Native Women's Association of Canada

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1. Editorial

by Sharon D. McIvor, LL.B., LL.M. Candidate

Why have an Aboriginal Women's Law Journal? Why now?

More than a year ago the Native Women's Association of Canada called upon students in Canada's law students to submit articles on legal issues of concern to Aboriginal Women. Thirteen articles were submitted and five were selected for publication in this premiere edition of the Aboriginal Women's Law Journal.

There were several purposes for starting a law journal devoted to Aboriginal women's legal concerns. First, we wanted to encourage law students to begin the study of legal issues of concern to Aboriginal women; second, we wished to provide a forum for publication of articles on legal issues of concern to Aboriginal women; third, we want to protest the lack of concern for Aboriginal women's legal issues in other law journals in Canada; fourth, we were concerned that the "gating" of these kinds of articles has been successfully denying Aboriginal women a place to air their legal concerns; and finally, we want to stimulate all persons inside the legal profession from law students to judges to realize we have specific interests which legitimately deserve "legal thought".

The authors of these Articles (except myself) each received a prize of $1,000. from the Justice Project, Native Women's Association of Canada, for being selected for publication. We extend our congratulations and invite law students to, in future, continue to submit their articles for consideration and publication.

2. Why The Anunga Rules From Australia Ought To Be Adopted Into Canada's Criminal Justice System

By Bradley W. Enge

a) Introduction

The present situation in Canada with regards to the number of Aboriginal peoples in the prison system is of serious concern to all. This one ethnic group makes up approximately 4% - 5% of the general population in Alberta.[1] Native people, however, comprise a disproportionably high percentage of the prison population. This is true for men, women and young offenders.

The *Cawsey Task Force*[2] examined the current admission rates/number, incarceration rates/numbers, and a host of other related data in regards to Aboriginal groups in comparison to the non-native population in March, 1991.[3] Statistics for the year 1989 revealed that the prison population for men consisted of 31.1% Aboriginal; for women, 44.6%; and, for young offenders, 38.5%.[4]

In Australia, a similar pattern has emerged. The Aborigines who comprise approximately 1.46 per cent of the general population,[5]

> *...are at least ten times more likely to be gaoled than non-Aborigines according to a recent paper written for the Royal Commission Into Aboriginal Deaths In Custody...An almost simultaneous publication by the Australian Institute of Criminology suggests that 20 times is nearer the mark...*[6]

> *The situation of Aboriginal juveniles seems to be even worse, though statistical analysis is less comprehensive than for adult offenders. For example, in the Northern Territory for 1983-1984 44.7 per cent of juvenile court appearances were made by Aborigines, and 14.2 per cent in Western Australia...* [7]

(no data was available regarding female incarceration-rates)

In 1976, the nine *Anunga Rules*[8] were instituted by the Northern Territory Supreme Court of Australia in an attempt to address some of the reasons for the extremely high number of Aboriginal people in the prison system.

The purpose of this essay is to persuade the reader to agree with the suggestions made by the *Cawsey Task Force* and many others before it,[9] that the *Anunga Rules*[10] from Australia be implemented here in Canada. In the following pages, I propose to put forward arguments in favour of adopting these *Rules*[11] which would lend additional protection to Natives who find themselves in conflict with the law. I would like to stress at this point that there are many factors contributing to the large number of Native inmates in the Canadian penal system. The causes of this phenomena are multi-facetted and beyond the scope of this paper. I will focus exclusively on the interaction between the police and Native suspects because it is at this juncture that Aboriginal people first become enmeshed in the system which seems to lead inexorably to interrogation, trial and eventual punishment.

I would also like to note that many of the provisions enunciated in the *Anunga*[12] case are included in police arrest and detention procedure manuals already, as general principles which apply to all persons in conflict with the law. What has not been understood in the past are how these general guidelines are best adapted and applied when dealing with Native individuals with linguistic and cultural differences from society at large.

1. What Are The Anunga Rules?[13]

In 1976, Forster J. (as he then was) of the Northern Territory Supreme Court of Australia, enunciated these landmark rules after several cases were dealt with concerning the admissibility of written confessions obtained by the police from Aboriginal criminal suspects.[14] Nine guidelines were devised to protect the rights of Native detainees and assist police when engaged in interrogating Aboriginal suspects held in police custody. Fluency in English and cultural tendencies are the triggers which kickstart the provisions laid out in Justice Forster's decision. Taken as a group, these *Rules*[15] were designed to address the disproportionately high number of Natives in the prison system by ensuring that fundamental rights are not abrogated either voluntarily or as a result of duress.

It is important to note that if the guidelines are not followed, confessional evidence may be jeopardized in any future criminal proceedings that might result. For example, in *Gudabi v. R.,*[16] the court held that any confession obtained where the guidelines have not been complied with may lead to exclusion in the exercise of the court's discretion. [emphasis in original]
The first rule is as follows:

b) Rule # 1.

> *When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilized whenever necessary to ensure complete and mutual understanding.*[17]

In the following analysis, arguments for adopting this rule will focus on three areas: how language shapes an individuals worldview; the official languages of Canada and Aboriginal Peoples; and how pre-trial interpreters can enhance communications between police and Native suspects struggling with language barriers to understanding one another in real life, adversarial situations.

1. How Language Shapes An Individual's Worldview.

Communication is of prime importance to the police and to all societies in general. Where communication takes on added importance is when one of the participants is facing the potential of being sent to prison based on what s/he says to the police. Language, however, does not always act to facilitate a mutual understanding of one another.

At the turn of the century a prominent anthropologist, von Humboldt, hypothesized that the unique design of each language encoded a distinctive view of the world.[18] Another anthropologist, Edward Sapir argued that,

> *the worlds in which different societies live are distinctive worlds, not merely the same world with different labels attached. He advanced the view that language patterns are centrally important in structuring these distinct cultural worlds.*[19]

A student of Sapir's, Benjamin Lee Whorf took this hypothesis a step further when he applied it in some of his own work in 1956. Whorl argued:

> *that the European languages embody not only ways of speaking about the world, but also embody a model of that world. Contrasting "Standard Average European" with Hopi [Indian], he sought to show how our ideas of "thingness" are shaped by the grammatical treatment of nouns, and how our model of time as past, present, and future-reflects the tense system of our language structure. Hopi concepts of time and space, as built into their language structure, represent a different model of the universe: a model Whorl argues, that should make the theory of relativity more intuitively meaningful to a Hopi than to a European.*[20] *[emphasis in original].*

The theory goes to show that each language system has built-in distortions at the unconscious and preperceptual levels.[21] For example, if I describe the following person to you: male, short, slim and likes reading poetry. Of the two alternative choices, who do you think most likely matches the characteristics just described, an Indian, or an Ivy League classics professor? Another example, of the distinctive use of language is the way in which Aboriginals and Europeans perceive time. The former think of time in a cyclical fashion, whereas the latter think of time in linear form:

> *In contrast to those in Western cultures, Native Americans conceive of time not in a lineal; but cyclical form. Western time concepts include a beginning and an end; American Indians understand time as an eternally recurring cycle of events and years. Some Indian languages lack terms for the past and the future; everything is resting in the present.*[22]

The theory also explains the differences we have in regards to non-linguistic types of communication such as body language. For a period of time, culturally ignorant probation officers, police officers, doctors, lawyers, prosecutors, and judges (as well as many others) have misinterpreted the distinct code of behaviour demonstrated by Aboriginals.

An Assistant Crown Attorney from northern Ontario documented his 24 years of experience he spent amongst the Cree and Ojibway Nations in a book entitled, *Dancing With a Ghost: Exploring Indian Reality*[23]. The contents illustrate the immense gulf that separates Native from other Canadian cultures. Language acts to reinforce and entrench the differences between these cultures.

In summary, Canada's First Natives have found it difficult to communicate effectively when embroiled in the justice system in part because of the way language influences their view of the world - a view quite distinctive from the one held by society at large.

Linguistic anthropologists, having studied the distinctiveness of languages and the way in which different cultures see and describe the same things, emphasize how unique our worldviews are, and how difficult understanding one another really is.

2. The Official Languages Of Canada.[24]

In addition to the difficulties of communicating due to cultural factors, many Native suspects are further handicapped by a poor or incomplete understanding of the official languages of Canada.[25] The first *Anunga Rule*[26] clearly recognizes the fact that a linguistic gap exists between the two distinct cultures in Australia. In Canada, a similar gap exists between the two official languages and the 53 different Aboriginal languages.[27] To complicate the matter, dialects of the same Aboriginal languages are distinct from one another as well.[28] The language of choice for many Aboriginal Canadians is either English or French. There are pockets of Natives across this country, however, who use traditional languages as their primary, and in some instances, only language. Natives belonging to older generations are more apt to be unfamiliar with English or French and more comfortable with one of the Athabascan or Algonquian classes of languages.[29] In addition, as Aboriginal communities assert their right to self-government and regain control over educational institutions, there will undoubtedly be moves toward making Native languages an integral part of the new curriculum. As a result, the need for interpreters and translators will likely increase as Natives fight to preserve their languages and cultures from further extinction.

The Canadian legal system at present does make some provision for interpreters during the criminal trial process for accused persons. The provisions of the Charter[30] confers upon "any party or witness" the right to an interpreter:

s.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.

This is one of the "legal rights" every one enjoys with respect to proceedings conducted by the agents of the state. This particular right addresses the issue of accessing an interpreter for anyone who does not understand the language in which the legal proceedings are taking place. A similar right exists under section 2(g) of the *Canadian Bill of Rights*:[31]

s.2 - Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to...

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

One Canadian jurisdiction has dealt with the issue of language head-on and has been quite innovative in its approach. The majority of the people living in the N.W.T. are Native. In recognition of the language gap between Aboriginals and the legal system, the Legislative Assembly amended their *Official Languages Act*[32] in April 1990 allowing unilingual jurors to perform jury duties.

s.13(2) - Chipewyan, Cree, Dogrib, Gwich'in, Inuktitut and Slavey may be used by any person in any court established by the Commissioner acting by and with the advice and consent of the Legislative Assembly. [emphasis mine].

Subsequently, the *Jury Act*[33] was amended in order to accommodate these new provisions. A federally funded Legal Interpreters Program was then established in order to educate and train people for facilitating this process.[34] The interpreter/translators have found that legal concepts are not easily transferred from one language to another due to the different worldview each language seeks to describe. Some Aboriginal languages, for example do not have a word describing the term "guilty"[35] with all of its implications. Needless to say, there have been problems getting legal terms across to some who do not speak English or French.

The courts have also recognized the importance that language plays with regard to statements given by a suspect in the *R. v. Lapointe*[36] ruling. In this case, the trial judge found that the accused's statements were freely and voluntarily given. But since the accused experienced language difficulties, he ruled the statements inadmissible because he was not satisfied beyond a reasonable doubt that the statements were in fact and in law the accused's statement.[37] The Ontario Court of Appeal ordered a new trial:

> *...issues of accurate or inaccurate recording of the respondents' words, of unconscious or deliberate inaccuracy, editing or deliberate fabrication... are issues of authenticity and are not to be confused with issues of admissibility.*[38]

The courts have, therefore, recognized that some accused cannot express themselves well enough in the language they are undergoing interrogation in, and confessions made in those circumstances may be ruled inadmissible.

3. How Pre-Trial Interpreters Can Enhance Communication.

Despite the legal mechanisms now in place in Canadian law designed to address difficulties in communication, it remains important to adopt a canon similar to the first Anunga Rule.[39] To do so would help ensure that Native suspects understand as clearly and completely as possible, considering cultural and language barriers, what is and may happen to them.

A rule such as this would ensure that Aboriginals get interrogated in their own language. It would also help people who are partially fluent in an official language but more comfortable in a Native dialect, likewise ensuring that they have access to an interpreter.

In addition, such a rule would clarify that suspects are entitled to an interpreter beginning with their initial contact with police, as well as throughout the legal process. Because the law is unclear at the present time as to whether this right extends to the investigatory stages instead of only the hearing stage,[40] a new rule is needed to clearly establish the right to an interpreter at the outset. Such a concession would help make the criminal justice system a little bit fairer for the Native population now paying too high a price for living in a country they once called their own.

Should such a rule be adopted in Canada, the police would find themselves obligated to determine a suspect's level of competence in one of the official languages. This is not a simple task and one apt to be complicated by the adversarial nature of the police - suspect dichotomy. Police intent on apprehending someone they have reason to believe has broken the law, may not feel that it is in society's best interests to provide the suspect with assistance during questioning. It is crucial, therefore, that clear procedures be developed governing the steps police are to take when determining if a suspect is "as fluent in English as the average white man of English descent."[41] These procedures should indicate when police should be evaluating an Aboriginal's fluency level, how to do such an evaluation, and what steps to follow should an interpreter be required. In addition to having clear procedures to follow, police must also be provided with cross-cultural education to help them better under- stand the Native people. Strong and unequivocal support from senior officers for such procedures will also be imperative if the rank and file are to give them the importance they deserve.

c) Rule # 2.

When an Aboriginal is being interrogated it is desirable where practicable that a "prisoners friend" (who may also be interpreter) be present. The "prisoners friend" should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one these institutions who knows and is known by the Aboriginal. He may be a station owner, or a manager or overseer or an officer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported.[42]

Aboriginal people do not want to make trouble for the non-native authority figure and often fear the power of the whiteman. Often they are very submissive, polite, and obedient when confronted by a non- native police person. In many instances, Natives believe that if they are cooperative with the police and agree with what is put to them, they will be looked upon more favourably by the various players in the judiciary.

One of the greatest fears Natives have is incarceration. They will sometimes eagerly sign confessions without really understanding what it is they are signing in the hope that after doing so they will be released.

In addition, some aboriginals are intimidated by the mere sight of police officers, police cars, offices, police and court room procedures, and may plead guilty just to get the whole unpleasant experience over with as quickly as possible, regardless of the repercussions.

Being put on trial where the public is invited to watch the proceedings is contrary to Aboriginal cultural traditions. Rupert Ross stated, the accused was never singled out publicly to become an accused at all; no labelling took place.[43] There is a great deal of shame and embarrassment felt on the part of traditional Aboriginals when engaged in a conflict with the police, which acts to further encourage cooperation with the police in spite of the fact that this behaviour may not be in their own best interests. To reiterate, they lack the substantive understanding that most non-natives take for granted with respect to their Charter[44] rights. This, compounded by the desire to expedite dealings with the police because they are uncomfortable with the whole process, often leads Native people to "voluntarily" waive their rights. A "prisoners friend" can help by providing support in the form of knowledge and experience attained from the state sanctioned role they will be asked to render should the *Rules*[45] be adopted.

An important consideration is to ensure that it is the prisoner who gets to choose the friend, and not the police. The *Young Offenders Act*,[46] for example, that deals with the issue of obtaining statements from youths under the age of 18 years, requires the police officer to notify the offender of the choices s/he has with respect to who they would like to have present during the interrogation proceedings. A similar duty imposed on police officers when dealing with natives would not create a burden on the part of the police or the criminal justice system.

Another reason for adopting a Canadianized version of the second *Anunga*[47] guideline relates to the costs of acquiring legal counsel. Aboriginal people often fear that retaining a lawyer is going to cost a lot of money, money which they do not have. They simply cannot afford the expense. This serious misunderstanding about the Legal Aid system often results in Natives waiving their Charter rights more often then they should be due to financial considerations. Hence, section 24(2) of the Charter is sometimes not available to them when the time comes to argue for the exclusion of evidence. The burden rests upon the challenger (accused) to establish on a balance of probabilities that a right has been infringed. In cases like this, where a waiver of a right guaranteed under section 10(b) of the Charter has been waived, is pretty tough to do when the police undoubtedly have followed the correct procedure as outlined in the case, *R. v. Brydges*[48] where Lamer J. (as he then was), stated:

> *As part of the information component of s. 10(b) detainees must be informed as a matter of routine of tile existence and availability of the applicable systems of duty counsel and legal aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel.*

In summary, it will be a source of reassurance to the Aboriginal to know that a non-partisan individual will be made available to them should they find themselves under arrest or detention by the police.

Some cautionary steps need to be taken in selecting who is chosen to be a "prisoners friend." For instance, the detainee should be advised that s/he cannot select their best buddy because of the possibility that evidence relevant to the investigation may be destroyed at the request of the suspect. Another reason for the exercise of caution is the "prisoners friend" may be an unknown party to the offence under investigation. Thirdly, the person suspected of committing a crime may have no idea who would be knowledgeable about the criminal legal process and best able to offer assistance. Several solutions suggest themselves which would serve to answer the concerns of both police and detainee. A list of several local, well-known Natives with some advocacy training could be given to the suspect to choose from. Another alternative possible in urban centres might be an Aboriginal Legal Aid Office employing Native lawyers skilled in criminal trial procedures and Native languages.

d) Rule # 3.

Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms... Police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.[49]

1. Do Confessions Really Result In Imprisonment?

A recent study undertaken in an Australian prison, (where Aboriginals are over-represented), revealed that out of 147 people charged with indictable offences... confessional evidence was obtained from police interrogation in 96% of cases where a verdict of guilty was recorded.[50]

As it appears clear that confessions do result in convictions, it is important that Aboriginal suspects understand they need not incriminate themselves by answering questions regardless of whether they have indeed committed an offence, and regardless of a police officer's wishes. Here in Canada, a police officer upon the arrest or detention of a suspect or accused must inform the detainee of his/her right to counsel as per section 10(b) of the Charter. Not only that, s/he must read a police caution to the suspect which puts the person on notice that anything s/he says, may be recorded and given in evidence against them. There is a positive duty that rests with police to ensure the person understands the rights and cautions read to them. Having the assistance of a "prisoners friend" who is familiar with the language and culture, can have the detainee repeat in their own words the meaning of their rights and of the police warnings.

The common law in regards to the voluntariness of statements originated in 1763 when Nares J.,[51] stated:

> *Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit because it is presumed to flow from the strongest sense of guilt, and therefore it is admissible as proof of the crime to which it refers, but a confession forced from the mind by the flattery of hope, or by the torture of fear; comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.*[52]

Later a test for the admissibility of confessions in British common law was articulated by Lord Sumner in Ibrahim v. The King,[53] where he stated:

> *It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.*[54]

The *Ibrahim*[55] rule has become firmly entrenched in Canadian common law and more importantly is culturally biased against Natives. As proven above, some Aboriginal languages do not have a word in their vocabularies that describes the concept of guilt. Moreover, Natives, for cultural reasons, attempt to maintain a sense of peace and tranquillity within their respective communities. It is, therefore, non-traditional to deny a wrong-doing based on a mere technicality. Aboriginals are more inclined to accept responsibility for what others are saying about them and learn from that experience. If an individual falls into disfavour with his/her community members, they will often seek guidance from an Elder or another respected community member. Furthermore, Natives have lived under the constant "fear of prejudice" that is systemically pervasive throughout all facets of the judicial system, as well as the other institutions in this country, that the Ibrahim[56] rule alludes to. It is highly questionable whether any of the statements obtained from Natives could be labelled voluntary in the true sense of the word.

An important development occurred in Canadian jurisprudence in a 1956 decision dealing with the determining of the voluntariness of confessions. Rand I., stated in the *R. v. Fitton*[57] case:

> *...perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they played behind the admission, and to enable a court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.*[58]

These factors are extremely important from an Aboriginal perspective because such factors weigh heavily on the minds of the Native offender. They feel intimidated by their lack of understanding and their inability to communicate effectively. They will go along with many suggestions put to them by the officer because of their feelings of inferiority. The situation is exacerbated by the fact that Natives hope to be treated fairly by the police. They hope that they will be looked upon more favourably by the courts if the police communicate to the judge that the Native was cooperative throughout the investigation.

In conclusion, the confusion an Aboriginal detainee may experience when faced with a series of cautions and warnings is apt to lead to a confession. Added to this, language barriers, the native cultures' lack of concern with guilt, and a general predisposition to co-operate at the expense of self-interest, leads many Natives to incriminate themselves. A Canadianized version of this rule could address this problem by ensuring that Natives not be questioned (if at all) regardless of their willingness until after they have met with a "prisoners friend" or lawyer.

e) Rule # 4.

Great care should be taken on formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probitive value. It should be born in mind that it is not only the wording of the question which may suggest the answer but also the manner and tone of voice which are used.[59]

This rule addresses concerns regarding interrogation procedures. Police officers must be cognizant of the superiority they have in the language that they are using when questioning Aboriginal peoples. Collateral with a police officer's superior understanding and usage of their language and their cultural values is the power inherent as a person of authority originating from the dominant culture. Terminology in the legal and medical fields are typical examples of words which are very difficult to accurately interpret and translate to a Native accused and witness. Furthermore, nuances associated with the English language confuses even the well-educated from time to time. Common-sense dictates that questions be phrased in a clear and straightforward manner. Police officers should refrain from using ambiguous or confusing questions, such as sentences that contain several negatives. As an example, it is preferable to ask, "Did you go into that house?", rather then, "You didn't go into that house did you?" A reply of "yes" to the second question can be misconstrued. Rupert Ross asserts:

> *Great care must be taken never to ask leading questions to which people can answer "yes" or "no". Instead, questions must be neutral, requiring that all the information come from the person being interviewed. I have seen numerous instances where file summaries indicated that an accused had confessed, but the actual statement amounts instead to an officer giving his version of the event, asking the accused, "Is it right?" and receiving an affirmative answer in reply.*

When asked why he confessed to something he did not do, the reply is, "Because that s what the cop wanted me to say."[60] *[emphasis in original].*

It is important, therefore, that a rule similar to Anunga number four[61] be adopted by Canada that addresses such problems arising from methods used during interrogations of Native persons.

It is difficult to provide guidelines specific enough to cover a wide variety of circumstances, but some general principles to be considered when drafting a Canadian version of this rule might include:

1. Questions should be simple, short, and straightforward.

2. Complex sentences, especially those involving double negatives should be avoided.

3. If it seems there may be some confusion about a line of questioning, officers should re-phrase questions to see if the same response is forthcoming.

4. Police persons should paraphrase or repeat what they feel an Aboriginal has said to be sure they are understanding what the detainee intends.

f) Rule # 5.

Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter and endeavour to obtain proof of the commission of the offence from other sources...[62]

This rule is based simply on good sound police work. As professional investigators, police must strive to uncover evidence above and beyond confessions in order to substantiate criminal charges. In other words, one should not pin all hopes on a singular piece of evidence, namely an oral or written confession. This seems especially important in light of the number of high-profile cases in the recent past in which statements have been retracted leading to changed legal outcomes. Misunderstandings and misinterpretations as to what was said and meant has caused a lot of embarrassment over the past for all levels of the criminal justice system involving Native suspects, not to mention putting justice into disrepute. While it seems pretty much a given that the police will strive to uncover hard physical evidence to support (or disprove) a written statement, it is helpful if judicial policy supports such a requirement. This will bring a badly needed boost of credibility to the system, and prevent costly inquiries from having to convene resulting in tax dollar savings to the public.

In summary, statements made by Natives should be substantiated whenever possible by searching for extrinsic evidence that corroborates the accuracy and veracity of the information.

g) Rule # 6.

Because Aboriginal people are often nervous and ill at ease at the presence of white authority figures like policemen it is particularly important that they be offered a meal, if they are being interviewed in the police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.[63]

h) Rule # 7.

It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness, drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.[64]

These two guidelines refer to provisions of basic human rights treatment. Confessions obtained from anyone who has been denied food or drink have been found inadmissible based on the principle of oppression. In the Canadian landmark case, *Horvath v. R.*,[65] Spence J., accepted the dictum in *R. v. Priestly*[66] which was a case decided in England that defined oppression:

> *Whether or not there is oppression in an individual case depends upon many elements... They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.*[67]

The elements that may result in an inadmissible confession that is obtained because of oppression are somewhat unconstrained. On the other hand, a confession procured while a detainee was wearing only a blanket during questioning was sufficient grounds for oppression to render the confession inadmissible.[68] In another case, *R. v. Antoine*,[69] the accused was convicted of manslaughter following a trial at which the Crown was permitted to introduce an inculpatory statement made by the accused to the police. Huband J.A., outlined the circumstances of her detention and confession as follows:

> *There were sounds emanating from the room where Winnie Cobela was being interrogated, and those sounds would tend to accentuate the accused's feeling of anxiety. Additionally, there was the persistence on the part of the police officers. The accused had given both verbal and written statements, yet she remained in a locked room without charge. The accused had been offered no nourishment other than coffee.*[70]

The test for an oppressive atmosphere that could result in the inadmissible confession is an objective one. In addition, the oppressive environment must be created by the authorities who are in control.[71] The courts will scrutinize the entire set of circumstances that existed at the time the statements were made.

i) Rule # 8.

Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue.[72]
The procedures for taking statements from suspects or accused persons in Canada are fairly straight forward since the decision handed down by the Supreme Court of Canada in the Brydges[73] case. A police officer had disregarded the provisions under section 10(b) of the Charter which resulted in the exclusion of the statements that manifested a guilty conscience for the murder he was under interrogation for.

At common law, the right to silence operates to the extent that it entitles a suspect or an accused, whether or not in detention, to refuse to speak to the police. The right prevents the police from compelling an individual to Speak.[74] In *Rothman v. R.*,[75] Lamer J., (as he then was) described the common law right of silence as follows:

> *In Canada the right of a suspect not to say anything to the police is not the result of a right of no self-incrimination but merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law. It is because no law says that a suspect, save in certain circumstances [footnote omitted], must say anything to the police that we say that he has the right to remain silent; which is a positive way of explaining that there is on his part no legal obligation to do otherwise. His right to silence here rests on the same principle as his right to free speech, but not on a right to no self-incrimination. Therefore any frustration of his choice not to say is not an encroachment to a right to no self-incrimination for he has a right only "qua witness" and qua accused...*[76]

When dealing with Aboriginal suspects, judicial policy should make it very clear that questioning must not proceed if an individual expresses the desire not to speak to the police even after they have consulted with a lawyer or his/her "prisoners friend." If the right to advise legal counsel was waived earlier in the investigation, and the detainee changes his/her mind, questioning must stop. Even if the request is tentative, such as "I think I should maybe talk to a lawyer about this" officers must not proceed any further. Confessions obtained in like circumstances should be made inadmissible.

Similarly, should a Native state a disinclination to answer questions, policy must make it clear that police officers accept and respect that position. No attempts are to be made to influence, intimidate, or persuade the individual's mind to change once such a stance has been verbalized.

j) Rule # 9

When it is necessary to remove clothing for forensic examination or for the purpose of medical examination, steps must be taken forthwith to supply substitute clothing.[77]

There are provisions in police policy manuals dealing with the handling of prisoners where the clothes they have been wearing are seized as exhibits or otherwise. If the prisoner is situated close enough to where his/her relatives are, perhaps they can be contacted and asked to provide substitute clothing.

k) Conclusion

Adopting the *Annuga Rules*[78] should not be seen as either the redundant repetition of principles already ensured in the Bill of Rights and the Charter as an act of doling out special rights for Natives in conflict with the law. Rather, these nine guidelines strive to ensure that the basic rights already in existence are respected. This is simply an attempt to give a little extra help to a group of people having trouble understanding and dealing with the mechanics of the criminal justice system. Moreover, the rules will serve three very important functions if adopted here in Canada. First, they will protect the rights of our First Natives as the Indigenous occupants of this land who have endured a century or more of colonial rule. They recognize the problems that Aboriginals have in understanding their legal rights. In addition, they attempt to deal with the distinct cultural dichotomies that exist in areas of: language, deference to authority, concepts of time and distance, customary law and the misunderstandings between themselves and the police.

Secondly, the rules will assist the police in their dealing with Aboriginal suspects by making steps to follow during interrogation very clear. This ensures that information obtained regarding criminal activity is accurate and will not be disallowed by the courts during legal proceedings.

Finally, they will preserve the integrity of the criminal justice system and demonstrate to Aboriginal Peoples everywhere that the system is flexible and adaptable enough to make it sensitive to their concerns.

Endnotes:

[1] *"Justice on Trial", Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta, vol. 1 (Edmonton: Queen's Printer, 1991) at 6-4.*
[2] *Ibid.*
[3] *Ibid. at 6-4.*
[4] *Ibid. at 6-6.*
[5] *H. McRae, et al, Aboriginal Legal Issues, (Australia: The Law Book Company Limited, 1991) at 33.*
[6] *Ibid. at 241.*
[7] *Ibid. at 242.*
[8] *R. v. Anunga and Others, [1976] 11 A.L.R. 412 at 412; [here in after Anunga] R. v. Wheeler and Another (1976), 11 A.L.R. 412 (N.T.S.C.).*
[9] *See: Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba, vol. 1 (Manitoba: Queen's Printer, 1991); Royal Commission on the Donald Marshall, Jr., Prosecution, Commissioner's Report-Findings and Recommendations, (Halifax: Queen's Printer, 1989); Law Reform Commission of Canada, "Aboriginal peoples and criminal justice: equality, respect, and the search for justice (Report No. 34) by G. Letourneau et al (Ottawa: Law Reform Commission of Canada, 1991).*
[10] *Anunga, supra. note 8 at 412.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *McRae, supra, note 5 at 255.*
[15] *Anunga, supra, note 8 at 412.*
[16] *(1984), 52 A.L.R. 133. [hereinafter Gudabi].*
[17] *Anunga, supra. note 8 at 414.*
[18] *R.M. Keesing, Cultural Anthropology: A Contemporary Perspective, 2nd ed., (U.S.A.: Holt, Rinehart and Winston, Inc., 1975) at 86.*
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid. at 87.*
[22] *A. Hultkrantz, Native Religions of North America, (New York: Harper & Row, Publishers, Inc., 1987) at 32.*
[23] *R. Ross, Dancing With a Ghost: Exploring Indian Reality, (Markham: Octopus Publishing Group, 1992).*
[24] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11, s.16. [hereinafter Charter].*
[25] *Ibid.*
[26] *Anunga, supra, note 8.*
[27] *R.B. Morrison, et al, Native Peoples: The Canadian Experience, (Toronto: McClelland & Stewart Inc., 1989) at 26.*
[28] *B. Harnum, "The Tip Of The Iceberg" [unpublished].*
[29] *Morrison. supra. note 27.*
[30] *Charter, supra, note 24.*
[31] *S.C. 1960, c.44.*
[32] *1990, c.7. s.13.*
[33] *1990. c.18. s.6.*
[34] *Harnum, supra, note 28.*
[35] *Ibid.*
[36] *(1983).9 C.C.C. (3d) 366, [1987] 1 S.C.R. 1253.[hereinafter Lapointe].*
[37] *J. Sopinka et al, The Law of Evidence In Canada, (Markham: Butterworths Canada Ltd., 1992) at 349.*
[38] *Lapointe. supra, note 36 at 380 (C.C.C.).*
[39] *39 Anunga, supra. note 8.*
[40] *P.W. Hogg. Constitutional Law of Canada, 2nd ed., (Toronto: Carswell, 1985) at 784.*
[41] *Gudabi, supra, note 16.*
[42] *Anunga, supra, note 8.at 414.*
[43] *Ross, supra, note 23 at 9-10.*
[44] *Charter, supra, note 24.*
[45] *Anunga, supra, note 8.*
[46] *R.S.C. 1985, c. Y-1, s. 56(2)(c).*

[47] *Anunga, supra, note 8.*
[48] *[1990] 1 S.C.R. 190, 53 C.C.C. (3d) 330,2 W.W.R. 220.*
[49] *Anunga, supra, note 8 at 414-15.*
[50] *50 N. Stevenson "Criminal Cases in the N.S.W. District Court: a pilot study." in J. Basten et al, The Criminal Injustice System (1982) at 108-109.*
[51] *R. v. Warwickshall (1783), 1 Leach Cr. C. 298, 168 E.R. 234.*
[52] *Ibid. at 234-235 (E.R.).*
[53] *[1914] A.C. 599, [1914-15] All E.R. Rep. 874.*
[54] *Ibid. at 609-610 (A.C.).*
[55] *Ibid.*
[56] *Ibid.*
[57] *[1956] S.C.R. 958, 116 C.C.C. 1, 24 C.R. 371, 6 D.L.R. (2d) 529.*
[58] *Ibid. at 962 (S.C.R.).*
[59] *Anunga, supra, note 8 at 415.*
[60] *Ross, supra, note 23 at 25-26.*
[61] *Anunga, supra, note 8 at 415.*
[62] *lbid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *[1979] 2 S.C.R. 376,93 D.L.R. (3d) 1,44 C.C.C. (2d) 385.*
[66] *(1965),51 Cr. App. R. In (C.C.A.).*
[67] *Ibid. at In.*
[68] *R. v. Serack [1974] 2 W.W.R. 377,24 C.R.N.S. 295 (B.C.S.C.).*
[69] *(1982), 70 C.C.C. (2d) 140, 16 Man. R. (2d) 303 (Man. C.A.).*
[70] *Ibid. at 148 (C.C.C.).*
[71] *Sopinka, supra, note 37 at 346.*
[72] *Anunga, supra, note 8.*
[73] *Stevenson, supra, note 50.*
[74] *S.C. Hill, "The Right To Remain Silent" (1992) 3 Crown's Newsletter at 13.*
[75] *[1981] 1 S.C.R. 640,59 C.C.C. (2d) 30,20 C.R. (3d) 97.*
[76] *Ibid. at 64 (C.C.C.).*
[77] *Anunga, supra, note 8.*
[78] *Ibid.*

3. Aboriginal Child Welfare: Solutions To The Crisis

by Tracey Renee Fleck[1]

Removing children from their homes weakens the entire community. Removing First Nations children from their culture and placing them in a foreign culture is an act of genocide.[2]

The application of British Columbia's Family and Child Services Act has had a devastating effect on Aboriginal communities in British Columbia.[3] Since the 1950s there has been, and continues to be, a systematic removal of Aboriginal children from their families, communities, and culture.[4] Removal practices during the 1960s were so severe that they were known as the "Sixties Scoop".[5] Aggressive assimilation policies and colonial paternalism are largely responsible for this present state of crisis.[6]

In Part I, I introduce the crisis. I examine the failure of British Columbia's child welfare system in Part II. In Part III, I review other jurisdictions in a search for possible remedies. In Part IV, I analyze the recommendations of the Aboriginal Review Committee in *Liberating Our Children - Liberating Our Nations*. Finally, in Part V, I conclude that the report yields many useful solutions and I encourage the adoption of these recommendations in British Columbia.

Part I: THE CRISIS

"The negative effects of provision legislation [have] been so pervasive that [they have] affected virtually every one of our families".[7] Statistics indicate that the crisis has escalated at an alarming rate. Every year, over 950 Aboriginal children in British Columbia come into the care of the Superintendent.[8] Notably, this figure does not take into account re-admissions. Furthermore, Aboriginal children are grossly over-represented in British Columbia's child welfare system.[9] For example, the percentage of all Aboriginal children-in-care on a voluntary basis is almost double the percentage of all non-Aboriginal children-in-care.[10] The statistics concerning children - in-care on an involuntary basis is even more startling.[11] In this category, the percentage of all Aboriginal children-in-care, outnumbers the percentage of all non-Aboriginal children-in-care by twelve times.[12] The most disturbing statistic relates to the permanent placement of Aboriginal children into non-Aboriginal homes. Each year the Ministry of Social Services, [MSS] under the FSCA, places 74.45 % of Aboriginal children taken into care into non-Aboriginal homes.[13]

The forced removal of Aboriginal children has led to the destruction of families and entire communities. Thousands of Aboriginal children have been abducted from their community and consequently denied any knowledge of their cultural heritage. The permanent removal of Aboriginal children on such an enormous scale has prompted the accusation that the MSS is committing cultural genocide. The New Democrat Government has responded to public outcry over abuse of Aboriginal children by commissioning a critical review of the current legislation.[14] In 1992, the report of the Aboriginal Review Committee, *Liberating Our Children - Liberating Our Nations* was

released. It presents innovative responses to the current crisis. Extensive consultation between the Committee and First Nations has ensured that the Report credibly reflects the concerns of Aboriginal people living in British Columbia.[15]

I do not wish to forget that individual suffering is not merely an illustration of the systemic problems but the reason for my study. This analysis must address system causes. But, the crisis in Aboriginal child welfare services is not merely a theoretical or academic problem. It is a very real threat to the cultural survival of First Nations. It is important to recognize that the crisis simply does not end with the apprehension of Aboriginal children and their placement in non-Aboriginal homes. Profound impacts are experienced by the child, the family, and the community long afterwards.[16] My thesis is that the survival of Aboriginal culture depends upon the immediate return of child care to First Nations, so that they may develop child care systems based on traditional customs that protect their children.

Part II: CHILD PROTECTION IN BRITISH COLUMBIA

The provincial legislation is a serious impediment to Aboriginal communities. They are unable to exercise responsibility over their families and communities. The acute failure of the provincial legislation to provide appropriate services to Aboriginal people manifests itself in three ways. I suggest that the current crisis can be attributed to three elements inherent in the operation of the Family Child Services Act. The first is the legislative process involved in formulating child welfare statutes. The second is the administrative process provided for by the statute. The third is the judicial process under the statute. Underlying each of these processes is a culturally biased ideology. The values of this culturally specific ideology permeate the operation of each level and result in the application of a racist child welfare system to Aboriginal communities. Each of these processes will be discussed in turn.

a) The Family and Child Services Act

There are two aspects of the failure of the FCSA to provide acceptable services to First Nations in British Columbia. The first relates to the jurisdiction of the FCSA. The second relates to the contents of the FCSA.

Provinces have jurisdiction over "property and civil rights" by virtue of s. 92(13) of the *Constitution Act, 1867*.[17] The Supreme Court of Canada held in Re Adoption Acto that child protection and adoption were completely within the control of the provincial legislature under this head of power.[18] Accordingly, under this mandate, British Columbia has enacted the *Family and Child Services Act, the Adoption Act, and the Family Relations Act*.[19]

The federal government has jurisdiction over "Indians and lands reserved for Indians" by virtue of s. 91(24) of the Constitution Act, 1867. For the administration and regulation of Aboriginal people, the federal government has enacted the *Indian Act*.[20] However, there is no express provision in the Indian Act dealing with child welfare. The A.G.

Canada v. Canard decision affirms the federal government's power to regulate Indians under s. 91(24). The court recognizes that this specifically includes the power to legislate over the "property and civil rights" of Indians. Therefore, the federal government can validly enact Aboriginal child welfare legislation. However, the federal government has refrained from legislating in this area. To address the need by Aboriginal communities for social services under the jurisdiction of the provinces, the federal government amended the Indian Act. Section 88 of the Indian Act was enacted in 1951 to set out the extent to which provincial legislation is applicable to Aboriginal people:

> *Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order; role, regulation or by-law made thereunder; and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. R. S., c. 1-6, s. 88.*

The Supreme Court of Canada in *Natural Parents v. Superintendent of Child Welfare*[21] had held this provision to mean that, in the absence of federal legislation relating to Aboriginal adoption practices, provincial adoption laws apply to Aboriginal people.

Given this interpretation of s. 88 it is likely that provincial child welfare legislation, as it applies to Aboriginal people on reserves, is constitutionally valid. This is the position that the Department of Indian Affairs and Northern Development has taken.[22] Yet, this still leaves Aboriginal people "caught in a jurisdiction[al] quagmire which easily produces gaps in services."[23] The federal government's refusal to accept responsibility has led to jurisdictional disputes between the provinces and the federal government with respect to financing and administration of services to reserves. The provinces are loath to expand their jurisdiction to cover Aboriginal children on reserves because the costs for full servicing are substantial.[24] This had led to the inconsistent distribution of family and child services to First Nations.

The second failure relates to the contents of the FCSA. The provincial legislation is based on European liberal ideology.[25] At the forefront of liberal doctrine is the idea of "individual rights" and thus "the proper role of the state is to protect basic individual liberties".[26] Accordingly, Anglo-Canadian society acknowledges individual rights and stresses that individual rights are to take precedence over collective rights. These ideals have been enshrined into British Columbia's child welfare legislation.

For example the FCSA affords guidelines to identify "children in need of protection" by defining harmful circumstances and inappropriate parenting practices from which children need to be protected.[27] Family practices by other cultures are not considered in this definition. Instead, the nuclear family unit considered the ideal environment in which to raise a child. Aboriginal cultures believe that each member of a Nation bears responsibility for the well-being of their children. Responsibility is not limited solely to the parents. Rather, parenting is assumed by extended family and clan members.

Aboriginal societies are based on a set of communitarian values.[28] The failure to "recognize extended family and extended-responsibility pattern might be the greatest failing of the child protection system."[29] Situations may appear to represent "abandonment and neglect" when in fact they do not. Aboriginal societies believe it is possible to harmonize the well-being of the individual with the well-being of the community.[30] It is not a matter of choosing one over the other.[31] In addition, "the individual is characterized as the repository of responsibilities rather than as a claimant of rights".[32] Accordingly, Aboriginal problem solving practices are oriented towards reaching the best solution for the community. Decision making is not conducted by "fiat, or by majority vote; rather the aim [of] the band council, as in the extended family, [is] reaching consensus".[33]

The cultural specificity of the FCSA amounts to cultural chauvinism. Therefore, the political and social assumptions that underlie the FCSA differ vastly from the political and social practices of Aboriginal people. The government's persistent adherence to cultural chauvinism imposes unnecessary hardship on Aboriginal communities. Without the recognition of First Nations ideologies the FCSA will continue to be a racist statute.

b) Administration Under The Family and Child Services Act

The cultural insensitivity inherent in the FCSA, as discussed in the previous section, is further augmented by cultural insensitivity at the administrative level. The Ministry of Social Services [MSS] employs public servants to administer family and child services under the FCSA.[34] An agent performs assessment, treatment, and prevention services in accordance with the regulations and guidelines of the FCSA. Agents conduct investigations of child abuse complaints in order to determine if a "child is in need of protection".[35] "If professional guidelines for education and training are followed, [agents] will be university or post-high school graduate[s], likely from the middle socio-economic class, who [do] not comprehend the lifestyle and child rearing standards of the social class from which neglected children are perceived to come".[36] The implications of this are obvious. First, the agent, due to class blindness and economic privilege, may fail to understand the poverty of Aboriginal communities. Second, the agent is unlikely to appreciate cultural differences in Aboriginal communities generally.

Non-aboriginal agents are frequently incapable of appreciating the unique socio-economic position that Aboriginal people occupy within society. This is of particular concern because Aboriginal people frequently occupy the bottom of the social economic realm.[37] Unemployment levels are high.[38] Living conditions are below the national average. Health and education levels are also far below national standards. There is a tendency in assessing cases to ignore systemic causes of poverty and to focus on the inability of the parent(s) to provide adequate care for the child. Sadly, there is a tendency to ignore systemic causes of poverty. The tragic socio-economic position of most Aboriginal people is the result of the colonial practices of the federal and provincial governments, not individual failures.[39]

For example, most Aboriginal families are headed by single mothers. As stated earlier, community values are at the heart of Aboriginal culture. Thus raising children is the responsibility of the entire community, not just the individual family. But frequently, agents focus on the inability of the immediate family to provide child care. In doing so, the agent is utilizing liberal ideology which is structured around the nuclear family thus only individual players are considered. The concept of the extended family is not considered. This inevitably leads to the apprehension and permanent removal of Aboriginal children from a perceived "destructive environment".

There is a need to expand this ideological base and to look at the Aboriginal family as part of the Aboriginal community. More importantly, there is a need to consider systemic factors which are impacting negatively on Aboriginal communities, in addition to individual factors affecting child care. This will facilitate the use of constructive solutions that create a better environment for the family and the community. Consideration of system factors will reduce the number of apprehensions and force agents to become more sensitive to the actual context of child care in Aboriginal communities.

c) Judicial Review Under The Family and Child Services Act

The court system/judiciary firmly entrenches the application of Anglo-Canadian ideology to Aboriginal child welfare cases.[40] In other provincial jurisdictions, commentators have encouraged the courts to consider Aboriginal cultural issues when dealing with Aboriginal children.[41] In practice, however, the "best interest" test is still vigorously applied along traditional Anglo standards.

There is a general assumption that it is in the "best interests of the child" to place the child in what is perceived as a "good home". Generally, Aboriginal homes are perceived as "bad homes", and courts are reluctant to return the child to the Aboriginal community. The value system relied upon is racist. It requires that all homes be measured against a single standard - that of a white middle-class family. Furthermore, by judging the child's needs without regard to his/her cultural needs, the system "conceptualizes and prioritizes the rights of individuals over collective rights" thereby ignoring the importance of community to Aboriginal children.[42]

The two leading decisions of the Supreme Court of Canada illustrate that in practice, Aboriginal factors have no real impact on judicial reasoning. Courts have held that it is not discriminatory to apply uniform standards of child welfare policy across society.[43] In the Racine and Woods decision, the court held that native culture and traditions are significant factors but not determinative.[44] Madam Justice Wilson, as she then was, held that "the significance of cultural background and heritage as opposed to bonding abates over time."[45] In Natural Parents and Superintendent of Child Welfare, Mr. Justice Martland, stated that the "best interests of the child" lay in considering the child as an individual and not as part of a culture.[46] The problem with these decisions is that the courts have been given direction to consider Aboriginal cultural values but they are not instructed as to the weight which these factors are to be given. Consequently, the courts continue to consider Aboriginal issues in the context of Anglo-Canadian ideology.

The courts continue to blindly accept the utility of placing children outside of their Aboriginal Nation; this practice must be stopped. For example, the "assertion that the importance of heritage abates over time really reflects a belief in the value and possibility of the assimilation of racial minorities - particularly in a racist environment.[47] "This optimistic scenario often does not work for Canadian Indians".[48] Aboriginal children experience difficulties growing up in non-Aboriginal communities because cross-cultural placement is particularly traumatic. "Racial prejudice against native people is common and although not always malicious, severe".[49] Aboriginal communities have resisted assimilation and have remained separate and distinct cultural communities as the sovereign First Nations European explorers first encountered.

Therefore, Aboriginal children experience a real loss of community when they are placed in non-Aboriginal homes.

d) The Effect

The conflict between cultural ideology is vividly represented in the provisions of the FCSA, in its administration, and in child welfare jurisprudence. Each of these factors continue to impact negatively on already shattered Aboriginal communities. Aboriginal communities are experiencing feelings of helplessness and frustration as well as low levels of cultural esteem because they are unable to control their future.[50] Child Welfare practices in British Columbia are reaffirming the belief that Aboriginal culture is inferior. Under the FCSA, the MSS continues to isolate Aboriginal children from their families, communities and heritage by attempting to assimilate them into non-Aboriginal homes. The operation of the FCSA continues to perpetuate the crisis in Aboriginal child welfare. In the absence of major changes to the entire structure of the FCSA the annulation of Aboriginal society will continue. The next section will examine possible responses to this crisis.

Part III: RESPONSES

The crisis Aboriginal people faced with regard to child welfare is not limited to British Columbia. Aboriginal communities throughout North America have suffered the same systematic removal of their children under similar child welfare regimes.[51] Different jurisdictions have attempted to deal with the crisis by implementing different statutory models. There are four basic models of child welfare legislation in existence: the assimilation model, the integrated model, the delegated authority model, and the autonomous model.[52] Each of these models provides for different levels of participation by Aboriginal communities in the legislative, administrative and adjudicative processes of child welfare services. Consequently, each model produces a markedly different result in the over-all apprehension and placement of Aboriginal children. I will examine each of the child welfare models focusing on legislative, administrative, and judicial processes under each model.

a) The Assimilation Model

The assimilation model gives the province (or state government) complete jurisdiction over the legislation, administration and adjudication of child welfare services. The unrestricted jurisdictional power of provinces (and states) is the primary cause of the current crisis. Legislation enacted under this model does not consider cultural differences to be relevant because it adheres to liberal doctrine. According to liberal ideology rules of law are to be applied in a neutral universal manner to promote equality Therefore, Aboriginal cultural issues are generally not addressed in the development of child welfare systems. The application of child welfare legislation without acknowledgement of fundamental cultural differences inevitably results in inequalities as discussed in Part I.

British Columbia's initial child welfare legislation was created under this model. The operation of the Protection of Children Act, between 1950-1972 had severe consequences for Aboriginal communities.[53] Investigators found that there was a steady increase in the admittance of Aboriginal children was grossly disproportionate to the number of non-Aboriginal children. Grave public concern coupled with immense pressure from First Nations has prompted provincial governments to abandon this model.[54]

b) The Integrated Model

The integrated model imposes minimal changes on the assimilation model. The province retains full jurisdiction over the legislation, administration and adjudication of child welfare services. However, "Aboriginal issues" are emphasized in the policy guidelines and regulations for the administration and adjudication of the statute. This facilitates the involvement of Aboriginal communities in the delivery of Aboriginal child welfare services. This model advocates consultation with Aboriginal communities by provincial authorities and the recruitment of Aboriginal people to work within the Ministry.

This model has been used in Ontario with very little success.[55] Ontario legislation uses an advisory structure which allows for input by Aboriginal agencies into the decision-making process.[56] However, policy statements do not have the force of law Aboriginal concerns receive only cursory attention in administration practices and almost no consideration by the courts.[57] Confidence is misplaced if one believes that policy initiatives alone can change the racist practices. There continues to be a high rate of removal of Aboriginal children because "the Ontario model relies not only on the same agencies that held create the crisis to turn it around, it also relies on the same courts."[58] It does not address the legislative and judicial levels adequately.

c) The Delegated Authority Model

The delegated model is more progressive than the previous two models. Nevertheless, the province still retains jurisdiction over the legislative and adjudicative processes of the statute but, administrative powers relating to Aboriginal children are delegated to Aboriginal communities or agencies through bilateral or tripartite agreements.

This model has been employed in Manitoba for a number of years.[59] Several Aboriginal Nations in British Columbia have pursued child care under this model. The fourteen member bands of the Nuu-Chah-Nulth Tribal Council, the 13 member bands of the Carrier-Sekani Tribal Council and the McLeod Lake Band have all entered into agreements with the province for the delivery of child and family services to its members.[60]

This model is ineffective, however, for several reasons. First, there is considerable bureaucratic delay with the involvement of multiple levels of jurisdiction, particularly with respect to matters of financing. These financial impediments result in the reduction of services available to Aboriginal communities.[61] Second, the legislative and judicial powers still rest with the provinces. Hence, the province remains in a powerful position, capable of overruling the decisions of Aboriginal administration agencies. Administrative policies are still based on non-Aboriginal laws and subject to review by non-Aboriginal standards. Third, Aboriginal Nations are reluctant to embrace non-Aboriginal laws to govern their communities. These agreements serve as acknowledgement of provincial jurisdiction over Aboriginal people which is repugnant to Aboriginal political beliefs.[62] Although the model is a much more culturally sensitive approach to child welfare, it leaves Aboriginal people vulnerable to outside intervention and to the continued application of Anglo-Canadian ideology. A more empowering approach needs to be taken.

d) The Autonomous Model

The autonomous model is the most viable approach to return power over child welfare to the Aboriginal nations. Under this model provincial authorities acknowledge that legislative, administrative and adjudication powers ought to lie in the jurisdiction of each Aboriginal Nation. This enables First Nations to develop their own child welfare systems based on their cultural traditions. First Nations will create systems which prevent Aboriginal children from having to endure permanent placement in non-Aboriginal homes.

First Nations can resume control over Aboriginal child care by a variety of methods. First, it can be argued that s.81 of the Indian Act permits a band council to enact by-laws relating to the Aboriginal child welfare. Second, the federal government can enact Aboriginal child welfare legislation. Third, First Nations can argue that child welfare is an inherent Aboriginal right under s.35(1) of the Constitution Act, 1982. The fourth alternative is that First Nations can negotiate it into the terms of Aboriginal self-government. I will discuss each of these legal mechanisms in turn.

1. The Band By-Law

Band Councils have the authority to enact by-laws dealing with subjects set forth in s.81 of the Indian Act.[63] In 1980, the Spallumcheen band enacted a by-law entitled, "For the Care of Our Children".[64] The band council argued that a liberal interpretation of s.81(a) granted band councils the authority to regulate child welfare.[65] Section 81(a) reads:

81. The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Councillor the Minister, for any or all of the following purposes, namely,

(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

After a well publicized campaign, the band was able to overcome initial opposition to the by-law by the Minister of Indian Affairs. Eventually the Minister decided not to exercise his power of disallowance and the province agreed to recognize the by-law.[66] The by-law gives the band the right to develop its own child protection policies based on traditional customs.[67] The band has exclusive jurisdiction over the legislative, administrative, and adjudicative processes of child welfare services and employs traditional methods in its implementation.

Other bands have attempted to enact similar by-laws, but they have been disallowed by the Minister.[68] Opposition to band councils enacting child welfare by-laws is two-fold. First, it is submitted that child welfare does not fall under the auspices of "health" under s.81 (a). Second, it is submitted that rights guaranteed under the Charter of Rights and Freedoms, such as the right of due process, are not provided for in the administration of the band's welfare program.[69] Therefore, the Spallumcheen Band's autonomy is vulnerable and other options must be explored.

2. Federal Legislation

As previously noted, the federal government retains jurisdiction to enact legislation relating to Aboriginal child welfare.[70] Furthermore, s.88 of the Indian Act provides for federal paramountcy of all laws affecting aboriginal people.[71] Therefore, a federal statute giving First Nations jurisdiction over Aboriginal child welfare would displace provincial legislation. The federal government could thus amend the Indian Act or enact new legislation locating Aboriginal child welfare within federal laws.

This approach has been taken in the United States. Congress responded to the crisis by enacting the Indian Child Welfare Act, [hereinafter the ICWA].[72] The purpose of the ICWA is to "preserve the existence and integrity of Indian Tribes through the prevention of unwarranted removal of Indian children from their families".[73] The ICWA sets out comprehensive procedural devices and standards to provide for the "best interests of an Indian child".[74] The ICWA gives exclusive jurisdiction to Indian Tribes over Indian child welfare administrative and judicial processes. But, this jurisdiction is limited. Only children who normally live on reservations are subject to ICWA. State courts retain jurisdiction over those Indian children who do not live on reservations.

Caution must be exercised by First Nations when advocating this type of federal legislation since autonomy may be undermined by jurisdictional limits.

First, as under the ICWA, the state courts are still in a position to separate children from their culture, tribe, and extended families by ruling that the Act does not apply to a particular dispute, or that if it applies, jurisdiction should reside in the state rather than tribal court.[75]

Second, the legislation is drafted by non- Aboriginal authorities, so there will be inconsistencies between Aboriginal cultural values and Anglo-Canadian cultural values inherent in the statute.

3. Section 35

First Nations may also argue that child welfare is an inherent Aboriginal right under s.35(1) of the Constitution Act, 1982.[76] The decision of R. v. Sparrow has far-reaching implications for the recognition of Aboriginal rights under s.35(1).[77] The test to establish that there has been an infringement of a s.35 right is two-fold. The first step requires the party challenging the legislation to prove the existence of the aboriginal right, and to establish that the right has been infringed by the legislation. The second step requires the party seeking to uphold the legislation to establish that the statute is justifiable.[78]

Applying the Sparrow test to Aboriginal rights regarding child welfare suggests that the infringement of provincial child welfare legislation on First Nations cannot be justified under s.35. It is a long-standing practice of First Nations to care for their children. First Nations have not consented to application of provincial laws to their communities and the regulation of First Nations' right to care for their children by the FCSA does not amount to the extinguishment of the right.[79] There is compelling evidence that the application of the FCSA is unreasonable. It imposes undue hardships on the Aboriginal Communities and denies Aboriginal communities the right to exercise child care along traditional practices. Therefore, there is a prima facie infringement of the inherent Aboriginal right to care for their children.

It can be argued that the province cannot establish a valid legislative objective within the meaning of s.35, nor can it establish that jurisdiction over child welfare is in keeping with the "honour" or the "fiduciary duty" of the provincial crown. The care and protection of Aboriginal children by the province is not a "compelling and substantial" objective. The FCSA certainly does not interfere "as little as possible" with the Aboriginal right. In fact, Aboriginal communities exercise almost no rights over their children because the FCSA has removed vast numbers of Aboriginal children from their families, communities and culture. Only the federal government can legislate with respect to Aboriginal people. Therefore, the issue of s.35 justification should not even arise with provincial legislation.[80]

Thus, the FCSA interferes with an inherent Aboriginal right constitutionally protected under s.35 in a manner that cannot be justified. This approach to resuming control over child welfare has not been pursued. Although this approach would guarantee Aboriginal people unencumbered jurisdiction over child welfare its utility is questionable because it entails lengthy litigation and does not address the crisis now. In addition, it is questionable whether the colonial legal system is the correct forum to address this issue.[81]

4. Self-Government

I believe this fourth option is the most empowering approach. It clearly creates an autonomous model. The entrenchment of Aboriginal self-government is high on the political agenda. With this model there is no threat of loss of jurisdiction. The legislative, administrative, and adjudicative processes are completely within the control of First Nations. In the future this solution will inevitably be adopted; but other interim steps need to be taken first.

e) The Choice

British Columbia uses primarily the integrated model and, to a lesser degree, the delegated authority model.[82] Neither of these afford adequate protection for Aboriginal children, nor do they alter the use of dominant Anglo-Canadian values. The autonomous model is the only model that recognizes adequately the importance of Aboriginal-based values. The unconditional transfer of jurisdiction over legislative, administrative and adjudication processes will give Aboriginal people control over their lives. This process will take time and it requires the full cooperation of all parties. If any real fundamental change is to occur, there must be a transfer of real power to the Aboriginal communities. I recognize that it will take time for self-government to be constitutionally entrenched. Accordingly, effective provisional measures need to be adopted while self-government is being negotiated. In the next part, I will discuss the recommendations of the Aboriginal Advisory Committee. I believe they have suggested many work- able interim solutions to the crisis.

Part IV: THE REPORT

The NDP Provincial Government called for the review of the existing child welfare legislation and for recommendations to help authority over Aboriginal child welfare to First Nations.[83] The success of these directives depends on four things: 1. a willingness of the province to enter into agreements with Aboriginal Nations to facilitate the transition back to Aboriginal/First Nations Law; 2. a firm commitment to long-term financing of Aboriginal child welfare systems from both levels of government; 3. a generous and extensive legislative amendment to entrench Aboriginal cultural values; and 4. an introduction of comprehensive preventative and rehabilitation services to "heal the wounds" present in Aboriginal society. In what follows, I will discuss how the recommendations in these four categories will affect the legislative, administrative, and adjudicative processes under the FCSA in British Columbia.

a) Transition Back to First Nations

The focal point of recommendations 1 through 16 is the transfer of jurisdiction to the First Nations under an autonomous model. The Committee aims to protect Aboriginal people's right to self-government. It calls for the guarantee that future legislation and agreements will not abrogate or derogate from the right of Aboriginal people to exercise their inherent right to self-government. Agreements must not be seen as validating provincial over First Nations.

The Committee also recommends that the province recognize the right of First Nations to define the scope and application of child welfare legislation. Child welfare systems established by First Nations need not conform to the FCSA. First Nations desire the ability to define all aspects of family and child care; specifically the legislation, administration, and adjudication of the child welfare systems. Each Aboriginal community must be given the opportunity to develop its own child care system in accordance with the cultural, social and political needs of that community.[84]

For example, the Committee recommends that "Aboriginal Family" be defined to include any family in which: (i) at least one parent is of Aboriginal descent; and (ii) generally associates itself with an Aboriginal Nation or community. "Aboriginal child" is to be defined as any child of an "Aboriginal Family".[85] These definitions provide a much broader framework for child services to be applied. The Indian Act which is incorporated by the FCSA, provides an artificial definition of "Indian" which is far too narrow and this cannot protect the vast numbers of Aboriginal children who are not deemed "Status Indian".[86] There are over 50,000 Aboriginal people in British Columbia who are not "Status Indians" and over 30,000 who are part of the Métis Nation.[87] These people and Aboriginal families who have moved off the reserve are not considered to be Aboriginal people for the purposes of Aboriginal child welfare policies.[88] Accordingly, the Committee recommends that the First Nations be given the power to determine membership and the geographic scope of services to ensure all Aboriginal people receive family and child care services.

The Committee also recommends that the appeal/adjudication process remain exclusively in the realm of First Nations governments. This will prevent the loss of jurisdiction which currently occurs under the ICWA in the United States and under the other models of child welfare legislation. The Committee recommends the establishment of traditional court systems by First Nations to deal with family dispute resolution. If such a system is in place in a particular community, then appeals regarding the decisions made under the FCSA must be referred to them.[89] This procedural requirement will ensure that non-Aboriginal cultural values are not unnecessarily imposed upon Aboriginal children by the intervention of outside courts.

There is some fear regarding the possible abuse of individual rights traditional Aboriginal governments, particularly those of women and children. Aboriginal communities "focus on the collective rights of the community, permitting individual rights to bow more readily to the needs of the community".[90] This has prompted feminists and concerned individuals to advocate that there be continued intervention by the non-Aboriginal court system. However, as discussed earlier, the present judicial discourse has a devastating effect on Aboriginal families and there is no indication that it better serves the rights of Aboriginal women and children.[91]

Furthermore, I believe "that Anglo feminists have over generalized and distorted the place of Indian women within Indian culture".[92] The two main authors of the Report are Aboriginal women: Lavina White of the Haida Nation and Eva Jacobs of the Kwakiutl Nations. They recommended that there be assurances that dispute resolution structures

"provide protection against conflicts of interest and protect the rights of the women, children and individuals within the context of the rights of the collective".[93] If First Nations are merely given conditional control over their affairs, it will seriously undermine their ability to protect their children. Colonial superiority must be abandoned and faith placed with Aboriginal communities to develop fair and just practices over family and child services.

I believe many of the recommendations in the Report empower Aboriginal women and children by providing strong safeguards against abuse. Aboriginal women need to unite and work together to ensure their needs are provided for. Not because traditional Aboriginal customs commit violence against women but because the perversions of colonialism have created circumstances which commit violence against women.

b) Financial Considerations

Recommendations 17 through 24 call for a firm financial commitment from both levels of governments to ensure that Aboriginal communities have the capacity to develop and maintain a level of services comparable to those available in non-Aboriginal communities.[94] "Adequate funding needs to occur to ensure that services to Native people do not become 'second rate',"[95] It has been the experience of Aboriginal communities that program funding is on a start/stop basis.[96] The disruption in services renders programs ineffective. It is also the experience of Aboriginal communities that the province provides funding only if they are fully compensated by the federal government. Even more deplorable, the province limits its services, under the FCSA, to Aboriginal communities as much as possible.[97]

The Report advocates the allocation of substantial sums to assist First Nations in the development of a wide range of services. Presently, there is a restriction on the types of services that will be funded in Aboriginal communities. The government favours protective services as opposed to preventative. There is a reluctance to pay-out more money to First Nations programs if similar programs are provided in urban centres. This imposes undue hardship on Aboriginal families because many of them live considerable distances from urban centres. Of the hundreds of Aboriginal Bands in British Columbia, the location of 73.3 % of them are deemed urban, 8.6 % remote, and 17.7 % special access (they are classified by the distance that they are from a service centre).[98] It is unreasonable to deny the full range of services to Aboriginal families on this basis.

The division of family and child services between provincial ministries hinders Aboriginal communities from helping their people.[99] This is primarily because traditional Aboriginal culture does not categorize child care as a separate area as the provincial government does. Instead, a holistic approach is taken emphasizing collective goals and responsibilities of the community. Proposed Aboriginal child welfare services by Aboriginal communities either overlap with other provincial services (under other Ministries) or, have not been contemplated by within the framework of the FCSA and as a result do not quality for funding.

The Report recommends that "the process established by an Aboriginal Nation or community must be acknowledged as the only process that plans and identifies needs in all of the areas directly connected to, and ancillary to, the well-being of the families and children comprising that Nation or community.[100] If a community believes that preventative and rehabilitation services normally falling under the auspices of another ministry are needed, this jurisdictional issues should not prevent the community from supplying similar services.

This is particularly important when examining the many disabilitating effects Aboriginal people have suffered under colonialism. The residential school system inflicted terrible wounds on Aboriginal communities and is in part responsible for the decay of Aboriginal families.[101] Counselling services for these atrocities and others are necessarily linked to the care and well-being of Aboriginal children. Aboriginal Nations must be given the freedom to design solutions to their problems. This requires permanent financial support for a wide range of services.

c) Generous and Comprehensive Legislative Changes

The recommendations forwarded for the amendment of the Family and Child Services Act are numerous. The Committee attempts to make both substantive and procedural changes to the FCSA in order to produce a regime that will truly protect Aboriginal children. First, the Committee recommends cultural values be legislated into the FCSA to redefine the goals of child welfare with respect to Aboriginal children.[102] Second, the Committee recommends procedural changes to administrative practices such as investigation, apprehension and placement. These changes are to be applied by MSS agents and provincial family courts while the province continues to exercise temporary jurisdiction in Aboriginal communities without their own systems.

The paramount goal is to protect and preserve the heritage of Aboriginal children.[103] The first priority is to keep the child with his/her parents by supplying the resources needed to prevent the child being placed in care. This focuses on a preventative approach to child care. Removal is absolutely the last resort.[104] If removal is necessary, Aboriginal children have the right to know their birth name and the names of their birth parents. The priority of placement shall be first with the birth parents, then with the immediate and extended family, followed by the members of the Aboriginal community and agencies of the Aboriginal community. These steps will help to preserve the child's heritage while requiring non-Aboriginal authorities to alter their approach to placement of apprehended children.

Reunification shall be the underlying goal of all apprehension and removal procedures. The Committee advocates the abolition of permanent removal orders. The strong emphasis on reunification is completely new to the FCSA and supports a holistic approach to child welfare. Where circumstances require the removal of a child the goal of any plan made for the child shall be the reunification with his or her family.[105] A continued monitoring of the child and birth parent(s) shall be kept to ensure that all efforts are reunification are made. Contact between the child and the birth parents and

the community is also advocated to sustain the link between the child and his/her heritage. All information relating to placement shall be kept by the Aboriginal agency/Nation to assist in this matter. When reunification is possible full assistance is to be given to the family to ensure its success. Employment training, educational training, rehabilitation or general support services need to be made available to the family.

The Committee recommends the introduction of the term "child-in-need of support" to the FCSA to help keep Aboriginal children with their families. This recognizes the economic predicament of many Aboriginal families which previously has not been addressed.[106] Poverty is a major factor contributing to the removal of children.[107] To address impoverishment of their community the Spallumcheen Band focuses on the support of individuals and families to strengthen their position so that children can remain with their families.

Another innovative recommendation entails the amendment of the definition "children-in-need-of-protection". The new definition would introduce a secondary element to create two categories: (i) children who are in immediate danger in their present environment; and (ii) children who would suffer in the long term if an intervention did not occur.[108] The amended definition is to be interpreted in light of the proposed changes to ideology. This differentiation would afford several new solutions.

First, it will curtail the rampant use of "immediate removals" by providing an alternative procedure. This in turn will afford the parents the right of due process. Currently, if the agent determines that the child is in need of protection he/she can intervene and apprehend the child by force, without notice and without a warrant.[109] Often, these decisions are arbitrary and based on complaints by third parties and without detailed and substantiated investigations.[110]

Second, it would afford the appointment of a mediator to go between the agency seeking to apprehend the child, and the family. This new step will allow for remedial action to be taken by the parents to eliminate the causes of the abusive situation. Thus, other options can be explored before advocating the removal of the child. For instance, if the child is in immediate danger, the removal of the person presenting the threat can be made. This would prevent the need for the apprehension and relocation of the child. It would also negate the obligation of the other parent to prove herself/himself a good parent.

Third, in cases where there is a need for the immediate removal of a child, a mediator will also be appointed and required to make a report to the court. An advocate will be appointed to act on behalf of the child and will have access to all information regarding the future of that child. In addition, the agency seeking to place the child must supply to the court a long-term plan for reunification.[111] All parties will have access to information concerning the plan for the child. The family, the child, the Aboriginal community and the mediator will all be given the opportunity to be heard and their opinion's shall be given weight by the judicial body. This facilitates the participation of the collective: the child, the family, the community. It enables Aboriginal values to be contemplated by considering the right of the collective along with the rights of the individuals.

Another constructive recommendation is to extend the length of temporary custody orders. This will dramatically increase the likelihood of reunification. Aboriginal people are faced with many obstacles to survival. Many are in need of rehabilitation treatment. Often, treatment is intensive and requires residence at the facility. Without compassionate alternatives to the rigid practice of temporary custody orders Aboriginal people will be stuck in a vicious circle of abuse as the following story documents:

She was a single parent in her mid-twenties. She had some problems with alcohol. She was the victim of child sexual abuse. She sought help, and entered a treatment program, a life-skills program and an employment re-entry program. She was getting her life back together, but was away from home most of the time in these various programs. She voluntarily put her children into care. The six month limit for children being voluntarily in care was reached. Her healing programs were still under way. She was given the option to drop her programs and resume full-time care of the children, or fact a court ordered apprehension.[112]

d) Rehabilitation/Preventative Services

The Committee takes a holistic approach and looks beyond the symptoms of abuse to identify the underlying causes. It recommends that preventative and rehabilitation services be offered that are oriented towards the needs of Aboriginal people. The negative impacts of the colonialism and child welfare practice so far, have permeated every aspect of Aboriginal life. There are disproportionate rates of suicide and substance abuse in Aboriginal communities. There has also been an escalation of physical abuse and sexual abuse in Aboriginal communities.[113] This situation cannot be changed by legislation along "only through the rebuilding of our cultural values of respect and consent...can we purge our Nations" of these evils.[114] Accordingly, the Committee recommends several amendments to empower Aboriginal women, Aboriginal children and Aboriginal men.

Decisions regarding the safety of abused women and children will rest with the women of that Aboriginal Nation. The matrilineal customs of the Nation are to be followed. At the same time strong measures are encouraged to secure support from estranged husbands. The well-being of Aboriginal mothers and children are to take precedence over the rights of estranged fathers.[115]

In cases of sexual abuse the focus will be on healing rather then punishing. Healing resources must be made readily available to victims of sexual abuse and to their families. Extensive treatment must be made available to offenders, whether or not they have been convicted. More importantly, the disclosure of sexual abuse by the offender for the purpose of obtaining treatment should not prejudice him/her.[116]

The Committee believes that steps must taken to heal all of the problems that plague Aboriginal communities. Healing of Aboriginal communities will ensure the survival of Aboriginal culture. The Committee addresses both the systemic and individual factors responsible for the break down of Aboriginal families and recommends services to address these.

Part V: CONCLUSIONS

The report of the Aboriginal Review Committee, Liberating Our Children - Liberating Our Nations, recommends changes that present the opportunity to bring about meaningful change to Aboriginal family and child welfare practices in British Columbia. I say this because the purpose of the Report is different from previous reviews of child welfare legislation. This time First Nations are not merely seeking to participate in the administration of the FCSA, under the integrated or delegated-authority models. Rather, they are seeking to control child welfare services under the autonomous model. This goal is quite emphatically stated throughout the Report. This is a critical divergence from previous attempts to address the problems caused child welfare legislation. As discussed previously, the integrated and delegated authority models do not satisfactorily represent Aboriginal cultural concerns. Nor do they prevent the removal of Aboriginal children from their families and communities. Movement towards the implementation of an autonomous model of Aboriginal child welfare is a positive step towards resolving the crisis First Nations now face.

The Committee is successful in recommending changes which will affect the legislative, administrative, and adjudicative processes under the FCSA. The recommendations are extensive and provide for a fundamental change in the legislative aims of the FCSA and consequently the administrative and adjudicative practices. The Committee achieves this by surpassing the recommendations of previous reports and recommending the elimination of the legislative threats to Aboriginal children. Most importantly, the elimination of the practice of permanent removal and adoption into non-Aboriginal homes, and the guarantee that First Nations can develop their own systems of child welfare. The Committee provides comprehensive proposals to be legislated into the FCSA and strictly followed by non-Aboriginal agents and non-Aboriginal courts.

The crucial step to guaranteeing substantial change to the FCSA is the continued participation of Aboriginal people in the legislative amendment process. Without full participation in this area, there will be no change. The cycle of abuse will continue. If Aboriginal people are permitted to make changes to the FCSA, as contemplated by the Aboriginal Advisory Committee in their Report, there will be the creation of Aboriginal child care systems that will benefit Aboriginal communities. This will promote all parties to take the final step and transfer complete jurisdiction over child welfare to First Nations. I believe the crisis will be resolved when First Nations have the unencumbered jurisdiction over their children, families and communities.

Endnotes:

[1] *Third Year Student, Faculty of Law, University of Victoria 1992-93.*

[2] *Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 Canadian Journal of Women and the Law 1 at 3. [hereinafter "A Vicious Circle"]*

[3] *Family and Child Services Act, S.B.C. 1980, c. 11. [hereinafter FCSA].*

[4] *There has been extensive documentation of the destructive impact of British Columbia's child welfare practices and policies on Aboriginal people. See for example, J. A. MacDonald, "Child Welfare and the Native Indian Peoples of Canada" (1985) 5 Windsor Yearbook of Access to Justice 284, [hereinafter "Child Welfare"]; John A. MacDonald, "The Spallumcheen Indian Band By-Law and its potential impact on Native Indian Child Welfare Policy in British Columbia (July 1983) 4 Canadian Journal of Family Law 75. [hereinafter "The Spallumcheen"].*

[5] *Community Panel, Family and Children's Services Legislation Review in British Columbia Aboriginal Committee, "Liberating Our Children - Liberating Our Nations" (Victoria, B.C.: Queen's Printers, October 1992) at 20. [hereinafter Liberating].*

[6] *See generally, Marlee Kline, "Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations" (Canada) (1992) 30 Osgoode Hall L.J. 375 [hereinafter "Child Welfare Law"], which has an excellent summary of federal practices concerning First Nations people from Confederation to date. The Indian Act, R.S.C. 1985, c. 1-5, was initially premised on the segregation of Indians for care purposes, because they were inferior, with the aim of assimilation. It contains many provisions which extinguish Indian status. For example, if an Indian woman wished to marry a non-Indian she would lose her status. Later, the policy of "economic assimilation" was proposed by the Department of Indian Affairs and Northern Development in the 1969 Federal White Paper as the statement of the Federal Government. It proposed to end the separate status of Indians by ending separate federal services to them. In addition, the Residential School System was set up in the 1950s-1960s to take Aboriginal children away from their families and culture to teach them non-aboriginal values in the hope that this would facilitate assimilation.*

[7] *Liberating, supra, note 5 at v.*

[8] *Liberating, supra, note 5 at 1. Under s. 3 of the FCSA the Superintendent is authorized to carry out the administrative duties of child welfare services. The Superintendent is part of the Ministry of Social Services. Apprehension and placement powers are found in ss. 9 and 16 of the FCSA.*

[9] *Aboriginal people comprise 4 % of the total population in British Columbia. Yet the statistics in "Liberating", supra, note 5, indicate that, of the 3393 children-in-care on an involuntary basis, 51.6 % are Aboriginal. Of the 2673 children-in-care on a voluntary basis, 13.5% are Aboriginal. (1992 statistics)*

[10] *Liberating, supra, note 5 at 1. Voluntary admittance of children is usually under agreements between the parents and the Superintendent pursuant to ss. 4 & 5 of the FCSA.*

[11] *Involuntary admittance, by court order, is authorized under ss. 13 & 14 of the FCSA.*

[12] *Liberating, supra, note 5 at 1.*

[13] *Liberating, supra, note 5 at 2.*

[14] *It is interesting to note that the NDP Government responded to complaints about the abusive nature of the child welfare system as early as 1972 by commissioning a similar review; the Berger Commission. However, the NDP did not have the opportunity to implement many of the changes recommended because the Social Credit regained power shortly after in 1976. Not until 1978 did Social Credit take any action on the matter. It engaged in "serious consideration" of revisions to child welfare which culminated in the passing of the current FCSA, S.D.C. 1980, c. 11. See MacDonald "The Spallumcheen", supra, note 3 at 84-86, which notes that Native organizations were the most vigorous of opponents to the FCSA.*

[15] *The committee conducted over 33 public meetings in all regions of the province as well as several private meetings. See Liberating, supra, note 5 at ix-xi.*

[16] *For more information on the destructive effects experienced by Aboriginal children from placement in non-Aboriginal facilities, homes and foster-homes see Lynn K. Uthe, "The Best Interests of Indian Children in Minnesota" (1992) 17 American Indian L. Rev. 237 at 252-54; Philip Zylberberg, "Who Should Make Child Protection Decisions for the Native Community?" (Canada) (1992) 11 Windsor Yearbook of Access to Justice 74 at 78-80 [hereinafter "Who Should Make"]; and M. Kline, "Children Welfare Law", supra, note 6 at 377-78. In addition, ask Aboriginal people about their experiences in Residential Schools and Foster homes. Effects range from the horrendous to a sense of loss and cultural displacement.*

[17] *Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3.*

[18] *Re Adoption Act, [1938] S.C.R. 398.*

[19] *Adoption Act, R.S.B.C. 1979, c. 4 and the Family Relations Act, R.S.B.C. 1979, c. 120.*

[20] The Indian Act sets out a regime by which Aboriginal people are categorized and controlled. Section I of the Act sets out the definitions of Indians, Reserves, Bands, Band Councils, etc. to facilitate the regulation and governance of Indians. The Act authorizes the Minister to administer the Act under section 3. The Minister has the power to authorize/disallow any of the powers given to Indians under this Act. For example, the Minister has the power to disallow by-laws which band councils enact.

[21] (1975), D.L.R. (3d) 148.

[22] MacDonald, "Child Welfare", supra, note 4 at 291.

[23] W. Warry, The Province of Ontario, The Research Policy Nexus: Children, Families and Public Policy in the 1990s. "Ontario's First People: Native Children" (Toronto, Ontario: 1992) at 6. [hereinafter "The Native Child"]

[24] See R. Wuerscher, Indian Affairs and Northern Development. "Problems with the Legislative Base for Native Child Welfare Services (Ottawa: Ministry of Consumer Affairs, 1979) at 4. [hereinafter "Problems With"].

[25] This is discussed specifically in Liberating, supra, note 5 at 13, and generally throughout the report. See also P. Monture, " A Vicious Circle", supra, note 2 at 13.

[26] Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. of Law and Jurisprudence 19.

[27] "Children in need of protection" is defined in s.1 of the FCSA. It is based on the notions of abuse, abandonment, and need for care. As discussed previous the FCSA affords mechanisms to apprehend "children in need of protection" and procedures to place them in the care of the Superintendent.

[28] Liberating, supra, note 5 at 9.

[29] Zylberberg, "Who Should Make", supra, note 16 at 77.

[30] There is no culture or system shared by all Aboriginal people except a "widely-shared understanding of creation and stewardship responsibilities of First Nations People for the land, for Mother Earth." Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 C.H.R.Y. 3 at 29.

[31] Menno Boldt & J. Anthony Long, ed., in association with Leroy Little Bear, The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) at 336.

[32] Ibid. at 166.

[33] Chief John Snow, These Mountains are our Sacred Places (Toronto: Hunter Rose Company, 1977) at xii. Chief John Snow goes on to say "coming to agreements that are generally acceptable to all concerned is never an easy task, but within a society conditioned by thousands of years of co-operation, working together, and sharing for survival, it usually [is] possible - a fact the whiteman has often had difficulty grasping."

[34] The Superintendent is delegated authority to administer the FCSA under s.3. Section 3(4) enables the Superintendent to employ agents for this purpose.

[35] Section 6 of the FCSA requires the Superintendent or his/her agents to investigate complaints of child abuse.

[36] Timothy T. Daley, "In Whose Best Interest? The Child Welfare Agent before the Court" (Canada) (1991) 8 Can. Fam. L.Q. 215 at 226.

[37] For current demographic statistics on Aboriginal people (in British Columbia) see Indian and Northern Affairs. Basic Departmental Data (Ottawa: Minister of Supply and Services, 1991). See also Warry, "The Native Child", supra, note 23 at 9-13.

[38] Ibid. at 79. In 1986, only 49.8% of registered Indians were in the labour force in British Columbia. The problem is more acute when you consider that most Aboriginal households are headed by single mothers and the rate of employment for women is a dismal 38.2 %.

[39] Kline, "Child Welfare law", supra, note 6 at 379-80.

[40] For a thorough summary of judicial practices re: Aboriginal child welfare see Emily F. Carasco, "Canadian Native Children: Have Child Welfare laws Broken the Circle?" (1986)5 Can.J.Fam.L. 111 at 115 [hereinafter "Canadian Native Children"; and Monture, " A Vicious Circle", supra, note 2 at 7-8, as noted in Kline, "Child Welfare Law", supra, note 6 at 380.

[41] See Zylberberg's discussion of Ontario's Child and Family Services Act, S.O. 1984, c. 55 at Zylberberg "Who Should Make", supra, note 16 at 81.

[42] Monture, " A Vicious Circle", supra, note 2 at 13.

[43] M.K.S. and J.D. v. Nova Scotia, [1990] 1 C.N.L.R. 10.

[44] [1983] 2 S.C.R. 173.

[45] Ibid.

[46] Natural Parents v. Superintendent of Child Welfare (1975), 60 D.L.R. (3d) 148; [1976] 1 W.W.R. 699 (S.C.C.).

[47] Monture, "A Vicious Circle", supra, note 2 at 13.

[48] Carasco, "Canadian Native Children", supra, note 40 at 124.

[49] *Zylberberg, "Who Should Make", supra, note 16 at 78.*

[50] *Warry, "The Native Child", supra, note 23 at 20.*

[51] *As noted in Native law Student's Association, "Indian Child Welfare and Band Membership Workshop" U.B.C. March 19, 1983; and Alberta Social Services, The Working Committee on Native Child Welfare; and each of the articles cited in this paper.*

[52] *I borrow these categories from J. Taylor-Henley and P. Hudson, "Aboriginal Self-Government and Social Services: First Nations-Provincial Relationship" (1992) 18 Can. Pub. Policy 13.*

[53] *These effects were monitored and reported by the Provincial Advisory Committee on Indian Affairs. Most notably in Provincial Advisory Committee on Indian Affairs, Fifteenth Annual Report (Victoria: Queen's Printer, 1965) as cited in MacDonald, "The Spallumcheen", supra, note 4 at 80.*

[54] *MacDonald, "Child Welfare", supra, note 4 at 285.*

[55] *Zylberberg, "Who Should Make", supra, note 16 at 84.*

[56] *See Carasco, "Canadian Native Children", supra, note 40 at 111-115 for an outline of Ontario legislation; also Wuerscher, "Problems With", supra, note 24 at 1-10.*

[57] *As previously noted in Part n, and see Zylberberg, "Who Should Make", supra, note 16 at 84. Statistics indicate that despite the fact that courts are directed by the statute to consider "Indian" factors, they have not been directed as to the weight these factors should be given. Sadly, they are given very little weight.*

[58] *Ibid.*

[59] *The Canada-Manitoba-Northern Indian Child Welfare Agreement was signed in February 1983, Taylor-Henley and Hudson, "Aboriginal Self-Government", supra, note 52 at 13.*

[60] *Nuu-Chah-Nulth Tribal Council agreement was signed February 27, 1987. It is the most extensive of the three and covers a comprehensive range of child and family services including support and prevention services. The Carrier-Sekani Tribal Council agreement was entered into in July 1987. The McLeod Lake Agreement was entered into June 1988. See Ministry of Social Services and Housing Native Child Welfare Report (Victoria, B.C.: Queen's Printer, June 1990).*

[61] *Rural and remote communities often do not receive adequate services because funding will not be provided when the services can be found in urban centres.*

[62] *Liberating, supra, note 5 at vii-viiii, and 27, which specifically emphasizes that First Nations in British Columbia do not recognize the application of provincial laws to them; and Taylor- Henley and Hudson, "Aboriginal Self-Government", supra, note 52 at 19.*

[63] *Section 81 provides for by-laws to be passed on topics enumerated in ss. (a) - (r) which are subject to the Minister's power of disallowance.*

[64] *Samuel Bull, "The Special Case of the Native Child" (Canada) (1989) 47 The Advocate 523 at 529.[hereinafter "The Special Case"].*

[65] *Following Dickson J. in Nowegijick v. R., [1983] 1 S.C.R. 29; 144 D.L.R. (3d) 193 at 198 [hereinafter Nowegijick cited to D.L.R.], which held that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian" and LaForest J. in Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, 3 C.N.L.R. 46 at 64 [hereinafter Mitchell cited to C.N.L.R.] would support this thesis.*

[66] *MacDonald, "The Spallumcheen", supra,note 4 at 91.*

[67] *For analysis of the by-law see MacDonald "Child Welfare", supra, note 4 at 294-7.*

[68] *Bull, "The Special Case", supra, note 64 at 529.*

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

[70] *Brian Slattery, "First Nations and the Constitution: A Question of Trust" (Canada) (1992) 71 Can. Bar Rev. 261 at 274 points out that Mitchell held the provincial crown bears no responsibility to provide child welfare to Aboriginal communities,...it is the exclusive responsibility of the federal government.*

[71] *J. Woodward, Native Law (Toronto: Carswell, 1989, c. 1990) at 351. Note that s. 88 affords for the paramountcy of federal laws and laws enacted by band councils under federal statutes.*

[72] *Indian Child Welfare Ace, 25 U.S.C. 1901-63 (1988).*

[73] *Michael J. Dale, "State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test" (1992) 27 Gonzaga Law Review 353 at 356. [hereinafter "State Court Jurisdiction"].*

[74] *Uthe, "The Best Interests", supra, note 16 at 250.*

[75] *Dale, "State Court Jurisdiction", supra, note 73 at 390-1.*

[76] *Constitution Act, 1982, being Schedule B of the Canada Act, 1982 (U.K.),1982, c.11.*

[77] *[1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385. The Supreme Court of Canada has set out a two-step test regarding t1le infringement of s. 35 rights.*

[78] *Chris Tennant, "Justification and Cultural Authority in s. 35(1) of the Constitution Act, 1982: Regina v. Sparrow" (1991) 14 Dalhousie L.J. 372 at 373.*

[79] *See Liberating, supra, note 5 at vii-viii.*

[80] *Slattery, "First Nations", supra, note 70 at 285.*

[81] *Mary Ellen Turpel, "Home/land" (1990) 10 Can.J.Fam.L. 17 at 20 where she discusses the utility of the Sparrow decision. She argues that this approach to Aboriginal rights only validates the federal government's predominance over First Nations.*

[82] *However, there are no express provisions in the Act to delegate authority to Aboriginal communities. See Liberating, supra, note 5 at 35.*

[83] *Summary of recommendations, Liberating, supra, note 5 at 97-107.*

[84] *Liberating, supra, note 5 at 34.*

[85] *Ibid. at 34.*

[86] *The Indian Act only recognizes the "Status Indian". The draconian classification system has denied thousands of Indians the right to be called "Indian", thus denying these individuals the right to live in their communities. It has seriously disrupted membership in First Nations. Non-status Aboriginal people face many obstacles to maintaining affiliations wit1l their communities.*

[87] *Liberating, supra, note 5 at 33.*

[88] *See Indian and Northern Affairs, Basic Departmental Data, at 5, Table 1, which indicates that in 1990 about 38.3 % of Status Indians live off reserve. This number is not likely to decrease.*

[89] *The recommendations take note that not many First Nations have Aboriginal child welfare services in operation. Therefore, the Committee recommends that a flexible time table be adopted for the transfer of jurisdiction from provincial agencies to First Nation agencies.*

[90] *Donna J. Goldsmith, "Individual vs. Collective Rights: the Indian Child Welfare Act" (Spring 1990) 13 Harvard Women's L.J. 1.*

[91] *Madam Justice Wilson's response in Racine is a perfect example of a non-Aboriginal women passing judgment on the rights of an Aboriginal woman and her child without any consideration of Aboriginal cultural issues. The decision and the system cannot be regarded as a better system to protect Aboriginal women's rights.*

[92] *Linda J. Lacey, "The White Man's Law and the American Indian Family in the Assimilation Era" (1986) 40 Ark. L. Rev. 327 at 330, as cited in Goldsmith, "Individual vs. Collective Rights", supra, note 90 at 11. This is not to dismiss the fact that many Aboriginal women live under the threat of violence because they do. What I am suggesting is that the outside courts do not protect Aboriginal women's rights. Therefore, some other solution must be sought. An alternative is an Aboriginal court system based on traditional customs with the assurances suggested by the Committee.*

[93] *See Liberating, supra, note 5 at 37.*

[94] *Ibid. at 41-46.*

[95] *Ibid. at 45. Quote from Kamloops Indian Band.*

[96] *Ibid. at 42.*

[97] *Ibid. at 41-49.*

[98] *See Indian and Northern Affairs, Basic Departmental Data at 17. Urban depicts an Aboriginal community within 350 km of a service centre with year-round road access. Remote indicates communities located over 350 km from a city with year-round road access. Special access denotes communities located over 350 km with no year-round road access to the nearest service centre.*

[99] *Taylor-Henley, "Aboriginal Self-Government", supra, note 52 at 18. This article points out how the disagreement between the Aboriginal Nations and the Manitoba Government over the scope of services provided has prevented the Aboriginal agencies from providing appropriate services.*

[100] *Liberating, supra, note 5 at 44.*

[101] *MacDonald, "Child Welfare", supra, note 4 at 288.*

[102] *Changes to the child welfare legislation cannot be limited to the FCSA, other legislation will incidentally be affected.*

[103] *The Recommendations call for the registration of the child as an "Indian" at birth and the establishment of an "Indian Registry" to ensure that no child is denied his or her Indian heritage. See Liberating, supra, note 5 at 58-59.*

[104] *Ministry of Social Services, News Release, December 3, 1992, has called for a moratorium on the adoption of Aboriginal children until a thorough investigation is completed and the recommendations in this report are implemented.*

[105] *Liberating, supra, note 5 at 58.*

[106] *Liberating, supra, note 5 at 20. "There is something inherently wrong in a system that will pay .strangers' more money to look after our children than they would allot to the Aboriginal family." Louis Riel.*

[107] *See MacDonald, "Child Welfare", supra, note 4 at 287-289; MacDonald, "The Spallumcheen", supra, note 4 at 81; and Bull, "The Special Case", supra, note 64 at 523.*

[108] *Liberating, supra, note 5 at 67. Recommendation #57.*

[109] *See s. 9 FCSA.*

[110] *Liberating, supra, note 5 at 69-70, where a practical joke brought about the removal of several Aboriginal children. It took the family nine months to get their children back.*

[111] *Ibid. at 70.*

[112] *Liberating, supra, note 5 at 76.*

[113] *Turpel. "Home/Land", supra, note 81 at 37.*

[114] *Liberating, supra, note 5 at 81.*

[115] *Liberating, supra, note 5 at 81-83. One recommendation is to require the father of an involuntary pregnancy to provide support without any access rights.*

[116] *This recommendation is specific to the problems faced in many Aboriginal communities because there is a cycle of sexual abuse emerging. Without the unqualified availability of treatment it will continue to grow. The offender will be subjected to criminal proceedings but certain self-incriminating evidence will not be permitted.*

4. Native Women And The Charlottetown Accord Proposal to Protect Individual Gender Rights in Aboriginal Self-Governments *by Marcie J. Gray*

...the ability to see clearly, through complex situations and over a long time is learned; the capacity to watch over and guard the well-being of others is an important gift, and one that is learned with great difficulty; for it is one thing if we see the situation others are in, but it is quite another to care enough about them to want to help, and yet another to know what to do

...we will experience ourselves to be a small but infinitely sacred part of a very large process.[1]

Brian Dickson, a former chief justice of the Supreme Court of Canada, wove imagery involving eyesight to depict the struggle one faces when untangling a complex web of issues to protect varying interests. Dickson, who was making a speech at a conference in March 1992, on "First Peoples and the Constitution," had seen only part of the long process of constitutional bargaining that led to the Charlottetown Accord's completion on August twenty-eighth. The negotiations among the federal, provincial and territorial governments and four national Aboriginal groups covered many interests, seeking a compromise Canadians would accept.[2] Nevertheless, a majority of Canadians rejected the deal on October twenty-sixth in a national referendum. The Native Women's Association of Canada, which claims to represent 120,000 Native Women,[3] supported the "No" vote. However, other Native groups, including some which specifically represent Women, supported the deal. The two sides differed in their opinions as to whether the accord could meet Women's needs in self-government arrangements.

The final agreement available before the referendum, embodied in a draft legal text, is filled with ambiguous language that tries but fails to ensure Aboriginal Women's legitimate claim to equal gender rights. But this does not mean the accord should die; parts of it can be salvaged to secure these gender rights in future constitutional negotiations, or any self-government agreement. To begin, one must examine the accord and apply the gender provisions that are stronger than the provisions regarding the collective right to self-government, while discarding sections that weaken the individual right. Furthermore, a non-gender individual right in the Canadian Charter of Rights and Freedoms-the right to vote and to run in an election-must apply to all Aboriginals, regardless of sex. Finally, Native Women will need a seat at future bargaining tables. This procedural right is necessary because without adequate representation, Women cannot ensure that these gender and non-gender individual rights will receive priority in negotiations.

Priority must be given to these rights; otherwise, Women will be defenceless against traditional Aboriginal governments that may discriminate against them. They have already faced discrimination under the Indian Act, the federal statute that currently governs registered Indians.[4] Until 1985, section 12(1)(b) maintained that a Native

woman who married a non-Native man permanently lost her official Indian status. "Along with her status, the woman lost her band membership and with it, her property, inheritance, residency, burial, medical, educational and voting rights on the reserve."[5] Despite court challenges,[6] the Canadian government, which has legislative authority over Indians and lands reserved for Indians,[7] did not repeal this provision until after a test case was brought before the United Nations Human Rights Committee. The plaintiff in the case, Sandra Lovelace, had been unaware of the consequences of her actions when, after leaving the reserve, she married a white man. After divorcing him, she returned to the Tobique Indian Reserve in New Brunswick. "I decided I wanted to come home and be with my people,"[8] she recalls. But they were not officially "her people" any more; she had lost her Indian status. However, she was not alone; many Native Women on the reserve faced the same plight. Also, many status Women sympathized, as did the United Nations; the committee found in favour of Lovelace in 1981, ruling that the Canadian government had breached the International Covenant on Civil and Political Rights. Internationally embarrassed, the federal government still waited another four years to apply Bill C-31, which eliminated the discriminatory clause.[9]

Native Women expressed concern during negotiations of the Charlottetown Accord that Aboriginal governments may be able to discriminate against them in a similar manner, but for different purposes. The federal government had efficiency as a goal; by maintaining status along one blood line-that of the male-the government could easily ensure that the number of registered Indians remained constant, so that reserves did not become crowded.[10] This aim of administrative efficiency took on prejudicial tones because it ignored the matrilineal view. Many Aboriginal Women say that the goal of proposed Aboriginal governments-to protect tradition-could discriminate against Women too. Using tradition as a defence, the governments could act as some band councils have in the past, unjustly giving benefits such as houses first to men in the council, and then to Women. Self-government is "dangerous ...when most chiefs aren't able to handle the little power they have now responsibly."[11] Indeed, only two per cent of the seventy thousand Women and children reinstated by Bill C-31 have been allowed to return to their reserves.[12] Gail Stacey-Moore, president of the Native Women's Association of Canada, has been indirectly quoted as saying that "the same leaders who turned Women away have been slow to react to the epidemic of domestic violence in their communities and to help Women break away from traditional roles."[13]

However, other Native leaders believe that they cannot protect their culture if they are subject to non-Native legislation, such as the *Canadian Charter of Rights and Freedoms.*[14] Chief Wendy Grant of the Musqueam Band in British Columbia has said that, "'Divisions between First Nations people based upon the non-Native fascination with extreme individualism simply support the assimilation of our people into the non-Native culture.'"[15] Carole Corcoran, a British Columbia Native Women's spokeswoman, called the fight for Aboriginal rights "'a life-and- death struggle.'"[16] She believes that if the collective right to self-government is lost, all individual rights will be lost as well.

While self-government must be achieved, it need not sacrifice individual gender rights. Tradition deserves protection, but not to the extent that Women are subjugated to men.

Perhaps individualism is a characteristic of the non-Native culture in Canada today, but it has already seeped into the Native culture somewhat, as Aboriginal Women have demanded equality under the Indian Act. They do not want individualism in order to break apart their traditional culture; they want equal rights so they can help maintain a unified and fair society. "We've always been for Native rights and the good of all Native people, the First Nations,"[17] says Shirley Bear, a Tobique woman who helped lobby for Bill C-31. "The time has come for the men to stop fighting against the Women and start listening to us and working with US."[18] To guarantee that the men listen and cooperate, the Constitution must protect gender equality rights.

The Draft Legal Text of the Charlottetown Accord attempted to provide this protection. A revised version of the August twenty-eighth Consensus Report on the Constitution (amended due to pressure by Aboriginal Women's groups-notably, the Native Women's Association of Canada),[19] the legal text has various provisions that, when stripped of ambiguous terminology, support the right to gender equality.[20] The strongest provision is section 35.7 in the Constitution Act, 1982. It states that, *"Notwithstanding any other provision of this Act, the rights of the Aboriginal peoples of Canada referred to in this Part are guaranteed equally to male and female persons.*"[21] "Notwithstanding" is the strongest term available to writers of legislation, and the authors apply it here to the entire act. Thus, it would override any provision in the Constitution Act, 1982, including another "notwithstanding clause," section 33 of the Canadian Charter of Rights and Freedoms. Under the Charlottetown Accord, Aboriginal governments would have access to section 33, which would enable them to override rights embodied in section 2 or sections 7 to 15. Section 15 affords equality before and under the law and equal protection and benefit of the law, despite characteristics such as race, religion or sex.[22] But with section 35.7, Aboriginal governments' attempts to apply section 33 to limit section 15 rights pertaining to race and sex-Native Women- would be quashed by the courts.

Section 35.5(2) provides an extra assurance. It states that, "For greater certainty, nothing in this section abrogates or derogates from section 15, 25 or 28 of the Canadian Charter of Rights and Freedoms or from section 35.7 of this Part."[23] The phrase "in this section" is unclear because it does not denote whether it refers to section 35 or simply section 35.5. If it is limited to section 35.5, then it ensures that affirmative-action programs aimed at improving "conditions of individuals or groups who are socially or economically disadvantaged or [protecting and advancing] Aboriginal languages and cultures"[24] do not infringe on individual gender rights protected by sections 15 and 28. (Indeed, section 28 protects gender rights notwithstanding any provision in the Charter.)[25] If, however, one may apply section 35.5(2) to all of section 35, then these gender rights are assured against every delineated collective right, including Aboriginal and treaty rights and the inherent right to self -government.[26] While this may be too broad a reading, section 35.5(2) does provide extra protection to the right to gender equality.

However, the effort spent to build up this right could easily be wasted; the Canada Clause in the Constitution Act, 1867 takes a swing at gender equality.[27] As part of this act, the clause affects all legislation that comes after it, including the Constitution Act, 1982 and its Charter.

The Constitutional Conferences saw the Canada Clause as a poetic statement of our vision of ourselves as a country. In the Charlottetown agreement, it has been turned into a powerful interpretive clause that would give the courts direction on how to interpret the rest of the Constitution, including the Charter of Rights and Freedoms.[28]

If judges, following the Canada Clause, had to determine whether government or individual rights merited greater weight, they would discover that the clause's language favours the collective right.[29] The clause, embodied in section 2 of the 1867 act, begins and ends with commitments to a parliamentary and federal system of government, in which provinces are equal, yet diverse. Within this framework, Aboriginal governments are seated alongside the federal and provincial governments, and "have the right to promote their languages, cultures and traditions to ensure the integrity of their societies."[30] Further, these government rights are protected by a non-derogation clause, so that "Nothing in this section (the Canada Clause) derogates from the powers, rights or privileges"[31] of any of the three orders of government. In [contrast, individual rights are weak. The Charter is watered down to a statement that citizens, not governments, are committed to "a respect for individual and collective human rights and freedoms of all people."[32]

When looking specifically at the individual right to gender equality, one sees that the language is also fragile and may be shattered by the strong terminology used for government rights. Positive, active verbs like 'promote," present in section 2(b) protecting the rights of Aboriginal governments, "convey the need for, or commitment to, active steps. ..."[33] Yet such terms are absent from the gender right. Instead, section 2(g) says that, "Canadians are committed to the equality of female and male persons."[34] (Once again, only citizens, and not governments, have a duty to the individual right.) This section seems "to assert that…sex equality already [exists] and that individual Canadians must only maintain a bland commitment to these principles."[35]

Moreover, the unique position of Native Women is not contemplated. The Canada Clause protects Aboriginal peoples in the promotion of their languages, cultures and traditions, and confirmation of their societies' integrity,[36] but does not deal with the independent status of Women. Since courts are supposed to interpret the Constitution according to the Canada Clause, the effect of section 35.7 could be thrown to the wind. Native Women face their original worry anew-that Aboriginal governments may over-ride their sexual-equality rights for the sake of tradition. "...there is no assurance that the equality interests of Aboriginal Women will take precedence over patriarchal and discriminatory interpretations of traditions or the integrity of Aboriginal societies."[37]

Furthermore, section 2(4) states that, "For greater certainty, nothing in this section abrogates or derogates from the Aboriginal and treaty rights of the Aboriginal peoples of Canada."[38] Treaty rights in section 35(3) of the Constitution Act, 1982 (and retained in the Draft Legal Text) include rights that “now exist by way of land claims agreements or may be so acquired." Since the right to self-government may be obtained under a land-claims agreement, government action taken under the guise of tradition, which violates equal gender rights, would still be protected by section 2(4) in the Draft Legal Text.

Thus, gender equality provisions in the Charlottetown Accord, facing the crush of the Canada Clause, fail to adequately defend the individual rights of Aboriginal Women. Another Charlottetown proposal makes a section protecting a non-gender individual right fail as well. Section 3 states that, "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[39] This right is exempt from application of section 33, the notwithstanding clause that governments (including, under the Charlottetown Accord, Aboriginal governments) can use to protect an act or provision despite its infringement of certain Charter rights. In the Consensus Report on the Constitution, the authors make a vague reference to the Charter's democratic rights. The report indicates that a "technical change" to section 3 in the English text will ensure that the section corresponds with the French text.[40]

However, the Draft Legal Text contains the amended provision, and the ambiguous reference in the August twenty-eighth report becomes menacingly clear. The revised section states that citizens have the right to vote and run in an election of the parliament or a legislative assembly "of a province."[41] This explicit phrase implicitly denies the democratic right to all citizens of Aboriginal governments. Consequently, Aboriginal Women would not be guaranteed the opportunity to elect officials who promote their views, or to run for office themselves.[42]

If Native Women cannot protect their individual rights through elected representatives, their rights could be forsaken in favour of the collective right of self-government.[43] Therefore, it is essential that Women have a seat at the table when Aboriginals and current governments negotiate this collective right. Denying Women a place infringes equality rights in sections 15 and 28 of the Charter, as well as section 2(b), which ensures that everyone has the fundamental freedom of thought, belief, opinion and expression.[44] In fact, the Federal Court of Appeal recently declared that the Native Women's Association of Canada had been unjustly silenced when the federal government invited four Native associations to participate in constitutional talks while refusing the Women's group access to the discussions.[45] Indeed, the government even financed the four organizations' involvement while denying the Women's association fair representation. Justice Mahoney, speaking on behalf of the three-judge panel, issued a declaration in favour of the association, which had brought the case against the federal government.[46] Justice Mahoney said that,

> *In my opinion, by inviting and funding the participation of those organizations (the Assembly of First Nations, Inuit Tapirisat of Canada, Native Council of Canada and Métis National Council) in the current constitutional review process and excluding the equal participation of NWAC (the Native Women's Association of Canada), the Canadian government has accorded the advocates of male dominated Aboriginal self-governments (sic) a preferred position in the exercise of an expressive activity, the freedom of which is guaranteed everyone by s.2(b) and which is, by s.28, guaranteed equally to men and women.*[47] (emphasis added)

Despite this ruling, the court decided not to fulfil the request of the Women's association to halt the continued funding of the four organizations until the federal government granted the Aboriginal Women's group an equal amount, or until the group received status as a negotiator in the talks. The court took "the view that at that stage discussions had moved to the 'legislative' stage with which courts cannot interfere."[48] However, the four groups continued to be involved in discussions in Ottawa on August twenty-first and twenty-second and in Charlottetown on August twenty-seventh and twenty-eighth. Meanwhile, telephone calls by the Women's association to the respective offices of Prime Minister Brian Mulroney and Constitutional Affairs Minister Joe Clark met resistance. The association claims that, "Each office stated that such a decision was the responsibility of the other office and neither office responded directly"[49] to the request for participation.

Another court challenge did not rectify the discrimination against the Native Women's group. The association asked for an injunction against further discussion among the federal government and the four Aboriginal associations, and an injunction against the referendum. (The association considered the national vote illegal since it was based on constitutional talks which violated the group's rights.)[50] On October sixteenth, ten days before the referendum, Justice Strayer at the trial division of the Federal Court of Canada found that the August twentieth declaration applied only to public consultation before the governments decided to ask the four Aboriginal associations to join them in the following constitutional discussions.[51] Furthermore, Justice Strayer said that courts should not have a role in deciding who is invited to constitutional conferences.

Assuming that, for example, sections 15 or 28 of the Charter require that there be a gender balance in the interests represented at the constitutional table, how is one to define those interests?

How is a judge to determine who genuinely represents those interests and who does not? These are surely political questions for which there are no legal or constitutional principles to guide a court in its decision. I cannot think that such decisions are the proper function of judges.[52]

The national Native Women's association could not get an appeal of this decision before the referendum. On November thirteenth, the Federal Court of Appeal dismissed the case as concerning a hypothetical debate. "It is common ground that the Charlottetown accord and the related accords are now a dead matter,"[53] Chief Justice Isaac said. This decision is too convenient; Native Women's concerns still need to be addressed, and can be legitimately addressed by the courts. Judges, as fact-finders, should be able to decide whether a major interest is not being fairly represented at government discussions. Indeed, Justice Mahoney held that Native Women's interests could be expressed by the four associations that participated in the talks, but he found that none of the groups did, in fact, represent Women's concerns strongly enough.[54] Moreover, in his role as fact-finder, he held that, "NWAC is a bona fide, established and recognized national voice of and for Aboriginal Women."[55]

Other Aboriginal groups have contested the fact that the national Women's association represents all Native females. Sheila Genaille, president of the Métis National Council of Women, has stated that Métis Women, in particular, do not follow the agenda of the Native Women's Association of Canada. Instead, they voice their concerns through Métis groups. "Métis Women, through their provincial and national associations, have been involved in shaping the constitutional strategy put forward by the MNC (Metis National Council) at the negotiating table."[56] Carole Corcoran has said that the national Women's association falsely portrays itself as the advocate of today's Aboriginal Women. Calling the group's agenda "'very self-serving,"'[57] Corcoran stated that Native leaders true to their tradition want to protect Aboriginal people; gender and age do not affect traditional priorities.[58]

Traditional priorities are justifiable if they affect men and Women equally. However, Native Women have faced discrimination under the Indian Act, as, for example, at least one band council has decided to deny reserve residence to Women who were reinstated by Bill C-31 but are still married to non-Native men.[59] With 120,000 members across Canada, the Native Women's Association of Canada deserves a voice in constitutional talks to ensure that such blatant discrimination cannot occur under Aboriginal self-government.[60] Meanwhile, the Native Women who felt they could work with the four national Aboriginal groups present at the Charlottetown negotiations may continue to use these avenues to fulfil their needs.

Gender equality is a need-an entrenched right in the Constitution of Canada-that must be protected in future Aboriginal self-governments. The Charlottetown Accord offers a framework which, if amended and fortified as a distinct federal and provincial policy of self-government negotiations (consequently affecting negotiations of land-claims agreements under section 35.1 of the current Constitution Act, 1982), could offer the security Native Women require. The wording and spirit of section 35.7 of the Draft Legal Text must be retained. Furthermore, the Canada Clause must be altered to ensure that governments do not garner greater attention than individuals, and specifically, Aboriginal Women, when courts decide which rights prevail in constitutional cases. Since ambiguous terminology makes it nearly impossible to guarantee this, policy makers should consider throwing out the Canada Clause and amending the Charter of Rights and Freedoms so that the Aboriginal right to self-government is protected, subject to the gender-equality right. This individual right requires further fortification by ensuring that the democratic right of every citizen to vote and run in elections applies to Aboriginal governments. Finally, concerned Native Women's associations must have a seat at the bargaining table, so that they can assure the policy to protect individual gender and non-gender rights is enforced. If these rights are not protected, Aboriginal self-government will face an uncertain future. "To succeed in the long term, it should be able to encourage general support by all those it affects."[61]

Endnotes:

[1] *Right Hon. Brian Dickson, indirectly quoting from The Sacred Tree, "Session III-Process, Implementation and Practical Aspects of Self-Government," First Peoples and the Constitution: Conference Report of Co-Chairs (Ottawa: 13-15 March 1992) at 62.*
Dickson says the book The Sacred Tree is "dedicated to the countless clans, tribes and nations of indigenous people through Mother Earth whose sacred visions, dreams, prayers, songs, wisdom, experience and kind guidance form the foundation and living reality of the sacred tree." (at 62)

[2] *The four groups represent natives living on and off reserves, Métis and Inuit people. (Stephen Bindman, "Native Women Lose Bid to Block Oct. 26 Vote," The [Ottawa] Citizen (17 October 1992) A4.*

[3] *Bindman, supra, note 2.*

[4] *Indian Act, R.S.C. 1985, c. 1-5.*

[5] *Janet Silman, Enough is Enough: Aboriginal Women Speak Out (Toronto: Women's Press, c1987, 1990) at 12.*

[6] *See, for example, Attomey-General of Canada v. Lavell; Isaac et al v. Bedard (1974), 38 D.L.R.(3d) 481 (S.C.C.).*

[7] *Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3; R.S.C. 1985, App. II, No.5, s. 91(24).*

[8] *Silman, supra, note 5 at 75.*

[9] *Ibid. at 13-4, 74.*

[10] *David W. Elliott, Lecture "Status," Law 51.354, Carleton U, 23 Sept. 1992. Prof. Elliott notes another result of limiting status: benefits attached to Indian status did not have to be paid to Indian women marrying non-Indian men (and their children).*

[11] *Silman, quoting Caroline Ennis, supra, note 5 at 235.*

[12] *Andre Picard, "Native Women Cling to Charter: Won't Trade Rights for Unity Deal," The [Toronto] Globe and Mail (29 May 1992) A4.*

[13] *Ibid.*

[14] *Rudy Platiel, "Native Women to Challenge Proposal on Aboriginal Rights," The [Toronto] Globe and Mail (17 January 1992) A6. The original argument between some native organizations and native women's associations revolved around the issue of whether the Canadian Charter should apply to aboriginal governments. If so, should the governments have recourse to section 33, the notwithstanding clause that enables the state to override individual rights protected in section 2 and sections 7 to 15? The Native Women's Association of Canada advocated binding the governments to the Charter, while other organizations said aboriginals should not follow a non-native charter.*
The essay will show that the Draft Legal Text's section 35.7 voids the native women's concern with the Charter. Instead, the threat to individual rights comes from the Canada Clause.

[15] *Rudy Platiel, "Aboriginal Women Divide on Constitutional Protection: Exempting Chiefs from Charter Risky, some Contend," The [Toronto] Globe and Mail (20 January 1992) A3.*

[16] *Ibid.*

[17] *Silman, quoting Shirley Bear, supra, note 5 at 247.*

[18] *Ibid.*

[19] *Geoffrey York, "Native Women's Fear Leads to Text Change: Drafters Drop Clause Seen as Threat to Sexual Equality," The [Toronto] Globe and Mail (7 October 1992) A1-2.*

[20] *The final text simply retained section 35(4) of the Constitution Act, 1982, and said gender equality should be on the agenda of the First Ministers' Conferences on Aboriginal constitutional matters. The first of four must take place before 1996. (First Ministers of Canada, territory leaders and aboriginal representatives, Consensus Report on the Constitution, Final text (Charlottetown) 28 Aug. 1992 [hereinafter Consensus Report].)*
Section 35(4) states:

> *"Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons." (Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.) 1982, c. 11; R.S.C. 1985, App. II, No.44.*

The Native Women's Association of Canada expressed concern that the Consensus Report set the inherent right to self-government in section 35.1, apparently independent of section 35, and thus, not affected by section 35(4). (Teressa Nahanee, Native Women's Association of Canada, et al. v. Her Majesty the Queen, et al.:
A Plain Language Summary (Ottawa: Native Women's Association of Canada 11 Sept. 1992) at 3 [hereinafter Case Summary].
This concern is eliminated by the Draft Legal Text's section 35.7, which guarantees gender equality, "Notwithstanding any other provision of this Act (emphasis added)."

[21] *First ministers, territorial and aboriginal leaders, Draft Legal Text (based on the Charlottetown Accord of 28 Aug. 1992) 9 Oct. 1992: at 42 [hereinafter Draft Legal Text].*

[22] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11; R.S.C. 1985, App. II, No.44 [hereinafter Charter].*

[23] *Draft Legal Text, supra, note 21 at 41.*

[24] *Ibid.*

[25] *Section 25, as revised by the Draft Legal Text (new addition highlighted below), states that,*
The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763;
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired; and
(c) any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions.
While sections 15, 25 and 28 seem to be given equal status (thus putting the collective right to protect language, culture or tradition on the same footing as the individual gender right), they all fall under the supreme provision, section 35.7, which guarantees male and female equality notwithstanding any pro- vision in the Constitution Act, 1982.

[26] *Draft Legal Text, supra, note 21.*

[27] *Shelagh Day, "Forum on the Referendum: What's Wrong with the Canada Clause," (October 92) Canadian Forum at 21-3.*

[28] *Judy Rebick, "Why to Vote No in the Referendum," The [Toronto] Globe and Mail (17 September 1992) A19.*

[29] *Day, supra, note 27 at 21.*

[30] *Draft Legal Text, supra, note 21.*

[31] *Ibid.*

[32] *Ibid.*

[33] *Day, supra, note 27 at 22.*

[34] *Draft Legal Text, supra, note 21.*

[35] *Day, supra, note 27 at 22.*

[36] *Draft Legal Text, supra, note 21.*

[37] *Day, supra, note 27 at 22.*

[38] *Draft Legal Text, supra, note 21.*

[39] *Charter, supra, note 22.*

[40] *Consensus Report, supra, note 20.*

[41] *Draft Legal Text, supra, note 21.*

[42] *Michele Landsberg, "Unity Deal Will Rob Native Women of Key Rights," The Toronto Star (22 September 1992) B1.*

[43] *Cox, "Native Women's Group Asks for Injunction to Put Vote on Hold," The [Montreal] Gazette (14 October 1992) A12.*
Mary Eberts, a lawyer for the Native Women's Association of Canada, says that, "native governments could control band membership, thus denying some women the right to housing, medical services and education for their children." Bob

[44] *Charter, supra, note 22.*

[45] *Teressa Nahanee, constitutional advisor to the Native Women's Association of Canada, says that this case is the fIrst of its kind in legal history.*
"Discussions with NWAC (Native Women's Association of Canada) counsel, Mary Eberts of Toronto, lead us to believe that this court decision is the only one of its kind in the world because it recognizes freedom of political expression for women." (Case Summary, supra, note 20 at 1.)

[46] *Gail Stacey-Moore and Sharon Mclvor, with the Native Women's Association of Canada, initiated the action.*

[47] *Native Women's Association of Canada, Gail Stacey-Moore and Sharon Mclvor v. Canada, [1992] 4 C.N.L.R. 71 at 83 (Fed. C.A.), Mahoney J.*

[48] *Native Women's Association of Canada, Gail Stacey-Moore and Sharon Mclvor v. Canada (16 Oct. 1992), No. T-2283-92 (F.C.T.D.) at 5, Strayer J. [hereinafter Native Women].*

[49] *Native Women's Association of Canada, Gail Stacey-Moore and Sharon McIvor v. Canada, Amended Statement of Claim (17 September 1992), No. T-2283-92 (F.C.T.D.) at 3 [hereinafter Amended Claim].*

[50] *Sean Fine, "Native Women Aim to Block National Referendum," The [Toronto] Globe and Mail (13 October 1992) A8.*

[51] *Native Women, supra, note 48 at 6-7.*
Strayer J. states that, ". ..a process of consultation with the public and with aboriginal organizations had commenced with the release by the Government of Canada of its constitutional proposals entitled Shaping Canada's Future Together in the summer of 1991. Those proposals were referred to a Parliamentary Committee which proceeded to hold hearings at which members of the public could make their views known; and at about the same time a parallel process was started by

the aboriginal organizations with respect to their communities, sustained by funding to the designated organizations provided by the Government of Canada. This and other processes of public consultation continued until March 12, 1922 (sic) when representatives of the federal, provincial and territorial governments and the designated organizations started meetings. ..."

[52] *Native Women, supra, note 48, 1 at 11.*

[53] *Bob Cox, "Judges Halt 'Hypothetical' Legal Debates on Plebiscite," The [Ottawa] Citizen (14 November 1992) A5.*

[54] *Fine, supra, note 50.*

[55] *Amended Claim, supra, note 49 at 1. The summary of facts in the amended statement of claim indicates that the Native Women's Association of Canada, a national non-profit organization incorporated in 1974, was founded and is led by Aboriginal women.*

[56] *Sheila Genaille, letter to the editor, "Métis Women Endorse Agreement," The [Toronto] Globe and Mail (30 September 1992) A23.*

[57] *Robert Matas, "Native Leaders try to Discredit No Groups," The [Toronto] Globe and Mail [Toronto] (14 October 1992) A7.*

[58] *Ibid.*

Other women's aboriginal groups that promoted the "Yes" vote in the national referendum (in particular, after the Draft Legal Text dealt with concerns about the Charlottetown Accord) included the Ontario Native Women's Association, which represents about 10,000 aboriginal women, and the Inuit Women's Association of Canada. (Geoffrey York, "Support for Deal Growing among Native Women," The [Toronto] Globe and Mail (9 October 1992) A4.)

[59] *Gail Stacey-Moore, for example, is a Mohawk of Kahnawake, Quebec and was reinstated by Bill C-31. However, she cannot return to live on her reserve with her family because the band council has decided that Indian women with non-Indian husbands cannot reside there. (Amended Claim, supra, note 49 at 1-2.)*

[60] *Furthermore, the Native Women's Association of Canada gains status since the National Action Committee on the Status of Women (Canada's largest women's organization, representing more than 550 Canadian women's groups) fully supports the aboriginal women's group. (Statistics from Judy Rebick, "Forum on the Referendum: Why Not Women?" (October 1992) Canadian Forum at 14-5.)*

Geoffrey York, in "Support for Deal Growing among Native Women," supra, note 58, reported that "Ms. Rebick said her committee is taking its cue from NWAC and will continue to oppose the deal as long as NWAC is against it." The Native Women's Association continued to oppose the deal despite changes in the Draft Legal Text, and Sharon McIvor told York that, ."We will not be happy unless we are seated at the table."'

[61] *David W. Elliott, ed., "Note on Aboriginal Self-Government," Law and Aboriginal Peoples of Canada (North York, Ont.: Captus Press, 1992) at 195.*

5. The Contribution of the Child Welfare System to the Deterioration of Aboriginal Culture and the Need for Aboriginal Control

by Lauren Sasaki

Child protection agencies are charged with the legal and moral obligation of promoting the welfare of children, by ensuring that they are not subject to abuse or neglect. Provincial and territorial legislation gives these agencies the authority to intervene in the lives of parents and children in order to provide protection.[1]

While all would agree that the protection of children is a worthwhile and necessary endeavour, there is much disagreement over the methods by which child protection agencies attempt to achieve their purpose, particularly with respect to aboriginal peoples. Despite the widespread nature of child abuse and neglect, it is well-documented that child protection agencies, whose workers are typically white, well-educated and from middle-class backgrounds, are more likely to have as their clients, poorly educated families, "living in or near poverty, and not infrequently members of a racial minority group and living in a family led by a single parent."[2]

The following statistics illustrate the overwhelming impact of the child welfare system on aboriginal communities - even more devastating considering the fact that children represent 50% of the aboriginal population.

Although native children accounted for only 2% of the total population of children in Canada in 1986, they represented approximately 20% of all Canadian children in substitute care;[3] thus they are more likely to come in contact with Canada's child welfare system than any other children. "In 1987, the percentage of status Indian children 'in care' was four times that of non-Indian Canadian children, 3.2 percent as com- pared to 0.8 percent for the total population."[4] In some western provinces, more than 50% of the children in care are aboriginal.[5] By the 19808, thousands of native children had been placed in foster homes or institutions or given up for adoption.[6]

My intent is to illustrate how "child protection", merely one aspect of the dominant culture's assimilative policies, has been used, directly and indirectly, to destroy aboriginal culture. I thus hope to demonstrate the urgent need - nay, necessity - for aboriginal peoples to assume control over their children's welfare. I am specifically referring to governmental policies which have "justified" the removal of children from their native homes and native communities to be placed in white society, thereby depriving the children of their culture, family and extended family, identity, and natural environment. My emphasis will be on the effects of Canada's adoption policies on native societies since adoption legally severs all ties between the child and his/her natural parents.

It is important to look historically at Canada's intervention to understand why aboriginal children are at such a high risk of being apprehended by child protection agencies today.

The intrusion by child welfare authorities in the past has been paternalistic and colonial in nature, condescending and demeaning in fact, and often insensitive and brutal to Aboriginal people. Aboriginal children have been taken from their families, communities and societies, first by the residential school system and later by the child welfare system. Both systems have left Aboriginal peoples and their societies severely damaged.[7]

Since the earliest contact between Canada's aboriginal peoples and the European settlers, attitudes and philosophies concerning family relationships and child-rearing have vastly differed. For example, while the early French settlers were shocked to find that the Indians did not physically discipline their children, the Huron believed that children were individuals with their own needs and rights, not things to be moulded. The Huron felt that it was wrong to coerce or humiliate someone in public, believing that undue humiliation might drive a child to commit suicide. In general, aboriginal children were taught to assume adult roles surrounded by warmth and affection. Their learning process included an appreciation of values such as respect for all living things, sharing, self-reliance, individual responsibility, and proper conduct. As well, children were taught how to effectively utilize the environment to survive. Most importantly, and integral to all aspects of their education, was the spiritual; ceremonies, which stressed the individual's link to the spiritual and sacred, marked the passage of time from birth to death, thus ensuring cultural continuity.[8]

During the period when there was little social interaction between the two cultures, the differences were not problematic. However, the Europeans felt that their child-rearing practices were superior to those of the Indians and that in order to survive, the Indians would have to be assimilated into the European way of life.[9] The religious missionaries were the first to attempt to change the aboriginal people, particularly emphasizing conversion to Christianity.[10] Missionaries and settlers both emphasized assimilation, and as the 19th century progressed, Indians were becoming less valued for their original cultural attributes, whether as partners in the fur trade or as military allies. Settlement assumed priority. This new paternalistic, one-sided relationship received its legal justification in the British North America Act, which ...took away Indians' independent status by making them wards of the federal government. As consolidated in the Indian Acts of 1876 and 1880, Indian self-government was abolished, and finance and all social services, including education, were placed under federal control. Lands reserved for Indians' use were to be managed on their behalf until such time as individual Indians enfranchised themselves or became sufficiently "civilized" to be allowed a measure of self-government.[11]

Copying U.S. "civilization" policies, "residential schools" (racially segregated, industrial schools) were established to remove aboriginal children from the "disruptive influences of the parents and the community".[12] Here, native children were forbidden to speak their own languages or practice any of their customs, which were generally considered to be uncivilized,[13] and were punished if they violated these rules.[14] Removal from their families and communities was highly destructive emotionally to all concerned. As well, "the devaluation of the children's culture and heritage which occurred in such institutions had a very negative effect on their self-esteem".[15] At some residential schools, the

children suffered devastating physical and sexual abuse, along with disease. Ironically, the supposed education was substandard: "few Aboriginal people achieved more than a grade five level of education".[16] Eventually, the residential school system was phased out in the 1950s and 1960s.[17] However, the damage was done:

> *The effects upon Aboriginal societies of the federal government's residential school system, and its policy of assimilation, have been astounding. Residential schools denigrated Aboriginal cultures, customs and religions, and disrupted the traditional practices of Aboriginal child-rearing and education. They tore apart families and extended families, leaving the children straddling two worlds, the European one and that of their own Aboriginal societies, but belonging to neither: These policies have caused a wound to fester in Aboriginal communities that has left them diminished to this day.*

The loss of successive generations of children to residential schools, the destruction of Aboriginal economic bases, the decimation of their populations through diseases and the increasing dependence on government welfare have led to social chaos. This manifests itself in Aboriginal communities through staggering poverty rates, high unemployment rates, high suicide rates, lower education levels, high rates of alcoholism and high rates of crime. In individuals, the legacy of the residential schools has been lowered self-esteem, confusion of self-identity and cultural identity, and a distrust of, and antagonism toward, authority.[18]

One of the most devastating results of the residential school experience on the Aboriginal community has been the breakdown in traditional methods of teaching child-rearing and parenting, since entire families used to take part in the raising of children. Children, as all children do, learn parenting skills by example from their own parents. Aboriginal peoples also draw from the examples and advice of their extended families, i.e. their grandparents, uncles, aunts, and siblings.

Life for a child on a Reserve or in a native community is described as one of safety, love, adventure and freedom. A child feels, and is welcome in any home and may join any family for a meal. A mother is not concerned if a child does not return home for a meal or even to sleep. The mother knows that some family is willingly providing for the child.[19]

Understandably, many aboriginal parents who have grown up in the residential school system, have no experiences upon which to draw and thus feel that they have never learned how to raise their children.[20]

The "Circle of Life" is a term used by native groups. When a native child is removed from his/her home, the traditional circle of life is broken, leading to a breakdown of the family, the community and the bonds of love between parent and child. It is apparent that the residential school system constructively set out to break the "Circle of Life". Many believe it is this factor that is "literally destroying native communities and native cultures."[21]

This "Circle of Life" relationship has been described in various ways, emphasizing the passing down of custom and tradition from generation to generation through an oral history[22] and by setting an example of the aboriginal way of life. Further, in Aboriginal communities, the elders assume prominent positions - they are largely responsible for retaining much of the knowledge and traditions of Aboriginal cultures. In general, they help their people, individually and collectively, to gain knowledge of the "history, traditions, customs, values and beliefs of the tribe, and to assist them to maintain their well-being and good health".[23] For example, elders have long been considered the ones who bridge the gap between the ancient traditions and beliefs of the people and the modern-day influences that affect the daily lives of aboriginal men and women."[24]

It is important to also keep in mind that the aboriginal peoples' have a strong relationship with their environments. There are certain "responsibilities" that each generation must fulfil under the law of the Creator. The elders are concerned that if the children do not learn their responsibilities, they will not be able to survive:

> *We the human beings, have been given the original instructions on how to live in harmony with the natural law... We are concerned that the basic principles of the law are no longer being passed on to the next generation. This could be fatal to life as we know it.*[25]

It can't be overemphasized that this concern goes to the very heart of aboriginal culture. One's individual "worldview" or cultural understanding of humanity's place in creation, and in turn one's corresponding role, will "pervade and shape all aspects" of one's life[26] - whether aboriginal or not. There have been attempts made, many unsuccessful, by various native groups to describe this harmonious relationship or "natural law" and its importance to aboriginal culture. For example, in the case of *Delgamuukw v. British Columbia*,[27] the Plaintiff's Opening Address identified the Feast as being the most significant Gitksan and Wet'suwet'en "institution". The Feast, being political, legal, economic, social, spiritual, ceremonial and educational, gives expression to the essential values of the culture. Through the means of its practice, repetition and recombination, these values are transmitted from generation to generation.

The Circle of Life has been broken for many aboriginal communities for a number of generations through government intervention - firstly, by the residential school system, and then by the child welfare system. Modern child protection statutes base agency involvement on a finding of a "child in need of protection" or, similarly, an "endangered child". Following this finding by a court, there are basically three dispositional alternatives that the court can order:

> *First, the child may be returned to the parents, subject to supervision by the child protection agency. This order may include terms requiring the agency to provide certain services to the child and parents. Second, the child may be made a temporary ward of the protection agency for a limited period of time. Under this order, the agency assumes temporary legal guardianship of the child and places the child in a foster home or other residential setting. Third, the child may be*

> *made a permanent or Crown ward. In general, this order terminates the parents' guardianship rights and responsibilities and transfers them to the state. The child may then be placed in an adoptive home or a long-term foster home.*[28]

Under these child welfare statutes, aboriginal peoples were further subjected to the white man's push for assimilation, as evidenced by the increase in aboriginal children thought to be in need of protection by child welfare authorities. Cultural differences were ignored as non-native child welfare authorities focused on the nuclear family. Non-native attitudes toward aboriginal social and environmental conditions and a misunderstanding of the structure of native communities led to native child apprehensions. For example, the aboriginal concept of the community all taking part in the rearing of a child and recognition of a child's independence, were often misconceived as neglect. Or, an aboriginal person's lack of display of emotions in public, thought by aboriginals to be inappropriate and uncomfortable for the viewer, has often been mistaken for indifference by non-aboriginal people.[29]

The lack of formal education and resultant high unemployment, poverty, disease, high infant mortality, alcoholism, violence, poor self-esteem, and poor parenting skills - all contributing factors to child neglect - are not denied by the native people. However, these conditions can be attributed to the social and institutional processes which originated outside the individual community and which were imposed upon the natives.[30] Their powerlessness, lack of education, lack of opportunity, disease, etc. are not cultural choices but the results of the government's "wardship". Typically, child welfare personnel observe the conditions in the native community, make comparisons to the "standard" of white, middle-class society, and consequently apprehend the children, thus breaking the traditional "Circle of Life" which leads to the destruction of native communities and native cultures. And understandably, "[f]rom the Indian point of view there is probably no issue in child welfare more disturbing than that of adoption of Indian children by non-Indians."[31]

Aboriginal peoples view children as "precious commodities", necessary for the survival of their cultures and integral to nation-building.[32] Studies have shown that native children admitted into care are less likely than non-native children to be returned to their parents. As they grow up, they are dislocated in terms of their culture, their race and their family, and have no clear sense of identity - and thus no home to which they can return. Hence, the community can no longer regenerate itself,[33] leading to the devastating conclusion that "removing First Nations children from their culture and placing them in a foreign culture is an act of genocide".[34] Aboriginal groups are quite consciously aware of this threat to their survival.

Aboriginal people worry about the future of their languages, cultures and societies if yet another generation is swept into institutions and away from their communities.[35]

On the other hand, placements within the child's native community enable the child to still learn his/her peoples' ways and traditions, teaching them how to become full participating members in the community in the future.

The third dispositional alternative (as outlined above) available to the court -adoption -is the most intrusive and destructive to aboriginal communities. Non-native adoption legally creates a parent-child relationship between non-biological "parents" and the child, while extinguishing legal ties to the natural parents. Adoption policy in the late 19th and early 20th centuries was directed towards fulfilling the needs of the adoptive parent, a focus which remained even after the introduction of adoption legislation. Adoption agencies tried to find the right "match", considering physical characteristics, intellect, religion, class, and most importantly, race of the child, to those of the prospective parents.

Parents were invited and even encouraged to conceal the fact of adoption. Adoption legislation supports this pretence, stressing as it does concealment of the child's biological origins through sealing of records and creation of the legal relationship of biological parenthood, "... as though the child were a child born to the adopting parent in lawful wedlock" [The Family Services Act, R.S.S. 1978, c. F-7, s.6O(2)(b)]. Adoption policy tended to exclude adoption by the poor, racial minorities, older couples and single people, and favoured adoption by those who most closely approximated the approved family form: nuclear, middle-class families, financially comfortable and of child-bearing age, and usually white.[36]

The natural parents were then to no longer have any contact with their children.

Wayne Warry reports that in 1961, 65% of adopted native children were cared for by registered native parents; by 1970-73 this figure had dropped to between 13-16%. By 1981, it was 27.3%. This last figure indicates that approximately 75% of status Indian children who were adopted have non-Indian parents! While status Indian children retain their status under federal law, even if adopted by non-Indian parents,[37] adoption under provincial law interferes with the child's rights under federal law. Under the Indian Act, bands have the right to determine their membership. However, provincial legislation prohibiting disclosure of adoption information has severely limited a band's ability to identify prospective members. Further, provincial legislation does not place any "onus on non-Native agencies to inform Indian adoptees of their eligibility for Band status under the Indian Act."[38]

This legal concept of adoption as "terminal" and "irreversible" is alien to Indian culture.[39] In addition to the sense of community beginning with the "extended family" (a social network of caregivers),[40] "North American Indians had developed their own form of adoption as a means of providing care for children whose parents were unwilling or unable to do so."[41] Aboriginal "customary adoption" has been recognized by some Canadian courts since the 1960s.[42] One important and distinguishing feature is that children do not lose contact with their natural parents. Adopted children retain their birth names and grow up completely aware of their origins; disclosure is viewed as their birthright. Although the adoptive parent, usually a relative or member of the extended family, has care and custody, "the birth ties are not completely severed".[43]

The raising of children is seen as a communal responsibility with the immediate and extended family carrying the primary responsibility for a specific child. In addition to the input of grandparents, aunts, uncles, and older siblings, the parents, it is understood, may select a specific person to assume a special role in a child's life. This person will oversee the child's development, teach necessary skills, and maintain a lifelong relationship with the child.

Adoption in native communities does not only apply to children. A family may adopt a grandparent. A child may adopt an uncle or an aunt. A man may adopt another as a brother and each will assume all the rights and responsibilities of a natural brother to each other's wife, children, and relatives.[44]

It is easy to understand why customary adoption is preferable to aboriginal peoples than statutory adoption since the former allows the natural parents to know where their child has been placed and allows them to maintain contact. Also, it emphasizes and acknowledges the importance of maintaining the child's culture and heritage.[45] Recent developments in adoption laws in Canada and other countries, such as more disclosure of information and post-adoption access, indicate movement towards a more open adoption approach, bringing statutory adoption nearer to aboriginal custom.[46]

Similarly, the tradition of custom adoption is quite common to the Inuit. It has been reported that as many as 20% of the children in the Keewatin District of the Central Arctic have been informally or formally adopted. The practice of taking in the children of friends and relatives is quite accepted. In the 1960s, the Northwest Territories Supreme Court was given the power to approve custom adoptions, which have the same legitimacy in law as the more complicated private or departmental adoptions.[47] In *Re Katie's Adoption Petition*,[48] the court, in recognizing the Eskimo custom of adoption, pointed out that "Eskimos, living in the remote areas of the Eastern Arctic, ...would find it difficult, if not impossible, to comply" with some of the legislative provisions for adoption. The Northwest Territories Court of Appeal in *Re Deborah E 4-789*, took the same point of view, stating:

> It was never intended that these [legislative] provisions would exclude the well-established custom of Eskimo adoption. To interpret it otherwise would be to deprive many of these people of a custom that is so valuable to the safety and survival of children where death of a parent is a common hazard of their existence. It would also invalidate a large number of custom adoptions that have been confirmed by the courts throughout the years.[49]

Custom has always been recognized by the common law. In this case, the requirement of evidence of the existence of this custom extending back to time immemorial was shown. However, the expectation of assimilation once again raised its ugly head: Johnson J.A. added that "in time, as Eskimos are brought more closely into the Canadian Community, the necessity to retain custom adoptions will disappear".[50]

More recently, the Northwest Territories Supreme Court in *Re Tagomak*[51] held that customary adoption is also a right under s.35(1) of the Constitution Act, 1982, which states that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[52]

Provinces, however, vary greatly in their approach to the quantity and quality of social services provided to aboriginal children.[53] In Ontario, its Child and Family Services Act provides the following Declaration of Principles:

> *Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.*[54]

Many provisions in the Child and Family Services Act specifically require the court to consider the importance and uniqueness of Indian and native culture, heritage and traditions when making an order or determination in the best interests of a native child. For example, native participation is sought or considered: as parties to a proceeding [s.39(1)4]; in placing a child in need of protection [s.53(5)]; in applying for access [s.54(2)(b)]; in selection of a residential placement [s.57(1)(d)]; in applying for status review [s.60(4)(d)]; etc. Applying these principles in *Re D.L.S. and D.M.S.; J.T.K. and L.S. v. Kenora-Patricia C.F.S.,*[55] the court, in recognizing the importance of customary aboriginal adoption, placed two sisters on the reserve where their mother lived, contrary to the child welfare agency's decision to have the children adopted by a family on another reserve.

However, despite the fact that courts seem to be placing more emphasis on the aboriginal child's right to culture and heritage, other considerations may still be given higher priority.[56] The Supreme Court of Canada, in *Racine v. Woods*,[57] ruled that the "importance of exposing children to their cultural background decreases as the time spent with caregivers outside their community increases and relationships to non-aboriginal caregivers are strengthened".[58] Madam Justice Wilson, as she then was, prioritized the bonding that had occurred between the adoptive parents and the child over a number of years, in denying the child's return to her natural mother:

> *In my view, when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates overtime. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.*[59]

It is important for all children to have their culture and heritage play an important factor in determination of the child's best interests. Emily Carasco argues that the native people of Canada should be given special consideration because they did not immigrate to Canada expecting to assimilate. Citing Mr. Justice Thomas Berger, she differentiates between immigrants who choose to come to Canada and submit to Canadian policies, as opposed to natives who were already here and were forced to submit.[60]

Government policy, since before Confederation, has "been designed to eliminate - by assimilation - the aboriginal peoples of Canada".[61] Many examples can be found throughout Canadian history even up to as recent as 1974!

1895:
When treaties were made with the Indian people of Western Canada, the Queen had promised that the Indians would not be forced to adopt the culture of the white men. Despite this fact, commencing in 1895, a series of amendments were made to the Indian Act, making it an offence for an Indian to participate in religious ceremonies and celebrations.

Indian [Affairs] agents complained that these ceremonies interfered with the daily routine of labour on the reserve, that they were cruel, and that they discouraged the private accumulation of property ... The purpose of these amendments [was] to suppress important manifestations of Indian culture.[62]

The penalty, on summary conviction, was a fine and/or imprisonment.

1920s:
'I want to get rid of the Indian problem,' Deputy Superintendent of Indian Affairs Duncan Campbell Scott told the House of Commons in the early 1920s. 'Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department.'[63]

1969:
Pierre Trudeau's Liberal government issued its White Paper on Indian Policy which "envisaged rapid assimilation of Indian people into 'Canadian' society in the name of equality".[64]

1974:
'Before a quarter of a century is gone, perhaps, the savages will be no more than a memory!' wrote a Quebec civil servant in 1897. 'Is it wise to sacrifice, for needs that are more fictional than real of this race that is leaving, the interests of the majority of the state?' His argument was repeated, virtually verbatim by a judgment of the Quebec Court of Appeal in 1974 in the case brought by the James Bay Cree against the Quebec government's hydro-electric project.[65]

Fortunately, it would be quite wrong to believe that aboriginal traditions, values and beliefs have completely disappeared. While aboriginal cultures have undergone contemporary changes (as many cultures do), "their identity as separate peoples continues to be an important part of the lives of Canada's aboriginal population".[66]
Indians have not assimilated. Their identity as separate people - with a vision of reality and destiny and of themselves and their world - remains an essential feature of their lives.[67]

The aboriginal "vision" of self-government, or self-determination as some prefer,[68] includes the administration of their own child welfare and social services.[69] And while the question of jurisdiction extends to every decision which a native government might make (in the context of child welfare, provincial legislation applies)[70], some Indian bands and aboriginal communities over the past twenty years have been "seizing control of their own schools, health clinics, child welfare agencies and justice systems"[71] (emphasis added). In fact, the Spallumcheen Band in British Columbia unilaterally declared its jurisdiction over child and family services by passing a Band By-Law.[72] Further, Ovide Mercredi, grand chief of the Assembly of First Nations, has been oft-quoted as stating that natives will continue to pass their own laws in areas such as child welfare, health and education.[73]

The Supreme Court of Canada in *Natural Parents v. Superintendent of Child Welfare*[74] upheld the application of provincial adoption legislation to status Indians, seemingly on the basis that there were no competing adoption provisions in the Indian Act. Indian governments, on the other hand, are asserting inherent jurisdiction over many aspects of their lives, including child welfare.[75]

> *Tribal sovereignty includes rules of membership and inheritance, domestic relations and child custody or adoption, ...*[76]

A number of proposals for Indian self-government have included the creation of new institutional arrangements such as Indian school boards and Indian child welfare agencies, as part of a wholesale restructuring of the relationship between Indians and the rest of Canada. This new relationship would enable natives to exercise greater control over many aspects of their lives, i.e. it would involve self-determination. Other proposals consider enactment of "subject acts" such as an Indian Education Act or Indian Child Welfare Act.[77]

One must note that not only have aboriginal children been deprived of learning parenting skills by example, but also spousal skills. Aboriginal women have expressed their view that in cases of spousal abuse and child abuse, the family and the community needs to undergo a healing process. It is no solution to the victim or the abuser to remove either party temporarily without any treatment process.[78] Removing the child from the home punishes the child. If the goal of the child welfare system is to return the child when it is safe to do so, there needs to be some change in the situation in the home.

In the view of the Aboriginal Justice Inquiry of Manitoba, the "single greatest threat to the future of Aboriginal people and their societies" is child abuse.[79] The Inquiry further endorses recommendations made before them calling for greater community responsibility and response to both child abuse and spousal assault. The community must emphasize to the abuser that his/her actions are unacceptable but that assistance is available if the offender will accept responsibility. The Hollow Water Resource Group has implemented such a program.

> *The resource group will continue to meet separately with the offender, the victim and the family of each to explain what will be expected in the healing process. A special gathering and ceremony then is held. The offender, victim, family members and resource group members gather and speak of how they feel about the offence, what responsibility the offender must take, and how each can help in the healing process of the victim and offender. This is the heart of the process and allows the community to show concern for all involved. The offender publicly apologizes and signs a Healing Contract, which usually commits the offender to some form of community service and treatment, and includes a promise by the offender against future victimization of the abused individual.*[80]

The main advantage that the Hollow Water approach offers, that is missing from other programs, is the provision of a mechanism to heal and restore harmony to the families and the community, in addition to providing rehabilitation to the offender and support and comfort to the victim. This approach is directed at dealing with the problem of abuse at its source. It was specifically designed to protect its people against the repetition of abuse and to prevent any new incidents of abuse.

The Inquiry has also recognized that aboriginal women have been prominent in the design and implementation of aboriginal models of healing both the victim and abuser, and in developing the necessary community support. Further,

> *It is clear to us that Aboriginal people must be allowed to develop culturally appropriate programs and institutions to deal with family violence issues. These institutions must come under Aboriginal control. The Indigenous Women's Collective and others recommended a healing lodge concept - a place where Aboriginal people can come together to learn the teachings of elders and to participate in healing ceremonies. The Interlake Reserves Tribal Council is working to develop their Harmony and Restoration Centre near Gypsumville to provide a more formalized program for offenders, while enabling their families and victims to join in the growing and healing process. The Assembly of Manitoba Chiefs has a research team investigating the development of the Healing Lodge to assist Aboriginal people and communities to recover from the ravages of residential school experiences.*[81]

While these methods may be particularly called for in family violence situations, they would seem quite appropriate in dealing with all kinds of child protection matters. The emphasis is on healing and saving the family unit by concentrating on restoring harmony and balance to the community by healing both the victim and offender.

I would like to point out at this time that non-aboriginal children have not fended very well either in the Canadian child welfare system. Studies have indicated that most "street kids" are "products" of the child welfare system. Most have been sexually abused. Life on the street invariably means a (short) life of juvenile prostitution and very often drugs. It has been recognized that the child protection system and its laws have failed these children whose numbers are ever increasing.

Many of the young people [living on the street] had been in foster care, group homes or shelters, but none of these institutions seemed able to address the angry rebellion against conventional norms which these young people brought with them from their disturbed home life.[82]

Recommendations for community-based strategies are also being made for non-aboriginal children,[83] as a result of the realization that no child protection strategy operating under (present) provincial laws will "save" these young people.

However, there are clearly special problems specific to native children entangled in a non-native child welfare system. These include confusion and severe identity crises during adolescence, common among Indian children who have been adopted into non-native homes or sent to non-native foster homes.[84] Tragically, the number of youth suicides is considered to be a significant problem for many aboriginal communities.[85]

Apprehensions of Aboriginal children by the child welfare system invariably leads to a pattern of multiple foster home placements, often leading the children into young offender institutions, and ultimately into adult correctional institutions. One native group has asked: "Is the system conditioning our young for lives in institutions and not in society?"[86] From the statistics, it would seem so. Even upon returning to their communities, having been deprived of their cultural ways, they are not capable of becoming fully functional members of the community.

At this point, we should ask why this system, which seems to be inadequately dealing with a large number of its child victims, is still being imposed on native communities? More importantly, where do we go from here?

I have tried to illustrate and emphasize that the historical pattern of apprehensions in Canada has been destructive to the development of aboriginal children as future contributing members of aboriginal communities. Native leaders are calling for the repatriation of the thousands of native children to their home communities and native control over child welfare.[87] It would make little sense to impose one aboriginal child welfare model on all aboriginal communities since each community is different. Thus each tribe must be free to implement their own system to adequately address their needs. As a signatory to the U.N. General Assembly's Declaration of the Rights of the Child, Canada has a responsibility to protect children against all forms of cruelty and neglect, as well as safeguarding a child's right to culture.[88] And until aboriginal communities have implemented their own child welfare agencies, this responsibility requires recognition by child welfare legislation and the judiciary of the importance of the "indigenous factor", "the disregarded, underemphasized or undervalued factor in child welfare situations involving Indian children, i.e. their unique character and the need therefore for a particular rather than a general response".[89]

A necessary factor in the success of any child welfare system would seemingly be trust - of the families, the community, and especially the children. Trust is so important because of the necessity of full and frank communication between all of the parties

involved, including the child protection workers. Without trust, information may be withheld - information vital to making decisions regarding a child's welfare. Given the government's track record of assimilative policies, not only in the child welfare area, how can anyone expect aboriginal peoples to trust a government-run child welfare system, despite changes in the applicable legislation? It would not be the first time that the government has ignored its commitments to aboriginal peoples. For this additional reason, aboriginal communities should be encouraged to implement their own child welfare systems with regard to their own children's specific needs.

I have attempted to show that aboriginal peoples are strong peoples, full of integrity and courage. Despite the government's various assimilative policies which can quite fairly be labelled "cultural genocide", aboriginal communities have continued. Robbed of their children for many generations, there still exists separate, thriving peoples who choose to meet the problems of their communities head on. It is quite apparent that some aboriginal communities are prepared to effectively deal with, and in some cases have been dealing with, their problems of child abuse and domestic violence. Their programs seek to fight the problem at its source, i.e. healing not only the victim but the offender as well, along with the family and community. These actions should not be discouraged but wholeheartedly embraced, for the rest of Canada can only hope that the aboriginal "healing process" may somehow be applied to non-aboriginals too - for our children's sake.

Endnotes:

[1] *Nicholas Bala, "An Introduction to Child Protection Problems" in Nicholas Bala. Joseph P. Hornick, and Robin Vogl, eds., Canadian Child Welfare Law: Children, Families and the State (Toronto: Thompson Education Publishing, Inc., 1991) at 10.*

[2] *Ibid. at 15.*

[3] *Canadian Council on Children and Youth, For Canada's Children, Vol. 2, No.3, May 1990.*

[4] *Standing Senate Committee on Social Affairs, Children in Poverty: Toward a Better Future (1991) at 7.*

[5] *Bala, supra, note 1 at 16.*

[6] *Assembly of First Nations, National Inquiry into First Nations Child Care (Ottawa: Assembly of First Nations, 1989).*

[7] *Report of the Aboriginal Justice Inquiry of Manitoba. Vol. I: The Justice System and Aboriginal People (Winnipeg: Province of Manitoba, 1991) 1 at 509-18.[hereinafter Report of the Aboriginal Justice Inquiry of Manitoba].*

[8] *Ibid.*

[9] *Ibid.*

[10] *J.W. Grant, Moon of Wintertime: Missionaries and the Indians of Canada in Encounter Since 1534 (Toronto: University of Toronto Press, 1984).*

[11] *J. Barman, Y. Hebert and D. McCaskill, eds., Indian Education in Canada: The Legacy, Vol. 1 (Vancouver: University of British Columbia Press, 1986) 1 at 4.*

[12] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 509-18.*

[13] *Judge Murray Sinclair, Donna Phillips, and Nicholas Bala, "Aboriginal Child Welfare in Canada" in Nicholas Bala, Joseph P. Hornick, and Robin Vogl, eds., Canadian Child Welfare Law: Children, Families and the State (Toronto: Thompson Education Publishing, Inc., 1991) 1 at 173.*

[14] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 509-18.*

[15] *Sinclair, Phillips, and Bala, supra, note 13 at 174.*

[16] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 509-18.*

[17] *Sinclair , Phillips and Bala, supra, note 13 at 174.*

[18] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 509-18.*

[19] *E.C. Kimelman, Chairman, No Quiet Place: Review Committee on Indian and Métis Adoptions and Placements (Manitoba: Manitoba Community Services, 1985) 1 at 45.*

[20] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 509-18.*

[21] *Jessica Hill, "Remove tile Child and the Circle is Broken" (1983) Children's Act Workshop, Ontario Native Women's Association at 55 cited in Emily F. Carasco, "Canadian Native Children: Have Child Welfare Laws Broken The Circle?" (1986) 5 Canadian Journal of Family Law 111 at 112.*

[22] *George Stanley, "An Historical Comment" in Ian A.L. Getty and Antoine S. Lussier, eds., As Long As the Sun Shines and Water Flows: A Reader in Canadian Native Studies (Vancouver: University of British Columbia Press, 1983) at 1-24.*

[23] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 17-39.*

[24] *Ibid.*

[25] *Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights" in Menno Boldt and J. Anthony Long, eds., Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) at 19-23.*

[26] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 17-39.*

[27] *Delgamuukw v. British Columbia (1991), 79 D.L.R. (4th) 185 (B.C.S.C.); Plaintiffs Opening Address.*

[28] *Dick Barnhorst and Bernd Walter, "Child Protection Legislation in Canada" in Nicholas Bala, Joseph P. Hornick, and Robin Vogl, eds., Canadian Child Welfare Law: Children, Families and the State (Toronto: Thompson Education Publishing, Inc., 1991) 1 at 27.*

[29] *Sinclair, Phillips and Bala, supra, note 13 at 176.*

[30] *Wayne Warry, "Ontario's First People" in L.C. Johnson and D. Bamhorst, eds., Families and Public Policy in the 90s (1991) at 207.*

[31] *Carasco, supra, note 21 at 111.*

[32] *Warry, supra, note 30.*

[33] *Carasco, supra, note 21.*

[34] *Patricia A. Monture, " A Vicious Circle: Child Welfare and the First Nations" (1989) 3 C. J. W. L. 1.*

[35] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 509.*

[36] *Anne McGillvray, "Transracial Adoption and the Status Indian Child" (Canada) (1985) 4 C.J.F.L. 437.*

[37] *Natural Parents v. Superintendent of Child Welfare, [1976] 2 S.C.R.751.*

[38] *Warry, supra, note 30.*

[39] *Ibid.*

[40] *Ibid.*
[41] *Heather L. Katarynych. "Adoption" in Nicholas Bala, Joseph P. Homick, and Robin Vogl. eds.. Canadian Child Welfare Law: Children. Families and the State (Toronto: Thompson Education Publishing. Inc. 1991) at 133.*
[42] *See Re Katie's Adoption Petition (1962), 38 W.W.R. 100, 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.); and Re Beaulieu's Petition (1969), 67 W.W.R. 669 (N.W.T. Terr. Ct).*
[43] *McGillivary. Supra, note 37 at 437-67.*
[44] *Kimelman, supra, note 19 at 163.*
[45] *Sinclair, Phillips and Bala, supra, note 13 at 180.*
[46] *Ibid.*
[47] *'Inuit way of adoption continues to flourish' in The [Toronto] Globe and Mail (2 January 1989) A2.*
[48] *Re Katie's Adoption Petition (1961), 38 W.W.R. 100, 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.) at 101.*
[49] *Re Deborah E 4-789 (1972), 5 W.W.R. 203 (N.W.T.C.A.).*
[50] *Ibid. at 209.*
[51] *Re Tagornak (1983),50 A.R. 237 (N.W.T.S.C.).*
[52] *Constitution Act, 1982. being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s.35(1).*
[53] *Sinclair. Phillips and Bala, supra, note 13 at 186.*
[54] *Child and Family Services Act, S.O. 1984, c.55, ss.3(15)(20).*
[55] *Re D.L.S. and D.M.S.; J.T.K. and L.S. v. Kenora-Patricia C.F.S.. [1985] W.D.F.L. 934 (Ont. Prov. Ct. -Fam. Div.).*
[56] *Sinclair. Phillips and Bala, supra. note 13 at 178.*
[57] *[1984] 1 C.N.L.R.161, [1984] 1 W.W.R. 1 (S.C.C.).*
[58] *Sinclair, Phillips and Bala, supra, note 13 at 178.*
[59] *Supra, note 57 at 187.*
[60] *Carasco, supra, note 31, citing Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry, Vol. 1 (Ottawa: Canada Department of Supply and Services, 1977) at 173 (Chair: Mr. Justice Berger).*
[61] *Doris Ronnenberg. President, Native Council of Canada in Frank Cassidy. ed.. Aboriginal Self-Determination (Lantzville: Oolichan Books and The Institute for Research on Public Policy, 1991) at 36-37.*
[62] *Delia Opekokew, The First Nations: Indian Government and the Canadian Confederation (Saskatoon: Federation of Saskatchewan Indians, 1980) at 18-19.*
[63] *George Erasmus, "Twenty Years of Disappointed Hopes" in Boyce Richardson, ed.. Drumbeat: Anger and Renewal in Indian Country (Toronto: Summerhill, 1989) at 1-13.*
[64] *Kent McNeil. "Aboriginal Peoples and Constitutional Reform in Canada", unpublished paper delivered at Primero Seminario -Taller "Derecho Indigena: Derecho Alternativo", Chapala, Mexico. October 28-31, 1992 at 7-8.*
[65] *Erasmus. Supra, note 63 at 13.*
[66] *Sinclair. Phillips and Bala, supra, note 13 at 176.*
[67] *J. Barman, Y. Hebert and D. McCaskill, eds., Indian Education in Canada: The Challenge, Vol. 2 (Vancouver: University of British Columbia Press, 1986) at 156.*
[68] *The following excerpt is from Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies. Cultural Differences" (1989) C.H.R.Y.B. 3:*
"There is an important distinction between self-determination and self-government for Aboriginal peoples. Self-determination is seen as more in keeping with cultural difference than is self-government. The granting of self-government (which has been the ultimate objective of all human rights discussions in the Canadian context) implies that Aboriginal peoples, who were not previously able to govern themselves because they were not at a sufficiently advanced stage of civilization, can now take on some responsibility for their own affairs ...
Self-determination is viewed as a more hopeful concept ... because if is fluid enough to permit various arrangements between existing or recognized states and Aboriginal peoples. It is viewed by them as a concept which provides greater recognition of the cultural differences of peoples who live within enclaves defined by dominant cultures rather than Simply providing a predetermined context for minority or 'ethnic' rights."
[69] *Opekokew, supra, note 62 at 1-13.*
[70] *Frank Cassidy and Robert Dish, Indian Government: Its Meaning in Practice (Lantzville, B.C. and Halifax: 00lichan Books and The Institute for Research on Public Policy, 1989) at 29-50.*
[71] *Geoffrey York, "For Aboriginals: Hope remains for self-government", The [Toronto] Globe and Mail (27 October 1992) A1.*
[72] *Warry, supra, note 30.*

[73] *"B.C. native leader sees hard bargaining ahead on land claims", Victoria Times -Colonist (27 October 1991) A9 and Geoffrey York, "Natives set to move ahead with own laws", The [Toronto] Globe and Mail (20 November 1992) A5.*

[74] *Supra, note 37.*

[75] *York, supra, note 71 at A1.*

[76] *Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987), "Whose Culture?" at 69, footnote 8.*

[77] *Special Parliamentary Committee on Indian Self-Government. "Proposals for Indian Self-Government" in J. Rick Ponting, ed., Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland and Stewart, 1986) at 327-41.*

[78] *Report of the Aboriginal Justice Inquiry of Manitoba, supra, note 7 at 475-96.*

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

[82] *Christopher Bagley, Barbara A. Burrows and Carol Yaworski, "Street Kids and Adolescent Prostitution: A Challenge for Legal and Social Services" in Nicholas Bala, Joseph P. Hornick, and Robin Vogl, eds., Canadian Child Welfare Law: Children, Families and the State (Toronto: Thompson Education Publishing, Inc., 1991) at 115.*

[83] *Ibid. at 122.*

[84] *Geoffrey York, "Teenager's Death Seen as Tragic Proof of Need for Native Social Workers", The [Toronto] Globe and Mail (24 Apri11989) A1 and Anna Pellatt. "An International Review of Child Welfare Policy and Practice in Relation to Aboriginal People" (Calgary: Can. Research Inst. for Law and the Family, 1991) at 10-19.*

[85] *Erasmus, supra, note 63 and Tony Hall, "As Long as the Sun Shines and the Water Flows", The [Toronto] Globe and Mail (25 July 1989) at A7. Aboriginal youths take their own lives at a rate at least five times higher than the national average.*

[86] *Swampy Cree submission to the Public Inquiry into the Administration of Justice and Aboriginal People of Manitoba, The Pas, Manitoba (17 January 1989) at 14.*

[87] *Phil Fontaine, member of the Ojibway First Nation, speaking on "Justice for Aboriginal Peoples", Queen's University, Kingston, Ontario (21 January 1992).*

[88] *Carasco, supra, note 21.*

[89] *Ibid.*

6. The Indian Act as Patriarchal Control of Women

by Sharon D. McIvor[1]

The federal Indian Act, since 1867, was intended and did alter the lives of Indian women by destroying their roles within Indian society. The destruction of the equal and valued place of Indian women within their communities began with the onslaught of settlement of these lands by Europeans and continues today. For purposes of this discussion, my intention is to review a number of legal cases, first respecting male membership rights, second, treatment of Indian women's rights, and finally, examining matrimonial property rights of Indian women today. My intention is to show that Indian women have been much more harshly dealt with by the judiciary and the law than Indian men when they seek to have their rights interpreted and enforced.

a) Membership Cases

The Indian Act, the politicians who created it, the bureaucrats who administered it, and the judiciary who enforce and interpret it-as men-understand its intention: to both protect males and erase the presence of women. The courts were sympathetic to one such Indian male, Sam Jean Baptiste Wilson,[2] in declaring that he should not have been asked to prove his Indian paternity 60 years after-the-fact. Wilson was born in or about 1893 near Peace River, Alberta to Madeline Sanata and may have had a white, American father. Or he may have been "sired" by "one Le P'tit (Lepsie) Laboucan. As early as June 1, 1900, Wilson, then an infant, and his mother received treaty payment. A year later, his mother married within her own Band-the Beaver Band at Horse Lake and Clear Hills. Wilson and his mother took the Band number of the new husband, Pierre Chatelas. At the proper age, Sam Jean married and was given his own Band number. He subsequently married and received treaty money for him and his wife.

In 1942, the Department of Indian Affairs decided to purge the Beaver Band list and questioned anyone with a non-Indian name. Wilson said he received his name from his mother's husband, a Mr. Wilson. His name was then removed from the Band list because his mother was alleged to have married a non-Indian. His name was removed from the list even though he had received treaty payments for 43 years. The court found the Department had removed Wilson's name based on his own oral evidence as to his paternity and mother's first marriage. Wilson was not one year old when his alleged "real" father died, likely while he was out trapping. The learned judge reviewing the Department's decision under s. 9 of the Indian Act rightly stated: "It is a new departure when the evidence of an individual as to his own paternity is accepted as admissible much less as conclusive evidence on the question."[3] No value should have been given to Wilson's evidence as to his paternity. The judge found Wilson's knowledge on his paternity must "be assumed to have been merely the local rumour and idle chatter in the community and which came to his ears in later life."[4] Two elders, aged 90 and 79, gave contradictory evidence as to Wilson's paternity. Wilson, on appeal, denied his first testimony and said his name was given to him by an Indian agent during the first Treaty payment.

The judge interpreted the then section 11(b) of the Indian Act as being to establish finality in a band list: once it is established, it is beyond challenge. Treaty payment lists were one way of establishing a final band list. Wilson's mother was not on the 1899 list, but is on the 1900 list as being a member who has returned. The judge noted that at least two widows were on the 1900 treaty list, and they later appeared on the 1951 Band list. The combined 1899 and 1900 treaty lists were found to comprise a final band list which included Wilson and his mother. Wilson was deemed by the court to be a band member and one entitled to be registered and have his named reinstated to the band list. He was found to be the illegitimate child of an Indian woman entitled to be registered. The court found Wilson could have his name struck from the list by the Registrar "if the registrar is satisfied that the father of the child was not an Indian". Since no evidence was held by the Registrar, "he could not reasonably have been satisfied that the father of the child was not an Indian.

In a similar case[5] involving a 70-year-old Indian male, it was held that it would be unjust and unfair to require him to establish the blood of his ancestors, all of whom had passed away. Joseph Poitras, registered as a Member of the Muscowpetung Band of Saskatchewan in 1920, protested his removal from the Band list in 1952. The Department of Indian Affairs removed his name because his father, Pierre Poitras Sr. was alleged to have received scrip on June 16, 1900. Those who received scrip were generally found to be Métis or become Métis despite their Indian blood quantum and they were not eligible to be registered as Indians and Band members. Joseph Poitras was born on November 8, 1884 and at the age of 12 he left his parents and 10 brothers and sisters to earn his own way in the world. He never returned to the family. By 1919, he had lived on several Indian reserves in Saskatchewan and settled on the Muscowpetung Reserve at the age of 35. He was voted unanimously as a Band member by the Band in 1920.

The Department made the final determination on Band membership for the "half-breed" Poitras, his wife and four children. Commissioner W. M. Graham found Poitras and his wife to be "both thrifty and good workers".[6] The reasons given by Poitras for leaving the Standing Buffalo Reserve were the lack of available land and accommodation. The sympathetic Commissioner reported to headquarters that "it would be impossible for this man to extend his farming operations on the Standing Buffalo Reserve, as there is no available land there."[7] In its Band Council Resolution the Muscowpetung Band invited Poitras and his family to be Band members and to share in the lands of the Band.[8] Eighteen names were listed in favour; none against. By 1956, the trial date, Poitras had lived on the Muscowpetung Reserve for 37 years and the family had 1,000 acres under cultivation.

Ten years after Poitras and his family established themselves at Muscowpetung, an application was made (in 1929) to investigate his right to Band membership. On two occasions, he was found eligible. The Indian Act was amended in 1951 allowing for establishment of Band lists, reviews, and setting out categories of persons not entitled to be registered. On January 31, 1952, the Chief and Councillors protested against Poitras registration on the Muscowpetung Band list on the basis that he was the son of someone who received Half breed scrip. His wife and all his minor children were also subject to the protest.

Judge Hogarth noted:

> *...in considering this protest we are dealing with lives of people as human beings and their to happiness arising from rights granted and established 36 years ago. The protest not only affects Joseph Poitras but his wife and children and the right of all of them to share in land and moneys of the band, land which by their industry they have helped to improve and make more valuable, and in moneys, the common property of all members.*[9]

As there was no evidence the Band list was posted in a public place, the court denied the Chief and Council a right to be heard on this protest. The Judge noted that individuals did not have a right to protest inclusion of names on a posted Band list, but Band Councils could protest. He found the Chief and Council, not presenting evidence of convening a meeting for the purpose of protesting, were three electors of a 200-member Band. They, thence, had no standing to protest Joseph Poitras' inclusion on the Band list. The Judge was equally harsh on the Registrar stating he had taken Joseph Poitras' name off the Band list because he had received scrip. In fact, it was Joseph Poitras' father who received scrip. But even on that point, neither the Registrar nor the Band presented any evidence that Pierre Poitras Senior received scrip.[10] It was found that Joseph Poitras, having been registered as a Band Member at Muscowpetung in 1920 by section 5 of the Act, should be regarded as an Indian in the eyes of the law. There was no evidence that Joseph Poitras ever received scrip and it was not conclusively proven that Pierre Poitras Sr. who received scrip for his three sons was the complainant's father.

The Judge freely commented on Parliament's intention with respect to section 12 of the 1951 Indian Act.

> *I cannot bring myself to the conclusion that Parliament ever intended sec. 12 to have the retroactive effect suggested by counsel for the protestors. To construe sec, 12 as being retroactive and operating to oust Joseph Poitras and his family from the Muscowpetung reserve after 36 years' residence there would be a gross and intolerable justice.*[11]

Joseph Poitras, his wife, children and grandchildren kept their Band membership at Muscowpetung Reserve.

Circuit Judge Buchanan[12] agreed with Judge Hogarth's reasoning in the Poitras case, but disagreed that the 1951 Indian Act could not act retrospectively and was only intended for future registrations to Band lists. In dealing with protests to the inclusion of 27 names on the Band list, the Judge noted that the fate of wives and children follows the "head of the family". The case, then, dealt with 27 Band members, male and female,[13] Their membership was contested by 10 Band members who wrote out the protests under the 1951 Indian Act.

The history of the definition of who is an Indian was noted by the court as tracing to the 1868 Indian Act.[14] Those entitled to be Indians included:

> *Firstly. All persons of Indian blood reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and their descendants;*
>
> *Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and the descendants of all such persons; And*
>
> *Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.*[15]

The Judge noted that the definition of "Indian" was simplified in the 1886 Indian Act, Ch. 43 as:

> *2 (h). The expression 'Indian' means -*
>
> *First, any male of Indian blood reputed to belong to a particular band…*
>
> *Secondly. Any child of such person.*
>
> *Thirdly. Any woman who is or was lawfully married to such person.*[16]

The 1951 Indian Act repealed all definitions of "Indian" in previous Indian Acts and reinforced male descendency in section 11(c). A person entitled to be registered is a male person who is a direct descendant in the male line of a male person described in paragraphs (a) or (b), or is the legitimate child of a male person. Also included were illegitimate children of female Indians unless the Registrar is satisfied the father was not an Indian. Persons whose mother and grandmother on the father's side were non-Indians prior to marriage were not eligible for registration, Indian women who married non-Indians were not eligible for registration, or continued registration.

The 1951 Indian Act called for Band Lists to be developed of eligible registrants and these lists were to be posted in a public place. The Act gave the Registrar powers to add or delete the names based on provisions in the Act. Protests to the Band List could be made by either the Band Councillor or 10 electors, those being registered on the List, over 21 years of age and eligible to vote in Band elections.

In the present case, 10 electors protested the inclusion of 27 names and their families on the basis that these people accepted scrip. A hearing was held under the Inquiries Act,[17] and the protests were not sustained. A year-long investigation resulted in a recommendation to the Registrar that the 27 persons have their names deleted from the Sampson Band List. All 27 persons filed a request for judicial review. Five years later, this decision was rendered with the Judge noting:

> *I am reminded that five years, years of painful suspense for those protested (the appellants), of golden opportunity for the writers of editorials and of letters to the newspapers, and of unlimited joy to the propagandists have gone by since the protestors initiated these proceedings.*[18]

The blame, he said, rests with the Department of Indian Affairs. The Judge also noted that oil had recently been discovered on reserve lands and the Samson band has suddenly "become possessed of a highly valuable asset and that loss of status as band members would be to the individual appellants an irretrievable disaster."[19] This, however, was irrelevant to the task at hand, namely on how to interpret the Act.

The Act, the Judge held, was meant to be retrospective. If this resulted in scrip takers and their descendants being removed from Band Lists even though their entire lives were spent with the Band, and if this were inhumane, it was for Parliament to resolve.[20] The courts should not mettle with Parliament's intention. The tests for entitlement and non-entitlement were severe and the enforcement, therefore, should also be severe. Is it sufficient to lodge a protest against 27 individuals whose “forbearers" took scrip? The Judge said no. No evidence was presented that the ancestors of the 27 persons took scrip. No evidence was presented that the said ancestors did not return the scrip and resume membership, and yet there is evidence others did so.

The protestors did not present evidence that they were electors of the Samson Band. It is not sufficient that the protestors be Members of the Band; they must be electors. The protestors failed on three counts to have the names removed from the list: failure to post the Samson Band list; failure to state reasonably intelligent grounds of protest; and failure of the 10 to prove they were electors. The 27 persons subject to protest were found to be entitled to have their names included in the Indian register as members of the Samson Band.

b) Illegitimate Children

The question of equality between illegitimate children of male and female Indians was dealt with in 1973. The court held in that instance that the illegitimate child of a male person was entitled to be registered under the Indian Act[21]. The illegitimate children of Indian women also were entitled to registration unless the Registrar found the father to be a non- Indian and the child could then not be registered. This differentiation in the treatment of illegitimate children of male female Indians was found not to be discrimination based on sex,[22] contrary to the Canadian Bill of Rights, s. 1(b). No provision is made in the Indian Act to protest registration of illegitimate children of male Indians and no provision is made for removal of that person's name from the Band list.

Counsel for the Children's Aid Society argued:

> *...that the effect of the legislation is to discriminate with a class (Indians) by reason of the sex of the Indian parent of the child in question; that such discrimination leads to inequality before the law with the consequent comparable loss of property and other rights to the illegitimate child of a female band member.*[23]

Reference was made to three court decisions dealing with discrimination in the Indian Act after enactment of the Canadian Bill of Rights which I refer to as *Drybones*,[24] *Lavell*,[25] and *Bedard*[26]. In each of these cases it was found that sections of the Indian Act were inoperative when it was in contravention of the Bill of Rights. At this point, the Lavell decision had been made in Jeanette's favour at the Federal Court and was to be appealed to the Supreme Court of Canada where she would lose.

The question of illegitimacy of children of male and female Indians was different, the court argued. The court decided that male and female illegitimate children were treated equally. What mattered most was the sex of the parent. Rather than tackle that issue, the court concerned itself with legitimacy and descendency. It found that descendants in law refers only to legitimate children and concluded:

> *In my opinion, s. 11(1)(c) has reference only to male legitimate children. It therefore follows that there is no difference under the Indian Act between an illegitimate child of a male Indian and an illegitimate child of a female Indian when the other parent is a non-Indian [except for the protest if the father is a non-Indian].*[27]

The court next considered the purpose of the Indian Act.

> *One of its general objects is to preserve Indian reservations and benefits to Indians and to no one else. I would go so far as to state that these rights are intended to be confined to full-blooded Indians. This proud and dignified race is thus given some opportunity to retain its identity and culture in the face of the onslaught by an alien society on its way of life.*[28]

The court found no discrimination against the illegitimate children of female Indians based on sex. Maternity, it held, is always identifiable; paternity, it said, has a degree of uncertainty. The Indian Act simply recognizes the fundamental differences between men and women which have been recognized by the common law for centuries. David Froman, the illegitimate child of an Indian mother was not entitled to be an Indian because his father was a non-Indian and evidence was provided to that effect.[29]

Circuit Court Judge Bence[30] addressed the definition of "Indian" for purposes of the Constitution Act, 1930,[31] otherwise known as the Natural Resource Transfer Agreement between Canada and the Prairie Provinces. Which Indians were exempted from the provincial Game Act[32]? A. J. Jordan[33] in his commentary on the Laprise case, states that the Constitution Act, 1930, being a constitutional document was not subject to provincial or federal laws. It "has the force of law notwithstanding any Act of Parliament of Canada." Jordan states that "it is not within the competence of the federal Parliament to determine who is an "Indian" for purposes of the Agreement."[34] The fallacy with the decision in Laprise is found in the Judge's reliance on the Indian Act definition of "Indian" to interpret a constitutional document, namely, the Constitution Act, 1930.[35] Jordan states that the problem faced by the courts is "formulating a workable definition of an Indian apart from that contained in the Indian Act."[36]

The courts had the opportunity to deal with the inclusion on the Caughnawaga Band List of the illegitimate daughter of an Indian woman.[37] The child's name was included on the Band List under s. 11(1)(e) of the Indian Act.[38] The Band Council lodged a protest stating the father of the child was a non- Indian. The Registrar removed the child's name from the Indian Register. It was stated by Justice Bard of the Quebec Superior Court[39] that the father was the illegitimate son of a registered Indian. If this were the case, the child's name could not be protested or removed from the list because it was both the illegitimate child of a female Indian and illegitimate child of a male entitled to registration. Justice Bard found the father, being illegitimate, was not entitled to be registered because the Indian Act only recognized legitimate children of male Indians. This case was later overturned by Martin at the Supreme Court of Canada. Justice Bard wrongly decided that since Parliament was silent on the status of illegitimate children of male Indians, having only determined the fate of illegitimate children of female Indians, Parliament must have intended to exclude these children from membership.[40]

In the same year Justice Biron of the Quebec Superior Court also decided[41] that Joseph Curotte was not entitled to be registered as a Member of the Caughnawaga Band after a Band Council protest to have his name included on the Register. The court decided the Quebec Civil Code concerning legitimacy applied to Indians. The facts are these. Joseph Curotte was born to an Indian mother married to a non-Indian. He alleges his father was an Indian. After his birth, he was given to his maternal grandparents resident on the Caughnawaga Reserve. They subsequently adopted him, after which his name was placed on the Band List. The Band Council protested and his name was removed.

The court found Joseph Curotte was the legitimate son of his mother and her husband because children born in a marriage are presumed to be the children of the husband in law. The evidence tendered about his real Indian father was not accepted. Even though Joseph was adopted by his maternal grandparents, he being born a non-Indian because his mother lost status, could not be registered. Adopted children of Indian parents could not gain status through adoption. This case was also overruled or modified by the Martin decision.

c) Double-Mother Clause

In 1979, the Quebec Superior Court ruled on application of section 12(1)(a)(iv), known as the double-mother clause, meaning the mother and paternal grandmother were not Indians prior to marriage to an Indian.[42] The agreed statement of facts confirmed that the mother and paternal grandmother were non-Indians prior to marriage to Indians, and Douglas Giasson was 22 years of age.[43] Under section 12(1)(a)(iv), any child, male or female, who reached the age of 21 having been born to a family where the mother and paternal grandmother were not Indians at birth, automatically were struck from the lists. By 1972 this phenomenon resulting from the 1951 amendments were beginning to be felt by male Indians.[44] Men were now losing their Band membership under the Indian Act and, as a result, there was a great furore rising among the Chiefs. The children of some Chiefs were being struck from the lists, including in Quebec.

This case is interesting because the appellant-the person who appealed to have his name placed back on the Band List-traced his Indian and white ancestry to 1747 and 1709 respectively.[45] The white ancestors of Douglas Giasson lived among the Iroquois of Caughnawaga for over 170 years as of 1908![46] In 1910, the Secretary of the Department, M.J.D. McLean decided the Giasson family were "band members".[47] Despite a history of 230 years of living among the Iroquois of Caughnawaga, Douglas and his brothers and sisters when they reached 21 were destined to be struck from the Band List. This action was in keeping with a Band Council Resolution asking the Department to strictly enforce section 12(1)(a)(iv) with the assistance of the Band Membership Clerk.[48] Before the Giasson case five members of the Caughnawaga Band had their names struck from the Band List.

Chief Walter Watso of Odanak informed the court that one-quarter of his reserve would be affected by section 12(1)(a)(iv), they being over 21, and whose mother and paternal grandmother were non-Indians upon marriage to an Indian. Chief Watso asked the Department to not enforce section 12(1)(a)(iv) until the Band ascertained who would be affected.[49] By the late 1970s, almost 300 of the 600 Indian Bands had applied under section 4 to not have section 12(1)(a)(iv) applied to their Band Membership lists. The exemptions, while possibly not legal or within the Minister's power that time, were allowed. Not nearly as many Indian bands applied to have section 12(1)(b) apply, this section applying exclusively to Indian women who married out. Douglas Giasson lost his appeal; his name remained removed from the list until the 1985 amendments to the Indian Act. His non-Indian wife was never added to this Band list and did not gain status through the 1985 amendments.

d) Adoption

In 1983 the Supreme Court of Canada decided an illegitimate child of an Indian male and non-Indian female was entitled to be registered as an Indian.[50] The interpretation by lower courts that only legitimate children could be registered was struck down by Canada's highest court. Justice Lamer, now Chief Justice of the Supreme Court dissented stating that the Indian Act demanded both legitimacy and purity of blood.[51] The facts are these. John Martin was the illegitimate son of Robert Martin, a Micmac of the Maria Band Member and May Richards, a non-Indian. When he applied for Indian status, John was 28 years of age. The Registrar denied him membership on the basis that section 11 (1)(c) applied only to legitimate children.[52]

In overturning the decisions of the lower courts, Madam Justice Wilson, as she then was, found John Martin qualified to status under section 11(1)(c), he being a male person who is a direct descendant in the male line of a male person described in paragraph (a) and (b).[53] The court found that section 11(1)(c) was restricted to males, but paragraphs (d) and (e) applied equally to female children.[54] It also found that the intention of the Indian Act was that Indian status depended upon descendency from the Indian male line.[55] The primary group entitled to Indian status are found in section 11(1)(a) to (c). Paragraphs (d) and (e) determine which among the children of the primary group are entitled to status.[56] It was also discerned that the purpose of

paragraphs (d) and (e) was not to take away Indian status, but to determine who among the secondary group were entitled to status.[57] "These paragraphs are clearly intended by the legislature to confer rights and not to take away rights which have already been granted."[58]

Counsel for the government arguing that John Martin should not be registered because it gave him, as an illegitimate child, greater benefits than legitimate children who may lose rights under section 12(1)(a)(iv). Government counsel argued this would be absurd. Madam Justice Wilson, as she then was, found fault in this reasoning. What the government was trying to do was to impose a harsher reading of the Act upon illegitimate children of mixed blood in one generation than upon legitimate children of mixed blood in two generations. Government counsel were indirectly admonished to keep the facts which are before the court at issue, rather than facts which were not before the court, namely section 12(1)(a)(iv) children. The Government was trying to prevent "reverse discrimination" by asking the court to read in the words, "legitimate" in section 11(1)(c), which the court refused to do.[59]

The court rightly questioned whether it was for the courts to replace discrimination against legitimate children with discrimination against illegitimate children because the legislature might prefer that.[60] In dissent, Justice Lamer-now our Chief Justice-accepted the Government's arguments that there was an anomaly or conflict between section 11 (1)(c) and 12 (1)(a)(iv) if one accepted the view that only illegitimate children of Indian males could gain status.

In interpreting the Act, Justice Lamer, as he then was, held the primary purpose of the Act was to preserve the control of Indian lands by male Indians.[61] The 1951 Indian Act amendments brought in a new requirement for Indian blood and the intention of section 12(1)(a)(iv) was to ensure that no less than half-breeds were qualified for status. Since women marrying out lost their status under section 12(1)(b), the only dilution of Indian blood came through the male line. The issue of two generations of mixed bloods on the male side then lost status at the age of 21 for the first time under the 1951 Act.[62] There was no dilution on the female side because women lost status under section 12(1)(b) for marrying non-Indians. This had been the law since 1869.[63]

As a forerunner of the Twinn case now being argued in the Federal Court Trial Division, the Sawridge Indian Band tried to force the deregistration of two illegitimate children of a female Band member.[64] One son, Trent, was born September 6, 1981 and Aaron was born October 1, 1982 and both were registered at birth on the Sawridge Band List as illegitimate children of a female member. On July 23, 1983, the mother married a Member of the Saddle Lake Band. The court found the Registrar had rightly decided the sons were entitled to registration on the Sawridge Band List. It found no legitimacy to the argument that the Legitimacy Act of Alberta and section 10 of the Indian Act combined to force the Registrar to transfer the boys from the Sawridge to the Saddle Lake Band List.[65] Not only did the court uphold the membership of the sons, disagree with the Sawridge Band's arguments, but it also found it had no jurisdiction to dictate to the Registrar on which list to place the boys.[66]

Justice Cattanach of the Federal Court Trial Division decided in 1982 that a full-blooded Indian child adopted by registered Indians was not entitled to registration under the Indian Act.[67] Terry James Shanatien, a resident of the Gibson Indian Reserve, was the son of a woman enfranchised as a child when her father decided to enfranchise himself and his family. Because his mother lost her registration in this manner against her will, Terry James was also not entitled to registration as the illegitimate child of a female Indian.[68] His mother was not considered an Indian for purposes of the Indian Act.

Terry James was legally adopted under the Child Welfare laws of Ontario. Under section 88 of the Indian Act the laws of the provinces are deemed to apply to Indians on reserve provided they are not in conflict. When a conflict does arise, the Indian Act takes precedence. The court decided that provincial adoption laws do not alter Indian status. The Natural Parents[69] decision of the Supreme Court of Canada dealing with adoption of Indian children by non-Indians at the time and today encourages out-adoption of Indian children. It is the application of provincial adoption laws on reserves which has resulted in thousands of Indian children being seized and adopted by non-Indians. In this case, Terry James, a full-blood Indian, adopted by Indians could not benefit from Indian status upon adoption. This adoption scheme was changed by Bill C-31. Non-Indian children adopted by Indians after 1985 can be registered as Indians. That is another whole broad topic. Terry James was not registered.[70]

e) The "Lavell" Decision

The Supreme Court of Canada was deeply divided over the Lavell[71] case, but, in the end, it quashed all hopes of Indian women achieving sexual equality in Canadian courts under the Canadian Bill of Rights.[72] The right of Jeanette Lavell as an Indian woman to equality before the law was compared to the right of an Indian to be intoxicated in a public place off the reserve. Her case was measured against the victorious Drybones[73] case where it was found that Mr. Drybones was denied equality under the law based on race contrary to the Bill of Rights because his treatment under the Indian Act for being intoxicated off a reserve was more severe than for non-Indians in the Northwest Territories under their Liquor Ordinance.

Jeanette, on the other hand, was compared to other Canadian married women and the court completely ignored the Indian Act's impact on her personal rights. Under the Act, Jeanette was stripped of her Indian status and rights. Ignoring her "Indianness", the court decided she was no worse off than Canadian married women. The Trial Judge found that her treatment in law was in concert with paragraph 58 of the 1970 Report of the Royal Commission on the Status of Women. That Report recommended that Indian men and women wanted to enjoy the same rights and privileges in marriage and property as all other Canadians.[74] Judge Grossberg totally disregarded the following paragraph, 59, which recommended that section 12(1)(b) of the Indian Act be repealed so that Indian women, in future, upon marriage to non-Indians, would not lose their Indian status. The Supreme Court of Canada also ignored the Commission's recommendation.

Uppermost in the minds of the Judges at the Supreme Court was parliamentary supremacy in law-making. The court held that to decide that Lavell had been stripped of her Indian birthrights under a law offensive to the Bill of Rights would have been to deny Parliament the right to exercise their authority over Indians and Indian lands under section 91(24) of the Canada Act, 1867.[75] Just as the Supreme Court of Canada had held in 1928 that Canadian women were not "persons"[76], so the 1974 Supreme Court of Canada decision in the Lavell case became the immutable rock in which the legal incapacity of Indian women was carved.[77]

The Supreme Court of Canada found Jeanette's fate was the same because she had a duty to follow her husband-off the reserve. The majority of the court did not compare her treatment to the treatment of Indian men who married non-Indians. This analysis could have led the court to conclude that Lavell was discriminated against on the basis of sex. Sex discrimination against Indian women, embedded in Canadian law for over 100 years dating from the original Indian Acts, remained in tact after the Lavell decision.[78] After 1974, this tradition of sex discrimination in law against Indian women continued until the Act was amended by Bill C-31.

f) Matrimonial Property on Indian Reserves

The Ontario Court of Appeal decided in 1979 that the trial Judge correctly decided against the wife of an Indian living on reserve with respect to the matrimonial home and property situated thereon. The Trial Judge held:

> *In my view, it would be impossible to enforce the land provisions of the Family Law Reform Act, 1978, without directly contravening the Indian Act. There can be no division of the matrimonial home under s. 4, no transfer under s. 6, no determination under ss. 7 and 8, no restraining order under ss. 9 or 22, without affecting the licence of the husband granted to him under s. 20 of the Indian Act.*[79]

The Trial Judge went too far in deciding the Family Law Reform Act, 1978 and the Judicature Act of the Ontario had no constitutional validity as they affect Indians.[80] The Court of Appeal found that many sections of the F.L.R.A. which do not conflict with the Indian Act were applicable to Indians to reserves.[81]

Where an Indian father has made an agreement A under provincial law with provincial authorities to provide maintenance for his child, and fails to make payments, the agreement can be enforced under provincial legislation.[82] The mother and children were all Indians residing on the Hobbema reserve. The father contended that the Indian Act[83] had effectively occupied the field regarding support for illegitimate children and claimed immunity from provincial maintenance laws.[84] He claimed that the Indian Act made provisions where an Indian male had abandoned his spouse and/or children under s. 68(3).[85] The Court noted the Intervenant took the position that section 68(3) does not preclude application of provincial laws to maintenance of illegitimate children.[86]

Judge Bracco concluded that the provincial Maintenance and Recovery Act was an Act of general application and applied to Indians on reserve.[87] The Court noted the restrictive nature of the Minister's discretion under section 68(3) regarding attachment of annuity and interest moneys of parents which could be diverted to support their children. "The Minister is not given any wider power to attach, recover or divert funds payable to the parents from other sources." In other words, the subject matter of section 68(3) does not displace provincial maintenance legislation.[88] The Judge concluded there were no inconsistencies between the Alberta Act and the Indian Act: they were not overlapping or incompatible. Melvin Potts was ordered, if still in arrears, to be summoned to court in the usual manner.[89]

County Court Judge Clements[90] held in 1980 that the Indian Act did not preclude an order granting exclusive possession to another Indian in circumstances contemplated by the Family Law Reform Act.[91] An application for custody of the infant children of the marriage, support and exclusive possession of the matrimonial home was made by the Indian wife of an Indian living on the Moraviantown Indian Reserve. The wife applied under section 45 (3) which provides:

> *45(3) An order under subsection 1 for exclusive possession may be made only if, in the opinion of the court, other provision for shelter is not adequate in the circumstances or it is in the best interests of a child to do so.*

The question to be determined by the court was whether this section of provincial law conflicted with the federal law on Indians, and, if it did, which would prevail. The short answer is that the laws of the Dominion must always prevail.[92] But this does not mean provincial laws of general application and federal specific laws respecting Indians cannot stand together, provided the province promulgates laws within its constitutional jurisdiction.[93] Adoption laws of a province have been found applicable to Indians but they cannot destroy Indian status[94] where an Indian child is adopted by non-Indians. The partition laws were also found applicable under an earlier case,[95] but such laws are subject to restrictions in the group of transferees under the Indian Act.

The Judge held that the Indian Act does not preclude an order granting exclusive possession under the Family Law Reform Act, 1978 to another Indian, namely, the applicant spouse. Having found jurisdiction to decide, the wife was granted exclusive possession to the matrimonial home subject to approval by the Minister and disposition of the matter between the parties.[96]

The Saskatchewan Queen's Bench had the occasion in 1982 to deal with division or sale of matrimonial property upon dissolution of a marriage.[97] The application was made pursuant to the Matrimonial Property Act.[98] The couple were married in 1951; twelve children were born of the marriage, all of whom had since left home when the couple separated in May 1976. The Judge found the wife was "entitled to a share of the matrimonial property."[99] The question to be determined is what constitutes "matrimonial property". The husband, after leaving his wife, purchased a home off the reserve worth $35,000. The Judge found this constituted matrimonial property.

The problem determined by the court was the disposition of the farmland on reserve which consisted of 480 acres on the Muskeg Lake Indian Reserve. There are stringent conditions for being in possession of land on a reserve, and strict conditions on to whom land may be transferred. The Judge found no jurisdiction to deal with Indian lands which came under the exclusive jurisdiction of the federal Indian Act. Nevertheless, the court held the wife did have a possessory interest in the matrimonial property and determined the value of the marital property to be $34,200. Upon dividing the matrimonial property, the wife was awarded $ 16,000 less $5,000 she had already received.[100] The value of the award was made against the off-reserve property and the husband was ordered to pay the monies by September 30, 1982.

A year later in Ontario, the County Court ruled[101] that matrimonial property held by Indians on the New Credit Indian Reserve "are not within the definition of 'matrimonial home' as defined in the Family Law Reform Act and the Act is inoperative with respect to these lands situated on reserve." The plaintiff was denied the following remedies: "(1) a declaration that the lands and premises are the matrimonial home of the parties; (2) partition or sale of the lands or premises; and (3) an order that the defendant pay to the plaintiff one half of the value of the lands and premises."[102] The couple were married in 1976, had three children and were joint tenants of the lands and premises on reserve. The application was dismissed.

g) The Paul and Derrickson Cases

The Supreme Court of Canada further entrenched the patriarchal nature of the Indian Act when it decided the Paul[103] and Derrickson[104] cases.

The Paul case deals with two Indian members of the Tsartlip Indian Band, located near Sidney, British Columbia.[105] They were married for 19 years and had three children ranging in ages from 8 to 18. The couple married in 1966, and in 1968, the husband received a Certificate of Possession to their land on reserve under section 20 of the Indian Act.[106] They built their matrimonial home on the property and lived there for 16 years.[107] In July, 1982, the parties separated and the wife was successful in being awarded interim possession of the home under provincial law.[108] The parties reconciled for a short time and separated again from July 1983. During both separations the children remained with the mother. Upon the second separation, the wife was awarded interim possession of the Matrimonial home for herself and the children by Order of Judge Cooper. This Order was over-turned by the British Columbia Court of Appeal.

On appeal to the Supreme Court of Canada, the Attorney General of Canada intervened on behalf of the husband; two provincial Attorneys-General intervened on behalf of the wife.[109] This case allegedly differed from Derrickson, also decided by the Supreme Court of Canada on the same day, in that the wife sought interim possession of the family home, and not a division of family property.[110] The Court held there can be no distinction between the cases because section 77 of the Family Relations Act is in actual conflict with the Indian Act. Therefore, the "provisions of s. 77 of the Family Relations Act are inapplicable to a family residence located on land in an Indian reserve."[111]

A more extensive review of the conflict of laws is dealt with in the Derrickson case.[112] The wife appealed to the Supreme Court of Canada against the decision of the B.C. Court of Appeal denying her any interest in properties for which her husband held certificates of possession under the Indian Act.[113] The husband cross-appealed from the same decision which awarded the wife compensation in lieu of her interest in family property.[114] The question which the court sought to answer was whether provisions of the B.C. Family Relations Act were constitutionally applicable to lands in a reserve held by an Indian.[115]

The husband and wife were members of the Westbank Indian Band, B.C. The wife sought a divorce and division of family assets. Specifically, the wife asked the court for a declaration that she was entitled to one-half of all properties for which her husband held a certificate of possession under the Indian Act. The husband sought a declaration that even if the properties were family assets, provincial law did not apply on Indian reserve lands.[116]

The Court considered three questions: (1) Are provisions of the B.C. Family Relations Act applicable to lands reserved for Indians? (2) Is the Family Relations Act referentially incorporated in the Indian Act by s. 88 of that Act? (3) Can an Order for compensation be made under the provincial Act in lieu of an Order directing division of family property?[117]

On the first question, the Court considered the purposes for sections of the Indian Act relating to property. It is clear that the intention of the Act is to ensure that lands reserved for Indians remain for the use and benefits of Indians. While possession can be allotted to individual Indians, such occupation and possession must be awarded by the Band Council and be approved by the Minister of Indian and Northern Affairs. Land may be transferred among Band members, but it will not be effective unless approved by the Minister.[118]

It is clear from this decision that the wife of an Indian male suffers legal impediments where she is married to an Indian living on an Indian reserve when compared to other married Canadian women. Under the provincial Family Relations Act, a wife is entitled to division of property upon dissolution of the marriage. The provincial Act deals with: ownership, right of possession, transfer of title, partition or sale of property and severance of joint tenancy, among other things.[119] In arguing that Indian wives on the verge of divorce had no property entitlements, the Attorney General for Canada argued why the Family Relations Act ought not to apply to reserves. It was argued that the "true character is to regulate the right to the beneficial use of property and its revenues and the disposition thereof."[120] If Indian wives, upon divorce, were to receive an entitlement to "in interest" in the husband's certificate of possession, they would then gain the right to possess the property.[121]

While conflict in possession of the matrimonial home between Canadian couples is resolved by clear provincial laws and is a matter resolvable between the couple, Indian women find themselves married to their husbands, their communities and the Canadian government. For an Indian wife, upon divorce, to gain possession of the family home even where she has custody of the children, would be harder to achieve than for a "camel to go through the eye of a needle". Everyone wants the land first. First, her

husband will claim possession, especially if he has a certificate of possession. Second, the community has a reversionary interest in the land. If for some reason, the Indian wife could wrestle the interest from a "weak" husband, the community will step in and claim its interest. Third, if the community is too weak to keep its interest, the Minister will jump in and claim the land to preserve it for the use and benefit of the community. Agreeing with the husband, the Court quotes: "By reallocating possession of reserve land, Part 3 of the Family Relations Act would significantly impact on the ability of the Band and the federal Crown to ensure that reserve lands are used for the benefit of the Band."[122] All interests in the family property which the wife might ordinarily have had in family law are subverted to the interest of the husband, the Band government and the Minister. The court decided the Family Relations Act "cannot apply to lands on an Indian reserve."[123]

On the second question of referential incorporation under section 88 the Court said normally it would try to preserve the constitutionality of provincial law. Until now, however, the question of referentially incorporating laws to regulate use of reserve lands had not been settled.[124] The Court noted that section 88 deals with "Indians" without mentioning "Indian lands", unlike the Constitution Act, 1867 which deals with two subjects: "Indians and lands reserved for Indians". This being so, the Court argued the Family Relations Act, as it affects Indian lands, could not be referentially incorporated.[125] Even if it were, the impugned sections of the Family Relations Act actually conflicted with the Indian Act.[126]

If the husband won his interpretation he would have sole ownership of the family property under the Indian Act; if the wife won, she would be entitled to one-half interest in the family property. The Court accepted that the resulting conflict between the two laws meant the Family Relations Act was not referentially incorporated under section 88 of the Indian Act. While the Court hinted some understanding for the situation of spouses on reserve, it said, wise or not wise, this consideration is not relevant to the constitutional validity of the law in question.[127]

On the final question of compensation in lieu of division of family property, the Court held there was no conflict in this section of the Family Relations Act and the Indian Act. "Compensation in lieu of a division of property is not a matter for which provision is made under the Indian Act and in my view there is no inconsistency or 'actual conflict' between such a provision for compensation between spouses and the Indian Act".[128]

In another case the Saskatchewan Court of Queen's Bench held an Indian woman could enforce a maintenance order against an Indian male on reserve.[129] The facts are these. In 1986, Donna Marie-Anne Walker was awarded interim custody of her two infant children. The father, Eldon Benedict Bellegarde, was ordered to pay $200 per month per child for support. He made this application to avoid paying support contending he was an Indian under the Indian Act and enforcement of the maintenance order would result in attachment of personal property of an Indian situated on reserve. In this case the father could not hide behind section 88 of the Indian Act to avoid paying maintenance for his children. Section 88 allows application of provincial laws such as

the Enforcement of Maintenance Orders Act except where such laws touch Indians as Indians. Here the Enforcement Act was found to be a law of general application, and applicable to Indians on reserves. Section 89 of the Indian Act deals with garnishment proceedings against Indians and is designed to protect the personal property of Indians on reserves. The Court held that where it is an Indian seeking to garnish the personal property of another Indian, section 89 does not apply or protect that property.

h) Conclusion

Most Indian cases under the Indian Act have been taken by Indian men and, in the majority, they have been won by men and most of them have gone unreported within the Indian community. The celebrated Lavell case was widely reported within the community with most Chiefs and Councillors siding with the government to prevent Indian women from achieving sexual equality rights. What these cases show is men winning membership cases with sympathy from the courts, and women losing cases with chastisement from the court. Different standards of equality have been used by courts in their treatment of Indian men and Indian women respectively.

The marital property cases clearly demonstrate a bias in law against Indian women married to Indian men living on reserves. While Canadian women can simply marry one man and have her rights protected in law, Indian women find themselves married to the State: Indian and Canadian. The state has a greater claim to Indian marital property than female spouses. This kind of treatment under the Charter calls for massive law and land reforms on reserves to give Indian women equal rights to matrimonial property. Land is more valuable than compensation. More often than not, the male spouse is unemployed. If the wife is kicked out with the children, she is homeless and left to the whims of the welfare state.

Endnotes:

[1] *Sharon Donna McIvor, LL.B. (Victoria), LL.M. Candidate (Queen's), is a Member of the Lower Nicola Indian Band, British Columbia. She has been married for 24 years and is mother of three: son, Jake, and daughters, Jaime and Jordana. She served as Executive-West Region with the Native Women's Association of Canada from 1988. She participated as a plaintiff in two N.W.A.C. cases [now reported in D.L.R.], and has launched her own "McIvor Case" protesting sex discrimination against section 12(1)(b) women and their children and grandchildren. Sharon was called to the Bar of British Columbia in August 1987, and has been actively involved in a number of aboriginal legal organizations in B.C. in an executive capacity.*

[2] *In re The Indian Act; In Re Wilson (1954), 12 W.W.R. (NS) 676, 1954 Can Abr 429 (Alta.-Buchanan, C.J.D.C.).*

[3] *Ibid. at 682.*

[4] *Ibid.*

[5] *Re The Indian Act; Re Joseph Poitras (1956) 20 W.W.R. 545 (Sask., 1956, Hogarth, D.C.J.).*

[6] *Ibid. at 547.*

[7] *Ibid. at 548.*

[8] *Ibid. at 549.*

[9] *Ibid. at 553-54.*

[10] *Ibid. at 555.*

[11] *Ibid. at 560.*

[12] *Re The Indian Act; Re Samson Indian Band (1957), 21 W.W.R. 455 (Alta., 1957, Buchanan, C.J.D.C.). [hereinafter Re Samson].*

[13] *Ibid. at 457.*

[14] *The Secretary of State Act, "An Act Providing for the Organization of the Department of the Secretary of State of Canada and for the Management of Indian and Ordinance Lands", ch. 42 of 31 Vict., 1868.*

[15] *Re Samson, supra, note 12 at 457-58.*

[16] *Re Samson, supra, note 12 at 458. The definition, it is noted, remained unchanged in the Indian Act, R.S.C. 1906, ch. 81, sec. 2(f). Half-breeds of Manitoba were denied Indian status in the 1906 Act. The definition remained unchanged in the Indian Act, R.S.C. 19927, ch. 98.*

[17] *Inquiries Act, R.S.C. 1952, ch. 154, on March 29, 30 and 31 and April 1, 1954, and July 7 and 8, 1955.*

[18] *Re Samson, supra, note 12 at 462-63.*

[19] *Ibid. at 464.*

[20] *Ibid. at 465.*

[21] *Indian Act, R.S.C. 1970, c. 1-6, s. 11(1)(c).*

[22] *Re Froman (1973), 2 O.R. 360.*

[23] *Ibid. at 362.*

[24] *R. v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, 3 C.C.C. 355.*

[25] *Re Lavell and A.-G. Canada (1971), 22 D.L.R. (3d) 188, [1971] F.C. 347.*

[26] *Bedard v. Isaac et al., [1972] 2 O.R. 391, 25 D.L.R. (3d) 551.*

[27] *Ibid. at 366.*

[28] *Ibid. at 366.*

[29] *Ibid. at 367.*

[30] *R. v. Laprise, [1977] 3 W.W.R. 379; C.N.L.B., Vol. I, No.1, Dec. 1977 at 22.*

[31] *R.S.C. 1970, App. m, no.25.*

[32] *S.S. 1967, c. 78.*

[33] *A.J. Jordan, "Who is an Indian?" (1977) I:1 Canadian Native law Bulletin 22.*

[34] *Ibid. at 23 [C.N.L.B.].*

[35] *Ibid. The Judge relied on the definition of "Indian" in the Indian Act, 1927, R.S.C. 1927, c. 98, s. 2(d); R.S.C. 1970, c. I-6,ss. 11 & 12.*

[36] *Ibid. at 26.*

[37] *Two-Axe v. The Iroquois of Caughnawaga Band Council (1978) 1 Canadian Native law Bulletin 2 at 9. [hereinafter Two-Axe].*

[38] *R.S.C. 1970, c. 1-6.*

[39] *Two-Axe, supra, note 37 at 10.*

[40] *Ibid. at 11.*

[41] *Curotte v. Council of the Iroquois of Caughnawaga Band et al, [1979] 1 C.N.L.R. 83.*

[42] *Re Giasson, [1982] 2 C.N.L.R. 66.*

[43] *Ibid. at 69.*
[44] *Ibid. at 77.*
[45] *Ibid. at 70.*
[46] *Ibid. at 71.*
[47] *Ibid.*
[48] *Ibid. at 72.*
[49] *Ibid. at 73.*
[50] *Martin v. Chapman, [1983] 1 S.C.R. 365.*
[51] *Ibid. at 366.*
[52] *Id.*
[53] *Ibid. at 369.*
[54] *Ibid. at 370.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid. at 371.*
[58] *Ibid.*
[59] *Ibid. at 371.*
[60] *Ibid. at 372.*
[61] *Ibid. at 379.*
[62] *Ibid.*
[63] *1869 (Can.), 32-33 Vict., c. 6.*
[64] *Sawridge Indian Band v. Potskin and Potskin, [1986] 2 C.N.L.R. 164.*
[65] *Ibid. at 166.*
[66] *Ibid. at 167.*
[67] *Sahanatien v. Smith (1982), 134 D.L.R. (3d) 172.*
[68] *Ibid. at 175.*
[69] *Natural Parents v. Superintendent of Child Welfare et al. (1975), 60 D.L.R. (3d) 148, [1976] 2 S.C.R. 751, [1976] 1 W.W.R.699.*
[70] *Sahanatien v. Smith, supra, note 67 at 177.*
[71] *Attorney-General of Canada v. Lavell, Isaac v. Bedard, (1973), [1974] S.C.R. 1349. [hereinafter Lavell].*
[72] *(1960) (Can.), c. 44 [now R.S.C. 1970, App. III].*
1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
(a)...
(b) the right of the individual to equality before the law and the protection of the law;
[73] *R. v. Drybones, [1970] S.C.R. 282.*
[74] *Re Lavell and Attorney-General of Canada (1971),22 D.L.R. (3d) 182 at 186.*
[75] *Lavell at 1359.*
[76] *In the Matter of a Reference as to the Meaning of the word "Persons" in section 24 of the British North America Act, 1867, [1928] S.C.R. 276. Edwards v. A.-G. for Canada, [1930] A.C. 124.*
[77] *K. de long, "On Equality and Language" Statute Audit Report (Charter of Rights Education Fund, 1984) at 1.12.*
[78] *An Act for the Gradual Enfranchisement off Indians, the Better Management of Indian Affairs and to Extend the Provisions of Act Thirty-First Victoria Chapter 42, S.C. 1869, c.6. Lavell at 1368.*
[79] *Re Hopkins and Hopkins, infra, at 727.*
[80] *Sandy v. Sandy (1979), 107 D.L.R. (3d) 659.*
[81] *See also: Sandy v. Sandy (1979), [1980] 25 O.R. (2d) 192, 100 D.L.R. (3d) 358, 9 R.F.L. (2d) 310.*
[82] *Re Baptiste: Director of Maintenance and Recovery v. Potts and Attorney-General of Alberta, [1979] 6 W.W.R. 560; Maintenance and Recovery Act, R.S.A. 1970, c. 223, ss. 10, 21 [am. 1973, c. 70, s. 2(6)], 26 subs. (1) [now s. 60 by 1971, c. 67, s. 14]; subss. (2), (3), (4), (6) [repealed by 1971, c. 67, s. 8] now see ss. 61- 70 [en. 1971, c. 67, s. 14; subs. (5) re-en. as s. 26 by 1973, c. 70, s. 2(7)].*
[83] *R.S.C. 1970, c. I-6.*
[84] *Re Baptiste at 561.*
[85] *Section 68 of the Indian Act read:*
68 (1). Where the Minister is satisfied that a male Indian

(a) has deserted his wife or family without sufficient cause,
(b) has conducted himself in such a manner as to justify the refusal of his wife or family to live with him, or
(c) has been separated by imprisonment from his wife and family, he may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of the wife or family or both the wife and family of that Indian.

(2) Where the Minister is satisfied that a female Indian has deserted her husband or family, he may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of her family.

(3) Where the Minister is satisfied that one or both of the parents of an illegitimate child is an Indian, he may stop payments out of any annuity or interest moneys to which either or both of the parents would otherwise be entitled and apply the moneys to the support of the child, but not so as to prejudice the welfare of any legitimate child of either Indian.

[86] *Re Baptiste at 565.*
[87] *Ibid. at 568.*
[88] *Ibid.*
[89] *Ibid. at 569.*
[90] *Re Hopkins and Hopkins (1980), 111 D.L.R. (3d) 722.*
[91] *1978 (Ont.), c. 2, s. 45.*
[92] *Ibid. at 725. See also: Re Fisheries Act, 1914; A.G. Can. v. A.-G. B.C., [1930] 1 D.L.R. 194, [1930] A.C. 111, [1929] 3 W.W.R. 449, Lord Tomlin for the Privy Council sets out four propositions on paramountcy.*
[93] *For authority, the court cited: Cardinal v. A.-G. Alta., [1974] 2 S.C.R.695, 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1, Martland J.*
[94] *The court cited: Re Nelson et al. and Children's Aid Society of Eastern Manitoba (1974), 46 D.L.R. (3d) 633, [1974] 5 W.W.R. 449, 18 R.F.L. 290 [aff'd 56 D.L.R. (3d) 567, [1975] 5 W.W.R.45, 21 R.F.L. 222].*
[95] *Bell v. Bell (1977), 16 O.R. (2d) 197, 78 D.L.R. (3d) 227.*
[96] *Hopkins. supra, note 90 at 728.*
[97] *Greyeyes v. Greyeyes, [1982] 6 W.W.R. 92.*
[98] *1979 (Sask.), c. M-6.1.*
[99] *Greyeyes, supra, note 97 at 93.*
[100] *Ibid. at 96.*
[101] *Laforme v. Laforme (1983), 33 R.F.L. (2d) 69, Fanjoy Co. Ct.J.*
[102] *Ibid.*
[103] *Paul v. Paul (1986), 26 D.L.R. (4th) 196. (S.C.C.)*
[104] *Derrickson v. Derrickson (1986), 26 D.L.R. (4th) 175. (S.C.C.)*
[105] *Paul, supra, note 103 at 197.*
[106] *R.S.C. 1970, c. I-6.*
[107] *Paul, supra, note 103 at 197.*
[108] *Family Relations Act, R.S.B.C. 1979, c. 121.*
[109] *Paul, supra, note 103 at 197.*
[110] *Ibid.*
[111] *Paul, supra, note 103 at 200.*
[112] *Derrickson, supra, note 104 at 177.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid. at 178.*
[116] *Ibid.*
[117] *Ibid. at 182.*
[118] *Ibid.*
[119] *Ibid. at 183.*
[120] *Ibid. at 184.*
[121] *Id.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid. at 185.*
[125] *Id.*
[126] *Ibid. at 188.*

The Court held the following:

Section 18 of the Indian Act provides that reserves are held by Her Majesty for the use and benefit of the bands.
Section 20 provides that the possession by an individual Indian can only come through allotment by the council together with the approval of the Minister.
Section 24 permits transfer only to the band or to another member of the band and only with the consent of the Minister.
Section 25 requires an Indian who leaves the reserve to transfer to another member.
Section 28 prohibits any arrangement or occupation save to another member.
Section 29 provides that reserve lands are not subject to seizure under legal process.
Section 37 exempts reserve lands from execution, prohibits sale or lease except by surrender to Her Majesty.
Sections 42 to 47 control testamentary succession.
Sections 48 to 50 control distribution of property on intestacy.

[127] *Ibid. at 190.*

[128] *Ibid. at 191.*

[129] *Re Bellegarde and Walker (1987), 36 D.L.R. (4th) 700.*

7. Aboriginal Women And Self-Government

by Susan G. Drummond

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...

-Preamble to the Canadian Constitution Act, 1982

I would like to say this book is written to the glory of God', but nowadays that would be chicanery, that is, it would not be rightly understood. It means the book is written in good will, and it, so far as it is not so written, but out of vanity, etc., the author would wish to see it condemned. He cannot free it of these impurities further than he himself is free of them.

-Foreword to Philosophical Remarks,
Ludwig Wittgenstein, November; 1930

Native women, in many of their submissions on the recent constitutional reform, find troubling the assertions of the Assembly of First Nations which delineate the right to self-government as inherent and collective. It is the latter word that Native Women's Associations find disquieting, particularly because Native women have historically had a very problematic relationship vis a vis the collectivity in light of section 12. (1) (b) of The Indian Act. RSC 1970, C. I-6; amended 1985 (hereinafter, Indian Act). This is the section which removed Native women's Indian Status upon marriage to a non-Native. Despite amendment c-31 to the Act in 1985, the issue remains unsettled for a variety of reasons. On the one hand, some Native bands are claiming that the right to determine Band membership is an Aboriginal right, protected by s.35 of the Constitution Act, 1982 from Federal Legislation analogous to and including the Indian Act with its recent amendment.[1] Purportedly protecting the integrity of the collective, they wish to retain the right to exclude Native women who have 'married out'. They wish to similarly exclude those women's non-Native husbands, and their children from Band membership. On the other hand, although other bands accept that the c-31 women are legally reinstated, they have raised many obstacles to the women receiving de facto membership in their bands. For example some bands have denied reinstated women housing, denied them social services, and denied their children services such as schooling and ambulances.[2] The issue also remains more profoundly unsettled in the collective memory of Native people as the wounds that have been created by the federal Indian Act run very deep, with nations, communities, families, and individuals having been fractured and torn asunder.

There is recent flurry of writings about the intricacies of the legal challenges and the constitutional amendments regarding Native self-government and how the rights of the individual ought best be protected within the collectivity. I am aware that a number of Native and non-Native authors have cautioned that there is an insider and an outsider analysis of these issues. Regarding understandings of Aboriginal politics generally, Mary Ellen Turpell indicates that the notion of individual rights which she sees embodied in the Charter is hostile to a Native aspirations of ordering social relations.[3] Natives purportedly base social relations on responsibilities rather than rights.[4] As Nitya Duclos

points out, outsider women have a further difficulty conceiving of the issue in a way that corresponds to the concerns of Native women. They have difficulty conceiving the issue as other than a struggle between gender rights and Aboriginal rights. For outsider women, the former trumps the latter with its presumptive moral weight.[5]

As there is an abundance of literature written on the conflict between Native women, Native self-government, and individual rights (albeit most of it recent[6] I am going to attempt to explore these issues from another angle. Without diminishing the importance of the issues being articulated in the legal arena, my sense is that in this dispute, law tends to telescope the issues in a way that distorts what is of importance. A wider optic embraces pluralistic notions of justice. These latter get translated into the more pedestrian language of law. Something is gained in the translation; something is also lost. Pluralistic notions of justice come from the telling of stories, some of which have not been told. Some of them have been recounted so often that they receive judicial notice. Some of the stories have been told but have not been heard. Some of them have been too terrible to tell until now. Some of them are mute, inchoate, waiting for a teller with enough fortitude to listen. I am going to attempt, in this essay, to explore the issues of Native women, Native communities and Native self-government from the angle of the collective memory of abuse and how collective memory shapes individual identity. It is my contention that this angle refracts through the discourse about law and about self-government. Collective memories of abuse infuse meaning into the law. The law has a compelling integrity insofar as it absorbs and addresses those memories, even if only obliquely. My sense is that this preoccupation with a sense of injustice, imbedded in the collective memories underlying the law, corresponds more closely to the way that Native women are talking about self-government and politics.

I am aware that the very same Native women's groups that are voicing their anxiety about protecting the individual rights of women are the same women who are insisting that Native leaders cannot talk about self-government without looking head on at the problems of family violence and drug and alcohol abuse in Native communities.[7] Ironically, they are also the same women who are insisting that entrenching self-government by Band council in the Constitution entrenches power elites that have been created by the Indian Act; by a hostile and colonizing government. They are insisting that more attention needs to be given to creating processes to allow traditional forms of leadership to be revived. These are the women that are pushing for forms of healing community violence that incorporate traditional ceremonies and spirituality. They are also pushing for forms of community healing that do not abandon the perpetrators of violence and abuse. Their sense of history and injustice extends beyond the individual perpetrator. Hence they see the embracement of the perpetrator in the community as an integral part of the community's healing. This distinguishes them from most non-Native feminist understandings of how to deal with family violence. This distinguishes them already from outsider women.

In light of their struggles, it seems odd, then, that these women are conceived of as being co-opted to an individualistic, rights-based, European model of social relations. In light of some of the characterizations of these women as champions of individual rights,

it would appear to be odd that they are so focused on healing the collectivity and reviving a traditional Native identity. In light of their insistence on community healing through the recovery of a traditional identity, it is odd that these women are not construed as the paradigmatic champions of the collectivity.

Rather than look at the legal intricacies and constitutional proposals regarding self-government, I wish to explore in this paper questions of identity and healing that Native women are trying to put at the top of the self-government agenda; questions which embrace both the collectivity and the individual. What Native women appear to be insisting on is that the individual Native woman be conceived under the auspices of another collectivity to which they owe allegiance. Their loyalty runs as deep as their understanding of what has happened to them. What is really being weighed is the moral weight of one collectivity and another, not the collectivity and the naked individual. Moral weight comes from a sense of injustice which is informed by the history of the collective. The fact that it is an individual who speaks of the injustice, especially in the context of Charter challenges, does not diminish the fact that they speak on behalf of a constituency. The identity of the individual is marked by their membership in that constituency. Collective and individual identity form a möbius strip, an apparently two dimensional surface with only one side. Both are intimately linked to a coherent and compelling conception of Native self-government. I believe that it is a deeper understanding of Native identity and self-government to which Native women are attempting to draw our attention when they cry out about the violence that is happening in Native families and in Native communities.

Emphasis on identity is reiterated over and over in Native conceptions of healing. Identity is intimately linked with membership. As the question of membership has been one that has so radically divided Native communities, and as it is the very crucible of many of those Native women who are now vociferous about community healing, it is with this issue that I will begin.

a) Membership

Two adoption cases heard in the Supreme Court of Canada in the last fifteen years raise some very perplexing, if not troubling, questions of Solomonic proportions about what it is to be an Indian. The first case is *Natural Parents v. The Superintendent of Child Welfare et al*.[8]. The second is Racine v. Woods[9]. In the first case, a male child, the son of registered members of an Indian band was admitted to hospital at age of 7 weeks in a condition near death as a result of injury and neglect. The child's life was preserved by a nurse who was a staff member of the hospital, a petitioner in the case at bar. The child was discharged into her care on a foster care basis. The child remained with this woman and her family except for a brief stay with his blood parents at age 3 which resulted in another episode requiring a stay in the hospital. The foster parents subsequently applied to adopt the child which the trial judge described as "now a member of the family in every way but blood relationship." The legal issue in the case at the Supreme Court level was whether the provincial Adoption Act conflicted with the Indian Act.

Section 10 (1) of the Adoption Act states that "For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock." Section 11 (1) (d) of the (pre-C-31) Indian Act designates an Indian for the purposes of the Indian Act as the legitimate child of a male person who is a member of a band or is the legitimate child of a male person who is a direct descendant in the male line of a male person who is a member of a band. It was held, in this case, that the two provisions were not inconsistent. While other adopted children lose all legal filiation with their blood parents, an Indian child remains an "Indian" despite an adoption that would otherwise obliterate all ties to blood parents, to culture, to community.

This decision appears to suggest that, at least for the purposes of the Indian Act, an Indian can be defined purely by blood. It implies that an Indian by birth remains an Indian for life even while contemplating the possibility that the individual may never know about their culture, their history, their language, their people, their community, or any of the other criteria intuitively embraced by our understanding of "Indianess". Indeed, it contemplates the proposition that, whether an Indian by birth recognizes it or not, they are still an Indian. In this sense, Indians are born and not made. This child is an Indian despite himself.

In the case of Racine, a female child, Leticia, was born to full status Indians. The blood mother of the child, by her own admission, had a serious alcohol problem. When the child was six weeks old, she was apprehended by the Children's Aid Society and five months later was placed in the foster care of the plain- tiffs, one of whom was non-Native and the other Métis. Over the years, the birth mother had made a number of sporadic efforts to retrieve her child and have her cared for by a family member, however it was not until the child was six years old that she made an application for habeus corpus. At that time, the plaintiffs submitted an application for de facto adoption which became the issue in the case at bar. An attempt was made to determine the best interests of the child in settling where her home would be.

It was part of the birth mother's argument that it is a constituent element of the best interests of the child that she not be cut off from their Indian heritage and culture, something which the finality of an adoption order necessitates. It was the contention of the adoptive parents and the Supreme Court that, important a factor as her Indian heritage and culture might be, the duration and strength of her attachment to the Racines was more important. The significance of belonging to a culture and heritage which preserves cultural integrity as opposed to belonging to a family which preserves emotional integrity abates over time.

Of course, Leticia does not choose her emotional attachment to her adoptive family either. This is something that fate has had a hand in bringing about. Her adoptive mother was there, present to her. Similarly, she cannot now simply choose to care more about her birth mother. Her alienation from her blood mother is something that circumstance has made almost inevitable; "almost" because she may still choose to develop a relationship with her mother as an adult; but a sense of intimacy with her blood mother is not something she will be able to generate spontaneously at will. It is likely not something she will feel despite herself.

What is being weighed in this case is a form of attachment that outweighs the need for attachment to community and cultural identity; it stands as a prerequisite for the robust acquisition of cultural identity. Neither option is a matter of choice for Leticia. As is emphasized throughout the court levels, however, bonding to a family does not eradicate the need for cultural identification with the culture into which one is born by blood. Wilson J. notes that:

> *Hall, JA did not underestimate the importance of the fact that the child was an Indian. However he adopted the conclusion the trial judge drew from the expert evidence before her as to the Racine's sensitivity to the interracial aspect and their appreciation of the need to encourage and develop in Leticia a sense of her own worth and dignity and the worth and dignity of her people. The trial judge found that they had amply displayed their ability to guide Leticia through and identity crisis she might face in her teenage years.*

The courts do not question that Leticia is an Indian by blood and that this fact is crucial for a complete understanding of who she is. In this case, however, her Indianess, though inherent in her blood, is something which will need to be learned at a later age, almost as one learns a foreign language. Perhaps even more incongruous, coming to terms with her "Indianess" is something which will be facilitated by adults who are in fact foreigners themselves to her culture and identity. Is culture something that can be learned as one learns a foreign language? Can culture be mediated by people who, sympathetic as they might be, are not members of that culture? Can White people help an Aboriginal person understand what it means to be Native? Could a non-Native and a Métis adult help a child understand what it means to be an Inuit? Could they help her understand what it means to be a Cree if they never bring her to the land where the Cree live? If she never speaks to a Cree person herself? Could they help a child understand what it means to be a Mohawk of Akwesasne, as opposed to a Mohawk of Kahnawake? Can they help her understand what it means to grow up as an Akwesasne Mohawk if she does not spend any of her childhood growing up on Akwesasne? Could they help her to understand what it means to be a Beothuk if she is the last surviving Beothuk?

If Leticia must learn who she is as an adolescent, then what does it mean to say that she is an Indian by birth? In what sense can they help her learn any more than what it is to be marked by blood as an Indian, to be born of a status Indian mother who had severe alcohol problems; to be born of an alcoholic Indian mother who abandoned her to be brought up by Métis and non-Native parents? In what sense can they help her to do any more than to love herself despite who she is? Surely the most they can do is to help her to love herself because of who she is: an Indian by birth, whose alcoholic status Indian mother abandoned her at birth, who has lived to tell the tale. In the process of coming to love herself because of who she is, will this not mean that she will need to love herself despite what her adoptive mother's people have done to her blood mother's people? That is, despite who her adoptive mother is? That is, despite who she is?

Both of these cases raise a plethora of questions about Native identity and the preservation of the emotional, moral, and cultural integrity of human beings. Is Indianess something that is defined by blood, by kinship, or by voluntary association (appropriation)? It is very often felt that a definition of Indianess that is based on blood raises any number of troubling implications. It generates intimations of animal husbandry, tribalism, eugenics. When referencing membership to the contingency of birth, one hears echoes of such invidious expressions as "pure blood", "half-breed" and "pedigree". In the face of the ominous implications of rooting culture in something as involuntary as blood, made more ominous by the uses made of this designation in Nazi Europe, we flee to a notion of culture that is based on voluntary association, or at least kinship.

Without denying that the Racines may well be the best placed in the circumstances to help Leticia negotiate her identity as an adolescent, I would contend that we understand this scenario to be a troubling compromise precisely because it is the nature of culture that it is rooted in something that is contingent, that is involuntary, that cannot be taught at a later age, that is rooted in blood, in the circumstances of our birth, and in fate. It is because we have an understanding of culture that is rooted in such contingencies that transpire beyond our wills that the choices presented to the court in deliberating the best interests of the child are Solomonic and speak to a deeper human tragedy underlying the options. Either option divides the child. It is my contention in this paper that, of the competing definitions of membership - blood, kinship, or appropriation - blood is in fact the far deeper undercurrent of culture, even though it brings us into very troubled waters, often darkly coloured by tragedy and grief.

Leticia's dilemma is echoed in a haunting passage quoted in Identity, Youth and Crisis: "My God", a Negro woman student exclaimed, "What am I supposed to be integrated out on I laugh like my grandmother - and I would rather die than not laugh like her."[10] Erik Erikson goes on to describe the impact of this statement on other Black students who heard the remark. "There was silence in which you could hear the stereotypes click, for even laughter has now joined those aspects of Negro culture and Negro personality which have become suspect as the marks of submission and fatalism, delusions and escape." It would appear that to embrace who one is is to embrace a description of yourself which is true whether you recognize it or not, ie, a description of yourself which belongs to the world, which is not "granted or given, created or fabricated",[11] but which is recovered. It is a description which is true despite our ignorance, despite our denial, despite our false consciousness, despite our heartfelt wishes that it were not so. The tragedy of this realization for people who have been abused or silenced is that the world which describes who you are describes you as a subjugated, humiliated person. It has obliterated your humanity. Or it describes you as non-existent. In a very real sense, if you do not embrace your discovered self you are embracing a non-entity, something vaporous and insubstantial, a false reality, mere ephemera. In that sense, not to laugh the way that your grandmother laughs is to be non-existent, because an alternative grandmother did not exist. Erik Erickson describes the despair of recognition that the world has constructed a negative identity of you in the Black American context. "What if there is nothing in the hopes of generations past nor in

the accessible resources of the contemporary community which would help to overcome the negative image held up to a minority by the compact majority'?" Then, so it seems, the creative individual must accept the negative identity as the very base line of recovery. And so we have in our American Negro writers the almost ritualized affirmation of "inaudibility", "invisibility", "namelessness", "facelessness" - "void of faceless faces, of soundless voices lying outside history," as Ellison puts it."[12]

We cannot hear soundless voices that lie outside of history. We can imagine now what someone who was never asked to speak might have said. We can imagine now what we might have said. But it is nonsensical to hear something which is inherently inaudible. Of course Ellison is not asking us to do so; he is invoking the image as a literary device. In the same manner as we are compelled by the literary image, we are seduced by the philosophical image of a private language, a world of meaning existing outside of the public sphere of meaning, as if such a thing were possible or even conceivable.

Wittgenstein has done much to highlight the meaninglessness of this conception of a private language. It is worth retrieving what he says about language because we are often tempted to create similar images about morality, about culture, and about identity: that these are merely private things which have meaning only insofar as I confer meaning upon them; that these are purely private choices.

In the Philosophical Investigations, Wittgenstein focuses on what it means to learn a language and what it means to learn a mother tongue as opposed to a second language. He remarks that,

> *Someone coming into a strange country will sometimes learn the language of the inhabitants from ostensive definitions that they give him; and he will often have to guess the meaning of these definitions; and will guess sometimes right, sometimes wrong.*
>
> *And now, I think, we can say: Augustine describes the learning of human language as if the child came into a strange country and did not understand the language of the country: that is, as if it already had a language, only not this one. Or again: as if the child could already think, only not yet speak. And "think" would here mean something like "talk to itself ."*[13]

It is the latter image, of a child being in possession of a prior language, which we find so seductive. We feel on the verge of hearing a mother tongue as the mother's language and not the child's. We imagine that we can hear a mother tongue as if it too had the odd musical qualities of another language, as if it were cacophony of symbols, not yet hinged to meaning. We think we are doing something or saying something meaningful when we imagine in this way, forgetting that we have used our mother tongue to articulate the image; forgetting that we are articulating the image to another speaker of our mother tongue.

We move into other cultures and are similarly provoked with a sense that we might be able to perceive of our own as if we were complete foreigners to it.[14] When Toby Morantz says that Indians originally used to regard missionaries as a form of bingo, as a form of entertainment, we chuckle to ourselves.[15] Even we might be able now to see what they saw. Even we can be delighted at this image, recognizing that our first emissaries must have appeared quite odd, even quaint, in their stubborn sincerity. We are tempted by our sense of delight to imagine that we might be capable of laughing at ourselves today: that we can see our own earnest preoccupations as a form of entertainment.

However, it is very hard to see the apology of the Oblates as entertaining.[16] It is hardly possible to claim that the Oblates are being duped by the popular sentiment of the times. It is hardly appropriate to pretend that we are not moved. Those amongst us who laugh at the Oblates are just crass. We feel that they must not really understand what is going on. If they truly did, they simply could not react in such a manner.

We imagine that we must be able to conceive of a pre-cultural, pre-moral, pre-linguistic vantage point which characterizes reality outside of the characterizations of known languages. We are seduced by the image of 'translating from reality' into English in the same what that we translate from English into French.

Wittgenstein points out, however, that we are being seduced by an image. Doubts belong within a world of accepted meaning. To doubt something is to accept certain facts groundlessly, without explanation. Hence the universal doubt of Descartes does not make sense as he must at least take for granted that the word 'doubt' has the meaning he assumes it has in order to be doing what he claims to be doing. It is an empirical fact that English words have the meaning they have. In this sense, doubt comes to birth in a world that is already ordered. Wittgenstein invites us to imagine a pupil who will not let his teacher explain anything to him, because he constantly interrupts with doubts about the existence of things, the meaning of words, etc.[17] The teacher's impatience is justified, because the pupil's doubt is hollow: he has not learnt how to ask questions; he has not learnt the game that he is being taught. Not calling things in doubt is often a precondition of learning certain games. The child learns by believing the adult, and doubt comes after belief. Learning a game means that we can be corrected, that we can be wrong, that we may be making a mistake. We look to our teachers when we are uncertain. If we are learning a game, we do not simply make up new rules when we are uncertain.

Similarly, it is an important part of what we mean when we talk of moral decisions that there is room for real disagreement. It is part of what is serious about morality that I cannot simply make my behaviour mean what I want it to mean. I can be mistaken about how I characterize my behaviour. I can have failed to see the way things really were when I acted. I can fail to see the way things are because of a flaw in my personality such as denial, such as vanity, such as arrogance, such as a desire for vengeance.[18] This is in fact the way we characterize our serious moral dilemmas: we are uncertain that we are doing the right thing, as though the right thing to do exists

outside of us. We feel compelled to weigh the issue before we act as we hope to discover the right thing to do; we hope to come to an understanding of what must be done. We may act, believing that we are doing the right thing and discover later that we have made a terrible, terrible mistake. We may even act unintentionally, and still feel at some later date that we have made a terrible, terrible mistake. We may feel burdened by guilt when there is nothing else we could have done in the circumstances. There is a sense in which we may indeed be guilty despite the fact that there is nothing else we could have done in the circumstances. This is the sense in which Oedipus is guilty of having killed his father and slept with his mother, though he had no intention to do so and no knowledge of what he was doing. It does not console him that he made an 'honest' mistake, one that an individual could not foresee, one that know one else foresaw. It was no less his father that he killed and no less his mother that he slept with.[19]

Framed this way, we may be able to make sense of what it means for Leticia to discover who she is. There is a story that is being told about her whether she recognizes it or not. We are almost compelled to say about her, as we might say about ourselves, that until she knows the truth about herself, she cannot feel completely at home in the world, she is not completely at home in the world. She may be deluded in her sense of being at ease in the world. For an Indian to retain the designation of status Indian means far more than retaining eligibility for tax exemptions and free post-secondary education under the Indian Act. It is retaining Indian status to keep intact the possibility of discovering who you are.

Because we are born into a world that is already ordered, part of recovering our memory is recovering a collective memory. This is part of the identity that an adolescent Indian who has been adopted out will have to recover. Not only do we discover the story that is being told about us from the moment of our birth, we discover a story that began long before our birth. Just as we can recollect our individual history wrongly, we can also be ignorant of the history of our people; think we have the facts, but be wrong. Hence those among us who went through secondary schools in the Maritimes and never learned that the Mi'kmaq were hunted and shot by Europeans do not really know our history, do not really know our culture, do not really know the true characterization of our people. The Mi'kmaq can remind us of these facts. In this regard, the Mi'kmaq know more about us than we know ourselves. Until the Mi'kmaq have told us about this aspect of who we are, we are merely deluded in thinking that we are at home in the world.

When we talk about race being defined by blood, as the adoption cases intimate, it is not blood in the geneticist's sense, or the government's sense of the double mother rule -it is blood in the poetic or spiritual or religious sense of the moment of our birth placing a stamp of fate on us that is as much a fact of the world as the genetic imprint in our blood. History culminates in the circumstances of our birth. The fact that Leticia's people have been so badly abused and demoralized must be taken into account when she discovers that her Indian mother is abusive or alcoholic: this is not just an individual choice on her mother's part. The fact that Leticia and other Native children were taken

away from their families is part who an Indian child, born to a status Indian mother, in Portage la Prairie, Manitoba, September 4, 1976 is. Part of the ordering of the world into which Leticia is born is that her people have been so badly demoralized and dispossessed that they cannot take care of their children. Part of Leticia's mother's demoralization is that her people have historically had their children taken away from them purely because they were Indian, and not because of any individual choices they made about caring for their children. This recollection in Native people's blood of what happened in residential schools is eloquently told by William Elm, an Oneida Elder:

> *Our parents, our grandparents, were taken there. Their traditions were ripped away. Language was ripped away. Motherhood was ripped away. Fatherhood was ripped away. There were no role models for our grandmothers, our grandfathers, or our fathers and mothers. My parents were in residential schools. They came out of there not knowing anything about being a parent, not blowing how to show affection, not knowing what a grandmother's hug was like - and they passed that on to their children and to me.*[20]

If we are Indian, then in our blood there is an inherent memory of the hundreds of years of abuse that have been done to us. Though we may find ourselves completely alone, we carry our family, our community, and our culture within ourselves. This is so whether we recognize it or not. This is something that Native Elders know. An Ojibway Elder who insists on being allowed to heal his people who are in prison talks about it in this way:

> *I listened to a psychologist who was part of a team that was hired by the prison system to look into why so many Native women had committed suicide. He could not understand why Native women were destroying themselves. It had become a terrible crisis within the prison.*
>
> *I said to him, "In part it is happening because these women have been abused. It is an inherent memory of the hundreds of years of abuse that have been done to us. They have lived with the hopelessness that so many of our people have lived with. They have given up. The only way that those women see out is to die'.*[21]

Regardless of what we do with the pain that our families inflict upon us, we can never become any less their children. As with Oedipus, regardless of what we do with the pain that our destiny has inflicted upon us, we can never become any less its captives.[22]

Because we cannot escape the story that has been told about us and that is being told about us, part of learning to be at home in the world is coming to terms with who we are, apart from who we would wish ourselves to be. This is a restorative process. This is the insight of psychoanalysis. We react to things from our childhood that we have buried whether we wish to or not. Similarly we react to things about our people that we have buried. This process is not necessarily filled only with grief. We can recover our grandmother's laugh at the same time as we recover her bitterness.

There is another sense in which the process is not filled only with grief. Discovering the truth about ourselves liberates us from its bondage. Erik Erickson talks about the restorative nature of this recovery.

> *From Du Bois' inaudible Negro there is only one step to Baldwin's and Ellison's very titles suggesting invisibility, namelessness, facelessness. But I would not interpret these themes as a mere plaintive expression of the Negro American's sense of 'nobodyness" a social role which, God knows, was his heritage. Rather; I would tend to interpret the desperate yet determined preoccupation with invisibility on the part of these creative men as a supremely active and powerful demand to be heard and seen, recognized and faced as individuals with a choice rather than as men marked by what is all too superficially visible, namely, their colour: In a haunting way they defend a latently existing but in some ways voiceless identity against the stereotypes which hide it. They are involved in a battle to reconquer for their people, but first of all for themselves, what Vann Woodward calls a " surrendered identity". I like this term because it does not assume total absence, as many contemporary writings do -something to be searched for and found, to be granted or given, to be created or fabricated - but something to be recovered. This must be emphasized because what is latent can become a living actuality, and thus a bridge from past to future. The widespread preoccupation with identity, therefore, may be seen not only as a symptom of 'alienation' but also as a corrective trend in historical evolution."*[23]

Recovering a surrendered identity is a vital part of learning how to speak, learning how to become visible. In order to participate in the mainstream, we need to know on whose behalf we are speaking. Is it only on behalf of my family? On behalf of my religious order? On behalf of my people? Is it only on my own behalf? If we have no background from which to make these distinctions, then what we say may be confused and jumbled, inaudible. If the mainstream has levelled the background so that nothing appears salient, then these structures will need to be resurrected so that they become salient. If the mainstream has levelled the background for unjust reasons, then it has a moral obligation to create spaces and territory for people to rebuild. Institutions must be erected where people can meet. In congregations, people find what they have lost. Some of what is recovered in congregations will be facts that generate a sense of injustice; this will, in turn show us what else needs to be built to rectify the past. As Erikson notes, this process not only acts as a symptom of alienation, it is restorative. It builds bridges from the past to the future.

At the very heart of this restorative process is a conception of the individual human being who is attempting to speak on their own behalf. It is our sense of the humanity of the individual at stake that compels us to create spaces and territory to rebuild. It is the emphatic affirmation of the humanity of the individual that creates an urgency to the individual's quest. Something vitally human may be lost. This is a conception of the individual that is both infused with a collective identity but not wholly captured by it. To reiterate the relevant passage for emphasis, Erikson states that he "would tend to interpret the desperate yet determined preoccupation with invisibility on the part of these

creative men as a supremely active and powerful demand to be heard and seen, recognized and faced as individuals with a choice rather than as men marked by what is all too superficially visible, namely, their colour." The same may be said of blood. Biology is not a final destiny for human beings as it is a paradigmatically human capacity to understand the meaning of our destiny and to decide what we will do with it. As Lewis Thomas noted in context of the theory of evolution, the brain is the atom's way of understanding itself.[24] Only human beings have a choice between resisting their destiny and coming to terms with it; between feeling at the mercy of and at peace with particulars.

b) We Are What We Love

As is clear from above, of all Twentieth Century philosophers, Wittgenstein was acutely aware that children and philosophers must have been the attentive recipients of a language before their doubts are any more than posturing or before they are able to ask the right questions, questions that mean something in the subject studied. Philosophical thought comes to birth in a world that is already ordered. It presupposes a community of philosophers who have been able to correct us when we were wrong, a community that holds rigor as a deep philosophical value, a community of teachers to show us that not everything counts as philosophical thought. Only a shallow philosopher begins their studies in philosophy with universal doubt; first they must come to understand the language game of philosophy. It is in this context, then, that the following passage from Wittgenstein must be understood: "The philosopher is not a citizen of any community of ideas. That is what makes him into a philosopher."[25] It is also a deep philosophical value that philosophers transcend their community. They are lovers of the truth, not lovers of the particular. They have unfastened their shackles and climbed out of the cave, aware now that they have been chained from birth in front of a screen, watching merely the shadows of forms, and not the forms themselves. It is of the essence of this process that it is inherently personal. What Simone Weil says about mathematics is true of philosophy: 'a collective cannot so much as add together two and two: only an individual mind can do that.'[26]

It is hopefully worth begging patience in this segue into the process of the formation of philosophers. I am contending that the process has parallel threads that run through moral formation, the formation of women's identity, and the formation of Native identity. It also maps out a path of transcendence from oppressively ascribed identities or from tacitly accepted accounts of the world. As tacitly accepted histories hold the greatest suasion in defining the law, finding a voice to tell a different history will affect the shape of the law. Recovering a woman's voice that is not simultaneously constrained will increase the chance that the law will respond to women qua women: hearing a woman's history is simultaneously essential and irrelevant to creating justice for women. Both women's gender and their humanity must be affirmed, ie, who we are and who we might become. Similarly, the law needs to create a forum to identify the needs of Native women qua Native women so as to enable them to make the distinction become not wholly relevant. I am claiming that the process that Native women endure in transcending who they are is a process which is analogous to that which philosophers endure when they become lovers of the truth.

It is relevant in all of this that it is an attitude of love that reveals the world, even to the philosopher. The truth about certain fundamental parts of the world is revealed not by a cold rationality, but by an emotion. While rationality often gets contrasted with inappropriate emotion such as hysteria, in fact it is the inappropriateness of the emotion that is irrational, not emotion itself. Emotion itself is not the opposite of rationality. Unfortunately, we have laboured under one over-extended use of rationality that leads us into this error. It is true that if a law student is asked to submit a legal memorandum on wrongful dismissal and they submit a paper full of furious and indignant anecdotes about people they know who have been laid off and what happened to them when they went to court, we would think that they have missed the point. They have not grasped that the kind of reasoning used in law is based on certain kinds of facts and certain kinds of authority. Their indignation is irrational. Similarly, if someone accuses a doctor of racism for making a diagnosis of Sickle Cell Anemia, we would think they had misunderstood the kinds of truth that science is intending to disclose. However, we might also say of a doctor who tells a pregnant woman that she is mistaken in her belief that what she has inside of her is an object of love because, in fact, it is merely a fetus before the age of twenty-two weeks, and not a human being - we would say that he has missed the point. His interjection is irrational. Her attitude to what is inside of her reveals to herself, and perhaps to us, what it is. This is similar for a woman who cannot bring herself to give birth to what is inside of her. If she is told by a judge that her grief is appropriate because the unborn, if viable when born, has the capacity to inherit when the succession devolves by art. 608 of the Civil Code, we would think he has failed to see the proper arena for her grief.[27] The rational response in the circumstances may not be a manifestation of scientific or legal rationality. The rational response may be emotional. While scientific and legal rationality is appropriate for some contexts, emotional rationality is appropriate for others.[28]

When Plato talks about philosophers being lovers of the truth he means that it is not an attitude to the world that is indifferent. It is not characterized by scientific or legal rationality. It is of the nature of the stance that it engages us personally. Hence it is part of what characterizes philosophy that 'the search says more than the discovery'.[29] This cannot be said of medicine. When philosophers seek to transcend a community of ideas, it is because the process has personal significance for them. When a philosopher is bored with what she is formulating, it is a sign that she is not asking the right questions. It may be a sign that she has ceased to be doing philosophy at all. We would not say this of National Civil Procedure (1 hope). Philosophy is characterized by a certain passion and not by indifference. Clearly, though, this is not a passion that stirs our blood or warms our groin. Perhaps it is a passion that only the most resolute and strong-willed amongst us can master. It certainly seems like an extraordinarily lonely kind of love. As Martha Nussbaum notes,

> *Socrates is put before us as an example of a man in the process of making himself self-sufficient - put before us, in our still unregenerate state, as a troublesome question mark and a challenge. Is this the life we want for ourselves? We are not allowed (in Alcibiade's description of him in the Symposium) to have the cosy thought that the ascending man will be just like us, only happier. Socrates is weird. We feel, as we look at him, both awestruck and queasy, timidly homesick for ourselves.'*[30]

Homesick as we might feel, it is nonetheless true that, among the great lovers of the truth, it is their passion that impels them towards this almost inaccessible world. They care about getting it right.

While it is true of philosophy that it is a characteristically personal enterprise it is also the same with moral decisions. It may not be accurate to say of moral decisions that the search says more than the discovery, however, the search says as much as the discovery. If Leticia searches for her past by having her horoscope done or by watching westerns, this says something different about her than if tracks her half-sister down. While it is of the essence of our moral decisions that they are objective, ie, that we can be wrong about how we have characterized our behaviour, it is simultaneously of the essence of our moral decisions that they are subjective, that they are stamped with our personal imprimatur. It is of the essence of our moral decisions that we are alone when we make them. I believe that this is what a Native activist who spent some time in prison was getting at when he responded with uncharacteristic anger to two younger Native ex-prisoners who were complaining about the misery that they had seen in prison. His sentence had been commuted nine days before he was executed. After listening to them talk, he said:

> *When I hit death row there was no place to go but up. You (other ex-prisoners) are talking about all of the things that happened on the inside-I have seen the things that you are talking about. I have seen guys get stabbed. I have seen them get killed. I have seen them hang themselves. I have seen them carried out. I know about the suffering that prisoners go through. But I want to bring in the other side too, because when I was on death row, I had to ask myself, 'Well, where does the responsibility lie? Nobody is in here with me anymore. I cannot blame anybody.' I had to look at my own self.*[31]

These words speak volumes about the activist.

In the same manner that the activist's reaction to the magnitude of what he has seen reveals who he is, it can be said of Oedipus that the magnitude of what he did is revealed by his reaction at the same time that his reaction reveals who he is. A shallower man may have committed suicide, may have become a drunkard, may have gone into psychotherapy, may have started a support group for Adult Children Who Have Unwittingly Killed Their Father And Slept With Their Mother.[32]

It is the same with culture and race and gender. We resist, even within ourselves, the eradication of our individual humanity that comes from defining ourselves by the contingencies of our birth. What renders us invisible as human beings is when we are 'marked by what is all too superficially visible' and not 'recognized and faced as individuals with a choice'. We will come to understand the magnitude of what we have done to Leticia by hearing her story, by seeing how she comes to terms with being an Indian by blood, whose alcoholic status Indian mother abandoned her to be brought up by Métis and non-Native parents. Perhaps it is not quite so serious as we might have thought. Perhaps it is far more tragic than any of us could have imagined. Only Leticia can tell us. This is true even though Leticia herself may not be able to find the words to

tell us. This is true even if Leticia herself has not yet got a handle on her story. This is true even if Leticia is no longer alive. And these things are true because although it is Leticia's story, her story also belongs to the world. In belonging to the world, it belongs only to one individual born into an unreproducible time and space.

What is it then, that we can understand another human being's story when both they and we are shaped by our destiny; when our understanding of the world depends on the culture and language and time into which we are born. Because we have come to birth in a world that is ordered, it requires a form of attentiveness to the world to make sure that what we hearing is the other person's story and not merely echoes of our own. And even for ourselves, it requires attention to our own humanity to make sure that our reactions to the world are not merely mediated by inherent memories of abuse or those aspects of our culture and personality which are 'suspect as the marks of submission and fatalism, delusions and escape'. As well, for those of us who have not been subjugated or abused, it requires attention to ensure that our reactions to the world are not clouded by our privilege. Simone Weil talks of this latter obstacle when she insists that the cry of one who believes that he or she is being harmed - in a sense of 'harm' that implies injustice - is a 'silent' cry, Peter Winch questions what this might mean:

> *This cannot mean that it is a cry for which there is no possible expression - in order properly to discern the protest of someone who is being violated it is not enough to be familiar with the words, if any, that are being uttered - there are special obstacles in the soul of the reader in the way of recognizing protests at real injustice, "Attention " is necessary,' and the peculiar difficulty of my attending to someone in such a situation is that it requires me to understand that we are both equal members of a natural order which can at any time bring about such a violation of whoever it may be, including myself. That is, I cannot understand the other's affliction from the point of view of my own privileged position; I have rather to understand myself from the standpoint of the other's affliction, to understand that my privileged position is not part of my essential nature, but an accident of fate.*
>
> *"To acknowledge the reality of affliction means saying to oneself." I may lose at any moment, through the play of circumstances over which I have no control, anything whatsoever that I possess, including things that are so intimately mine that I consider them as myself. There is nothing that I might not lose, It could happen at any moment that what I am might be abolished and replaced by anything whatsoever of the filthiest and most contemptible sort."*[33]
>
> *It may be easy enough to express verbal assent to this; it is not so easy to actually think it.*[34]

Attention to the world beyond our own vantage, then, appears to be attention to the particulars of the world. To understand the affliction of another, we must understand who they are in their context and in their detail, in the accidents of their fate. This is not an impossible task. We do not have to hear every fact about them, only the facts that

are relevant to their story. And the story points us to which facts are relevant. Both the teller and their audience are attending to the story, even though it inheres exclusively in the teller. The teller also struggles to understand what it means; sometimes what they say may ring hollow. The relevant details may be breathtakingly brief, The relevant facts may not even approach words, It may dwell in the way someone holds their back, In a fabric store on Avenue du Parc in Montréal, it is a series of numbers tattooed into an arm. I am reminded in this context of a woman in a Native healing circle who addressed the circle in her turn:

> *My name is X. I want to talk about what has happened to me - but every time I have tried to tell my story, I have not been able to get past the first sentence. This time I am going to try and tell my story."*
>
> *She took a deep breath and continued.*
>
> *"I was put in a residential school as a child..."*
>
> *At this point, she broke down weeping. She wept for a long time, unable to put words to anything more than that.*[35]

Without an exhaustive compendium of the facts of her life, it is not inconceivable that someone might respond by saying that they understand exactly what she is talking about. Someone in the circle may respond with an immediacy that shows us that they understand exactly what she is talking about. This response may be without words. She may be speaking in the plaintive hope that someone else might understand what it means better than she: a healer. Perhaps our stillness in the circle is a response that shows that we grasp what she is talking about.

If it is true of philosophy that it is an attitude of love that reveals the world to us, it is particularly true that it is an attitude of love that reveals another human being to us. To be a lover of the truth, then, means also being a lover of contingencies.

Part of what it means to overcome obstacles in the way of our understanding of the world is to insist that we are not defined by contingencies, by what is superficially visible. We insist on the fact that we are individuals that must make individual and highly personal choices. Like Wittgenstein's philosopher, we transcend the contingent communities to which we belong by birth; the communities which tell us who we are. In our attempts to transcend what is purely contingent, we create who we are despite who we seem to be. We create who we are by the choices that we make. Insofar as our choices are motivated by a false consciousness, they are not true or authentic choices. To be authentic choices they must be undertaken with a view of the world beyond the obstacles in our soul. Insofar as it is an attitude of love that reveals this world to us, as Plato notes, we become like what we love.

However, in attempting to transcend what is purely contingent about us, we are resisting both obstacles in our souls and obstacles in the world. It is part of what it means to insist on being 'heard and seen as individuals with a choice rather than as men marked by what is all to superficially visible', that we be free to determine as well as to discover

our fundamental identity. Part of what the Black writers that Erikson describes are insisting on is that the obstacles in the world that inhibit them from determining who they are as free men must be removed. They are insisting that there are some decisions so fundamentally tied to people's identity that they should not be forced to make them.[36]

One of the most fundamental choices that we should not force people to make is between who they are and who they might become; between who they are as a member of a collective and who they are apart from the collective; between who they are and who they love. Part of what is so debilitating about being forced to choose between who we are and who we love is that we are also who we love insofar as we are reflected in our choices. This is precisely the choice that Aboriginal women had to make when they were forced by the Indian Act to choose between who they were as Indians and who they were as individual women, to choose between loving their destiny and loving their freedom.

Erikson talks about a stage beyond adolescence, beyond narcissism, which appears to correspond with a love formed apart from the collective. He characterizes adolescence as a period where 'much of sexual life is of the self-seeking, identity-hungry kind; each partner is really trying only to reach himself.' He speaks of the erotic love of adults as a kind of transcendence of narcissistic genital love.

> *Man, in addition to erotic attraction, has developed a selectivity of 'love' which serves the need for a new and shared identity. If the estrangement typical for this stage is isolation, that is, the incapacity to take chances with ones identity by sharing true intimacy, such inhibition is often reinforced by a fear of the outcome of intimacy: offspring - and care. Love as mutual devotion, however, overcomes the antagonisms inherent in sexual and functional polarization and is the vital strength of young adulthood.*[37]

It certainly feels as though who we fall in love with is not something which should be dictated by the collective. It certainly feels like a deeply personal choice. It feels as though, even if our community forces us to marry someone, they cannot force us to love him or her, for that facility is something that is most privately and intimately within us. Just as a collectivity cannot so much as add two and two, so the collectivity cannot fall in love.

It is also the hallmark of erotic love that it is the love of particulars. What we love is a smell, an inflection of voice, a way of laughing, the way a particular curve meets a particular angle. What we love is what is in the blood: a singular molecular configuration of DNA, a singular personality with a singular history, a singular birth, a singular identity, a singular destiny.

Aristophane's description of erotic love in Plato's Symposium captures this irresistible sensation that the other half of our identity exists out there, in the world. He tells the tale of a species of creatures that used to be perfectly spherical and so perfectly content that in their arrogance they scaled they heights of heaven and set upon the gods. To put an

end to this disturbance, Zeus cut them in half and dispersed them into the world. He left them with "these jagged forms, equipped with these oddly lumpy and pointy facial features, these ridiculously dangling and exposed genital members."[38] Each half is left like the various parts of a jigsaw puzzle with only the combination of specific configurations creating a whole; each is left wandering about with a desperate yearning for the other, questing and clasping at random in search of the other half that would make them whole.

While humans aspire to be lovers of The Truth, which transcends the particular, these creatures are driven, as if by pheromone, by their hunger for the particular. As Martha Nussbaum notes, "from the inside the disharmony in the nature of these creatures, whose reason still aspires to completeness and control, but whose bodies are so painfully needy, so distracting – from the inside this would feel like torment. From the outside, we cannot help laughing. They want to be gods – and they are, running around anxiously trying to thrust a piece of themselves inside a hole; or, perhaps more comical still, waiting in the hope that some hole of theirs will have something thrust into it."[39] These creatures delight us.

Though we laugh, we are aware that we are those creatures. Though we laugh, we are aware that there is something tantalizing impossible about this love of the particular, as though it merely appears possible to behold the contingent 'other' beyond our self-seeking attempts to reach out for ourselves. In the act of lovemaking, we might momentarily ask "'Is this me?', 'Is everything that I am in this?', 'Does that person moving around inside my body really know anything about me?'"[40] We might be overcome with the suspicion that the other is asking the same questions. This is a more acute kind of loneliness than that of Socrate's self-sufficient man. It is almost as though we must come to the same realization about the other as we do about ourselves. We discover our true love in the same way that we discover ourselves as if the veracity of the love is a feature of the world. In the same way that we may be mistaken about the characterization of our behaviour, we may be deluded in love.

Not that these tales of tragedy ever truly extinguish our desire to reach out beyond our boundaries. Our very intimate desire for an individual human being is like the desire that bewitches our bodies. It is something, like pheromone, that courses through our blood, causing us to be so painfully needy and distracted. This has a tragic poignancy when erotic love seeks to cross the abyss of culture and blood.

The tantalizing paradox of love across an abyss is that although it is the particulars of the blood that we are drawn to, the blood carries inherent memories of the collective and it is this collective memory that constitutes the particular stigma which makes the individual who they are. These inherent memories encode not only who we are but also how we act and how we love. If the inherent memory of the collective is one of having been abused, until the individual heals the memory, he or she is almost bound to subjugate themselves. If the inherent memory of the collective is that of the subjugator, he or she is almost bound to an inescapable sense of entitlement.

Native women, in formulating ways to heal the violence that is going on in their communities, are certainly aware of the power of the collective memory.

The colonizer's revisions of our lives, values, and histories have devastated us at the most critical level of all - that of our own minds, our own sense of who we are. The portrayal of the squaw is one of the most degraded, most despised and most dehumanized anywhere in the world. The 'squaw' is the female counterpart to the Indian male 'savage' and as such she has no human face; she is lustful, immoral, unfeeling and dirty. Such grotesque dehumanization has rendered all Native women and girls vulnerable to gross physical, psychological and sexual violence.

American Indian men (have been depicted) as bloodthirsty savages devoted to treating women cruelly. While traditional Indian men seldom did any such thing - and in fact among most tribes abuse of women was simply unthinkable, as was abuse of children or the aged - the lie about 'usual' male Indian behaviour seems to have taken root and now bears brutal and bitter fruit.[41]

Just as Indian men and women have difficulty escaping these memories as between themselves, so do Native and non-Native couples have difficulty recollecting and burying these memories about each other. It is almost as though history imposes a choice upon them between who they are and who they love. It is almost inevitable that the more historically powerful continues to subjugate the one who has always acquiesced. The tortured continues to enrage the torturer by being a living testimony to what they have done. Enraged, the torturer continues. They absorb a history that is not of their individual making. The con- figuration becomes unseemly, awkward, ugly, brutal.

Louise Erdrich creates such a tragic couple in Love Medicine.[42] King is a Chippewa Indian. The mother of his child, Lynette, is described by the King's grandmother as 'that white girl'. This reduction of Lynette by King's people is reproduced in his words and in his attitude towards her:

> *“You hear?" King, already out of the car and nervously examining his tires, stuck his head back in the driver’s side window and barked at Lynette. "She was calling you. My father’s mother. She just told you to do something."*

The reduction of Lynette to a 'girl' is reproduced in his words and in his actions. The narrator of the story recollects that she had 'adored King's mother into telling me everything she needed to tell:

- and it was true, I hadn't understood the words at the time. But she hadn't counted on my memory. Those words stayed with me.

And even now, King was saying something to Lynette that had such an odd dreaming ring to it I almost heard it spoken out in June's voice.

June had said, 'He used the flat of his hand. He hit me good.' And now I heard her son say '- flat of my hand - but good -'

King's reduction of Lynette is also reproduced in his actions. The narrator awakes one night to hear King, in a drunken rage, trying to drown Lynette by pushing her face into a sink of cold dishwater. He only stops drowning the mother of his child when the narrator has jumped on his back and bitten his ear until her mouth fills with blood.

Lynette too has absorbed a history that obscures her ability to resist the blows. She is almost too forgiving, too desperate for reconciliation, too quick to forget that he has almost obliterated her. After pulling King off of Lynette, the narrator is left alone as the couple departs:

> *Lynette had turned the lights out in the kitchen as she left the house, and now I heard her outside the window, begging King to take her away in the car:*
>
> *'Let's go off before they all get back,' she said. 'Its them. You always get so crazy when you're home. We'll get the baby. We'll go off. We'll go back to the Cities, go home.'*
>
> *And then she cried out once, but clearly it was a cry like pleasure. I thought I heard their bodies creak together, or perhaps it was just the wood steps beneath them, the old worn boards bearing their weight.*
>
> *They got into the car soon after that. Doors slammed. But they travelled just a few yards and then stopped. The horn blared softly. I suppose they knocked against it in passion. The heater roared on from time to time. It was a cold, spare dawn.*

What will their child remember? How will he make sense of this?

If it is true that we have inherent memories of centuries of abuse, then King is not only reacting to the immediate memory of his father beating his mother. He is reacting to the inherent memory of being a man in a world that has acquiesced to and forgiven male violence. If we can accept that he is reacting to what generations of men have gotten away with, then we must also take into account that King is an Indian, and Lynette is White. He is reacting to the memory of being an Indian and to the memory of years of abuse that his people have suffered at the hands of Whites. In a sense, he is reacting to a memory of this almost-500-year-old story:

> *Each of them [the Spanish foremen] had made it a practice to sleep with the Indian women who were in his work-force, if they pleased him. Whether they were married women or maidens. While the foreman remained in the hut or the cabin with the Indian woman, he sent the husband to dig gold out of the mines; and in the evening, when the wretch returned, not only was he beaten or whipped because he had not brought up enough gold, but further, most often, he was bound hand and foot and flung under the bed like a dog, before the foreman lay down, directly over him, with his wife.*[43]

Is it extraordinary to think that Lynette bears the memory of what her people have done to his? She bears it in her acquiescence, as it is perhaps more characteristic of women to absorb too much of other people's history while it is characteristic of men to absorb too little. Just as it is characteristic of women that our children take on their father's names and not our own, it is characteristic of women to believe that we can mitigate and heal centuries of violence by embracing where it comes from in our lifetime. I have heard White prostitutes attempt to transcend the violence of their Black pimps towards them by referring to the racism he has had to endure, as though we alone, as individual women, can heal centuries of violence by tending to the pain of the man in our arms and ignoring the bruises that he has left on our bodies and on our souls. I believe it is the capacity of women to absorb too much of other people's history that made the marriage of White women to Native men less threatening to the survival of Native culture than the marriage of Native women to White men.

If it is so that Lynette bears the memory of what her people have done to King's, this is also because she bears what centuries of men have done to women. In her acquiescence, she bears the memory of degradation and violence and humiliation that has been done to every woman who has suffered at the hands of men. She bears the memory of every woman in every culture who has been told that their position is as supplicant to man, on her knees, yielding, acquiescing, absorbing blows, spreading her legs. She bears the memory of every woman whose rape is seen as the most potent way to emasculate the manhood of another nation and not as a profound and devastating violation of her own person, her own body, in her own right, and not just as a member of a nation but as a woman and as a human being.

Both Lynette and King will need to transcend these histories in order to heal as individuals. They will need to transcend these histories in order to be able to love each other and not only be reaching for themselves when they reach for the other. They will need to transcend their own histories before they are capable of love over the troubled river of blood. They will need to transcend their histories before they become the masters and mistresses of their own destinies.

c) Self-Government

In our blood is the inherent memory of abuse, whether we are the abuser or the abused. That is part of how we understand, on a personal basis, the depth of the injustice which must be addressed. That is how we understand what must be done.

This said, we may not realistically be able to provide more than justice in our time. We can no more heal centuries of abuse by absorbing a history that is not of our making than Lynette, alone, as an individual women, can heal centuries of violence by tending to the pain of the man in her arms and ignoring the bruises that he has left on her body and on her soul. It does not help King one iota to not hold him accountable for what he, as an individual in his time, has done to Lynette. It does not help Lynette as an individual in her own time, to hold her accountable for the behaviour of generations that preceded her. It does not help either of them when they are not scaled down to the

exact proportions of their generation. These are injustices that are far beyond the capacity of a puny human being to remedy in their lifetime. It would be supremely arrogant to think that an individual could heal wounds of such epic proportions.

Part of scaling ourselves down is recognizing that our histories are not frozen in our blood, that cultures are not frozen at some arbitrary time, such as contact. While we may be marked, as peoples, by who we are, we are marked as human beings by our ability to become what we love. We evolve. It is difficult to tell what pure blood looks like anymore. In the 1992 Arctic Winter games, the girls play hockey, the Russians compete with the Inuit in the seal kick, Northerners and Southerners compete for the gold ulu in the dog sled mush, and the boys wait out these games for their chance to compete in gymnastics alongside the girls in the next Arctic games, when hopefully, it will be considered acceptable. We are no longer who we were.

There are parties on both sides that have attempted to assert that such is not the case, as though there has not been generation upon generation since Columbus landed, driven almost by pheromone, mingling blood and semen, contaminating the inherent memories of the collective. On our behalf, in 1991, McEachern J tells the Gitksan and Wet'suwet'en people that what we meant by 'existing aboriginal and treaty rights' in s. 35 of the Constitution Act of 1982 was those rights which existed at contact.[44] Hence, to the extent that we have not extinguished these rights, the Gitksan and Wet'suwet'en can continue to pick berries and "use whatever else was used before exposure to European civilization for subsistence and survival, including wood, food and clothing and for culture and ornamentation." And that's it! That is what remains of the Gitksan and Wet'suwet'en peoples.

It is not only us who reduce our pasts to who we were before we were exposed to each other. I can recollect an exchange between a Carrier woman, Maggie Hodgeson, who works as a healer, and a Mohawk warrior who had just spent ten months in a federal penitentiary.[45] She had just finished speaking about someone who had sexually abused a child in his own community and how she had had him charged. She and his community had also followed him through a treatment program that was based as much in traditional healing ceremonies and Native spirituality as it was in the threat that he would be removed from the community and put in prison if he re-offended. The Mohawk warrior asked:

> *You said that when there was a problem with members of the community, you still went to the R.C.M.P. and you went through the process in the White system. Why was it necessary to involve police from the outside? Couldn't this healing process have taken place in the community?*

She responded:

> *There were children involved!*
>
> *And there is a requirement to report. And that is the law. As long as we live in Canada, we are subject to that law.*

Now if we only do something because we are subject to it, I would really question the wisdom of doing it. However, this particular person was a teacher who had perpetrated in a number of other communities as well; communities who chose to ignore it.

I'll give you an example of where they used a traditional process when the community was not yet healthy. I wanted to cry when I heard about it. A woman had disclosed to the people in her community that an elder had abused her. They had their elders meet with this elder who had sexually abused children. This woman trusted that this traditional process was going to help. The elders confronted the perpetrator about the abuse. They told him, 'You have to get help.' It stopped there! Nothing was done!

That woman was violated twice: she was violated the first time when she was abused, the second violation occurred when she reported it and nothing was done about it.

In one particular community, the recourse that they chose when a perpetrator did not follow through was to banish him. You know what he did? He moved to another community, an Indian community. In his particular community he had abused 200 kids. And then he moved to another community and abused kids there.

The warrior responded:

I disagree that we have to go to the outside. The White government has destroyed our communities. Prior to the coming of Europeans, our societies were very well established. Not only did we know how to take care of problems as they occurred, there were very few problems to begin with. In the days before the Europeans came, the Crees, for instance, or the Ojibway, did not go to the Mohawk to solve their problems. They solved it internally.

I think a lot of Native people, particularly younger Native people, would disagree that we absolutely must abide by the laws of Canada since we had sovereignty for thousands and thousands of years before the Europeans came. We have all of these problems in our community because Canada has forced its laws down our throats, including alcoholism, including family abuse, sexual abuse. Those things did not exist or occur in any existing society prior to the coming of the Europeans.

Maggie Hodgeson replied:

I would really like to see a Native justice system. Soon! But do you know what? Our women in our communities have to get healthier. There are men in our community that have to get healthier. Our teachers in our community have to get healthier. Our leaders have to get healthier.

There can be a very subtle distinction between being sentimental about our histories and being clear. I would suspect that the warrior's recollection is incomplete. I suspect we have not recovered enough history to know for sure. Perhaps we never will.

Nevertheless, it is a fact now that children are involved. This is what is happening now in our homes and in our communities. As much as has been lost, this is what we have become. Even to recover what is important so that we can leave the flotsam and the perilous behind, we need to have on eye on the child that is in front of us, or as Native people sometimes put it, on the next seven generations. We only know what is important to us now. While the child in the neighbouring community may have been safe five hundred years ago when banishment was to a vast wilderness, that child is much closer to us now. That child is vulnerable not only because our communities are closer but because of what bringing our communities closer together has done. It has created new generations, some of them blighted. It has changed our ways of interacting with each other as much as it has changed our traditions. As well, thank God, we have finally woken up to the fact that we need to be subject to a law protecting children from sexual abuse at this point in our history. This is just a fact. We will evaluate the wisdom of this fact from the robust parts of our culture that we use to keep our children safe.

We use this knowledge of the child in front of us to pick up and modify the tools that will heal us. We see the child in front of us as a human being whose ability to be free and whole should not be damaged by memories of abuse. We see the child in front of us in their contingency, impatient with the curiosity to discover their destiny, and know the right thing to do to protect this impatience.

We use our sense of who our children are now to understand what is valuable to retrieve from who we were; to recover the heirlooms from the ashes and leave the mere trinkets behind. Hence the sweat lodge ceremony has been revived and shared between Nations. It has been offered to Nations to whom it was unfamiliar. While there is an awareness among the Elders that the original languages have been diminished, they have decided amongst themselves that it is appropriate that the traditional teachings of the people be passed along in English or French. Work has to be done to recover the original languages. And yet still, the teachings are being passed on. Which is good! They have not died. For some of the traditional teachings, not much is lost in translation. But 'for some of the teachings there is something lost. The ritual feeling of the words is lost because when you translate into French or English, it becomes very difficult to explain spirituality because a lot of people confuse it with religion.'[46] By translating, something is lost and something is gained. We understand ourselves more and we understand ourselves less.

I believe, in all of this, that this is what Native women are saying to the Assembly of First Nations, to the Canadian government, and to us. Because we are talking about a constitution, the only language with which we have to talk uses words like 'individual equality rights', like 'section 15', like 'inherent', words like 'abrogate', like 'notwithstanding'. That translation does not necessarily mean that the whole message will be lost. Some people will confuse it with law, just as some people will confuse

spirituality with religion. Translating from legal and other texts, what I am able to understand Native women to be saying is the following: Stop beating on us! Don't create forms of government that might tolerate the beating of women for an instant. Don't mark us by what is superficially visible. Don't accept the colonizer's revisions of our lives.

Absorb some of our history into our forms of government. Take judicial notice of our pasts as well; don't make us prove that we too have suffered. Protect our ability to love our freedom, to become what we love, to determine who we are apart from the collective. Don't banish us from the collective because of who we love and who we have loved. Help us recover forms of government that will keep our children safe. Help us retain enough of our past that our children can discover who they are. Help us heal our Nations, our communities and our families so the next generation will want to remember who they are. Don't let them mark us by what was visible when they met us. Don't entrench only what we are now. Don't tell us not to laugh like our grandmothers.

These claims are very different than those that would be made by a naked, atomistic individual, asserting rights against a monolithic state. These are claims that a Native women's collectivity is asserting vis a vis a Native collectivity. The claims are different because the histories are different. The histories tell of a different source and a different sense of injustice. In spirit, the Charter affirms these histories. While it may very well be true that the Canadian Charter is typically used by property-laden men of European ancestry, the right not to be subjected to any cruel and unusual treatment or punishment is also meant to protect individuals qua members of the collectivity of prisoners; the right to the equal protection and equal benefit of the law without discrimination is also meant to protect individuals as members of the collectivity of women. Contrary to Mary Ellen Turpel, I would suggest that it is the use of the paradigm that is individualistic and property-driven, not the paradigm itself. This is of course a very humble assertion. The evidence is abundant that the paradigm of protecting vulnerable collectivities in Canada has enjoyed a thin history in practice; most poignantly thin for Native Canadians.

If we accept that the Charter embodies a collective-rights paradigm (perhaps even if only in tandem or competition with an individual-rights paradigm) this does not make the resolution of conflict necessarily any easier. It becomes more cumbersome and often more troubling. We must attend to competing collectivities. This is not a utilitarian weighting of the collectivity and the individual. That process is relatively facile. We must listen to histories of injustice from a plurality of speakers. People may speak on behalf of a number of groups to which they owe loyalty. Sometimes they are warring within themselves about which story is truly compelling them. We must weigh the history of one group against the history of another in coming to a decision about what must be done. At times, this is an inescapably Solomonic process. It is not made easier by glib relegation of Native women to the group of those whose needs must be sacrificed for the needs of the many. Until they have had a chance to tell their story, on what basis is the sacrifice made?

In partial support of my claim that the Charter is not singularly intended to be driven by the protection of private property, I would refer to the preamble which professor Turpell draws to our attention in her article on Aboriginal Peoples and the Charter.[47] In doing

so, I would not suggest for a moment that the preamble to the Constitution Act of 1982 has an acceptable presence in the constitution of a nation - state. As professor Turpel rightly point out, it creates an offensive cultural dissonance for Native Canadians. I would humbly suggest, however, that, inept and stilted assertion that it is, it contains an echo of an intention that would indicate that the Charter is not the property-based, individualistic document that professor Turpel claims. Inept, offensive and stilted assertion that it is, I would suggest that this preamble is what passes in these times for something vaguely akin to what is often reiterated by Native people in framing any discussion of self-government; namely that spirituality is the highest form of govemment.[48]

d) Spirituality and Self-Government: An Afterword

What does this mean to say that spirituality is the highest form of government? It is not only being asserted in Constitutional circles that spirituality must govern formulations of self-government. Native women, in their healing circles, are insisting that healing must incorporate Native spirituality. Native spirituality is seen as an important element in dealing with problems of alcohol and drug dependency, violence, and other forms of anomie. Perhaps the most emblematic sign of this revival of spirituality as a form of healing for the dispossessed and alienated Native is taking place in prisons. Prisons, non-Natively conceived, are the paradigmatic institution which strips the individual of identity, which mortifies the self. The recognition that prisoners are a naked individual facing a monolithic state is reinforced by criminal proceedings themselves where the state sovereign brings an action against the solitary offender on behalf of the state. Goffman captures the essence of this institutionalized surrendering of identity:

It is characteristic of inmates that they come to the institution with a 'presenting culture' derived from a 'home world' - a way of life and a round of activities taken for granted until the point of admission to the institution. Upon entrance, he is immediately stripped of the support provided by these arrangements (that have supported his identity on the outside) .In the accurate language of some of our oldest total institutions, he begins a series of abasements, degradations, humiliations, and profanations of self. His self is systematically, if often unintentionally, mortified. He begins some radical shifts in his moral career, a career composed of the progressive changes that occur in the beliefs that he has concerning himself and significant others. The admission procedure can be characterized as a leaving off and a taking on, with the midpoint marked by physical nakedness. Leaving off of course entails a dispossession of property, important because persons invest self feelings in their possessions. Perhaps the most significant of these possessions is not physical at all, one's full name; whatever one is thereafter called, loss of one's name can be a great curtailment of the self.[49]

Native prisoners, on the other hand, are seeking to undermine the institutional obliteration of identity through grassroots prison organizations such as the Native Brotherhood and Sisterhood. They have begun a movement from the inside, facilitated by elders and community workers on the outside, to introduce Native spirituality into the penitentiary. For Native prisoners, the unhindered performance of Native spiritual

ceremonies is their pivotal demand from the institution. The recovery of a surrendered identity is integral to what is happening on the inside. Michael Jackson refers to this process in Locking up Natives in Canada.

> *"An Elder, while understanding the importance and need for individual change, is able to locate this within an historical and cultural continuum; An Elder is able to identify the sources of individual strength for a young person in (1992) which trace a spiritual path which has given native communities their collective strength; an Elder is able to recount a history which identified a young Indian person's responsibility for the future. In these and other ways Elders are able to show the young person how he or she has a valued place within the context of Native society and to learn or rediscover how they can make a contribution to a future in which the Native people of Canada can take their rightful place among the native peoples of the world"*[50]

This sense of identifying sources of individual strength by tracing a spiritual path is consistent with what Native women are talking about when they locate the sources of community and family strength in the recovery of traditional ceremonies and traditional forms of government. The story that is told about the individual transcends their lives, the lives of their family, and indeed the lives of their people. In classical Greek philosophy, it has epic proportions. In Canadian Native traditions, it has spiritual proportions. The historical and cultural continuum that Native women are locating themselves on is sometimes different than the continuum of Native men. However the focus on spiritual paths appears to be a consistent nexus in Native assertions about self-government, whether this be the government of the nation, the community, the family, or the self. Mindful of the reminders that there is a difference between spirituality and religion,[51] it would appear to be a complex task to attend across the linguistic and cultural divides that give these notions meaning.

In attending to what Native women and Native Elders are telling us, we will need to remove obstacles from our souls. However, it is not clear, in these times, how this might be done. Even the word 'soul' is an awkward anachronism outside of musical contexts. While philosophers and lovers are lovers of the truth and lovers of the particular, it appears that there may be another revelation of the world that Elders invoke to show Indian prisoners the way out of anomie, despair, and dispossession.

If the message of Native healers and Elders has resonance for us, we will need to attend to what our own children are telling us is the right thing to do to determine what the times are calling for. We, too, will need to transcend our histories to cross the divide between nations. We will need to locate our individual responsibility for the future in an historical and cultural continuum. This also involves scaling ourselves down to proportion. In order to scale ourselves down to proportion, we will also need to recognize that we too have evolved. We are no longer be involved in something epic. Our shame can paralyse us. We too are not only marked by what is all too superficially visible. We too have been invited to become the masters of our destiny. And we are individuals, not necessarily bound to what McEachern J has said. Although he speaks on our behalf, he does not speak for all of us.

Humble as the efforts may appear, some of our people have attempted a form of reconciliation. Some of us have attempted to apologize for what went on in residential schools. The country has been going through hell (albeit a typically Canadian hell) since Brian Mulroney rolled the dice and Elijah Harper silently but insistently shook his head in the week before June 23, 1990. Some of us woke up with the sound of machine guns on July 11, 1990 with the recognition that we are not yet at home in this world. There may be some of us who are saying now: tell us about your Creator. This is what is Art Solomon, an Ojibway Elder, seems to be indicating when he says:

> *I see a society that has gone insane and keeps on going. It has no direction, because they were lost when they came here and they are still lost, including the churches. The churches, that were so anxious to declare us as savages and pagans, are now asking us about spirituality. They are searching for their own spirituality.*
>
> *So we are the final teachers in this sacred land.*[52]

These people who are searching for their spirituality are inescapably searching for their own spirituality, and not for Art Solomon's. To engage in the latter is facile. My sense is that they are people who, when they go to the final teachers in this sacred land, are saying: "Tell us about your Creator; understand, though, that when you tell us who you are, you are talking to a people who cannot escape the sensation that the records they leave of their searches for Truth ought to be written to the glory of their God. You are talking to a people who are, at the same time, overcome by a sensation that saying this much is chicanery, that is, that such a devotion would no longer be rightly understood.[53] You are talking to a people who feel compelled to slip in a preamble, hoping it will be innocuous, embarrassed that it is not. You are talking to an inescapably religious and godless people." To be truly understood, those who are asking Native people to teach them about spirituality are not really asking about Native spirituality at all, they are asking about their own. What is being recovered is their own God. In the same way that the Mi'kmaq know more about Maritimers than Maritimers themselves, the people who were entertained by our missionaries and who witnessed the apology of the Oblates, (understanding what it was an apology for), understand more about our God than we do. It may only be because we still devote the constitution of our people, in 1982, to the glory of God, despite how our representations of that God have been hilarious or evil or downright banal, that we Canadians retain a hope that we might be understood, that our story is not completely lost, that we are not completely lost. In the same manner, the woman in the healing circle spoke in the plaintive hope that someone else might understand what her suffering means better than she: a healer.

I should think, however, that if, when we enter our constitutional circle, we are only straining to understand the supremacy of 'our God' then that circle has not been cast wide enough. It only embraces 'our people'. It would appear evident from Elijah Harper's silent yet insistent shaking of his head that it has not been cast wide enough to include his people. The people who feel compelled by a sense of obedience to the laws of that constitution are the ones who hear in it the rumblings of their God, or feel that it is

written on their hearts.[54] The rest of us are merely submitting to the law, resentful of its illegitimacy. How does a Constitution embrace a God? Simply by asserting that it is founded upon principles that recognize the supremacy of God? How on earth would a constitution, awkward, dull, NCP'ish[55] instrument that it is, embrace The Creator, the spirit people?

It is part of the nature of the particularly Canadian dilemma that we have gotten ourselves into that we have to try. We cannot escape the fact that there is a deadline. Even this document, bumbling and sincere as it is, will soon be a cultural artifact. We cannot refuse to act. Either we will succeed in this round or we will fail, The country may fall apart, Our people may be ripped asunder, like Aristophane's creatures; doomed, perhaps, to spend the next millennium questing and clasping over the land in search of our other half.

Endnotes:

[1] *See, especially, Twinn v. A.-G. Canada, Federal Court, Trial Division.*

[2] *Native Women's Association of Canada, Constitutional Reform Process and Aboriginal Women (Ohsweken, January 24, 1992); Quebec Native Women's Association Inc. Presentation to hearing of The First Nations Constitutional Circle (Montreal, February 6, 1992); Quebec Native Women's Association Inc. Presentation to the National Aboriginal Inquiry on the Impact of Bill C-31 (Montreal, December 8, 1989); Quebec Native Women's Association Inc.: Brief to the House of Commons Standing Committee on Native Affairs and Northern Development Concerning the Implementation of Bill C-31, (Ottawa, February 4, 1988)*

[3] *Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 C.H.R.Y.B.3.*

[4] *This theme has a vernacular resonance wider than legal writings. Note, for example, Mohawk Social Worker Rheena Diabo who remarks that "Indians do not have rights. We have gotten into a very White way of thinking. I am not trying to be insulting to non-Indian people but rights are not our way. Responsibility is our way. As a human being, when you are born you are given certain responsibilities. You have to conduct yourself to meet those responsibilities in your lifetime. If every human being is a responsible human being you do not have to worry about rights." This comment can be found in the report Communities in Crisis: Healing Ourselves, (Montreal: Waseskun House, 1991)*

[5] *Nitya Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 3 Harvard Human Rights 13.*

[6] *See especially Joanne Whyte, "Aboriginal Women and Self-Government; Equality Within the Collective" (1991) McGill: unpublished paper submitted to professor Colleen Sheppard.*

[7] *See note 2.*

[8] *[1976] 2 S.C.R. 751. [hereinafter Natural Parents].*

[9] *[1983] 2 S.C.R. 173. [hereinafter Racine].*

[10] *Erik Erikson, Identity, Youth and Crisis, (New York: W.W. Norton & Co., 1968).*

[11] *Natural Parents, supra, note 8.*

[12] *Ibid.*

[13] *L. Wittgenstein, Philosophical Investigations (Oxford: Basil Blackwell, 1978) at paragraph 32.*

[14] *This seduction is captured in the following:*

FOREIGNERS
Their architecture intrigues us;
their regional specialties too
are an education;
amazed that they eat bugs,
still, we appreciate the wisdom
of adapting to difficult circumstances,
of burrowing homes into the rock,
gathering cow dung for fuel,
and being the first to invent the astrolabe,
of subsisting on cabbage-wine and strong cheeses,
worshipping in the cult of a Local Variant,
evolving a form of money too heavy to lift.

That they stare back at us
is very pleasing.
We are delighted to be delightful;
in their presence
we savour our own
oddness, an amusing sensation;
especially we love to excuse
their attitudes and beliefs,
indigenous quirks
in the costume of
Immanent Values or Eternal Verities,
like the man in the mud mask
who says he's a god.
Who are we to argue?

It is worth losing a snapshot
to be told by the subject
he is afraid for his soul.
- Bruce Taylor
Getting On With The Era

[15] *A remark made by McGill anthropology professor Toby Morantz in Aboriginal Peoples and the Law class, McGill University, March, 1992.*

[16] *I am referring to the public apology that the Oblates offered to Native people last summer, acknowledging what their order had done in residential schools.*

[17] *Anthony Kenny has collated these latter aphorisms from Wittgenstein's On Certainty in his book Wittgenstein at p. 207. Anthony Kenny, Wittgenstein (Suffolk: Penguin Press, 1973).*

[18] *Simone Weil, tile French philosopher, who suffered from unbearable migraine headaches, once said that when she beholds evil in the world, she must recollect to herself that when she has a headache she is overcome with the urge to hit someone in the exact same spot that she is hurting. Class notes, professor Raymond Gaita, King's College, University of London, 1980.*

[19] *This said, Peter Winch adds that, "although I say 'I understand Oedipus blaming himself', I do not mean that I should want to blame him too. That is a different issue. Blaming oneself is quite a different matter from blaming other people - a difference which is marked by our having a special word for it: 'remorse'. If Oedipus had intended what he did, I might indeed think it appropriate for me to blame him. As it is, the appropriate reaction is surely one of pity, the attitude which Sophocles' play invites from us." Peter Winch, Ethics and Action (London: Routledge & Kegan Paul, 1972).*

[20] *Communities in Crisis: Healing Ourselves (Montreal: Waseskun House, 1991).*

[21] *Weil, supra, note 18.*

[22] *Wittgenstein expresses tile impossible poignance of our contingency in the following way: "How can a man be happy if he cannot ward off all the misery of this world?" This might be contrasted with what he said on his death bed to his housekeeper: "Tell them I've had a wonderful life", 'them' referring to his colleagues in philosophy. Class notes, professor Raymond Gaita, King's College, University of London, 1979)*

[23] *Natural Parents, supra, note 8.*

[24] *High school biology class notes, Professor Rene Spence.*

[25] *L. Wittgenstein, Zettel (California: University of California Press, 1970) at para 455.*

[26] *Simone Weil, The Need for Roots (London: Routledge & Kegan Paul, 1952).*

[27] *Please excuse the grammatical errors in these sentences. I believe that gender-neutral language would distort the meaning of what I am trying to get at.*

[28] *Some of the preceding analogy is borrowed from a 1979 class discussion with Rai Gaita, lecturer in philosophy, King's College, University of London.*

[29] *St. Augustine, translated from Latin by L. Wittgenstein, ibid, note 24.*

[30] *Martha Nussbaum, "The Speech of Alcibiades" (1979) Journal of Philosophy and Literature, 1.*

[31] *Weil, supra, note 18.*

[32] *I have been helped in developing some of these themes by an essay entitled 'The Personal in Ethics' by Raimond Gaita in Wittgenstein: Attention to Particulars, eds: DZ Phillips & Peter Winch, St. Martin's Press, New York, 1989.*

[33] *Simone Weil, "Human Personality" in Simone Weil: An Anthology, ed Siân Miles (London: Virago Press, 1986).*

[34] *Peter Winch, Simone Weil "The Just Balance" (Cambridge: Cambridge University Press, 1989).*

[35] *To circumscribe the anonymity of the circle, more detailed reference cannot be given.*

[36] *Paraphrase of comment made by professor Jeremy Webber in Social Diversity and the Law, Montreal: McGill, March 10, 1992.*

[37] *Natural Parents, supra, note 8.*

[38] *Supra, note 27.*

[39] *Supra, note 27.*

[40] *Ibid.*

[41] *Manitoba Justice Inquiry, Manitoba: Manitoba Department of Justice, December, 1991.*

[42] *Louise Erdrich, Love Medicine (New York: Holt, Rinehart and Winston, 1984).*

[43] *Account, provided by Dominican priests, of Spanish savagery in the Caribbean, cited in Tom Berger, A Long and Terrible Shadow (Vancouver: Douglas & McIntyre, 1991).*

[44] *Delgamuukw et al. v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada, [1991] 3 W.W.R. 97. (hereinafter Delgamuukw).*

[45] *Communities in Crisis: Healing Ourselves (Montreal: Waseskun House, 1991).*
[46] *Communities in Crisis: Healing Ourselves (Montreal: Waseskun House, 1991).*
[47] *Turpel, supra, note 3.*
[48] *Brian Slattery quoting Oren Lyons on Aboriginal Self-Government (McGill University: Native Rights Association of McGill, March 27, 1992).*
[49] *Erving Goffman, Asylums (New York: Anchor Books, 1961).*
[50] *Michael Jackson, "Locking up Natives in Canada" (1989) 23 U.B.C.L.R.215.*
[51] *Ibid., note 41, as well as Mary Ellen Turpel, supra, note 3 at p.7.*
[52] *Communities in Crisis: Healing Ourselves (Montreal: Waseskun House, 1991).*
[53] *See passage on title page for reference.*
[54] *Turpel, supra, note 3 at 7.*
[55] *Accepted student acronym for National Civil Procedure.*

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