SEXUAL EQUALITY AND INDIAN GOVERNMENT: AN ANALYSIS OF BILL C-31 AMENDMENTS TO THE INDIAN ACT

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INTRODUCTION

The recently passed Bill C-31, An Act to Amend the Indian Act, alters several sections of the Indian Act. The most significant of these amendments is removal of Section 12(1)(b), which stripped Indian status from Indian women who married non-status Indians or non-Indians. As well as removing Section 12 (1)(b)'s application to future marriages, Bill C-31 makes it possible for women who have lost status via Section 12(1)(b),and for their children, to apply for status and band membership.

While some Bill C-31 amendments address issues other than reinstatement of persons affected by Section 12(1)(b), it is beyond the scope of this paper to examine all sections of the new Act. Only the status provisions relative to Section 12(1)(b) will be considered, together with implications for Indian government.

It has become apparent over the past two decades that the federal government has been increasingly uncomfortable with a number of Indian Act provisions, Section 12(1)(b) in particular. With the condemnation of this section by the Royal Commission on the Status of Women in Canada,[1] the unsuccessful Lavell and Bedard challenges to the Indian Act,[2] and the successful Lovelace case,[3] public and international opinion has grown more critical of the Indian Act's discriminatory provisions. The adoption of the Canadian Charter of Rights and Freedoms has made it impossible for the government to continue to tolerate this anomaly under any guise. With the coming into force of Charter equality guarantees on 17 April 1985, the government faced the unhappy prospect of being taken to court, and of losing. The Indian Act would be found inoperative insofar as certain sections offended the Charter. The courts would then find

NATIVE STUDIES REVIEW 1, No. 2 (1985), 81-95.

themselves coincidentally deciding questions of First Nations citizenship.[4]

To date political consensus on resolution of this matter has evaded all parties. The longer a political solution is delayed, the more likely it is that a legal resolution will occur. The latter has fewer chances of securing an outcome satisfactory to all.

HISTORICAL OVERVIEW

The seemingly irresolvable issues deriving from Section 12(1)(b) and Bill C-31 are best appreciated in an historical and political context. The current Indian Act is one of the most recent of a series of legislative measures addressing the government-Indian relationship. The first such legislation, passed prior to Confederation, made no mention of Indian status. The first enactment dealing with Indian membership entitlement was in 1850.[5] Since this date other Acts dealing with membership entitlement, Indian Acts,[6] and revisions thereto have followed.

The policy objective of the various Indian Acts and of the reserve system has been assimilation. It was envisioned, first by colonial and then by Canadian governments, that Indians would assimilate as quickly as they were raised to Euro-Canadian standards, as determined by the minions of Indian Affairs. "Status" was a temporary designation. With assimilation, it was expected that both status and reserves would become redundant and disappear.

It was in 1857 that restrictive definitions were attached to the concept of status. For example, male Indians who met certain criteria could be involuntarily enfranchised.[7] Enfranchisement of the males automatically caused the enfranchisement of their wives and minor children. By 1869, Indian women marrying "any other than an Indian" lost their status and rights.[8]

The Indian Act of 1876 further emphasized patrilineal descent and legitimate birth as criteria for Indian status. These criteria were integral to European notions of the male-female relationship and the role of women in society. European

societies were patrilineal and patriarchal. Women were legally the property of their husbands, as were their children. Consistent with this view, Section 11(1)(f) of the Indian Act decreed that non-Indian and non-status women marrying status Indian males took the status designation of their spouse.

That the Indian Act is discriminatory is incontestable.[9] Many sections other than Section 12(1)(b) single out classes of Indians for special treatment. For example, there are different inheritance provisions for legitimate and illegitimate children. The Act decrees involuntary enfranchisement for wives and minor children of males who voluntarily enfranchise. Formerly, enfranchisement was required if, for instance, an Indian wished to pursue higher education,[10] become a member of some profession, or join the armed forces. Until 1956 Indians had to renounce their status to exercise the rights of Canadian citizenship.

For some years those sections of the Act discriminating on different bases had been targeted for revision by the affected groups and by equal rights advocates. The most successful attack on the Act was the Drybones[11] challenge to Section 94 (now Section 95) of the Indian Act which differentiated between Indians drinking on and off the reserve. In upholding the Canadian Bill of Rights,[12] the Drybones decision held that Section 94 of the Act was inoperative as offensive to the Bill of Rights.

Encouraged by this victory, activists and Indian women's lobbies supported the Lavell and Bedard challenge to Section 12(1)(b),[13] arguing that the section was pernicious in its repercussions consequent to a choice of spouse and discriminatory[14] in that its effects are not extended to Indian men. Lavell and Bedard sought a ruling that Section 12(1)(b) was inoperative as offensive to the Bill of Rights. Their challenge failed in a Supreme Court of Canada decision which stripped the Bill of Rights of its potential protection of de facto equality. Equality of the law was held to be equal application of the law. Uniform discrimination against Indian women was in law "equality."

The implications for all challenges to Canadian legislation based on Bill of Rights' guarantees were obvious.

It seemed there was no recourse from the discriminatory provisions of the Act, short of political pressure for legislative revision or repeal. That was not forthcoming, as status Indian organizations used the Act as a lever to gain governmental concessions on other important Indian issues.[15] The rights of Indian women were to be held hostage for the political goals of Indian organizations.

With the Canadian judicial appeal process having been exhausted and with the conviction that Section 12(1)(b) represented a fundamental injustice that had to be corrected, opponents to it turned their attention to the remedies offered by international law. Canada had ratified the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, attached to the International Bill of Human Rights. As well, Canada had signed the optional Protocol, by which this nation agreed that a Canadian dissatisfied with the decision of the court of last resort could appeal to the United Nations Human Rights Commission.

In 1975 Sandra Lovelace, a Maliseet Indian who lost her Indian status via Section 12(1)(b), took the issue to the United Nations Human Rights Commission, contending that Canada was in violation of several sections of the Covenants named above. Because her marriage had taken place before Canada had ratified the Covenants, the Commission could not find Canada guilty of sexual discrimination.[16] Retroactivity is not contemplated in international law. However, the court did find Canada in violation of Section 27 of the Covenant of Civil and Political Rights. That section guarantees the right of all persons to enjoy their culture in their community. Lovelace's exclusion from her reserve violated this right. This decision resulted in some international censure of Canada for the Section 12(1)(b) provision.

After the Lovelace case, affected individuals, women's advocacy groups and equal rights proponents continued to pressure the federal government for removal of Section 12(1)(b)

and reinstatement of Section 12(1)(b) women. At the same time, some status Indian organizations opposed removal of Section 12(1)(b) and reinstatement. The political pressure, unfavourable international opinion and the equality guarantee in the Charter combined to force the federal government to deal with legislative discrimination in the Indian Act. The former Liberal Government's proposed remedy was Bill C-47, An Act to Amend the Indian Act, which died in the Senate just before the Liberals were defeated in the September 1984 election. The issue awaited the Conservative Government, which responded with Bill C-31.

While addressing the discriminatory provisions of the Indian Act, the present federal government is trying to avoid the appearance of violating the authority of Indian government. Indian participants in the constitutional conferences have made it clear that Indian government is an aboriginal right, and that citizenship falls within its parameters. Bill C-31 tries to please both sides, and predictably fully pleases neither.

BILL C-31 AND INDIAN GOVERNMENT

One right which Native people have consistently claimed is self-government and its concomitant responsibilities. Determination of First Nations citizenship is considered fundamental to this. Some Indian politicians argue that reinstatement of Indian women violates this right, and that the government is arbitrarily imposing its own lately-realized equality provisions on Indian nations. Others accept federal rectification of federally imposed discrimination, but fear the financial consequences of reinstatement of large numbers of women and first-generation children.

Band control of band citizenship is recognized in Bill C-31 providing bands have a membership code conforming to the equality provisions of the Charter of Rights and Freedoms. This will not satisfy bands claiming an inherent right to determine citizenship regardless of Canadian legislative criteria. The Bill creates two registers: one maintained by the Department of Indian and Northern Affairs Canada (INAC) (formerly the Department of Indian Affairs and Northern Development) and the

other by the bands. Indian status held by virtue of the INAC list will not in some cases automatically confer band membership. This is a concession to bands demanding the right to control citizenship, while attempting to appease Section 12(1)(b) women and first-generation children demanding their Indian rights. The stipulation that INAC will go by its status register amounts to the INAC's insistence on ratification of band citizenship lists. The federal government reserves control of "status under the Indian Act." Indian Act status continues to limit federal fiscal responsibility under Bill C-31.

While there is no guarantee that all band members will be found on the federal register, neither is there a requirement that bands reflect the federal register. Of some solace to Indian governments opposed to reinstatement, this may still find itself subject to Charter of Rights and Freedoms challenge on the basis of separate treatment. Reinstated women will want the political rights attached to status, formerly synonymous with band membership, and will not be amenable to having their bands reject this indefinitely.

The onus is on those eligible for reinstatement (or, in the case of first-generation children, for instatement) to apply for both INAC and band status. Restoration of band membership logically includes reserve residency rights, though the Bill tacitly acknowledges that it may initially be impossible to realize these rights. There is a grace period for bands to assume control of membership pursuant to an approved code, and for reinstated women and their children to request enrollment. Bill C-31 makes it possible to limit the annual number of reinstatements to band lists. This limit is set at ten per cent of current band membership, spread over a time period until 1992.

It seems the Bill tries to respond to band government concerns that their reserves cannot physically, financially or socially contend with mass reinstatement. However, this measure does not address the issue of additional lands needed to accommodate those returning to the reserve; it says nothing about where these lands will come from and who will provide

them. It merely provides some time for bands to adjust, while delaying realization of rights supposedly guaranteed by the Charter of Rights and Freedoms. These measures, which extend beyond the three years Canada was given to fall into line with the Charter equality section, Section 15, delays rights of a segment of the population further and violates the intent of Section 15. Further, Bill C-31 does not provide any guarantees of the funds required to service the needs of the reinstated women and their children. While there is mention of funds for capital expenditures for community requirements precipitated by reinstatement, the Bill makes it clear that only community facilities are contemplated. There is a fainthearted guarantee of funds sufficient to service all eligible persons with specified services. It must be noted that the services in question, in many cases treaty rights, are grudgingly given by INAC to a limited number of status Indians at present. Health, education and social service funding are bandied about between federal and provincial governments, based on various guidelines such as residence of the applicant. This often leaves hapless Indians befuddled by bureaucracy and without their so-called rights. Further, the recent revelation of "Buffalo Jump of the 1980s," as the Neilson cabinet memorandum is colloquially known,[17] fans fears of the government's hidden agenda on Indian policy. This document advocates wholesale cuts of federal funding for Indian health, education, housing and other services, and transference of responsibility to the provinces.

In short, given restrictive federal funding of Indian rights and services at present and the lack of specific funding guarantees in Bill C-31, bands should not expect significant funding increases. Existing criteria would prevent all reinstatees from receiving their "rights" unless they resided on a reserve. Indian Act status will no longer confer band status and vice versa. Reserve residency rights will attach to band status. Reinstated women may well find themselves without any substantive rights if they are not guaranteed band membership,

and if bands are not guaranteed the means to support their membership.

Under Bill C-31, the Minister of INAC must report to Parliament two years after the date of assent of Bill C-31 on the numbers of reinstatees, the "names and numbers" of bands controlling membership, and most significantly the "impact of the amendments" on Indian nations. There is no requirement for Indian participation in this report, nor for participation by potential and realized reinstatees. Without substantial participation by both these groups, any INAC report will be a superficial pronouncement of available statistics. A more useful tool would be a special all-party committee reporting directly to Parliament, with members of status Indian organizations, Native women's organizations, and other interested groups.

One hundred years of the Indian Act's discrimination has created its own problems now. If the emotional resistance to reinstatement were to vanish overnight, problems would still remain. Reserve governments have insufficient resources to service the existing population. Natural population increase is not accounted for in government commitments to provide land bases. Bill C-31, with all its promise of making it possible for reinstatement to occur, makes it quite clear that additional reserve land is not contemplated. While limited federal funds exist to purchase additional Indian lands "as needed," there is no commitment to securing such lands. In most cases land would have to be purchased from the provincial government, with constitutional and jurisdictional disputes as the provinces balk at surrendering control and resources. One need only look to the Lubicon Indian Nation's experience to see an example of this.[18]

Nor does the Bill make a commitment that the federal government will deal with recalcitrant provinces to ensure land needs are met. The present and projected housing shortage is not addressed. While Bill C-31 will make monies available for community needs such as health centers, increased educational requirements and the like (if all funds are not cut off by the

budget-minded Tories) there is no commitment to provide the means for supplying private residences. Perhaps greater than the need for community services is the need for lands for residential and economic development.

THE REINSTATEMENT DEBATE

Proponents of the Section 12(1)(b) amendment point to the inequality arising from the differential treatment between Indian men and women; to the injustice of having to choose between status and one's choice of spouse; to the immorality of such a choice being imposed on them. Opponents point to the right of First Nations to determine their own citizenship without federal interference, citing Section 12(1)(b) as past interference. Frequently, opponents point to the inability of reserves and Indian governments to meet current population demands, and to the intolerable stress a population influx would precipitate in the community. The Blood Tribe's position, for example, encapsulates this widespread feeling, in terming reinstatement *via* Bill C-31 a "ham-fisted" response to a complex issue.[19]

Objections to reinstatement of Section 12(1)(b) women and to granting status to first-generation Indian children are grounded in three bases. The first is political: the federal government is once again dabbling in internal Indian government matters, and Indian governments are unhappy about it.

Bands protest that enforced reinstatement violates the right of First Nations to determine their membership, and that this is part of aboriginal and treaty rights. Still, bands have rarely protested the systematic loss of their women citizens who fell within the ambit of Section 12(1)(b), and the discrepancy of logic is apparent.[20] If it is all right to separate Indian women from the reserve but not all right to return them, the issue seems to be the women rather than control of citizenship. If such is the case, at least some First Nations are guilty of discrimination on the basis of sex and of a woman's choice of spouse.

The second base of opposition to reinstatement is economic. The vast majority of Indian governments are very poor. Indian

land bases are static. For most bands, the band capital and land bases are inadequate to service the existing population, and the government has made no guarantee that it will fill the gap. Bands find themselves unable to provide for their existing populations. Employment opportunities are limited. Housing needs cannot be met. There is insufficient land for current residential, recreational and economic requirements. For example, the Blood Tribe has stated to the Standing Committee on Indian Affairs that it suffers an unemployment rate of eighty-five per cent; and a high incidence of alcoholism and other forms of social maladjustment common to impoverished, unemployed and colonized people; and that a large number of people are landless and cannot be housed.[21] The Bloods point out that enforced reinstatement of people with claims on inadequate reserve resources will result in community tensions. The returning women and their children stand to be scapegoated by people who presently cannot be provided with minimum necessities.

The Minister of Indian Affairs, David Crombie, has said that he anticipates reinstatees will take their turn at the housing and services queue. Nevertheless, apprehension flourishes on the reserve that reinstatees will somehow benefit at the expense of the present population.

The third base of opposition is emotional. Having had Section 12(1)(b) imposed for over a century, some Indian people have internalized what is an assimilative colonial instrument. There are those who defend the Indian Act as the last bastion of Indian rights, who see tampering with the Act as tantamount to tampering with the treaties; who assert that removal of women in the Section 12(1)(b) predicament is Indian custom. The colonial experience has created its own exponents on the reserve, and these factions are perhaps the worst that returning women must deal with. For these people, the reaction to Section 12(1)(b) reinstatement is purely emotional, without reference to logic, justice, political expediency or cultural imperatives. The rhetoric used is violent and emotional: Section 12(1)(b) women are accused of watering down Indian genes and destroying Indian

culture. This same argument is not usually extended to Indian men who marry non-Indian women; these women became "Indians" by virtue of Section 11(1)(f) of the Indian Act.[22]

Other concerns articulated by at least one Alberta chief include the fear that reinstated women will gang together to force sale of reserve land via referendum. However, there is no indication that the women who have lobbied so long for their status will now deliberately destroy the land base their status entitles them to. Further, bands are free to set tribal constitutions in place stipulating residency clauses for purposes of political participation. Finally, in the most unlikely scenario that all reinstated women were in fact dedicated to destruction of the reserve, they do not constitute the population percentage necessary for such action.

CONCLUSION

Indian political arguments against reinstatement are substantive, and must be dealt with. Economic arguments are also substantive and deserve unqualified fiscal guarantees by the federal government. The emotional arguments must be laid to rest in the interests of the health of the Indian community in general, and the returnees in particular. If the emotional issue is not dealt with, reinstated women stand a chance of ostracization; their children run the risks of rampant racism. At worst, violence can be contemplated.[23] It is dangerous to underestimate the degree of opposition to reinstatement. If reinstatement is dealt with on its bases, many people will likely change their views. A few hard-liners, not much impressed with history or logic, will continue their opposition. But the community will be better prepared to accept returning women and their first-generation children.

Bill C-31 provides no assurance of fulfilling land and residential requirements for returning reinstatees. And, while there is passing mention of funds set aside to allow bands to purchase land, there is no guarantee that such land would receive reserve status. Obviously land would most likely be purchased directly or indirectly from the provincial govern-

ments. The question of jurisdiction over resources and persons will be raised. The provinces traditionally have been reluctant to return jurisdiction to Indian governments. At the Constitutional Conferences held pursuant to Section 37 of the Charter of Rights and Freedoms, Alberta, British Columbia and Saskatchewan have made their views opposing substantive Indian government well known, and they are not disposed to compromise.

If serious about easing reinstated populations back into the reserve, the federal government must guarantee that land will be made available and that it will be given reserve status. Indian governments can then exercise full jurisdiction over it. Anything less welcomes provincial intrusion into Indian jurisdiction and undercuts Indian government.

Indian Nations have long invoked international legal precepts, covenants and declarations supportive of aboriginal rights such as self-determination and cultural integrity. International standards are also quite specific on the matter of legal and political equality of treatment of all people. Indian nations will have to submit their governments to the requirements of international law if they intend to claim its benefits.

First Nations, if they are to act as such, need constitutions which articulate the goals of their nations and the relationship between the nation, its citizens and other governments. Somewhere in this heady stuff there will have to be provisions defining who is a citizen; processes, if any, of naturalization; and the rights and duties of non-Indian reserve residents. A full catalogue of political, social, and economic rights and responsibilities must be constitutionalized by First Nations. Should any First Nation enact discriminatory provisions, Charter remedies and international law exist to defend individuals.

If Section 15 of the Charter of Rights and Freedoms is not to be another empty promise, Indian women must have the same rights and opportunities as Indian men. In addition, substantive self-government must be recognized as the right of Indian

First Nations. This right will include control of citizenship, its processes and practices.

The means by which Section 12(1)(b) women lost their status supports federally-legislated reinstatement. The creation and implementation of the Act was premised on European concepts of how both female persons and non-white races were to be dealt with. Females, as property, did not possess individual rights separate from their male parent or spouse. Indians were to be raised to the colonial level of civilization and then assimilated into the colonial population, without special rights or legal status. The Indian Act was the instrument by which this would be achieved. Section 12(1)(b) was a minor section, completely consistent with the sexist tenor of the day. That the government recognizes its past sins is to be applauded. Now, it must also ensure that First Nations do not have to pay the costs of government expiation of those sins. Lands and funds, fulfillment of treaty obligations, and constitutional guarantees must accompany reinstatement. Finally, the federal government must recognize its future non-role in Indian citizenship matters, and the integrity of Indian self-government.

NOTES

1 Report of the Royal Commission on the Status of Women in Canada (Ottawa: Supply and Services, 1970).

2 Attorney-General v. Lavell and Isaac v Bedard, SCC [1974] S.C.R. 1349; 1978 38 D.L.R. (3d) 481; 23 C.N.R.S. 197; 11 R.F.L. 333. Lavell and Bedard challenged section 12(1)(b) of the Indian Act R.S.C. 1960, as offensive to the Canadian Bill of Rights, S.C. 1960. In a split decision upholding the Indian Act, the court held that equality under the law meant equal application of law. Since all Indian women marrying non-status persons were dealt with via 12(1)(b), the section was not discriminatory.

3 Re Sandra Lovelace, United Nations Human Rights Commission 6-50 M 215-51 CANA. Lovelace charged that Canada was in violation of sections of the Covenants of Civil and Political Rights, and Economic, Social and Cultural Rights, insofar as Section 12(1)(b) discriminated against her as an Indian woman. The Commission held that Canada had violated Section 27 of the Covenant on Civil and Political Rights, in that she was denied the right, in community with other members of her ethnic and religious group, to enjoy her culture, profess and practice her religion, and use her language. Because Lovelace's marriage had preceded Canada's ratification of the Covenant, and because international law is not deemed to be retroactive, the Commission could not consider whether Section 12(1)(b) discriminated against her on the basis of her marriage.

However, it is entirely possible for a status woman who marries subsequent to ratification to take the case to the UN Human Rights Commission, and to succeed on those grounds.

4 The term "First Nations" is used by Indian Nations to indicate their primacy as original self-governing nations on the Canadian political scene. It became popular parlance with publication of Indian Self-Government in Canada. Report of the Special Committee (Ottawa: Supply and Services, 1983), also known as the "Penner Report" after Committee Chairman Keith Penner.

5 13 and 14 Victoria (1850) Cap. 42 (Province of Canada). An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada.

6 The first time that Canadian legislation dealing with Indians became known as the Indian Act was in 1876: 39 Victoria (1876) Cap. 18 (Canada). An Act to Amend and Consolidate the Laws Respecting Indians (The Indian Act, 1876).

7 20 Victoria (1857) Cap. 26 (Province of Canada). An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians.

8 32 and 33 Victoria (1869) Cap. 6 (Canada). An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act. 31 Victoria Cap. 42.

9 References are to the Indian Act prior to the Bill C-31 amendments. These amendments have ameliorated many discriminatory provisions.

10 Many Indian volunteers returning from combat during World Wars I and II found they had been stripped of status in their absence. Proportionately more Indians volunteered for service than did any other ethnic group in Canada.

11 R. v. Drybones, S.C.R. 1970.

12 Canadian Bill of Rights, S.C. 1960.

13 A.G. v. Lavell and Isaac v. Bedard, ibid.

14 Kathleen Jamieson says that the effects of Section 12(1)(b) extend "from marriage to the grave ... and even beyond that. The woman, on marriage, must leave her parents' home and her reserve. She may not own property on the reserve and must dispose of any property she does hold. She may be prevented from inheriting property left to her by her parents. She cannot take any further part in band business. Her children are not recognized as Indian and are therefore denied access to cultural and social amenities of the Indian community. And, most punitive of all, she may be prevented from returning to live with her family on the reserve, even if she is in dire need, very ill, a widow, divorced or separated. Finally, her body may not be buried on the reserve with those of her forebears." Kathleen Jamieson, Indian Women and the Law in Canada: Citizens Minus (Ottawa: Supply and Services, 1978), p. 3.

15
Harold Cardinal stated that: "Our alarm, which led to our decision to oppose the two women, was based on our belief that if the Bill of Rights knocked out the legal basis for the Indian Act, it would at the same time knock out all legal basis [sic] for the special status of Indians." Harold Cardinal, The Rebirth of Canada's Indians (Edmonton: Hurtig, 1977), p. 110.

16
It is still possible for Canada to be found guilty of sexual discrimination contrary to the International Covenants. See note 3.

17
Memorandum to Cabinet, Report of the Ministerial Task Force on Native Programs, 12 April 1985.

18
The Lubicon Indians, recognized as a band by the federal government, have been trying for 40 years to obtain a reserve from Alberta. The Natural Resources Transfer Agreement of 1930 makes it incumbent upon the provinces to make reserve land available to cases such as Lubicon's. Alberta remains intransigent.

19
Blood Tribe Presentation to the Standing Committee on Indian Affairs and Northern Development, on the matter of Bill C-31. 21 March 1985.

20
While the option has been available for some time, as of January, 1985 only 111 bands had chosen to suspend operation of Section 12(1)(b).

21
Blood Tribe Presentation to the Standing Committee on Indian Affairs and Northern Development, 21 March 1985. Subject of Bill C-31.

22
Section 11(1)(f) was removed by Bill C-31.

23
Jenny Margetts, President of Indian Rights for Indian Women, has stated: "But even members of my own band, Saddle Lake, said they would shoot us if we moved back, and many women are afraid to move back." See: "Indian Nations Stronger by New-Status Women -- Margetts," Kainai News, July, No. 1, 1985, p. 2.