was not reflected in Bill C-31, which has been described as a compromise between the major interests in what I have called the Indian-status policy community. It addressed the federal government's and the non-native women's movement's interests by removing sexually discriminatory sections from the Act. It partially addressed the interests of Indian women who had been deprived of their status by reinstating them as well as their immediate children. It went some distance toward addressing the concerns of the status Indian organizations by separating the rules governing Indian status, which dealt primarily with rights to entitlements provided by the federal government, from those governing band membership, which dealt primarily with the right to reside on reserve. This would allow the government to retain control over status (and thus costs) while allowing Indian bands the opportunity to take greater control of their membership if they so chose. A key exception to band control, however, was that reinstated women (but not their children) were automatically reinstated to band membership (11(1)(c)). As Weaver noted, this was also likely to offer the government other benefits since the "... policy of assigning residency control to the bands and, at the same time, making financial support initially uncertain, significantly reduced the chances of reinstated First Nations women actually receiving these benefits [i.e., the more expensive ones associated with on-reserve status Indians].... [It] also transferred the politically difficult decisions on residency from Ottawa to the First Nation's communities." (1993: 126)

The aspects of the policy reflected in Bill C-31 that are most clearly inconsistent with *Lovelace* are those that govern how Indian status is to be determined in the future. According to the amended Indian Act, a person is entitled to Indian status under subsection 6(1) if both of his or her parents were status Indians, or under subsection 6(2), if one of his or her parents was entitled to be registered under subsection 6(1). By implication, a person, one or both of whose parents was entitled to status under subsection 6(2) and neither was entitled under 6(1), would not be entitled to Indian status. While such children are not entitled to Indian status, they are entitled to reside on reserve with their status parent(s) so long as they are considered dependents (Indian Act section 18(1)). Without status of their own, however, these children would lose the right to reside on reserve once they reach the age of maturity (although the band could exercise its discretion under Bill C-31 to include them on its band list). This means, contrary to the HRC's view in *Lovelace*, under Bill C-31 people "... who are born and brought up on a reserve, who have kept ties with their community and wish to maintain those ties" (para. 14) can be denied the right to live on their reserve.<sup>11</sup> It is highly unlikely that this problem was inadvertent as it was brought to government's attention on numerous occasions.<sup>12</sup>

A further reason for suggesting that *Lovelace* did not contribute significantly to the shape of the policy in Bill C-31 is that that policy actually appears to predate *Lovelace*. Bill C-31 is very similar in substance to a policy the Department of Indian Affairs had proposed in a discussion paper in 1978.<sup>13</sup>

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<sup>11</sup> The HRC has also criticized the amendment because it "... affects only the woman and her children, not subsequent generations, which may still be denied membership in the community." (UN 2000: para. 19)

<sup>12</sup> See, for example, presentations before the House of Commons Standing Committee on Indian Affairs and Northern Development by the National Action Committee on the Status of Women; (Canada 1985: 15: 7) the Native Council of Canada; (Canada 1985: 18:21, 30) and the Quebec Native Women's Association. (Canada 1985: 24:7ff)

<sup>13</sup> Like C-31, the 1978 proposal suggested that marriage not affect Indian status (i.e., Indians would not lose it or non-Indians gain it), first generation children of mixed marriages would retain status, but children of second generation mixed marriages would not, and bands could opt to make non-status Indians "band beneficiaries". (DIAND 1978: 2-3)

In sum, as Bill C-31 does not satisfy key requirements of *Lovelace* and it is very similar to proposals the government was considering prior to the HRC's decision in 1981, I conclude that *Lovelace* did not significantly influence the shape of the government's policy.

### **Case Study: Conclusion**

Thus, contrary to the popular boomerang pattern narrative, passage of Bill C-31 does not provide evidence of the effectiveness of the ICCPR: the case study only produced evidence to support two of the three elements required to demonstrate that *Lovelace* had a determinative effect; and, further, the legislation itself did not comply with the HRC's view. This said, and so as not to paint too bleak a picture, I should note that, while Bill C-31 did not comply with ICCPR article 27, it was a positive change to the extent that it brought the Indian Act into greater compliance with sexual equality provisions in ICCPR articles 2 and 26.

### **FURTHER DISCUSSION: BOOMERANG OR BACKFIRE?**

Having concluded that *Lovelace* did not have a determinative effect on the passage of Bill C-31, and thus rejecting the boomerang as an appropriate narrative for describing its impact, we must consider whether backfire presents a superior alternative. That backfire might do so is suggested by a clever strategy the federal government appears to have employed. This allowed it to take advantage of a weakness in the ICCPR's treaty compliance system to use *Lovelace* to help secure passage of legislation that, as we have seen, did not comply with key elements of the view.

Even prior to the publication of *Lovelace* in 1981, the federal government appears to have been employing a strategy designed to reduce the resistance of the status Indian organizations to its desired Indian-status policy. If successful, this would shift the balance of power in the Indian-status policy community enough to break the policy logjam. This strategy involved portraying status Indian organizations as the main impediment to removing sexual discrimination from the Indian Act. This appears to have involved deflecting any criticism the government received about sexual discrimination onto these organizations. (See Boldt and Long 1985: 173-174 for a similar view.) This is nicely illustrated by the response of Prime Minister Trudeau (1980: 2588) to a critical question he received in the Commons concerning Ms. Lovelace's communication: "... Perhaps the case being decided at the United Nations will help persuade the Indian leaders themselves that they should be moving in this direction."<sup>14</sup> Thus, as Weaver writes, "... governmental members may well have welcomed [the embarrassment generated by *Lovelace*] given their desire to remove the discriminatory sections of the Indian Act." (1983: 72) The success of this strategy was suggested at the 1983 first ministers conference when the status Indian organizations basically abandoned their attempts to link progress on the sexual equality issue to progress on all other forms of inequality in the Indian Act. (See, e.g., George Erasmus in Canada 1983: 243.) The final effect was, of course, the successful passage of amendments to the Indian Act that failed to comply with *Lovelace*, the goals of status Indian organizations, or the full desires of the Indian women and their children who had lost their status.

To understand why the *Lovelace* boomerang could be made to backfire in this way, we must ask how it was possible for the Canadian government to use the HRC's view that it was violating the rights of Indians as members of a cultural minority to weaken the position of status Indian organizations. Canada could do this, I believe, because this key aspect of the HRC's view was not disseminated to the Canadian public. Simply put, the subtlety and substance of the view

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<sup>14</sup> For similar examples, see Canada 1983: 218-9; *Winnipeg Free Press* 1983; *The Globe and Mail* 1984. For evidence that, as Prime Minister, Joe Clark used this strategy, see Silman 1987: 164.

did not make it through the media filter: as represented in media reports, the assumption seems to have been that since Lovelace won, the HRC must have decided the case on the basis of sexual discrimination.<sup>15</sup> The federal government, of course, had no incentive to set the record straight; as Mitchell suggests, ambiguity about obligations "... 'naturally' leads states to interpret treaty rules so they can behave as their interests dictate while claiming their behaviour is in compliance." (1996: 7) I believe it was this failure of dissemination that made it possible for the government to present Bill C-31 to the Canadian people as an adequate response to *Lovelace*.

If we ask how this backfire effect might be avoided in the future, two observations come to mind. First, we are led to the obvious conclusion that increasing the transparency of the ICCPR's compliance information system remains one of the keys to improving its effectiveness. Lest this be thought a purely historical concern, it should be noted that while the HRC has taken measures to improve transparency (see, for example, Gandhi 1998: 338-342), Canada has yet to satisfy the HRC that it has complied with *Lovelace*. A second observation is that transparency, by its very nature, is not something the HRC can address entirely on its own. Much also depends upon the education of the lawyers and journalists whose role it is to introduce and interpret the decisions of international bodies into Canadian and other domestic contexts. This raises interesting questions, which I cannot pursue here, about how the effectiveness of international human rights treaties may be affected by the degree of congruence between values held in domestic political contexts and those advanced internationally.<sup>16</sup> What seems clear is that the impact of the HRC's view in *Lovelace* was hampered by incongruence between the values upon which it was decided, and the values through which it was interpreted in the Canadian context.

## CONCLUSION

This article set out to introduce a methodology for assessing the effectiveness of international human rights treaties and to demonstrate the efficacy of this model through a case study involving the HRC's view in *Lovelace v. Canada*. Having identified problems with the popular story about the impact of *Lovelace*, discovered a strategy by which the federal government appears to have made the *Lovelace* 'boomerang' backfire, and pointed out some of the problems that allowed this strategy to succeed, I suggest the value of this methodology has been demonstrated.

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<sup>15</sup> For example, *The Globe and Mail* 1981; *Toronto Star* 1981; and *Montreal Gazette* 1981.

<sup>16</sup> I wish to thank one of the anonymous reviewers for drawing this out of my analysis.



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