CONTEMPORARY TRADITIONAL EQUALITY: THE EFFECT OF THE *CHARTER* ON FIRST NATION POLITICS

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First Nations[1] in Canada have struggled since contact with Europeans to preserve and exercise their inherent powers of self-government.[2] In the past few years these efforts towards greater self-determination have met with increasing attention and partial success.[3] First Nations now have some protection in the Canadian Constitution[4] and a heightened presence and influence in the formal political arena.[5] Yet, despite the gains made by First Nations in the assertion of these freedoms, there is much work left to be done to assure that they and their governments are liberated from the controlling layers of regulation and oppression under which they live and operate.[6] The work to further facilitate self-government must proceed as strongly within First Nations as it is pursued with groups external

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[1]I use the term "First Nations" to denote the peoples who trace their ancestry to the original inhabitants of North America. These peoples comprise North American Indian, Métis and Inuit people. I prefer the term First Nations because it denotes the diversity of their composition and their existence as organized societies before colonization.

[2]For a compilation of First Nation peoples' understanding of contemporary self-government see, generally, F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, British Columbia: Oolichan Books, 1991); D. Engelstad & J. Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord, Ont.: Anansi, 1992).

[3]For a description of the recent history of self-government see, generally, B. Richardson, ed., *DrumBeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989); M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984); K. Brock, "The Politics of Aboriginal Self-Government: A Canadian Paradox" (1991) 34 *Canadian Public Administration* 272; P. Tennant, "Aboriginal Governments and the Penner Report on Indian Self-Government" in M. Boldt, J. Long & L. Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 383; J.E. Chamberlain, "Aboriginal Rights and the Meech Lake Accord" in K. Swinton & C. Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 11.

[4]See ss 25 and 35 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. For an example of how these sections can be used to potentially protect First Nations see, generally, P. Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" (1992) Special Edition on Aboriginal Justice, U.B.C. L.R., 280.

[5]See B. Schwartz, *First Principles; Constitutional Reform with Respect to the Aboriginal People of Canada* (Kingston: Institute of Intergovernmental Relations, 1985).

[6]See the comments of Ovide Mercredi, Grand Chief of the Assembly of First Nations, expressing the need for reform, in *First Peoples and the Constitution: Conference Report of March 13-15, 1992* (Ottawa: Supply and Services, 1992) 33 at 34.

to them.[7] To accomplish this objective, dialogue must be encouraged not only with non-Native people, but also within and between the various First Nations. This means that legitimate criticism of the government for the oppression that their policies have caused must be augmented with pertinent internal criticism or endorsement of policies that First Nations themselves will adopt.

One of the greatest internal barriers to the enhancement of self-government through the latter procedure is the division the *Canadian Charter of Rights and Freedoms*[8] has caused within the First Nations community. The conflict within First Nations over the application of the *Charter* to their societies has provoked severe internal contention which threatens to disintegrate the fragile gains that have been made towards self-determination in the last decade. Underlying much of this debate is the appropriateness of invoking the language of "rights" to achieve progressive social change. Rights are often dismissed as a tool in the transformation of First Nations subjugation because "they seem *prima facie* incompatible with Aboriginal approaches to land, family, social life, personality and spirituality."[9] For people debating in this corner, the *Charter* represents "further encroachment on the cultural identity of the community" of First Nations because it "use[s] a framework which undermines their objectives."[10] In the other corner of this controversy, rights are invoked by First Nations because they are deemed an aid in their communal struggle against oppression.[11] These people argue that the *Charter* contains many precepts that are currently accepted and were traditionally endorsed by a considerable number of First Nation people and, as

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[7]I recognize that increasingly visible internal debate may cause the non-Native public to become more sceptical about First Nations ability to govern themselves as they see continual dissension within these communities over different policy options. However, I would argue that the non-Native public should not hold Aboriginal people to higher standards of political unity than that of the general polity. As is the case with other individuals and groups, First Nations are entitled to display and assert the diversity they live with. In order for self-government to be truly meaningful, First Nations must be able to test ideas in the public forum and then have rigorous debate about them. In this vein I would submit that further debate about the *Charter* in First Nation communities needs to continue.

Concern will also be expressed of the old complaint about wanting self-government spelled out before it is recognized. However, since First Nations already possess self-government and are merely seeking its recognition, this argument ignores the fact that self-government is already detailed to a certain degree since it does exist, and one merely has to examine the communities to see the kinds of powers an unburdened self-government will enhance.

[8]Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[9]M. E. Turpel, "Aboriginal Peoples and the *Charter*: Interpretive Monopolies, Cultural Differences" (1989) C.H.R.Y.B. 3 at 37. See also M. E. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 Canadian Journal of Women and the Law 174.

[10]"*Charter*", *ibid*. at 40, 10.

[11]T. Nahanee, "Dancing With a Gorilla: Aboriginal Women, Justice and the *Charter*" in *Aboriginal Peoples and the Justice System* (Ottawa: Supply and Services, 1993) 359 at 364.

such, that these principles must be restored to maintain and fortify their inherent authority and exercise of powers of self-government.[12] The application of Government policy to First Nations throughout the last 100 years has concealed the degree to which many of the precepts underlying the *Charter* were present in First Nations.[13] The hidden alignment of interests between tradition and equality has caused many Indian people to turn from the *Charter*'s promise of emancipation. Yet, intersections in the objectives of the *Charter* and traditional First Nations practices provide a meeting place for the potential transformation of rights discourse. By creating a conversation between rights and tradition, the *Charter* presents First Nations with an opportunity to recapture the strength of principles which were often eroded through government interference.

In order to prevent a further unravelling of the broader consensus surrounding self-government, more attention must be given to the potential to reconcile the divergent opinions surrounding the *Charter*'s application of rights to First Nations. The *Charter* and its ideology have had a profound impact upon First Nations identity and politics since its inception in 1982 and, in the spirit of healing the divisions currently permeating First Nations politics, its underlying principles can facilitate and have enhanced self-determination without overpowering their society's customs, laws and traditions. In submitting that the *Charter* has some role to play in the struggle for First Nations self-government, I am acutely aware of its constraints and limitations.[14] Rights can be applied in a culturally biased way.[15] There is an ideology of formal equality which is difficult to overcome.[16] The American experience with the application of rights to Native American tribes

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[12]See, Native Women's Association of Canada, *Matriarchy and the Canadian Charter: A Discussion Paper* (Ottawa: Native Women's Association of Canada, no date).

[13]Respect for the beliefs, association, privacy, and so forth, of people was the hallmark of Indigenous activity throughout the millennia before Colonial contact. The close-knit interdependence of individuals within First Nations necessitated behaviour that gave a wide latitude of personal freedom to balance the stresses of living in a small community. While there were variations and exceptions to the prevalence of these ideas, the practices of pre-contact First Nations demonstrated a significantly widespread acceptance and protection of people's autonomy. Principles recognized as creating this leeway are the adherence to the ethics of non-interference, non-competitiveness, respect and restraint. For a discussion of these ethics within First Nations, see C. Brant, "Native Ethics and Rules of Behaviour" (1990) 5 Canadian Journal of Psychiatry 534, and J. Dumont, "Justice and Aboriginal People" *Aboriginal Peoples and the Justice System*, *supra*, note 11 at 42.

[14]See D. Herman, "Beyond the Rights Debate" (1993) 2 *Social and Legal Studies* at 25 for a thoughtful discussion about the opportunities and limits of "rights" in the politics of progressive social change.

[15]D.L. Donoho, "Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards" (1991) 27 Stanford Journal of International Law 345 at 350.

[16]J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can. Bar Rev. 307.

has not been particularly encouraging[17] and there are economic, social and political factors which create unequal access to justice.[18] Yet, despite potential for the language of rights to oppress[19], because of its indeterminacy and extensive acceptance, this same discourse can also augment political struggle and contribute to emancipation.[20]

The language of rights and the influence of the *Charter* has helped to partially liberate some First Nations people from discrimination. Perhaps it is too early to claim such victories when the battle still rages all around. In particular, I am quite uncomfortable with the fact that the victories I describe appear to have come at the expense of solidarity within and between First Nations. I am also disappointed that the changes made did not encompass ancillary reforms and occur on a much larger scale.[21] As First Nations, we still live with the *Indian Act*,[22] and that is a great cause for sadness. Furthermore, it is entirely conceivable that the benefits conferred by "rights" displaced more meaningful reform and came in the place of wider liberation. It may be said that we would be celebrating much greater

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[17]For information about the dismal American experience in the application of rights to Native Americans see, generally, D.L. Burnett Jr., "An Historical Analysis of the 1968 *Indian Civil Rights Act*" (1972) 9 Harv. J. Legis. 557; *Martinez* v. *Santa Clara Pueblo* (1978), 436 U.S. 49, C. McKinnon, "Whose Culture? A Case Note on *Martinez* v. *Santa Clara Peublo*" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987); A.J. Ziontz, "After *Martinez*; Civil Rights Under Tribal Government" (1979) 12 University of California, Davis L.R. 1; G. Schultz, "The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After *Santa Clara*" (1985) 62 Denver Univ. L.R. 761; D.C. Williams, "The Borders of the Equal Protection Clause: Indians as Peoples" (1991) 38 UCLA L.R. 759; C. Christofferson, "Tribal Courts' Failure to Protect Native American Women" (1991) Yale L.J. 169.

[18]For a discussion of the social factors which contribute to the defeat First Nation's rights see S. Zimmerman, "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System" (1992) Special Edition on Aboriginal Justice U.B.C.L.R. 367; R. Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw*" in F. Cassidy, ed., *Aboriginal Title in B.C.: Delgamuukw* v. *The Queen* 206. Political obstacles are described in the article by M.E. Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In" in *Aboriginal Peoples and the Justice System*, *supra*, note 12 at 161. Economic factors which hinder First Nations from securing their rights are surveyed in John Goddard, *Last Stand of the Lubicon Cree* (Toronto: Douglas and McIntyre, 1991) see particularly 100-115.

[19]M. Tushnet, "An Essay on Rights" (1984) Texas L.R. 1363.

[20]For a discussion of this point generally, see A. Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17 J.L. & Society 309. For a discussion of this point as applied to First Nations, see P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

[21]In particular, I would have favoured the explicit recognition and affirmation of First Nations self-government simultaneously with the reinstatement of many First Nations women to their communities. Furthermore, I would have also preferred, and still am in favour of, rights discourse being solely translated by First Nations through an Aboriginal Charter. However, this has not yet occurred.

[22]R.S.C. 1985, c. I-5.

victories if we did not have to filter our proud and distinct traditions through the corruption of the *Charter*'s definition of rights. I wish it could be otherwise.

We cannot, however, ignore the world we live in.[23] The parlance of "rights" has meaning to many people. People can partially understand us when we speak this language. It is true that something gets lost in the translation, but what else do we have? In reconstructing our world we cannot just do what we want.[24] We require a measure of our oppressors' cooperation to disentangle ourselves from the web of enslavement they created. While these knots can best be unravelled through greater economic and political power vesting in and being exercised by First Nations, the freeing of our people is simultaneously worked out on conversational grounds.[25] Though the forum and process for this discourse belongs to the more powerful party – the Canadian government – words are retranslated and transposed by us to convey our meanings.[26] To some extent this has occurred with First Nations and the *Charter*. Thus, despite undeniable grounds for cynicism in much of what continues to happen to, and in, First Nations communities, the vocabulary of the *Charter* has helped us achieve partial success in our quest for self-determination. In pursuing this examination, I will briefly trace some of the significant events that dealt with sexual discrimination prior to the *Charter*'s enactment in order to give some context to efforts that were assisted by the *Charter* once it took force.[27]

[23]"What needs to be stressed is all struggles begin on old ground." *Supra*, note 20 at 324.

[24]*Supra*, note 10.

[25]See J. Nedelsky & C. Scott, "Constitutional Dialogue" in J. Bakan and D. Schneiderman, eds, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 59 at 63-64, 69-70.

[26]First Nations people should be familiar with the ability to transform and subvert ideas and events. The trickster is a cultural hero who teaches us about these possibilities. We need an awakening of the trickster in First Nations intellectual discourse. For a successful attempt to re-interpret equality as applied to First Nations sovereignty see P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L.R. 1311. For a description of the trickster's potential in legal discourse, see J. Borrows, "Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L.R. (forthcoming).

[27]It is important to recognize the dialectical interaction of both society and the judiciary in producing change in assessing the *Charter's* effect on Indians. One must be careful not to give either the *Charter* or the surrounding societal determinants of political behaviour the sole emphasis in explaining change. The words of the *Charter* and its legal interpretations interact with society's expectations and both influence one another. For a discussion and rejection of both legal and sociological determinism in Constitutional matters see R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson, 1992) at 67-73.

I. Before The *Charter*

The principles of the *Charter* have had their greatest impact in Indian gender politics and have served to highlight the sexual inequality that exists in Indian communities.[28] While debate about sexual equality prevailed before the *Charter* was implemented, the *Charter* served to give greater strength to those arguing in favour of this right. The availability of the *Charter* to pursue the elimination of sexual inequality has been noted as follows:

> Aboriginal women are at a watershed: taking action now under the *Charter* provides them with perhaps their only opportunity to secure a future in which they will have available at least some tools with which to fight the massive, persisting systemic discrimination, on grounds of gender and race, which they face at every turn.[29]

At the centre of this debate were the sexist rules of the *Indian Act* that caused Indian women to lose their status when they married non-Native men.[30] These rules resulted in Indian women losing the association and benefits of their communities and the important social and political positions they occupied within them.[31] The negative change in gender relations supported by the *Indian Act*[32] meant that there was a need to reconstruct Indian communities to restore the respect and dignity that Indian women once enjoyed.[33] The effort to reinstate this dignity was undertaken by some very courageous women who spoke out against the discrimination they suffered.

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[28]The impact of the *Charter* on First Nations politics can best be illustrated through examining its place in status Indian communities. This is not to diminish the effects or potential of this document upon Métis and Inuit peoples, but to acknowledge that an examination of the distinct political identity of these peoples could not be well served within the confines of a paper of this size.

[29]M. Eberts, Memorandum of Law to NWAC, 19 December 1991:3 in *supra*, note 11, 359 at 367.

[30]Section 12(1)(b), which stated:

> 12(1) The following persons are not entitled to be registered, namely, ...
> (b) a person who married a person who is not an Indian ... .

[31]For a discussion of the introduction of sexual discrimination through the *Indian Act*, see "Aboriginal Women" in A.C. Hamilton & C.M. Sinclair, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 (Winnipeg: Queen's Printer, 1991) at 476-477.

[32]The effect of the *Indian Act* on internal community gender relations has been described also in *ibid*, at 481.

[33]The search for a return to equality for Aboriginal women has been explained by V. Kirkness: "Emerging Native Women" (1987-1988) 2 Canadian Journal of Women and the Law 408 at 415.

Indian criticism of the provisions of the *Indian Act*, which caused women to lose their status, have been present since at least 1872.[34] However, during the greater part of the Act's existence, sex discrimination was largely concealed from the general public because it was the explicit policy of the Act to eventually compel all Indians to relinquish their status.[35] In 1920 the Deputy Minister of Indian Affairs, Duncan Scott, explained the government's ambition to eradicate all Indian status when he stated:

> Our object is to continue until there is not a single Indian in Canada that has not been absorbed by the body politic, and there is no Indian question, and no Indian Department.[36]

Thus, specific discrimination against status Indian women was hidden to most non-Native people because it was expected that all Indians would eventually suffer the same fate – the loss of their status. This policy was officially promoted as recently as 1969[37] when the Trudeau government proposed to eliminate all special Indian status in its "White Paper".[38] However, it was during this same period that Indian people began to attract greater attention to their opposition to assimilation by insisting on the maintenance of their separate status.[39] Indian people did not want to be absorbed by the general population because they wanted to preserve their culture, traditions, treaties, lands, and powers of self-government. Indians

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[34]See K. Jameson, *Indian Women and the Law in Canada: A Citizens Minus* (Ottawa: Supply and Services, 1978) at 30.

[35]For a description of these policies in the *Indian Act*, see J. Leslie and R. Maguire, *The Historical Development of the Indian Act* (Ottawa: Treaties and Historical Research Branch, DIAND, 1979) and J. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in I. Getty and A. Lussier, eds, *As Long as the Sun Shines and the Water Flows: A Reader in Canadian Native Studies* (Vancouver, University of British Columbia Press, 1983) at 29.

[36]J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989) at 207.

[37]Some still believe that the federal government's policy to encourage assimilation remains: see M. Boldt & J.A. Long, "Native Self-Government: Instrument of Autonomy or Assimilation?" in J. Long, M. Boldt & L. Littlebear, eds., *Governments in Conflict: Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 38-56.

[38]The White Paper stated:

> [For Indians] different status [is] a road which has led to a blind alley of deprivation and frustration. This road, because it is a separate road, cannot lead to full participation, to equality in practice as well as in theory. In the pages which follow, the Government has outlined a number of measures and policy which it is convinced will offer another road for Indians, a road that would lead gradually away from different status to full social, economic and political participation in Canadian life.

"Statement of the Government of Canada on Indian Policy (The 1969) White Paper."

[39]Two representative examples of the expanding literature in the late 1960's on Indian desires to maintain special status are H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969) and H.B. Hawthorne, *A Survey of the Contemporary Indians of Canada*, 2 vols (Ottawa: Indian Affairs, 1966-67).

believe that the enhancement of their own cultural endowments will best facilitate prosperity in a manner consistent with the world-view they sustain and value.

As Indians' desires to maintain their status became more widely known in the late 1960's, the inequality Indian women faced in losing their status became a more conspicuous issue. Mary Two-Axe Early's presentation to the *Royal Commission on the Status of Women* about the sexual discrimination she faced as a non-status Mohawk women is one example of the prominence this issue gained.[40] In her presentation she told of how she had been requested to leave her reserve because she was married to a non-Native man, and she spoke of how she had organized a group called "Indian Rights for Indian Women" to protest the provisions that decreed her eviction. Other Indian women also came before the Commission to make the same point. When the Commission made its recommendations, it suggested that status be restored to Indian women and that Indian women should have the same civil rights as other Canadians with respect to marriage and property.[41]

In the early 1970s, sexual inequality in Indian communities once again gained public attention when the issue was argued before the Supreme Court of Canada. The case of *Lavell and Bedard* v. *The Attorney General of Canada*[42] was brought by Jeanette Corbiere and Yvonne Bedard who were, respectively, Ojibway and Iroquois non-status Indians who had lost their status when they "married out". The Supreme Court found that "equality before the law as employed in the *Canadian Bill of Rights* referred only to the application or enforcement of law." As such, since the rule of law treated all Indian women the same (i.e. it discriminated against all Indian women equally), it was held that the *Indian Act* did not breach the equality provisions of the *Bill of Rights*.

As Mary Two-Axe Early, Jeanette Corbiere, Yvonne Bedard and other women in similar circumstances brought forward their dilemma for resolution, it became apparent that they were not strongly supported by the National Indian organizations, nor did many in their communities often provide explicit approval. National political organizations such as the National Indian Brotherhood (NIB) and the Native Council of Canada (NCC) wanted to use the sexual equality provisions of the *Indian Act* to negotiate wholesale changes throughout the Act.[43]

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[40] *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Supply and Services, 1970). See also *supra*, note 10, for a critique of the Commission's effect on First Nations women.

[41] *Ibid.* at 238.

[42] (1973), 38 D.L.R. (3d) 481.

[43] This was in response to the federal government's desire to change its Indian policy, see S. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

As such, while these organizations did view sexual discrimination as wrong, they wanted Indian women to subordinate their objectives to other purposes that lay outside these women's immediate and particular concern.[44] Furthermore, besides a lack of support from national Aboriginal organizations, Indian people within reserve communities often internalized and accepted the colonial structures of the *Indian Act*, and thus did not provide active support to the women that were attempting to secure their status. This meant that Indian women had to organize themselves to press their concerns and to provide a network of support for those who were victims of the Act's discrimination. One prominent group that formed at the time of the *Lavell* case to fulfil these goals of advocacy and support was the Native Women's Association of Canada (NWAC). NWAC would henceforth play a major role in pressing for sexual equality for Indian women.

Lovelace v. *Canada*[45] was the last incident before the *Charter* to publicly exhibit sexual discrimination in the *Indian Act*. Sandra Lovelace was a Maliseet woman from the Tobique Indian Reserve in New Brunswick who lost her status when she married a non-Native man. She and the women of her reserve struggled for many years for her right to status and membership in her community.[46] Eventually, Ms. Lovelace took her claim of discrimination before the United Nations Human Rights Committee. The Committee found the Canadian government had breached s. 27 of the *International Covenant on Civil and Political Rights* by denying her band membership and the concomitant access to her culture. The Committee did not rule on whether Canada had discriminated on the basis of sex because Ms. Lovelace had already lost her status before Canada ratified the Covenant in 1976. Even though the Committee did not rule on the issue of sexual discrimination, the Lovelace decision caused Canada considerable international embarrassment and was regarded by many Indian women as a significant step towards being restored to their communities.

II: The Political Impact of the *Charter*

Canada's Constitution was patriated in 1982, and along with it a new *Charter of Rights and Freedoms* was proclaimed.[47] Three new sections, dealing with

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[44]C. Cheda, "Indian Women: An Historical Example and Contemporary View" in M. Stephenson, ed., *Women in Canada* (Don Mills: General Publishing, 1977) at 195-208.

[45]36 U.N. GOAR Supp. (No. 40) Annex XVIII. Doc. A/36/40 (1981).

[46]J. Silman, ed., *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987).

[47]During the struggle for repatriation, NWAC was associated with the NIB in lobbying federal and provincial governments to include Aboriginal rights in the new Constitution. In pursuing this objective NWAC and NIB agreed that a provision on sexual equality should be inserted in any section dealing with Aboriginal rights. However, due to government nervousness about entrenching Aboriginal rights in the Constitution, Aboriginal rights were limited to those still "existing" in 1982.

Aboriginal peoples, appeared in the Constitution to compliment s. 91(24), which already had a place in the *BNA Act*.[48] These new additions were s. 25, which was designed to shield Aboriginal and treaty rights from *Charter* rights erosion[49], s. 35, which recognized and affirmed "existing" Aboriginal and treaty rights[50], and s. 37, which mandated a series of Constitutional conferences to discuss Aboriginal rights[51]. Since only s. 25 was part of the *Charter* and did not confer any positive rights on Aboriginal peoples[52], there were early questions as to whether the *Charter* would have any impact on Indian peoples at all. Specifically, there was a question whether the equality provisions of the *Charter*, ss. 15 and 28[53], would

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[48]Section 91(24) reads:

> 91 ... the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...
> (24) Indians, and Lands reserved for the Indians.

The Constitution Act, 1867.

[49]Section 25 reads:

The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty, or other rights or freedoms that pertain to the Aboriginal peoples of Canada including

> (a) any rights that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[50]Section 35(1) reads:

> The existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed.

[51]Section 37 stated:

(1) A Constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters which affect the Aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

[52]Section 25 appeared in the *Charter*, though it did not confer any positive rights on Aboriginal people, and ss. 35 and 37 were in part II of the Constitution and were therefore not part of the rights and freedoms delineated.

[53]Section 25 was viewed by some as possibly preventing the application of ss. 15(1) and 28 of the *Charter* which dealt with equality. These sections read:

> 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.
> 28 Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

compel the removal of sexual discrimination in the *Indian Act*[54]. Yet, despite initial doubts about the potential impact of the *Charter* on Aboriginal politics, its influence is now apparent. The ideas endorsed in the *Charter* were crucial in securing an amendment guaranteeing sexual equality in s. 35, in changing provisions of the *Indian Act* to counter sexual discrimination, and in assisting in the defeat of First Nations self-government provisions in the *Charlottetown Accord*.

(a) The *Charter*, Constitutional Conferences and Section 35(4)

Constitutional conferences between the Prime Minister, the Provincial First Ministers and representatives of the Assembly of First Nations (AFN)[55], Native Council of Canada (NCC)[56], Inuit Tapirisat of Canada (ITC)[57], and the Métis National Council (MNC)[58], took place in 1983, 1984, 1985 and 1987. During these conferences, the shrouding influence of the *Charter* permeated these various participants' ideologies and made it impolitic to disregard the sexual inequality of First Nations women. Ss 15 and 28 assisted Indian women in securing a guarantee of sexual equality at the conferences because they could draw upon the near consensus these sections created, and persuasively argue that self-government should not be entrenched without confirming this right. Such arguments made Ottawa aware that:

> The *Indian Act* was intimately connected with sexual equality and Aboriginal rights in the *Constitution Act* [and that] the Canadian *Charter* dictated a future *Indian Act* amendment to abolish sex discrimination. Furthermore, since it already appeared at an early stage of Constitutional negotiations that Aboriginal self-government would become the most significant subject of constitutional amendment requirements, it was felt necessary to establish principles within Aboriginal self-government that guaranteed sexual equality for Aboriginal males and females.[59]

[54]For differing viewpoints on whether the equality provisions of the *Charter* would compel the removal of sexual discrimination from the *Indian Act* compare M. Eberts, "Sex and Equality Rights" in A. Bayefsky & M. Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Carswell: Toronto, 1987) at 217-218, with D. Sanders, "The Renewal of Special Status", *ibid*. 529 at 554.

[55]The AFN was the successor to the NIB and is the organization which represents status Indians.

[56]NCC represents non-status and off-reserve Aboriginal people.

[57]ITC represents the Inuit people of Canada.

[58]The MNC represents descendants of the historic Métis Nation originating in Manitoba.

[59]L.E. Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982 - 1987* (Saarbrucken: Verlag Breithenbach, 1991) at 148.

Most who participated in the Constitutional conferences recognized this connection between Aboriginal rights of self-government, the *Indian Act*, and the *Charter*. The relationship of these factors prompted the various actors at the conference to insist that sexual equality had to be placed in the Constitution as an Aboriginal right. To ensure that there would be sufficient information to consider sexual equality in the constitutional conferences, each of the four Aboriginal groups represented was given money to study the issue.[60]

In 1983, the second day of the conference was entirely dedicated to discussion of sexual equality for Aboriginal women. Deliberations led to s. 35(4) being inserted in the Constitution to protect Aboriginal gender equality.[61] All governments except the AFN supported the entrenchment of sexual equality as an Aboriginal right.[62] It was the position of the federal and provincial governments that ss. 15 and 28 of the *Charter* gave sexual equality protections to Aboriginal people,[63] "nevertheless the governments were willing to amend the Constitution to make doubly sure of Aboriginal sexual equality."[64] While ITC, NCC, MNC and NWAC[65] also supported these amendments, the AFN did not wish to entrench sexual equality in the Constitution because it felt that sexual equality

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[60]*Ibid.*

[61]Section 35(4) states:

> Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[62]Despite widespread acceptance of including sexual equality for First Nations in the Constitution, there was a considerable range of opinions as to the appropriate wording to accomplish this objective and as to whether this guarantee should be placed in ss 25 or 35. See Sanders, *supra*, note 54 at 557.

[63]*Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 32d Parliament, 1st session, Issue No. 69 at 46.

[64]See R. Dalon, "An Alberta Perspective on Aboriginal Peoples and the Constitution" in M. Boldt and J.A. Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 95.

[65]Throughout the Constitutional conference process the federal government did not provide a seat for NWAC to participate because they were considered as not being sufficiently representative of Aboriginal people. See *supra*, note 59 at 115. The AFN also opposed NWAC's direct participation in the Constitutional Conferences, *supra*, note 59 at 148. However, despite being denied formal participation, NWAC was able to make its position known at the Conferences in various ways. NWAC communicated by making written submissions through a sub-group called the National Committee on Aboriginal Rights, by working through the NCC and AFN at various stages of the process, and even by using provincial seats at the Conference to express its views. In pursuing their objectives Indian women were placed in a dilemma because they were forced to live with wondering whether pre-eminence should be given to their gender rights or their Aboriginal rights when seeking to better their place in society. For a description of this challenge, see N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179 and N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) Canadian Journal of Women and the Law 25.

protections were already implicit in s. 35 as a part of self-government.[66] The AFN stated its position as follows:

> We would like to make it clear that we agree with the women who spoke so forcefully this morning that they have been treated unjustly. The discrimination they suffered was forced upon us through a system imposed upon us by white colonial government through the *Indian Act*. It was not the result of our traditional laws, and in fact it would not have occurred under our traditional laws. We must make it perfectly clear why we feel so strongly that we must control our citizenship. The AFN maintains that "equality" does already exist with the traditional "citizenship code" of all First Nations people.[67]

The AFN eventually had to relinquish their opposition to the amendment on sexual equality, which they did in return for the government's promise not to interfere with Indian citizenship and membership in the future.

The deliberations of the Constitutional conference created an environment in which Indian people had to call upon their traditional values to articulate their positions.[68] For example, it is interesting to note that the AFN, despite their opposition to an amendment, nevertheless regarded traditional Indian "laws" as upholding an outcome different than the unjust treatment being received under the *Indian Act*. There was a recognition by all First Nations parties involved that balance and harmony in gender relations was a condition that all wished to return to. The disagreement, at least in the language employed, merely existed over how this was to be achieved. The AFN felt equality would best be achieved by a partial return to traditional practices through self-definition of citizenship, while NWAC and others felt an *Indian Act* amendment was the first step in removing the intolerance towards Indian women found in some communities.

The ideology of the *Charter* stood as a backdrop in the development of this discourse and subtlety helped to strengthen claims for equality. Tradition was brought forward, and its concepts were draped around the contemporary language of rights. The dialectical interaction of traditional practices and modern precepts forged a language that partook of two worlds. Rights talk could not overwhelm traditional convictions of symmetry in gender relationships while tradition could not ignore current concerns about equality in these same associations. Each discourse partook of the other and created an exchange of legitimacy. People who were concerned about their traditions could use the language of equality to

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[66] This was consistent with the AFN's position that s. 35 contained a "full box" of Aboriginal rights and therefore only their definition, and not their creation, was required. See *supra*, note 59 at 153.

[67] "Statement on Equality at First Ministers Conference", *Unity*, 1, 1, 1984 at 10-11, *supra*, note 59 at 154.

[68] Chapter 5 "Traditional Indian Motherhood: A Strategy", *supra*, note 59 at 120-145.

preserve their interests, while people who sought for equality could use tradition to show that it sanctioned and justified the removal of gender discrimination.

This mingling of ideologies constructed an alignment of wider interests because greater individual sovereignty and self-determination for First Nations women could potentially be seen as incorporating these same rights for the First Nations community as a whole. Thus, the use of "rights" discourse combined the past and the present for First Nations as historical remembrances of gender relations had to take account of current notions of sexual equality. The process of injecting new understandings into customary ancient practices is very much in agreement with the cyclical world-view[69] of many First Nations people and follows the culturally reproductive patterns of oral tradition. In communities with oral traditions time is dynamic and includes both past and present understandings and events. Penny Petrone, Emeritus Professor of Lakehead University, describes the oral tradition in this way:

> Oral traditions have not been static. Their strength lies in their ability to survive through the power of tribal memory and to renew themselves by incorporating new elements. When contact with the white man is established, a new set of problems arises and requires a logical cultural explanation to restore the world to order. Hence old myths are altered or new ones are generated to explain the process of cultural change.[70]

The ability of the oral tradition to include ancient and modern concepts should convey the lesson that tradition can have significance in contemporary First Nations political and legal discourse. At the same time, it must be recognized that understandings of tradition itself change by enveloping new concepts. In the example of the Constitutional Conferences, the cyclical nature of First Nations concepts of time was revealed and tradition was reinterpreted as rights were invoked to protect traditional practices of respect for gender congruity.

b) The *Charter* and the Amendment of the *Indian Act*

The need to remove sexual discrimination from the *Indian Act* was also assisted by the presence of ss 15 and 28 because the federal government felt the *Indian Act*'s status provisions contravened these sections. The requirement for amendment was reinforced by the work of Indian women, the prominence of the

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[69]"Native people think in terms of cyclicity. Time is not a straight line. It is a circle. Every day is not a new day, but the same day repeating itself ... A characteristic of cyclical thinking is that it is holistic, in the same way that a circle is whole. A cyclical philosophy does not lend itself readily to dichotomies or categorizations, nor to fragmentations and polarizations ... .", L. Little Bear, "Aboriginal Rights and the Canadian Grundnorm" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1988) at 245.

[70]P. Petrone, *Native Literature in Canada: From the Oral Tradition to the Present* (Toronto: Oxford University Press, 1990) at 17.

Lovelace case, and the amendments to s. 35; yet there was still little prospect of the discriminatory provisions being eliminated without the equality sections of the *Charter*. The *Charter* tipped the balance in support of an amendment because its equality sections compelled the reforms as a legal necessity. As one leading commentator, who worked with and wrote about NWAC throughout this process, has expressed, "section 15(1) of the *Canadian Charter of Rights and Freedoms* guaranteeing equality between men and women as of April 17, 1985 [was] perceived as the most important reason to pursue the *Indian Act* amendment."[71]

Further evidence of the importance of the *Charter* in securing an amendment is that Bill C-31, the legislation which ended much of the discrimination in the *Act*,[72] came about in conjunction with the coming into force of the *Charter*'s equality rights on 17 April 1985.[73] There was a great urgency on the part of the federal government to secure an amendment to the *Indian Act* before 17 April because the government did not want to litigate the discriminatory provisions of the Act. The concern to avert a *Charter* challenge explains why the new provisions of the *Indian Act* were retroactive to 17 April 1985, while the Bill did not actually receive Royal Assent until 28 June 1985. The idea that the *Charter*'s provisions led to amendment is confirmed from a federal perspective in a publication by the government published under the authority of the Minister of Indian Affairs. This report, entitled *Impacts of the 1985 Amendments to the Indian Act: Summary Report*, stated:

> In June 1985, Parliament passed a series of amendments to the *Indian Act* known as Bill C-31. The amendments were enacted by all party consent to make the Act compatible with the *Canadian Charter of Rights and Freedoms*.[74]

Teressa Nahanee, Constitutional Advisor for NWAC, also stated the conclusion that the *Charter* had a pivotal impact in making these changes. Nahanee wrote:

> Stripped of equality by patriarchal laws which created "male privilege" as the norm on reserve lands, Indian women have had a tremendous struggle to regain their social position. It was the *Canadian Charter of Rights and Freedoms* which turned around our hopeless struggle. It has been argued that the equality provisions of the *Charter* would not apply to the *Indian Act* and it would not have resulted in the Supreme Court of Canada overturning the *Lavell* decision. I would argue that the

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[71] *Supra*, note 59 at 160.

[72] The sections of the *Indian Act* which discriminated on the basis of sex [12(1)(b)] were removed when Bill C-31 was introduced in Parliament and s. 6 was inserted in the Act; see R.S.C. 1985, C. I-5.

[73] Bill C-31 was introduced in the House of Commons on 28 February 1985 while the Constitutional Conferences took place on April 2 and 3 of that same year. Hearings on acceptability and implementation of the Bill were taking place while the Conference was proceeding.

[74] *The Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report* (Ottawa: Supply and Services, 1990) at i.

> government of Canada believed the *Charter* did apply to the *Indian Act*; would have overturned the *Lavell* decision; and this thinking resulted in the passage of Bill C-31.[75]

It is apparent that the people who were involved in changing the discriminatory provisions of the *Indian Act* viewed the *Charter* as a vital reason for the passage of Bill C-31.

The objectives of Bill C-31 were to "remove discrimination on the basis of gender, to restore Indian status and band membership to eligible persons[76], and to enable bands to assume control over their membership."[77] The impact that this legislation had on both individuals and communities has been enormous. The introduction of Bill C-31 through the prompting of the *Charter* has helped to redefine individual Indian identity as well as the local politics of Indian peoples.

Individually, the *Charter*'s effect on First Nations' social and political struggles caused many Indians to reinterpret their identity and reorient their personal loyalties towards their Aboriginal ancestry. This was a major victory for those using the *Charter*. The process of cultural reawakening has created a significant body of people aspiring to greater cultural control. A major survey of Bill C-31 revealed that the primary reasons people applied for registration were personal identity (forty-one percent), culture or sense of belonging (twenty-one percent), correction of injustice (seventeen percent) and Aboriginal rights (seven percent).[78] By June of 1990 these aspirations had led over 133,000 people to apply for reinstatement and as of that date 75,761 of these people had been approved.[79] Women represented seventy-seven percent of those to whom status was restored, and fifty-eight percent of all those who were new registrants as a result of the amendments.[80] This development has been at least partially

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[75] *Supra*, note 11 at 372.

[76] A person was eligible to receive or have their status restored if they lost their status under former s. 12(1)(b) or 109(1) of the *Indian Act*, or if one or both of a person's parents was a status Indian or was eligible for status under the 1985 changes. These people included women who lost status through marriage to a non-status person, individuals who lost status through enfranchisement, and children of people in the above categories. See *Changes to the Indian Act: Important Changes to Canada's Indian Act Resulting from the Passage of Bill C-31* (Ottawa: Indian and Northern Affairs, 1986) at 3.

[77] *Ibid.*

[78] *The Impact of the 1985 Amendments to the Indian Act (Bill C-31): 2) Survey of Registrants* (Ottawa: Indian and Northern Affairs, Supply and Services, 1990) at 15-20.

[79] *Supra*, note 74 at ii.

[80] *Supra*, note 74. The profile of a typical Bill C-31 registrant is that most are female (fifty-eight percent); educated (forty-three percent graduated from high school, twenty-five percent from post-secondary education); employed (fifty-nine percent); with household incomes over $25,000 (forty-one percent); live off-reserve (ninety percent); and own their own homes (fifty-five percent). The on-reserve registrant is more likely to be male, unemployed and is more likely to live in a household that

responsible for causing the status Indian population to grow by one-third in the past seven years.

Politically, the *Charter*'s ancillary influence on Indian politics indirectly caused an influx of previously excluded people to local Indian communities which resulted in no end of concern over lack of resources and communal personality.[81] This has sometimes caused ugly divisions[82] and this battle over rights and the *Charter* is still being fought in many First Nations. Some people within First Nations communities viewed returning members as competitors for scarce resources and resented these individuals rather than focusing on the need for expanded resources to support the implementation of Bill C-31.[83] Respondents to a survey assessing the feelings of long time band members about Bill C-31 found it had created a great deal of disharmony. Statements from a variety of people portray this turmoil:

> "It has become harder for people in the community to get to know each other." "Bill C-31 has effectively disrupted community life because it creates rifts amongst family members and amongst community members." "There has been an inordinate amount of energy, time, and money spent with little regard for the social, emotional, and psychological impact; consequently, there is bigotry and fighting because of misunderstanding." "[Bill C-31] has segregated and labelled people: those who were living here before against those returning."[84]

The attitude these statements reveal has caused incidents such as name calling of children from mixed families, people being shunned in the community and prevented from accessing services available to band members, registrants feeling unwelcome and isolated, and people not being allowed on their reserve.[85] The continued discrimination that the predominantly women registrants encounter is

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contains children under eighteen.

[81]As a result of the amendments, the average band size increased by nineteen percent. *The Impacts of the 1985 Amendments to the Indian Act (Bill C-31): 3) Bands and Communities Studies* (Ottawa: Indian and Northern Affairs, Supply and Services, 1990) at 12.

[82]The wedge that has been driven into some bands is exemplified in one community as follows:

> All women reinstated under Bill C-31 from the Cold Lake First Nations (Alberta) reserve have been refused treaty monies. ... We are being denied our right to practise our cultural heritage on the reserve level and are being treated like second class citizens by our own people, and now we are nomads in our own land because we chose to marry who we wanted to.

C. Minoose-Ritter, Edmonton, *The Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Aboriginal Inquiry*, (Ottawa: Supply and Services, 1990) at 59.

[83]*Ibid*. at 28.

[84]*Supra*, note 81 at 20.

[85]*Supra*, note 81.

greatly discouraging to say the least.[86] It illustrates the limits of "rights" discourse in being able to transform community structures away from discriminatory practices.

We can gain a sense of the impact of these amendments on one community by examining my band, the Chippewas of the Nawash in southern Ontario.[87] One great consequence of the amendments was that our community grew by thirty percent in a five year period. Before the amendments to the *Indian Act*, we had 941 people who were registered as Indians, and by 1990 there were over 1522 people registered.[88] Of the 581 people added to our community, 456 became citizens because of Bill C-31, and there were over 220 people who are still waiting for their registration to be approved. Since 1990, numerous other people have also applied for registration in our band.

There is no doubt that the registration of hundreds of new people initially caused many to feel uncomfortable. These feelings were manifest in the band council's refusal to accept certain funding that was available for newly registered people as they returned to the reserve.[89] The housing program in particular exemplifies the resistance to newly registered people becoming part of the community again. As a Chief in another community expressed the concern:

> Housing, in itself, has caused special political problems. Lifelong band members are entitled to housing under either the standard DIAND subsidy program of the band CMHC program. Reinstated C-31 members, on the other hand, are entitled to participate in the special C-31 housing program and this program is limited exclusively to Bill C-31. The special C-31 housing program has created a degree of animosity between lifelong band members and reinstated band members.

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[86]For an account of someone who has felt the direct impact of this discrimination, see *supra*, note 82 at 30. However, despite calls for looking beyond the categories created by the government when defining membership, many still have difficulties accepting their newly registered "cousins" among them.

[87]For a short history of my people and their resistance to colonial control, see J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291.

[88]The following statistics come from *The Impacts of the 1985 Amendments to the Indian Act (Bill C-31): 4) Government Programs* (Ottawa: Indian and Northern Affairs, Supply and Services, 1990) at Appendix 2.

[89]Other communities have also taken a similar position by refusing to accept money to assist newly registered people in returning to their reserve. Sharon Venne, legal counsel, Chiefs of Northeast Alberta, has stated:

> We will not accept funding for the implementation of the legislation, as our treaty right is not for sale. No amount of force or intimidation practised by the bureaucrats will have the legislation imposed on our people.

Supra, note 82 at 59.

> Lifelong band members have to put in their application for housing and wait as long as eight years for their name to reach a level in priority listing. ... C-31 members on the other hand, can jump to the head of the lineup as a result of the special C-31 housing program.[90]

Among the Chippewa of the Nawash, the money available for Bill C-31 housing was originally refused because long time band members who had been waiting for houses felt it created the impression of unfairness. Here, as in other places, there was a concern about newly registered people "jumping to the head of the line" in securing band resources, even though these people were previously precluded from the line.

In the end, however, the band accepted the money available to assist newly registered people. Ultimately, our community recognized that there was a deep and disturbing irony in relying on the *Indian Act* for our identity as Indians. They saw a profound contradiction in deriving their character from a government imposed system which dictated who was entitled to be an Indian.[91] Such tactics came to be recognized as a strategy of divide and conquer. Our people know that the preferred course for reform would have been to pursue definitions of Indian identity without reference to the *Indian Act*. Yet, since this was not probable in 1985, people chose obtainable interim innovations and this has brought many people home. This realization has now caused most people in my community to refuse to distinguish on the basis of prior status or recent registration.[92] All extended family are members of the community and it is their determination, and not the government's, which is regarded as legitimate.

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[90]Chief Harry Coo, Lac La Ronge Band, Saskatchewan, *supra*, note 82 at 39.

[91]Many Indian people realized that continued reliance upon the external authority of the *Indian Act* to confer rights was negative. As one Indian spokesperson from another band said when trying to convey this idea:

> I would like to go on record as saying that Bill C-31 is nothing more than another vehicle to divide and conquer the Native people of Canada.

Supra, note 82 at 5.

[92]The decision to rely on Indian evaluations of membership is reflected in other communities. Hugh Braker, speaking for the Nuu Chah Nulth Tribal Council on Vancouver Island, has stated:

> Nuu Chah Nulth people reject classification of our people as either 6(1) or 6(2); we reject the classification of our people as on-reserve or off-reserve. We reject the classification of our people as half-breed, quarter-breed, or full breed. We reject the classification of our people as non-status. We reject the classification of our people by anything other than their roots.

Ibid. at 17.

Yet, despite steps to heal wounded feelings surrounding Bill C-31, the full impact of our community's growth has yet to be felt.[93] Newly registered people have found it difficult to return to their reserves because of previous attitudes and lack of community resources. As of June 1990, the number of people who had moved back to my reserve since reinstatement was less than one tenth of one percent. Though the numbers are uneven across bands, the number of Bill C-31 people living on reserves is closer to ten percent; while eighty percent of bands have fewer than fifteen newly registered people living on reserve.[94] Statistics indicate that eventually over fifty percent of all reinstated people will want to move to their reserves.[95] When this happens, there will be further adjustments in the life of the community, as resources to meet their needs will be stretched and opinions on how to meet their requirements will be diverse.

Some of the further adjustments yet to be made are in the areas of health care and post-secondary education benefits,[96] economic development,[97] political participation,[98] and the administration of membership. The main difficulties in the area of citizenship will be due to the new lines that have been drawn to determine who is an Indian, and to decide who will be entitled to live on the reserve. The question of determining who is an Indian is a problem because,

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[93]"One of the views encountered most frequently in the study (of bands) was that the major impact of Bill C-31 has probably not yet been felt." *Supra*, note 74 at 33.

[94]*Supra*, note 88 at 25. See 25-37 for a broader description of demographic trends.

[95]*Supra*, note 78 at 34.

[96]A foreshadowing of the future tests Indian communities will have to meet as more newly registered people move to the reserve is found in the following quote regarding health care and education:

> Socially, C-31 registrants moving to the band have made a difference to the fabric of the community. Many have never been on a reserve before. Some want to affect change and expectations are very high. In many cases, they have not been able to articulate their demands very well, but band staff feel that they have a demanding attitude just the same. Some C-31's were petitioning to have the health services and education coordinators removed from their jobs. But people on the reserve would not sign the petition.

Supra, note 81 at 21.

[97]Reinstatement will bring many future challenges in community economic development:

> Bill C-31 registrants were seen as a threat to the few jobs available on the reserve: "They will take jobs away from reserve members." "[Long time] band members should get jobs first, before outsiders." Other respondents voiced the fear that Bill C-31 registrants moving to the reserve could mean changes to the traditional economy and standard of living, or could affect the reserve land base.

Ibid. at 24.

[98]Future political difficulties due to reinstatement are evident in this quote:

> Some regular[?!] band members feel threatened by the numbers and vocalism of the C-31 registrants returning to the band. They are returning in sufficient numbers that they could influence the political process, but ... they lack an understanding of the band's history and way of life.

Ibid. at 22.

while the new amendments eliminated the worst discrimination, other forms have been introduced. A "second generation cutoff clause" has been established which serves to create a new class of Indian people, and conceal sexual discrimination in the new legislation. The problem results under s. 6(2) of the *Indian Act* which entitles a person to registration if only one parent had a right to be registered under s. 6.[99] The provisions in s. 6(2) do not allow status to be passed on to succeeding generations if their partner/spouse does not have status. This had led to the unequal treatment of male and female siblings as women who lost status prior to 1985 cannot pass status along through successive generations, while their brothers who married non-Indian women prior to 1985 can do so.

The second potential difficulty lies in the area of who will be entitled to live on a reserve. Bands were given the power to take control over their membership lists when the new registration provisions were enacted. Problems could arise if communities decide to discriminate in an arbitrary manner when membership decisions are made. While reserves were obliged to place reinstated people on their band lists, newly registered people who never possessed status before do not enjoy this same privilege. Since 232 of 615 bands now control their own membership lists, it is possible that many newly registered people who never before possessed status will be denied access to their community or culture. If this happens a new class of Indian citizens will be created.[100]

Litigation is currently being pursued to further address inequality in both the definition of Indian status[101] and in the exclusion of community people from membership.[102] This is bound to raise new perplexities for communities as they confront these challenges in the future. Many people who used the *Charter* to argue for reinstatement continue to look to its equality provisions to remove the *Act*'s remaining discrimination and to compel recalcitrant communities to accept their newly registered relations. Some are insisting that the *Charter* be used to define membership codes within communities.[103] Other new registrants who live

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[99]Sixety percent of applicants were registered under 6(2), *supra*, note 74 at 12.

[100]The recognition of this danger was stated eloquently by Linda MacDonald of the Yukon Native Women's Association, *supra*, note 82 at 5. This criticism is well placed and shows that it would have been preferable if rights discourse could have been used to make more fundamental changes, such as sexual equality being guaranteed in an affirmation and recognition of self-government.

[101]A case is being brought by Sharon McIvor to challenge the "second generation cut-off clause".

[102]See *Twinn* v. *Canada* (1986) 6 F.T.R. 138, [1987] 2 F.C. 450; *Courtois* v. *Canada* [1991] 1 C.N.L.R. 40 (Canadian Human Rights Tribunal); *Mantel* v. *Omeasco* (1992), 58 F.T.R. 231 (F.C.T.D.).

[103]"The Québec Native Women's Association argues that membership rules developed by bands ought to be consistent with s. 15 of the *Canadian Charter of Rights and Freedoms*. ... The QNWA maintains that any government, whether it be a band government or the federal government, must protect the right of the individual." See *supra*, note 82 at 26.

off reserve claim services equal to that which Indians can access on reserves. Again, this is done by using the *Charter*. As one newly registered applicant put it:

> We strongly believe that we should also benefit from all Aboriginal rights throughout Canada, and we have the right to choose where we want to live. It is unfair for the government to reinstate us and only provide services and benefits to on reserve Natives. We are requesting equality in the services that could be provided to on reserve Natives. In the *Charter of Rights*, the equality clause guarantees equal rights to everyone. Therefore, we ask the minister and his government to apply this *Charter* to all Native people on and off reserves.[104]

Thus, despite all the limitations that *Indian Act* classifications produced, people are nevertheless pursuing their rights to status because it is also a source of positive identity.[105] The short-term reliance on *Indian Act* status does set Indians apart from broader Canadian society and is symbolic of their distinctive culture, treaties and self-government, though the Act encumbered its exercise.

While remaining problems demonstrate that Indian peoples must escape from the narrow confines of the *Indian Act*'s mocking irony of external definition,[106] the numbers of people recapturing their identity and community through its provisions illustrates that at least some First Nations peoples have been partially unfettered as a result of the Act's new classifications. Yet, with all that has been accomplished, people must be careful not to think that the *Charter* and status under the *Indian Act* is an "answer" for full First Nations liberation. Restructuring of political, economic and social power relations between Canada and First Nations must continue to lie at the heart of First Nations self-determination. But, using the language of rights to assist in this restructuring is not as fatal as some have predicted because, as this section has shown, while many have suffered because of the contradictions built into the *Indian Act*'s amendments, many others have greatly benefitted from the reinvigoration of traditional extended family relationships. Many have come home. There is hope that the re-uniting of families will help to recapture much of what was lost through the exclusionary and sexually discriminatory provisions of the *Indian Act*. Thus, while the path to decolonization will be hard, because of external and internalized oppression, negotiations between tradition and rights in First Nation's economic, political and social struggles can have some influence on the evolving debates about status and citizenship within Indian communities.

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[104] Rheal Boudrais, Québec, *ibid.* at 34.

[105] Liz Pointe, of the United Native Nations, stated about Indian peoples realizing positive identity through Bill C-31, *ibid.* at 12-13.

[106] M.E. Turpel, "Discrimination and the 1985 Amendments to the *Indian Act*: Full of Snares for Women" (September, 1987) *Rights and Freedoms* 6.

c) The *Charter* and the *Charlottetown Accord*

The *Charlottetown Accord* of 1992 examined potential amendments to the Canadian Constitution to, among other things, explicitly entrench an Aboriginal right of self-government. This raised debate about the position and protection of First Nations women in Aboriginal self-government.[107] Some feared that the entrenchment of self-government would place greater control in the hands of men to the detriment of women. The framers of the agreement attempted to meet any concerns that First Nations women would be disadvantaged by self-government through proposing a series of amendments to the Constitution that dealt with gender equality. For example, s. 35.7 stated:

> Notwithstanding any other provision of this Act, the rights of the Aboriginal peoples of Canada referred to in this part are guaranteed equally to male and female persons.

Despite such provisions, some doubt was cast on the acceptability of these sections because some First Nations women felt they were marginalized by First Nations men in participating in the definition of self-government in the Accord.[108] The Native Women's Association of Canada (NWAC) stated their concerns as follows:

> What we want to get across to Canadians is our right as women to have a voice in deciding upon the definition of Aboriginal government powers. ... Aboriginal women have sexual equality rights. We want those rights respected. Governments simply cannot choose to recognize the patriarchal forms of government which now exist in our communities. The band councils and Chiefs who preside over our lives are not our traditional forms of government. The Chiefs have taken it upon themselves to decide that they will be the final rectifiers of the Aboriginal package of rights. We are telling you, we have a right, as women, to be part of that decision. Recognizing the inherent right to self-government does not mean recognizing or blessing the patriarchy created by a foreign government.[109]

NWAC backed up its conviction that women were not being granted equal rights of participation in defining self-government by initiating litigation against the four Aboriginal organizations who were participating in constitutional discussions[110] and federal government.

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[107]See T. Issac & M.S. Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Self-Government" (1992) 21 Man. L.J. 453, and J. Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 *Constitutional Forum* 110.

[108]T. Nahanee, "What we are dealing with in this constitutional process is the silencing of Native women." *Kahtou News* 15 October 1992 at 5.

[109]Native Women's Association of Canada, "Statement on the Canada Package" (Ottawa: NWAC, 1992) at 7.

[110]These organizations were the Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Métis National Council (MNC) and the Inuit Tapirisat of Canada (ITC).

(i) **Politics in Court: *NWAC* v. *The Queen***

Two cases were brought to restrain governmental groups from further discussion until NWAC was granted a greater role in defining self-government in the Constitution. In one case, NWAC asked for an order prohibiting the Government of Canada from making further payments to the four organizations until equal funding was given to NWAC and until it was given an equal right of participation in the constitutional review process.[111] In this case, NWAC gained something of a victory as Mahoney, J.A., of the Federal Court of Appeal, held that the federal government's failure to provide NWAC with funding and rights of participation in the constitutional review process were a violation of Aboriginal women's rights to freedom of expression contrary to ss 2 (b) and 28 of the *Charter*.[112] The court specifically found that

> [t]he interests of Aboriginal women, measured by the only standard this court can recognize in the absence of contrary evidence, that of Canadian society at large, are not represented in this respect by AFN, which advocate a contrary result, nor by the ambivalence of NCC and ITC.
>
> In my opinion, by inviting and funding the participation of organizations in the current constitutional process and excluding equal participation of NWAC, the Canadian government has accorded the advocates of male dominated Aboriginal self-governments a preferred position in the exercise of expressive activity ... in a manner offensive to ss. 2(b) and 28 of the *Charter*.[113]

This case was a significant victory for NWAC because it agreed with their perception that several national political organizations were male dominated in a way that threatened First Nations women's participation in Constitutional debate.

In the other case, NWAC sought to restrain constitutional discussions between the different groups, and it also asked for an injunction to stop the national referendum on the Constitution.[114] The court was not as generous in this instance, failing to restrain constitutional discussions or the referendum. The federal trial court's reasoning was constructed around the idea that the court could not interfere with a legislative process aimed at producing a constitutional amendment. It was held that the question concerning with whom the governments

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[111]*Native Women's Association of Canada* v. *Canada* (1992), 95 D.L.R. (4th) 106 (F.C.A.), (1992), 90 D.L.R. (4th) 394 (F.C.T.D.).

[112]Sections 2(b) and 28 of the *Charter* state:

> 2. Everyone has the right to the following freedoms:
> (b) freedom of thought, belief, opinion and expression ...
> 28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[113]*NWAC* v. *Canada*, *supra*, note 111 at 120-121.

[114]*Native Women's Association of Canada* v. *Canada* (1992), 97 D.L.R. (4th) 537 (F.C.T.D.), (1992), 97 D.L.R. (4th) 548 (F.C.A.).

ought to meet to arrive at an amendment was not justiciable. Therefore, at trial NWAC's claim was struck out because it disclosed no reasonable cause of action. On appeal, the court did not decide whether the referendum should have been stopped because the referendum was concluded by the time the issue came before the appeal court. The court stated:

> That it is common ground that the *Charlottetown Accord* and the related Accords are now a dead letter. ... In these circumstances, we decline to exercise our discretion and would dismiss the appeal.

Appeal has been made to the Supreme Court of Canada for a final determination of whether the Aboriginal or federal governments violated the *Charter* by not including NWAC in the constitutional provisions. Despite losing the case at the Court of Appeal, the litigation nonetheless accomplished some of the purposes of NWAC at the time of the referendum as their challenge in this instance received national media attention.[115]

These cases are quite difficult for me on many levels because of the tensions which they harbour. I am quite uncomfortable with a judge assessing First Nation society from "the only standard the court can recognize in the absence of contrary evidence, that of Canadian society at large." Anyone familiar with case law involving First Nations knows that such an approach has been at the root of many of the deprivations we have experienced.[116] I am also very apprehensive about using litigation to resolve inter-group conflict between First Nations. Adversarialism seems inimical to First Nations professions of consensus, harmony and respect.

At the same time, I have a great deal of sympathy with the frustrations of those who have been excluded from constitutional discussions. It does seem to me that NWAC's concerns were not being taken seriously enough. Litigation appeared to be the only way that the other Aboriginal organizations would listen to their concerns. I know that the four national Aboriginal organizations were under a great deal of pressure to keep constitutional discussion focused on self-government to avoid the attenuation of their interests; but I don't think this should have caused them to disregard a group that was expressing significant challenges to their position. After all, these same Aboriginal organizations have levelled similar complaints of exclusion against the federal government for many years. It would be perverse if NWAC could not invoke the very privileges other First Nations organizations employed just because in this instance they were being used to these organizations' disadvantage.

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[115]S. Fine, "Native Women Aim to Block National Referendum in Court" *The Globe and Mail* (13 October 1992).

[116]See L. Mandell, "Native Culture on Trial" in S. Martin & K.E. Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 358.

While I am aware that NWAC was not representative of all Aboriginal women, and their tactics pose significant challenges to the consensus and public support needed to facilitate self-government, at the bottom of my assessment of their actions is an appreciation that a discrete and specific group of people were suffering[117] and that their leaders were being ignored by those with greater access to power and resources. While it would have been my wish that "rights" discourse could have had a more political, rather than legal, impact, as was the case with the Constitutional and *Indian Act* amendments, I cannot dispute with these people for pressing their claims in the courts. Again, it is no different than what other First Nations have done in combatting Crown failures to consider and protect their lands and culture. Why should this group of First Nations women be prevented from exercising the same liberties that other First Nations organizations regularly utilize?

(b) The "notwithstanding" clause

Besides a worry about proper representation in the constitutional process, some other First Nations women were also concerned that the *Charter* would not apply to Aboriginal governments recognized by the *Charlottetown Accord*. This was of great concern because, as we have seen, many First Nations women viewed the *Charter* as a vehicle to regain their social position, which was lost to them through the colonial application of racist and sexist laws. NWAC wrote:

> The Native Women's Association of Canada supports individual rights. These rights are so fundamental that, once removed, you no longer have a human being. Aboriginal Women are human beings and we have rights which cannot be denied or removed at the whim of any government. These views are in conflict with many Aboriginal leaders and legal theoreticians who advocate for recognition by Canada of sovereignty, self-government and collective rights. It is their unwavering view of the Aboriginal male leadership that the "collective" comes first, and that it will decide the rights of individuals. ...
>
> [NWAC] recognizes that there is a clash between collective rights of sovereign Aboriginal governments and individual rights of women. Stripped of equality by patriarchal laws which created "male privilege" as the norm on reserve lands, Aboriginal women have a tremendous struggle to regain their social position. We want the *Canadian Charter of Rights and Freedoms* to apply to Aboriginal governments.[118]

Considerations such as these prompted negotiators to ensure that the *Charter* would apply to Aboriginal governments. It was hoped that this would confirm,

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[117] "A decision that does not speak to them, one that is not grounded in an appreciation of their moral identity, is a decision that sacrifices real people to abstractions." N. Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 Buffalo L.R. 325 at 377.

[118] *Supra*, note 109 at 9-11.

among other things,[119] that women would have the protection of the *Charter* against abusive individual or collective actions on the part of First Nations men.

Some First Nations women were concerned, however, that protection of the *Charter* could not be guaranteed because Aboriginal governments were granted the right to use the provision for opting out of the *Charter* that was available to other governments by the *Charlottetown Accord*. This s. 33.1, read:

> Section 33 applies to legislative bodies of the Aboriginal peoples of Canada with such modifications, consistent with the purposes of the requirements of that section, as are appropriate to the circumstances of Aboriginal people concerned.

Some First Nations were anxious about this section because First Nation governments could conceivably override women's equality rights if it was collectively considered appropriate to the circumstances of the Aboriginal people concerned.

The potential application of s. 33 to Aboriginal governments prompted NWAC to state:

> If the Government agrees that the *Charter* does apply to Aboriginal governments, and if the Government agrees that Aboriginal governments may use section 33, the following rights of Aboriginal citizens could be suspended: freedom of conscience and religion, freedom of thought, belief and opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association. Aboriginal governments could also suspend legal and equality rights guaranteed under the *Charter*. ... The powers of suspension under section 33 should not be allowed to federal and provincial governments, let alone to Aboriginal governments.[120]

This statement demonstrates the tremendous lack of confidence that some First Nations women had in Aboriginal governments.[121] They felt that Aboriginal governments would not be sensitive to their interests and would dispossess them of their rights. As a result, these women put greater trust in the *Charter* and common law courts to protect them in their rights than they did in their own people. This demonstrates that some First Nations women were very concerned that their rights to self-government were not being protected by the process and

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[119]Some felt that the best protection of individual rights for First Nations peoples would be by adopting an Aboriginal Charter. While people were not adverse to this idea they were cynical about its development. For the words of Gail Stacey-Moore, leader of NWAC, *see* S. Delcourt, "Natives Divided Over the *Charter*", *The Globe and Mail* (14 March 1992).

[120]*Supra*, note 109 at 11-12.

[121]As one leader said, "Native women and children need a safeguard against the abuse of power by male leaders and, until an acceptable alternative is put in place, we insist on having the safeguard of the *Charter*." G. Stacey-Moore, in A. Picard, "Native Women Cling to the *Charter*", *The Globe and Mail* (29 May 1992).

substance of the *Charlottetown Accord*. As Sharon McIvor put it, "this Constitutional deal wipes out the twenty year struggle by Native women for sexual equality rights in Canada." The rebuke of Indian bands and Aboriginal governments by NWAC contains powerful words – "no longer a human being", "male privilege", "clash of rights", and "rights of Aboriginal people could be suspended". These are words I take seriously. First Nations women have too often been excluded from the circle of decision-making. This has led to male bias and has perpetuated the disintegration of harmony between male and female in Aboriginal societies. Such conduct is unconscionable.[122] While colonialism is at the root of our learned disrespect of women,[123] we can not blame colonialism for our informed actions today. This generation of First Nations men must take some measure of responsibility for the activities in which they engage. It is no longer enough to say the *Indian Act* was responsible. Such positive acceptance of responsibility is an important step in healing the divisions which have occurred.

Having accepted the need to renounce and abandon practices which maintain colonial inspired sexual discrimination, there is a danger to be protected against in such acknowledgements. The danger is that concern for Aboriginal women will be "piously invoked by closet opponents of Aboriginal sovereignty" and that these people will "use a new-found solidarity with women as an expedient and politically correct justification for their resistance."[124] This problem can best be avoided by First Nations women continuing to assert their aspirations for self-government,[125] which includes gender equality and respect. People who express support for First Nations women, but who harbour hostility towards self-government could then no longer honestly claim to be endorsing these women if they continued to assert their opposition to self-determination.

A second peril that follows the acknowledgement of sexual discrimination in our communities is that it could paint all First Nations men with the same brush. It can be very discouraging working for and with your people, only to be accused of actions you do not sanction. There are many Aboriginal men who dedicatedly work for a return to tradition and a facilitation of self-government in a way which honours, respects and includes women. Much has been accomplished to help our people through their efforts, and these efforts may be made more difficult if they have to overcome insinuations of sexism every time they speak. A "belief in an

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[122]*Supra*, note 31 at 485.

[123]D. Maxwell, "Casting Hearts to the Ground: The Learned Deviance of European Contact" (1993) *Direct Research* for Law III, UBC Law School at 57 (on file with the author).

[124]D. Greshner, "Aboriginal Women, The Constitution and Criminal Justice" (1992) Special Edition on Aboriginal Justice U.B.C.L.R. 338 at 339.

[125]For a stance which criticizes sexual discrimination, yet supports self-government, see B. Hammersmith, "Aboriginal Women and Self-Government" in D. Engelstad & J. Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Toronto: Anansi, 1992) at 53.

inherent or irremediable chauvinism of Aboriginal men, worse than the chauvinism of non-Aboriginal men, must be shown for what it is: false, pernicious and racist."[126]

A posture which recognizes, supports and promotes positive contributions from First Nations men does not excuse those who exercise oppressive authority, but it does require that people avoid making statements that overreach merely to sustain their position. There is a great temptation to make these expansive statements because they seem to make the point of sexism stand out in greater relief. I would argue that such over-broad statements are dishonest and separate the person from the community and disconnect the individuals in the community from each other. There is room in both law and politics for making interpretations of rights that do not accept these adverse effects. Equality rights do not have to be applied to mean sameness.[127] Individual and collective rights do not have to be dichotomized.[128] Many First Nations men can be strongly and legitimately censured, but this need not encourage adversarialism between First Nations men and women. My grandmothers and grandfathers lived and taught that the circle of life and the four directions encourage honesty, sharing, strength and kindness.[129] These directions were encompassed by vision; vision which connected the whole of First Nations. It is my hope that people will reinterpret the language of rights with vision and esteem, to honour and revere the lessons that tradition teaches us in the application of this discourse. The continued return to these principles will enlarge our existing and inherent right to self-government. Such an approach has achieved some success as changes have been made which have contributed to the self-determination and liberation of some First Nations women.

Conclusion

The *Charter*, in employing the language of rights, has helped to liberate some First Nations people from the oppression they encounter in Canada. As such, the ideology underlying the *Charter* has facilitated the exercise of self-government. This has been accomplished through contemporary discourse of equality rights building upon traditional understandings of gender symmetry and harmony. The result has been an amendment of the Canadian Constitution to include equality rights, an amendment of the *Indian Act* to remove most gender discrimination, and

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[126] *Supra*, note 124 at 339.

[127] *Ibid.* at 350-353.

[128] W. Moss, "Indigenous Self-Government in Canada Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 Queen's L.J. 279.

[129] For a description of these teachings see Dumont, *supra*, note 13 at 54.

the obliging of Aboriginal organizations to allow First Nations women to participate in future constitutional discussions.

The effect of the *Charter* on Aboriginal politics illustrates the complications that are involved in working with rights discourse. While there are many constraints and limitations to the employment of rights, they also possess the potential to remove impediments to greater individual and collective self-determination for Aboriginal peoples. Those invoking the language of rights should harbour no illusions or misconceptions that summoning rights will always produce the desired results. There are many obstacles which can, in reversionary fashion, take away the very thing you are claiming. This danger is compounded when rights are employed by peoples from a different cultural tradition with less access to economic, political and legal resources. Yet, despite these dangers, rights can work to assist, though not replace, struggle for progressive social change. In this case, the *Charter*'s role in progressive social struggle was interpreted favourably by political actors,[130] which demonstrates there is still enough room to use rights discourse to realize First Nations community aspirations.[131]

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[130] J. Brigham, "Rights, Rage and Remedy: Forms of Law in Political Discourse" (1987) *Studies in American Political Developments* 303.

[131] For discussion about the impact of the *Charter* in other social arenas, see "Impact of the *Charter* on the Public Policy Process: A Symposium" 30 (1992) Osgoode Hall L.J. 501.