

“Multi-Level Governance and International Human Rights Treaties: Assessing the Impact
of the International Covenant on Civil and Political Rights on Canadian Public Policy:
the case of *Lovelace v. Canada*”

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Research for this paper is ongoing. The conclusions drawn for the purposes of this
presentation are tentative and subject to revision.

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For years the promotion of international human rights has been a key element in Canada's foreign policy. This, of course, has always been highly dependent upon Canada maintaining its credibility as a respecter of international human rights agreements. Thus in 2001, for instance, a Department of Foreign Affairs webpage entitled 'The Canadian Approach,' stated, "Canada does not expect other governments to respect standards which it does not apply to itself."¹

Such statements naturally lead us to ask just how Canada does apply international human rights standards to itself.² Taking up a challenge posed by other students of global and multilevel governance,³ this paper considers the treaty system created by the International Covenant on Civil and Political Rights and its Optional Protocol and asks whether participation in this treaty system has had a discernible and positive effect on public policy outcomes in Canada. This paper will not answer this question. Instead, it begins the process of providing such an answer by developing an analytical approach to answering the question, and by testing its usefulness by applying it to a case widely believed to have represented an example of the ICCPR having a positive impact on Canadian public policy—Sandra Lovelace's communication to the United Nations Human Rights Committee in 1977.

I. Analytical Framework

¹ Cited in Ken Norman, "Taking Human Rights Lightly: The Canadian Approach." *National Journal of Constitutional Law* 12 (2000/01), n. 1.

² For instance, the mandate of a recent delegation of the Canadian Senate to Geneva and Strasbourg included "inquiring into Canada's compliance with the United Nations International Convention on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights." *Report of the Delegation of the Standing Senate Committee on Human Rights on its FACT-FINDING MISSION TO GENEVA SWITZERLAND AND STRASBOURG, FRANCE, October 10-17, 2003*. Internet. Accessed January 20, 2004. Available: <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep07oct03-e.pdf>.

³ For instance, Douglas Brown has suggested that the study of multilevel governance would benefit from more case studies which focus on specific policy sectors (Douglas M. Brown. "Aspects of Multilevel Governance in Australia and Canada." paper presented at the Institute of Intergovernmental Relations conference, "Globalization, Multilevel Governance and Democracy: Continental, Comparative and Global Perspectives" May 3-4, 2002. Available at <http://www.iigr.ca/conferences/archive/pdfs1/brown.pdf>). Ronald Mitchell, whose interest is environmental policy, has noted the possible value of comparisons with compliance and human rights conventions. Ronald B. Mitchell. "Compliance Theory: An Overview" in *Improving Compliance with International Environmental Law*. James Cameron, Jacob Werksman & Peter Roderick (eds.) (London: Earthscan, 1996), 27.

This paper is interested in the impact of the United Nations International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol (OP), as an instance of *multilevel governance*, on Canadian *public policy*. This phrasing two key decisions which shape the analytical approach of this study and thus need to be explained. These are the decision to employ the framework of multilevel rather than global governance and the decision to focus on effects on public policy rather than national sovereignty.

a. Multilevel, Not Global Governance

The reason for adopting the framework of multilevel governance, as well as its implications for the analysis, can best be explained by comparing it to the obvious alternative, global governance. In an insightful paper, Robert O'Brien has compares 'global governance' and 'multilevel governance' as theoretical frameworks that seek to understand processes of supranational governance.⁴ Both challenge state-centric approaches to studying international relations by suggesting "that authority and policy making influence is shared across subnational, national and supranational levels." They differ, however, with respect to their focus and central concerns. The global governance framework focuses on the system level and "attempts to integrate horizontal relations between different spheres of governance." Those who adopt this approach tend to be most interested in relations between international regimes, multinational corporations, and international civil society. Their central concerns are often normative, addressing such issues as "the distributional impact of present and future governance arrangements."

The multilevel governance framework, conversely, addresses the relationship between system- and state-level institutions and, thus, "focuses upon vertical relations between political

⁴ Robert O'Brien. "The Nuances of Multilevel and Global Governance." Paper presented at the conference on "Globalization, Multilevel Governance and Democracy: Continental, Comparative and Global Perspectives." May

authorities”. O’Brien says it helps “us understand how a particular country or region fits into a system of governance that crosses state boundaries” and that it assumes “certain ingredients such as developed institutions, a sense of political community, the rule of law and a role for constitutional courts.” Not surprisingly, those who have adopted this approach have tended to be interested in federal states and the European Union. Multilevel governance studies have also tended “to be more technocratic and more focused on policy than global governance approaches” and more concerned with effectiveness and “solving particular problems” than with normative issues.

As O’Brien notes, these frameworks are not “completely unrelated” and thus, the “differences should not be overdone.” Thus, I would suggest it can make sense to study the same phenomena by employing one or the other of these frameworks, depending upon the questions being raised. Similarly, if one is sensitive to the differences, it may be appropriate to employ analytical techniques developed within one to address questions raised within the other—or, at least, that is the assumption I have proceeded with

b. Public Policy, Not National Sovereignty

The multilevel governance framework is attractive, then, because it allows us to focus on *vertical relations* between Canada as a federal state and to ask empirical questions about *effectiveness* the ICCPR. “Effectiveness,” of course, has to be operationalized; effectiveness in terms of what? Here one is tempted to invoke the phrase ‘limitation of national sovereignty’. Without treading too far into a debate about which I have little present interest or expertise, I can say that I have not found such language very helpful because it is not clear what would constitute a limitation of sovereignty in such circumstances. Consider, for example, a state which complies

with a treaty even though it doesn't prefer the effects of such compliance. On the one hand, if its decision to ratify the treaty was truly voluntary, then it seems wrong to characterize the effects of that decision as limiting sovereignty.⁵ If the state was seriously opposed to the outcome, it could exercise its sovereignty by withdrawing from the treaty. If, on the other hand, the state's decision to ratify and remain a party to a treaty reflects an involuntary capitulation to pressure from some greater power, then its sovereignty has indeed been compromised—but by the greater power, not by the treaty. In either case, the question of whether state sovereignty has been limited is not clearly related to the effectiveness of a treaty in achieving its goals.

A more promising approach to operationalizing effectiveness from our perspective is suggested by Douglas Brown 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...?⁶

This formulation gets at what we're really interested in—did an international treaty system make a positive difference to domestic policy—without invoking the troublesome issue of sovereignty. While this seems a better place to start, we must still ask how we can know if policy outcomes do “differ from those that would be made”⁷

c. Operationalizing Effectiveness: Adapting Mitchell's Framework

So, how could we know if a treaty has made a difference? We will try to answer this question by adapting an analytical framework developed by Robert B. Mitchell.⁸ Mitchell's framework provides a general analytical approach and, perhaps more importantly, a rich analytical language

⁵ For instance, Mitchell writes, “treaties can redefine what constitutes infringements of sovereignty by authorizing certain actions in the event of treaty violations.” “Compliance Theory,” 22. See also his and *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance*. (Cambridge, Mass.: MIT Press 1994), especially chapters 1-2.

⁶ Brown.

⁷ Brown.

⁸ Mitchell. “Compliance Theory.”

for evaluating the impact of international treaties. His framework must be adapted and not simply applied, however, because we are working within different approaches and asking different questions. Mitchell adopts a global governance approach to analyze the effectiveness of rule changes in an international environmental regime on the behaviour of states and private actors in order to make suggestions for their amelioration. We are conducting a multilevel governance analysis of the impact of an international human rights treaty and its monitoring body on public policy in one country. We want to determine if changes in domestic policy reflect the influence of unchanged rules. Adapting Mitchell's framework requires sensitivity to these differences.

These differences aside, though, Mitchell's approach is useful because he shares our desire to determine if international treaties have effects on behaviour. In this regard, Mitchell makes a very useful distinction by contrasting 'compliance' as "an actor's behaviour that conforms to a treaty's explicit rules" with '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."⁹ This distinction is important because it reminds us that the mere fact that public policy has been brought in line with treaty rules does not, in and of itself, constitute evidence that outcomes actually differ from those that would have been made without the treaty; such policy changes may occur for reasons quite unrelated to the treaty. Thus, we share with Mitchell his desire to distinguish when compliance can "plausibly be explained by the treaty and its rules and when it can more plausibly be explained by factors that were correlated with, but independent of, the treaty."¹⁰

In general, a demonstration that policy outcomes differed because of a treaty must

⁹ Mitchell, "Compliance Theory," 5. Emphasis in original.

¹⁰ Mitchell, *Intentional Oil Pollution*, 31.

contain three elements. They reflect Mitchell's approach of assuming that treaties don't affect policy outcomes and designing analysis so as to identify "empirical evidence...of the type needed to falsify this assumption."¹¹ One element is a correlation between the requirements of a treaty and subsequent compliant behaviour. A second element is evidence that demonstrates how the treaty rule "could have led to the observed change in behavior."¹² The final element is a demonstration "that the treaty rule, rather than other factors, caused the chain of events involved."¹³ This requires considering "rival explanations of how exogenous factors can explain the observed change in behavior, evaluating whether any variance that occurred in such factors would be predicted to have increased compliance".¹⁴

As appealing as it would be to translate these three elements into a step-by-step analytical process that could be applied in all cases, this does not seem possible. Rather, a general discussion is presented below of how one might assess whether the three elements are present. The actual form such assessment will have to be tailored to the details of each case. The elements are presented in the form of questions that a qualitative analysis must consider.

1. Have policy changes occurred, subsequent to ratification of the treaty, which appear to bring public policy into compliance with a treaty rule?

If the assumption that human rights treaties have no impact on public policy is to be falsified, we must be able to identify policy changes that constitute prima facie examples of the ICCPR having had an impact. The most obvious source of such evidence are policy changes which a government has expressly declared to be intended to satisfy ICCPR obligations. Less obvious are cases where a treaty has had an impact on public policy, but the government has not noted

¹¹ Mitchell, *Intentional Oil Pollution*, 18.

¹² Mitchell, "Compliance Theory," 22.

¹³ Mitchell, "Compliance Theory," 22.

¹⁴ ???

this explicitly. In the Canadian case there are a number of places one can look for evidence of such changes. As Ronald Manzer has observed, in Canadian “practice human rights have been recognized and guaranteed in three main forms of public policy: judicial protection of rights in the common law; legislative protection of rights in public statutes; and entrenchment of rights in the constitution.”¹⁵ In no case, however, can a policy change be considered to demonstrate the impact of a treaty if it occurred prior to the treaty’s being ratified.

This first element, of course, provides only necessary, but not sufficient, evidence of a treaty having had an impact. If no relevant policy changes can be identified, then clearly the treaty has not had an impact. If, however, some can be identified, it is always possible that their relationship to the treaty is one of coincidence and not of cause. To eliminate this possibility we must consider the other two elements.

2. Is there evidence that the treaty was a causal factor in the policy change?

If public policy became compliant with a treaty rule, but no causal connection can be established between the treaty and the change, then the assumption that the treaty had no impact cannot be falsified. How, though, can such a connection be demonstrated? In answering this question, we will rely quite heavily upon Mitchell’s analysis of the causes of compliance and noncompliance as well as his model of the treaty compliance system.

As Mitchell suggests, to argue that a treaty caused a change in policy, we need a theory of how treaties generate compliance. This in turn presupposes assumptions about the causes of non-compliance. Mitchell suggests three: preference, incapacity, and inadvertence. *Preference* is a cause of non-compliance when a state ratifies a treaty, has the capacity to comply, but chooses not to. Such preferences may reflect states acting as classic free-riders; choosing to devote

¹⁵ Ronald Manzer. “Human Rights in Domestic Politics” in *Human Rights in Canadian Foreign Policy*. Robert O. Matthews and Cranford Pratt (eds.) (Kingston and Montreal: McGill-Queen’s University Press, 1988), 35.

resources “to more pressing social problems”; expressing simple differences in values; viewing “compliance as having no real benefits;” or simply refusing to incur any costs. *Incapacity*, as a separate reason for non-compliance, occurs where states are willing to comply, but don’t because they lack the administrative, financial, technological or other means to do so. Finally, *inadvertence* occurs where states “take actions sincerely intended and expected to achieve compliance but nonetheless fail to meet treaty standards.”¹⁶

Given these suppositions about non-compliance, then, treaties can generate compliance by overcoming these impediments. According to Mitchell they do this through positive inducements or negative sanctions. *Positive inducements* seek to address incapacity and inadvertence by providing financial incentives, technology transfers, or education to “clarify treaty requirements and identify strategies for compliance.” *Negative sanctions* involve the “threat or use of sanctions...[to] make the expected costs of violation exceed those of compliance.” This includes the pressure of social opprobrium and world public opinion, expressed by state and non-state actors.¹⁷ Where a treaty has not been a key factor in removing impediments to compliance in a particular case—be it preference, incapacity or inadvertence—we can conclude that it has not have an impact on public policy.

But, it may still be asked, where should we look for evidence that a treaty has in fact contributed to the removal of such an impediment? To answer this we must consider how treaties can affect domestic policy. This is the purpose of Mitchell’s model of the ‘compliance system’—“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

¹⁶ Mitchell, “Compliance Theory,” 13.

¹⁷ Mitchell, “Compliance Theory,” 14-5.

system is crucial to our analysis since, as Mitchell notes, if apparent compliance “cannot be explained by factors exogenous to the treaty regimes, these three systems provide a framework for identifying the source of such variance in inducing compliance.”¹⁸ Thus, we need to consider the meaning of these parts of the compliance system both in general and as they apply to the ICCPR.

Primary Rule System

The primary rule system “consists of the actors, rules and processes related to the behaviour that is the substantive target of the regime.”¹⁹ It reflects many decisions that can affect the treaty’s success. These include the definition of the problem, the choice of solution, and the institutions that will be put in place to achieve the solution. This, in turn, determines who and what activities get regulated, the changes in behaviour that will be required, the cost of such changes, and the exogenous factors that will come into play as well as the degree of transparency of the overall system and the degree of specificity in the requirements. Thus, by influencing the actors and their payoff structures, the “primary rules may prove the most powerful lever international policy-makers have over the level of compliance elicited.”²⁰

The ICCPR’s primary rule system designates States party to the treaty as the actors to be regulated. Its rules include a wide range of civil and political rights which it requires States party to respect in their relations with persons within their jurisdiction. In federal states both central and regional governments are expected to uphold the ICCPR,²¹ but violations are “nevertheless attributed to the central government, as it is the government with international legal personality,

¹⁸ Mitchell, “Compliance Theory,” 17.

¹⁹ Mitchell, “Compliance Theory,” 17.

²⁰ Mitchell, “Compliance Theory,” 18-9.

²¹ Note, ICCPR Article 50 states: “The provisions of the present Covenant shall extend to all parts of Federal States without any limitations or exceptions.”

and the actual treaty party.”²² The ICCPR’s solution to human rights violations is to require States party to “adopt such legislative or other measures as may be necessary to give effect to the rights recognized in [the ICCPR]” and to provide and enforce effective remedies to any person whose rights or freedoms have been violated.²³ It is the States party, and not the institutions created by the ICCPR, which have primary responsibility for carrying out these obligations. Thus, having voluntarily ratified the ICCPR in 1976, Canada took on an obligation to bring its public policy into line with respect for these rights.

While much of the ICCPR’s primary rule system is described in the text of the covenant and the Optional Protocol, it should be noted that the ICCPR constitutes a treaty body known as the Human Rights Committee (HRC) which, while not authorized to change the terms of the Covenant, arguably exercises *de facto* powers in this regard. Thus, for instance, the ICCPR empowers the HRC to determine its own rules of procedure, which can clearly affect the ‘compliance system.’ Further, the HRC has the power to clarify and further specify the meaning of rules through its jurisprudence. As Joseph, Schulz, and Castans note, “the essential sources of HRC jurisprudence are its decisions under the Optional Protocol, its General Comments, and its Concluding Comments [These are discussed briefly below].”²⁴ While, as Steiner notes, the status of the HRC’s decisions under the Optional Protocol is not clear—“No text defines the form or status of these ‘views’—hortatory, recommendatory, or binding—or refers to remedies”²⁵—these decisions are not without impact. For instance, the HRC has used them to

²² Sarah Joseph, Jenny Schulz, and Melissa Castan. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2000), 24.

²³ ICCPR, Article 2.

²⁴ Joseph, Schulz, Castans, 16A. A fourth potential source of jurisprudence--reports resulting from Article 41 which allows a State party to submit a communication suggesting that “another State Party is not giving effect to the provisions of the present Covenant”--“has never been utilized.” Joseph, Schulz and Castan, 13.

²⁵ Henry J. Steiner, “Individual Claims in a World of Massive Violations: What Role For the Human Rights Committee?” in Philip Alston and James Crawford. *The Future of UN Human Rights Treaty Monitoring* (Cambridge:

propose remedies for rights violations including “compensation, release of a prisoner, [and] legislative change”. Further, while its decisions are not legally binding, as the “pre-eminent interpreter of the ICCPR which is itself legally binding [in international law]”, the HRC plays an important role in specifying the meaning of the ICCPR.²⁶ Besides responding passively to State reports and individual communications, the HRC can also act proactively to give greater specificity to ICCPR rights by issuing general comments.²⁷ Thus in the process of carrying out its compliance information functions, the HRC can change its primary rules by increasing their specificity. This may affect domestic policy by prompting states to identify instances of non-compliance due to inadvertence.

Compliance Information System

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.”²⁸ This subsystem contributes more to inducing compliance the more it maximizes transparency. “Transparency refers to both the amount and quality of the information collected on compliance and non-compliance by the regulated actors as well as the degree of analysis and dissemination.”²⁹ Central to the value of the subsystem is the fact that before actors can be influenced by the non-compliance response system, they “must know that

Cambridge University Press, 2000): 23. Joseph, Schulz, and Castans go further, and follow McGoldrick in suggesting that “HRC views are not legally binding, as the HRC is not a judicial body.” (14)

²⁶ Joseph, Schulz, Castans, 14. This can have important implications for domestic policy since “the civil and political rights norms developed under the ICCPR and other UN treaties are of obvious relevance for the interpretation of these rights by judges, lawyers, government officials, and human rights advocates in all municipal jurisdictions due to their universal applicability.” Joseph, et. al., 29.

²⁷ Article 40 (4) of the ICCPR authorizes the HRC to transmit to States “such general comments as it may consider appropriate.” While, as Steiner notes, there is little agreement as to what these comments are supposed to embody, their actual content has ranged “from spelling out internal procedures of the HRC or requiring states to include certain information in their periodic reports, *to making general interpretations of the substantive provisions of the Covenant*, such as those on non-discrimination or political participation”. Steiner, 22, emphasis mine.

²⁸ Mitchell, “Compliance Theory,” 17.

²⁹ Mitchell, “Compliance Theory,” 19.

their choices will not go unnoticed.”³⁰

The central actor in the ICCPR’s compliance information system is the Human Rights Committee. The HRC is involved in several compliance monitoring processes. By far the most frequently used is the requirement that States “submit reports on the measures they have adopted which give effect to the rights recognized [in the ICCPR] and on the progress made in the enjoyment of those rights”.³¹ These periodic reports are normally expected every five years. After studying a report and asking questions during the state’s presentation, the HRC has been in the practice since 1992 of issuing concluding observations, which indicate what states are doing well and where they are coming up short.³² Thus, the revelation of, and the potential embarrassment arising from, instances of non-compliance could motivate states to change policy to address inadvertent or preference-motivated non-compliance.

A further means for eliciting information on compliance is provided by the Optional Protocol (OP). Under Article 1 of the OP, member states allow the HRC to “receive and consider communications from individuals who claim to be victims of [ICCPR rights] violations by that State Party”. After considering “all written information made available to it”, the HRC issues its ‘view’ as to “whether the state party has violated a right secured under the ICCPR.”³³ Unlike the interstate procedure under the ICCPR, this has been well utilized.³⁴ Clearly the expectation is that a finding of a violation would motivate a state to reform its public policy either by reducing any “uncertainty about what they need to do to comply” or by removing “the excuse of inadvertence or misinterpretation”.³⁵

³⁰ Mitchell, “Compliance Theory,” 19.

³¹ ICCPR, Article 40.

³² Steiner, 50.

³³ Steiner, 23.

³⁴ “[B]y the end of 1998, the HRC had completed its consideration of nearly 600 communications.” Joseph, Schulz, and Castan, 16

³⁵ Mitchell, “Compliance Theory,” 19.

Finally, while the ICCPR identifies States Party and, for states which ratified the OP, individuals, as the actors responsible for collecting information on compliance, the HRC has used the power allotted to it to add NGOs to the list of actors which could provide information on compliance.³⁶

Non-Compliance Response System

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.”³⁷ Possibilities range from facilitating compliance by providing positive inducements such as funds, information, or technology to enforcing negative sanctions, to implementing ‘pre-monitory’ control measures to prevent violations.³⁸

As Oran Young has noted, “international organizations are notoriously weak when it comes to using sanctions to promote compliance with international rules.”³⁹ This is especially true of international human rights treaties like the ICCPR. While trade agreements can authorize member states to punish violators with economic sanctions, and environmental agreements concerning transborder problems can be enforced through specific reciprocity— “promising to comply if others comply and threatening to violate if others violate”⁴⁰—the HRC has no coercive power to ensure compliance.⁴¹ This does not mean, however, that the non-compliance response systems of human rights treaties cannot induce compliance; few international organizations have

³⁶ Gandhi reports that at its fiftieth session the HRC decided that it “would welcome any information which N.G.O.s might care to submit on what measures States Parties had taken or failed to take in respect of implementation of the Committee’s view.” P.R. Gandhi. *The Human Rights Committee and the Right of Individual Communication: Law and Practice*. (Dartmouth: Ashgate, 1998), 342; quoting from G.A.O.R., 49th Session, Supplement No. 40 (A/49/40), Report of the Human Rights Committee, vol I., p.p. 85-86.

³⁷ Mitchell, “Compliance Theory,” 17.

³⁸ Mitchell, “Compliance Theory,” 20-23.

³⁹ Oran R. Young. *Governance in World Affairs* (Ithaca: Cornell University Press, 1999): 100.

⁴⁰ Mitchell, “Compliance Theory,” 16.

⁴¹ Steiner notes that it has never asked the General Assembly or the Security Council to put pressure on states which do not comply with its views (37). Gandhi reports that the HRC has “described the absence of enforcement

the power to enforce their rules without the cooperation of states or civil society actors like NGOs. This means, as Young argues, that compliance is possible without enforcement and, where enforcement is necessary, it is not necessary that international organizations acquire the powers traditionally associated with governments.⁴²

The main means the HRC has to influence states to comply is the encouraging of “social opprobrium and world public opinion.”⁴³ This draws our attention to the fact that the weakest aspect of the ICCPR’s compliance information system concerns dissemination. Much of the HRC’s hearings and deliberations are conducted behind closed doors. Its main reporting requirement is the submission of an annual report to the General Assembly through the Economic and Social Council.⁴⁴ The HRC has also published representative collections of its views arising out of the Optional Protocol procedure, and most of its other views and General Comments are accessible on the Internet. In other words, dissemination has not been the HRC’s strong suit.

In 1990 the HRC began to address this deficiency by changing its own procedural rules to improve its ability to mobilize world public opinion by creating the office of Special Rapporteur for the ‘follow-up’ of views. The Special Rapporteur’s duties include seeking information on compliance from States Parties and, where appropriate, victims.⁴⁵ Further, at its fiftieth session the HRC took further specific actions to pressure States that refused to implement its views under the OP.⁴⁶ Changes in public policy that respond to public opinion so-mobilized should be

machinery in the [Optional Protocol] as ‘a major shortcoming in the implementation machinery established by the Covenant.’”: 352.

⁴² Young, *Governance in World Affairs*, Chapter 4.

⁴³ Mitchell, “Compliance Theory,” 15.

⁴⁴ ICCPR, Article 45.

⁴⁵ Ghandhi, *Human Rights Committee*, 338-339. In 1995, the Special Rapporteur made a significant first fact-finding mission to Jamaica to collect information *in situ*. Ghandhi, *Human Rights Committee*, 344-345.

⁴⁶ In particular, it decided that:

1. every form of publicity would be given to follow-up activities;

considered treaty-induced.

Thus, there are many parts of the ICCPR's treaty compliance system that could impact Canadian public policy by removing impediments to compliance.

3. Are there factors exogenous to the treaty that better explain the change in public policy?

A third element in a complete analysis of the impact of a treaty on public policy is consideration of rival explanations. While there is nothing we can say at this point that will apply in all cases, it will be useful to follow Mitchell in developing "a checklist of 'likely suspects' that will help us avoid attributing causation to rules in cases in which other factors are responsible for changes in compliance."⁴⁷ The evaluation of rival explanations requires much subtlety and can be quite controversial. It is also with respect to this element that Mitchell's framework appears most in need of adaptation for application to human rights treaties.

Let's begin by considering the aspects of Mitchell's two "treaty-independent, first-order sources of compliance"--compliance as independent self-interest and compliance as interdependent self-interest--which are least controversial.⁴⁸ Such interests are considered exogenous factors and thus form the basis of rival explanations because compliance occurs "even absent positive inducements or negative sanctions. Power plays little role in determining

2. future annual reports would include a separate and highly visible section on follow-up activities under the O.P. This would convey clearly to the public which States Parties had co-operated and which States Parties had failed to co-operate with the Special Rapporteur;
3. reminders would be sent to all States Parties that failed to provide follow-up information;
4. press communiqués would be issued once a year after the Committee's Summer session which would highlight both positive and negative features concerning the Committee's and Special Rapporteur's follow-up activities;...
7. the Committee should draw the attention of States Parties, at their biannual meetings, to the failure of some States Parties to implement the Committee's views and co-operate with the Special Rapporteur in providing information on the implementation of views.

Ghandhi, *Human Rights Committee*, 342; quoting from G.A.O.R., 49th Session, Supplement No. 40 (A/49/40), Report of the Human Rights Committee, vol. I., p.p. 85-86.

⁴⁷ Mitchell, *Intentional Oil Pollution*, 66.

⁴⁸ "Compliance Theory,"

whether a state complies or not...Efforts to manipulate interests are unnecessary...”⁴⁹

*Compliance as independent self-interest*⁵⁰ does not represent treaty-induced compliance because “treaty rules have been brought in line with existing or intended future behaviours, and not vice versa.” (9) For example, treaty rules may simply have been created to reflect “*pre-existing interests*,” either defined narrowly,⁽⁷⁾ or more broadly—based, for instance, on assumptions about how other states would act, or on the belief that complying with the rules in the future is consistent with its self-interest. Independent self-interest may also be at play where “the rules *require little change in current behaviour patterns*.” (9) For instance, “leader states” may comply because this requires no change in their behaviour (7); treaties may proscribe behaviour “that no one currently has incentives to undertake”; or treaty rules may “prove sufficiently vague to allow business as usual. The absence of an international court to interpret such ambiguities authoritatively ‘naturally’ leads states to interpret treaty rules so they can behave as their interests dictate while claiming their behaviour is in compliance.” Finally, compliance may reflect *the way states calculate their self-interest*, and not the effect of the treaty compliance system on such calculations. For instance, states may comply because they “fail to recalculate their interests constantly”, or because of exogenous economic or technological changes that reduce the cost of compliance (thus altering calculations of self-interest), or because the actions of non-state actors like multinational corporations, NGOs, scientists, and general publics may lead states to redefine their interests, thus increasing “the domestic costs of violation”.⁵¹ Where any of these forms of independent self-interest are at work, Mitchell suggests, and we agree, it is self-interest, and not the treaty compliance system, which explains

⁴⁹ “Compliance Theory,” 9.

⁵⁰ Mitchell, “Compliance Theory,” 7-9.

⁵¹ For example: “New scientific knowledge or greater environmental activism can cause increases in the perceived costs of an environmental externality and lead to greater compliance;” “Elections or larger social or political factors

compliance.

While *compliance as interdependent self-interest* is also treaty-independent,⁵² it is not nearly so relevant to human rights treaties as to the environmental treaties which Mitchell studies. The central idea is that in deciding whether to comply with treaty provisions, “states can not only include broader and longer-term concerns in their calculus of self-interest, but can also include their expectations regarding the impact their own compliance will have on others.”⁵³

The tangible externalities involved in many environmental treaties naturally lead to considerations of game theory and the incentive structures of public goods and of coordination and collaboration games. Since human rights treaties like the ICCPR focus primarily on relations between the state and individuals living within it, they do not tend to create such externalities and these questions of interdependent self-interest do not tend to arise. Some of Mitchell’s observations in this context merit brief consideration, however, because they help illustrate the subtle distinctions involved in distinguishing endogenous from exogenous causes. For instance, Mitchell notes that in collaboration games where “compliance requires enforcement,” compliance should not be attributed to a treaty if the enforcement is not due to the treaty itself. Similarly, where an important impediment to compliance is a lack of international trust, increases in compliance due to improvements in geopolitical relations unrelated to the treaty must be considered exogenous they originate outside of the treaty compliance system.

Besides their limited capability to generate externalities, human rights treaties also differ from environmental and economic treaties in that their non-compliance enforcement systems rely almost exclusively upon the mobilization of social opprobrium and public opinion. This has

often change the bargaining positions of domestic bureaucratic and political groups, altering how a state assess its interests in compliance.” Mitchell, “Compliance Theory,” 9.

⁵² Mitchell, “Compliance Theory,” 9-11.

⁵³ Mitchell, “Compliance Theory,” 9.

important implications for determining what is rightly an endogenous or exogenous explanation. In particular it suggests that we might want to reassess some aspects of Mitchell's discussion of compliance as independent self-interest. As an example of cases where "the state would have behaved as it did in any event," he provides an example where "the agreement provides international legitimacy which increases domestic political support enough to enable the government to implement a desired but otherwise unattainable policy." (7) Similarly, in discussing independent self-interest broadly defined he refers to the fear of "adverse public opinion, domestically or internationally". (8) If these must always be considered exogenous explanations, then most human rights treaties which rely upon the mobilization of public opinion and political support will be found to have had no impact.

We can resist this conclusion, however, if we accept that the distinction between causes that are appropriately attributed to treaties and exogenous causes does not lie in the types of causes per se, but rather in their origin. To demonstrate this we need to take a step back from the factors themselves and consider the nature of the impediments to compliance that they may be addressing. Recall that Mitchell suggested three types of reason for non-compliance: preference, incapacity, and inadvertence. Where states desire to comply but find the policy unattainable due to lack of political support, the impediment is neither preference nor inadvertence, but rather incapacity. What incapacitates the state, however, is not a lack of technology or money, but rather a lack of domestic support. Mitchell raises the possibility of such a form of incapacity when he writes that "cultural and social contexts may make compliance significantly more difficult to elicit from the companies and citizens of one country than another" and presents as an example the possibility that "two governments could be equally committed to reducing population growth but one with a predominantly Catholic population might prove significantly

less successful at complying.”⁵⁴ Thus, if an aspect of the treaty compliance system contributes to a shift in domestic political support which allows the government to implement the compliant policy, this must be considered treaty-induced, even though there may have been no direct interaction between government and the treaty compliance system.

This is especially important with respect to human rights treaties like the ICCPR which depend so heavily upon the generation of adverse public opinion as a means of enforcement. Where changes in political support that enable governments to act are not clearly related to a treaty’s compliance system, they must be treated as exogenous. But, where it can reasonably be demonstrated that this shift in political support could not have occurred *but for the existence of the treaty* and its compliance system, then the treaty can be considered a causal factor.

Drawing Conclusions

Thus if it can be demonstrated that all three elements are in place in a given case—correlation between treaty and policy change, evidence that the treaty could have led to the policy change, and evidence that there are no more rival explanations which are more convincing—then we may conclude that policy outcomes have differed from what they would have been had Canada not joined the ICCPR.

II. Case-Study: Lovelace v. Canada:

It is generally understood that Canada’s record of implementing views of the UN Human Rights Committee has been good. For example, in 1988, Cathal J. Nolan wrote, that while Canadian response to the opinions of the Human Rights Committee have at times been ambivalent, “most frequently Canadian governments have responded to committee criticism by admitting

⁵⁴ “Compliance Theory,” 13 and n. 62.

shortcomings and introducing legislative or administrative remedies.”⁵⁵ In this section we put test this assumption by applying the approach outlined above to analyze *Lovelace v. Canada*.

Have policy changes occurred, subsequent to ratification of the treaty, which appear to bring public policy into compliance with a treaty rule?

The basic facts of the Sandra Lovelace case are well-known. Ms. Lovelace was born and raised as a status Indian on the Tobique reserve in New Brunswick. Having married an American in 1970 whom she subsequently divorced, Ms. Lovelace lost her status under Section 12(1)(b) of the Indian Act. This section had the effect that while a status Indian man who married a non-Indian woman retained his status and had it extended to his wife as well as their children, a status Indian woman who married a non-Indian was thereby denied status as were any children resulting from the union. As the right to reside on reserve was attached to being registered as a status Indian, she also lost her right to reside permanently on her home reserve. Ms. Lovelace sent a communication to the HRC in December of 1977, claiming that a number of her rights under the ICCPR had been violated. The HRC issued a view in 1981 siding with Lovelace and arguing that Canada was in breach of its commitments under the ICCPR. In 1985 Canada enacted Bill C-31: An Act to Amend the Indian Act. Among other things, this legislation amended the Indian Act to remove sexual discrimination in the determination of Indian status (and, thus, the right to reside on reserve), by repealing and replacing section 12(1)(b). As Bill C-31 was enacted four years after the publication of the in *Lovelace*, it was widely perceived that the HRC’s view had had an impact on this decision.

This perception is reinforced by explicit statements made by the government of Canada. In its response to the HRC dated June 6, 1983, Canada wrote, “Canada is anxious to amend the

⁵⁵ Cathal J. Nolan. “The Human Rights Committee” in *Human Rights in Canadian Foreign Policy*. Robert O. Matthews and Cranford Pratt (eds.) (Kingston and Montreal: McGill-Queen’s University Press, 1988), 109.

Indian Act so as to render itself in fuller compliance with its international obligations pursuant to article 27 of the International Covenant on Civil and Political Rights.” And further, “Canada is committed to the removal from the *Indian Act* of any provisions which discriminate on the basis of sex or in some other way offend human rights”.⁵⁶ In 1985 when Bill C-31 was introduced in the Commons this commitment was noted by Secretary of State for External Affairs, Joe Clark:

Hon. Members may recall that, in July 1981, the Commission on Human Rights [sic] concluded that Canada had violated Article 27 of the covenant because Indian Act Section 12(1)(b) had prevented Sandra Lovelace from living on a reserve...In the summer of 1983, Canada advised the Commission concerning the steps it was taking to correct that violation. Specifically, our representative gave the assurance that Canada was committed to delete from the Indian Act any discriminatory provision related to sex. The Government is now about to honour that commitment...By having the House adopt this Bill, Canada will meet its obligations and eliminate that discrimination.⁵⁷

There can be little doubt that it was the Canadian government’s position that in passing Bill C-31 it was responding to *Lovelace* and complying with its obligations under the ICCPR. This, of course, is insufficient evidence upon which to conclude that this demonstrates that the ICCPR had an impact on Canadian public policy.

Is there evidence that the treaty was a causal factor in the policy change?; Are there factors exogenous to the treaty that better explain the change in public policy?

To assess whether Bill C-31 does actually represent evidence of the ICCPR having had an impact upon Canadian public policy we will consider is the counterfactual proposition that the federal government was going to arrive at the policy represented in Bill C-31 irrespective of Sandra Lovelace’s communication to the HRC. To do so, I will address four questions which suggest how *Lovelace v. Canada* might have had an impact on the policy outcome. These are: did *Lovelace* put the issue of sexual discrimination in the Indian Act on the political agenda?; did

⁵⁶ “CANADA: Follow-Up: a) Jurisprudence—Actions by Treaty Bodies,” Online: Bayefsky.com; Accessed 4/19/04. http://www.bayefsky.com/.pdf/canada_ccpr_follow_juris.pdf .

⁵⁷ House of Commons, March 1, 1985, 2652.

Lovelace change the federal government’s position on the issue?; did *Lovelace* determine the shape of the policy outcome?; and did *Lovelace* affect the timing or details of the outcome? In answering these questions, the counterfactual case will emerge.

Question 1: Did *Lovelace* put the issue of sexual discrimination in the Indian Act on the political agenda?

There can be no doubt that the *Lovelace* communication did *not* put the issue of sexual discrimination in the Indian Act on the political agenda. As early as August 1968 a federal minister was reported as having raised the issue of “the status of Indian spouses married to non-Indians” with Indian leaders⁵⁸ and in 1971, a government discussion paper on the Indian Act considered options for addressing the issue.⁵⁹ In almost every session of Parliament from 1969 to 1979 private member’s bills were introduced which called for the repeal of the section. Of greater impact, the 1970 report of the Royal Commission on the Status of Women called for the repeal of section 12(1)(b).⁶⁰ Also in that year Jeannette Lavell, an Ojibwa who had lost her status by marrying a non-Indian man, challenged the section as a violation of sexual equality provisions in the 1960 Canadian Bill of Rights. By the time Lavell won on appeal to the Federal Court of Appeal in October of 1971, section 12(1)(b) had become a national issue.⁶¹ As this all occurred prior to Canada’s ratification of the ICCPR in 1976, the ICCPR could not possibly be responsible for placing this issue on the political agenda.

Question 2: Did *Lovelace* change the federal government’s position on the issue?

There is also good reason to believe that *Lovelace* did *not* change the federal government’s

⁵⁸ “Indians hold private talks on new act.” Globe and Mail Aug 13, 1968, p.5.

⁵⁹ “Discussion Notes on the Indian Act.” (Ottawa: Information Canada 1971). While no author is attributed to the document, Indian Affairs Minister Jean Chrétien acknowledged in the Commons that it had been published by the Department of Indian Affairs. Commons, December 12, 1973; 8665.

⁶⁰ Kathleen Jamieson. *Indian Women and the Law in Canada: Citizen’s Minus*. (Ottawa: Canadian Advisory Council on the Status of Women, 1978), 80.

position on this issue. In fact, the federal government's position as reflected in Bill C-31 does not appear to have changed much since at least 1974. This said, the federal government's position has always been nuanced, reflecting the competing pressures it has faced from the key players in what we might call the 'Indian status entitlement' policy community.

A first indication of the complexity of the federal position is revealed by examining its response to the Federal Court of Appeal's decision in *Lavell*. To many it may have seemed that the issue had been settled.⁶² Section 12(1)(b) represented illegitimate sexual discrimination, the court had recognized this, there was nothing more to be done. In fact, within days of the decision it was reported that "a directive had been sent from the department [of Indian Affairs] to its agents to discontinue removing such Indian women from the Indian register" and the department had begun considering whether to reinstate women who had lost their status.⁶³

The government's actions in the weeks subsequent to the decision, however, illustrate the complexity of its position. On the one hand, some of its actions suggested a desire to defend the status quo; Justice Minister John Turner informed the Commons that the government would appeal the decision to the Supreme Court,⁶⁴ and Indian Affairs Minister Jean Chretien said "that he would be willing to help any Indian group wishing to appeal to the Supreme Court of Canada to reverse a recent decision of the Federal Court of Appeal."⁶⁵ Progressive Conservative MP Eldon Woolliams appeared to share this assessment when he suggested the government was

⁶¹ Douglas Green. "Loss of Indian status on marriage called discriminatory." *Globe and Mail*, October 8, 1971, p. 13; Douglas Green. "Wed to white, Indian to regain band status." *Globe and Mail* Oct 9, 1971, p. 15.

⁶² For instance, responding to the government's declaration of its intention to appeal to the Supreme Court, Progressive Conservative critic John Woolliams said, "It seems very strange to me that this government and this minister would want to use the taxpayers' money to enter an appeal on a question of social justice, real justice, when we have for the first time a ruling establishing equality between the sexes and equality as far as race and colour are concerned." December 1, 1971; 10046.

⁶³ "Indian woman wedding to keep status." *Globe and Mail*, October 19, 1971, p. 18.

⁶⁴ House of Commons, December 1, 1971; 10045.

⁶⁵ Rudy Platiel. "Group objects to the ruling that woman wed to white still an Indian." *Globe and Mail*, November 29, 1971.

trying “to break the decision.”⁶⁶ On the other hand, the government indicated that it was not willing to maintain the status quo at all costs; it was reported in February 1973 that Chrétien had “rejected an Alberta Indian request to bring in a temporary amendment to the Indian Act protecting it from changes brought about by court decisions.”⁶⁷

As it turned out, Chrétien was not pressed on this matter, since the Supreme Court overturned the Federal Court of Appeal’s Lavell decision, thus reinstating the status quo.⁶⁸ By August 1973, the Department of Indian Affairs had resumed enfranchising Indian women who married non-Indians.⁶⁹

How are we to make sense of these apparently contradictory actions? A good place to start is with the justification Turner offered the Commons when he announced the government’s intention to appeal to the Supreme Court:

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.’⁷⁰

Captured in this statement are the key elements in the ‘Indian status entitlement’ policy community: women and sexual discrimination; Indians and aboriginal rights; and universal human rights. A fuller understanding of the federal position requires an exploration of these interests, their positions on the issue, and their relative strengths.

Promoting the women’s position were various non-Indian and Indian women’s groups which had very different stakes in the issue. Non-Indian women’s groups, such as the Advisory

⁶⁶ “Indian status case to go to top court,” G&M December 2, 1971, p. W3.

⁶⁷ “Indian leader predicts violence if women push too far,” G&M February 22, 1973, p. W7.

⁶⁸ John D. Whyte, “The Lavell Case and Equality in Canada.” *Queen’s Quarterly* Vol. 81 (1974), 41. The details of the Lavell decision are not our concern here. Much has been written on the decision, however. See, for instance, **CITATIONS**

⁶⁹ Sally M. Weaver. “The Status of Indian Women” in *Two Nations, Many Cultures: Ethnic Groups in Canada*. Jean Leonard Elliott (ed.) (2nd ed.) (Scarborough: Prentice-Hall, 1983): 67.

Council on the Status of Women, defined the issue primarily in terms of sexual equality.⁷¹ The main group representing non-status Indian women in the 1970s was Indian Rights for Indian Women (IRIW). It had been formed by women who supported Lavell in her court case. As its name indicates, the IRIW saw the section 12(1)(b) issue as a matter of fair access to status 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....Mrs. Lavell says she does not want to see a white man gain Indian status by marrying an Indian woman. 'Everyone should be legally an Indian, if they are an Indian. If they are white, they should be white.'"⁷² Finally, the Native Women's Association of Canada [NWAC], the major status Indian women's groups appear 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."⁷³ Despite the differences in their positions, all these groups put pressure on the federal government to address the issue of sexual discrimination.⁷⁴

⁷⁰ House of Commons, December 1, 1971; 10045.

⁷¹ For instance, the Advisory Council on the Status of Women called for the repeal of section 12(1)(b) in reports in April and October of 1974 and 1976, and provided funding to Indian Rights for Indian Women which resulted in Kathleen Jamieson's *Indian Women and the Law in Canada: Citizens Minus* (1978). See, Patricia Bell, "40-page report on women's rights tells what's been done, still to do." G&M April 11, 1974, p. 13; "Ottawa urged to find value of housework." G&M, November 19, 1974, p. 20; "Report deplores lack of laws aiding women." G&M, September 22, 1976, p. 13; "Council to aid non-status Indian women in study of discrimination against them." G&M, June 23, 1977, p. F4.

⁷² Rudy Platiel. "To Mrs. Lavell, it's 'question of human rights.'" G&M February 22, 1973, W6.

⁷³ Marlene Pierre-Aggamaway, "Native Women and the State" in *Perspectives on Women in the 1980s* Joan Turner and Lois Emery (eds) (Winnipeg: University of Manitoba Press, 1983), 68.

⁷⁴ So much pressure in fact that in 1978 National Indian Brotherhood president Noel Starblanket put his own pressure on provincial Indian organizations to take public stands on the section 12(1)(b) issue because, he said, "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'". Geoff White. "Loss of treaty rights upheld." *Calgary Herald*, March 25, 1978, B1.

Most, but not all, status Indian organizations, led by the National Indian Brotherhood (NIB) defined the issue in terms of aboriginal and treaty rights.⁷⁵ This was understandable given that twice since 1969 they had faced the prospect of the Indian Act, and thus Indian special status, being unilaterally repealed or rewritten without their consent. In 1969 the federal government had issued a white paper on Indian policy which had proposed repealing the Indian Act and removing all references to Indians from the Constitution.⁷⁶ Then, in 1971 the Lavell case presented the possibility that the courts might declare the whole Indian Act invalid because of its inconsistency with the Bill of Rights.⁷⁷

In this context, the NIB seemed to have had three different, but reinforcing, reasons for opposing federal action to redress section 12(1)(b) which were compatible with the claim they made at times that they were not opposed to addressing sexual discrimination. First, they were opposed to allowing the federal government to amend the Indian Act in any way without first consulting and receiving the approval of Indians.⁷⁸ Second, many Indian bands claimed that among their aboriginal rights was the right to determine band membership;⁷⁹ this could not be squared with allowing the federal government to unilaterally change rules governing Indian

⁷⁵ In February 1973, prior to the Supreme Court's Lavell decision, the Manitoba Indian Brotherhood declared its support for Lavell. "In one corner, the Bill of Rights, in the other, the Indian Act." *Globe and Mail*, February 22, 1973, p. W6.

⁷⁶ Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969).

⁷⁷ John D. Whyte wrote of the Lavell case: "What evoked this wide participation, in particular the participation of the country's Indian organizations in support of the validity of the sections of the Indian Act under attack, was the realization that what was at stake was the continued existence of the current form of Indian administration in Canada. This is a significant impact to claim for a decision which considered only one subsection of the Indian Act, but crystallized in this case was a general concern about the propriety of the whole Indian Act in relation to the Canadian Bill of Rights." 29.

⁷⁸ Thus, for instance, Harold Cardinal reports having won an important victory in February 1975 when the federal government committed "that no changes to the Indian Act would be introduced in Parliament by the Department of Indian Affairs, without first having such changes 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." Harold Cardinal. "Native Women and the Indian Act." in *Two Nations, Many Cultures: Ethnic Groups in Canada*. Jean Leonard Elliott (ed.) (Scarborough: Prentice-Hall, 1979): 49.

status. Third, the status Indian leadership appears to have been motivated by a fear that if the federal government were allowed to deal with the sexual discrimination issue first, it would never get around to revising the Indian Act in ways that were important to Indians. This concern was expressed clearly by then National Chief of the Assembly of First Nations, David Ahenekeew in his presentation to the Commons Subcommittee on Indian Women and the Indian Act:

Recently, with what I consider to be great hypocrisy, the Government of Canada made a big thing of one aspect of the many injustices to which we have been subjected. It said that it was deeply concerned about the way in which the Indian Act discriminated against Indian women who married non-Indian men. ...

Yet it has been able to mobilize a mighty campaign, which has extended itself down to the creation of this very subcommittee, to deal with just one aspect of one part of one law which its regards as discriminatory. We can only look with great suspicion on such a manoeuvre.

We look with even greater suspicion when the government has proceeded with this campaign while at the same time refusing to accede to our demand that there be no changes in the Indian act until the aboriginal and treaty rights of the First Nations have been properly secured in the Constitution.⁸⁰

This was perceived by some as a deliberate strategy of ‘holding Indian women hostage’ to get attention paid to their demands—that is, it was trying to use Ottawa’s desire to remove the sexual discrimination to negotiate amendments desirable to Indians.⁸¹

Other reasons for opposing government action that were presented by some status Indian organizations were not reconcilable with repeal of section 12(1)(b). These reflected the fear that

⁷⁹ Even prior to the Lavell decision, the Association of Iroquois and Allied Indians “told Mr. Chrétien that the act should be revised to leave decisions on band membership to the individual band councils.” Rudy Platiel. “Group objects to the ruling that woman wed to white still an Indian.” *Globe and Mail*, November 29, 1971.

⁸⁰ 1:66-67. Similarly, in 1980 it was reported that the Indian Association of Alberta, like the NIB, “contends that while discrimination against women exists under the act, what is needed is a complete overhaul of the act with full Indian consultation, not just piecemeal revision.”; and it was reported of Arnold Goodleaf, NIB spokesperson, that he “says politicians have become champions of the Indian women’s rights issue because it’s ‘politically sexy’, while ignoring the larger issue of Indian rights.” “It’s a man’s world out there in Indian country” *Calgary Herald*, April 29, 1980, E1.

⁸¹ For instance, in an article entitled, “Indian women ‘made pawns’ in rights battle,” Lynda Hurst reported in the *Toronto Star* that “Indian leader Harold Cardinal agreed that the Indian act, was ‘discriminatory from start to finish’ but said because it was an embarrassment to the government Indians could use it as a lever.” April 13, 1978, D9. Similarly, in 1980, then federal human rights Chairman Gordon Fairweather was quoted as saying, “It makes me really sad that some Indians, including Alberta chiefs, are using the rights of their women as a bargaining tool in negotiations with the federal government.” “Indian women seen as pawns.” *WFP*, March 20, 1980, 54.

women who had lived off reserve for a long time and their children who had never lived on reserve would suddenly regain status and, thus, the right to move to the reserves. Concerns expressed in this context were cultural (these outsiders don't know our ways and will swamp our culture) and practical—most reserves were concerned that they wouldn't have enough money and land to provide housing and services to these new residents, let alone their present residents; other reserves, especially those sitting on large oil and gas reserves, were concerned about retaining control of their wealth.⁸²

The other major player with independent interests in this policy community was the federal government itself. Some key elements of its position were explicitly acknowledged, others were noted, but not played up. The government's explicitly acknowledged position appeared intended to portray it as an honest broker in this debate; while its declared policy since 1974, and repeated by every Minister of Indian Affairs thereafter, was to end sexual discrimination,⁸³ it also claimed it was unable to act because of its commitment to consult with Indian organizations.⁸⁴ This argument was invoked to defend the government's decision in 1977 to exempt the Indian Act from the application of the new Canadian Human Rights Act. For instance, defending the government's position before the Commons Justice Committee, Justice Minister Ron Basford "said making the discrimination illegal under the human rights bill would be seen as unilateral government action interfering with the Indians. ...and could hurt

⁸² REFERENCE

⁸³ John Munro, then Minister of Labour, cited Lavell in a speech to the Commons as an example "that much more has to be done in the field of legislation" to protect women for discrimination. March 5, 1974; 187.

⁸⁴ Typical of this approach is a response by the Minister of Indian Affairs to a question in the Commons concerning whether the government would remove discrimination from the Indian Act: "an undertaking was given to all Indian people in Canada that the federal government would not unilaterally alter the Indian Act without consultation with the Indian people. They have given us preliminary proposals, amongst which is a clause providing that the discriminatory aspect would be removed in the sense that neither a male or female spouse, on marrying an Indian person, would acquire Indian status, nor would the offspring. They made it clear that that was a tentative proposal and asked us to bide our time until they consulted with all the Indian people before they made a final presentation." January 25, 1975; 2511.

consultations with the National Indian Brotherhood...[He said,] Indians must eliminate the discrimination themselves through consultation on reform of the Indian Act.”⁸⁵

A further factor that complicated the federal government’s position was financial implications. While it was often commented upon, it was rarely explicitly acknowledged as a factor driving the government’s policy. Money was involved because any change to the rules that affected the number of status Indians, would likewise affect the cost of providing benefits to status Indians. Further, since Indian status and band membership (and thus the right to reside on a band’s reserve) were not separated prior to Bill C-31, the financial obligations of Indian bands, which would have to provide housing and other benefits to these new Indians, would also increase; given the state of band finances, this cost would also likely have to be borne by the federal government. While federal officials tended to skirt the issue of financial implications in public, there is abundant evidence that it was a key consideration; while the issue was usually presented as a matter of justice and equality, the government rarely considered it without estimating demographic and financial implications. For instance, within days of Lavell’s victory in the Federal Court of Appeal in 1971 a Department of Indian Affairs official told the *Globe & Mail* that a decision to reinstate might affect as many as 5,000 women.⁸⁶ In a series of discussion papers on amending the Indian Act released in 1978 the Department of Indian Affairs noted that since “federal funds are limited, the effects of adding beneficiaries will have to be borne in mind.” It also felt it necessary to estimate the additional numbers of women and children that would be eligible for Indian status under its proposals.⁸⁷ In October 1981 following Lovelace’s victory at the UN, a cabinet document was ‘leaked’ to the Canadian Press which urged the

⁸⁵ “Immediate action rejected but Basford says Indian act’s discrimination to end,” *Winnipeg Free Press*, May 26, 1977.

⁸⁶ “Indian woman wedding to keep status.” *Globe and Mail*, October 19, 1971, 18.

⁸⁷ DIAND. “INDIAN ACT REVISION: Discussion Paper: Membership” (Ottawa: DIAND, 1978).

government to end sexual discrimination, but warned cabinet the cost could “range from a low of \$312.2 million to a high of \$556.7 million—in 1980 dollars.”⁸⁸ In a discussion paper released in 1982, options which were eventually incorporated into Bill C-31 were described 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.”⁸⁹ Finally, in the third reading debate of Bill C-47 in June of 1984 (a Liberal bill similar to Bill C-31 that died in the Senate), Minister of Indian Affairs John Munro mentioned “the horrendous expense” as one of the reasons for the government’s decision not to extend reinstatement to Indian status beyond “people who lost status plus one generation.”⁹⁰ Thus, it seems that cost containment was a key factor influencing the government’s position.

Besides these conflicting interests represented in this policy community, the government’s attempts to address the section 12(1)(b) issue were hampered by the fact that the problem was actually much more complex than those demanding the simple repeal of section 12(1)(b) admitted. This complexity arose from the fact, as was often noted by learned commentators, that section 12(1)(b) did not stand alone, but rather was just one part of a complicated set of rules that constituted the Indian band membership system in Canada. Thus, it could not be repealed in good conscience without rethinking the entire band membership system. This was the reason, Douglas Sanders has suggested, that the Supreme Court had decided *Lavell* as it did; “In my view,” he said, “the court realized the complexity of the issue and felt unable to take on the job of rewriting the membership system in the Indian Act.”⁹¹ This complicated the issue by adding significantly to the variables and interests that would have to be balanced in

⁸⁸ “Document urges sweeping changes to end discrimination.” *Halifax Chronicle-Herald*, October 2, 1981, 16.

⁸⁹ DIAND . *The Elimination of Sex Discrimination from the Indian Act* (Ottawa, DIAND, 1982), 6, 14.

⁹⁰ June 29, 1984; 5336.

⁹¹ Commons Subcommittee on Indian Women and the Indian Act, 1982, 5:17.

order to reach a satisfactory solution; allowing Indian women who married non-Indians to retain 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 Indians or non-Indians.

More than the issue of sexual discrimination, it was this question of how the Indian Act status and band membership system would be defined that made the determination of a new policy so difficult. On this question the interests of the key players in the policy community gave rise to conflicting and competing sets of demands. Status Indian organizations were willing to have the sexual discrimination issue resolved, but only if the federal government gave them control over the definition of who was an Indian (and dealt with other key concerns) first. Indian women who had lost their status wanted the federal government to reinstate them along with their children, but the status Indians organizations opposed this because it would mean the federal government was determining band membership. The federal government wanted to eliminate sexual discrimination in the Indian Act, but it was unwilling to do so if it meant ceding control of the power to grant Indian status.

This is a rather long way of getting to the point that since at least the mid-1970s the federal government's position on the section 12(1)(b) issue was basically fixed; it wanted to eliminate sexual discrimination from the Indian Act, subject to its concerns about cost containment. Thus, it wanted to avoid excessive increases to its financial burden by creating more status Indians or by ceding over the granting of Indian status. Nothing in *Lovelace* altered this position.

Question 3: Did *Lovelace* Determine the Shape of the Policy Outcome

Even if the federal government was already committed to rectifying sexual discrimination in the

Indian Act when the *Lovelace* communication was published, the HRC's view might have by determined the parameters of the policy outcome. This, however, does not appear to have been the case. To see this we must first consider the HRC's view in *Lovelace* and then compare it to the policy that was put in place. What we find is that rather than addressing the core conclusion in the HRC's view, Bill C-31 is reflective of the domestic pressures that had been shaping the issue for at least a decade.

The relevant elements of the HRC's view in *Lovelace* can be summarized quite succinctly.⁹² First, the HRC decided that as Ms. Lovelace had married a non-Indian, and thus lost her Indian status six years 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, this did not prevent the HRC from considering "the continuing effect of the Indian Act", which was that Ms. Lovelace had no right to reside on the Tobique reserve. (para. 13.1) Third, it considered that Article 27 of the ICCPR was the most applicable to the complaint. (para. 13.2) Art. 27 reads:

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 an Indian for the purposes of the Indian Act, she was a member of the Tobique Maliseet band for the purposes of Article 27 because "persons who are born and brought up on reserves who have kept ties with their community and wish to maintain those ties must normally be considered as belonging to that minority". (para. 14). According to Professor Donald Fleming who acted as Lovelace's legal counsel, this suggested that the HRC had accepted as a standard of group membership for the purposes of Article 27, a combination of sanguinity ("she had been born into the Malecite Indian Reserve")

and cultural affinity (“she was a creature of that culture.”)⁹³ Fifth, while the HRC accepted that restrictions on the right of residence may be consistent with Article 27, (para. 15), it was “of the view that statutory restrictions affecting the right to residence on a reserve 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) Sixth, given 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) Thus, and finally, the HRC decided that it did not need to “to examine the general provisions against discrimination (articles 2,3, and 26) in the context of the present case”. (para. 18) The key points of this view were summarized quite nicely by Fleming’s when he said that the HRC 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.”⁹⁴

The policy that eventually emerged in Bill C-31 in 1985 struck a compromise between the major interests in the Indian status entitlement policy community. The legislation satisfied the federal government’s and the non-Indian women’s movement’s interests by removing sexually discriminatory sections from the Act. It satisfied Indian women who had lost their status under the old provisions by reinstating them as well as their first generation children. It went some distance towards satisfying the status Indian organizations by separating the rules

⁹² *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

⁹³ 2: 94.

⁹⁴ Subcommittee on Indian Women and the Indian Act, 1982, 2: 104.

governing Indian status, which dealt primarily with rights to entitlements from the federal government, and band membership, which dealt primarily with the right to reside on the reserve. By separating these previously overlapping categories, the government was able to satisfy itself by retaining control over status and to offer Indian bands the opportunity to take greater control of their membership if they so chose. A key exception to this band control, however, was that the reinstated women (but not their children) were automatically reinstated to band membership in addition to Indian status. (11(1)(c)).

The provisions of the Bill C-31 policy that are most controversial from the perspective of the HRC's view in *Lovelace* are those that concerned how Indian status will be determined in the future. These rules lay out that a person is entitled to be registered to as a status Indian if either both of his/her parents were entitled to be Indians under Indian Act section 6(1) (i.e., registered as a status Indian on April 17, 1985, entitled to be reinstated as an Indian on that date, or descended from people, all of whom were so entitled), or according to section 6(2), if one of his/her parents was entitled to be registered under section 6(1). By implication, a person, one or both of whose parents were entitled to status under section 6(2), but neither of whom were entitled under section 6(1), would not be entitled to registered as a status Indian. While such persons will not be entitled to be registered as status Indians, Bill C-31 empowered Indian bands to place them on their own lists (if they chose to take control of membership) or to request the government to place them on the band's list (if they opted to leave control with Indian Affairs). The band, however, would not be entitled to extra resources to cover expenses arising from the inclusion of these additional band members.

One reason for believing that the shape of the policy embodied in Bill C-31 was not determined by *Lovelace* is that Bill C-31's system of allocating status has direct implications for

eligibility for band membership and thus the right to reside on reserves which contradict the HRC's view in *Lovelace*. Band members who have status under section 6(2) are entitled to reside on reserve with their dependent children (Indian Act section 18.1). If neither of the dependent child's parents has status by virtue of section 6(1), however, the child is not entitled to status. Thus, where bands do not opt to extend membership to such children, a child could be born into and raised in a reserve community, yet not have the right to be included on the band list and, thus to reside in the community upon reaching the age of maturity. This is clearly is not in keeping with the HRC's view in *Lovelace*, as it means that people "who are born and brought up on reserves who have kept ties with their community and wish to maintain those ties"⁹⁵ can be denied the right to do so. It seems highly unlikely that the federal government was not aware of this eventuality, and in case it wasn't, the HRC drew this to the government's attention in its

Concluding Observations on Canada's fourth periodic report:

The Committee is concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee's Views in the *Lovelace* case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community. The Committee recommends that these issues be addressed by the State party.⁹⁶

A second reason for suggesting that the shape of this policy was not determined by the *Lovelace* decision is that, while it was put into legislation in 1985, it is very similar to a policy the Department of Indian Affairs proposed in a discussion paper in 1978. According to the 1978 proposal, and like Bill C-31: i) marriage would not affect Indian status—i.e., Indians would not lose status upon marriage, non-Indians would not gain it; ii) first generation children of mixed

⁹⁵ *Lovelace v. Canada*, para. 14.

⁹⁶ *Concluding Observations of the Human Rights Committee: Canada*. 07/04/00. CCPR/C/79/Add105. (Concluding Observations/Comments), para. 19. While the observation begins by erroneously suggesting that *Lovelace* concerned sexual discrimination, the reference to children is accurate and gets to the point.

marriages would retain status, but children of second generation mixed marriages would not; and iii) bands could opt to make non-status Indians ‘band beneficiaries’.⁹⁷ The obvious attraction of this model for the federal government was noted in a 1982 discussion paper which considered the implications of various options for dealing with children of mixed marriages. While granting full status to children of mixed marriages “would lead to a continual increase in the [status] Indian population over time,” the policy of denying status to “children, one of whose parents and one of whose grandparents on the Indian side are non-Indians,....would limit the future growth of the Indian population and would reduce the pressure on scarce band resources.”⁹⁸ It would also, of course, reduce the growth of expenses related to the entitlements associated with Indian status. Thus, the policy thinking reflected in Bill C-31 appears to predate the HRC’s view in *Lovelace* and to reflect government interests which were unaffected by it.

Thus, as the policy embodied in Bill C-31 does not satisfy the requirements of the HRC’s view in *Lovelace*, and it is very similar to proposals the government was considering prior to the HRC’s decision in 1981, we can conclude that *Lovelace* did not determine the shape of the government’s policy.

Question 4: Did *Lovelace* Affect the Timing or Details of the Policy Outcome?

While the research for this paper is not complete, I feel confident that *Lovelace* did not effect the Bill C-31 outcome in any of the three ways considered above. More research is required, however, to provide a satisfactory answer to the question of whether *Lovelace* may have affected the timing or details of that policy. In the space that remains I will present a hypothesis concerning what I think I might find, present some evidence to support it, and suggest how I plan to proceed.

⁹⁷ DIAND. “INDIAN ACT REVISION: Discussion Paper: Membership” (Ottawa: DIAND, 1978), 2-3.

⁹⁸ DIAND . The Elimination of Sex Discrimination from the Indian Act (Ottawa, DIAND, 1982), 13-14.

I suspect that the major effect of *Lovelace* was to contribute to an alteration in the balance of power within the Indian status entitlement policy community that made it possible for the federal government to break the log-jam by acting unilaterally. I say I think it *contributed to*, and not that it *effected*, such an alteration, because to a great extent the changes that facilitated the enactment of Bill C-31 in 1985 appear to have been domestic in origin. Foremost among these was the creation of the Constitution Act, 1982 which included the Charter of Rights and Freedoms. The federal government used this to propagate the idea that when the equality provisions in the Charter came into effect on April 17, 1985, section 12(1)(b) would be found in violation. It appears that it was this deadline, which the federal government set for itself, and not the *Lovelace* decision, that was the key determinant of the timing of the change in policy. This suggests that to the limited extent that Bill C-31 represents compliance with the ICCPR, the major motivation for the compliance was not treaty-induced, but rather reflected an exogenous change in Canada's domestic constitutional structure.

This, however, does not appear to be the whole story. In fact, the *Lovelace* case appears to represent a strange version of compliance requiring little change in current behaviour patterns. In this case, to paraphrase Mitchell, *Lovelace v. Canada* “provide[d] international legitimacy which increase[d] domestic political support enough to enable the government to implement a desired but otherwise unattainable policy.”⁹⁹ What is strange about this, is that, as we have noted, the desired policy that *Lovelace* helped facilitate appears to be in violation of the ICCPR.

The first thing to note is that the government's position appears to have been strengthened vis-à-vis the status Indian organizations by the fact that the subtlety of the HRC's decision was lost in the Canadian context—it seems that a simple jump was made by most, especially in the media, that since *Lovelace* won, the HRC *must* have decided the case on the

basis of sexual discrimination. Most newspaper articles reported the HRC's decision in this way.¹⁰⁰ Had the issue of membership criteria for access to protected minority communities been associated with *Lovelace*, the government could not so easily have presented Bill C-31 as compliance. To confirm my broader hypothesis, however, further research is required to determine if foreign newspapers reported the story, and how they presented the decision; and if foreign dignitaries used the decision to chastise Canada, and how they appeared to understand it.

Second, there is the idea that that *Lovelace* contributed to mounting international pressure on Ottawa to act on this issue. This is certainly the perception one gets from reading Hansard and from news clippings. There is, however, a surprising dearth of references to specific international criticism, other than that of the HRC. Here again, further research is required to determine if and to what extent Canada felt pressure and to what extent Canada's 'international embarrassment' was a domestic phenomenon. To the extent that this is the case, it would suggest that *Lovelace* had an impact by emboldening the federal government to act.

Third, and finally, the federal government appears to have done a remarkable job of defining opposition from status Indians organizations as the impediment to removing sexual discrimination from the Indian Act. This had the effect of reinforcing the idea that the status Indians were mainly concerned with defending sexism and of diverting international pressure onto their organizations. For instance, a year prior to the HRC presenting its view, Prime Minister Trudeau responded to a question from Flora MacDonald referring to *Lovelace* and calling on the government to repeal section 12(1)(b) by saying, "I am certainly in agreement with the hon. lady. Perhaps the case being decided at the United Nations will help persuade the

⁹⁹ Mitchell, "Compliance Theory," PAGE

¹⁰⁰ For example, "UN group says Indian Act works against women," *Globe and Mail*, August 15, 1981, 4; "Our Indian act unfair to women UN ruling says," *Toronto Star*, August 18, 1981, A9; "UN commission says Indian Act

Indian leaders themselves that they should be moving in this direction.”¹⁰¹ Similarly, in 1983, after the *Lovelace* decision, Indian Affairs Minister John Munro was reported to have said that “native opposition [to removing sexual discrimination from the Indian Act] has generally been quite muted. ‘I think they have a sort of feeling of inevitability about it (the changes),’ he added.” The same article said that a Native Council of Canada analysis of government proposals claimed that “Munro is merely trying to ‘get the federal government off the hook as far as its international commitments on sexual equality go.’”¹⁰² An April 1984 report provides a more explicit example of the attempt to transfer pressure:

John Munro predicted a ‘horrendous attack’ in the House of Commons if he tries to push through an Indian self-government bill without changing the women’s rights clause, widely regarded as ‘a blatant injustice’...[Munro said,] ‘They (Indian bands) know that this isn’t a unilateral act to stir up the waters on the part of the federal Government,...They know that we’ve been under extreme pressure.’¹⁰³

Confirming this hypothesis will require looking more into the negotiations between the federal government and native groups post-*Lovelace*. Of particular interest is the constitutional conference of 1983 that amended section 35 of the Constitution Act, 1982 to include a sexual equality provision. Review of the native press will be important here to try to get a sense of whether and how status Indians perceived the pressure to be being applied.

III. Conclusion

This paper began by asking whether Canada’s participation in the ICCPR has had a discernible and positive effect on public policy outcomes in Canada. Our aim was to develop an analytical framework to begin to answer this question and to test its usefulness by applying it to *Lovelace v. Canada*. Now having done so, I believe we can safely conclude that Mitchell’s approach, as

discriminates,” *Montreal Gazette*, August 19, 1981, 28; “Canada censured by UN committee,” *Globe and Mail*, September 2, 1981, 14.

¹⁰¹ July 7, 1980; 2587.

¹⁰² “Government plans to move on Indian Act, Munro says,” WFP, September 19, 1983, 13.

adapted in Part I of this paper, does provide a practical and useful means of assessing the impact of human rights treaty on domestic policy. Further the application of the approach to the *Lovelace* communication demonstrates that this effort is worthwhile, as it has generated some interesting insights. On the one hand, it suggests that, in at least one circumstance, the ICCPR has proven capable of having impact on Canadian public policy by contributing to an alteration in the balance of power within a domestic policy community. Further, the effect was positive to the extent that an element of sexual discrimination was removed from the Indian Act. On the other hand, it suggests that this impact was certainly not what advocates of the ICCPR might have hoped for. In a rather perverse way it supports Mitchell's claims about the importance of transparency to the effectiveness of the compliance information system.

¹⁰³ "Munro urges restoring Indian women's status." *Globe and Mail*, April 9, 1984, 5.