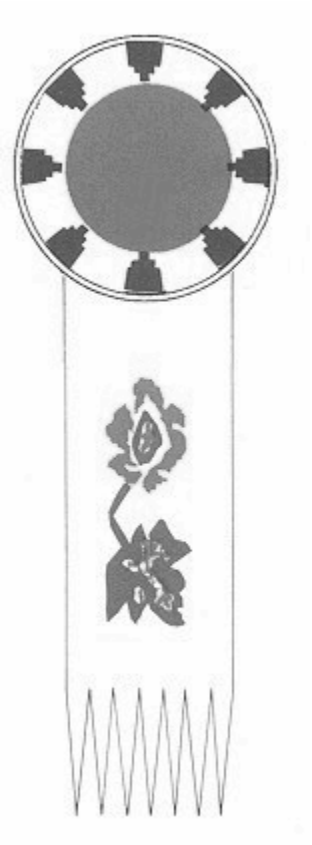
Native Women's Association of Canada



"DANCING WITH A GORILLA"

ABORIGINAL WOMEN, JUSTICE & THE CHARTER

~ November 25-27, 1992 ~

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An NWAC submission for the Round Table on Justice Issues

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"Dancing with a Gorilla"

By Teressa Nahanee[1]

1. Introduction

The purpose of this paper is twofold: to examine from Aboriginal women's perspective, first, the jurisdiction and structure of a parallel justice system, and second, the application of basic principles and legal rights found in the Canadian Charter of Rights and Freedoms[2]. This paper examines Aboriginal justice from a female perspective taking into account the current constitutional regime (pre-Charlottetown). There is no consideration of section 96[3] and its impact on establishing a parallel Aboriginal justice system as this is the subject of a separate paper. No examination is carried out with respect to the differences between Métis, Indian and Inuit systems of justice, nor is consideration given to the connection between multiple systems which may be established under the current constitution. I take it as a given that there is a common goal among Aboriginal peoples and governments to establish some form of parallel Aboriginal justice system(s). What this paper examines are the basic requirements of a parallel Aboriginal justice system from a female perspective. I am going to begin by examining the current socio-legal context of Aboriginal women, and the impact of this upon justice reform. Next I will examine the Aboriginal women's view of participation in socio-legal reforms and how this will shape Aboriginal justice. I will examine the application of the Canadian Charter. Then I will consider questions related to jurisdiction and structure.

What appears to me to be unique about feminist legal theory is the concentration on the value of individual experience and the way in which it can contribute to legal theory. This is particularly true in looking at necessary legal reforms to make them conform to female, human experience. Some legal scholars ignore the female human experience and look at law as some kind of mathematical equation, or chemical formula which, with some adjustment, will suit any occasion. I find myself explaining and being somewhat apologetic because there are those learned "men" who will wonder why there might be a Aboriginal feminist perspective to criminal justice administration[4]. Why is there a need to look at law from a female perspective? What is a female perspective? In my view, the two powerful driving forces which will shape Aboriginal criminal justice administration

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[2] *Part I of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 (hereafter referred to as the Charter).*

[3] *Constitution Act, 1867.*

[4] *I discussed over lunch with John Briggs, then of the Law Reform Commission, whether he would consider the Native female perspective in preparing what is now Report #34 of the LRC. He and his fellow colleagues at lunch wondered what a Native feminist perspective might be. In fact, the LRC did solicit some input from Professor Mary Ellen Turpel and Professor Patricia Montour.*

are first, the almost total victimization of women and children in Aboriginal communities[5], and second, the 30-year struggle by Aboriginal women for sexual equality rights in Canada[6]. As the man sang in "Cabaret" while dancing with a gorilla, "if you could see her through my eyes, you would find her beautiful, too."

2. Women and Aboriginal Parallel Justice Systems

Before examining what jurisdiction and structure a parallel Aboriginal justice system would be endowed with, serious consideration needs to be given by governments to the involvement of Aboriginal women in the consultation process. Without equal participation, consultation and funding, Aboriginal women's organizations today would reject the establishment of an Aboriginal parallel justice system[7]. There are three driving forces for this premise. First, women are enraged with the Justice pilot projects which allow Aboriginal male sex offenders to roam free of punishment in Aboriginal communities after conviction for violent offences against Aboriginal women and children[8]. Second, Aboriginal women oppose lenient sentencing for Aboriginal male sex offenders whose victims are women and children[9]. Third, Aboriginal women and their organizations have hailed as a victory the unanimous ruling by the Federal Court of Appeal on August 20, 1992 which declared that it was a violation of freedom of expression to consult mainly men on Aboriginal policies affecting all Aboriginal peoples[10].

Violence against Aboriginal women has reached epidemic proportions according to most studies conducted[11] over the past few years. This violence includes the victimization of women and their children, both of whom are seen as property of either their men e.g. husbands, lovers, fathers, or of the community in which they live. To

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[5] *See the attached Bibliography for a list of studies on Aboriginal male violence against Aboriginal women and children.*

[6] *See a speech by Mary Two Axe Early, 82, of Kahnawake, given at the Annual General Meeting of the Native Women's Association of Canada on file with N.W.A.C. The AGM was held at the Citadel Inn Ottawa, October 22, 1992.*

[7] *In August, 1992, the Victoria Daily Colonist carried a series of articles on alternative Native justice Systems, sentencing, sexual assault and Aboriginal women. In news reports, as well as verbal reports at meetings, Aboriginal women have voiced their opposition to Native law and Native justice because it is insensitive to the needs and views of Aboriginal women. It also does nothing to curb Aboriginal male violence against women and children.*

[8] *Verbal complaints have been made increasingly at meetings of Aboriginal women during 1991-2.*

[9] *These complaints have been raised in Saanich on Vancouver Island where Aboriginal sex offenders have been sentenced to the "Longhouse". The Longhouse is a physical and spiritual structure which has been ineffective in curbing sexual violence against women, children and elders in the affected communities. In the Maritimes where convicted men are serving alternative sentences in Aboriginal communities, some women have voiced their opposition to this practice as too dangerous. "It took us a long time to get rid of these men." Pauktuutit is taking a Court Challenge against the northern judiciary for lenient sentencing of Inuit sex offenders.*

[10] *See press releases and statements by Gail Stacey-Moore, Speaker, Native Women's Association of Canada after August 20, 1992, including her Statement at Charlottetown, August 27, 1992. On file with N.W.A.C.*

[11] *This part of the paper dealing with violence against Native women and children was completed jointly with Sharon McIvor, B.C. lawyer and Executive - West Region, Native Women's Association of Canada.*

understand Aboriginal women and criminal justice reform, one must understand the cultural context of Aboriginal male violence. Cultural values of kindness, reconciliation and family cohesiveness may prevent some Aboriginal women from reporting violence in the home[12]. Social forces such as fear of child apprehension may prevent Aboriginal women from reporting violence in the home[13]. The threat of child apprehension comes not only from the Canadian state and provincial child care agencies[14]. Today that threat also comes from Chiefs, Councils and Indian Child Care Agencies controlled by Aboriginal men who view children as community property. The Aboriginal mother may flee male violence, but she may be asked to leave her children behind[15].

Although denial is rampant concerning Aboriginal male abusiveness, it is primarily men who have almost total power and control in Aboriginal communities e.g. Band Councils and Chiefs, male police, etc [16]. These Aboriginal male leaders have protected each other, and have collectively or collusively contributed to the violence against Aboriginal women and children through their inaction, ineptness, ineffectiveness or neglect[17]. In a study among Micmac women it was revealed that 100 per cent experienced mental abuse, and 80 percent, physical abuse during married life[18]. This level of abuse was confirmed in a northern Ontario study where between 75 to 90 percent of women were battered[19]. The Native Women's Association of Canada has been asking the federal government to provide funds to establish an "800" line for community victims of violence[20]. This "hotline" would connect community victims to Aboriginal women's organizations in each province and territory. It would also allow the Aboriginal women's organizations to inform community Aboriginal women and children of their legal rights in violent situations.

Cultural defences by men will come under fire by Aboriginal women's organizations. Already, Aboriginal women oppose the use of cultural and racial considerations by law

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[12] *Squamish Family Violence Prevention and Treatment Model Project submitted to the Health and Welfare Canada/Indian and Northern Affairs Canada Advisory Committee on Family Violence, March 12, 1991: 82.*

[13] *Sharlene Frank, Family Violence in Aboriginal Communities: A First Nations Report (Victoria, B.C.: Minister of Women's Equality, 1992): 16.*

[14] *In a study conducted in Washington, D.C., the author wrote to State Governors asking for a report on numbers of Canadian Indian/Native children sent- to their State for adoption. As many as 300 Native children from Winnipeg were sent to Louisiana in one year. No large scale study has been done on Indian child apprehension and adoptions by non-Natives.*

[15] *Reported by the Indigenous Women's Collective, Manitoba, 1991.*

[16] *Affidavit of Gail Stacey-Moore filed with the Federal Court - Trial Division in N.W.A.C. et al v. Her Majesty et al, March 1992.*

[17] *Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Queen's Printer, 1991). See other studies included in the Bibliography.*

[18] *Claudette Dumont-Smith and Pauline Sioui-Labelle, National Family Violence Survey: Phase I (Ottawa: Indian and Inuit Nurses of Canada, 1991): 18.*

[19] *Ibid.*

[20] *Proposal on file with the Native Women's Association of Canada, 1992. Submitted to National Health and Welfare Canada, March 1992.*

enforcers to mitigate sentencing of Aboriginal men convicted of violent sexual crimes against women and children[21]. Aboriginal men need not take the total blame for raising cultural defences. The primarily middle-aged, upper class, white male judiciary are also responsible for accepting these defences and remaining ignorant of the nature of sexual assault and rape[22]. Sexual assault is a violent crime. All unwanted sexual advances made upon women and children are "violent" and interfere with the victim's security of the person. Criminal sexual intrusions by men are as much a violation of one's bodily security as are criminal intrusions upon the body by the State e.g. unwanted and illegal searches and seizures of body cavities, or taking of blood, semen or hair samples.

The case law shows that Aboriginal men have claimed in child sexual abuse trials that Aboriginal culture condones deviant sexual behaviour, e.g. incest, child sexual abuse[23]. There is a need to study the use of cultural defences used by Aboriginal men accused of the sexual violation of children and women. The criminal justice system, particularly in British Columbia[24] and the Northwest Territories are beginning to be 'culturally-sensitive'. This is detrimental to women, particularly victims of sexual abuse. The introduction of cultural defences which condone incest and child sexual abuse among Aboriginal peoples has been rejected by Aboriginal women[25]. Such treatment by the court, which often results in lenient sentencing of Aboriginal males, reinforces the view that violence against Aboriginal women and children is acceptable in Canadian society. Police have used cultural considerations in determining whether or not to lay criminal charges, including in spousal abuse situations. "Racial or cultural background should not be a factor which affects the immediacy of police response to a call for assistance in a spousal assault complaint."[26] This kind of state action is racist because it accords a different standard of treatment to Aboriginals than to non-Aboriginals.

There needs to be a return to traditional ways, healing circles, and a sharing of power between men and the women. This is particularly true in reforms which will come about in the field of criminal justice administration in Aboriginal communities. Aboriginal women support the revival of traditions and cultural practises which recognized the equally valued roles, rights and responsibilities of women. This was a common finding in studies under review. One reform which seems to be required is the need to place the punishment of sexual crimes in the control of Aboriginal women at the community

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[21] *Materials on file with Pauktuutit for a proposed Court Challenge against Her Majesty for lenient sentencing of Inuit sex offenders in the Northwest Territories.*

[22] *See generally Inuit sexual assault cases, Northwest Territories 1986-1990.*

[23] *Ibid.*

[24] *See materials with the Provincial and Federal Minister of Justice on Native Justice Projects, particularly at Saanich, Vancouver Island, B.C. 1991-92.*

[25] *Reported by the Victoria Daily Colonist, July 1992.*

[26] *Hon. Dennis Patterson, Task Force on Spousal Assault (Yellowknife: Government of the Northwest Territories, 1985): 64.*

level.[27] The use of elder's circles has not been effective in deterring violent crimes against women for three reasons: first, elders also abuse Aboriginal women and children[28]; second, Aboriginal community leaders do nothing to stem the epidemic violence against Aboriginal women and children[29]; and, third, males do not understand the violation of a female body, and cannot determine appropriate forms of punishment and deterrence.

Today, there is an evident resistance by Aboriginal men to share power with women and this has resulted in the denigration of the Aboriginal women's movement for constitutional and legal reforms. "For example, they tell women they cannot participate in 'sweat lodges' or other ceremonies when they are menstruating because they are afraid of women power and they don't want to share. Although it is accepted that culture is ever-changing and ever-alive, in fact, Aboriginal traditions have become bastardized by Christianity and the imposition of western culture. One example, cited in the November issue of MS. Magazine is the effect of the Handsome Lake Code on the Iroquoian matriarchy. The Handsome Lake Code, named after Mohawk spiritual leader, Handsome Lake, was designed along Christian lines to displace the Iroquoian matriarchy with a form of Iroquoian patriarchy. This displacement is still going on today. The Handsome Lake Code effectively displaces the power and place of Clan Mothers. The fight to define "tradition" is going on today in Aboriginal communities.

Over the period of colonization, Aboriginal women lost their important economic position. Aboriginal women had important economic roles in the fur trade with explorers, and today they are among the lowest on Canada's economic ladder. The federal Indian Act over the last century has completely deprived First Nations women of their property rights. In traditional societies, women held all private and real property for transference to future generations. Today, with the Paul[30] and Derrickson[31] decisions of the Supreme Court of Canada, First Nations women have no property rights at all on Indian lands because there is no federal law in the field, and provincial laws do not apply. As reported by Professor Mary Ellen Turpel:

> The consequence of the Derrickson and Paul decisions is that an aboriginal woman who resides in a home on a reserve with her spouse cannot make an application under provincial family legislation for occupation or possession of the home upon marriage breakdown or in the event of physical and emotional abuse from her spouse. There is no federal family legislation to govern these conflicts. In the Paul case, for Pauline Paul, this meant she was denied legal access to the matrimonial

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[27] *It is reported by Gail Stacey-Moore, Speaker, Native Women's Association of Canada, that domestic violence on the Kahnawake Reserve is sometimes effectively controlled by women as a collective. The offender receives his punishment at the hands of women.*

[28] *Reports on file with the Aboriginal Women's Circle, Canadian Panel on Violence Against Women, Ottawa.*

[29] *As reported by the Aboriginal Justice Inquiry of Manitoba 1990.*

[30] *Paul v. Paul, [1986] 1 S.C.R. 306.*

[31] *Derrickson v. Derrickson, [1986] 1 S.C.R. 285.*

home of sixteen years which she herself helped to build. With the sanction of constitutional law, she was, effectively, left out in the cold[32].

Professor Turpel reaffirms her article that the Indian Act "does not provide for marriage breakdown, property division, or for situations of family violence and protecting the property rights of the abused in such situations."[33]

Poverty is rampant in Aboriginal communities and contributes to the sexual violation of women and children, child prostitution, runaways, throwaways, substance abuse, suicide, battered women and youth crime. All Aboriginal people have been kept in a state of abject poverty by past and present government policies and laws, both federally and provincially. The failure by governments to clarify jurisdictional issues which would ensure all aboriginal peoples enjoy a standard of living comparable to other Canadians is racist, and a violation of the Universal Declaration of Human Rights. The legal instruments of the United Nations were passed to ensure a certain minimum standard of human existence, and this has been violated by Canada. The conditions under which aboriginal peoples live in Canada are worse than in some Third World countries.

The Indian residential school system over the last century contributed immeasurably to violence against Aboriginal women and children in modern Canadian and Aboriginal societies. One study found that the high incidence of sexual abuse is rooted in the residential school experience 20 years ago.[34] Reports of sexual abuse within Aboriginal communities has increased since investigations of abuse in the schools were initiated in 1987.)[35] Young Indian boys were subjected to sexual abuse by religious men including Ministers, priests, and brothers of Christian orders. This has lead to suicide, paedophilia, homosexuality, and cyclical sexual abuse in modern Aboriginal society. The Professional Native Women's Association said suicide, family violence and abuse can be traced to residential schools.[36] This was confirmed in the study by the Indian and Inuit Nurses Association[37] and the 0jibway Tribal Family services.[38] The latter study concluded that residential schools were a form of genocide, or violence against a nation.

European religions set out to alter the roles of men and women in Aboriginal societies, and this was accomplished over a period of several hundred years. The traditional roles of men and women was displaced. Christianity and its values today keep Aboriginal women in violent situations because of their Christian marriage vows. Christian

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[32] *Mary Ellen Turpel, "Home/Land", (1991) Canadian Journal of Family Law 17.*

[33] *Ibid., 35.*

[34] *Dumont-Smith, 27; Frank, 4.*

[35] *Nl'Akapamux, Family Violence Project: Final Report, 1992.*

[36] *Is Anyone Listening? Report of the B.C. Task Force on Family Violence (Victoria: Government of B.C., 1992): 191-2.*

[37] *See Dumont-Smith study.*

[38] *Ibid., 8.*

teachings of confession and forgiveness also condone Aboriginal male violence because it leads to increased tolerance for violence against women.

The role of male elders as perpetrators of violence, and arbitrators needs serious examination. Aboriginal elders today abuse women and children within the community. Some Aboriginal women have been subjected to sexual, physical, emotional and psychological abuse in the form of "teaching". An Aboriginal e1de.r is a-person in a trust position with children and women, particularly when the elder is a grand-parent to the child s/he abuses, or a spiritual adviser to women within the community. If elders are to have a role in ending sexual, physical, emotional and psychological abuse within Aboriginal communities they must speak out and take a leadership role. It is their role to advise Chiefs and Councils that the victimization of women and children must end. Elders should devise the punishment for this deviant behaviour, or allow the criminal justice system to take its' toll within the Aboriginal community. "Elders should be involved in counselling those who batter their spouses."[39]

Substance abuse among Aboriginal children needs serious examination. In particular, studies should be conducted to ascertain the relationship between child substance abuse e.g. glue-sniffing, gas sniffing, etc. and child sexual abuse within the home and the community. Sexual and physical violence of Aboriginal children affects over 80 percent of Aboriginal infants and young children,[40] and this has led to the destruction of young Aboriginal people. It leads to suicide, violent crimes, prostitution at a young age, juvenile delinquency, substance abuse, loss of self esteem, illiteracy, pornography, unemployment and hopelessness. This whole area requires more study and consultation, particularly with children and youth. It has been estimated that up to 80 percent of Aboriginal girls in N.W.T. have been sexually molested by the age of eight, and up to 50 percent of boys suffer similar abuse.[41] More study is required on the correlationship between Aboriginal justice administration and its treatment of Aboriginal offenders who have suffered child sexual and violent physical or emotional abuse. This includes a need to study the impact of child apprehension and adoption of Aboriginal children by non-Aboriginals. The placement of Aboriginal youth in detention centres and the level of Aboriginal juvenile crime also requires further study. There is also a requirement to evaluate the need for an Aboriginal Child Advocate Office, preferably run by Aboriginal women.

It was found in a survey conducted by the First Nations Confederacy Brotherhood of Indian Nations and Manitoba Keewatinowi Okimakanak that death by suicide is considerably higher for Aboriginals than non-Aboriginal Canadians. "Suicide is most common in status Indian males between the ages of 15 and 40, especially in the 20-24 age group. The suicide rates are much higher for males than females. The suicide rate

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[39] *Patterson, 62.*

[40] *Dumont-Smith, 25.*

[41] *Ibid.*

of the status Indian population for the five-year average for 1981 to 1985 was 2.6 times the Canadian rate."[42]

"The Chief and Band Council should take a greater part in publicly criticizing spousal assault."[43] It has been suggested that men who beat their wives should appear before the Chief and Council and explain their behaviour and be criticized for it.[44] Historically, among the Dene, any man who abused women, girls or children had to appear at a public community meeting and the medicine leaders would judge them. A first offender might receive a warning; a repeat offender sometimes faced death. The medicine for abuse was harsh.[45] The Manitoba Justice Inquiry Report stated that Chiefs and Councils have done nothing to stop the epidemic of spousal abuse within Indian communities. The leaders of First

Nations governments and organizations must accept their responsibility to protect aboriginal women and children from male violence.

If criminal justice administration is taken over by Aboriginal people, women should be in charge of sentencing in cases where there are female and child victims of abuse. Pauktuutit has called for treatment facilities to be established in the N.W.T. to help the victims, families and offenders of child sexual abuse. In its 1991 study on child sexual abuse, Pauktuutit said it is a myth that this behaviour is traditional or acceptable among Inuit. The Inuit women called for a reaffirmation of the respect and value of children in Inuit society.[46] Pauktuutit called upon governments in 1991 to develop policies to deal with offenders charged with child sexual abuse including treatment while incarcerated. They asked that ways be found within the system to minimize the trauma experienced by child victims, including use of video-tape testimonies.[47]

There is no meaningful role for victims of crime in the criminal justice system. This is particularly true in the case of female victims. Lenient sentencing for accused who kill or sexually abuse Aboriginal women gives a signal to society that its okay to treat Aboriginals as if they are less than human. "[T]he batterer is better protected and defended in the courtroom" than victims of violence.[48] It has been recommended that prosecutors only withdraw charges of battering in exceptional circumstances, and they should seek sentences which reflect the seriousness of the crime.[49]

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[42] *Ibid., 7.*

[43] *Patterson, 64.*

[44] *Ibid.*

[45] *Communities Voice on Child Sexual Abuse (Yellowknife: Native Women's Association of N.W.T., 1989): 5.*

[46] *Rosemarie Kuptana, No More Secrets (Ottawa: Pauktuutit, 1991): 10.*

[47] *Ibid.,*

[48] *Patterson, 5.*

[49] *Ibid., 63.*

Aboriginals are over-represented in Canadian prisons. Over half the men in prison are Aboriginal. The Prince Albert Prison for Women sometimes has 100 Aboriginal female prisoners. Increasingly, Aboriginal women are imprisoned for violent crimes against the person including murder, manslaughter and physical assault. The majority of Aboriginal women in conflict with the law were victims of incest, child sexual assault or violent childhoods. Many Aboriginal women are victims for life. The Elizabeth Fry Society reported that 90 percent of Aboriginal women in prison have been physically or sexually abused. They said these women would continue to come into contact with the criminal justice system until their situation is redressed.[50]

Sometimes police remove the victim from the home instead of the abuser.[51] Governments at all levels should establish a policy which removes the abuser from the home. Such a policy would place a top priority on the safety of Aboriginal women and their children in the home and in the community. The police have recommended that Chiefs and Councils should develop policies to handle domestic violence instead of relying on the police. They advocate more funding for dealing with the problem, and more training for Aboriginal professionals to work in this field.[52]

The Alberta study indicated that Aboriginal women are reluctant to report domestic violence to male police. In a Report by the Dene Tha' Women's Society, they stated that a woman will likely be abused 38 times before reporting it, and may leave her male partner 35 times before going to the police.[53] The same study said there is a need for more Aboriginal women in the legal assistance field because Aboriginal women are reluctant to discuss matters of a sexual nature. There is a need for more female Aboriginal lawyers to represent Aboriginal women.

Many Aboriginal women both fear and oppose aboriginal self-government.[54] The women do not want to live under brown patriarchs who abuse power. The women are calling for a return to matriarchies where women had real political power and enjoyed individual human rights. Contrary to popular thought, individual rights and freedoms were supreme within Aboriginal democracies.[55] It would not be too far-fetched to acknowledge that the Iroquois Confederacy was the cradle of democracy. The Iroquois political system fed the thought processes of leading western European philosophers

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[50] *See Native Women's Association of Canada report on Federally Sentenced Women, 1989. Also see, Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta: Justice on Trial (Edmonton: Government of Alberta, 1991) : 8-52.*

[51] *Patterson, 5.*

[52] *Dumont-Smith, 51.*

[53] *Alberta Task Force, 8-53.*

[54] *See press releases and position papers of the Native Women's Association of Canada responding to recommendations of the Ministerial Multilateral Meetings on the Constitution 1992.*

[55] *Speech made by Sharon McIvor to the B.C. Indian Homemakers, Vancouver, 1992 on file with the Native Women's Association of Canada.*

who are attributed with inventing democracy.[56] As Gail Stacey-Moore has repeated over and over again, women owned all private and real property historically; they had control of the family and community governance; women both selected and deposed political leaders. Women sent men to war, sometimes for years.[57]

Racism contributes to abuse of Aboriginal women. (Frank, 16) The Aboriginal Justice Inquiry of Manitoba confirmed Aboriginal women are victims of racism, of sexism and of unconscionable levels of domestic violence.[58] On August 20, 1992, the Federal Court of Appeal held in N.W.A.C. et al v. Her Majesty et al that Aboriginal women are doubly disadvantaged by reason of race and sex within Canadian society, and by reason of sex within aboriginal societies. This disadvantages result in discrimination in programs and services by the Government of Canada, and by Indian Act governments. It is clear from the decision that racism and sexism in federal government decisions violates the Charter rights of aboriginal women, and contributes to the epidemic of violence perpetrated against them. The oppression of aboriginal women results from patriarchy and colonialism, and it will not be eradicated without clear federal initiatives aimed at restoring the cultural, social, economic and political position of aboriginal women within their societies.

3. Equal Participation and Consultation: Aboriginal Women

Aboriginal women as a collective will continue to resist any changes to Aboriginal laws and policies which have not resulted from equal participation, consultation and funding to their associations. What is evident over the past year is the desire of Aboriginal women, collectively and individually, to be involved in decision-making. The Native Women's Association of Canada has taken a strong stand on the issue of participatory democracy and there is no sign that they will back down from this stance. It is likely they will have their case put to the Supreme Court of Canada by 1993. Their case is premised on three issues: first, freedom of political expression as females; second, sexual equality rights under sections 15, 28 and 35(4); and third, equal aboriginal and treaty rights with men.

Freedom of speech is recognized as a cornerstone of democratic government, and that right has been found by a Canadian court to have been denied to Aboriginal women and NWAC in this current constitutional round. That was the finding of the Federal Court of Appeal in N.W.A.C. et al v. Her Majesty et al. Counsel, Mary Eberts of Toronto, told NWAC this court decision is the only one of its kind in the world because it recognizes freedom of political expression for women. This is the first time a Canadian court has ruled on the right of women to freedom of speech in a political process, and it has recognized that this right has been infringed by Canada.

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[56] *Ibid.*

[57] *Speech on Native Women's Political Rights given on numerous occasion by Gail Stacey-Moore, Speaker, Native Women's Association of Canada. On file with N.W.A.C.*

[58] *B.C. Task Force Report, 192.*

In a decision 20 August 1992, the Federal Court of Appeal ruled in favour of the Native Women's Association of Canada stating that by funding the participation of the Assembly of First Nations, Métis National Council, Native Council of Canada, Inuit Tapirisat of Canada in the current constitutional review process and excluding the equal participation of NWAC," the Canadian government has accorded the advocates of male dominated Aboriginal self-governments a preferred position in the exercise of an expressive activity.... It has thereby taken action which has had the effect of restricting the freedom of expression of Aboriginal women in a manner offensive to ss. 2(b) and 28 of the Charter. In my opinion, the learned trial judge erred in concluding otherwise,' said Justice Mahoney on behalf of the Federal Court of Appeal.

Counsel Mary Eberts of Toronto put forward the legal arguments that Charter rights of Aboriginal women and the Native Women's Association of Canada have been infringed by the Government of Canada. First, she argued that our freedom of expression rights must be read together with section 28 of the Charter which guarantees men and women have equal rights. Second, she alleged violations of sections 15 and 35(4) sexual equality rights. Third, arguments were put as to whether a relief or remedy could be sought under the Federal Court Act. Finally, the parties argued as to whether this was a legislative process barring review by a court.

The Court of Appeal summarily dismissed claims that section 35(4) rights of Aboriginal women were violated by exclusion of Aboriginal women from the constitutional review process. In this case the Court of Appeal may have erred by interpreting section 35(4) in relation to sections of the Constitution Act which no ,longer exist--namely, sections 37 and 37.1. These sections mandated the Governments of Canada to convene four First Ministers Conferences on Treaty and Aboriginal Rights between 1983 and 1987. Those conferences were held with no beneficial results, and after 1987, section 37.1 was effectively dropped from the Constitution Act.

The Court of Appeal has missed the argument entirely. The purpose of section 35(4) was to guarantee treaty and Aboriginal rights equally to male and female persons. The purpose of the current constitutional review process (and former sections 37 and 37.1) is to define treaty and Aboriginal rights as they will be enjoyed by Aboriginal peoples. By excluding Aboriginal women from the definition process, the sexual equality rights of women under section 35(4) are effectively denied. There is ample precedent that courts must look to the purpose of the constitutional provision, and the effect of the denial of a guaranteed constitutional right such as section 35(4). The Supreme Court of Canada has also mandated courts to give a broad liberal interpretation to constitutional provisions affecting Aboriginal peoples, and interpret the provision in the manner understood by, in this case, Aboriginal women.

The Court denied that section 15 sexual equality rights of Aboriginal women were infringed by Canada on the basis that this right is guaranteed to individuals and not collectivities. The Court also found most Aboriginal women fear losing sexual equality rights under recognized self government, and this fear has good foundation. Until that event occurs, however, the threat of losing a right is not itself a present denial of a right

under section 15; The Court said it could not interfere in the current constitutional process on the basis of a mere hypothetical consequence.

Counsel Mary Eberts argued that Aboriginal women's section 15 rights were infringed by Canada because of its failure to include them as individuals and as a collective in the constitutional talks. A finding that section 15 rights--the right to be free from discrimination on the basis of race and sex--were violated by Canada's Constitutional Funding Program of the Department of Secretary of State is not going to open the floodgates to everyone who may demand to be at the constitutional table the Court found.

The decision is clear that the Federal Court of Appeal rejected the floodgates argument put forward by Canada. The Court held that Canada can fund or not fund, but 'it is bound to observe the requirements of the Charter.' The government is bound by the Charter. The Court said 'I should think a decision to fund will be made on the basis of need to permit effective and informed expression by an otherwise handicapped and particularly concerned interest group. A proper decision to fund one group but not another should be readily justifiable under s.1 of the Charter.' The Court discredited Canada's floodgates argument saying it was put forward purely for administrative convenience and said it 'ought not prevail when a constitutionally guaranteed right or freedom has been proved to have been infringed. The Court found NWAC has justification to complain that its constitutional right to freedom of expression was infringed when Canada chose to fund only male-dominated organizations.

The Court found that no Aboriginal group in the constitutional process represents the constituents of NWAC. Justice Mahoney held that 'NWAC is a bona fide, established and recognized national voice of and for Aboriginal women.' He said it is open to the courts to make a declaration to Canada and governments that 'the federal government has restricted the freedom of expression of Aboriginal women in a manner offensive to ss.2(b) and 28 of the Charter. In this way, the Court has said we have rights, individually and collectively, as Aboriginal women (as represented by NWAC) and those rights have been violated by Canada.

The Court recognized that the AFN and the former National Indian Brotherhood 'has vigorously and consistently resisted the struggle of Aboriginal women to rid themselves of the gender inequality historically entrenched in the Indian Act. This opposition took the form of adverse interventions before Parliamentary committees and legal proceedings, including opposing repeal of section 12(1)(b), and the section 35(4) amendment. The Court rightly found that none of the Intervenants -- Assembly of First Nations, Native Council of Canada, Métis National Council and Inuit Tapirisat of Canada -- represent the interests of Aboriginal women and went so far as to find that AFN was likely to take a constitutional position harmful to Aboriginal women. The judgment is clear in stating that it is NWAC which represents the interests of Aboriginal women. The history of the organization and Aboriginal women's struggles shows that and it was reflected in affidavits filed by Gail Stacey-Moore and Sharon McIvor, Executive of the

West Region. Justice Mahoney stated, "it is clear AFN is not addressing their [Aboriginal women's] concerns."

The case against Her Majesty was brought by the Native Women's Association of Canada, and by individual Appellants, Gail Stacey-Moore, a Mohawk of Kahnawake, Quebec and Sharon McIvor, Executive member of the West Region and Member of the Lower Nicola Indian Band of British Columbia. The Court found the women represented by NWAC collectively and Stacey-Moore and McIvor presented ample evidence of discrimination on the basis of sex and race in Canadian society, and on the basis of sex in some Aboriginal communities.

4. Aboriginal Women and The Canadian Charter

> 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 of race, which they face at every turn.[59]

The recognition of parallel Aboriginal justice systems for Canada's aboriginal peoples must include consideration of 100 years of statutory sex-based discrimination against Indian women. This approach is necessitated by the existence of the Canadian Charter of Rights and Freedoms[60] and the recognition in international law of the special rights of colonized populations. While there is increasing recognition of race bias in justice administration among legal scholars who specialize in indigenous law[61], most cannot make the quantum leap to recognize that the British-based legal system is rampant with sex bias against women. Justice has not been blind to race or sex, and this is evident when one views the legal history of Indian women and the law in Canada. The purpose of this section is to discuss the role and treatment of women in the context of Aboriginal justice and aboriginal self government.

The Constitution Act, 1982 contains three provisions guaranteeing sexual equality rights to, inter alia, aboriginal women. Section 15(1) states:

> Every individual is equal before and under the law and has the right to the 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 disability.
>
> Section 28 provides:
> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

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[59] *Mary Eberts, Memorandum of Law to Native Women's Association of Canada, 19 December 1991: 3 [hereinafter Eberts].*

[60] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, [hereinafter the Charter].*

[61] *Kent McNeil, "Striking a Blow for Native Land Rights", Globe & Mail, 15 July 1992: A5**.*

> Section 35(4) provides:
> 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.

Section 35(1) recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, including "rights that now exist by way of land claims agreements or may be so acquired."

The Supreme Court of Canada has not yet commented upon the meaning of sections 28 and 35(4). It has considered the meaning of section 15 in its landmark decision of Andrews v. Law Society of British Columbia:[62]

> "In Andrews, the court rejected the "similarly situated" test for determining when there was a violation of the right to equality before and under the law. The similarly situated test had depended for its meaning on the dictum that persons who are similarly situated should be similarly treated and on the converse of that dictum, that persons who are differently situated should be differently treated. The idea underlying this approach was the Aristotelian concept of formal equality: things that are alike should be treated alike while things that are unalike should be treated in proportion to their unlikeness.[63]„

The Supreme Court of Canada referred to a number of aboriginal cases it had decided to further elaborate on the meaning of section 15 as it ought to be interpreted by the courts. Counsel Mary Eberts, advising the Native Women's Association of Canada on their court case, comments:

> Mr. Justice McIntyre points out in his reasons, at page 167, that this similarly situated test had. figured in the decision of the British Columbia Court of Appeal in R. v. Gonzales (1962), 132 C.C.C. 237 that it was not contrary to section 1(b) of the Canadian Bill of Rights to prosecute an Indian for possession of intoxicants off a reserve even when there was no reserve in his locality. The Court's reasoning in Gonzales was that section 1(b) means 'a right in every person to whom a particular law relates or extends no matter what may be a person's race...or sex to stand on an equal footing with every other person to whom that particular law relates or extends." Mr. Justice McIntyre points out that this approach was specifically rejected by the Supreme Court in R. v. Drybones, [1970] S.C.R. 282, and adopts the Drybones reasoning when he states at page 167 that:
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> > Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for the violation of equality rights.

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[62] *[19891 1 S.C.R. 143.*

[63] *Eberts: 4.*

Mr. Justice McIntyre endorses (at page 171) the principle that 'the purpose of s. 15 is to ensure equality in the formulation and application of the law.' He specifically relates the purpose of section 15 to the promotion of equality, and states that this promotion of equality has a much more specific goal than the mere elimination of distinctions. Indeed, he accepts that the promotion of equality may sometimes require the safeguarding of certain distinctions, citing the provisions of section 25 of the Charter as an example.

Rather than focus on formal equality, then, the Court accepts that section 15 requires the promotion of substantive equality. Mr. Justice McIntyre states at page 165 that the main consideration in the equality analysis should be the impact of the law on the individual or group concerned, following up on page 168 with the statement that:

> Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application.

The Court's view that not every distinction in law will amount to a violation of the equality guarantee necessitates that it articulate its test for determining when such a distinction will infringe the Charter. It decides that those distinctions which involve 'discrimination' will infringe the equality guarantee, describing discrimination, at pages 174-5, as:

> ... a distinction, whether intentional or not ... but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

The Court in Andrews, and later in R. v. Turpin, [1989] 1 S.C.R. 1296 (at page 1332) held that those who can claim the benefit of section 15 are those characterized by the grounds enumerated in the section, and related grounds. Its reasons for confining the guarantee's protection to persons disadvantaged by these characteristics is closely related to the powerlessness of these groups to effect change in their circumstances through more traditional political means. In Turpin, Madame Justice Wilson describes the intended beneficiaries of section 15 as 'discrete and insular minorities', borrowing that term from a judgment of the Supreme Court of the United States. American academic John Hart Ely says, in Democracy and Distrust (1980) at p 151, that the whole point of this approach is 'to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending'. It is the Courts, within the ambit of an

instrument like the Charter, which must be the guardians of the rights of those so disadvantaged.[64]

5. Section 15 Applies to Indian Women

The anniversary of the Charter of Rights and Freedoms will always coincide with the effective date of Bill C-31 [An Act to Amend the Indian Act] and represents an individualistic female victory for sexual equality. In discussing the application of the Charter of Rights and Freedoms to Indians on Indian lands[65], it is evident there was a clash between Indian collective rights to self government and feminist ideals of individual rights. I am adopting the individualistic feminist perspective to argue for application of the Charter of Rights and Freedoms to First Nations' governments and their justice systems. During the 1970s and 1980s, the only secure knowledge that Aboriginal women activists have had is the notion that it is unacceptable and contrary to the Universal Declaration of Human Rights to discriminate against individuals, including against women on the basis of sex.

The Canadian Charter of Rights and Freedoms is apposite to the collectivist aspirations of some Indian leaders who find themselves supported by legal theoreticians like Boldt and Long, and to a certain extent, Professors Doug Sanders and Mary Ellen Turpel. Their theories, in my view, are largely influenced by American Indian policy and case law and perhaps their own reading of international law and colonized peoples. To a certain extent, Boldt and Long are influenced by the Rousseauian 'Noble Savage' philosophy, and Sanders and Turpel are influenced by the international concept of 'self-determination'. Some of these theoreticians and some male Indian leaders have argued that sovereignty would put Indian governments outside the reach of the Canadian Charter of Rights and Freedoms.

The legal theoreticians say the Canadian Charter does not belong in Indian communities because their concern for the collective overrides concern for individual rights. In my view, they forget that the collective is made up of "little Indians"[66] and they should take time to remember the history of sexual oppression of Aboriginal women. Each and every individual comprises the collective; there is no collective without them. Indian women need to remember the history of our extinction in this country. Indians numbered in the millions before smallpox, influenza, measles, sexual diseases, alcohol and self-destruction. If Aboriginals do not protect the individual, the nation will vanish like the Beothuk Indians of Newfoundland. What are collectivist theorists and Aboriginal leaders doing to ensure that this does not happen to other First Nations. There is a duty to protect each and every individual Indian.

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[64] *Eberts: 5-6.*

[65] *s. 91(24), Constitution Act, 1867.*

[66] *I borrow this term from Senator Guy Williams, now retired from the Senate of Canada. A leader for forty years of the Native Brotherhood of British Columbia (a fisherman's union originally), he devoted his life to finding equity and justice for the "little Indian". "Who's looking out for the little Indian?", he often asked throughout the 1970s.*

To understand the coming struggle over Aboriginal justice, attention must be paid to the 30-year struggle by Aboriginal women for sexual equality rights. The struggle for sexual equality was cast in terms of individual versus collective rights by the patriarchal Indian establishment. In some respects, the prism of collective rights was used to justify the denial of sexual equality to Indian women.

The battle between individual and collective rights emanated in three fora: the Parliamentary Sub-committee on Indian Women and the Indian Act;[67] the 1970s struggle for Indian self–government;[68] and in events leading to the adoption of the Constitution Act, 1982. In each case, the male Indian leadership argued in favour of sexual equality for women, but only in the context of collective rights. Essentially, they argued that Indian governments must be established and recognized first, and sexual equality would follow. The evidence before the two parliamentary committees confirms this contention.

The records of the First Ministers' conferences[69] on treaty and aboriginal rights in the 1980s confirmed the concern of Indian women for sexual equality. This item remained the top priority of Indian women from 1971 until 1985. These dates are important because they overlap with two First Ministers' Conferences on Aboriginal and Treaty rights - 1983 and 1985. At both meetings, the Indian women were represented by their organizations and each time they were assigned solely to take care of the 'equality' issue. In 1983, the Native Women's Association of Canada received their accreditation through the Native Council of Canada to attend the meeting and represent the sexual equality issue. In 1984, section 35(4) was added to the Constitution Act, 1982 to ensure gender equality to Aboriginal and treaty rights. In 1985, N.W.A.C. received accreditation from the Assembly of First Nations. The timing of that meeting coincided with passage of Bill C-31, but still Indian women were at the First Ministers' Conference to represent the sexual equality issue.

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, in part, the 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.[70] I would argue that the 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.

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[67] *See Note 13.*

[68] *Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 8 July 1980, 11:6.*

[69] *Bryan Schwartz, First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984, (Kingston: Queen's University, 1986).*

[70] *Sanders, Note 4.*

a) "Discrete and Insular Minority"

Mary Eberts describes the status of all aboriginal peoples as being a "discrete and insular minority" and maintains that this is particularly the case for aboriginal women.

> Aboriginal peoples may also be described as a 'discrete and insular minority', a situation resulting from over a hundred years of government action and policy, and deeply ingrained racism in public and private decision-making. Yet power within these communities rests largely with Aboriginal men, who control most of the Band Councils and the larger national organizations of Aboriginal leaders. Aboriginal women may thus be described as one discrete and insular minority within another: they suffer the systemic disadvantages of gender discrimination in and by an Aboriginal society that itself must cope with the results of racism. While women as a whole are disadvantaged within Canadian society, Aboriginal women like all Aboriginal people must contend not only with that sexism but also with the adverse economic, social and political consequences of living in a profoundly racist society.[71]

b) Social and Economic Position of Women

Eberts notes the following on the social and economic position of Aboriginal women:

> Being a disadvantaged group within a disadvantaged group has many complex social, economic and political consequences. A recently released Statistics Canada social trends study, Canada's Off-Reserve Aboriginal Population, reports that by 1986 more than half of all Aboriginal people were living off reserves, and 23% of the off-reserve families were headed by a single parent, compared with 12% of all Canadians. Aboriginal women constituted 87% of those single parents, compared with 83% for non-Aboriginals. They earned an average yearly income of $9,000, compared with $12,900 for non-Aboriginal women, $14,300 for Aboriginal men living off-reserve, and $23,200 for non-Aboriginal men. The poverty of families headed by women is well-known: families headed by Aboriginal women are the poorest of the poor.[72]

c) Exclusion from Power and Decision-Making

Eberts reports:

> On the political level, the interrelationship of race and gender means that Aboriginal women are twice excluded from decision-making that affects them: once, from the Parliamentary institutions of Canada, and again from the male-dominated Band Councils and Aboriginal organizations that purport to speak on behalf of all Aboriginal peoples in dealings with the Canadian government. Thus, they have access to power within neither the non-Aboriginal society nor the Aboriginal society;

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[71] *Eberts: 8.*

[72] *Eberts: 8.*

> when Aboriginal groups deploy their own power as a countervail to federal government power, men dominate on both sides of the encounter and Aboriginal women have no voice.[73]

In the 1991-92 constitutional round, the Assembly of First Nations argued that section 3 - democratic rights - did not apply to aboriginal governments. Provincial officials at the Working Group level agreed. The AFN position relates directly to the demands of the Native Women's Association of Canada that the Canadian Charter of Rights and Freedoms must apply to aboriginal governments. The parties agreed that the Charter would apply, but this did not mean that aboriginal governments exercising their recognized inherent right to self government had to establish democracies which guaranteed women the franchise - the right to vote. In assessing the meaning of section 3, the Supreme Court of Canada stated the following:

> In the final analysis, the values and principles animating a free and democratic society are arguably best served by a definition that places effective representation at the heart of the right to vote. The concerns which Dickson C.J. in Oakes associated with a free and democratic society - respect for the inherent dimity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political, institutions which enhance the participation of 'individuals in society - are better met with an electoral system and focuses on effective representation than by one that focuses on mathematical parity. Respect for individual dignity and social equality mandate that citizen's votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated[74].

Eberts takes the position that this case shows that the Court "tries to balance individual aspirations and group identity: the two ideas are not contradictory."[75] She concludes that "an approach to representation which focuses only on the group rights of Aboriginal people and takes no account of the individual rights of Aboriginal women, or the group interest of such women, would be contrary to the charter."[76]

d) Struggle for 'Indian' status

Eberts reports:

> The efforts by Aboriginal women to overcome the effects of section 12(1)(b) of the Indian Act reflect their struggle against multiple and interlocking disadvantages ....

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[73] *Eberts: 12.*

[74] *Saskatchewan (Attorney-General) v. Carter et al (June 6, 1991).*

[75] *Eberts: 13.*

[76] *Id.*

Under section 12(1)(b) of the Indian Act, an Indian woman automatically lost her status and band membership upon marriage to a non-Indian. In contrast, an Indian man did not lose status with such a marriage; rather, he conferred status upon his wife.

Individual women challenged this provision, which had been enacted by a white-and-male dominated Parliament, and which was supported by the predominantly male leadership. In the case of Lavell v. A.G. Canada, [1974] 1349, Jeanette Corbiere Lavell argued that section 12(1)(b) violated the guarantee of equality before the law with no discrimination on account of sex that was found in section 1(b) of the Canadian Bill of Rights. Taking the same position was Yvonnne Bedard, another individual woman whose case was heard at the same time as Ms. Lavell's, a handful of women's organizations, the Native Council of Canada and the Anishnawbekwek of Ontario. Mr. Justice Laskin, in his dissenting reasons at page 1378, lists those ranged against the women, supporting the position of the Attorney-General of Canada: The Indian Association of Alberta, The Union of British Columbia Indian Chiefs, The Manitoba Indian Brotherhood Inc., The Union of New Brunswick Indians, The Indian Brotherhood of the Northwest Territories, The Union of Nova Scotia Indians, The Union of Ontario Indians, The Federation of Saskatchewan Indians, The Indian Association of Quebec, The Yukon Native Brotherhood, The National Indian Brotherhood (forerunner of The Assembly of First Nations), The Six Nations Band and The Treaty Voice of Alberta Association. We understand the funding for these interventions came from the Departments of Justice and Indian Affairs.[77]

6. The Legal History of Indian Sexual Equality

Indian women lost their legal bid for sexual equality in the Supreme Court of Canada in the Lavell case because there was no constitutional guarantee of sexual equality for women in Canada. The Supreme Court of Canada in Lavell, in fact, did not address the issue of sexual equality, nor the impact of the Bill of Rights on sex discrimination in the Indian Act. I think it is evident now that Jeanette Lavell not only challenged the patriarchal Indian Act, but also the patriarchal State. The Indian Act, in 1970, was drafted in male terms to empower male Indians, and disenfranchise Indian women. The whole design of the Indian Act was to establish a patriarchal system of laws to govern Indians and lands reserved for Indians.[78] Indian women were legislatively denied rights and privileges granted to Indian males under the Indian Act.[79] Section 12(1)(b), requiring Indian women to give up their Indian status for marrying white men, was, in my

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[77] *Eberts: 14.*

[78] *Marguerite E. Ritchie, Q.C., "Alice Through the Statutes" McGill Law Journal 21 (1975): 685; Professor Anne F. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace", The Canadian Yearbook of International Law (1982): 244. Professor Bayefsky not only found the Indian Act to be patrilineal, but also patrilocal, meaning women who married Indian men from other bands also lost their band membership. Women were required to join their husband's band, and were placed on his Band List.*

[79] *See Marguerite Ritchie, Q.C. at 703. R.S.C. 1970, c. I-6, ss. 11 and 12.*

view, a clear case of sex discrimination and legally the decision against Jeanette Lavell made little sense at the time.

At issue in the Lavell case was whether it was contrary to the Canadian Bill of Rights to discriminate against Indian women on the basis of sex in the federal Indian Act at section 12(1)(b). Mrs. Lavell claimed discrimination based on sex because Indian men not only did not lose their status for marrying a non-Indian, but their wives were given the status of "registered Indians". The court did not address the issue of sexual equality, but rather found Mrs. Lavell to be in the same class as other Canadian married women[80]. Judge Grossberg of the County Court found Mrs. Lavell was treated the same as all Canadian married women, and, therefore, he concluded there was no discrimination. He found no discrimination between Mrs. Lavell and other Canadian married women. To support his finding, Judge Grossberg quoted from the Report of the Royal Commission on the Status of women[81] which stated that Indian men and women "should enjoy the same rights and privileges in matters of marriage and property as other Canadians."[82] The judge failed to note that paragraph 59 of the same Report called for the amendment of s. 12(1)(b) of the Indian Act to allow Indian women to retain their Indian status and band membership upon marriage to a non-Indian and transmit her status to her children.[83] Mrs. Lavell lost her case in the County Court.

At the Federal Court of Appeal,[84] s. 12(1)(b) was declared inoperative as offending the Canadian Bill of Rights because the section discriminated against Indian women based on sex. The court held that Indian women were discriminated against when they married non-Indians, and when they married Indian men from different Bands.[85] Mrs. Lavell won her right to be reinstated to her Band List along with her children.

Upon Appeal to the Supreme Court of Canada,[86] the court disregarded the issue of sexual equality and reversed the decision of the Federal Court of Appeal, thereby restoring the decision of the County Court. The Canadian Bill of Rights, in 1973, was riot a constitutional instrument but stood on the books as a statute equal to other federal statutes. In coming to a conclusion in the Lavell case, the Supreme Court of Canada concerned itself with whether or not Parliament had acted within its jurisdiction under s. 91(24) of the British North America Act, 1867 [Now called the Constitution Act, 1867] respecting Indians and Indian lands. The court decided that Parliament did have the authority to determine legislatively who was and who was not an "Indian". In fact the power is all-inclusive. If Parliament wished to declare 10,000 white women to be Indians

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[80] *Ibid. at 186*

[81] *para. 58 at 238 of the Report of the Royal Commission on the Status of Women*

[82] *Ibid.*

[83] *The Report of the Royal Commission on the Status of Women, para. 59, number 106 at 410.*

[84] *Re. Lavell and Attorney-General of Canada (1971), 22 D.L.R. (3d) 188 (F.C.A.).*

[85] *Ibid. at 191.*

[86] *Attorney-General of Canada v. Lavell, Isaac v. Bedard (1973), [1974] S.C.R. 1349.*

even though they had no Indian blood, language or culture, it could have done so. If Parliament wished to declare 10,000 "Indian" women to be "not Indians" for purposes of the Indian Act because they married non-Indians, it had that power. To deny this power to Parliament would be a denial of Parliamentary supremacy.[87] The court held that if Indian women were to be treated the same as Indian men upon interracial marriages, this must be done through plain statutory language in the Indian Act.[88]

Only Chief Justice Bora Laskin held the Indian Act gave a statutory preference to men which amounted to sex discrimination contrary to the Canadian Bill of Rights. He held that s. 12(1)(b) ought to be declared inoperative. Laskin, C.J. held that simply because the Indian Act was tied to the federal power under s. 91(24) of the Constitution Act, 1867, did not give Parliament the power to offend the Canadian Bill of Rights. "Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power."[89]

Eberts makes the following observation concerning the Lavell decision saying "the position taken in the majority judgment reflects a total failure to appreciate the differences in treatment between Indian women and Indian men."[90] She continues:

> At pages 1368 and 1369 of his reasons on behalf of the majority, Mr. Justice Ritchie reviews the history of the loss of Indian status by Indian women who marry non-Indians, concluding that 'it is thus apparent that the marital status of Indian women who marry non-Indians has been the same for at least one hundred years...'' The majority seems to view this longstanding exclusion of Indian women as a necessary and integral part of the exercise of the federal government jurisdiction over Indians and lands reserved for Indians conferred by section 91(24) of the Constitution Act, 1867, as this passage from page 1359 of its reasons indicates:
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> > In my opinion the exclusive legislative authority vested in parliament under s. 91(24) could not have been effectively exercised without enacting laws establishing the qualifications required to entitled persons to status as Indians and to the use and benefit of Crown 'lands reserved for Indians.' The legislation enacted to this end was, in my view, necessary for the implementation of the authority so vested in Parliament under the constitution.
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> The subordination of women is thus seen as essential to the very definition of the 'race' legislated for in the Indian Act, and beyond the reach of the Canadian Bill

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[87] *See Ian Greene, The Charter of Rights (Toronto: James Lorimer & Company, 1989) at 16. Peter W. Hogg, "Case Comment: The Canadian Bill of Rights - 'Equality Before the Law' - A.G. v. Lavell" The Canadian Bar Review 52 (1974) 263.*

[88] *[1974] S.C.R. 1360.*

[89] *Ibid. at 1389.*

[90] *Eberts: 15.*

of Rights as interpreted by the majority. The majority sees the Drybones decision as ruling inoperative an Indian Act section 'that could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to a racial group (emphasis added). On the other hand, continues Justice Ritchie at page 1372, 'no such inequality of treatment between Indian men and women necessarily flows as a necessary result of the application of section 12(1)(b) of the Indian Act.' Here, the majority clearly states that it will not apply Drybones to sex discrimination because sex discrimination is not race discrimination. Thus, at two different stages of the Lavell decision, the County Court and the Supreme Court, we see a serious inability to grasp and grapple with the nature of multiple disadvantage.[91]

Eberts argues that it is the dissenting reasoning by C.J. Bora Laskin which is likely to prevail in a Charter case arguing sex discrimination against Indian women today. In his reasoning, Laskin C.J. analyzed the interplay of sex and race underlying the discrimination against Jeannette Lavell in Canadian law. The Chief Justice elaborated:

> The gist of the judgment [in Drybones] lay in the legal disability imposed upon a person by reason of his race when other persons were under no similar restraint. If for the words 'on account of race' there are substituted the words 'on account of sex' the result must surely be the same where a federal enactment imposes disabilities or prescribes disqualifications for members of the female sex which are not imposed upon members of the male sex in the same circumstances.
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> It is said, however, that although this may be so as between males and females in general, it does not follow where the distinction on the basis of sex is limited as here to members of the Indian race. This, it is said further, does not offend the guarantee of 'equality before the law' upon which the Drybones case proceeded ...
>
> It appears to me that the contention that a differentiation on the basis of sex is not offensive to the Canadian Bill of Rights where that differentiation operates only among Indians under the Indian Act is one that compounds racial inequality even beyond the point that the Drybones case found unacceptable. In any event, taking the Indian Act as it stands, as a law of Canada whose various provisions fall to be assessed under the Canadian Bill of Rights, I am unable to appreciate upon what basis the command of the Canadian Bill of Rights, that laws of Canada shall operate without discrimination by reason of sex, can be ignored in the operation of the Indian Act.
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> Section 12(1)(b) effects a statutory excommunication of Indian women from this society but not of Indian men. Indeed, as was pointed out by

[91] *Eberts: 15.*

> counsel for the Native Council of Canada, the effect of ss. 11 and 12(1)(b) is to excommunicate the children of a union of an Indian woman with a non-Indian. There is also the invidious distinction, invidious at least in the light of the Canadian Bill of Rights, that the Indian Act creates between brothers and sisters who are Indians and who respectively marry non-Indians. The statutory banishment directed by s. 12(1)(b) is not qualified by the provision in s. 109(2) for a governmental order declaring an Indian woman who has married a non-Indian to be enfranchised. Such an order is not automatic and no such order was made in relation to Mrs. Bedard; but when made the woman affected is, by s. 110, deemed not to be an Indian within the Indian Act or any other statute or law. It is, if anything, an additional legal instrument of separation of an Indian woman from her native society and from her kin, a separation to which no Indian man who marries a non-Indian is exposed.

Finding Indian women to be "similarly situated" with other Canadian married women, the Supreme Court of Canada found sexual equality was not even an issue in the Lavell case. The key to finding discrimination based on sex would have meant finding Indian women to be "similarly situated" with Indian men. As David Cole has argued, "the law of sex discrimination to a significant extent requires conformity: working from standards set by men, sex discrimination law demands that women present themselves as 'similarly situated' to men before they can be considered worthy of equal treatment."[92] This kind of thinking and the "similarly situated test" went the way of the dinosaur in the Andrews decision of the Supreme Court of Canada.

The political struggle by Indian women for sexual equality began with Jeanette Lavell's loss in the County Court. It is difficult to imagine now, in 1991, what it was like in 1970 for some 10,000 Indian women to await the outcome of the Lavell decision. Each of these women had married outside their race; each had lost her status; and many were raising their children off Indian reserves. We know now that at least 70,000 lives depended upon the outcome of the Lavell decision. There were very few Indian families which would not be directly affected by the Lavell case. Everyone had a mother, aunt, sister or daughter whose life was touched by s. 12(1)(b) of the Indian Act. Every Indian Band[93] was affected because each had women who were removed from their Band list for marrying outside their race. When this young woman, Jeanette Lavell, went to court in the County District of York, she changed Indian male/female relationships across the country. She created a controversy which even today has not died down.

International pressure, constitutional change in Canada, and this country's human rights activities in the international sphere awoke a new consciousness among cabinet Ministers for sexual equality in 1981. Canada became a party to the United Nations

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[92] *DavidCole, "Strategies of Difference: Litigating for Women's Rights in a Man's World" Law and Inequality, 1:II (1984): 33 at 34-35.*

[93] *An Indian Band is a creature of the Indian Act and it refers to a community of people for whose sole use some land has been set aside under the Indian Act or under treaty.*

Convention on the Elimination of All Forms of Discrimination Against Women[94] in December, 1981. In 1982, the Constitution Act became law, and s. 15, which was to come into force on April 15, 1985, added considerable impetus to end sex discrimination against Indian women. It was becoming increasingly clear that sex discrimination against Indian women was a blemish upon Canada's international reputation.[95]

Whereas the Canadian state had actually solicited the support of Indian bands and organizations against Lavell in the early 1970s, it now needed their support for amendments to the Indian Act to end sex discrimination in 1982. The Liberal government, in the 1980s, actually awarded a few hundred thousand dollars a year to the National Indian Brotherhood and its affiliates to design amendments to the Indian Act.[96] No funds were made available to either the National Committee on Indian Rights for Indian Women, nor the Native Women's Association of Canada because both organizations had non-status Indian members.

Funds originated from the Department of Indian and Northern Affairs, and that Department would only fund all-Indian groups. Women who had lost their status were not considered to be "Indians", and were not fundable. Because the women were no longer Indians, they could not be consulted on amendments to the Indian Act as far as the Government was concerned. This meant the Department and its Minister had to consult male Indians on amendments to the Indian Act designed to end sex discrimination against female Indians.

In attempting to bring the Indian male leadership on side to amend the Indian Act, the Government decided to give the Chiefs what they had been asking for during the 1970s - a study on Indian self government. The Government of Canada gave a reference on Indian self government to the Standing Committee on Indian Affairs and Northern Development.[97] The reference given to the Committee by the Minister of Indian Affairs through the House of Commons had one significant rider or qualification. Before the self government study could be conducted, the Standing Committee was asked to study the issue of Indian women and the Indian Act.[98]

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[94] *Canada, House of Commons, Debates (10 December 1981) 13912.*

[95] *Katharine Dunkley, 23.*
The Minister of Indian Affairs, the Honourable John Munro, appearing before the Sub-committee [on Indian Women and the Indian Act in 1982], stated the government's commitment to end discrimination, but only in full consultation with Indian people and others. He cited the pressure of the Charter of Rights and Freedoms and the international embarrassment arising from the Lovelace case. He opposed the linking of the issue to the question of band government.
Canada, House of Commons, Sub-committee on Indian Women and the Indian Act, Minutes of Proceedings and Evidence, 1st Session, 32nd Parliament, 8 September 1982, 1:19.

[96] *Information available from the Department of Indian and Northern Affairs, Ottawa K1A 0H4.*

[97] *This is the period prior to Parliamentary Reform when Committees needed a government reference to conduct a study. In 1991, the Committees have more power to determine the subject matter of their own studies.*

[98] *Order of Reference to the Standing Committee on Indian Affairs and Northern Development, Wednesday 4 August 1982, House of Commons, Debates, p. 20014.*

It was in the hearings before the Sub-committee on Indian Women and the Indian Act where the struggle between individual [women's] rights were seen to clash with collective rights of First Nations. For example, while the Assembly of First Nations agreed that sex discrimination must end, it also took the position that reinstatement and citizenship in the First Nations was a collective right. The Native Council of Canada agreed with the Assembly of First Nations and said interim measures should be taken respecting sex discrimination while studies continued on amendments to the whole Indian Act.[99] The Native Women's Association of Canada, which had now replaced the National Committee on Indian Rights for Indian Women, said it was not willing to wait for Indian self-government before amendments could be brought ending discrimination. The women wanted reinstatement and the repeal of s. 12(1)(b) immediately. In general, the Report of the Sub-Committee on Indian Women and the Indian Act favoured ending sex discrimination by legislative amendment.[100] It also recommended reinstatement of Indian women who lost status under s. 12(1)(b), along with first generation children. In summing up the problem faced by the State, Library of Parliament Researcher assigned to the Indian Affairs Parliamentary Committee, Kate Dunkley, wrote:

> The current Indian Act is clearly unacceptable; however, any new measures must take into account both individual and collective rights. New standards must guarantee the right of an individual not to be discriminated against on the basis of sex, and in particular, the right of an individual who belongs to a minority not to be denied access to her culture, religion and language in community with other members of their group without reasonable and objective justification. The recognition of the right of access to a minority culture presupposes the right of survival of that culture.[101]

In the dying days of the 1984 Parliament, the Liberal Government responded to the Standing Committee Report on Indian Women and the Indian Act by bringing in legislative amendments to end sex discrimination in the Indian Act in the form of Bill C-47.[102] The Bill repealed s. 12(1) (b), reinstated Indian women who lost status and membership, and gave status and membership to the first generation children of these women. This was the first comprehensive, legislative effort by the Canadian government to finally end sex discrimination. It would be safe to assume that this bill appealed to women voters heading into the federal election because it showed some semblance of

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[99] *Canada, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, Report of the Sub-committee on Indian Women and the Indian Act, 20 September 1982, 58:30. The Native Council of Canada suggested that the Governor in Council refuse to issue any further enfranchisement orders under s. 109(2). One of the affiliates of the N.C.C. suggested:*
[O]ur association urges the committee and the government not to act prematurely when making changes to the Indian Act that presuppose the outcome of constitutional discussions. Any legislative change must go hand in hand with constitutional reform and should be preceded by the necessary or desired changes in the Constitution. 58 : 27

[100] *Canada, House of Commons, First Report of the Sub-committee on Indian Women and the Indian Act, in Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 20 September 1982, 58.*

[101] *Katharine Dunkley, Indian Women and the Indian Act, Law and Government Division, Library of Parliament, November, 1982, 1 at 10.*

[102] ****cite****

a desire to grant sexual equality to one of the smallest minorities in Canada. However, the bill died on the Order Paper in the Senate when several Senators refused to give unanimous consent for passage.[103] The Liberal government was voted out of office in 1984, having tried, but failed to end sex discrimination against Indian women.

Ten months into its term, the new Tory Government in June 1985, introduced Bill C-31[104] to end sex discrimination against Indian women. The Minister responsible for the Bill, the Honourable David Crombie, was among the Tory Ministers of 1979 to meet with the Indian Women Marchers. He had given his commitment at that time as Health Minister to do all in his power to end sex discrimination against Indian women. Five years later, he designed and brought in Bill C-31. Under the legislation, all women who lost their status under s. 12(1)(b) were to be entitled to be reinstated to status and band membership, along with their first generation children. To resolve some of the controversy around Indian self-government, Bill C-31 increased the powers of Indian Band Councils to pass Band Membership Codes in future. The voting age for Band Councils was lowered from 21 to 18, and Councils were given greater authority over the control of their reserve lands. The Bill was passed June 25, 1985 and its effective date was April 15, 1985, the date section 15 of the Charter became effective in Canada.

a) Jurisdiction and Structure: Aboriginal Justice System

Jurisdiction, without doubt, is where the battle will be fought and it will determine whether or not we will have a parallel justice system within Aboriginal communities. The decolonization of the criminal justice system within Aboriginal communities will be a long, slow and painful process, which will be like watching paint peel off the walls. With the defeat of the Charlottetown Accord, this immediate period will be a time for navel-gazing and soul searching by Governments. Legal theorists to date have not written anything impressive about Native justice, and few, if any, have proposed any worthwhile changes or reforms that do not smack of paternalism and colonialism. There has been some suggestion that Aboriginal people be allowed to administer their own "by-"laws. And there's a sense that these aren't real laws. Real laws include the Criminal Code. When we look at the jurisdiction of an Aboriginal Justice system, some Aboriginal people might take offence to being compelled to administer the Criminal Code in the community. Others might take offence to not being considered responsible enough to administer the Code.

With the death of the Charlottetown Agreement, we are back where we were before...in a state of confusion. The Law Reform Commission was asked by the Minister of Justice to examine Natives and criminal justice administration. With respect to the Canadian Charter of Rights and Freedoms and its application to an Aboriginal justice system, the LRC said the matter should be referred to the Supreme Court of Canada! It suggested

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[103] ***cite***

[104] *R.S., c. I-6 as amended c. 10 (2nd Supp.); 1974-75-76, c. 48; 1978-79, c. 11; 1980-81-82-83, cc. 47, 110; 1985, c. 27. See "Definition and Registration of Indians", ss. 5-17. The enfranchisement provisions were repealed. Provisions for reinstatement of certain categories of Indians were included.*

that Aboriginal peoples may not need the same legal rights other Canadians enjoy e.g. sections 7-14 of the Charter. There was a suggestion that Aboriginal peoples may not need a "right to counsel" and may not need a "right to silence". Report 34 is likely to go the way of the Charlottetown Agreement if Governments accept recommendations which deprive Aboriginal peoples of legal rights guaranteed to other Canadians. Personally, I found the Report confusing, misleading, and without imagination.

If we are to learn something from the death of the Charlottetown Agreement, it should be that there is a requirement to respect individual rights. There is a need to accommodate group rights within the collective, including the rights of women, of children, and of those among us who come into conflict with our collective social values and social harmony. Women, youth and elders must be accommodated within the Aboriginal justice system. Their advice must be sought and followed. They must have a voice in determining the kind of criminal justice administration which we want and need within our communities.

The jurisdiction of a parallel Aboriginal justice system will necessarily be a blend of federal, provincial and tribal laws. In the two tier government system now in place in Canada, the federal government passes the criminal laws and the provinces administer those laws. I think we have to recognize that we have a collective foggy memory of Aboriginal customary law, and even among laws which can be recalled, we may not want them put into effect. Do we want to cut off the ear of a woman who commits adultery? Why the ear? Punishment by physical mutilation may not be an acceptable form of punishment today. Nevertheless the jurisdiction is likely to be a mix of the Code and customary law, and I will later say, with the Canadian Charter thrown in for the benefit of-those who disturb our social harmony.

There needs to be a holistic approach to jurisdiction and structure, and it will necessarily mean defining the whole range of powers of the Aboriginal state. If you looked at Nunavut, for example, it would not make sense to define jurisdiction and structure as having the ability to pass the laws and administer the laws, without also both enforcing the law and punishing offenders. What would be the sense of fly-in justice, or deporting prisoners to southern Canada from Nunavut? That is what I mean by holistic. It means prevention, enforcement, administration, punishment and rehabilitation, as well as community healing.

Among the First Nations there is a need to define the meaning of "nation". A nation is not an Indian Band as defined in the Indian Act. Yet there will be those--likely many--who will resist the restructuring of Aboriginal nations because it means some Chiefs will be out of a job, or will have a new and less powerful job. As Ovide Mercredi said, there are Regional Chiefs and then there are "powerful Chiefs". The need for definition is practical as well as necessary. Today there are over 2,000 Native communities in Canada and 566 Indian Bands. Yet there are only 52 aboriginal languages. If, as has been suggested by the Aboriginal Languages Steering Committee, each nation has one language, then the definition of Aboriginal nations should not be difficult.

There is a need to define the meaning of "crime" and "punishment" within a cultural context. This debate must involve women. Over the centuries, the Criminal Code evolved mainly as a tool to control men and men's crimes with little consideration for women, as criminals or victims. This debate will involve a consideration of culture, tradition, language and the roles of men, women and children. Is incest a crime? Is incest deserving of punishment? Is homosexual paedophilia a crime? What is the role of women within the Aboriginal community? Do we want to make and administer criminal laws and send our, mainly, men to foreign prisons? What is to be done about staffing prisons outside the Aboriginal communities with Aboriginal prison guards?

The young people need to be involved in defining "crime" and "punishment" and they need some forum for getting control of their lives. The lesson we learn from Canadian society is that leaving children out of the criminal justice system is not the answer. This is true partly because there are those who will exploit the young and drive them to lives of crime for which there is no punishment. On the other hand, children and young offenders also need a supportive environment if it is not found in the home. Like education, that responsibility rightly rests with parents.

Institutionalization is not the answer, although the death penalty may be appropriate in certain cases. Incest, child sexual abuse, physical violence against women and children, rape, homosexual paedophilia, and domestic violence are likely to be the crimes of most concern to women, youth and children, and elders. The nature of the relationship between criminal and victim and the crime are such that institutionalization will be a second choice after simply asking the perpetrator to stop the criminal behaviour. Children actually want a loving relationship with their parent, and prefer it to abandonment or the imprisonment of a parent. The Aboriginal State, however, has a duty to stop the abusive behaviour.

Enforcement within the community is an Aboriginal responsibility. No one wants Chiefs and Councils to have "goon squads" in the form of Aboriginal, usually male, police forces. There is some question as to whether it is advisable to have police come from the same community because there is room for favouritism and selective enforcement. There is a question of balance between male and female police. There is also the consideration of how many police are too many. Do we want the best police enforcement in the world, or do we want to live in harmonious communities?

b) Legal Rights

The legal rights[105] contained in the Canadian Charter will apply to parallel Aboriginal justice systems in the absence of Aboriginal Charters which guarantee individual rights within Aboriginal collectivities. Without setting out the legal and constitutional arguments, I accept that the inherent right to self government is contained in section 35(1) of the Constitution Act, 1982 as an existing aboriginal and treaty right. This right predates Confederation and exists in and of itself without the need for further entrenchment. It is an unfettered right to the extent that it has not been infringed, abridged or regulated by law. Nevertheless, in the current constitutional framework, Indian governments today receive their authority from federal legislation, namely, the Indian Act. This law sets out all the powers which may be exercised by Chiefs and Band Councils, and governs the lives of Indians from birth to the grave. It is in this context which parallel aboriginal justice systems will be born. They will be creatures of federal and provincial law, and as such, will be subject to the Canadian Charter of Rights and Freedoms.

The Canadian Charter will apply because Aboriginal women through their associations have adopted a strong position on this point. They have lobbied governments and the Canadian public, and they have succeeded in their argument that it is inconceivable that only Aboriginal peoples should be deprived of Charter rights. For those who have said Aboriginal women should abandon the Charter because it is no good anyway, I know

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[105] *The legal rights contained in the Canadian Charter are:*

7. *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

8. *Everyone has the right to be secure against unreasonable search and seizure.*

9. *Everyone has the right not to be arbitrarily detained or imprisoned.*

10. *Everyone has the right on arrest or detention*
    - *a) to be informed promptly of the reasons therefore;*
    - *b) to retain and instruct counsel without delay and to be informed of that right; and*
    - *c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.*

11 *Any person charged with an offence has the right*
    - *a) to be informed without unreasonable delay of the specific offence;*
    - *b) to be tried within a reasonable time;*
    - *c) not to be compelled to be a witness in proceedings against that person in respect of the offence;*
    - *d) to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal;*
    - *e) not to be denied reasonable bail without just cause;*
    - *f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;*
    - *g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;*
    - *h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried again; and*
    - *i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.*

12. *Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.*

13. *A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incrimate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.*

14. *A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.*

the reply has been, fine, abolish the Charter for all Canadians. Are Canadians willing to abandon their individual rights and trust governments not to abridge their rights willy-nilly. It is a foregone conclusion that unless Aboriginal women and their associations are willing to throw their individual rights out the window, the Charter will apply. If it does not apply, a stringent justification will be required under section 1.[106]

Let us suppose the federal and provincial governments agree with Tribe or Nation "X" that it may establish a parallel justice system to which the Charter does not apply. What kind of justification would be required under the Oakes test? It has been suggested that the Supreme Court of Canada has adopted a less stringent and a two-tier test for section 1. The less stringent test is reserved for those cases involving socio-economic issues where there are competing claims by different groups in society. The more stringent test may be used where the State is the antagonist against an individual[107]. I would argue that neither of these tests would be appropriate in a situation where the group rights of women and children are impaired to the point of obliteration. Depriving Aboriginal individuals of all legal rights under an Aboriginal justice system which likely will administer federal and provincial laws e.g. the Code will not meet the "minimal impairment" test. Nor will it meet the proportionality test. What is the choice here? Maximum collective rights versus minimum individual rights? To establish a parallel Aboriginal justice system in a Charter vacuum is taking nonsense too far. Who can conceive of such a world? Mad [wo]men!

The Oakes test requires governments federally and provincially to adopt laws which impair Charter rights as little as possible. Courts are also required to keep in mind the objective of Government action. What would be the objective of Canada in seeking to deprive individual Aboriginal people of all of their legal rights under the Charter? To respect Aboriginal collective rights? If the Charlottetown Accord has taught us anything, it is that governments have no respect for collective rights of Aboriginal peoples. What was the purpose in imposing peace, order and good government on governments acting under the inherent right to self government?

The objectives of Aboriginal peoples and the objectives of governments in establishing a parallel justice system are likely to be at odds. It is conceivable that governments will want Aboriginal peoples to administer Canadian laws like the Criminal Code. The Oka Crisis made it abundantly clear that the Rule of Law must prevail, and that Rule is White Rule. Although the Criminal Code makes some allowance for protecting property with arms, this went by the wayside in dealing with armed Mohawks at the Kahnesatake barricades and on the Mercier Bridge. While the Mohawks argued sovereignty and bargained to have the Code not apply, Governments argued stringently and with force that the Criminal Code applied to Indians on Indian lands, sovereignty aside. Sovereignty is never an issue. The establishment of a parallel Aboriginal justice system in Canada is going to come with a big price.

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[106] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[107] *Irvin Toy*, [1989] 1 S.C.R. 927, 993.

Not only the Charter will apply to parallel Aboriginal justice systems, but also the Criminal Code. What will be left to Aboriginal governments is what is left to Provincial governments and that is the right to administer the law. This may be accompanied by a right to establish the machinery of justice administration e.g. police, courts, jails(?), probation(?). Like Provinces, Aboriginal governments can add their "laws" to the list of laws to be enforced. One woman has already asked: Does this mean we will have thousands of police in Aboriginal communities enforcing the law(s)? Jurisdiction, in this context, would seem to be the least negotiable item. Perhaps the battlelines will come mainly over structure and process.

It is over structure and process where conflict is most likely between male-dominated Indian governments and women's groups locally, regionally and nationally. There is an assumption deeply engrained within the federal public service and among Ministers that once the men are at the table that is sufficient to negotiate. It is not sufficient or acceptable. The victimization of Aboriginal women and children so rampant within Native communities today at the hands of Aboriginal men will not be tolerated within the Aboriginal criminal justice system. Nor is it acceptable to simply consult Aboriginal male elders and expect Aboriginal women to fall in line, setting aside the desire to respect elders.

One of the most important struggles by Aboriginal women in the 1990s will be their resistance to the establishment of parallel Aboriginal justice systems which do not involve them equally in planning, design and execution. Aboriginal women already have their bodies on the line, and they are being beaten in incredible numbers by Aboriginal men in their homes and in their communities. This will not spill into the criminal justice system without female war cries. The choice is clear for governments: either involve Aboriginal women, or let the courts decide on the meaning of equality in this participatory democracy. It is participation which has been demanded by the Native Women's Association of Canada. It is participation which has been denied. That case is on its way to the Supreme Court of Canada, if not the Privy Council.

In conclusion, the basic principles and legal rights protected in the Charter will apply with full force to any parallel Aboriginal justice system. There is no justification possible under the current constitutional framework. What Aboriginal women have shown over the past 18 months is their preparedness to mount a full-scale assault against anyone wishing to deny individual rights and establish totalitarian regimes. To be an Aboriginal woman in Canada today is a disgrace to this nation. I would not push the women to the wall on aboriginal justice.

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