Chapter II
"And Justice I Shall Have": Women and Legal Rights

From its inception, New Brunswick followed the English legal tradition, in doing so displacing the legal heritage of the other non-British groups in the province: the aboriginal peoples, the reestablished Acadians and other immigrants of European origin, such as the Germans. Like all law, English common law reflected attitudes towards women which were narrow and riddled with misconceptions and prejudices. As those attitudes slowly changed, so did the law.[1]

Common law evolves in two ways: through case law and through statute law. Case law evolves as judges interpret the law; their written decisions form precedents by which to decide future disputes. Statute law, or acts of legislation, change as lawmakers rewrite legislation, often as a result of a change in public opinion. Judges in turn interpret these new statutes, furthering the evolution of the law. Women's legal rights are therefore much dependent on the attitudes of judges, legislators and society. Since early New Brunswick, legal opinion has reflected women's restricted place in society in general and women's highly restricted place in society when married.

Single women

In New Brunswick, as in the rest of Canada, single women have always enjoyed many of the same legal rights as men. They could always own and manage property in their own name, enter into contracts and own and operate their own businesses. Their civic rights were limited, although less so at times than for married women.

However, in spite of their many legal freedoms not shared by their married sisters, single women were still subject to society's limited views regarding women's capabilities, potential and place. Opportunities for work began expanding for women, particularly single women, in the late 19th century but only in certain sectors of the labor market deemed appropriate to the "innate abilities" of women. Except in the special case of nuns and perhaps midwives, work for single women was considered by society something to be done only when in extreme need and only while awaiting marriage. Societal pressures also encouraged single women to leave paid employment to care for elderly parents, sick relatives or to help with the rearing of young nieces and nephews — work which carried less status than the work of married women and which offered little or no remuneration.

Given the limited work options for single women, the many social pressures to marry and the idealization of marriage, it is not surprising that most women accepted marriage as a preferable alternative to single life, in spite of the legal disabilities marriage placed on women.

The law as it dealt with single women focussed on a woman's relationship to a man just prior to marriage, or while in a relationship not sanctioned by law, like a common-law union.

Until 1983, a minor who wished to marry needed the father's consent. The mother's consent was acceptable only if the father was deceased or otherwise unavailable. Since 1983, both or either signature has been required.

Upon promising to marry someone, a woman entered into a legal contract, most likely unaware that if she broke that promise she could be sued by her betrothed for breach of promise. This state of affairs, dating back to 1638 in English law, still exists in New Brunswick, although it is rarely used. It reflects a prefeudal concept of marriage in which engagement signified the family's sale of their daughter to her husband-to-be.[2]

Common-law unions

In spite of societal pressures to marry, a few women entered into common-law unions. These were recognized as common-law marriages if the couple openly declared themselves wife and husband; if they met all the requirements necessary for an actual marriage; and according to one interpretation in New Brunswick,[3] if their union had been celebrated by a minister. Otherwise these unions were viewed in law as forms of cohabitation and not common-law marriages per se.

Until 1980 in New Brunswick, a common-law husband was not considered financially responsible for his wife (unlike a legal husband). With the enactment of the *Family Services Act,* unmarried couples who have been together three or more years or who have had a child and lived together one year are viewed as spouses; each is responsible for his or her own needs and those of his or her partner in as much as each is able.

If a partner in a relationship can establish dependency, she or he may be able to benefit as a legal spouse would from the *Worker's Compensation Act* (since 1918) and the *Compensation to Victims of Crime Act* (since 1971). Since 1969, the common-law spouse (together with the legal spouse) has been eligible to receive a survivor's pension from the Canada Pension Plan. However, the *Superannuation Act* of New Brunswick, which regulates the pensions of provincial civil servants, has never recognized partners outside of legal marriage.

Unlike legal spouses, common-law spouses cannot inherit money from their partner unless a will has been left specifying inheritance and in the case of a breakup of the union, no law provides for an equitable sharing of property accumulated by the unmarried partners during their relationship. The *Marital Property Act* of 1980, unlike similar acts in other provinces, did not include common-law partners and so, in the event of a dispute on property division, each partner must show he or she helped pay for purchases.

Women and childbearing

In 1792, New Brunswick passed *An Act to Provide for the Maintenance of Bastard Children.* The act began with the observation that provincial parishes needed to be protected

> *from the great charges frequently arising from Children begotten and born out of lawful Matrimony.*[4]

The number of children born out of wedlock was apparently

straining parish purses and something had to be done. The act required that the single mother of a baby likely to become "chargeable to any Parish" declare the putative father. He risked being sent to jail, and could be required to pay a sum to cover the costs of the childbirth and child support.[5]

How frequently and what classes of single women used this law in New Brunswick is not known. What is clear, however, is that it did not adequately deal with the myriad of problems of single women who became pregnant. Many such women continued seeking other solutions to their problems. Some were forced into marriage. Some sought to terminate their pregnancy. Some resorted to infanticide.

Evidence suggests that infanticide and abortion were "far from uncommon"[6] in 19th century Canada and there is no reason to believe that they were any less frequent in New Brunswick. For example, the early 19th century correspondence between Roman Catholic missionaries in Caraquet and their bishops notes the occurrence of infanticide and abortion in their parishes.[7] It was not until 1869 that the Roman Catholic Church began considering abortion equivalent to murder and excommunicating those who procured an abortion.

Early annotations in the *Criminal Code* observed that:

> *Women have been known to employ some of the most extraordinary means to procure abortion; such as violently rolling down hill, throwing themselves downstairs, or out of window, submitting themselves to be laced with extreme tightness, or even to be trampled on and kicked on the abdomen....*
>
> *Amongst the drugs generally used to procure abortion might be included almost every known purgative, and almost every drug or herb which has medicinal properties....*
>
> *Amongst the mechanical instruments and contrivances which have been used in procuring abortion may be mentioned pointed sticks and wooden skewers, syringes, catheters, guarded stilettos, forceps, long knitting needles, and steel claws, the latter being worn on the fingers, for the purpose, as it seems of penetrating the membranes or tearing the embryo.*[8]

Although through the years, women have sought the option of having an abortion, it is only recently that women have been able to receive a safe one. In the past,

methods were crude and dangerous and part of the intent of early laws against abortion was likely to prevent the deaths of these women.

In 1810, following on the heels of Britain, New Brunswick passed *An Act for making further provisions to prevent the destroying and murdering of Bastard Children, and for the further prevention of the malicious using of means to procure the miscarriage of women.*

A woman who in a despondent state killed her newborn illegitimate child was to be tried as a murderer and, if found guilty, sentenced to death. A woman found guilty of hiding the body of her illegitimate baby to conceal its birth was to be sentenced to two years in prison. This provision could be used by a jury if it could not find a woman guilty of murdering her child. Indeed, British juries, when faced with the case of a mother who had killed her baby, would not convict her on the murder charge and British judges began protesting against a law that required the death sentence which everyone knew would not be carried out.[9] Similarly in New Brunswick few convictions were recorded.[10]

Anyone found guilty of "wilfully, maliciously and unlawfully" administering a noxious poison or other destructive substance to a woman quick with child (pregnant with a child that has begun to stir in the womb) with the intent of murdering that woman was to be sentenced to death. Lawmakers seemed to fear that women risked death at the hands of a lover afraid a pregnancy would cause him to lose social station.

Anyone found guilty of unlawfully administering a poison to cause the pregnant woman to miscarry was also to be sentenced to death. It has been suggested that the term "unlawfully" as used here implied that there were circumstances in which abortion was considered lawful. In fact, in 1846, British law commissioners were to recommend a clarification of British abortion laws to allow abortion to save the life of the mother.[11]

By 1854, the crime of infanticide had disappeared from the books in New Brunswick; the only way the law dealt with the act was through the provision against concealing the body of a baby. Also by 1854, someone who procured a miscarriage was liable to 14 years in prison and not a death sentence, again probably because convictions were otherwise difficult.

With the 1869 federal *Act Respecting Offences Against the Person,* the sentence for a woman found guilty of "unlawfully" causing herself to miscarry and for someone who aided her could range from one day to life imprisonment. When the *Criminal Code* was enacted in 1892, anyone causing the death of a child before or after delivery to save the life of the mother was not guilty of a criminal act. But a woman found guilty of attempting to abort herself was liable to seven years in prison and whoever helped her do so, whether she was pregnant or not, was liable to life imprisonment. Again the provisions used the term "unlawful" in the same way as earlier acts.

Over the decades, the *Criminal Code* changed but little. By mid-20th century, the sentence of a woman guilty of attempting to cause herself to miscarry was reduced from seven to a maximum of two years, and a woman who failed to seek assistance in childbirth so that her baby would likely die became liable to five years in prison. Following the example of Britain, Canada added infanticide to the code in 1948 as a special crime. The killing of a newborn child by its despondent mother was not viewed as murder since in the past juries had balked at convicting on that charge. Instead the crime was called infanticide and still carries a maximum sentence of five years.

In 1955, the term "unlawfully" no longer appeared in the abortion provisions of the *Criminal Code.* The law was then interpreted by some to mean that abortion was not to be allowed under any circumstances, not even to save the mother's life. It has been suggested that this situation led the Canadian Medical Association to favor the reform of abortion laws.[12] Members of the medical profession had long said it was sometimes necessary to perform an abortion to save the mother's life.

In 1969, Canada was again to follow the example of Britain after the lobbying of many women and permit abortions under certain circumstances. The British law allowed abortions when the pregnant woman's life or health was in danger, when she risked giving birth to a severely handicapped child, when she was socially or emotionally unable to mother the child, when she was under 16 or when the pregnancy had resulted from a sexual assault. The Canadian amendments were less specific. Canada allowed therapeutic abortions when a therapeutic abortion committee of an accredited hospital or clinic found that the continuation of the pregnancy would endanger the life or health of the woman. Controversy has arisen regarding the scope in meaning of "life and health". Many women's groups have lobbied to have the abortion provision removed from the *Criminal Code* so that the decision to have an abortion would be a private matter between the woman and her doctor. Other concerned

groups have lobbied to retain the laws as they are or to amend them to prohibit therapeutic abortions for any reason.

Contraception

Methods of contraception have ancient roots. The aboriginal peoples are known to have used medicines to prevent pregnancy.[13] Western societies were no less interested in contraception and used various birth control methods and devices. Birth control became greatly debated in Britain and the United States in the 19th and early 20th century. Canada reacted to this debate in 1892 by making the advertisement and sale of contraceptive devices illegal, except when done in the public interest. This ban remained in Canada until 1969, although in practice only the ban on advertising was effective.

Midwifery laws

Until 1981, there was no law in New Brunswick to regulate or prevent the practice of midwifery, although midwifery was recognized in the *Medical Act*. In 1981, a new act prohibited the practice of midwifery in the province, putting an end to a profession that had served families for centuries.

Single mothers

A woman who bore a child outside of wedlock had, by the very early days of the province's existence, a form of recourse for child support from the father with the *Act to Provide for the Maintenance of Bastard Children* of 1792. This manner of seeing to the financial needs of the "illegitimate" child remained more or less intact through numerous revisions and new enactments of similar laws until 1980. Then, with the enactment of the *Family Services Act*, the whole concept of illegitimacy was abolished and both parents of a child became responsible to provide for his or her support inasmuch as they are able.

At common law, "illegitimate" children were considered fatherless and therefore unable to inherit from their father unless his will specified the illegitimate child's name. Being without a father, the "illegitimate" child was viewed as the property of her or his mother. She therefore had custody of the child and bestowed her surname on the child. Under the *Vital Statistics Act* of 1979, as previously under the *Health Act* (since 1952), the single mother had (and still has) the choice of giving the child her own surname or, with the father's acknowledgement and consent, his. This is a choice that married women in New Brunswick do not have under the *Vital Statistics Act*, although legislative reform is pending. Legislation prior to 1952 had not specified how parents,

whether married to each other or not, were to surname their children. The father's name was given by custom and common law.

Until 1980, the single mother could place her child for adoption without the father's consent. With the *Family Services Act*,it was specified that if the father acknowledged his paternity or declared himself the child's father in court, he must give his consent to an adoption.

The single mother's lot is difficult. Current issues such as the availability of affordable housing, of high quality day care, and of flexible working hours touch the day-to-day lives of single mothers who are trying to make a living or upgrade their education. The years when the extended family was nearby and able to help the single mother are disappearing. Although the stigma attached to having a child out of wedlock or being a divorced parent is slowly dying, the financial and personal costs exacted on the single mother are still high. Reform of services will help the single mother who has few options to gain control over her personal and professional life.

Married women

Most women marry; this has always been so. Thus the legal strictures which limit married women affect most women. In the 17th century, canon law became incorporated into English common law. The biblical concept that upon marriage a woman and a man become "one flesh" was translated into a legal concept which we know as "unity of legal personality". In the eyes of the law, wife and husband are one. In practice, legal and civic rights could be given to only one of the two. Since society viewed the male as superior, those rights were given to the husband. When a woman married, her separate legal identity merged with her husband's and she became invisible.

At common law, the married woman could not enter into contracts with anyone nor sue or be sued in court. She had no right to own, control or manage property. She did not even legally own her own clothing, nor could she control her personal earnings. If children were born of the marriage, the married woman had no legal right to their custody, to overseeing their education or to choosing their religious upbringing. When apprenticing was still practiced, the father had the exclusive rights of deciding upon his child's apprenticeship. The father was also the first heir to his children's property.

The common-law tradition viewed marriage as a union where the wife was duty-bound to give her husband certain sexual and

domestic services and to bear and raise his children. In return, her husband was to ensure her financial security.

Until 1985, common law also protected the husband against loss of his wife's services. These rights were with respect to "criminal conversation", "enticement", "harbouring" and "loss of consortium".

Criminal conversation: if criminal conversation (relations between a wife and a third party) was deemed to have occurred, the husband had the right to sue his wife's lover for compensation for the actual value of his wife and for injury to his feelings, honor and family life.

Enticement: this was an action for compensation that a husband could take against a person who enticed his wife to leave him, thereby causing the loss of her services.

Harbouring: a husband could sue a third party for sheltering his runaway wife. This did not apply if it could be proven that his wife was in need of protection.

Loss of consortium: should a wife be injured, as in a car accident, a husband could sue the third party who caused the injury for "loss of consortium", that is for loss of the sexual and domestic services of his wife.

A wife was entitled to none of these actions for compensation should she have lost the services of her husband.

Until 1985, a woman, unlike a man, lost her right upon marriage to choose a separate domicile (a legal term for a permanent residence). If her husband changed his domicle, for example to accept a new job, she and their children were to follow him or she risked being considered a deserting wife or mother. If the married woman's job required her to move, however, her husband did not have to follow.[14]

Wife assault

Until the late 19th century, common law gave the husband the right to beat his wife, to "discipline" her if she disobeyed his demands. During that century, the law had begun to evolve suggesting that a husband did not actually have a right, but that if he did beat her, he was not to endanger her life or health.[15] In an 1863 divorce case, argued on the ground of cruelty, the presiding New Brunswick judge stated that neither blows provoked by the wife's insulting remarks nor the husband's exercising marital

authority to restrain the wife's contact with her own family were cruelty. In dismissing the suit, the judge added that the wife "was too independent of her husband's wishes to be consistent with that subordination and obedience which is due from a wife to her husband".[16]

Since common law had created the concept of "interspousal immunity", a woman could not sue her husband for a wrong (called a tort) he should do her. Although in 1895, with the *Married Women's Property Act,* married women were given the right to sue their husbands for damage to personal property, they remained, and remain until this day, unable to sue their husbands for personal injury, except as of 1985 in the case of a car accident. If a husband should break his wife's nose and glasses,she may sue him for the broken glasses but not her broken nose. This is not the case between persons not married to each other.

Between 1909 and 1965, wife-beating was a special crime carrying a sentence of up to two years in jail and a whipping; the victim had to suffer "actual bodily harm", although assault normally meant the intentional use of force against another, regardless of actual physical injury.[17] Assault in the current *Criminal Code* embraces wife assault. But only in the 1980's have New Brunswick's police begun treating wife assault as they would any assault case, that is, by charging the alleged assaulter if there is adequate evidence. Until now the battered wife has had neither the recourse of the civil legal system nor the cooperation of the law enforcement system.

Since common law had created the concept of "unity of legal personality", it was deemed impossible for a husband to rape his wife, for how could one rape oneself? Also, a wife was duty-bound to accept whatever sexual demands her husband placed on her and she could be forced to submit to her duty if she resisted. The act of rape is now seen for what it is: a violent assault. In legal terms rape is now called sexual assault to reflect its fundamental basis in violence. In 1983, the *Criminal Code* was amended to add the new offences and sentences and to acknowledge the possibility of sexual assault perpetrated by a marital partner.

Rights to children

Until the enactment of the *Family Services Act* in 1980, New Brunswick had always adhered to common law which allowed mothers no legal right to the custody of their children. Even with the *Supreme Court in Equity Act* of 1890, which enabled mothers to gain custody of children under 16, courts were "still resigned to the paramount rights of the father"[18] as late as 1975. Often

however, the mother was given the children in a custody suit because the father did not ask for custody. In the 1940's and 1950's, popular sentiment held that a child was best with his or her mother. In the 1970's, courts began to take the view that a form of shared custody was preferable.[19] The *Family Services Act* codified this new view. Now neither parent is automatically considered as the custodial parent.

Being a "next friend"

Until recently, courts sometimes questioned whether a married woman could act as a "next friend" (a person who acts in the interests of an infant or a mentally incompetent person who is the plaintiff in a legal proceeding) or as a guardian *ad litem* (a person appointed by the court to defend an action on behalf of an infant or a mentally incompetent person). This limitation on a wife's legal capacities was not derived from common law but was "merely one of the practices adopted by the Courts".[20] In 1985, legislation bringing New Brunswick laws in line with the *Canadian Charter of Rights and Freedoms* did away with this question once and for all.

Property

The aspect of a married woman's legal rights which most quickly evolved in New Brunswick was that of her property rights. Common law had developed the view that a woman's property became her husband's upon marriage although this was tempered by what is known as equity. Equity courts allowed a wife to own some property separately from her husband, but it had to be held in trust. Although the wife did not have direct control of her property, the trusteeship ensured that the property remained for her "sole and separate use"[21] and that the property "escaped the control of the husband and the liability of his debts"[22]. These courts also developed what is called "restraint upon anticipation".

> *This meant that a father, for instance, could give his daughter a sum of money or property and formally state that she was restrained from selling or otherwise dealing with it. This was a means of preventing her from being persuaded or forced by her husband to give the property to him.*[23]

In other words, these courts were attempting to help the father who had given property to his daughter to keep it within his own bloodline.

This was the state of affairs in New Brunswick until 1851 when married women's right to separate property began to be recognized in legislation. This reinforced the tradition of the courts of equity by protecting the married woman's property from her husband's creditors and by preventing her husband from dealing with her property without her consent. The property remained liable for the debts she had accumulated before her marriage as well as for any legal wrongs which she had been found to have done. The act also provided that a woman deserted by her husband could recover anything due her in her own name and for her own use. In 1869, the act was amended to ensure that a separated woman had "complete control and power of disposal"[24] over her property.

Anna O'Neill of York County, involved in a marital property dispute with her estranged husband, vowed, in an 1879 Fredericton *Reporter* ad, "All I want is justice and justice I shall have".[25] But New Brunswick women had yet over a century to wait for equality and justice in cases of marital property division.

Although her husband could not deal with her property without her consent, a married woman could not contract or dispose of her property without her husband's consent. He, of course, had complete control of his own property. Any wages she earned were also considered her husband's property unless the courts could be convinced to rule otherwise.

While the early property acts were not comprehensive, they were ground-breaking attempts at legislating the concept of separate property for women and, indeed, preceded England and Ontario by several years. In fact, New Brunswick "at this time took second place to no other jurisdiction in either legislation or the interpretation placed on the law or property"[26] by the courts. Unfortunately, the province did not bring this heritage of avant-gardism into the 20th century.

It was 1895, several years after England and a number of provinces had adopted laws giving women full control over their property, before New Brunswick passed the *Married Women's Property Act.* That act granted a married woman full control of her own property as if she were a *feme sole,* a single woman. However, the concept of "restraint of anticipation" was retained until 1927, and so the courts could bind her interest in a property if they deemed doing so was to her benefit.

In practice, most women upon marriage had little or no property, although some may have stood to inherit. And women's traditional role inside marriage was long unrecognized as a contribution worthy of an interest in marital property. Domestic

work was seen as merely a marital duty and not as a contribution to the accumulation of property by the couple. Upon marriage breakdown most women had the right to very little.

This situation was dramatically shown in the famous Murdoch case in 1975. Irene Murdoch was an Alberta farmer who after 25 years of marriage sought "one-half interest in the farm properties owned in her husband's name by virtue of her contribution of money and labour".[27] She had left her husband after he had violently assaulted her, breaking her jaw in three places, permanently paralyzing her jaw and lip.

She described her work on the ranch as:

> *...Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done...just as a man would...*[28]

and explained that during five months of the year when her husband was working elsewhere, she ran the ranch herself. Admitting to the work his wife had done, her husband remarked:

> *Oh!* [*it's*] *just about what the ordinary rancher's wife does. Most of them can do most anything.*[29]

Some of the Murdoch's joint earnings had been used for the down payment on the property and Irene Murdoch had also used money from her mother to acquire property, buying almost all the household furniture and appliances. But her contributions were not deemed relevant to her claim to a share in the ranch. The trial judge, while granting her $200 a month in maintenance payments, declared that if he were to give her a share in the ranch:

> *it would be tantamount to establishing a precedent that would give any farm or ranch wife a claim in partnership.*[30]

And that would have been a dangerous precedent to set.

The case went to the Supreme Court of Canada where the majority "considered her financial contribution as a loan to her husband, and her contribution of labour as normal for a rancher's wife".[31] The late Bora Laskin dissented:

> *He characterized Irene Murdoch's contribution of labour as "extraordinary". He concluded: "In making*

> *the substantial contribution of physical labour, as well as financial contribution, to the acquisition...the wife has in my view, established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband."*[32]

The public reaction was strong against the Supreme Court's majority decision and the provinces began reexamining their marital property laws. The case had proved the contention of the Royal Commission on the Status of Women in Canada that provincial property statutes:

> *do not solve the problem of financial security during marriage for the partner who does not accumulate assets through paid employment and is without property of his or her own....If a system could be devised whereby equal rights to matrimonial property were to be realized during marriage, it would provide greater security for married women...and more fully express the true sense of the partnership between married persons.*[33]

Subsequent cases similar to the Murdoch case recognized labor as a contribution to the acquisition of marital property. In 1976, the Supreme Court of Alberta ordered Irene Murdoch's husband to pay his ex-wife $65,000, and, if he defaulted, to give her one quarter-section of his land.

New Brunswick, in response to a women's lobby and following the lead of the rest of Canada, finally passed *The Marital Property Act* in 1981. It recognized unpaid domestic work and child care as an equal and integral contribution to the acquisition of marital property. The act states that both partners should be equal beneficiaries of the marital property upon separation or death, and that spouses are equally liable for marital debts.

Separation and divorce

At the time New Brunswick became a province, marriage was viewed as a permanent and indissoluble union. In 1790, the English jurist Sir W. Scott stated that "the great happiness of the married life is secured by its indissolubility".[34] He believed that when a couple knew they must live together, "they learn to soften by mutual accomodation that yoke which they know they cannot shake off ".[35]

However, "in practical terms, it was the wife who learned to 'soften the yoke' ".[36] After all

marriage was a woman's economic security and if she felt no choice but to break free, she usually lost her children, shelter, financial security and social status. If she sought the law's sanction for leaving, or legal assistance in securing support if her husband left, she encountered a complicated array of rules.[37]

Of course, some married couples did live separately. The legal system only became involved when one of the partners wished the status of the marriage to be resolved — usually because the wife needed financial assistance or one of the partners wanted to remarry.[38]

Couples could also ask for a judicial separation *a mensa et thoro* (separation from bed and board) which was a civil separation done in court. The parties thus remained legally married but their status was clarified.

New Brunswick passed its first law "for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery and Fornication"[39] in 1787 and a second one in 1791 which codified what was already established in common law. This act allowed divorce on the grounds of frigidity, impotence, adultery and blood relationship. A court composed of the province's governor and five members of council was set up to hear all suits for divorce and alimony. Four divorces were granted during the court's 69-year existence.[40]

Unlike Nova Scotia, New Brunswick did not include cruelty as a ground for divorce. But even if it had, New Brunswick courts had defined cruelty very narrowly, as actions causing physical harm that put the victim's life or health in danger.

Annulments were a remedy distinct from divorce. Couples in New Brunswick could get a nullity decree if it was found that their marriage was null and void from the start, for reasons of frigidity, impotence or blood relationship.

With Confederation in 1867, the power to make divorce laws became federal. The provinces could no longer amend their divorce laws. The federal government was not moved to write a new divorce law for Canada until 1968. New Brunswick thus remained under its 1791 divorce law for 177 years.

The 1968 *Divorce Act* was a "radical departure"[41] from previous legislation on divorce. The new law broadened the grounds for divorce, and empowered the courts to order the custody and maintenance of children and maintenance for the needy spouse. Grounds for divorce were matrimonial offences (adultery,

sodomy, bestiality, rape, homosexual acts, form of marriage with another, and physical or mental cruelty) and permanent marriage breakdown (imprisonment, alcoholism, separation after three years, or petitioner's desertion after five years). This was the first time that separation could be used as a reason for divorce.

Legislative changes are pending that would establish the breakdown of the marital relationship as the sole basis for divorce.

In divorce matters, domicile was important because it governed the choice of country (or province) whose laws would be applied in a dispute. Since a woman upon marriage lost her separate right to domicile, a woman seeking a divorce from a man who had deserted her had first to find in what province or country he was living and then bring a divorce action there, even if the matrimonial home had been elsewhere. In 1930, the law was changed so that if she had been deserted for over two years, she was allowed to sue for divorce where the husband had lived prior to the separation. The 1968 *Divorce Act* finally gave a married woman the right to a separate domicile from her husband for purposes of divorce and she is able to sue for divorce where she lives.[42]

Maintenance

Through the action of judicial separation (civil separation done in court), the wife could secure a court order for alimony. However, she had to prove that her husband had committed adultery,or that he was so cruel to her that he would have endangered her health or life if she had continued living with him, or that he had deserted her for more than two years without sufficient cause. She could be refused alimony if her husband could prove that she had committed adultery.[43]

In 1926, the New Brunswick legislature passed *The Deserted Wives' and Children's Maintenance Act.* The act deemed that a married woman was deserted when she was

> *living apart from her husband because of his acts of cruelty, or his refusal or neglect, without sufficient cause, to supply her with food and other necessaries when able to do so.*

The wife lost her right to support payments if she engaged in uncondoned adultery. The state "attempted to impose fidelity on the wife"[44] until 1980 when the *Family Services Act* was enacted. This new act recognizes both spouses as responsible to one another inasmuch as each is capable. It lists 20 specific

circumstances to be taken into account by a judge when determining the amount of support payments; a spouse's conduct is not a factor in determining support payments except in extreme and special circumstances. After nearly two centuries, the province finally eliminated the double standard of fidelity regulations for the wife.

Widowhood

Until recent decades, society had frowned upon the idea of a married woman working in the paid labor force and she had little opportunity to build up financial security in her own right. The institution of marriage was supposed to meet all of a wife's financial needs — forever.

Dower

Over the centuries, a way of protecting the wife in the event of the death of her husband had evolved. Common law gave a married woman an interest in one-third of her husband's property. This interest was called her dower. It could become her property only upon her husband's death. Her husband could not sell or deal with the property unless she "barred her dower" by signing away her dower interest to the extent it was to be affected by his dealings.

A husband could avoid respecting his wife's dower right by making himself a type of trustee rather than owner of his property, by sharing his property ownership or tenancy with someone other than his wife or by incorporating a company to own the land.[45] A married woman could also lose her dower rights through divorce or separation or adultery, or if she were deemed mentally incompetent.

But a dower right was meaningless if the woman's husband had little or no property. It was "more meaningful in times when wealth came from large landholdings."[46] The dower right was abolished with the *Marital Property Act* in 1981. This act entitles the surviving spouse to the marital home and half of the couple's marital property.

Curtesy

The married man had an interest in his wife's property similar to a dower interest. It was called tenancy by curtesy. Upon the birth of their child, it gave him the right to a life interest in all of his wife's property, not just a third. The right was abolished in New Brunswick in 1916.

> *Dower and curtesy arose for different historical reasons. The right to dower was a means to carry on the husband's obligation of support after his death. The right to curtesy reflected the husband's control of his wife's property during her lifetime and continued that control after her death.*[47]

Inadequate wills

If a husband omitted making provisions for his wife in his will or inadequately provided for her, his estate had no obligations to her, beyond her dower rights. A study of wills written in the Richibucto parish in the mid-19th century reveals that although husbands "could not deny a wife's dower rights, these men did not usually go beyond the recognition of those rights."[48] It was not uncommon for a husband's will to stipulate that his "wife was permitted the use of property only as long as she remained his wife, or, to be more precise, his widow"[49]. Indeed, the husband practiced what the study's scholar, Nanciellen Davis, terms "patriachy from the grave".

In 1925, New Brunswick passed *The Widows Relief Act,* enabling the widow to apply for relief paid from her husband's estate if his will had left her less than the one-third that was her dower right. The act did not apply for the widow living apart from her husband at the time of his death. In 1959, the *Testators Family Maintenance Act* was passed to extend the widow's right to other dependents.

No will to divide

If a woman's husband died without leaving a will, the state ensured that the widow received a share of her husband's property. Until 1926, New Brunswick acts dealing with intestate cases did not give the widow any more than her dower right. She received a third of her husband's personal property and the rest was divided between the couple's children.

In 1926, a new act, [50] which has remained substantially the same until this day, specified that the widow receive half of her deceased husband's property if there was only one child inheriting, and one-third if there were more children inheriting. If the couple had had no children, the widow was accorded the full estate.

As in other provinces, New Brunswick intestate laws denied the woman who had deserted her husband the right to inherit from his estate if she were "living in adultery at the time of his death". Unlike other provinces, however, New Brunswick applied the rule

to widowers as well. The state was clear: marital misconduct was punishable even after a spouse's death.

The present act, the *Devolution of Estates Act,* makes no provisions for common-law spouses nor does it allow courts to make awards according to the extent of the claimant's sacrifices and contributions to the estate. Recommendations have been made for the act to be repealed and for equitable amendments to be brought to the *Testators Family Maintenance Act,* the act which deals with inadequate wills.

The *Marital Property Act,* since 1981, has entitled the surviving spouse to the marital home and half of the couple's marital property.

Women and social legislation

For some 175 years, until the 1960's, the poor were the responsibility of the parishes. Some parishes opened institutions such as workhouses and almshouses. Almshouses were for the aged, the disabled, orphans, alcoholics and unwed mothers.[51] But half of the counties, instead of funding almshouses, contracted their poor to bidders at public auctions. Overseers of the poor auctioned off the old, disabled or unemployed poor to the lowest bidder who was then paid the bidded amount for the pauper's food and lodging for a year. Due to women's economic vulnerability, many of these destitute poor were likely female. In 1884, Hannah Boles, who had married well but was made a pauper by her husband's death, went for $72.[52] The *New Brunswick Child Welfare Survey* of 1929 found that there were still auctions in the counties of Albert, Kent, Queens, Sunbury and Restigouche at that late date. Even a 1880's campaign waged in the New Brunswick press (headlining, "White Slaves Sold at Public Auction") which brought international shame to the province had not stopped the practice. Eventually, it became cheaper to open almshouses than to auction the poor and the practice ended because of economic, not humanitarian, reasons.[53]

In 1930, following the example of other provinces and acknowledging the lobbying efforts of such groups as the Saint John Council of Women, New Brunswick passed the *Mothers' Allowances Act.* It was to provide maintenance payments to widowed mothers or disabled women unable to support a dependent child. Deserted or deserting mothers and unwed mothers were not included. To be eligible for the allowance of $60 a month, the mother had to be "in every respect a fit, proper and suitable person to have the custody and care of her children" and the children in her care had to have been "born in lawful wedlock".

However, no money was paid out in this plan until 1944[54] when the act was replaced by a new one which also provided for the payment of allowances to both widowed and deserted mothers and to disabled fathers. In the same year the federal government introduced the universal program of family allowances. In 1959, the provincial act was amended to include the wife who had left her husband because of his cruelty or uncondoned adultery.

Apart from mothers' allowances and family allowances, little assistance existed to help the unskilled divorced or separated mother provide for her children. This harsh financial reality likely kept many women in unhappy or intolerable marriages. Until 1967, when the provincial government fully took over the administration of the welfare system and equalized social assistance payments, the public assistance she could receive depended on whether she lived in a rich or poor county. If she had children and attempted to support herself, she had to face disapproving social attitudes. Moreover, due to social conditioning she often lacked the necessary skills or education to work in a well-paying profession.

Although the divorce law was broadened in 1968 and social attitudes regarding working women have improved, and although there now exists a more equitable system of social assistance, a dependent woman in an unhappy relationship still faces great practical difficulties in leaving her partner. Too often still, she has few skills and cannot expect to offer a decent standard of living to her children. Maintenance payments are rarely paid. She may be able to scrape by on social assistance but without other aid she will not be able to improve her situation. The facially neutral social service laws do not help women become autonomous. In the end, union based on a bread-winning husband and a dependent wife places the wife in a precarious position.

Education — breaking the rules

Women's right to post-secondary or superior education was not fought in New Brunswick courts; but neither was it given without the struggle of a few women and men against traditional opinion. Although public education for girls developed more or less at the same pace and during the same periods as education for boys, post-secondary education for women and men did not. In a society where women were not expected nor, often, believed capable of aspiring to professional work, it was difficult for men or women to see the usefulness let alone the right of women to study beyond their adolescent years. Not only did the possibility of women receiving post-secondary education signify the possibility of women stepping out of their traditional and

idealized place in society, but it also demanded society's reappraisal of women's abilities.

The first post-secondary or superior educational institutions to open their doors to women were the Provincial Training and Model Schools or Normal Schools for teachers. The original schools were established in Fredericton and Saint John in 1848. Neither had provisions for female students. In that same year, however, Rachel Martin was admitted to the Fredericton training school on the recommendation of Lieutenant-Governor William Colebrooke and she became the school's first female student.[55] Martha Hamm Lewis attempted to enroll in the Saint John Training School in 1849 but was refused by the headmaster on the "grounds of custom and expediency".[56] She appealed the decision to Lieutenant-Governor Edmund W. Head and he issued an Order-in-Council requiring Lewis' admission. The head master abided by the order but applied strict rules to Lewis. She was to wear a veil, arrive 10 minutes before class began, sit in the back of the class, leave five minutes before class ended and speak to no one.[57] In spite of these limitations on her movement, she successfully completed the program. Once women's right to teacher training had been given a governmental blessing, the number of female students increased steadily. By 1856, there were almost twice as many female students as male students at the Saint John school.[58] Male candidates were less attracted to the teaching profession because it promised little pay and prestige and men had many more career options.

The number of francophone students remained tiny at the Normal School. In the 1877-1878 session, there were only two francophone students, one of them female, out of a total of 229 students at the Normal School, by now permanently established in Fredericton.[59] In 1878, a French preparatory department was established at the Normal School to prepare francophone students for the English-taught Normal School. The preparation allowed these students to earn a temporary two-year third-class teaching license. To qualify for a permanent and higher-level license, they were required to return to Normal School and follow the regular English teacher training program. Few did. In 1883, this arrangement was slightly improved when francophone students were allowed to earn a permanent license through a renamed "French Department" which provided training in both English and French, but the license was still only third class, the least well-paid and least prestigious. As with the anglophone section of the Normal School, the francophone section became predominantly female.[60] Except for studies in nursing, this form of superior education was to be the only one available in French (and only partially at that) to francophone women until 1943.

In 1854, the Female Branch of the Mount Allison Wesleyan Academy was founded in Sackville, 11 years after the boys' academy and after a number of years of intermittent fund-raising and deliberations. The first preceptor of the Female Branch (later named the Mount Allison Ladies' College) was Mary Electa Adams. She believed "that the introduction of the abstruser sciences into a course of study for females, is of the highest utility".[61] Her high academic principles prepared the ground for 1872 when women would be allowed to receive university diplomas from Mount Allison Wesleyan College (10 years after men). The first female graduate was Grace Annie Lockhart. She earned a Bachelor of Science and English Literature in 1875 and was the first woman to receive a bachelor's degree in the British Empire. Harriet Starr Stewart received a Bachelor of Arts in 1882 and became the first woman in Canada to receive that degree.

In 1886, the University of New Brunswick (founded as King's College in 1800) opened its doors to women, but only after the persistent struggle of Mary K. Tibbits. She had written her entrance exams in 1885 and had passed with "flying colours"[62]. The legislation regarding admittance to the University of New Brunswick allowed "any person 'who passed the matriculation examination, paid the dues, and signed the declaration' required of all students, pledging obedience to the rules of the University"[63] to be admitted. Tibbits' lawyer assured her that she was a person in law and she applied for admission. However, many members of the university's Senate and the university community did not wish to admit her. Only after a member of the House from Saint John, John V. Ellis, opposed a grant to the university because it had "refused admission to a duly qualified student, one Mary K. Tibbits"[64] did the university recant. Tibbits graduated along with Florence Caie in 1889 and the two women became the first female graduates from U.N.B. The first Black woman to graduate from U.N.B. was Mary Matilda Winslow in 1905.[65]

In 1923, Marguerite Michaud became the first francophone woman from New Brunswick to earn a B.A. when she graduated from Saint Francis Xavier University in Nova Scotia. Francophone women would have to wait until 1943 before they were to have a place in a university degree-granting program in their own language. In 1864, the Collège Saint-Joseph was founded in Memramcook, Westmorland County. It was the first francophone degree-granting institution in New Brunswick, and like the anglophone universities, admitted men only. It was followed by other clerically-run classical colleges, but none admitted women.

It took the Religieuses de Notre-Dame du Sacré-Coeur to change

all that. They had a history of concern for the education of girls. While they were still a part of the Sisters of Charity they had, in 1873, founded in Memramcook one of the first francophone convents in New Brunswick dedicated to the education of francophone girls. In the early 1940's some of their students began expressing the desire to receive classical training as offered in the men's classical colleges.[66]

Mère Marie-Jeanne-de-Valois (originally Bella Léger from Saint-Antoine, Kent County) director of the congregation's boarding school, took up her students' request with enthusiasm. Like Mary Electa Adams 90 years before, she believed that women should be able to receive a solid post-secondary education and she insisted that the classical education her congregation would offer not be a diluted version of the men's classical education. In Quebec, congregations had modified classical education for women to include culinary arts and domestic sciences. Mère Marie-Jeanne-de-Valois believed that women had as much right and need for a solid cultural and intellectual education as men.

Père Clément Cormier, superior of the Université Saint-Joseph in Memramcook, supported her initiatives. But the general public and elder clergymen did not. Neither perceived the need for women to receive a university education. Many classical college professors also believed that women were incapable of absorbing such education, that the required courses in philosophy in the classical program were incomprehensible to the female brain.[67] Some members of mère Marie-Jeanne-de-Valois' own congregation were also hesitant. They questioned their abilities to undertake such a venture. For many, nuns, priests, educators and members of the public, the notion of training young women in the liberal or classical arts (philosophy, history, literature, latin, music, as well as science and mathematics) was still too new, too audacious an undertaking.

In spite of the opposition and the obstacles, mère Marie-Jeanne-de-Valois and père Clément Cormier persevered and quietly won their cause. They struck an agreement that the Université Saint-Joseph would grant the degrees earned by the women taught by the Religieuses de Notre-Dame du Sacré-Coeur and in 1943 the congregation of sisters accepted their first four students in classical studies. It was an appropriate way to mark their 70 years of providing instruction to girls in Memramcook.

Two of the original four students graduated in 1947: Antoinette Léger of Moncton and Alphonsine Després of Cocagne.

Needing space for the young college as well as the high school and business course the sisters wished to offer, the congregation built

the collège Notre-Dame d'Acadie in Moncton and it opened its doors in 1949. Many of the graduates of the classical program of the college would go on to make important contributions in the artistic and liberal professions and some would earn international stature. Once the Université de Moncton became a reality (1963), the congregation closed its college (1965) marking the end of segregated post-secondary education for francophone women and men in New Brunswick.

Other classical colleges for francophone girls were opened in 1949 in Saint-Basile by the Hospitalières de Saint-Joseph, in 1960 in Shippagan by the Religieuses de Jésus-Marie, and in 1965 in Bathurst by the Filles de Marie-de-l'Assomption. The former two would be replaced by the Edmundston and Shippagan campuses of the Université de Moncton. The Bathurst college would close in 1966.

These quiet but persistent struggles for post-secondary education for women opened the doors for those women with the will, the means and the encouragement to join the professional world. Although women quickly penetrated those faculties or programs which reflected their traditional place in society, as child-educators, social workers and nurses, or faculties which seemed to complement their "innate" artistic and linguistic abilities, women have yet to penetrate in numbers equal to men certain pure and applied science programs such as physics and engineering and it has yet to be demonstrated that girls receive the same encouragement as boys to pursue such non-traditional programs. In historical terms, women are relative late-comers to the world of post-secondary education, and universities are still adapting to their relatively new clientele, especially to those women with family responsibilities. University-provided day care, distance education, part-time programs and evening classes are helping to equalize the opportunities.

Although women have made great strides since the time of Martha Hamm Lewis and Mary Tibbits, we still have not arrived in an era where women are equally represented with men in all post-secondary programs.

Women and labor legislation

With industrialization came factories and with factories came difficult working conditions.[68] People concerned about the conditions, including members of the Women's Enfranchisement Association and the Saint John Council of Women lobbied for and finally got the adoption of a *Factories Act* in 1905. Ontario had had such legislation since 1884.

This new act regulated working hours, conditions and building standards. It had rules for washrooms, ventilation, cleanliness and the prevention of overcrowding. It also prohibited the employment of girls under 18 or boys under 16 in factories considered "dangerous or unwholesome". It required the inspection of factories to ensure that the standards were met and allowed for the appointment of female factory inspectors from "time to time": a small victory for women.

The act's purpose in part was to limit the working hours of girls between 14 and 18 and of women employed in factories. The act required that girls and women not be employed more than 10 hours a day nor more than 60 hours a week. However, in exceptional circumstances the factory could employ girls and women up to 13½ hours a day or 81 hours a week but for no longer a period than 36 days a year. In such circumstances, girls and women were not to begin work before 6 a.m. nor finish after 10 p.m. These women, like women today, also had a work day waiting for them at home.

It was to take another 38 years, until 1943, before New Brunswick factories' legislation limited work hours to current standards. Female and male employees under 18 were ordinarily not to put in more than nine-hour days; however, no limits were given for the hours of work of adult employees.

In 1916, regulations were added to the original act, requiring that girls and women in shops be provided chairs and be allowed, when not working, to sit in them without "threat...or intimidation". In 1928, regulations were added to allow girls and women to sit while working if the work could be done just as productively in that position.

The 1905 *Factories Act* also stipulated that:

> *A young girl or woman shall not be allowed to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water or other mechanical power.*

It is unclear whether female workers were being protected from their "inherent" ineptness with machines or from the dangers caused by ample dresses that might catch in moving machine parts.

Even in the 1937 *Factories Act* women were to stay away from moving machines. In fact, not until the 1946 *Factories Act* did the regulation disallowing women from working near operating machines disappear from the books. Perhaps the need for women

in the war industries had belatedly called for a realistic view of women's abilities.

Minimum wage

Early this century, provinces began bringing in minimum wage legislation for women to help prevent their exploitation.[69] New Brunswick did not do this until 1930. By then, many of the other provinces were beginning to extend their minimum wage laws to include men, too, and New Brunswick followed suit. It was not until 1965 that the minimum wage was the same for women and men in New Brunswick.[70]

Earning equal pay

New Brunswick women won their first equal pay battle in 1920. Until then, female teachers had been paid less than male teachers. From the third quarter of the 19th century women had begun to dominate the teaching profession.[71] Since few attractive career options were open to women, they worked for whatever pay they were offered. Government quickly saw the economic advantages of having female teachers and legislated lower pay scales for them.

It was to take a virtual crisis before the government was to bring in equal pay for female and male teachers. The First World War caused an acute shortage of trained male teachers.[72] By the end of the war, female teachers, the lowest paid in a low-paying profession, were looking elsewhere for better employment. Schools were reported closed apparently for lack of teachers.[73] To attract potential teachers, the government introduced one pay scale for all teachers based on years of experience.

Equal pay was finally extended to everyone 41 years later. Following Ontario by 10 years, New Brunswick brought in the *Female Employees Fair Remuneration Act* in 1961. In effect until 1976, it required employers to give women and men equal pay for equal work. The act's usefulness was limited in large part because the majority of the female work force has never worked concurrently in the same occupations as the male work force. A more meaningful remuneration of work done by the sexes would pay according to the value of their work: equal pay for work of equal value. Still in our present day, women make on the average 63 cents to every dollar men earn. This gap has remained virtually static since the turn of the century.

Human rights legislation

The 1960's began with Canada adopting equality principles — including sexual equality — in the *Canadian Bill of Rights.* The provinces followed suit with human rights acts. In 1967, New Brunswick enacted its first *Human Rights Code,* prohibiting discrimination on the basis of race, color, religion, origin, age and physical disability. But it was not until 1971 that the act was amended to prohibit discrimination on the basis of sex and later on the basis of marital status. The principle of equal pay for equal work is deemed to be protected by this act, the 1961 equal pay act having been repealed in 1976, but it has been questioned whether the administration of the code provides much practical protection on this issue. A landmark at the time of its enactment, the code is now considered in need of strengthening. Indeed, many concerned women believe that the concept of equal pay for work of equal value, when implemented, should be included in the much stronger *Employment Standards Act.*

Married women on the job

When married women sought to enter the labor market, they encountered prejudices, many of which still linger.

First, in society's view, married women were not supposed to work for pay outside the home. Women were to work only until marriage. Employers enforced this belief in regulations and in laws. Until 1955, except during the Second World War, the federal civil service did not employ married women as a rule. It was not until 1967 that the New Brunswick civil service was to employ married women. Until then they had to be separated or divorced or married to an unemployable man before they could be considered for permanent employment.

Second, married women were supposed to stay home to raise children. Over the years the public has debated whether or not children require their mother's constant care. We forget of earlier times when nannies and domestics, or maiden aunts or elder children helped relieve the mother of 24-hour-a-day child care duties.

Day care

The issue of day care is far from new. Before the turn of the century Saint John, at least, had a day nursery.[74] Early women's groups such as the Saint John Council of Women, the Women's Christian Temperance Union and the Women's Enfranchisement Association worked in support of day nurseries and kindergartens for working mothers.[75] 1908 saw a flurry of

activity in this regard. Other provinces instituted day care for the children of mothers working in the war industries. The full history of such services and other alternate child care methods in New Brunswick has yet to be told.

As mothers began entering the work force in increasing numbers in the 1960's, the issue of day care became pressing. The number of day care centers increased and 1973 saw the foundation of Garde de Jour - N.B. Day Care Association. In response to day care advocates, the New Brunswick government brought in elaborate day care standards in 1984. However, it has yet to develop a comprehensive policy regarding early childhood development services.

In 1985, there were some 3000 day care spaces while there were over 62,000 children aged under six in the province. Existing day care centers struggle under difficult financial conditions despite waiting lists.

Day care is an issue that continues to grow. The mobility of today's families has greatly distanced them from their extended families. Many parents do not have the family support an earlier generation of parents had in raising children. Most couples in New Brunswick are having only one or two children and parents are concerned that their children have limited opportunities for socializing with other children.[76]

Most parents with children under age six work.[77] Although the day care issue is not exclusively a women's issue, but rather a family one, women have been in the forefront of the day care movement. As working mothers, they hold the triple responsibility of child care, home care and employment.

Maternity

Where working mothers encountered prejudices regarding a mother's place in the paid work force, expectant mothers faced possible firings. In 1964, the New Brunswick government passed a *Minimum Employment Standards Act* which allowed women up to 16 weeks maternity leave (17 since 1976) and since 1971, the federal government has allowed qualifying women on maternity leave to draw unemployment insurance. But it was not until 1976 that the provincial government amended its employment standards to prohibit the dismissal of pregnant women. Significant gains have yet to be made regarding paternity leave.

Prostitution

Prostitution was never a crime in New Brunswick before

Confederation nor has it been in Canada since. Activities related to prostitution were prohibited and many prostitutes were arrested as vagrants or "disorderly persons". New Brunswick had passed one of the first such laws in 1786: *An Act for preventing Idleness and Disorders, and for punishing Rogues, Vagabonds and other Idle and Disorderly Persons.* Such people were liable to be sent to prison or the House of Correction for one month of hard labor.

In 1829, New Brunswick passed *An Act for the speedy and effectual punishment of Persons keeping Disorderly Houses.* This included bawdy houses, and masters or mistresses of such houses were liable to prosecution or punishment. Whether because lawmakers naively hoped that bawdy houses would disappear over time or whether because lawmakers hesitated criminalizing the keepers of such places, they stipulated that the act was only to remain in force for five years, until 1834. However, it was continued until 1840, and in 1854 the keeper of a common bawdy house became liable to two years imprisonment. This penalty has remained unchanged up until the *Criminal Code* of the present day.

When Canada gained jurisdiction over criminal law, it passed *An Act Respecting Vagrants* in 1869. This law made all vagrants, which included prostitutes, keepers of bawdy houses, and persons living off the avails of prostitution, liable to two months imprisonment, a fine of $50 or both.

Responding to calls from concerned citizens for the protection of innocent girls and women from sexual exploitation, Canada enacted in 1886 *An Act respecting Offences Against Public Morals and Public Convenience.* The act prohibited householders from allowing women under 16 years to resort there for the purpose of "unlawful carnal knowledge"; it prohibited persons from enticing a woman to a brothel for the purpose of prostitution and forbade men from having "illicit connection" with any woman of previously unchaste character who was between 12 and 16 years old. In 1892, related provisions became part of the *Criminal Code.*

Social reformers desired more than prohibitionary laws. They wanted to reform "the fallen women" and many believed that "women criminals could achieve almost total rehabilitation"[78]. Federal legislation of 1871 allowed Quebec women to serve their sentences in a Quebec female reformatory and moreover required that they serve their time there if they had been convicted more than once under the *Vagrancy Act.* What was peculiar in this arrangement was that women had to remain in a reformatory a minimum of five years while the penalty under the *Vagrancy Act*

was only six months. It would seem that the extended time was to ensure the women's rehabilitation. In 1891, similar federal legislation was brought in to deal with convicted Roman Catholic women from Nova Scotia and in 1896, a New Brunswick act incorporating the Sisters of the Good Shepherd of Saint John allowed judges to commit "vagrant or incorrigible" Roman Catholic girls to the Good Shepherd Industrial Refuge in Saint John to serve out their jail terms, or up to five years if the girl was under 14 years of age.

The prostitution and exploitation of Indian women became a federal concern in the late 19th century. In 1880, the government passed *An Act to amend and consolidate laws respecting Indians* which "prohibited the keepers of houses from allowing Indian women prostitutes on the premises". When the *Criminal Code* was enacted in 1892, specific provisions were inserted to penalize unenfranchised Indian women who kept or were found in a disorderly house, tent or wigwam. This provision was elimated in 1954.

From 1869 until 1972, vagrancy provisions in Canadian criminal law had made it an offence for a prostitute to be in a public place for the purpose of prostitution. In 1972, that provision was replaced with one that prohibited anyone from soliciting in a public place for the purposes of prostitution. Narrow judicial interpretation of the new 1972 section has rendered it difficult for law officers to use successfully. Other provisions regarding disorderly conduct, indecent acts in a public place, keeping a bawdy house, having sexual intercourse with a young girl are also used currently to regulate prostitution.

Over the past century and a half, lawmakers have attempted to deal with prostitution through various measures of regulation, prohibition and rehabilitation, but these have been unsuccessful in diminishing the trade. Complex legal and social reforms have been proposed by women's organizations, in particular the Canadian Advisory Council on the Status of Women. It has recommended that laws related to prostitution be applied equitably to women and men but that we must recognize that prostitution is too firmly entrenched in our social and economic system to be eradicated by legal stricture or even social reform in the near future.

Crimes against women: sexual assault

Through much of recorded history, rape, like homicide, has been viewed as a major crime and the rapist has been liable to the death penalty. New Brunswick inherited England's legal view of rape and while England was revising its laws in the early 19th century, New Brunswick enacted in 1829 its own statute of offences against the person which stated in no uncertain terms:

that every person convicted of the crime of rape shall suffer death as a felon.

When Canada gained jurisdiction over criminal law and wrote its 1869 *Act respecting Offences against the Person,* the sentence for rape remained death. But in the *Criminal Code* enacted in 1892, sentence was life imprisonment or death.

In practice, convicted rapists were not executed; their sentence was commuted. In 1921, whipping was added to the life imprisonment sentence in recognition of this fact and in the hopes of rendering the life sentence an "adequate punishment"[79] that would deter the potential rapist. The judicial system's reluctance to carry out the death sentence in cases of rape was evident in one early New Brunswick rape case. A Queens County man was found guilty of raping a young girl in the 1790's but:

> *The magistrates of the county, horrified that such a sentence should be passed on an officer and a gentleman (!), reviewed the evidence to see if they could find any loopholes. They succeeded in having the sentence commuted to banishment from New Brunswick for life, whereupon the accused retired across the Bay of Fundy, from which vantage point he vilified everybody in New Brunswick, including the magistrates who had saved him from the gallows.*[80]

Other forms of sexual assault, in particular incest and sexual intercourse with young girls, were also specifically dealt with in New Brunswick's early criminal law. A man who "carnally knew" a girl under 10 risked the penalty of death. Now a man who has sexual intercourse with a girl under 14 who is not his wife is liable to life imprisonment. Since 1854, the person found guilty of committing incest in New Brunswick has been liable to 14 years in prison.

It is only very recently that Canadian society has begun to look upon rape with new understanding. Until the 1970's society viewed rape as a crime caused by a man's uncontrolled sexual passions. We now see all sexual offences as gross abuses of power.

From 1892 to 1983, the *Criminal Code* definition of rape remained intercourse that a man has with a woman other than his wife, without the woman's consent or with her consent after the use of force or fraudulent means.

It was general practice for the defendant's lawyer to grill the victim on her past sexual experiences and her life-style. A victim who was unchaste before the crime was viewed with suspicion. In

1976, the *Criminal Code* was amended to prohibit defense lawyers from questioning the victim regarding her past sexual experience. The intent of this amendment was not clear to all and victims were still sometimes compelled to answer such questions. Finally in 1983, the section was rewritten to clearly forbid questions about the victim's past except in specified circumstances, such as when consent is in question and past conduct might be relevant to the accused's professed belief that the victim consented. In the past, the verbal testimony of the victim was not sufficient evidence of the charge. Since 1983, corroboration has no longer been required, bringing the prosecution of sexual offences in line with that of other crimes.

In 1983, after years of lobbying by Canadian and New Brunswick women's groups, the *Criminal Code* rape provisions received major amendments. Rape is now legally termed "sexual assault" to underline the violent nature of the crime. There are varying degrees of this crime and they carry maximum sentences ranging from 10 years to life imprisonment. The code now also recognizes that sexual assault can occur in a marriage.

Challenging slavery

Not all of New Brunswick's early settlers came willingly. Some were slaves. In 1799, two Black women challenged the legality of slavery in the province.[81] One of the women, known simply as Nancy, had been brought as a slave from Maryland in 1785 by the slave owner Caleb Jones. The other, Mary Morton, had been purchased by another tenacious slave owner, Stair Agnew. Both women claimed their freedom; only Nancy's case was to come to trial. It was heard in the Supreme Court of New Brunswick.

During this period, popular sentiment in Britain, New England and British North America was increasingly for the abolition of slavery and it appears to have been no different in New Brunswick. However, there were vested economic and ideological interests which most of the Supreme Court judges, as part of the governing elite and as slave owners, wished to guard. Before this biased judicial system counsel for Nancy was to plead her case in 1800.

Nancy's two lawyers were Samuel Denny Street, a staunch abolitionist, and Ward Chipman, Solicitor General and later a Chief Justice of the province. While working on this case he wrote that he was "a volunteer for the rights of human nature"[82]. Neither lawyer charged for his legal services.

Slave owner Jones was represented by four leading lawyers, including the Attorney General and two men who later served as Attorney Generals.

The four judges of the Supreme Court of New Brunswick presided over the case. Two were slave owners, one espoused masters' rights and one was an abolitionist. The stakes were not in Nancy's favor.

Counsel for Nancy argued in part that because no law legalized nor recognized slavery in New Brunswick, slavery could not be tolerated in the province and Nancy must be freed.

The judges were unable to arrive at a judgement. Judge Upham, who owned slaves, and Chief Justice Ludlow, who accepted slavery, predictably found for the slave owner, ruling that Blacks could legally be held as slaves in New Brunswick. Judge Saunders, who opposed slavery, was joined by slave owner Judge Allen, in finding that slavery was not legal in New Brunswick since it was not recognized in Great Britain. The split in opinion resulted in no judgement and Nancy remained a slave.

But Nancy's challenge was not entirely in vain. To conform with his decision Judge Allen released all his slaves.

Although Mary Morton's case did not proceed to trial once Nancy's case had been heard, Morton's master, Stair Agnew, remained concerned about slave-owning interests in the province. He was a member of the House of Assembly and in 1801 introduced "A Bill relating to Negroes" which would have recognized slavery in New Brunswick. One of the drafts of the bill included the new regulation that mothers, rather than fathers, would transmit slavehood status to their children. Slave owners could thereby assure themselves of a continuous supply of slaves. The women who had dared to request their freedom would now by the sole virtue of their sex be keeping their descendants in slavery. Matriarchy would be recognized and institutionalized, but in a cruel form that was economically advantageous to the wealthy few.

Anti-slavery sentiments prevailed in the House, however, and the bill did not survive. But the issue of transmitting status through the mother was to resurface in the only other known slavery case in New Brunswick. The case involved a Black "servant", Richard Hopefield Jr. who at 21 claimed the freedom Stair Agnew had promised him. Agnew did not comply and, in 1805, was brought to court. Hopefield's status as a slave was in question. He was the son of Stacey Patience, who had been born a slave in New York, and of Richard Hopefield Sr., a free Black. Although the couple lived as wife and husband, they had never been formally married. When Patience was pregnant with Richard, her slave owner attempted to have her sold in the West Indies. Her husband approached New Brunswick's Governor Carleton on the matter

and the Governor declared Patience free. But she was not to remain so. Seven years later in 1792, a former master "seized on her by violence"[83] and later resold her. This was the state of affairs when her son claimed his freedom.

Samuel Denny Street, who had represented Nancy, was counsel for Hopefield Jr. He argued that Hopefield derived freeman's status from his father. Ward Chipman, reversing his anti-slavery stance of five years earlier, represented Agnew and argued that since Hopefield's parents had never formally married, Hopefield derived his status from his mother. Hopefield lost his case. Three of the four judges held slave-owning interests.

Although few details are available regarding the judges' individual positions, Hopefield's loss suggests that the judges held the traditional view that children of unmarried mothers derive their status from their mothers.

The 1800 and 1805 challenges to slavehood in New Brunswick not only attempted to rectify individual cases but also questioned the legality and humanity of slavery. That the particular plaintiffs involved did not receive their freedom points not only to the racial hierarchy which the judges' espoused [84] but to the sexual hierachy they embraced. Those men with slave-owning interests supported matrilineal concepts only when they served to keep slave women and men in their place.

A New Brunswick Persons Case

In 1905, New Brunswick was the scene of a case that foreshadowed the famous Canadian Persons Case. The Persons Case was the appeal by five women from western Canada in 1929 to the Privy Council of England for a decision on whether women were persons and therefore able to sit as Senators. Their appeal was successful much to the embarrassment of the Supreme Court of Canada, which, on an earlier appeal by the five women, had ruled that women were not persons under the *British North America Act.*

The same question: "Is a woman a person?" had been raised in the Supreme Court of New Brunswick in 1905. Mabel Penery French, who had graduated that year from the University of King's College Law School in Saint John, had applied for admission to the New Brunswick Barristers' Society. The Society agreed that she had "complied with all the requirements of the society as to study and examination and ...[that it was] fully satisfied of the moral character, habits and conduct during her term of study".[85] But before the Society could admit French it felt it needed the opinion of the court as to whether French was a person. Only persons could be admitted to the bar.

Since there had never been a similar application by a woman in England, there was no English precedent to go by. There had been similar applications in the United States, and five states allowed women to be court attorneys without specific legislation that gave women this right. Ontario allowed women to be admitted to the bar, this after a determined fight by Clara Brett Martin, who became the first female lawyer not only in Canada but the British Empire in 1897.

Six judges presided over the French case and several held strong views about the place of women. Justice Tuck declared:

> *I have no sympathy with the opinion that women should in all branches of life come in competition with men. Better let them attend to their own legitimate business.*[86]

To prove that women had no place in the administration of justice, Justice Barker quoted heavily from an American case where the judge had ruled against a female applicant to the bar:

> *the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband....The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.*[87]

He concluded that neither the court, nor the Barristers' Society nor the legislature in enacting the Society's regulations "had any thought or intention of making the radical change now suggested."[88]

Five judges ruled that Mabel French was not a person. One abstained.

But French was ultimately successful. In March 1906, four months after the ruling, the New Brunswick Legislative Assembly passed a law which allowed women to study law and to be admitted to the bar. All admissions of women to the study of law prior to the act were also declared legal. A woman was a person. A month later, French was admitted to the bar.

Until 1910, when she moved to British Columbia, she stood in good standing as an attorney, solicitor and barrister of the Supreme Court of New Brunswick and was an active member of the Saint John Council of Women and the Women's Enfranchisement Association.

In Vancouver, French was to fight the same battle for the right to be admitted to the bar. She met with resistance in spite of her qualifications. She brought her case to the British Columbia Court of Appeal in 1911 and lost; the judge ruled that women were not persons. In 1912, the University Women's Club of Vancouver began lobbying on French's behalf and the pressure caused the Attorney General to introduce a law in 1912 allowing women to study and practice law in British Columbia.[89]

Mabel French had won again. Little more is known about her career except that she practiced for several more years in British Columbia before moving to Seattle. She had blazed a trail for personhood from literally one end of Canada to the other.

A fight for a birthright

In recent years, aboriginal women have been fighting one of the most dynamic and difficult struggles in the women's rights battle. It embraces the right to retain in law two basic facets of self — one's personal and one's cultural identity — regardless of whom one marries. Their demands for equality have been brought before the Supreme Court of Canada and the United Nations' Human Rights Committee and have made national and international headlines.

The problem lay with the *Indian Act* which stripped aboriginal women who married non-Indian men or men from another band of their Indian status and of the rights and privileges that accompany that status. Legally, the Indian woman could no longer claim to be an Indian. An Indian man who married a non-Indian woman did not lose these rights. In fact, he conferred Indian status upon his non-Indian wife, status which remained hers even upon divorce or widowhood. This situation lasted from 1869 to 1985, when clause 12 (1) (b) of the *Indian Act* was changed.

Until this change, the aboriginal woman who married a non-Indian no longer had the right to reside on her home reserve,

losing the familial and communal support needed to keep and transmit her cultural values. She could not inherit family property. If she died her band could refuse her burial on Indian land. And, if she separated or divorced her non-Indian husband, or became a widow, she could not regain Indian status. Only through remarriage with an Indian man could she do so.

She had no right to vote in band elections, no right to the community services administered by the band council and had no right to housing subsidies. She could not benefit from health services nor educational and cultural programs offered status Indians. Her children suffered the same consequences. Although she was compensated for her losses through one payment of a share of band funds, this sum often was negligible when compared to the full assets of the band and to the social and cultural losses the woman sustained.[90]

In adopting the legislation which set off this ostracism in 1869, the Canadian government argued that it wished to prevent white men from dominating reserve lands by buying Indian land through their Indian wives.[91] Based on a patrilineal view of land acquisition (through the male), the rationalization did not conform with the matrilineal cultures of numerous native Indian tribes. At best the legislation was paternalistic and flawed; at worst it was tainted with assimilationism, racism and sexism.

Whatever the intent of the law, its effect was to break "basic link[s] in cultural and linguistic continuity"[92] with each removal of a non-status Indian woman and mother from a reserve. As a pamphlet produced by aboriginal women in New Brunswick explains:

> *The woman embodies the culture and language of any Nation, and once she is gone the Nation has no chance to survive.*[93]

In the late 1960's, Indian women began publicly condemning the effects of 12 (1) (b). Mary Two-Axe Earley, a Mohawk living in Quebec, was one of the pioneers of this movement. She had lost her Indian status through marriage and as a widow could not return to her home reserve. She was one of a number of aboriginal women who testified before the Royal Commission on the Status of Women in Canada on the plight of aboriginal women who had lost their Indian status.

Two-Axe was involved in the formation of the national aboriginal women's group, Indian Rights for Indian Women, in 1971. Canada was brought to international shame in 1975 when Two-Axe reported her plight at the United Nations' World Conference for International Women's Year.

Individual aboriginal women began bringing their grievances to court in the 1970's, beginning with Jeannette Lavell, an Ojibway living in Ontario. She had lost her Indian status upon her marriage to a non-Indian in 1970 and argued that the *Indian Act* contravened the *Canadian Bill of Rights*. She was successful at the appeal court level.

During Lavell's court battles, a second aboriginal woman in a similar situation, Yvonne Bédard, an Iroquois born in Ontario, also went to court. Her lawyer argued that the entire *Indian Act* "was discriminatory on the basis of race and with few exceptions should be repealed."[94] If the concept of Indian status had been abolished by the repeal of the *Indian Act,* Bédard would have been able to reside on her home reserve. Although the judge avoided ruling on the *Indian Act,* Bédard was successful.

Lavell's and Bédard's wins were not to stand. Pressured by male-dominated native Indian organizations, the Attorney General of Canada appealed the Lavell case to the Supreme Court of Canada. Bédard's home reserve, the Six Nations Indian Reserve, similarly appealed Bédard's ruling. The Court heard the cases simultaneously. Lavell and Bédard lost in 1973. Although the Court agreed that 12 (1) (b) discriminated against Indian women, it held by a split decision that the *Indian Act* could not be superseded by the *Canadian Bill of Rights*. 12 (1) (b) could stand.

The next step was to go beyond Canada's courts, to go before the world. Sandra Lovelace, a Maliseet Indian from the Tobique Reserve in northwestern New Brunswick, did just that. With the help of the New Brunswick Human Rights Commission and the moral support of women from Tobique, Lovelace petitioned the Human Rights Committee of the United Nations. She appealed for a ruling on the discrimination she had suffered under the *Indian Act* because she had married a non-Indian. She waited almost four years for a decision. During that wait she was to become an integral part of a large aboriginal women's lobby for reform, experience the bad faith of the government of Canada and witness the continued discord among her own people.

Lovelace and her counsel held that Canada was contravening the *International Covenant on Civil and Political Rights,* which it had signed in 1976. The covenant guarantees each person the right to equal protection before the law without discrimination on the basis of sex; all women and men the right to marry and found a family and the protection of that family from arbitrary or unlawful interference; all ethnic minorities the right to live in a community and to enjoy their own culture, practice and profess their own religion and use their own language.

Lovelace was pushed to take such action by her frustrating fight to receive housing on the Tobique Reserve upon her return to it in 1977 after divorcing her non-Indian husband. Her fight was to fuse with the struggles of other women on the reserve. Refused a house by the chief, she began living in a tent with her young son until the cold weather arrived. She then joined other women who had been occupying the reserve's band office since the summer. These status and non-status single mothers were protesting against their own inadequate, unwinterized housing; discrimination against non-status native Indian women; and matrimonial laws which put the ownership certificate of a reserve home in the man's name and allowed him to own and dispose of the property as he wished, evicting wife and children if he desired.

The occupation lasted until December when the electricity, heat and phone connections were cut off; the band office was set on fire and the protestors were attacked, allegedly by opponents of the women's cause. Lovelace came to her decision to petition the United Nations. The women moved into a motel with assistance from the Department of Indian and Northern Affairs; Lovelace chose to occupy the Tobique jail. The protestors received promises of better housing and of the addition of some women to the band list, and they returned to their homes when warmer weather came. But many of the promises did not materialize.

The Tobique women already had a history of public protest. In 1974 a Tobique native Indian woman had occupied the band office, demanding a house for herself and 10 children after being evicted from her home by her husband. In the early months of 1977, petitions had circulated on the reserve calling for better housing for Indian women.[95]

When it became clear that the government of Canada was ignoring the United Nations' Human Rights Committee's requests of 1978 and 1979[96] for information and observations on the Lovelace petition, Tobique women decided the time had come to act, again. They organized the Native Women's Walk — a 100 mile march on Ottawa.

Women from all over Canada contributed to the financing of the Native Women's Walk.[97] Departing from Oka, Quebec, July 14, 1979, aboriginal women and children of all ages walked five days "through a brutal July heat wave that blistered their faces"[98].The press followed their progress, giving it front-page coverage. Upon the fatigued women's arrival, Prime Minister Joe Clark met privately with Sandra Lovelace and, then Minister of Indian and Northern Affairs, Jake Epp, conferred with the marchers. The Clark government promised amendments to the act.

The federal government saw to it that the Tobique band received $300,000 in extra housing funds but critics alleged that the money was not used to provide housing for needy women and children. In late August 1979, a group of aboriginal women again occupied the Tobique band office, protesting their deplorable living conditions. But, for all their efforts, many remained without decent housing.

Meanwhile, a decision on Lovelace's petition was pending. Having never received a response from the Canadian government, the United Nations' Human Rights Committee decided in August 1979, a month after the Native Women's Walk, that Lovelace's petition was admissible without Canada's input. Finding itself in an embarrassing situation, Canada finally wrote to the committee the following month.

The new Clark government claimed that it intended to introduce legislation to amend the *Indian Act* in the next parliamentary session. But the government fell and all came to naught.

In April 1980, Canada wrote its second letter to the United Nations' Human Rights Committee. This time it was the Liberal government of Pierre Trudeau speaking.

Canada was now promising to change the *Indian Act* only when virtually all Indians unanimously concurred with proposed amendments. Canada failed to acknowledge that the divided opinion among Indians was caused by the *Indian Act,* itself. It had divided the Indian people into favored and disfavored camps, into those with status rights and vested interests to guard, and those without. Some status Indians feared that aboriginal women who had lost their Indian status and had it restituted would return in droves to the reserves, compounding the already critical housing and resources shortage.

Further complicating the situation was the fact that some Indian groups, such as the then National Indian Brotherhood, actively sought for a time to keep the *Indian Act* intact, although they acknowledged it contained discriminatory sections. This ploy dated back to 1969 when the federal government had proposed to abolish the *Indian Act* and all the special rights it granted Indians. This proposal had mobilized a large Indian rights lobby to reaffirm special rights for Indians.

During the 1973 Lavell-Bédard case, such Indian rights groups had feared that the Supreme Court of Canada would rule the *Indian Act* discriminatory by virtue of the *Canadian Bill of Rights* and therefore inoperative. Until these Indian rights groups could have constitutional amendments entrenching their

aboriginal and treaty rights, they were determined to lobby to retain the *Indian Act* since it protected the concept of special rights. The 12 (1) (b) clause served these groups to hold the federal government up to greater shame.

During this period, other women in New Brunswick had begun addressing native Indian women's issues. By 1980, several provincial women's groups had joined the native Indian women's lobby, such as the Saint John Women's Political Action Group, Fredericton Women for Political Action and Voice of Women. The New Brunswick Advisory Council on the Status of Women, which had aided the Tobique women's campaign for funds for their Walk, continued to pressure the federal government for reform. Concurrently, native Indian women organized provincially as the New Brunswick Native Indian Women's Council, following a 1981 provincial conference.

In July 1981, the United Nations' Human Rights Committee found Canada in contravention of the *International Covenant on Civil and Political Rights*. Since Lovelace had married in 1970, before Canada had signed the Covenant, the Committee could not rule on the sex discrimination of 12 (1) (b). However, it could and did rule on its effects. Since her marriage had severed her from her community, Canada was violating her ethnic rights to live and enjoy her culture with her people.

Lovelace had won. She had brought Canada to international shame. But clause 12 (1) (b) remained for a few years yet. In 1980, the government offered exemptions to 12 (1) (b) for bands that requested it. By 1985, only 111 of 560 bands, including 1 of 15 in New Brunswick, had done so.

With the coming into force in 1985 of the equality section of the *Canadian Charter of Rights and Freedoms* and with public opinion on the side of the 16,000 living aboriginal women who had lost status through marriage, 12 (1) (b) could not last much longer. In mid-1985, the government adopted legislation to remove 12 (1) (b), and to restore Indian status to those women who had lost it. However, children of Indian women and non-Indian men are still not on an equal footing with children of Indian men and non-Indian women. The former are considered second generation Indians and must marry another Indian in order to transmit Indian status. Also, band membership for these children is dependent on each band council's decision. Women's groups continue to lobby for real equality on this issue.

Citizenship

Until 1947, Canadian citizenship did not exist.[99] Anyone born in Canada was a British subject, anyone except certain women and

children. Citizenship was derived from husband and father. A Canadian-born woman lost her birth citizenship if she married a non-British subject; she acquired her husband's status. She could only regain her Canadian status through remarriage to a British subject. An "alien" woman who married a Canadian-born man also received her husband's status, earning what the Canadian-born woman "marrying out" had lost; the "alien" woman retained her new status regardless of whether she divorced or was widowed.

In 1947, Canadian citizenship was established in law. Under the new *Canadian Citizenship Act* the Canadian-born woman no longer lost her citizenship if she married an "alien"; however, those women who before the new act had lost their citizenship did not have it reinstated. And there were other inequities. Alien women who married Canadians could apply for Canadian citizenship within one year while alien men who had married Canadians had to wait five years. Children continued to obtain their citizenship through their fathers.

In 1970, the Royal Commission on the Status of Women of Canada recommended the elimination of these inequities and in 1976 the federal government complied. Women who had lost their citizenship through marriage before 1947 would be allowed to regain it, and Canadian women could confer their citizenship upon their children born outside of the country. In 1968, Margaret Rideout of Moncton was appointed citizenship judge, the first woman to hold that position in New Brunswick.

Jury duty

Jury duty has long been considered one of the responsibilities of a citizen. Fundamental to our system of justice is the accused's right to be judged by his or her peers. Moreover, a jury's decision may set precedents which help mold our laws. However, only relatively recently have women been considered able to sit on juries and to judge their peers.

In New Brunswick, this attitude persisted until mid-century. The Business and Professional Women's Club became deeply concerned about the matter and in 1953, Muriel Fergusson presented a brief on the Club's behalf to the provincial cabinet.[100] In 1954, the provincial government amended the *Jury Act*. However, the amendments did not treat women and men equally. While men were automatically liable for jury duty, women had to file a request with the sheriff of their county to have their name placed on the jury list and could have their name removed at a later date if they wished.

In coming years, the Business and Professional Women's Club was to urge women to register for the jury list. However, Muriel Fergusson was not satisfied with the law. She wanted to see women and men held equally responsible for jury duty. In 1971, as a Senator, she introduced a bill to this end. Although it passed the Senate, it did not receive first reading in the House of Commons. But her attempt was not in vain. In June 1972, the federal government amended the *Criminal Code* so that no person could be excused on the basis of sex from jury duty in a criminal proceeding. That same month New Brunswick amended its own *Jury Act* to make women and men equally liable for jury duty.

Legal pioneers

For centuries the law has viewed women as the dependents, indeed the property, of men. This view long limited a woman's options, whether she was a wife, a mother, an employee or a person wishing to exercise her citizenship. In spite of this, a number of women in New Brunswick have sought a place in the provincial judicial and law enforcement systems.

1795: New Brunswick has a female executioner, Moll Griff. Her only known execution is the hanging of a Kings County man, John Shanks, who had been found guilty of murdering his wife. The following year Griff is arrested and imprisoned for burglary.[101]

1893: New Brunswick has its first known female law student, Edith L. Hanington.

1896: a second woman, Isabel Mowatt, registers at King's College Law School in Saint John, but neither she nor Hanington go on to become lawyers in the province.[102]

1905: Mabel French, King's College's third female student applies for admission to the New Brunswick bar. Her right to admission is argued in the Supreme Court of New Brunswick and is refused when the judges deem that she is not a person.

1906: the New Brunswick legislature brings in a law allowing women to study and practice law in the province and French is admitted to the bar, the first woman in the province and the second woman in Canada to be admitted to a provincial bar.

1935: Muriel Fergusson, who had been admitted to the bar 10 years earlier, is appointed Judge of Probate in Grand Falls, Victoria County. She is the first woman to hold any sort of judgeship in New Brunswick. She goes on to hold numerous legally-related administrative positions which are firsts for New

Brunswick women. Another 50 years elapse before the second female judge is appointed.

1947: Frances Fish of Newcastle is appointed deputy magistrate for the County of Northumberland, the first woman to hold such a position in New Brunswick. She had been the first woman to graduate from Dalhousie Law School in Halifax (1918) and the first woman admitted to the Nova Scotian bar.

1953: Camille Robichaud becomes the first known francophone woman to be admitted to the New Brunswick bar. She had graduated that year from the U.N.B. law school.

1956: Yvonne Landry Martin, from Grand-Anse, graduates from the U.N.B. law school and is admitted to the bar in the same year; it is to be 1971 before other francophone women of New Brunswick begin following in Robichaud's and Martin's footsteps.

1965: Doris Ogilvie of Fredericton is appointed deputy judge of juvenile court, the first woman to hold such a position in New Brunswick, and is appointed deputy judge of magistrate's court, the second woman, to hold such a position.

1962: Bernadette Zigante becomes the first female police officer (rank constable) in Saint John. It is another 10 years before other New Brunswick cities hire female constables although over the years women had worked as police matrons. Groups such as the Saint John Women's Enfranchisement Association and the Moncton Council of Women had lobbied for police matrons in the early 20th century.

1974: Sheila Sullivan of Lakeville, Westmorland County, becomes the first woman from New Brunswick to join the R.C.M.P. 1974 is the first year women are admitted to the force and Sullivan belongs to the first troop of 32 women accepted.

Women have only very slowly begun to penetrate the ranks of the judicial and law enforcement systems in New Brunswick. Their numbers remain small. Only one female provincial court judge, Patricia L. Cumming, sits in 1985. There has never been a female police chief of any of New Brunswick's police forces. In fact, it has only been since the 1970's that women have begun training in any numbers to become lawyers or police officers.

Between 1906 and 1969, only 38 women were admitted to the bar in New Brunswick, 29 having graduated from the law school of the University of New Brunswick between 1924 and 1969 out of a total of 468.[103] Until 1981, women still made up less than 30% of the University of New Brunswick law graduates, having climbed

in numbers significantly since 1974 when they had made up only 10% of the graduates and since 1970 when there were no female graduates. The Université de Moncton law school opened its doors in 1978 and over 37% of its first graduates were women; they made up 50% of the graduating class by 1983.

The Atlantic Police Academy at Holland College in Prince Edward Island has been training police officers for the Atlantic region since 1971. In that first year, nine of the 40 students were female, one of whom was from New Brunswick, Mary Sharon Adair of Petitcodiac. In 1984, it had three female graduates all of whom were from New Brunswick. As of 1985, Saint John has five female police officers on a force of 191, Fredericton (which hired its first female officer in 1973) has four females on a force of 85 and Moncton (which received its first female officer in 1976) has three female police officers on a force of 112.

Long-standing myths regarding women's capacity to reason and to act logically and calmly, as well as traditional beliefs about women's place in society did not encourage women to study law or to train as police officers. Some people also determined a woman's need for independence by her appearance. A good-looking woman did not need education or employment; supposedly she could get by with a husband. Mary Louise Lynch, a lawyer, a former registrar of the U.N.B. Law School and the first New Brunswick woman on the Parole Board, summed up, in 1950, her experience as a female pioneer in law:

> *I would say that the majority* [*of people*] *have a definite idea that a woman lawyer should be plain, dowdy, and pedantic, in short, a blue stocking....you will constantly hear if you happen to look even passingly fair, "you don't look a bit like a woman lawyer" — and this remark is supposed to be a compliment.*[104]

The *Canadian Charter of Rights and Freedoms* now guarantees sexual equality. Gone are the days when the law viewed women as dependents. The time has come for full personhood.