

MODERN HUMAN RIGHTS: THE ABORIGINAL CHALLENGE

by

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Abstract

This thesis is about the development of a statutory means to allow for the articulation of Aboriginal theories on human rights. Currently, there is no indication that the application of the *Canadian Human Rights Act*, or the provincial Human Rights Code is the subject of any significant dialogue between the settler Crowns and the First Nations currently involved in treaty negotiations within the British Columbia treaty process. However, the repeal of section 67 of the *CHRA*, which prohibits the Canadian Human Rights Commission and the Canadian Human Rights Tribunal from adjudicating complaints by status Indians and other persons under the *CHRA*, would create a unique opportunity to allow for the articulation of an Aboriginal perspective on human rights. More fundamentally, the repeal of section 67 of the *CHRA* will enable for an intercultural exchange of Aboriginal views and the settler Crowns views with respect to human rights. At the core of this intercultural exchange is the issue of what is commonly referred to as the Bill C-31 debate. As a result of Bill C-31, there is ongoing gender inequality amongst Aboriginal peoples. The resolution of this gender inequality will go a long way in setting the ground work for a modern articulation of Aboriginal human rights. The challenge that will face Aboriginal peoples and the federal Crown is the ability to bridge Aboriginal and non-Aboriginal cultural practices and laws with respect to human rights.

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CHAPTER I: INTRODUCTION

This thesis discusses the need for the Aboriginal peoples of Canada to articulate their conception of human rights within the modern understanding of universal human rights. Aboriginal leaders and the settlor Crowns have not fully engaged in substantive dialogue to determine an Aboriginal theory of human rights. Aboriginal peoples have not engaged in a broad critique of the Western definition of human rights. However, without such a substantive critique, and the development of a dialogue on an Aboriginal theory of human rights, it is difficult for Aboriginal peoples to resist the imposition of conventional human rights legislation. The issue of human rights in the Aboriginal context is of growing importance for both First Nation citizens and for non-Aboriginal persons coming under the jurisdiction of Aboriginal governments by way of self-government agreements or court decisions.

In this thesis I discuss the development of a statutory means to allow for the articulation of Aboriginal perspectives on human rights. Currently, there is no indication that the application of the *Canadian Human Rights Act (CHRA)*,¹ or the provincial Human Rights Code is the subject of any significant dialogue between the settler Crowns and the First Nations currently involved in treaty negotiations within the British Columbia treaty process. However, the repeal of section 67 of the *CHRA* would create a unique opportunity to allow for the articulation of an Aboriginal perspective on human rights.

Section 67 prohibits the Canadian Human Rights Commission and the Canadian Human Rights Tribunal from adjudicating complaints by status Indians and other persons under the *CHRA*. Notwithstanding the near quasi-constitutional status of the *CHRA*, section 67 prohibits

¹ *Canadian Human Rights Act*, RS, 1985, c. H-6 [hereinafter *CHRA*].

the review of Indian band council and federal government decisions from human rights scrutiny. In essence, section 67 has created a “human rights free zone” on Indian reserves in Canada.² More fundamentally, the repeal of section 67 of the *CHRA* will enable an intercultural exchange of Indigenous views and the settler Crowns views with respect to human rights.³ The challenge that will face Aboriginal peoples and the federal Crown is to bridge Aboriginal and non-Aboriginal cultural practices and laws with respect to human rights. Europeans arrived to Turtle Island with their unique sets of cultural worldviews and laws. Needless to say, human rights law and practice in its present form was not an integral practice, custom or tradition of the colonists at the first contact with the Indigenous peoples of North America.

Any development of human rights theory in the Aboriginal context must address the notion of the universality of human rights. There are various competing theories of human rights, one of which accepts the universality of certain basic human rights. In other words, all human beings are entitled to a recognition and protection of such rights by virtue of their humanity itself. I will argue that this theory of the universality of human rights is the dominant and accepted theory within Canadian law, and must be addressed in any Aboriginal conception of human rights.

The rise of modern human rights law occurs after the atrocities of World War II, in particular, the mass murder of Jewish people throughout Europe by the German state and her

² Canada. Native Women’s Association of Canada, “Aboriginal Women, Self Government & The Canadian Charter of Rights and Freedoms: In the context of the 1991 “Canada Package” on Constitutional Reform – An NWAC Analysis” [hereinafter NWAC, Charter] at p. 20.

³ J. Borrows, (2002) *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press: Toronto) [hereinafter Borrows, *Recovering*] at pp. 4-5, John Borrows makes reference to R. Cover’s description that the creation of legal meaning occurs through a cultural medium by which “diverse jurisprudential sources” come into contact with each other and create a new jurisprudence reflective of the intersecting jurisprudence.

allies.⁴ As a response to the atrocities of World War II, the United Nations proclaimed the *Universal Declaration of Human Rights* in 1948.⁵ The *UDHR* was not without its critics before and after its proclamation. Before its proclamation, the *UDHR* was criticized for failing to take into consideration "... the validity of different ways of life"⁶, or, in plain language, to take into account the different cultural perspectives of non-Western European peoples with respect to the development and drafting of the *UDHR*. The *UDHR* is premised upon the concept that human rights are universal by virtue of our common humanity with no consideration to our diverse cultural backgrounds. This simple notion is at the core of the international debate with respect to the validity of the *UDHR* from its inception to the present day.

Within the international debate in relation to human rights, there is a clear divide between those countries and persons who are of the view that human rights are universal,⁷ those who oppose, or seek to modify, the universality of human rights on cultural grounds,⁸ and the communitarian view that seeks to resolve the tension between the cultural advocates and the

⁴ See: S.E. Merry, "Changing rights, changing culture" in J.K. Cowan, M.B. Dembour and R.A. Wilson, eds., (2001) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press: Cambridge) at p. 34 [hereinafter Cowan, Culture].

⁵ For a complete copy of the *Universal Declaration of Human Rights*, G.A. Res. 217 A(III), Dec. 10, 1948 see: <<http://www.un.org/Overview/rights.html>> [hereinafter *UDHR*].

⁶ The Executive Board of the American Anthropological Association in 1947 in its submission to the UN Commission on Human Rights stated: "How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?" in *supra*, note 4, at pp. 32-33. See also: D. Otto, "Rethinking the 'Universality' of Human Rights Law", (1997/1998) 29 *Columbia Human Rights Law Review* 1 [hereinafter Otto, Rethinking].

⁷ Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: New York, 2001) [hereinafter Ratner] at pp. 24-25; A. Bayefsky, "Cultural Sovereignty, Relativism and International Human Rights: New Excuses for Old Strategies", (Fall 1997), 9 *Ratio Juris* 42 [hereinafter Bayefsky, Cultural]; E.G. Mountis, "Cultural Relativism and Universalism: Reevaluating Gender Rights in a Multicultural Context", (1996) 15 *Dick. J. Int'l L.* 113 [hereinafter Mountis, Gender]; J. Donnelly, "Human Rights and Asian Values: A Defence of 'Western' Universalism" in Joanne Bauer and Daniel Bells, eds., *The East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press: 1999), pp. 60-87 [hereinafter Donnelly, Asian]; *infra*, note 58, Gonzalez, Honour; *infra*, note 58, Miller, Iran. This list is not meant to be exhaustive but rather illustrative of the various legal arguments and scholarship in this area.

⁸ Richard A. Falk, (2000) *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge: New York) at p.53 [hereinafter Falk]; and J. Morgan-Foster, "A new perspective on the universality debate: Reverse moderate relativism in the Islamic context", (2003) 10 *ILSA J Int'l & Comp L* 35 [hereinafter Morgan, Reverse].

universalists by focusing on group rights to resolve this tension.⁹ In addition to the latter views, feminists are of the view that international human rights law is “replete with male bias.”¹⁰ These views will be canvassed, with particular reference to Aboriginal peoples in Canada.

In the Canadian context, the Native Women’s Association of Canada (NWAC) is a strong proponent of the universal application of the *CHRA* and the *Charter*. NWAC takes the position “that all of our human, civil and political rights guaranteed under Canadian and International law must be protected equally between male and female Aboriginal persons and between Aboriginal and non-Aboriginal persons.”¹¹ NWAC is a national organization that represents approximately 513,000 Aboriginal women across Canada.¹² NWAC favours the application of the *Charter* and the *CHRA*, in part, because of the discriminatory treatment of Aboriginal women by Aboriginal men and the federal government. NWAC views the *Charter* and the *CHRA* as major tools in the “advancement of the human rights of Aboriginal women.”¹³

On May 31, 2005, the Government of Canada and the Assembly of First Nations signed a political accord entitled *First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments*, which, in part, recognized the importance of human rights and applicable international human rights instruments.¹⁴ The Accord is made up

⁹ K.Y. Schooley, “Cultural Sovereignty, Islam, and Human Rights – Towards A Communitarian Revision”, (1994) 25 Cumb. L. Rev. 651 [hereinafter Schooley, Revision] at pp. 678-679.

¹⁰ F. Banda, (2005) *Women, Law and Human Rights: An African Perspective* (Oxford, Hart Publishing) [hereinafter Banda] at pp. 1-10 and pp. 41-44.

¹¹ *Supra*, note 2 at pp. 7, 18 and 19.

¹² Canada. Native Women’s Association of Canada, “Aboriginal Women’s Rights are Human Rights: Canadian Human Rights Act Review – An NWAC Research Paper [hereinafter NWAC, CHRA] at p. 8.

¹³ *Ibid.* at p. 5.

¹⁴ Canada. *First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments* [hereinafter *Accord*]. See: <<http://www.afn.ca/cmslib/general/PolAcc.pdf>> for a complete copy of the Accord.

of eleven principles, all of which are to be "read together and are mutually supportive".¹⁵ With respect to human rights, the *Accord* states that:

First Nations and Canada are committed to respecting human rights and applicable international human rights instruments. It is important that all First Nations citizens be engaged in the implementation of their First Nations government, and that First Nation governments respect the inherent dignity of all their people, whether elders, women, youth or people living away from reserves.¹⁶

The Accord is a clear signal that the AFN is accepting the application of universal norms with respect to human rights.

The *UDHR* is premised on the assumption that human rights are inherent to all persons as a matter of being human¹⁷ and that they are duties that individuals might owe to others. The universalists differ on the source of human rights. Positivists argue that human rights can only flow from documents as agreed upon between state actors.¹⁸ For others:

Universalism may also take the form of naturalism, which "regards the content of human rights as principally based upon immutable values that endow standards and norms with a universal validity." Similarly, some universalists advocate secularism, "believing that ... normative order based on the dignity of the human individual is the only acceptable basis for political governance." This is not surprising. Universalism grew during the Enlightenment. Its heir is western liberalism which advocates the universal ideals of "liberty, equality, rights, neutrality, [and] autonomy."¹⁹

¹⁵ Ibid. at Introductory paragraph to the eleven principles.

¹⁶ Ibid. at Principle 8.

¹⁷ Ibid.. at p 691 and *supra*, note 8, Mountis, Gender at p. 114 and L.A. Trueblood, "Female Genetial Mutilation: A discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory", (2000) 28 Denv. Int'l L. & Pol'y 437 at 438 [hereinafter Trueblood, FGM]; J.D. van der Vyver, "Universality and Relatively of Human Rights: American Relativism", (1998) 4 Buff. Hum. Rts. L. Rev. 43 at 46 [hereinafter van der Vyer, American].

¹⁸ *Supra*, note 9 at p. 691.

¹⁹ Ibid. at p. 692.

Some academics and non-Western countries view the origins and biases of the *UDHR* as yet another example of the West's attempt to justify interventions into the internal affairs of non-Western countries.²⁰ Cultural relativists argue that local traditions and customs should have a role in determining what constitutes a human right and that local conditions and customs may limit the application of the same within a particular culture.²¹ The discourse espoused by the cultural relativists found its first international expression in 1993 in what is commonly referred to as the *Vienna Declaration*. In the *Vienna Declaration*,²² the following principle was adopted by consensus:

All human rights are universal, indivisible and inter-dependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The *Vienna Declaration* was followed up a year later at the Cairo Conference on Population and Development, which adopted the following principle:

The implementation of the recommendations contained in the Programme of Action is the sovereign right of each country, consistent ... with the full respect of the various religious and ethical values and cultural backgrounds of its people, and in conformity with universally recognized international human rights.²³

²⁰ *Supra*, note 8, Falk at p.40.

²¹ Lead by proponents of the cultural relativists, the 1993 Bangkok Declaration states, in part: "[W]hile human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds", cited in *supra*, note 6, Otto, Rethinking at p. 10.

²² *Supra*, note 8, Bayefsky, Cultural at p. 44.

²³ *Ibid.* at pp. 44-45.

In March of 1995, the *Copenhagen Declaration* was adopted at the Social Development and Programme of Action of the World Summit for Social Development. In the *Copenhagen Declaration*, there were further references to the universality of human rights having to take into consideration cultural concerns:

25. We heads of State and Government are committed to a political, economic, ethical and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values and cultural backgrounds of people.²⁴

In the Canadian context, the Sawridge Indian band took a very strict cultural relativist approach with regard to human rights in *Ermineskin Cree Nation v. Canada (Canadian Human Rights Tribunal)*.²⁵ In that case the Sawridge Indian band totally rejected the application of the CHRA to its community and its citizens on the basis that the CHRA was unconstitutional to the extent that it infringed the Aboriginal and treaty rights of the Sawridge Indian band to self-government under section 35(1) of the *Constitution Act, 1982*.

In the case of *Thomas v. Norris*, members of the Cowichan Indian band seized Mr. Thomas, a member of the Lyackson Indian band, and took him to the Somenos Long House.²⁶ The Band members then physically assaulted and battered Mr. Thomas in a variety of ways for a period of four or five days, which the court determined was unlawful imprisonment. The intent of the Band members was to initiate Mr. Thomas into the tradition of spirit dancing. The Band members' defence, in part, was they had an Aboriginal right to conduct themselves as

²⁴ *Copenhagen Declaration*, A/CONF.166/9, adopted 12 March 1995, part B, Principles and Goals, para. 25 as cited in Bayefky, at p. 45. See: < <http://www.un.org/documents/ga/conf166/aconf166-9.htm> > for a complete copy of the *Copenhagen Declaration*.

²⁵ *Ermineskin Cree Nation v. Canada* [2001] A.J. No. 1187, 2001 ABQB 760 (QL) [hereinafter *Ermineskin* cited to A.J.].

²⁶ *Thomas v. Norris* [1992] 2 C.N.L.R. 139, [1992] B.C.J. No 210 (B.C.S.C.) [hereinafter *Thomas* cited to C.N.L.R.].

they had done. The court rejected this defence on the grounds that the individual physical safety of Mr. Thomas could not be violated by the collective Aboriginal right of the Band members. In the penultimate paragraph, the court stated:

Placing the aboriginal right at its highest level it does not include civil immunity for coercion, force, assault, unlawful confinement, or any other unlawful tortious conduct on the part of the defendants, in forcing the plaintiff to participate in their tradition. While the plaintiff may have special rights and status in Canada as an Indian, the "original" rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike. He lives in a free society and his rights are inviolable. He is free to believe in, and to practise, any religion or tradition, if he chooses to do so. He cannot be coerced or forced to participate in one by any group purporting to exercise their collective rights in doing so. His freedoms and rights are not "subject to the collective rights of the aboriginal nation to which he belongs."²⁷

Clearly, as a result of *Thomas*, an Aboriginal person's physical safety cannot be violated and then justified as a collective Aboriginal right.

There are also moderate cultural relativists who take the position that there are such things as international human rights, but that such rights can be and should be informed by legitimate means.²⁸ The challenge for moderate cultural relativists is to establish the proper "internal cultural discourse" so as to enable a "cross cultural dialogue" to occur.²⁹ This view is best articulated as follows:

The balance of universality and cultural relativity of human rights ... requires giving each cultural tradition an opportunity to contribute in the standard formulation process without allowing any tradition to dictate to the others. The balance also requires recognition of the ethical standards and substantive norms of the cultural tradition while rejecting or disallowing archaic and oppressive norms. To avoid even the appearance of dictation by outsiders, which is likely only to be counterproductive, the classification of certain cultural (legal or

²⁷ Ibid.

²⁸ *Supra*, note 9 at p. 682.

²⁹ Ibid. at p. 682.

religious) norms, as archaic and oppressive, must be done by the members of the cultural or religious group themselves. Yet, they cannot be left to themselves completely to do whatever they, or their elites, deem fit and appropriate.³⁰

The *CHRA* expands upon the core ideal of the *UDHR* as follows:

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

The *UDHR* and the *CHRA* share the common goal of equality. More than formal equality, that is treating all persons the same, the instruments require substantive equality that seeks to promote and protect the dignity of all persons and afford them opportunities to achieve their respective potential free from discrimination. The important principles and values underlying human rights legislation have been identified and given elevated status within Canada's laws. The Supreme Court of Canada has declared many times that human rights legislation is fundamental law and quasi-constitutional. In *Insurance Corporation of B.C. v. Heerspink*, Lamar C.J. described the unique nature of human rights legislation as follows:

When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the peoples living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.³¹

With respect to exception to the application of human rights legislation, the SCC has stated:

³⁰ Abdullahi An-Na'im, "The Rights of Women and International Law in the Muslim Context", (1987) 9 Whittier L. Rev. 491, 501 at 515 as cited in *supra*, note 9 at 687.

³¹ *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145, (1982) 137 D.L.R. (3d) 219 [hereinafter *Heerspink* cited to S.C.R.] at 157-158.

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.³²

Articles 7 and 8 of the *UDHR* require Canada to ensure that all of its citizens can avail themselves of an effective remedy in the case of discrimination. They read as follows:

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against incitement to such discrimination.³³

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.³⁴

In a similar vein, Article 26 of the *International Covenant on Civil and Political Rights* states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁵

³² *Craton v. Winnipeg School Division* (No. 1) [1985] 2 S.C.R. 150, [1985] S.C.J. No. 50 [hereinafter *Craton* cited to S.C.R.] at para. 8. See also: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 [hereinafter *Vaid* cited to S.C.R.] at para. 81. In the *Vaid* case, it was held that: "The *Canadian Human Rights Act* applies to all employees of the federal government, including those working for Parliament."

³³ *Ibid.* at Article 7.

³⁴ *Ibid.* at Article 8..

³⁵ *International Covenant on Civil and Political Rights*.

The *Draft Declaration on the Rights of Indigenous Peoples*, Article 1, calls for the right of Indigenous peoples to the full exercise and protection of all human rights,³⁶ and the right to be free from any adverse discrimination, as set out in Article 2.³⁷

On the basis of these commitments, one could be lulled into thinking that all of Canada's citizens have equal access to the federal human rights legislation and its remedies for discrimination on a prohibited ground. However, persons residing on an Indian reserve are exempt from the application of the *Canadian Human Rights Act* due to section 67 of the *CHRA*. Section 67 reads as follows:

Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

The legal effect of this section is to preclude from review many of the decisions of chiefs and councils, and the federal government, acting pursuant to a provision of the *Indian Act* with respect to status Indians, non-status Indians and non-Aboriginal persons residing on Indian reserves.

I will argue that the presence of section 67 of the *CHRA* has hindered the development of an Aboriginal theory of human rights. Without access to the development of human rights theory by the Canadian Human Rights Commission through the review of instances of alleged human rights abuses by Indian band governments, complainants have been limited to

³⁶ Article 1 of the Draft United Nations Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 46th Session, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994) hereinafter *Indigenous Draft Declaration*] reads as follows: "Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."

³⁷ *Ibid.*, Article 2 reads as follows: "Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity."

challenges under section 15 of the *Charter*. While *Charter* litigation has provided some jurisprudence, it is a venue which is not easily accessed by a disadvantaged population, unlike the relatively more accessible Human Rights Commission.

The development of an Aboriginal theory of human rights in Canada will be enhanced by the repeal of section 67 of the *CHRA*. The repeal of section 67 will allow for human rights questions to be more readily advanced, and will also require the federal government to consult with Aboriginal peoples as its repeal will have an immediate impact on their respective First Nations.

In Chapter II, I review recent Supreme Court of Canada decisions, and decisions from New Zealand and the United Nations Human Rights Commission, with respect to the consultation obligations as between settler States and their respective Indigenous peoples which inform emerging guidelines with respect to consultation. In the course of reviewing the Supreme Court of Canada (SCC) decisions regarding consultation, I conclude that the determination of whether the "honour of the Crown" has been upheld vis-à-vis the Crown's dealing with Aboriginal peoples is a constitutional requirement under section 35(1) of the *Constitution Act, 1982*.³⁸ I will argue that the "honour of the Crown" is central in any negotiations regarding the repeal of section 67 and to this end, a consultation guideline will be suggested. In addition, I argue that the concept of the "honour of the Crown" can be a means to invigorate section 35(1). Section 35(1), based upon its wording, contains both a legal component and a political component. I argue that SCC decisions with regard to the legal component have reduced the purposive and remedial functions of section 35(1). However,

³⁸ *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

recent SCC decisions have invigorated the political component of section 35(1) and provide some hope to ensure that Aboriginal and non-Aboriginal objectives can be reconciled and in the process uphold the honour of the Crown. The honour of the Crown will be central to the repeal of section 67 of the *CHRA*.

In Chapter III, I examine the legislative history of section 67 and the current calls for its repeal. Section 67 prohibits the Canadian Human Rights Commission from accepting complaints from Indian band members, and other persons situated on an Indian reserve, as long as either the Chief and Council, or the federal government, is acting under a provision of the *Indian Act*.³⁹ This prohibition denies redress under the *CHRA* to the most vulnerable persons in Canadian society – Aboriginal peoples residing on and off Indian reserves. The repeal of section 67 will require that the federal government carry out a meaningful consultation with the Aboriginal peoples of Canada to determine whether there might be a legislative means to allow for the articulation of an Aboriginal perspective on human rights. I conclude that through the amendment of the *CHRA*, Aboriginal peoples will be afforded an opportunity other Canadians take for granted: the right to avail themselves of the *CHRA*.

With the repeal of section 67, it is foreseeable that sections 6(1)(c) and 6(2) of the *Indian Act* will be the subject of human rights complaints. As stated by the Native Women's Association of Canada:

It is common ground that one of the reasons for section 67 was to prevent Aboriginal women from using the *CHRA* to challenge their loss of status upon marriage to non-Aboriginal men. As a result of this provision, women had to

³⁹ *Indian Act*, R.S.C., c. I-5; re-en. R.S.C. 1985 (1st Supp.), c. 32, s. 4, s. 111; am. 1988, c. 52, s. 11 [hereinafter *Indian Act*].

resort to other forms of litigation and protest to secure change of the [Canadian Human Rights] Act.⁴⁰

As an example of how fundamental human rights are denied as a result of section 67, in Chapter IV, I will analyze and argue that sections 6(1)(c) and 6(2) of the *Indian Act* derogate from section 15.(1) of the *Charter* and cannot be saved by section 1 of the *Charter*.⁴¹ With the repeal of section 67 of the *CHRA*, there will be complaints about sections 6(1)(c) and 6(2) of the *Indian Act* filed with the Canadian Human Rights Commission. The latest consultation cases from the SCC set out some broad guidelines on how Crown objectives and Aboriginal interests can be reconciled with each other with respect to the repeal of section 67. A *Charter* analysis of sections 6(1)(c) and 6(2) will assist in the determination of complaints about sections 6(1)(c) and 6(2) if and when section 67 is repealed. This analysis is necessary because section 67 has denied the Canadian Human Rights Commission and Tribunal the ability to develop a comprehensive analysis of sections 6(1)(c) and 6(2). As a result, section 15.(1) of the *Charter* is the only legal means by which to challenge section 6(1)(c) and 6(2). Sections 6(1)(c) and 6(2) were brought into force through what is commonly referred to as Bill C-31.⁴²

Before Bill C-31, under section 12(1)(b) of the *Indian Act, 1951*, Aboriginal women along with any of their children were disenfranchised or deregistered as Status Indians for marrying non-Indians. However, Aboriginal men who married non-Indian women did not suffer the same fate. Rather, the non-Aboriginal spouses of Indian men became eligible to be

⁴⁰ Canada. Native Women's Association of Canada, "Aboriginal Women's Rights are Human Rights", paper submitted to the Canadian Human Rights Act Review, An NWAC Research Paper [hereinafter NWAC, Bill C-31] at p. 19.

⁴¹ *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, S.C.J. No. 76 [hereinafter *Dickason* cited to S.C.R.] at p. 1124. See also Walter S. Tarnopolsky, *Discrimination and the Law*, rev. by William F. . Pentney, looseleaf (Scarborough, ON: Carswell, 2001) at 4-102.11 where is summarized that *Charter* jurisprudence is at a minimum a "template for decision making" under human rights acts.

⁴² *An Act to Amend the Indian Act*, R.S.C. 1985, c. 321 (1st Supp.) [hereinafter Bill C-31].

registered as status Indians. The purpose of sections 6(1)(c) and 6(2) is to reinstate as status Indians Aboriginal women and their children who were disenfranchised under section 12(1)(b). On its face, Bill C-31 incorporated a gender-neutral system for determining entitlement to registration as a status Indian. However, there is still some residual discrimination in sections 6(1)(c) and 6(2).

To illustrate the residual discrimination in sections 6(1)(c) and 6(2),⁴³ assume that prior to the passage of Bill C-31, an Indian male and an Indian female both marry non-Indians. As a result, the Indian female loses her status and her children, if any, are not entitled to be registered or be on a Band member list. The wife and children, if any, of the Indian male are entitled to be registered as status Indians. As a result of the amendments under Bill C-31, all the members of the Indian male family retain their status as per section 6(1)(a). The Indian female regains her status as a result of section 6(1)(c) but her children, if any, are only eligible to be registered under section 6(2) because the mother was the only parent eligible to be registered as an Indian. The children of the Indian male will be able to pass on to their children the right to be registered as status Indians because they are registered pursuant to section 6(1). The children of the Indian female will not be able to pass on to their children the right to be registered under section 6(2) because they are registered under section 6(2). In the next generation, the grandchildren of the Indian male will be entitled to be registered under either section 6(1) if his children marry an Indian registered under section 6(1), or section 6(2) if his children marry a non-Indian. The grandchildren of the Indian female will only be eligible to be registered pursuant to section 6(2) if her children marry an Indian registered under section 6(1). The discrimination that existed prior to the passage of Bill C-31, as illustrated above, is still

⁴³ Wendy Baker, "Equality Challenges: Aboriginal Women's Claims Against Residual Sexual Discrimination in the Indian Act", (May, 1992), unpublished paper [hereinafter Baker] at pp. 6-7.

present in section 6(2), and as a result the termination of Indian status in the Indian female line may occur in two generations.

As a result of Bill C-31, section 12 was replaced by section 6 of the current *Indian Act*, 1985. In essence, section 6 now has eleven categories of persons who are eligible to be registered as status Indians:

Under section 6(1)(a), those persons who were registered, or eligible to be registered, as status Indian prior to April 17, 1985 remained status Indians.

Under section 6(1)(b), those persons who were members of a body of persons declared by the Governor General on or after April 17, 1985 to be a member of Indian band.

This section contemplated the recognition of a new Indian Band as defined in the *Indian Act* as in the case of the Conne River MicMac Band in Newfoundland.⁴⁴

Under section 6(1)(c), there are five subcategories of persons that are eligible to be reinstated if “the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951” because of one of the following:

- a. under subparagraph 12(1)(a)(iv) - **loss of status upon reaching the age of 21, if mother and paternal grandmother gained status through marriage** – this is commonly referred to as the double mother clause;⁴⁵
- b. paragraph 12(1)(b) - **marriage to an non Indian man;**
- c. subsection 12(2) – **children born to a status Indian woman, who lost status on protest because the alleged father was not a status Indian;**

⁴⁴ *Supra*, note 40 at p. 6.

⁴⁵ *Ibid.*

- d. under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985 – under this clause an Indian woman involuntarily enfranchised upon marriage to a non-Indian and any or all of her children from a former union who were involuntarily enfranchised due to that marriage,⁴⁶ or
- e. or under any former provision of this Act relating to the same subject-matter as any of those provisions

Under section 6(1)(d), “the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1) (**involuntary enfranchisement of a woman upon marriage to a man without Indian status and the enfranchisement of any of her children born before her marriage**), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions” – this clause addresses “the enfranchisement of an Indian man along with his wife and unmarried children due to his voluntary enfranchisement.”⁴⁷

Under section 6(1)(e), “the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951”:

- a. under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or –

⁴⁶ Ibid.

⁴⁷ Ibid. at p. 8.

this subsection covers off persons who were enfranchised for residing outside of Canada for more 5 years;⁴⁸

- b. under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section – this subsection covers off persons who were enfranchised for becoming a lawyer, doctor, clergyman, or upon receiving a university degree;⁴⁹

Under section 6(f), a “person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.”

Finally, under section 6(2), “a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).”

This thesis will examine in great detail the residual discrimination found in sections 6(1)(c) and 6(2). I conclude that rather than correcting the blatant gender discrimination present in the pre-Bill C-31 *Indian Act*, Bill C-31 simply instituted a superficially neutral system of determining entitlement to be registered as a status Indian but maintained the discrimination that it was supposed to remedy. More importantly, the wording of sections 6(1)(c) and 6(2), if not redrafted, will result in the termination of Indian culture within two generations. Assuming that that *Indian Act, 1985* is to remain in place, there will be another generation of Indians denied access to their respective communities. Bill C-31 will eventually deny the descendants of persons reinstated under section 6(1)(c) and 6(2) the right to participate in the on-reserve cultural portion of their respective communities based on their gender and the fact that they are the descendants of Indian women reinstated under 6(1)(c).

⁴⁸ Ibid.

⁴⁹ Ibid.

In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, the SCC recognized that the ability to maintain a connection with one's Aboriginal culture on an Indian reserve was a significant factor in determining the nature and effect of denying off-reserve Indian band members from participating in Indian band elections.⁵⁰ The SCC recognized the impact of pre-Bill C-31 legislation on Aboriginal women and their descendants.⁵¹ The SCC made the points to highlight the discriminatory aspect of the voting provisions under the *Indian Act* that were challenged in *Corbiere*. Of note in *Corbiere*, the SCC acknowledged that the "...band council has considerable power to safeguard, develop and promote the sources of traditional Aboriginal culture and to affect the access of off-reserve band members to these sources."⁵² Furthermore, "...history shows that Aboriginal policy, in the past, often led to the denial of status and the severing of connections between band members and the band."⁵³ In *Corbiere*, the SCC has underscored the import linkage between Indian band membership and the protection, promotion and maintenance of Indian culture. If sections 6(1)(c) and 6(2) are allowed to stand, there will be a whole generation of persons cut off from their respective Indian cultures on Indian reserves. This is the importance of having your name on an Indian band list: it gives a status Indian an important means to access their culture on an Indian reserve.

The review of section 6 of the *Indian Act* illustrates an instance where a substantive violation of a universal human rights norm, i.e. gender equality, is precluded from review by the Canadian Human Rights Commission. The discrimination suffered by Aboriginal women and their children is particularly important as it is a discrimination which affects access to culture, something that will be explored in this thesis. In many ways, the section 6 analysis lies

⁵⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 at paras. 17 and 81 [hereinafter *Corbiere* cited to S.C.R.]

⁵¹ *Ibid.* at para. 86.

⁵² *Ibid.* at para. 82.

⁵³ *Ibid.* at para. 89.

at the intersection of universal human rights and the self determination of Aboriginal peoples. More importantly, such an analysis lies at the heart of an understanding of Aboriginal human rights.

A reinvigorated dialogue is needed to fully articulate a modern understanding of Aboriginal human rights. This may be achieved by allowing band governments to be subject to the scrutiny of the Canadian Human Rights Commission, through the repeal of section 67 of the *CHRA*. Not only would the operation of the *CHRA* with respect to band governments open up the dialogue, perhaps an even more important dialogue would begin in the repeal process itself. As Aboriginal human rights are *prima facie* Aboriginal rights affected by a decision to repeal section 67, a full consultation process must be undertaken by the federal Crown. Through that process Aboriginal human rights would be more fully articulated, and an accommodation could be made to allow for the ongoing recognition of a unique Aboriginal conception of human rights.

CHAPTER II – THE LEGAL DUTY TO CONSULT: AN OPPORTUNITY TO DEVELOP AN ABORIGINAL THEORY OF HUMAN RIGHTS.

2.1 Introduction

The repeal of section 67 of the *CHRA*, provides a unique opportunity to further the development of an Aboriginal theory of human rights. The federal Crown will be required to consult with Aboriginal peoples because it will expose Aboriginal peoples to the *CHRA* for the first time and may infringe on an Aboriginal right to self-government to some degree.

In the current treaty negotiations in British Columbia between the federal and provincial settler Crowns and the Aboriginal peoples⁵⁴ of British Columbia, the issue of human rights has not been the subject of any extensive or meaningful dialogue. The existing agreements-in-principle arising from the British Columbia treaty process, and the Nisga'a Treaty, reveal that Aboriginal forms of governance will be subject to Federal and Provincial human rights legislation and the *Charter*.⁵⁵ The settler Crowns, without compunction, demand and expect that Aboriginal peoples accept the application of the *Charter* and human rights legislation to Aboriginal forms of governance. It appears that Aboriginal peoples have largely accepted this prerequisite in order to obtain a treaty with the settler Crowns.⁵⁶ There are two possible explanations as to why the Aboriginal peoples are prepared to accept the Western definition of human rights and practices. First, Aboriginal peoples involved in the British Columbia treaty process accept the Western definition of human rights. Second, Aboriginal peoples have not

⁵⁴ This thesis will adopt the definition of Aboriginal peoples as set out in section 35(2) of the *Constitution Act, 1982*.

⁵⁵ See <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html> for the Canadian Government's Aboriginal Self-government policy in which it is stated that the *Charter* will apply to Aboriginal forms of governance [hereinafter SG Policy].

⁵⁶ *Azak v. Nisga'a Nation* [2003] B.C.H.R.T.D. No. 75, 2003 B.C.H.R.T. 79 [hereinafter *Azak*].

been afforded an opportunity to develop an Aboriginal perspective with respect to human rights. This thesis will focus on the second explanation.

The core argument of this thesis is this: until the Aboriginal peoples of Canada articulate a broad critique of human rights as defined by the "West",⁵⁷ there will continue to be legal and political pressure to accept and implement a "Western" conception of human rights within their respective governing structures. Until Aboriginal leaders and the settler Crowns engage in a more constructive dialogue about their respective visions of "human rights", the easier it will be for the settler Crowns to insist on the application of the *Charter* and existing human rights legislation to Aboriginal governments. In addition, Aboriginal peoples expect their leaders either to accept existing "Western" human rights norms⁵⁸ or to articulate an alternative vision of human rights. The issue of human rights will grow in importance not just for First Nation citizens but also for non-Aboriginal persons coming under the jurisdiction of Aboriginal governments by way of self-government agreements or court decisions.

Aboriginal peoples have not articulated a critique of the Western conception of human rights in the same manner that scholars, and governments, such as those from an Islamic⁵⁹ and

⁵⁷ Richard A. Falk, (2000) *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge: New York) at p.49 [hereinafter Falk]

⁵⁸ Ibid. at p. 45.

⁵⁹ J. Entelis, "International Human Rights: Islam's Friend or Foe?" (1997) 20 *Fordham Int'l L.J.* 1251 [hereinafter Entelis]; W.M. Gonzalez, "Karo Kari: Honour Killing", (2000/2001) 9 *Buff. Women's L. J.* 22 [hereinafter Gonzalez, Honour]; L. Hilal, "The Cairo Declaration on Human Rights in Islam and International Women's Rights", (1997) 5 *Circles Bu. W. J. L. Soc. Pol.* 85 [hereinafter Hilal]; I. Khan, "Islamic Human Rights: Islamic Law and International Human Rights", (1999) 5 *Appeal* 74; L.J. Lauro, L.J. and P.A. Samuelson, "Toward pluralism in Sudan: A Traditionalist Approach", (1996) 37 *Harv. Int'l L.J.* 65 [hereinafter Lauro/Samuelson]; K.J. Miller, "Comment: Human Rights of Women in Iran: The Universalist Approach and the Relativist Response", (1996) 10 *Emory Int'l L. Rev.* 779 [hereinafter Miller, Iran]; and J. Morgan-Foster, "A new perspective on the universality debate: Reverse moderate relativism in the Islamic context", (2003) 10 *ILSA J Int'l & Comp L* 35 [hereinafter Morgan, Reverse].

Asian⁶⁰ perspective have done. Instead, Aboriginal peoples in Canada appear to have accepted the “Western” conception of human rights so as to obtain treaty settlements with the settler Crowns because, in part, there is no broad critique of available Western human rights from an Aboriginal perspective. Although there is a broad of academic literature about the rights of Aboriginal peoples from a human rights perspective,⁶¹ there is no international, national or local articulation of what *Aboriginal human rights* means, or whether there is such a thing as *Aboriginal human rights*. However, there is an opportunity to articulate Aboriginal human rights perspectives not only through litigation but through negotiations as well.

As will be discussed in Chapter III, the repeal of section 67 of the *Canadian Human Rights Act* would present an opportunity to implement a statutory regime to allow for the articulation of an Aboriginal human rights perspective. It will be argued that any attempt to repeal section 67 by the Federal Crown must be done in a manner that upholds the honour of the Crown – a concept that is evolving as a result of cases reviewing Crown conduct in light of section 35(1) of the *Constitution Act, 1982*. The balance of this chapter will deal with the decisions arising under section 35(1) to argue first that the SCC in *Haida Nation v. British*

⁶⁰ J. Donnelly, “Human Rights and Asian Values: A Defence of ‘Western’ Universalism” in Joanne Bauer and Daniel Bells, eds., *The East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press: 1999), pp. 60-87 [hereinafter Donnelly, Asian Values]; K. Engle, “Culture and Human Rights: The Asian Values Debate in Context”, (2000) 32 N.Y.U.J. Int’l L. & Pol. 291 [hereinafter Engle].

⁶¹ S.J. Anaya, (2004) *Indigenous peoples in international law* (Oxford University Press, New York) [hereinafter Anaya 2004]; P. Thornbury, (2002) *Aboriginal peoples and human rights* (Manchester University Press, Manchester) [hereinafter Thornbury 2002]; M.C. Lam, (2000) *At the edge of the State: Aboriginal Peoples and Self-Determination* (Transnational Publishers, Inc., New York) [hereinafter Lam 2000]; C.P. Cohen, (ed) (1998) *The human rights of Aboriginal peoples* (Transnational Publishers, New York) [hereinafter Cohen 1998]; R.A. Williams, Jr., (1990) *The American Indian in Western Legal Thought* (Oxford University Press, Oxford) [hereinafter Williams 1990]; S.J. Anaya, “International Human Rights and Aboriginal Peoples: The Move Toward the Multicultural State”, (2004) 21 Ariz. J. Int’l & Comp. Law 13 [hereinafter Anaya Multicultural]; and M. Skinner, “Locating Aboriginal Power: Cultural Relativism, Universalism and State Sovereignty Preface”, (2001) 7 New Eng. Int’l & Comp. L. Ann. 69 [hereinafter Skinner]; and S. Wiessner, “The Rights of and Status of Aboriginal Peoples: A Global Comparative and International Legal Analysis” (1999) 12 Harv. Hum. Rts. J. 57 [hereinafter Wiessner, Rights].

Columbia (Minister of Forests),⁶² *Taku River Tlingit First Nation v. British Columbia*,⁶³ *R. v. Marshall*,⁶⁴ and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,⁶⁵ is laying the ground to overrule *R. v. Gladstone*⁶⁶ and *Delgamuukw v. British Columbia*⁶⁷ with respect to extinguishment, and second, that *Haida*, *Taku*, *Marshall* and *Mikesew* inform the consultation process surrounding any attempt to repeal section 67.

For the purposes of this thesis, it is assumed that there is a strong prima facie case for the existence of Aboriginal human rights. Such rights are pre-existing and integral to the First Nations in Canada. Thus far, the content of such rights has not been fully articulated, and an Aboriginal articulation of human rights has not been raised generally through *Charter* or constitutional litigation. However, an understanding and recognition of Aboriginal human rights must and will be developed in the future. The repeal of section 67 of the *CHRA* would impact Aboriginal human rights, and would provide an opportunity to develop and understand the content of such rights through the consultation process which has been established through numerous cases challenging Crown impacts on other Aboriginal rights. A clear understanding of the development of the Crown requirement to consult with Aboriginal peoples before their rights may be impacted is necessary to conceive of how such consultation will be used in the development of a theory of Aboriginal human rights.

⁶² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70 [hereinafter *Haida* cited to S.C.R.].

⁶³ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, [2004] S.C.J. No. 69 [hereinafter *Taku* cited to S.C.R.].

⁶⁴ *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55 [hereinafter *Marshall* cited to S.C.R.].

⁶⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71 [hereinafter *Mikisew* cited to S.C.R.].

⁶⁶ *R. v. Gladstone*, [1996] 2 S.C.R. 723, [1996] S.C.J. No. 79 [hereinafter *Gladstone* cited to S.C.R.].

⁶⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 [hereinafter *Delgamuukw* cited to S.C.R.].

2.2 THERE AND BACK AGAIN: *Sparrow's* Tale

Although "aboriginal rights" were adjudicated at common law prior to 1982, there was no precise indication as to the nature and scope of such rights.⁶⁸ But Aboriginal peoples in Canada possess certain Aboriginal rights due to their "... historic occupation and possession of their tribal lands."⁶⁹ Aboriginal peoples had preexisting laws prior to the occupation, settlement and colonization of "Turtle Island" by Europeans and did not depend upon the *Royal Proclamation of 1763* or "on [any] treaty, executive order or legislative enactment".⁷⁰ However, prior to 1982, Aboriginal rights at common law were subject to regulation and extinguishment by an appropriate exercise of governmental authority. All of this changed with the entrenchment of section 35(1). Section 35(1) reads as follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 35(1) now gives explicit constitutional protection to aboriginal rights and rights created or confirmed in treaties entered into with Indian tribes or bands. The *Constitution Act, 1982* affirmed existing Aboriginal rights but did not define them. Since its proclamation, cases interpreting section 35(1) have generated the most heated dialogue between the SCC, the settler Crowns and the Aboriginal peoples of Canada. However, a meaningful dialogue model must embody the capacity for negotiated outcomes prior to the commencement of litigation. The dialogue between the Crowns, Aboriginal peoples and the courts can be broken down into three distinct phases: the pre-dialogue phase (negotiation/consultation), the dialogue phase

⁶⁸ *Regina v. Foreign Secretary of State for Foreign and Commonwealth Affairs, ex. parte Indian Association of Alberta and others*, [1982] 2 All E.R. 118 (Engl. C.A.) at p. 129 [hereinafter *Foreign Secretary*].

⁶⁹ *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481 (B.C.C.A.), aff'd [1973] S.C.R. 313 [hereinafter *Calder* cited to S.C.R.].

⁷⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49 [hereinafter *Sparrow* cited to S.C.R.].

(litigation) and the post-dialogue phase (negotiation/consultation informed by the litigation outcome in the dialogue phase). It has taken almost 20 years to come to this dialogue model. The balance of this chapter will examine the leading cases with respect to section 35(1) to highlight the development of the dialogue model set out above.

The dialogue began with *Sparrow*. *Sparrow* laid the foundation for the development of the pre-dialogue that has since been developed in *Haida*, *Taku*, *Marshall* and *Mikesew*. In addition, *Sparrow* is the well spring for the articulation of the current legal test to establish the existence of an Aboriginal right, as set out in *R. v. Vander peet*,⁷¹ and the justification test for the infringement of Aboriginal rights by the Crown, as set out in *Gladstone* and *Delgamuukw*. Finally, *Sparrow* made it clear that section 35(1) applied not just to the Indians and Inuit but to the Metis, something the SCC confirmed in *R. v. Powley*.⁷²

Sparrow has been described as the most significant decision the SCC has made to date.⁷³ Ronald Edward Sparrow, a member of the Musqueam Indian Band was charged in 1984 under the federal *Fisheries Act* for fishing with a drift net exceeding the length limit set out in the Musqueam Indian Band's food fishing licence. Mr. Sparrow admitted he was contravening the licence but asserted as a defence that he was exercising an existing Aboriginal right to fish and that the net length restriction in the licence was invalid because the licence restriction was inconsistent with section 35(1). Mr. Sparrow was convicted in B.C. Provincial Court. His conviction was upheld on appeal to the County Court of B.C., but the B.C. Court of Appeal overturned the conviction. Ultimately, the SCC remitted the case back to the trial level for the

⁷¹ *R. v. Vander peet*, [1996] 2 S.C.R. 507, [1996] S.C.J. No. 77 [hereinafter *Vander peet* cited to S.C.R.].

⁷² *R. v. Powley*, [2003], 2 S.C.R. 207, [2003] S.C.J. No. 43 [hereinafter *Powley* cited to S.C.R.].

⁷³ H. Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases", (1992) 21 Man. L. J. 343 [hereinafter Foster, *Forgotten*] at para. 6 (QL Aboriginal Law Commentary).

determination of whether Mr. Sparrow was guilty of the original charge based upon its analysis of section 35(1).

In *Sparrow*, the SCC made some broad comments with respect to section 35(1). It held that the word "existing" in section 35(1) meant those rights that were in existence when the *Constitution Act, 1982* came into effect; and that the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigor".⁷⁴ Section 35(1) did not revive extinguished rights. The approach to be taken with interpreting the meaning of section 35(1) is "derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself."⁷⁵ A "generous, liberal interpretation" must guide the judiciary in the interpretation of Aboriginal rights and the "nature of s[ection] 35(1) itself suggests that it be construed in a purposive way."⁷⁶ The SCC also rejected the "frozen rights" approach and that "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.⁷⁷ Moreover, Aboriginal rights are *sui generis* and the application of traditional common law concepts of property must be avoided.⁷⁸ It is "crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."⁷⁹ Aboriginal rights are not to be delineated by the "historical policy on part of the Crown" and "government regulations cannot be determinative of the content and scope of an existing right."⁸⁰ The SCC held that fishing rights are held by the "collective and are in keeping with the culture and existence of that

⁷⁴ *Supra*, note 70 at p. 1093.

⁷⁵ *Ibid.* at p. 1106.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at p. 1093.

⁷⁸ *Ibid.* at p. 1112.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* at p. 1077.

group.”⁸¹ The SCC stated that the onus is upon the party challenging the legislation to prove the existence of an Aboriginal right. Because the evidence about the Musqueam right to fish was not seriously contested by the Crown, the SCC was not forced to articulate a clear test for the establishment of the right. However, the SCC did state that “... the salmon fishery has always constituted an integral part of their distinctive culture.”⁸² These words would become the cornerstone for the test articulated in *Vander peet* with respect to Aboriginal rights.

In *Sparrow*, after stating that Aboriginal rights were not absolute,⁸³ the SCC set out a two part test for the infringement of an Aboriginal right.⁸⁴ Under the first branch, to determine if there has been a *prima facie* infringement of an Aboriginal right, the courts should ask: (1) Is the limitation of the right unreasonable?, (2) Does the infringement impose undue hardship?, and (3) Does the infringement deny the possessors of the right their preferred means of exercising the right? If there is a *prima facie* infringement established, the second part of the test requires the government to justify the infringement by establishing that: (1) the legislation and its regulations were enacted to achieve a valid legislative objective and (2) that the objective upholds the honour of the Crown in its relationship with the Aboriginal peoples of Canada. The SCC held that if a regulation that had its goal the conservation and management of a natural resource it was a valid legislative objective. Another valid legislative objective would be to prevent harm to the exercise an Aboriginal right or harm to the Aboriginal and non-Aboriginal persons or any other objectives found to be compelling and substantial.⁸⁵ However, the SCC expressly rejected “the public interest” as a valid legislative objective

⁸¹ Ibid. at p. 1078.

⁸² Ibid. at p. 1099.

⁸³ Ibid. at p. 1109.

⁸⁴ Ibid. at p. 1112.

⁸⁵ Ibid. at p. 1113.

because it was too vague a standard to provide any guidance "... for the justification of a limitation on constitutional rights."⁸⁶ With respect to the second part of the justificatory analysis, the honour of the Crown, the needs of Aboriginal peoples must be the first consideration in the allocation of resources subject to valid legislative objectives.⁸⁷

Sparrow suggests that section 35(1) is composed of two components: political compromise and legal principles. These two components might explain why some of the jurisprudence under section 35(1) has been described as more political than legal by Madame Justice McLachlin in *Gladstone*. The SCC, in *Sparrow*, stated the following:

It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.⁸⁸

This statement resonates with the decisions the SCC has made in relation to language rights cases determined pursuant to the *Charter*. Justice Beetz, in *Societe des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education*,⁸⁹ a case dealing with section 16 of the *Charter*, stated that:

Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination. Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain

⁸⁶ Ibid. at p. 1113.

⁸⁷ Ibid. at p. 1114-1116.

⁸⁸ Ibid. at p. 1105.

⁸⁹ *Societe des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, [1986] S.C.J. No. 26 [hereinafter *Societe des Acadiens* cited to S.C.R.].

nonetheless founded on political compromise. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.⁹⁰

This line of reasoning in *Societe des Acadiens* was affirmed by Chief Justice Dickson (as he then was) in the case of *Mahe v. Alberta*⁹¹ in which he stated that:

Section 23 provides a perfect example of why such caution is advisable. The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.⁹²

Time and time again the Supreme Court of Canada has shown deference to the legislative process in resolving politically sensitive issues which have been thrust upon it due to *Charter* litigation. With respect to Aboriginal rights, the possible reaction to such rights is illustrated in the case of *Mahe*:

...the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right.⁹³

⁹⁰ Ibid. at p. 552.

⁹¹ *Mahe v. Alberta*, [1990] 1 S.C.R. 365, [1990] S.C.J. No. 19 [hereinafter *Mahe* cited to S.C.R.].

⁹² Ibid. at p. 342.

⁹³ Ibid. at p. 393.

In *Vander peet*, the SCC created a two-part test to establish an Aboriginal right. The first step is the determination of the precise nature of the claim being made, taking into account such factors as:

- a. the nature of the action said to have been taken pursuant to an Aboriginal right;
- b. the government regulation argued to infringe the right; and
- c. the practice, custom or tradition relied upon to establish the right.⁹⁴

The second part of the *Vander peet* test "... requires the Court to determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question."⁹⁵ The test set out in *Vander peet* to establish an Aboriginal right is contrary to the purposive approach with respect to section 35(1) as required by *Sparrow*. *Vander peet* undermines the progressive interpretation of section 35(1). The SCC has consistently affirmed that a progressive and purposive approach is required with respect to constitutional interpretation, referred to as the "living tree" principle.⁹⁶

The second part of the test set out in *Vander peet* was attacked in the dissents of Madame Justice L'Heureux-Dube and Madame Justice McLachlin (as she then was). McLachlin, J. stated that the Aboriginal right at issue should be defined in broad terms before the analysis moves onto whether the modern practice of the Aboriginal right "may be characterized as an exercise of the right".⁹⁷ McLachlin, J. concludes that the failure "...to

⁹⁴ *Supra*, note 71 at para. 53.

⁹⁵ *Ibid.* CITE

⁹⁶ *Reference re Meaning of the word "persons" in section 24 of the British North America Act*, [1930] A.C. 124 (P.C.) at 136-137.

⁹⁷ *Supra*, note 71 at para. 239.

recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.”⁹⁸ Finally, McLachlin, J. summarizes her concerns as follows:

By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.⁹⁹

In her dissent, L’Heureux-Dube, J. set out a very detailed analysis as to why the majority approach on the second part of the test should be rejected. First, using the arrival of Europeans as the cut-off point for the development of Aboriginal practices, traditions and customs overstates the impact of Europeans on Aboriginal communities.¹⁰⁰ Second, freezing Aboriginal practices, traditions and customs at the assertion of British sovereignty in 1846 creates an arbitrary date for the assessment of existing Aboriginal rights.¹⁰¹ Third, the second part of the test is contrary to the requirement in *Sparrow* that requires “... purposive, liberal and favourable construction of aboriginal rights”¹⁰² and it creates an evidentiary burden that Aboriginal claimants may not overcome.¹⁰³ Fourth, because section 35(2) makes it clear that section 35(1) applies to Metis peoples, persons and a culture that come into being as a result of intermarriage between Aboriginal peoples and Europeans post-contact, it must have been contemplated that Aboriginal rights could arise after the assertion of British sovereignty in 1846.¹⁰⁴ Finally, to adopt the second part of the test would result in what was rejected in

⁹⁸ Ibid. at para. 240.

⁹⁹ Ibid. at para. 241.

¹⁰⁰ Ibid. at para. 166.

¹⁰¹ Ibid. at para. 167.

¹⁰² Ibid. at para. 168.

¹⁰³ Ibid.

¹⁰⁴ Ibid. at para. 169.

Sparrow, namely, that Aboriginal rights should not be characterized by reference to pre-contact activity as this would freeze the development of Aboriginal rights.¹⁰⁵

A First Nation has to meet a very tough legal standard to establish that they had a pre-existing “practice, custom, or tradition” that was integral to their culture.¹⁰⁶ In order for a practice to be integral to a distinctive Aboriginal society, it must be “one of those things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was.”¹⁰⁷ Further, is the practice “a defining feature of the culture in question”.¹⁰⁸ Any practice that is merely incidental to the distinctive culture will not count as an Aboriginal right.¹⁰⁹ In *Vander peet*, the majority concluded that Mrs. Vanderpeet failed to establish that the exchange of fish for money or other goods was an integral part of the

¹⁰⁵ Ibid. at para. 170.

¹⁰⁶ M. Asch and P. Macklem, “Aboriginal rights and Canadian sovereignty: an essay on *R. v. Sparrow*”, (1991) 29 Alberta L. Rev. 498 [hereinafter Asch/Macklem, *Sovereignty*]; R. Binch, “Speaking for themselves: historical determinism and cultural relativity in sui generic aboriginal and treaty rights litigation”, 13 National Journal of Constitutional Law 245 [hereinafter Binch, *Sui generis*]; W.I.C. Binnie, “The Sparrow doctrine: beginning of the end or end of the beginning”, (1990) 15 Queen’s L. J. 217 [hereinafter Binnie, *Doctrine*]; J. Borrows and L.I. Rotham, “The sui generic nature of aboriginal rights: does it make a difference?”, (1997) 36 Alt.L. Rev. 9 [hereinafter Borrows/Rotham, *Difference*]; G. Christie, “The Court’s exercise of plenary power: rewriting the two-row wampum”, (2002) 16 Supreme Court Law Review 285 [hereinafter Christie, *Two-row*]; B. Gaertner, “The Scope of Section 35 Fishery Rights: A Legal Overview and Analysis”, (2004) Prepared For: The First Nation Panel on Fisheries March 31, 2004 [hereinafter Gaertner, *Scope*]; B.J. Gover, and M.L. Macaulay, ““Snow houses leave no ruins”: unique evidence issues in aboriginal and treaty rights cases” (1996) 60 Saskatchewan L. Rev. 47 [hereinafter Macaulay, *Snow*]; D.C. Harris, “Territoriality, aboriginal rights, and the Heiltsuk spawn-on-kelp fishery”, (2000) 34 U.B.C. L. Rev. 195 [hereinafter Harris, *Spawn*]; T. Isaac, “Balancing rights: the Supreme Court of Canada, *R.v. Sparrow*, and the future of aboriginal rights”, (1993) 13 Canadian Journal of Native Studies 199 [hereinafter Isaac, *Balancing*]; T. Isaac, “Discarding the rose-coloured glasses: a commentary on Asch and Macklem”, (1992) 30 Alberta L. Rev. 708 [hereinafter Isaac, *Rose*]; T. Isaac, “Individual versus collective rights: aboriginal people and the significance of *Thomas v. Norris*”, (1992) 21 Manitoba Law Journal 618 [hereinafter Isaac, *Thomas*]; J. Koshan, “Aboriginal Women, Justice and the Charter: Bridging the Divide?”, (1998) 32 U.B.C. L. Rev. 23 [hereinafter Koshan, *Divide*]; R. Kyle, “Aboriginal fishing rights: the Supreme Court of Canada in the post-Sparrow era”, (1997) 31 U.B.C. L. Rev. 293 [hereinafter Kyle, *Sparrow*]; S. Lawrence, and P. Macklem, “From consultation to reconciliation: aboriginal rights and the Crown’s duty to consult”, (2000) 79 Canadian Bar Review 252 [hereinafter Lawrence/Macklem, *Consultation*]; L.I. Rotham, “Defining parameters: aboriginal rights, treaty rights, and the Sparrow justificatory test”, (1997) 36 Alt. L. Rev. 149 [hereinafter Rotham, *Defining*]; B. Slattery, “Making sense of aboriginal and treaty rights”, (2000) 79 Canadian Bar Review 196 [hereinafter Slattery, *Sense*]; B. Slattery, “Understanding aboriginal rights”, (1987) 66 Canadian Bar Review 727 [hereinafter Slattery, *Understanding*]; and A. Zalewski, (1997) “From Sparrow to Van der Peet: the evolution of a definition of aboriginal rights”, 55 University of Toronto Faculty of L. Rev. 435 [hereinafter Zalewski, *Evolution*].

¹⁰⁷ *Supra*, note 71 at para. 55.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. at para. 70.

distinctive Sto:lo society prior to contact with European culture and, in the result, there was no Aboriginal right to engage in such activity.

In *Gladstone*, a companion case to *Vander peet*, the SCC held that Donald and William Gladstone had an Aboriginal right to exchange herring spawn on kelp for money or other goods because such a practice was a significant feature of the Heiltsuk peoples prior to contact and such a practice was commercial in nature. Although the majority in *Gladstone* found that there was an Aboriginal right to fish for a commercial purpose, it is the justification test formulated in *Gladstone* that has essentially turned *Sparrow* on its head. In *Sparrow*, the SCC was of the view that an Aboriginal right to fish had priority over all other users¹¹⁰ and that "... federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."¹¹¹ In *Gladstone*, the Chief Justice stated that an Aboriginal right has to be reconciled with the broader interests of the community in which it is situated. In other words, if the non-Aboriginal interests to be protected are more compelling and substantial than the Aboriginal interest, then the Aboriginal interest may have to give way. In particular, "... objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups"¹¹² are valid legislative objectives that could justify the infringement of an Aboriginal right.

In *Vander peet*, Madame Justice McLachlin declined to follow the majority with respect to the justification for the infringement of an Aboriginal right as set out in *Gladstone*. In her

¹¹⁰ *Supra*, note 70 at p. 1116.

¹¹¹ *Ibid.* at p. 1009.

¹¹² *Supra*, note 66 at para. 75.

opinion, the Chief Justice's reasons with respect to justification were not in accordance with preexisting authorities, they were not required to be given on the facts of the case, and they were more political than legal.¹¹³ Madame Justice McLachlin states that to accept the expansion of legislative objectives as contemplated by the Chief Justice as set out in *Gladstone* "... would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and the consequent good of the community as a whole."¹¹⁴ In other words, the economic demands of the non-Aboriginal majority take precedence over an Aboriginal right. Further, by expanding the legislative objectives in the manner proposed by the Chief Justice would read into section 35(1) what was expressly left out by the framers of the *Constitution Act, 1982*, specifically, the subordination of Aboriginal rights "... to the good of society as a whole."¹¹⁵ Finally, to accept the expanded legislative objectives set out by the Chief Justice would amend section 35(1) – a procedure that can only be accomplished by treaty or constitutional amendment.¹¹⁶ As a result of *Gladstone*, the Federal Government issued additional J licences to the Heiltsuk Nation to harvest roe-on-kelp for commercial purposes and there is ongoing consultation to determine the amount of roe-on-kelp that is to be harvested by First Nations.¹¹⁷

The legislative objectives that could justify the infringement of an Aboriginal right, as set out in *Gladstone*, were followed up and expanded upon in *Delgamuukw*. *Delgamuukw* is the seminal case with respect to Aboriginal title. In *Delgamuukw*, it was held that Aboriginal title is just another Aboriginal right.¹¹⁸ Furthermore, aboriginal rights recognized and affirmed

¹¹³ *Supra*, note 71 at para. 302.

¹¹⁴ *Ibid.* at para. 306.

¹¹⁵ *Ibid.* at para. 308.

¹¹⁶ *Ibid.* at para. 315.

¹¹⁷ *Supra*, note 106, Harris, Spawn at p. 235.

¹¹⁸ *Supra*, note 67 at para. 137.

by section 35(1) based upon their connection to the land and aboriginal title itself.” However, in *Delgamuukw*, the SCC stated that: “...the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.”¹¹⁹ Clearly, the justification test in *Gladstone* and *Delgamuukw* is no more than the reformulation of the “public interest” argument that was expressly rejected in *Sparrow*. Of note, McLachlin, J. in *Delgamuukw* was in agreement with the expansion of the legislative objectives that could justify the infringement of an Aboriginal right. The legal test to establish an aboriginal right as set out in *Vander peet* and the legislative objectives that can justify the infringement of the same, as set out in *Gladstone* and *Delgamuukw*, do not make it easy to breathe life into the principled legal component of section 35(1). More importantly, to use the words of McLachlin, J., the majority decisions set out in *Gladstone* and *Delgamuukw* are more political than legal.

2.3 The Duty to Consult and Accommodate

The means by which the SCC is seeking to breathe life into the political component of section 35(1) is through the cases of *Haida*, *Taku*, *Marshall* and *Mikisew*. In *Mikisew*, Justice Binnie states:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the

¹¹⁹ Ibid. at para. 165.

process of reconciliation as some of the larger and more explosive controversies.¹²⁰

Reconciliation is to be found in meaningful engagement between the settler Crowns and Aboriginal peoples. The central core of meaningful engagement is consultation. The evolution of consultation as the core to the reconciliation of Aboriginal and non-Aboriginal interests in Canada can be illustrated by reference to the development of the law of consultation in and around the Aboriginal peoples of Canada and New Zealand and their respective settler Crowns, and decisions of the United Nations Human Rights Committee with regard to Saami.¹²¹

2.4 The Canadian cases

In *Haida*, the SCC articulated some broad concepts dealing with the Crown's obligation to consult with First Nations in Canada where Aboriginal title has not been extinguished or recognized. In the case, the Provincial Crown transferred a timber forest licence from one forestry company to another despite the concerns of the Haida Nation. In her opening remarks, McLachlin, CJ stated that:

This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this

¹²⁰ *Supra*, note 65 at para. 1.

¹²¹ The reason for referring to the Saami is the ongoing and difficult issue confronting Saami, specifically, resource extraction activities such as mining, forestry, and military activity, which interfere with Saami sustenance activities, such as reindeer husbandry, hunting, fishing and gathering – issues not dissimilar to those affecting the Aboriginal peoples of Canada. See: “Observations by the Saami Council on the 16th Periodic Report Submitted by Norway under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination” dated August 5, 2003 at p. 2; [hereinafter “the Saami Norway Review”]; “Observations by the Saami Council on the 16th Periodic Report Submitted by Finland under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination” dated August 5, 2003 at p. 1 [hereinafter “the Saami Finland Review”]; “Observations by the Saami Council on the 16th Periodic Report Submitted by Sweden under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination” dated February 19, 2004 at p. 2 [hereinafter “the Saami Swedish Review”] (collectively “the Saami Reviews”).

framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.¹²²

The Chief Justice states further that the duty to consult with and accommodate the interests of Aboriginal peoples is grounded in the honour of the Crown and is always at stake during such consultations. Consultation is but one means by which the reconciliation of Aboriginal interests and the sovereignty of the Crown can be achieved. The honour of the Crown informs not just treaty making but treaty negotiations as well.

The Haida Nation's main concern was the loss of old growth red cedar — a natural resource integral to the practice and expression of Haida culture.¹²³ The SCC did not accept the Crown's position that there was only a positive duty to consult after Aboriginal title or rights were determined. Aboriginal cases take years to resolve and the traditional territories of a First Nation may be laid to waste in the interim. The SCC thought this would not be in keeping with the Honour of the Crown.¹²⁴ It held that both sides must negotiate in good faith and that the Crown must not engage in "sharp dealing". Aboriginal people cannot frustrate the consultation process either, but in the end there is no duty to agree between the Crown and Aboriginal peoples.¹²⁵ The SCC wrote that the Crown's duty might vary from a requirement "to give notice, disclose information, and discuss any issues raised in response to the notice" to deep consultation, which "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" in the

¹²² *Supra*, note 62 at para. 11.

¹²³ *Ibid.* at para. 65.

¹²⁴ *Ibid.* at para. 32 – 34.

¹²⁵ *Ibid.* at para. 42.

case of a strong prima facie case¹²⁶ The Crown may also wish to engage in alternative dispute resolutions such as “mediation or administrative regimes with impartial decision-makers in complex or difficult cases.”¹²⁷ Meaningful consultation may require the Crown to change its proposed course of action so as to accommodate a strong prima facie Aboriginal case of Aboriginal title or right so as to minimize the impact of the proposed action and preserve the strong prima facie case until final resolution of the same.¹²⁸ Accommodation does not give Aboriginal people a veto over the proposed course of action by the Crown but is rather an opportunity for both the Crown and the Aboriginal people to reconcile their conflicting views. Reconciliation involves give and take by both parties.¹²⁹

In *Taku*, a companion case to *Haida*, the SCC stated that:

The duty of honour derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).¹³⁰

The honour of the Crown is enshrined in section 35(1). The honour of the Crown is in issue every single time there is a claim for an Aboriginal right and a court must determine to what extent the honour of the Crown has been upheld. Arguably, this determination must be made by a court prior to applying the test in *Vander peet* to establish an aboriginal right, the infringement test set out in *Sparrow*, and the justification test set out in *Gladstone*. Assuming

¹²⁶ Ibid. at para. 43 – 44.

¹²⁷ Ibid.

¹²⁸ Ibid. at para. 46 – 47.

¹²⁹ Ibid. at para. 48 – 50.

¹³⁰ *Supra*, note 63 at para. 24.

this to be correct, the justification analysis of *Gladstone* and *Delgamuukw* is not engaged because through consultation, the Aboriginal interest will be reconciled with the settler Crown's objectives. Perhaps more importantly, the SCC, through the cases of *Haida*, *Taku* and *Mikisew*, has placed the political component ahead of the legal component, as represented by the cases of *Vander peet*, *Gladstone* and *Delgamuukw*, so as to invigorate and breathe life into section 35(1).

In the case of *Marshall*,¹³¹ Mr. Justice Binnie reiterates that the honour of the Crown is at stake at all times in its dealings with Aboriginal peoples.¹³² Furthermore, in the context of treaties, the honour of the Crown has always been central to the Crown-Aboriginal relationship since at least 1895.¹³³ In an interesting observation, Justice Binnie states that the concept of the honour of the Crown has been central in the dealings between the Crown and its citizens from as early as 1603. Clearly, the honour of the Crown is central in its dealings with Aboriginal and non-Aboriginal peoples because of one simple fact: they are both citizens of the same Crown. Just like non-Aboriginal peoples, Aboriginal peoples are entitled to be dealt with by the Crown in a manner that is honourable. Perhaps more significantly, Justice Binnie characterized the truckhouse provision contained in the 1760 Treaty of Peace and Friendship as the right to earn "a moderate livelihood" which does not "extend to the open-ended accumulation of wealth". In *Gladstone*, characterizing the Aboriginal right in question as commercial in nature, or in the words of the court, "internally unlimited", enabled the majority to formulate its justification analysis in the manner it did. In *Marshall*, the truckhouse clause was characterized as "internally limited", specifically, the right to earn a moderate livelihood.

¹³¹ *Supra*, note 64.

¹³² *Ibid.* at para. 49.

¹³³ *Ibid.* at para. 50.

By characterizing the truckhouse clause in this manner, there is no need to invoke the justification analysis as set out in *Gladstone* and *Delgammukw*. Perhaps *Marshall* marks the SCC's attempt to get back to the justificatory analysis as set out in *Sparrow* though that remains to be determined in future cases. However, the reality is that *Vander peet*, *Gladstone* and *Delgamuukw* remain obstacles to breathing life into the principled legal component of 35(1) of the *Constitution Act, 1982*.

There have been several significant cases that have relied upon the *Haida* case to halt or delay the transfer of land, the extraction of resources and the expansion of existing businesses in the Province of British Columbia. In the case of *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*,¹³⁴ the Musqueam successfully delayed the Provincial Crown's authorization of the sale and transfer of land to the University of British Columbia. In *Musqueam*, the BCCA stated that the infringement or the possible infringement of an Aboriginal right, which includes Aboriginal title, requires consultation to reach some accommodation pending final resolution of the Musqueam's claim.¹³⁵ As stated above, consultation is a free standing requirement enshrined in section 35(1) that must be addressed as part and parcel of an overall Aboriginal rights claim. The Musqueam were successful, in part, because:

...the consultation undertaken by the respondent Crown entities was flawed because it was left until too late of a stage in the sale process. The Band had established, and the Crown had conceded, a strong claim of aboriginal title to the lands in question. If the land was sold to a third party, there was likely no further opportunity for the Band to prove their connection to the lands. The Band was therefore entitled to a meaningful consultation process in order that

¹³⁴ *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005] B.C.J. No. 444 (Q.L.), 2005 B.C.C.A. [hereinafter *Musqueam* cited to B.C.J.].

¹³⁵ *Ibid.* at para. 87.

avenues of accommodation could be explored. Accordingly, the authorization of the sale was suspended for two years to provide for proper consultation.¹³⁶[Emphasis added]

In the case of *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*,¹³⁷ the Homalco Indian band obtained a limited interim injunction restraining a salmon farmer from placing any more salmon stock in its growing pens. In this case, the B.C. Ministry of Agriculture, Food and Fisheries had issued various licenses, as per an amended agreement, to a salmon farmer whose facilities were located within the traditional territories of the Homalco Indian band. The Homalco Indian band was successful, in part, because: “the result of the grant of the amendment and the supply of fish within a very short space of time, by which I mean a matter of hours, at the most days, to the location, suggests that the Homalco Indian Band at the least has a basis upon which to claim that an injunction should be granted on an interim basis, pending disposition of its substantive claim.” As in *Musqueam*, the issue of allowing adequate time for meaningful consultation with the Homalco Indian band with respect to the licenses was a significant factor in the court’s decision to issue the interim injunction.

In the case of *Hupacasath First Nation v. British Columbia (Minister of Forests)*,¹³⁸ it was held that the principles set out in *Haida* and *Taku* were equally applicable to Crown conduct in relation to land held in fee simple by a third party.¹³⁹ The court found that the Provincial Crown owed a duty to consult the Hupacasath prior to removing some land from

¹³⁶ Ibid. at Headnote.

¹³⁷ *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, [2005] B.C.J. No. 401 (Q.L.), 2005 B.C.S.C. 283 [hereinafter *Homalco* cited to B.C.J.].

¹³⁸ *Hupacasath First Nation v. British Columbia (Minister of Forests)* [2005] B.C.J. No. 2635, 2005 B.C.S.C. 1712 [hereinafter *Hupacasath* cited to B.C.J.].

¹³⁹ Ibid. at paras. 197-200.

within a Tree Forest Licence area and that the Crown failed to meet this duty¹⁴⁰ but refused to quash the removal of the land. But the court did impose some terms on the use of the lands removed from the Tree Farm Licence area for a period of two years.¹⁴¹ More importantly, the court directed that in the event that the parties were unable to reach an agreement with respect to consultation,¹⁴² or the exchange of information,¹⁴³ they had to go to mediation to settle these disputes – as contemplated in *Haida*. However, the Provincial Crown did meet its duty with respect to amending the allowable cut within the Tree Forest Licence area.

2.5 The New Zealand experience

In *Haida*, Chief Justice McLachlin makes reference to the New Zealand experience with respect to consultation between the Crown and Maori.¹⁴⁴ A brief review of this experience will be undertaken so as to inform the ongoing development of the consultative guidelines between Aboriginal peoples and the settler Crowns in Canada.

In New Zealand, the Crown's duty to consult with Maori finds its source in the 1840 Treaty of Waitangi (the Treaty).¹⁴⁵ By way of background, the brief facts of the Maori Council case were as follows. The New Zealand government was attempting to transfer 10 million hectares of Crown lands to 14 State enterprises pursuant to a proposed statute called the *State-Owned Enterprises Act 1986* (the Act). In response to the Act, the Waitangi Tribunal issued an

¹⁴⁰ Ibid. at para. 333.

¹⁴¹ Ibid. at para. 321.

¹⁴² Ibid. at para. 335.

¹⁴³ Ibid. at para. 325.

¹⁴⁴ *Supra*, note 62 at para. 60.

¹⁴⁵ *New Zealand Maori Council v. Attorney General* [1987] 1 N.Z.L.R. 641 [hereinafter "NZ Maori Council"]. See also: Melanie Chartier, "The Crown's Duty to Consult with First Nations", LLM Thesis dated August 2001, University of British Columbia Law School [hereinafter Chartier, LLM]; and "He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal" Produced by Te Puni Kokiri (Wellington, New Zealand 2001).

interim report setting out a series of claims by five Maori tribes. As a result of the interim report, there was an amendment to the Act to include section 9 which read as follows:

9. Treaty of Waitangi – Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

Ultimately the Court of Appeal declared that the transfer of Crown lands, without taking into consideration Maori claims in light of section 9, would be unlawful and directions were given so as to establish a procedure to protect the claims of Maori until resolution of their claims. The court also declared that the Crown should not take any further steps to dispose of any assets in a way that might affect Maori claims to the same.¹⁴⁶ The court rejected Maori's submission that there was an absolute duty to consult in all cases involving Maori claims opining that this would lead to an open-ended duty to consult – which was not implicit in the Treaty. Rather, the court made the following statement with regard to consultation:

I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.¹⁴⁷

The court also upheld the following:

¹⁴⁶ Ibid., *NZ Maori Council* at p. 643.

¹⁴⁷ Ibid. at p. 683.

1. The New Zealand government should take "the Maori race into its confidence";¹⁴⁸
2. With regard to the transfer of Crown lands, the proposed scheme to protect Maori claims, as developed by the Crown, should be given to Maori for their agreement or comment ;¹⁴⁹
3. There should be a timetable so as to avoid delay;¹⁵⁰
4. "the duty to act reasonably and in the utmost good faith is not one-sided";¹⁵¹
5. "the principles of the Treaty do not authorize unreasonable restrictions on the right of a duly elected Government to follow its chosen policy".¹⁵²

Unlike Canada, there is no constitutional basis for the duty of consultation in New Zealand law. Instead, the New Zealand Parliament has allowed the principles of the Treaty (including the duty of consultation) to become legally binding obligations by incorporating references to the Treaty into particular statutes (such as the *State-Owned Enterprises Act*).

Pursuant to the Treaty of Waitangi, the Waitangi Tribunal was established in 1975 to deal with complaints of the Maori peoples. Although the Waitangi Tribunal can only make non-binding recommendations, the recommendations are usually followed up with legislation.

The Waitangi Tribunal, after considering the *NZ Maori Council* case, issued a report entitled the Ngai Tahu Land Report in which it was held that there was an expansive duty to consult with the Maori on matters not specifically tied to land.¹⁵³ In another Maori claim,

¹⁴⁸ Ibid. at pp. 665.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid. at pp. 664 and 682.

¹⁵² Ibid. at p. 665.

¹⁵³ The Ngai Tahu Land Report, Waitangi Trib. [1997] [hereinafter Ngai Report] stated the following: While the tribunal was there chiefly concerned with consultation on environmental matters, we emphasise that the need for adequate consultation extends to a wider range of social, economic and cultural matters of particular significance to Maori. The Ngai Report can be found at: < <http://www.waitangi-tribunal.govt.nz/reports/sichat/wai0271/chapt24/chapt2404.asp#t33>>.

dealing with the marketing of kiwifruit, the Waitangi Tribunal concluded that Maori peoples could be appointed to regulatory boards that oversee kiwifruit extraction in their traditional territories to allow for their direct input.¹⁵⁴ In the Manukau Report it was stressed there was a need to consult at the early stages of the development of a policy, or contemplated government action, which may affect Maori peoples.¹⁵⁵

The case of *Wellington International Airport Ltd. v. Air New Zealand* is illustrative of the indicia of a valid consultative process:

The word "consultation" did not require that there be agreement as to the charges nor did it necessarily involve negotiations towards an agreement, although this might occur particularly as the tendency in consultation was at least to seek consensus. It clearly required more than mere prior notification. If a party having the power to make a decision after consultation held meetings with the parties it was required to consult, provided those parties with relevant information and with such further information as they requested, entered the meetings with an open mind, took due notice of what was said and waited until they had had their say before making a decision: then the decision was properly described as having been made after consultation.¹⁵⁶

2.6 United Nations Human Rights Commission decisions

The Aboriginal peoples of Canada, the Saami, and the Maori are but three groups of Indigenous peoples who seek to have meaningful input in resource extraction activities, such as mining, forestry, drilling and fishing within their traditional territories. These activities are sanctioned by national governments that seek to create jobs and receive the revenue that flows from allowing such activity.

¹⁵⁴ The Kiwifruit Marketing Report, Waitangi Trib. [1995] at:
<<http://wai8155s1.verdi.2day.com/reports/generic/wai449/chapt0406.asp>>.

¹⁵⁵ Manukau Report, Waitangi Trib. (1985) at:
<<http://wai8155s1.verdi.2day.com/reports/northislandnorth/wai8/wai8doc49.asp>>. See the Mangonui Sewage Report (1988) for similar comments recognizing the need for early consultation.

¹⁵⁶ *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671; 1992 NZLR LEXIS 766, headnote of Lexis.

There have been various international initiatives to acknowledge and protect Indigenous people, and their respective ways of life. In the *International Labour Organization Convention, 169*, there are positive obligations to recognize Indigenous lands, to ensure access by Indigenous people to their traditional lands so as to enable them to carry out subsistence and traditional activities, to give special attention to the case of nomadic people, to take positive steps to delineate traditional Indigenous territory and guarantee effective protection of ownership and protection of the Indigenous lands, and to set up national institutions to allow for the resolution of lands claims by Indigenous peoples.¹⁵⁷ The natural resources of Indigenous peoples, including sub-surface rights are to be “specifically safeguarded” and “the use, management and conservation of these resources” will involve the applicable Indigenous people and where appropriate, compensation will be payable when these resources are damaged.¹⁵⁸ The *ILO Convention* includes the positive obligation of governments to consult with Indigenous people¹⁵⁹ and that such consultations be done in good faith.¹⁶⁰ Furthermore, Indigenous people have a right to participate in “the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”¹⁶¹

The *International Covenant on Civil and Political Rights*, provides that where ethnic minorities exist they “shall not be denied the right, in community with the other members of

¹⁵⁷ *Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries*, Adopted by the General Conference of the International Labour Organization, Geneva, June 27, 1989. Entered into force Sept. 5, 1991 [hereinafter *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*], available at: <http://www.ohchr.org/english/law/indigenous.htm>, Article 14 [hereinafter “ILO”].

¹⁵⁸ Ibid. at Article 15.

¹⁵⁹ Ibid. at Article 6(a – c).

¹⁶⁰ Ibid. at Article 6(2).

¹⁶¹ Ibid. at Article 7. Canada is not a signatory to the *ILO Convention*.

their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”¹⁶² The United Nations *Draft United Nations Declaration on the Rights of Indigenous Peoples*, which is non-binding in nature, also allows for the input of Indigenous people with regard to resource extraction activities that impact on their well being.¹⁶³

The United Nations Human Rights Commission has considered the adequacy of consultation between Saami and their respective settler states. As in the case of the Aboriginal peoples of Canada and New Zealand, consultation is an important process in reconciling not only Saami sustenance activities with the national interests of the settler states, but also in ensuring that the settler states fulfill their obligations with regard to the *International Covenant on Civil and Political Rights* (ICCPR). Part III, Article 27 of ICCPR reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The UN Human Rights Committee has made the following comment with regard to Article 27:

9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected

¹⁶² *International Covenant on Civil and Political Rights*, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 1(1), 999 U.N.T.S. 171 9entered into force March 23, 1976) available at <http://www.ohchr.org/english/law/ccpr.htm>, Article 27.

¹⁶³ “Draft United Nations Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities”, U.N. ESCOR, 46th Session, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994).

and they should indicate in their reports the measures they have adopted to this end.¹⁶⁴

The Länsman Case #2

In the case of *Ilmari Länsman et al. v. Finland*,¹⁶⁵ the UN Human Rights Committee made the following comments with regard to Article 27:

Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

By way of background, the alleged victims (the complainants) were all Saami and members of the Muotkatunturi Herdsmen's Committee (the MHC). The complainants alleged that approval of logging and road building, within the 255,000 hectares of lands where the alleged victims engaged in reindeer herding violated section 27 of the ICCPR. The estimated land required to carry out the logging activity was approximately 3,000 hectares. The 3,000 hectares subject to logging were situated within the winter herding lands of the complainant's reindeer. The complainants claimed that the lichen on the old growth trees in the proposed cut area was vital to the feeding of reindeer calves, that the area was necessary to provide a quiet birthing setting and that the lichen provided emergency food for elder reindeer. The MHC, and not the complainants, were consulted in a timely manner before logging activities commenced and did not oppose the logging activity and the proposed timetable.¹⁶⁶ Furthermore, there was a submission by other Saami, who engaged in logging activity, that logging and reindeer herding

¹⁶⁴ United Nations. General Comment No. 23: The Rights of minorities (Art. 27):. 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comments No. 23. (General Comments) at: <http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument>.

¹⁶⁵ *Ilmari Länsman et al. v. Finland* Communication No. 671/1995: Final Ind. 22/11/96. CCPR/C/58/D/671/1995. (Jurisprudence)[hereinafter "the *Lansman* case #2"].

¹⁶⁶ Ibid. at p. 4.

were not incompatible in the proposed logging area.¹⁶⁷ There were differences among the Saami over the proposed logging, but the committee ruled that the MHC was the proper body to consult and not its individual members. What this case illustrates is that in the development of the consultation process, there has to be a clear representative of the Aboriginal peoples. In addition, the decision of which Aboriginal person or organization carries out a consultative process should be determined by the Aboriginal peoples on their own.

The Kitok Case

In the case of *Ivan Kitok v. Sweden*,¹⁶⁸ which involved another Saami person, the UN Human Rights Committee made the following comments with regard to Article 27:

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant.¹⁶⁹

In this case, Ivan Kitok was denied membership in Sorkaitum Sami Village based upon the Swedish statute entitled the *Reindeer Husbandry Act of 1971*, which governs membership within Saami villages. Without village membership, a Saami cannot exercise Saami rights to water and land.¹⁷⁰ The statutory basis for excluding Kitok was that he engaged in a profession other than reindeer herding for more than three years. Swedish statutes limit the number of Saami who can engage in reindeer herding to 2,500. As a result, within Sweden, the available grazing area for reindeer herding can only support 300,000 reindeer. The Swedish government

¹⁶⁷ Ibid.

¹⁶⁸ *Ivan Kitok v. Sweden* Communication No. 197/1985: Sweden. 10/08/88 CCPR/C/33/D/197/1985. (Jurisprudence)[hereinafter the "the Kitok case"].

¹⁶⁹ Ibid. at p. 7.

¹⁷⁰ Ibid. at p. 2.

took the position that 300,000 reindeer were only capable of economically sustaining 2,500 Saami. The effect is to divide Saami into those 2,500 who can herd reindeer and those who cannot, approximately 15,000 to 20,000. In what can be described as a stunning admission, the Swedish government acknowledged that the non-herding Saami had a difficult time maintaining their Saami identity, **and the Swedish statute which limited the number of non-herding Saami had the effect of assimilating these Saami** into non-Saami society.¹⁷¹ The Swedish government took the position that the restriction on the number of Saami herders was justified for "public interests of vital importance or for the protection of the rights and freedoms of others."¹⁷² In this case, the Swedish government acknowledged that "reindeer husbandry was so closely connected to the Saami Culture that it must be considered part of the Saami culture itself."¹⁷³ The net effect of the Swedish statute was to deny many Saami within Sweden the right to engage in a sustenance practice that is integral to Saami culture - reindeer herding - and constituted a violation of section 27 of the ICCPR. Ultimately, the Committee ruled in all of the circumstances of the case that there was no violation of section 27 of ICCPR.

2.7 Conclusion

Canadian and New Zealand law, and the United Nations Human Rights Commission decisions set out some factors that should be taken into consideration when Aboriginal peoples are under a legal obligation to be consulted. These are:

1. Depending on the strength of an Aboriginal peoples' claim, the degree of consultation will vary from a mere duty to inform in the case of a weak prima facie case, to deep consultation in the case a strong prima facie claim.

¹⁷¹ Ibid. at p. 3.

¹⁷² Ibid. at p.4.

¹⁷³ Ibid.

2. Consultation with Aboriginal peoples should occur in the formative stages of a policy to ensure adequate Aboriginal peoples input and comment.
3. Given the diverse makeup of Aboriginal peoples, it is important to consult with the Aboriginal peoples that are directly affected by a policy rather than any national organization, unless the policy has national significance.
4. In the case of a policy that has national significance, all groups of Aboriginal peoples are to be treated equally and no one group is to be favoured over another during the consultation process.
5. Consultation is a two way process. Aboriginal peoples must provide sufficient information, which includes information on the cultural practice sought to be infringed, and collaborate with the applicable legislative body. The failure by Aboriginal peoples to provide sufficient information on a cultural practice cannot be used as an excuse in future proceedings to argue a lack of consultation.
6. Where applicable, consultation with Aboriginal peoples should be written into the appropriate statute.
7. Consultation does not mean that the applicable legislative body, or its representative, and Aboriginal peoples have to reach an agreement at the end of a consultative process.
8. Consultation may entail the opportunity for the Aboriginal peoples to make submissions, and formally participate in the decision-making process. The decision maker should provide written reasons to reveal how the concerns of the Aboriginal peoples were considered and how they impacted on the decision.
9. The decision making body should carefully examine all the evidence that was presented to previous courts or tribunals to determine if the concerns of the Aboriginal peoples were addressed.

The application of these factors in the context of the repeal of section 67 will be addressed in Chapter IV. Aboriginal human rights are preexisting and unextinguished. Section 67 expressly precludes the operation of the *CHRA* over Indian band governments. To this extent, section 67 can be seen as a recognition that First Nations had and continue to have a unique conception of human rights. How those concepts of human rights will be reconciled with the dominant theory

of human rights in the Western world, as adopted in Canada generally as expressed by the *CHRA*, has not yet been explored.

I argue that the repeal of section 67 is necessary, and that such repeal will trigger a duty to consult on the part of the Crown as such repeal may impact preexisting aboriginal human rights. This consultation process will initiate the dialogue needed to fully articulate a theory, or theories, of Aboriginal human rights in Canada.

CHAPTER III: THE REPEAL OF SECTION 67 OF THE *CANADIAN HUMAN RIGHTS ACT*

3.1 Introduction

The repeal of section 67 of the Canadian Human Rights Act will facilitate the articulation of an Aboriginal perspective on human rights.¹⁷⁴ There have been calls for the repeal of section 67, but there has not been detailed discussion about the impact of such a repeal for Aboriginal peoples and the Canadian government with respect to the development of an Aboriginal perspective on human rights.¹⁷⁵ Section 3.2 will review the history of section 67 of the *CHRA* to establish its context, and section 3.3 will present a brief review of how the Canadian Human Rights Tribunal has applied section 67 to illustrate difficulties surrounding its interpretation. Section 3.4 will review the various calls for the repeal of section 67. Finally, in section 3.5 there will be a discussion of the development of an interpretative clause that would allow Aboriginal peoples to develop their own unique conception of human rights.

¹⁷⁴ This chapter of the thesis is based upon, in part, the collaborative effort I was involved in as a Commissioner with the Canadian Human Rights Commission with respect to the repeal of section 67 of the *Canadian Human Rights Act*. As a result of discussions with various First Nation political organizations and federal government departments, the Canadian Human Rights Commission published a report entitled: "A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act", October, 2005 [hereinafter CHRA, Report]. A complete copy of CHRA, Report is available online at: < http://www.chrc-ccdp.ca/proactive_initiatives/section_67/toc_tdm-en.asp >. The views expressed in this thesis are mine alone and are not to be attributed to the Canadian Human Rights Commission in any way.

¹⁷⁵ There have been other studies that have concentrated on the repeal of section 67 of the *Canadian Human Rights Act*: W. Cornet, "First Nations Governance, the Indian Act and Women's Equality Rights", Status of Women Canada, ed., *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2001 [hereinafter Cornet, Equality] available at: < http://www.swc-cfc.gc.ca/pubs/pubspr/066231140X/200111_066231140X_30_e.html >; Chartrand and McKay Consulting, "The Implications of Repealing Section 67 Of the *Canadian Human Rights Act* Part I", prepared for Congress of Aboriginal Peoples December 2003 [hereinafter Chartrand, Repeal]; P. Chartrand, "The Indian Act Exemption – Options for Reforming the Canadian Human Rights Act" available at: < <http://canada.justice.gc.ca/chra/en/indact1.html> > [hereinafter Chartrand, Exemption]; Native Women's Association of Canada. M. Eberts, "Aboriginal Women's Rights and Human Rights", Prepared for Canadian Human Rights Act Review, undated [hereinafter Eberts, Human] available at: < <http://www.nwac-hq.org/AboriginalWomensRightsAreHumanRights.pdf> >.

3.2 The legislative history of section 67

With the introduction of the *CHRA* in 1977, Minister Basford stated that the purpose of the *CHRA* was to provide for the first time, a comprehensive body of law to deal with discrimination in Canada at the federal level.¹⁷⁶ In introducing the *CHRA* the Minister of Justice, the Honorable Ron Basford, noted that:

The existence of fundamental human rights and freedoms, including the right of every individual to participate in society without encountering discrimination, is a basic and underlying principle which has long been recognized by the Parliament and Government of Canada...¹⁷⁷

Basford went on to state that the purpose of the new legislation was “to give ... legal recognition to these rights by providing, for the first time, a comprehensive set of rules against discrimination at the federal level.”¹⁷⁸ The principle of comprehensiveness was, however, subject to an important exception - section 63 (now section 67). The Minister explained that this exception was necessary because the government had made a commitment to “Indian representatives” that there would be no modifications to the *Indian Act* except after full consultations.¹⁷⁹

During the Parliamentary Committee hearings Basford came under pressure to justify the *Indian Act* exemption. The Minister made it clear that section 63 (now section 67) was intended as a temporary measure:

¹⁷⁶ Canada. House of Commons Debates, February 11, 1977 at 2976 (Hon. Ron Basford) [hereinafter Basford, Debates].

¹⁷⁷ Canada. Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Respecting Bill C-25, An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals, March 10, 1977 [hereinafter Justice and Legal Affairs] as cited in *supra*, note 174 at p. 5.

¹⁷⁸ *Ibid.*, note 174 at p.5

¹⁷⁹ *Ibid.*

...Parliament is not going to look favourably on continuing this exemption forever or very long and that I take it from the proceedings and my own observations, Parliament, on a non-partisan basis, would like to see these provisions of the Indian Act, changed and corrected.¹⁸⁰

With the obvious exception of section 63 itself, the legislation made no reference to the *Indian Act* and did not alter it in any way. Nevertheless, the Government believed that applying the proposed human rights regime to matters falling under the *Indian Act* could substantively change the *Indian Act*. This was because, as the Minister conceded, certain provisions of the *Indian Act*, and actions carried out pursuant to it, might not pass human rights scrutiny and could be struck down if the complaints regarding them were considered by the new Human Rights Commission.¹⁸¹

3.3 The impaired application of section 67

The *Canadian Human Rights Act* prohibits discrimination based on eleven separate grounds.¹⁸² In order to ensure effective protection against discrimination, the *CHRA* provides for the investigation and resolution of allegations of discrimination. As a result a person who believes they have been discriminated against can file a complaint against any employer or service provider coming under federal jurisdiction. This includes complaints against federal government departments and agencies including complaints regarding the provisions of federal legislation and regulations. The Canadian Human Rights Commission must consider all complaints on their merits. With very limited exceptions, no legislation or action carried out by the federal government, or a federally regulated entity, is free from human rights scrutiny. Section 67, however, runs contrary to this inclusive approach.

¹⁸⁰ Ibid. See also: *supra*, note 175, Cornet, Equality at 127; Chartrand, Repeal at 4.

¹⁸¹ Ibid.

¹⁸² Ibid. at p.2.

Given the broad scope of the *Indian Act*, which affects many aspects of the daily lives of persons residing on and off Indian reserves, the impact of section 67 is significant.¹⁸³ In effect, section 67 of the *CHRA* has created a “human rights free zone” within which persons – status Indians and non-Indians - subject to decisions or actions made under the statutory authority of the *Indian Act* have no right to pursue claims of discrimination.¹⁸⁴ The impact can be better appreciated by considering some of the matters provided under the *Indian Act* that cannot be challenged either in their substance (is the provision itself discriminatory?) or their application (has the provision been applied in a discriminatory manner?).

In the case of *Re Desjarlais*, the complainant, a teacher, filed a complaint under the *CHRA* after the Chief and Council passed a non-confidence resolution because of the teacher’s age following complaints from the Band members.¹⁸⁵ The Federal Court of Appeal came to the conclusion that the Band council resolution of non-confidence was not authorized by any provision of the *Indian Act*, and therefore section 67 did not provide a defence for the council’s conduct.

In the case of *Canada (Human Rights Comm.) v. Gordon Band Council*, the Federal Court of Appeal, relying on *Re Desjarlais* in part, upheld the Gordon Band Council’s decision to deny housing to a female Indian band member, who was reinstated as a Status Indian as a result of Bill C-31, and married to a non-Indian.¹⁸⁶ In this case the Indian band member

¹⁸³ *Supra*, note 13 at p. 20 and *supra*, note 174 at p. 2.

¹⁸⁴ *Supra*, note 13 at p. 20.

¹⁸⁵ *Re Desjarlais*, (1990) 12 C.H.R.R. D/466 (F.C.A.) [hereinafter *Desjarlais* cited to C.H.R.R.].

¹⁸⁶ *Canada (Human Rights Comm.) v. Gordon Band Council* (2000), 39 C.H.R.R. D/60 (F.C.A.) [hereinafter *Gordon Band Council* cited to C.H.R.R.].

complained to the Canadian Human Rights Commission that she had been denied Indian band housing based upon her sex, marital status and race. Although the Canadian Human Rights Tribunal determined that the decision of the Band Council was discriminatory, the decision was beyond the jurisdiction of the Tribunal because of section 67. Ironically, the parties agreed that status Indian males of the Gordon Indian band who were married to non-Indians qualified for the allocation of Indian band housing. At the end of its judgment, the Federal Court of Appeal opined that the complainant was free to challenge the decision of Gordon Band Council under the *Charter*.¹⁸⁷

In the case of *Bressette v. Kettle and Stony Point First Nation Band Council*, it was held that the decision of a hiring committee was not sufficiently tied to any provision of the *Indian Act* to bring its decision within the ambit of section 67.¹⁸⁸ In this case, the complainant alleged that he was not hired due to family status. Notwithstanding the fact that the decision to fund the teaching position involved the Chief and Council acting pursuant to two regulations enacted pursuant to the *Indian Act*, the Tribunal ruled that the Indian band council could not avail itself of section 67. By comparison, in *Canada (Human Rights Commission) v. Canada (Department of Indian Affairs and Northern Development)*, the Federal Court of Canada upheld a Canadian Human Rights Tribunal's ruling that the Department of Indian Affairs educational funding policy, carried out pursuant to section 115 of the *Indian Act*, of restricting a child's education to the religious residential school that was closest to the child's residence, was shielded from scrutiny due to section 67.¹⁸⁹ Arguably, *Bressette* and *Canada (Human Rights Commission)*

¹⁸⁷ Ibid. at para. 32.

¹⁸⁸ *Bressette v. Kettle and Stony Point First Nation Band Council*, [2003] C.H.R.D. No. 38, 2003 C.H.R.T. 41 [hereinafter *Bressette* cited to C.H.R.D.] (Q.L.).

¹⁸⁹ *Canada (Human Rights Commission) v. Canada (Department of Indian Affairs and Northern Development)*, [2001] 1 F.C. 174 (F.C.A.), [2003] C.H.R.D. No. 38, 2003 C.H.R.T. 41 [hereinafter *Canada (Human Rights*

are hard to reconcile with each other because in both instances, the Indian band and the federal government were acting pursuant to a provision of the *Indian Act*.¹⁹⁰

3.4 The repeal of section 67

When Parliament enacted section 67 in 1977, First Nations were, arguably, no more than an administrative extension of the Department of Indian Affairs. Since then much has changed.¹⁹¹ First, the *First Nations Land Management Act* provides for a First Nation to manage First Nation lands by way of a land code approved under the *FNLMA*.¹⁹² If a First Nation under the *FNLMA* implements a land code, it is acting outside of the *Indian Act* and subject to the *CHRA* in relation to land management. Under the *FNLMA*, a First Nation is required to develop rules and procedures to deal with the breakdown of a marriage between Indians.¹⁹³ As a result, any land code that failed to apply to treat all parties equally and fairly could be subject to a complaint under the *CHRA*.

Second, the federal government has concluded various self-government agreements by which the *Indian Act* no longer applies to the Aboriginal peoples of certain First Nations. The most recent example is the *Nisga'a Final Agreement Act*. Section 18 of Chapter XX of the *Nisga'a Agreement* expressly states that the *Indian Act* no longer applies to the Nisga'a Nation. As confirmed in the case of *Azak*, the *CHRA* applies to the Nisga'a Nation.¹⁹⁴ Third, in the

Commission cited to F.C.A.]. For a similar case see: *Prince v. Canada (Department of Indian Affairs and Northern Development)*, [1993] C.H.R.D. No. 1.

¹⁹⁰ *Supra*, note 13 at p.21 for further discussion on the impaired application of section 67. See also: *supra*, note 175, Cornet, Equality at 127-130; Chartrand, Repeal at 7-10; Eberts, Human at 14-18.

¹⁹¹ *Supra*, note 174 at p. 12.

¹⁹² *First Nations Land Management Act*, S.C. 1999, c. 24, as am. S.C. 1999, c. 24, s. 47; 2002, c.8, s. 182(1)(r); SOR/2003-178 [hereinafter *FNLMA*].

¹⁹³ *Ibid.* sec. 17.

¹⁹⁴ *Supra*, note 55 at para. 39.

current treaty negotiations occurring in British Columbia, the Lheili T'enneh Nation,¹⁹⁵ the Maa-Nulth First Nations,¹⁹⁶ and the Sliammon First Nation¹⁹⁷ have agreed in principle that the *CHRA* applies to their respective nations.

Finally, the repeal of section 67 has been the goal of the Canadian Human Rights Commission since its promulgation in 1977.¹⁹⁸ In December of 2004, Rodolfo Stavenhagen, the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, issued a report on his summer 2004 mission to Canada. The report recommended, in part, that:

That the Canadian Human Rights Commission be enabled to receive complaints about human rights violations of First Nations, including grievances related to the Indian Act; and that section 67 of the Human Rights Act be repealed, as requested insistently by various organizations, including the Human Rights Commission, to which the Government of Canada agreed in principle in 2003.¹⁹⁹

In *Promoting Equality: A New Vision*, the Canadian Human Rights Act Review Panel recommended the repeal of section 67 subject to including an interpretative clause in the *Canadian Human Rights Act* to "ensure that Aboriginal community needs and aspirations are taken into account in interpreting the rights and defences in the Act in cases involving

¹⁹⁵ See section 15(b) of the Lheili T'enneh Agreement-in-Principle. For a complete copy of this AIP see: <http://www.bctreaty.net/nations_3/agreements/LheidliAiPJuly03.pdf> [hereinafter "Lheili T'enneh AIP"].

¹⁹⁶ See section 11 of the Maa-Nulth First Nations Treaty Negotiations Agreement-in-Principle. For a complete copy of this AIP see: <http://www.bctreaty.net/nations_3/agreements/Maa-nulthAiP.pdf>.

¹⁹⁷ See section 12 of the Sliammon Agreement-in-Principle. For a complete copy of this AIP see: <http://www.bctreaty.net/nations_3/agreements/SliammonAIP.pdf>.

¹⁹⁸ Canada, Canadian Human Rights Commission Annual Report 2004 (Ottawa: Supply and Services Canada, 2004) at p. 29.

¹⁹⁹ United Nations. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum MISSION TO CANADA, UN Doc. E/CN.4/2005/88/Add.3 of December 2, 2004 as cited in *supra*, note 174 at p. 10.

See: <<http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.88.Add.3.pdf>> for a complete copy of the report entitled "*Human Rights and indigenous issues*".

employment and services provided by Aboriginal governmental organizations.”²⁰⁰ However, the interpretative clause could not be used as a means to deny equality.²⁰¹ The Native Women’s Association of Canada has called for the repeal of section 67 so as to enable Aboriginal women to access the *CHRA* so as to promote equality.²⁰² As this brief review illustrates, the trend is in favour for the application of the *Canadian Human Rights Act* to various First Nations either by court decisions or self-selection by way of treaty negotiations.

3.5 Interpretative clause

In repealing section 67, it is important to ensure that the unique situation and rights of First Nations are appropriately considered in the process of resolving human rights complaints.²⁰³ The consultation process which is mandated where a Crown act may infringe Aboriginal rights will provide the mechanism to bring Aboriginal visions of human rights forward at the time of, or prior to, the repeal of section 67. The Crown will be required to address the unique concerns of Aboriginal peoples in their understanding of human rights in their communities. Such concerns are likely to vary across the many First Nations in Canada.

While the final mechanism to address the unique conception of Aboriginal human rights will only be known once the consultation has commenced, one possible mechanism to address Aboriginal perspectives may be to add a statutory interpretative clause relating to the application of the *CHRA* in a First Nation context. Such a clause would require that CHRC and the Tribunal too consider complaints against First Nations in the context of their particular circumstances. This would ensure that, where warranted, individual claims to be free from

²⁰⁰ See Chapter 18(c) of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) [hereinafter *Vision Report*] at: < <http://canada.justice.gc.ca/chra/en/toc.html>>.

²⁰¹ Ibid. at para. 142.

²⁰² *Supra*, note 13 at p. 28.

²⁰³ *Supra*, note 174 at p. 14.

discrimination be considered in light of legitimate collective interests. More importantly, the evolving law with respect to the duty to consult requires that Aboriginal peoples be given an opportunity to present their views about the wording of an interpretive clause.

3.5.1 Legal and constitutional precedents for an interpretative clause

The development of an interpretative clause is consistent with Canadian constitutional law and human rights principles that ensure human rights codes are interpreted and applied in a way that recognizes the individual circumstances and interests of both complainants and respondents.²⁰⁴ It also recognizes that no right is absolute and that flexibility is required when the rights of various groups conflict. For example, section 1 of the *Charter* recognizes this idea by guaranteeing and affirming *Charter* rights while subjecting those rights to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Given the importance of these entrenched *Charter* rights, the SCC has developed strict rules for determining when section 1 justification can be sustained. Similarly, the *CHRA* allows for exceptions in carefully defined circumstances. A respondent in a human rights case can put forward a “*bona fide* occupational requirement” (BFOR) or a “*bona fide* justification” (BFJ) for why it treated an individual in a way that would otherwise be contrary to human rights law.

The Canadian Human Rights Tribunal applied this type of reasoning in the *Jacobs* case, in which it recognized that the Mohawk Council of Kahnawake could make a BFJ claim to protect collective interests.²⁰⁵ Trudy and Peter Jacobs, although brought up in community of

²⁰⁴ Ibid.

²⁰⁵ *Jacobs v. Mohawk Council of Khanawake*, [1998] CH.R.D. No. 2 [hereinafter *Jacobs*] as cited in *supra*, note 174 at p. 14.

Kahnawake, did not meet the 50 percent blood quantum criteria that had been established for membership. The First Nation government argued that excluding the Jacobs was necessary to preserve the linguistic and cultural integrity of the community. The Tribunal accepted that such an argument could form the basis of a BFJ defence under the *CHRA*. However, the Tribunal rejected it on the grounds that the same objective could be achieved in a manner that would be less harmful to the Jacobs.

3.5.2 Key features of an interpretative provision

The Canadian Human Rights Act Review Panel has made recommendations for what might be included in an interpretative clause. The Panel recommended that an interpretative provision:

- ensure that Aboriginal community's needs and aspirations are taken into account in interpreting the rights and defences in the Act;
- ensure that an appropriate balance is established between individual rights and Aboriginal community interests;
- operate to aid in interpreting the existing justifications and not as a new justification that would undermine the achievement of equality; and
- not justify sex discrimination or be used to perpetuate the historic inequalities created by the Indian Act.²⁰⁶

The Review Panel did not recommend the specific wording of an interpretative clause. One proposal for legislative wording that attempted to incorporate the principles recommended by the Panel reads as follows:

²⁰⁶ *Supra*, note 174 at p. 15. This recommendation reflects section 35(4) of the *Constitution Act, 1982*:

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

16.1 In relation to a complaint made under this Act against an aboriginal governmental organization, the needs and aspirations of the aboriginal community affected by the complaint, to the extent consistent with principles of gender equality, shall be taken into account in interpreting and applying the provisions of this Act.²⁰⁷

In commenting on this proposed wording before a Parliamentary Committee, the Chief Commissioner of the Canadian Human Rights Commission endorsed the principle of an interpretative provision but expressed concern with some of the proposed language:

While we support the objectives of the interpretative clause, we do have a concern with the vagueness of the current drafting. What exactly is the scope of the term "needs and aspirations" of the community and how do these relate to the need to protect individuals from discrimination? The Commission's experience with the interpretation of the Canadian Human Rights Act by the Canadian Human Rights Tribunal and the courts leads us to believe that determining the correct balance between these two interests could lead to lengthy and costly litigation. Although some litigation is to be expected, greater clarity in the legislation would help minimize it and would ensure a more effective complaint resolution process.²⁰⁸

3.5.3 Implementation of an Interpretative Provision

The proper formulation of an interpretative provision is an important matter that must be carefully considered through a consultative process with First Nations. As important as it is, however, the process of formulating an interpretative provision should *not* be allowed to further delay the repeal of section 67. Therefore, the following two-step process is proposed. First, Parliament should repeal section 67 as soon as possible. Second, Parliament should initiate a process to develop an interpretative provision within a set period of time.

²⁰⁷ Ibid.

²⁰⁸ Submission of the Canadian Human Rights Commission to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, January 28, 2003. As cited in *supra*, note 174 at p. 16.

The repeal provision could include an enabling provision allowing for the federal enactment of an interpretative provision. Such an enabling provision might include reference to some of the key features of an interpretative provision discussed above, such as the need to ensure gender equality and to protect collective interests. Enactment could be carried out through the regulatory process. This could be achieved through the existing guideline-making authority of the CHRC so as to enable it to develop an interpretative provision in consultation with all affected parties including, of course, First Nations, also in accordance with the Crown's obligation to consult and accommodate, as discussed above.²⁰⁹ Again, the wording of an interpretive clause drafted by the federal government would require consultation with Aboriginal peoples.

At present there are two self-government agreements that subject the operation of the *CHRA* to an interpretive clause. The *Westbank Final Self-Government Agreement (British Columbia)* states that nothing "limits the operation of the *Canadian Human Rights Act* in respect of the Westbank First Nation and Westbank Lands and Members"²¹⁰ but the application is subject to the nature and purpose of the agreement. In the *United Anishnaabeg Councils*

²⁰⁹ Ibid. at p. 17. Under section 27(2) of the *CHRA*, the Commission has the authority to enact guidelines on how the Act should be applied with regard to a particular class or group of complaints:

27(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.

Guideline binding

27(3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

See also: *Supra*, note 175, Chartrand, Exemption at para. 3.

²¹⁰ See: *Westbank Final Self-Government Agreement (British Columbia)* at < http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wst_e.pdf > at para. 291.

(UAC) *Final Agreement (Ontario)*, when the *CHRA* is to be applied it must take into account the "... needs and aspirations" of the "e-naadsiyang and anishnaabemwin".²¹¹

One method of achieving this type of intercultural dialogue is to amend section 81 of the *Indian Act*, which sets out the powers of councils to make by-laws, to include the power to extend the laws in Canada that prohibit discrimination against individuals to Indian reserves. The drawback to this solution is that Chief and Councils may never pass a by-law that deals with the prohibition of discrimination. The better legislative solution is to draft wording similar to that in section 10 of the *Indian Act*. Section 10 essentially gave a 2 year window for Chief and Councils to draft their own Band membership rules and in the event that an Indian band did not draft such rules, the legislative scheme set out in the *Indian Act* applied by default if certain preconditions were met. Upon the repeal of section 67, there could be wording that would allow a Chief and Council a 2 year period to draft their own by-law dealing with human rights and in the event that such a by-law is not presented to the Minister for approval, the *CHRA* would apply by default. This approach would enable all of the Indian bands across Canada an opportunity to develop human right regimes that are in accordance with their respective views on human rights but would also require the approval of the Minister of Indian Affairs to ensure such by-laws complied with Canada's international obligations to respect human rights. In addition, such an approach would enable Indian bands to either accept the wording of an interpretive clause as set out in the *CHRA* or develop its own interpretative clause. If section 67 is repealed, this would allow for any complaints by band members with respect to the interpretive clause in the band bylaw, or any other band bylaw dealing with

²¹¹ See: *United Anishnaabeg Councils (UAC) Final Agreement (Ontario)* < http://www.ainc-inac.gc.ca/pr/agr/ont/rlt_e.html > at para. 176.

human rights matters, to be brought forward to the CHRC and the intercultural dialogue in the development of Aboriginal theories of human rights can continue at that level.

The cases of *Ermineskin*, *Thomas* and the position of the Native Women's Association of Canada represent snap shots of an undeveloped narrative involving Aboriginal perspectives on human rights. As illustrated by *Thomas*, there is a line Aboriginal peoples in Canada cannot cross in the promotion and enforcement of their conception of a collective right. The view of the Sawridge Indian band in the case of *Ermineskin* case represents a view that is, at best, archaic and potentially oppressive. It is submitted that Indigenous peoples do not have to accept either the universalist arguments about human rights, or take the reactionary cultural relativist position when pressed to accept human rights in their communities. Aboriginal peoples should seek out opportunities to transform the existing human right's culture in Canada so that it reflects Aboriginal views on human rights.²¹²

3.5.4 Bill C-31 Litigation

The clearest picture of Aboriginal views on human rights legislation arises in the context of litigation with respect to Bill C-31. Various First Nations have made claims under section 35(1) of the *Constitution Act, 1982* that they have an Aboriginal right to control who becomes a citizen/member of their respective First Nations. This debate is not new. During the hearings with respect to Bill C-31, representatives of the Assembly of First Nations stated the following:

There have been serious differences of opinion on the content of section 35(1) of the Constitution Act, 1982, which recognizes and affirms existing aboriginal and

²¹² *Supra*, note 6, Otto, Rethinking at pp. 36-44.

treaty rights. The Assembly of First Nations regards self-determination of citizenship as an existing right.²¹³

...

As to the degree of community control, the Minister has understood that the issue of First Nations citizenship is a fundamental issue of collective rights. As such, the basic authority must be with the collectivity.²¹⁴

Three of the Four Nations of Hobbema who would eventually become the plaintiffs in the *Sawridge Band v. Canada*, rejected Bill C-31 in its entirety.²¹⁵ Among other things, they argued that Bill C-31 did not give effective control over membership to the Indian bands. More importantly, the Four Nations of Hobbema were also concerned that Bill C-31 would lead to the dilution of Indian blood over a number of years.

The Sawridge, Ermineskin and Sarcee Indian bands argued that Bill C-31 infringed their Aboriginal right to determine membership. The court dismissed the claims but the Federal Court of Appeal, on the issue of an apprehension of bias by the trial judge, set aside the decision and ordered a new trial. Following this decision, the plaintiffs amended their claim to argue that Bill C-31 infringes on their aboriginal right to self-government. This claim is in addition to their initial claims that there is an Aboriginal and/or treaty right, as per Treaty 6, to determine membership and that section 11 of the *Indian Act*, as amended by Bill C-31, violated such rights under 35 of the *Constitution Act, 1982* and that such an infringement is not justified. The *Sawridge* case raises the following issues:

²¹³ The issue of residual discrimination in Bill C-31 was discussed during the debates as set out in the Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development Respecting: Bill C-31, An Act to Amend the Indian Act, House of Commons, First Session of the Thirty-third Parliament, 1984-85, Issues No. 12 – 48 at Issue 13, p. 13 [hereinafter Proceedings] at Issue 16, p. 7. See also: Association of Iroquois and Allied Indian position at Issue 21, pp. 23-28 at 23: "Our starting point was that the determination of citizenship is part of the inherent jurisdiction of each First Nation, and that this jurisdiction is recognized and affirmed under the Constitution Act of 1982."

²¹⁴ Ibid. at Issue 16, p. 12.

²¹⁵ *Sawridge Band v. Canada*, [1995] 4 C.N.L.R. 121 (F.C.T.D.), rev. [1997] 3 F.C. 580 (Fed. C.A.) [hereinafter *Sawridge*].

1. Is there an Aboriginal right to self-government?; and
2. Is there an Aboriginal right to determine citizenship?

These issues will be addressed in turn.

The jurisprudence in Canada with respect to an Aboriginal right to self-government is in its early stages. There are many scholarly texts²¹⁶ and articles²¹⁷ about Aboriginal self-

²¹⁶ C. Cook and J.D. Lindau (eds) (2000) *Aboriginal Rights and Self-Government* (McGill-Queen's University Press) [hereinafter Cook]; J. Borrows (2002) *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, Toronto) [hereinafter Borrows]; A. Cassese (1996) *Self-Determination of Peoples: A Legal Reappraisal* (2nd ed. Reprint) (Cambridge University Press, Cambridge) [hereinafter Cassese]; C. Harris (2002) *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, Vancouver) [hereinafter Harris]; J.H. Hylton (ed) (1999) *Aboriginal Self-Government in Canada: Current Trends and Issues* (2nd ed.) (Purich Publishing Ltd., Saskatchewan) [hereinafter Hylton]; C. McKee (2000) *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (2nd ed.) (University of British Columbia Press, Vancouver) [hereinafter McKee]; T. Schouls (2003) *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (University of British Columbia Press) [hereinafter Schouls]; and C. Tomnschat (ed) (1993) *Modern law of self-determination* (Martinus Nijhoff Publishers, Dordrecht) [hereinafter Tomnschat].

²¹⁷ M. Asch, "Aboriginal self-government and the construction of Canadian constitutional identity", (1992) 30 Alberta L. Rev. 465 [hereinafter Asch]; C. Bell, "Comments on Partners in Confederation, a report on self-government by the Royal Commission on Aboriginal Peoples", (1993) 27 U.B.C. L. Rev. 361 [hereinafter Bell]; B. Berg, "Introduction to aboriginal self-government in international law: an overview", (1992) 56 Saskatchewan L. Rev. 375 [hereinafter Berg]; P.W. Hogg and M.E. Turpel, "Implementing aboriginal self-government: constitutional and jurisdictional issues", (1995) 74 Canadian Bar Review 187 [hereinafter Hogg/Turpel]; P.W. Hutchins, C. Hilling and D. Schulze, "The aboriginal right to self-government and the Canadian constitution: the ghost in the machine", (1995) 29 U.B.C. L. Rev. 251 [hereinafter Hutchins et al.]; T. Issac, "The storm over aboriginal self-government: section 35 of the Constitution Act, 1982 and the redefinition of the inherent right of aboriginal self-government", (Spring 1992) Canadian Native Law Reporter 6 [hereinafter Issac #1]; T. Issac and M.S. Moloughney, "Dually disadvantaged and historically forgotten?: Aboriginal women and the inherent right of aboriginal self-government", (1992) 21 Manitoba L. J. 453 [hereinafter Issac/Moloughney]; T. Issac, "The Constitution Act, 1982 and the constitutionalization of aboriginal self-government in Canada: Cree-Naskapi (of Quebec Act)", (Winter 1991) Canadian Native Law Reporter 1 [hereinafter Issac #2]; L. McNamara, "Aboriginal self-government and justice reform in Canada: the impact of the Charter of Rights and Freedoms", (1993) 11 Australian Canadian Studies 43 [hereinafter McNamara]; K. McNeil, "Self-Government and the inalienability of aboriginal title", (2002) 47 McGill Law Journal 473 [hereinafter McNeil #1]; K. McNeil, "The Inherent Right of Self-Government: Emerging Directions for Legal Research", Prepared for the First Nations Governance Institute, November, 2004 [hereinafter McNeil #2]; P. Macklem, "Distributing Sovereignty: Indian and Equality of Peoples", (1993) 45 Stan. L. Rev. 1311 [hereinafter Macklem #1]; P. Macklem, "Normative dimensions of an aboriginal right of self-government", (1995/96) 21 Queen's L. J. 173 [hereinafter Macklem #2]; A. Peeling, and V. Napoleon, "Aboriginal Governance: An Annotated Bibliography", Prepared for the First Nations Governance Institute, Undated [hereinafter Peeling/Napoleon]; A. Pratt, "Aboriginal self-government and the Crown's fiduciary duty: squaring the circle or completing the circle?", (1992) 2 National Journal of Constitutional Law 163 [hereinafter Pratt]; B. Slaterry, "First Nations and the Constitution: a question of trust", (1992) 71 Canadian Bar

government and any attempt to articulate how the courts may rule on such a claim is speculative. This part of the thesis will examine the federal government's policy with respect to Aboriginal self-government, decisions by the SCC on self-government, and other court decisions with respect to the issue of control over citizenship by First Nations.

The current federal government of Canada, as a matter of policy, recognizes Aboriginal self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*.²¹⁸ This policy is a continuation of a trend to recognize Aboriginal self-government that began during the negotiations of the Charlottetown Accord in 1992. During those negotiations, the federal and provincial governments recognized what Aboriginal peoples have always stated: that Aboriginal peoples had a right to self-government and that it should be recognized in the Constitution.²¹⁹ The federal governments policy on self-government is as follows:

Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.²²⁰

The federal government recognizes that membership could be a matter of negotiation but who can become a status Indian is not a matter for negotiation.²²¹ Control over Band membership and the definition of who is a status Indian are very distinct matters from the federal government's perspective. This is not a new position for the federal government.

Review 261 [hereinafter Slattery]; and K. Wilkins, "... But we need the eggs: the Royal Commission, the Charter of Rights and the inherent right of aboriginal self-government", (1999) 49 University of Toronto L. J. 53 [hereinafter Wilkins].

²¹⁸ *Supra*, note 15.

²¹⁹ K. McNeil, "Aboriginal Rights: Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government", (2003) 22 Windsor Y.B. Access Just. 329 at 331 [hereinafter McNeil, Self-Government].

²²⁰ *Supra*, note 15.

²²¹ *Ibid*.

During the debates in and around Bill C-31, Minister Crombie stated that it was the exclusive domain of the government to determine how some person could become a status Indian but that membership could be assumed by an Indian band subject to the Minister's approval.²²²

Canadian courts have not recognized that self-government is a pre-existing Aboriginal right within the meaning of section 35(1). In the case of *R. v. Pamajewon*, the SCC ruled that a claim to an Aboriginal right to self-government, under section 35(1), must meet the test as set out in *Vander peet*.²²³ The significance of *Pamajewon* is that Aboriginal peoples must proceed on a case-by-case basis to establish a constitutional right of self-government and that such a claim must detail the exact nature of the self-government right that is sought to be recognized.²²⁴ The SCC will not recognize a broad or general right to self-government.

The debate at the committee hearing stage with respect to Bill C-31 set in motion the ongoing discussion about the individual right of Aboriginal women to be reinstated as status Indians and the collective right of First Nations to self-government. The claims of Aboriginal women are described as an attack on the collective/group right to Aboriginal self-government.²²⁵ Group rights are defined as follows:

Group rights benefit some particular class or category within a society and inure to the benefit of the members of the group through the group; that is, by virtue of their membership these people are entitled to the benefits accorded to the group, which are identified as group rights.²²⁶

²²² *Supra*, note 213 at Issue 12, p. 8.

²²³ *R. v. Pamajewon*, [1996] 2 S.C.R. 821, [1996] S.C.J. No 20 [hereinafter *Pamajewon* cited S.C.R.].

²²⁴ *Ibid.* at para. 27.

²²⁵ *Supra*, note 43 at p.22.

²²⁶ W. Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part I, The Interpretive Prism of Section 25" (1988), 22 U.B.C. L. Rev. 21 at 24 [hereinafter Pentney, Prism].

For some time, there was a debate as to the nature of Aboriginal rights. However, a review of the SCC decisions seems to suggest that Aboriginal rights are group rights. In the case of *Delgamuukw*, the SCC stated that Aboriginal title "... is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."²²⁷ As confirmed in *Delgamuukw*, a claim for Aboriginal title is just one type of claim on the continuum of Aboriginal rights.²²⁸ In the case of *Sparrow*, the SCC characterized an Aboriginal right to fish as a group right.²²⁹ In the case of *Gladstone*, the SCC characterized the right to a commercial roe on kelp harvest as a collective right.²³⁰ In the case of *R. v. Sundown*, the right to hunt is held by the community and not by the individual accused in that case.²³¹ In the case of *Marshall*, a treaty right is held by the community and not the individual.²³² In the case of *R v. Pamajewon*, the SCC, relying on the test set out in *Vander peet*, characterized an Aboriginal right to self-government as a group right.²³³ Any argument in support of an Aboriginal right to control membership in a discriminatory manner would require a collective decision. The test to establish an Aboriginal right, as set out in *Vander peet*, is reproduced:

The first step is the determination of the precise nature of the claim being made, taking into account such factors as:

- a. the nature of the action said to have been taken pursuant to an Aboriginal right;
- b. the government regulation argued to infringe the right; and

²²⁷ *Supra*, note 67 at para. 115.

²²⁸ *Ibid.* at para. 138.

²²⁹ *Supra*, note 70 at pp. 1112 and 1120.

²³⁰ *Supra*, note 67 at para. 170.

²³¹ *R. v. Sundown*, [1999] 1 S.C.R. 393 at paras. 35-36.

²³² *Supra*, note 64, at para. 17.

²³³ *R. v. Pamajewon*, [1996] 2 S.C.R. 821, [1996] S.C.J. No. 20 [hereinafter *Pamajewon* cited to S.C.R.] at para. 27.

- c. the practice, custom or tradition relied upon to establish the right.”²³⁴

Essentially, at this stage of the test, a First Nation will have to provide sufficient evidence to establish that it had a collective practice, custom or tradition of regulating its citizenship/membership. Although the Aboriginal perspective is an important factor at this stage, such perspectives “must be framed in terms cognizable to the Canadian legal and constitutional structure.” As set out in *Sparrow*, an Aboriginal right must be interpreted flexibly and such rights must be interpreted in a contemporary form.²³⁵ It is arguable that one such contemporary form is gender equality as expressed by section 15.(1) of the *Charter*.²³⁶

The second part of the *Vander peet* test “... requires the Court to determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question.” Even if a First Nation were able to marshal the necessary evidence that it was integral to its culture to discriminate against women with respect to membership/citizenship as a of matter practice, custom or tradition, such an argument could be defeated by section 35(4) of the *Constitution Act, 1982*. Section 35(4) states that:

²³⁴ *Supra*, note 71.

²³⁵ *Supra*, note 70 at p. 1093.

²³⁶ T. Isaac and M.S. Maloughney, “Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right to Aboriginal Self-Government” (1992) 21(2) *Manitoba Law Journal* 453 [hereinafter Isaac/Maloughney, Dually] at p. 475; Native Women’s Association of Canada, “Aboriginal Women’s Rights Are Human Rights”, Canadian Human Rights Act Review, An NWAC Research Paper, undated [hereinafter NWAC, Human Rights]; Native Women’s Association of Canada, “Aboriginal Women & The Implementation of Bill C-31”, Ontario Native Women’s Association, Thunder Bay, Ontario, An NWAC Presentation, October 3, 1991 [hereinafter NWAC, Bill C-31]; J.F. Sayers, K.A. MacDonald, J. Fiske, M. Newell, E. George, and W. Cornet, “First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports”, November 2001 [hereinafter Sayers et al., Research]; Krosenbrink-Gelissen, L.E., “Canadian constitution, the Charter, and aboriginal women’s rights: conflicts and dilemmas” (Spring-Fall 1993) *International Journal of Canadian Studies* 207 [hereinafter Krosenbrink-Gelissen, Dilemmas].

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

Section 35(4) mandates that any Aboriginal right must apply equally to Aboriginal men and women. Even based upon this brief review, it is arguable that any claim that an Aboriginal right to control citizenship/membership includes the right to discriminate on the basis of gender would be difficult to reconcile with the test set out *Vander peet*, *Sparrow*, and section 35(4) of the *Constitution Act, 1982*. More importantly, the development of Aboriginal views on human rights would have to, at a minimum, guarantee gender equality and must be reflected in any interpretive clause.

3.6 Conclusion

Canada is bound by international agreements and domestic legislation to ensure that its citizens can avail themselves of human rights legislation. However, section 67 of the *CHRA* acts as an absolute bar for Aboriginal peoples to avail themselves of the *CHRA*. The legislative history of section 67 indicates that it was introduced as a political compromise in 1977. Because of section 67, the courts, the Canadian Human Rights Tribunal and the Canadian Human Rights Commission are precluded from developing any clear jurisprudence on the basic human rights of Aboriginal peoples. In addition to international demands, there is an Aboriginal and non-Aboriginal consensus to have section 67 repealed because it denies Aboriginal peoples recourse to basic human rights protection. In conjunction with the repeal of section 67, there should be discussion and consultation about an interpretative clause so as to ensure that the Aboriginal views on human rights are recognized. Within Canada, there are snap shots of an unfolding narrative about Aboriginal peoples views on human rights. As evidenced by the Nisga'a treaty, and Agreements in Principle signed in the ongoing British

Columbia treaty negotiations, the *CHRA* has been accepted the norm for the protection of human rights. The *Sawridge* case is evidence of the *CHRA* been rejected on strict cultural grounds. This debate is not new. Within the international debate about human rights, there is a clear divide between those countries and persons who are of the view that human rights are universal and those who oppose human rights on cultural grounds. In addition, there is a third view that attempts to reconcile these two positions through a cross cultural dialogue. I have argued for wording similar to section 10 of the *Indian Act* so to enable Aboriginal peoples an opportunity, if they so choose, to develop their own bylaws dealing with human rights. In my view, this option will allow for a cross cultural dialogue on human rights between Aboriginal peoples and the Crown.

With respect to Aboriginal self-government, the federal government recognizes it as an inherent Aboriginal right and that the SCC in *Pamajewon* has implicitly acknowledged this. Membership is one area that can be controlled by Aboriginal peoples. As a result of Bill C-31, there is a real possibility that Indian culture will come to an end in two generations. The reality is that Indian culture will come to an end because of the growing trend towards "out-marrigae" by status Indians, in particular, Aboriginal women. The challenge for Aboriginal peoples is to extend the time that Indian culture can survive and that is best done through the reinstatement of all returnees under section 6(1)(a) of the *Indian Act*. If Aboriginal leaders wish to play hardball on membership codes by maintaining the status quo, or, as in the case of *Sawridge Band*, revert back to 12(1)(b) as the criteria for Indian status, they will only expedite their extinction as Indians. While it may argued that Indian band governments are unlikely to choose status criteria which would result in the extinction of their peoples as Indians, it is clear that universal human rights norms are likely to play a significant role in determining the

legitimacy of any future definition of Indian status. Any Indian status criteria which violate gender equality norms will be challenged and how Aboriginal human rights addresses such challenges will be an important foundation of an emerging modern concept of Aboriginal human rights.

CHAPTER IV SECTIONS 6(1)(c) and 6(2) OF THE *INDIAN ACT*: THE HUMAN RIGHT TO IDENTITY

4.1 Introduction

In the pantheon of human rights discourse, the issue of who can be registered as a status Indian under the *Indian Act*, and as a member of an Indian band, raises one of the most vexing and legally challenging debates.²³⁷ Section 6 of the *Indian Act, 1985* which allows for the registration of persons as status Indians, or on an Indian band list, has a long and divisive lineage informed by colonialism, prejudice, politics, and gender discrimination going back to at least 1850. The repeal of section 67 of the *CHRA* will certainly guarantee that section 6 will be challenged under the *CHRA*. These challenges will provide some of the most fruitful dialogue in the development of a theory of Aboriginal human rights. This dialogue has begun notwithstanding section 67, as a few challenges to band membership have been taken pursuant to protections provided by the *Charter*. Such a dialogue is still in its infancy given the cumbersome, expensive and inaccessible nature of *Charter* challenges for most disadvantaged persons. However, it is important to understand the current state of such analysis, and to understand how gender equality will predominate in the modern understanding of Aboriginal human rights.

Section 4.2 provides a review of the legislative debate with respect to Bill C-31. Section 4.3 provides an analysis of whether sections 6(1)(c) and 6(2) violate section 15.(1) of the *Charter*. Finally, section 4.4 suggests a remedy to address the residual discrimination found in section 6(1)(c) and 6(2).

²³⁷ *Supra*, note 43 at p. 3 and M. Furi, and J. Wherrett, "Indian Status and Band Membership Issues", (Revised February 2003) BP-410E, Political and Social Affairs Division, Parliamentary Information and Research Service, Library of Parliament, Canada [hereinafter Furi] at p. 2.

4.2 The legislative debate and fallout with respect to sections 6(1)(c) and 6(2)

During the hearings before the House of Commons Standing Committee on Indian Affairs and Northern Development ("the Committee") respecting Bill C-31 there were a variety of views proffered by various First Nations, national Aboriginal organizations and individuals with respect to the role and standing of Aboriginal women in their respective First Nations, the efficacy of Bill C-31 to address sexual discrimination, the cost of implementing Bill C-31, and the legal debate about the control of First Nation membership in light of section 35 of the *Constitution Act, 1982*.

Chief Wellington Staats of the Six Nations Band Council stated that one of the four main principles of the Six Nations was to ensure that "males and females should be treated equally".²³⁸ Mrs. Marianne Lavallee, a representative of the Federation of Saskatchewan Indian Nations Indian Government Commission, was of the view that "[h]istorically, Indian cultures, both in their ancient civilization and in the context of this twentieth century civilization, have always recognized the precedence of the male in their society."²³⁹ Mr. Simon Lucas, Co-chairman of the Nuuchahnulth Tribal Council stated that: "In our Nuuchahnulth area, because of our teaching, we are asked to respect the women with the highest esteem, because if it were not for them, Nuuchahnulth would never have existed."²⁴⁰ The late George Watts, Chairman of the Nuuchahnulth Tribal Council stated that within the Nuuchahnulth culture and political system that Nuuchahnulth women could be chiefs and at the time of his

²³⁸ *Supra*, note 213 at Issue 23, p. 5.

²³⁹ *Ibid.* at Issue 28, p. 32.

²⁴⁰ *Ibid.* at Issue 13, p. 8.

presentation, the highest ranking Chief of the Village of Hesquiat was a woman.²⁴¹ Based on this brief historical background of various Indigenous perspectives on the role of women in their respective First Nations, it is evident that role and place of Indigenous women in First Nations varied considerably.

During the committee stage hearings, Minister Crombie promised that there would be sufficient funding made available to meet the expected influx of persons reinstated as a result of Bill C-31. First Nation leaders stressed time and time again that their respective financial base could not handle the number of expected Bill C-31 returnees to their respective First Nations. Over time, the Minister's promise would not be kept and First Nations would be forced to work with modest increases in their respective budgets to deal with Bill C-31 returnees.

Various Aboriginal organizations highlighted the residual discrimination that was still present in the proposed amendments to be brought into force through Bill C-31. Throughout the Committee hearings, Aboriginal peoples stated that section 6(2) would result in the termination of the matrilineal line of women reinstated under section 6(1)(c) in two generations. At the committee stage hearings, the foundation for future litigation with respect to Bill C-31 would be expressed in not so subtle ways. Replete throughout the hearings were statements that First Nations had an Aboriginal right to self-government and an aspect of this right was the right to control membership/citizenship.

²⁴¹ Ibid. at Issue 13, p. 13.

4.3 Do sections 6(1)(c) and 6(2) derogate from section 15.(1) of the *Charter* ?

The determination of whether sections 6(1)(c) and 6(2) are discriminatory, and the impact of the *Charter* on Aboriginal women, have been the subject of great deal of academic literature²⁴² but there has been no detailed legal analysis of whether they are discriminatory as a matter of law. In the absence of a remedy under the *CHRA*, what follows is an attempt to argue that sections 6(1)(c) and 6(2) are discriminatory under section 15.(1) of the *Charter*, that they cannot be saved under section 1, and that all persons registered under sections 6(1)(c) and 6(2) should be reclassified under section 6(1)(a).

Section 15.(1) of the *Charter* the reads as follows:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

The decision of the Supreme Court of Canada in *Law v. Canada*²⁴³ now stands as the leading guide to the equality analysis under s. 15 of the *Charter*. It requires that the equality analysis be grounded in three broad inquiries, in which the claimants must show:

²⁴² F. Blaney and A. Huntly, "*Bill C-31: Its Impact, Implications and Recommendations for Change in British Columbia – Final Report*", A report prepared for the Aboriginal Women's Action Network, (December 1999) [hereinafter Blaney]; J. Borrows, "*Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics*" (1994) 23 University of New Brunswick Law Journal 19 [hereinafter Borrows, Equality]; J. Green, "*Sexual Equality and Indian Government: An Analysis of Bill C-31*" (1993) 4 Constitutional Forum 110 [hereinafter Green, Equality]; T. Isaac, "*Case Commentary: Self-government, Indian Women and Their Rights of Reinstatement under the Indian Act: A Comment on Sawridge Band v. Canada*" (1995) 4 Canadian Native Law Reporter 1 [hereinafter Isaac, Sawridge]; *supra*, note 236, Isaac/Maloughney, Dually; E. Jordan, "*Residual Sex Discrimination in the Indian Act: Constitutional Remedies*" (1995) 11 Journal of Law and Social Policy 213 [hereinafter Jordan, Remedies]; P. Kirby, "*Marrying Out and Loss of Status: The Charter and the New Indian Act Legislation*" (1985) 1 Journal of Law and Social Policy 77 [hereinafter Kirby, Marrying]; and *supra*, note 63, Koshan, Divide]; McIvor, S.D., "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights", (2004) 1 Canadian Journal of Women and the Law 16 [hereinafter McIvor, Equality].

²⁴³ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12 [hereinafter *Law* cited to S.C.R.]

- a) the impugned law imposes differential treatment between the claimant and others in purpose or effect;
- b) the differential treatment is based on an enumerated or analogous ground of discrimination; and
- c) the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.²⁴⁴

This three-stage process is to be carried out in a purposive and contextual manner. At each stage of the inquiry, the court must examine the legislative, historical and social context of any distinction made and the reality and experiences of the individuals affected by it. The main focus of the inquiry is to determine whether a conflict exists between the purpose or effect of an impugned law and the purpose of s. 15.(1).²⁴⁵ Given the requirement for a contextual and purposive approach at each stage of the s. 15.(1) analysis, it is important to set out the context of a claim and the purpose of s. 15.(1) at the outset.

A related and critical aspect of the context with respect to section 6(1)(c) and 6(2) is the general and historic disadvantage of Aboriginal people in Canadian society. As the Supreme Court of Canada found in *Lovelace v. Ontario*:

all aboriginal peoples have been affected “by the legacy of stereotyping and prejudice against aboriginal peoples” (*Corbiere, supra*, at para. 66). Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing...²⁴⁶

²⁴⁴ Ibid. at para. 88.

²⁴⁵ Ibid. at para. 41.

²⁴⁶ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37 [hereinafter *Lovelace* cited to S.C.R.] at para. 69.

With respect to the purpose of s. 15.(1), the Supreme Court of Canada in *Law*, after analyzing the development of the s. 15.(1) jurisprudence in that Court, stated at paragraph 51:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice... Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds and where the differential treatment reflects the stereotypical application of presumed groups or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or groups in this way and, in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.²⁴⁷

The concept of human dignity in the context of a s.15.(1) claim is also set out in *Law*:

Human dignity means that an individual or group feels self respect and self worth... human dignity is harmed by unfair treatment premised on personal traits or circumstances which do no related to individual needs, capacity or merits... Human dignity is harmed when individuals and groups are marginalized, ignored or devalued and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.²⁴⁸

The legislative and historical context of sections 6(1)(c) and 6(2) of the *Indian Act*

The first statutory definition of who could qualify as an Indian was attempted in 1850 so as to provide for persons who reside on Indian land in Lower Canada.²⁴⁹ The definition of an Indian was so expansive in the 1850 legislation that it allowed for the registration of a non-Indian upon marriage to an Indian, a person who was an Indian at birth or by blood, and a

²⁴⁷ *Supra*, note 239 at para. 51

²⁴⁸ *Ibid.* at para. 53

²⁴⁹ *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c.42, 13&14 Vic as cited in K. Jamieson, "Sex Discrimination and the Indian Act" in J.R. Ponting, ed., *Ardous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) [hereinafter Jamieson, Sex Discrimination] at p 116.

person who was reputed to belong to a group of Indians, or who was adopted into an Indian family.²⁵⁰ Between 1850 and 1869, the classes of persons who could be registered as Indian narrowed.²⁵¹ The most significant amendment during this time was the automatic disenfranchisement of all family members of a male person who voluntarily gave up his Indian status.²⁵² In 1869, Indian women who married non-Indian men, and the children of such a marriage were also ineligible for registration as status Indians.

The *Indian Act, 1869* was based upon the Dominion government's experience with the Iroquois and Algonquin peoples.²⁵³ Notwithstanding the Iroquois' matrilineal tradition that dictated "descent, leadership and clan membership",²⁵⁴ and that Iroquois women had "great economic, political and legal power enshrined in the Iroquois Constitution",²⁵⁵ the *Indian Act, 1869* determined "Indianness" along paternal lineage.²⁵⁶ Section 6 of the *Indian Act, 1869* was the first provision that allowed for the disenfranchisement of Indian women that married non-Indian men.²⁵⁷ Section 6 came under protest as early as 1872 by members of the Six Nations of the Grand River Band Council.²⁵⁸

Upon the passage of the *Constitution Act, 1867*, and pursuant to section 91(24), the federal government had jurisdiction over Indians. Nine years after Confederation, the federal government passed the first consolidated *Indian Act*. In the *Indian Act, 1876*, the definition of an Indian was restricted to any male person reputed to belong to a particular band; and any

²⁵⁰ Ibid., Jamieson, Sex Discrimination at p 116 and *supra*, note 43 at p. 4 and *supra*, note 237, Furi at p. 3.

²⁵¹ Ibid. at pp. 116-117 and *supra*, note 43 at p. 4 and *supra*, note 237, Furi at p. 3.

²⁵² *Supra*, note 43 at pp. 4-5 and *supra*, note 237, Furi at p. 3.

²⁵³ *Supra*, note 242, Jordan at 216 and *supra*, note 249 Jamieson, Sex Discrimination at p. 113.

²⁵⁴ Ibid., note 242, Jordan at p. 216.

²⁵⁵ *Supra*, note 223 at p. 454.

²⁵⁶ Ibid. at p. 459 and *supra*, note 249, Jamieson, Sex Discrimination at p. 216.

²⁵⁷ *Supra*, note 236 Isaac/Maloughney, Dually at p. 458.

²⁵⁸ *Supra*, note 249, Jamieson, Sex Discrimination at p. 216.

child of such a person, any woman married to such a person - but if an Indian women married a non-Indian man, she was disenfranchised. The *Indian Act, 1876*, enacted further grounds that allowed for the disenfranchisement of Indians.²⁵⁹ Eventually, the definition of Indian in the *Indian Act, 1876* would become section 12(1)(b) in the *Indian Act, 1951*.²⁶⁰

In the *Indian Act, 1951* Indian women who married non-Indian men were automatically struck off their Indian band membership list and disenfranchised, and children born after such a marriage were not eligible for Band membership and did not qualify for Indian status. However, if an Indian man married a non-Indian woman, she automatically gained Indian status and the children of such a marriage also gained Indian status, while, of course, the Indian man maintained his Indian status.

The punitive definition of an Indian in the *Indian Act, 1951* would come under legal challenge in the 1973 SCC case of *Canada (A.G.) v. Lavell*.²⁶¹ Ms. Lavell, cognizant of the repercussions of marrying a non-Indian in the face of section 12(1)(b) of the *Indian Act, 1951*, married a white man in December of 1970.²⁶² The case of Ms. Bedard was heard at the same time as the *Lavell* case. Ms. Bedard, had also married a white man in 1964.²⁶³ In 1970, Ms. Bedard separated from her white husband and with her children moved back to a home on the Six Nations Reserve.²⁶⁴ Under section 12(1)(b), both women were disenfranchised. Both parties relied upon the Canadian *Bill of Rights*²⁶⁵ to argue that section 12(1)(b) derogated from section 1(b) of the *Bill of Rights*. The majority decision in *Lavell* held that so long as section

²⁵⁹ *Supra*, note 43 at p. 4 and *supra* 237, Furi at p. 3.

²⁶⁰ *Supra*, note 43 at p. 5.

²⁶¹ *Canada (A.G.) v. Lavell* [1974] S.C.R. 1349 [hereinafter *Lavell*].

²⁶² *Supra*, note 249, Jamieson, Sex Discrimination at p. 217.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Bill of Rights* S.C. 1960, c. 44, s.1, reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*].

12(1)(b) was applied equally to all women discriminated against by section 12(1)(b), there was no violation of section 1 of the *Bill of Rights*.

It would take until July of 1981 before section 12(1)(b) would be laid bare for what it stood for and the consequences it caused for Indian women like Ms. Lavell and Ms. Bedard. In the United Nations Human Rights Committee case of *Lovelace v. Canada*,²⁶⁶ it was determined that section 12(1)(b) derogated from section 27 of the *International Covenant on Civil and Political Rights*.²⁶⁷ Ms. Lovelace, following the collapse of her marriage to a white man, moved back to her family located on the Tobique Reserve. The UNHRC did not find that section 12(1)(b) derogated from section 27 based upon sex but rather it prevented Ms. Lovelace from having access to her culture.

Although driven in part by the preceding legal treatment set out above with respect to section 12(1)(b), it was the prospect of a *Charter* challenge that motivated the Federal Government, in part, to take steps to rewrite the *Indian Act*. Another major factor was the lobbying of Aboriginal women's groups to have section 12(1)(b) addressed.²⁶⁸ After a four month process, the Federal Government of Canada amended the *Indian Act, 1951* to allegedly remove the gender discrimination and allow Indian bands to control Band membership lists for the first time. The legislative vehicle by which this was carried out is what is commonly referred to as Bill C-31.

²⁶⁶ *Lovelace v. Canada*, 36 U.N. GOAR Supp. (No. 40) Annex XVIII; U.N. Doc. A/36/40 [hereinafter *Lovelace*].

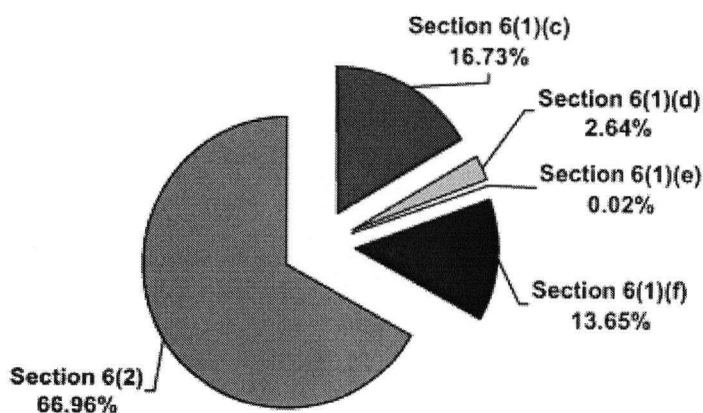
²⁶⁷ Section 27 reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

²⁶⁸ Tobique Women's Group, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987).

In a report produced for the Department of Indian Affairs in 2001, there is a very useful illustration of the distribution of registrants as per section 6 of the *Indian Act, 1985*:

Figure 5 illustrates the distribution of surviving Bill C-31 registrants according to the sub-section of Section 6 (i.e. Section 6 registry detail) under which they have been registered. As revealed in the figure, most individuals registered under Bill C-31 have been registered under one of three Section 6 sub-sections. The two largest groups of registrants include individuals registered under Section 6(1)(c) and Section 6(2). Those registered under Section 6(1)(c) include the women who were removed from the register through marriage to a non-Indian and the children who were removed from the register along with their mother. As of December 31, 1999, this group of registrants formed about 17 percent of the surviving Bill C-31 population. Individuals registered under Section 6(2) formed about two-thirds (67 percent) of the surviving Bill C-31 population. This population is comprised primarily of children born to Indian women after they were removed from the register by marriage to a non-Indian.

Figure 5
Section 6 Registration Status of Bill C-31 Registrants,
Canada, 1999



Source: Indian Register, December 31, 1999.

Individuals registered under Section 6(1)(f) formed about 14 percent of the Bill C-31 population. These individuals have two parents entitled to registration and include the off-spring (born prior to April 17, 1985) of two parents who were entitled to registration under the provisions of Bill C-31.

The remaining Bill C-31 population (about 3 percent of the total) is registered under Sections 6(1)(d) and 6(1)(e). The comparatively small size of these groups reflects, in part, the timing of the events which led to their removal from the register. In the case of those registered under Section 6(1)(e), their removal from the register was based on clauses of the Act which existed prior to 1920. Those

registered under Section 6(1)(d) were removed from the register as a result of clauses which applied prior to 1951.”²⁶⁹

And further in the Report it is stated with regard to the gender of persons reinstated under section 6(1)(c):

Gender Composition

As noted previously, women who were removed from the register through marriage to a non-Indian form a large component of the Bill C-31 population. As a result, among the population registered under Section 6(1), females form a much larger segment of the Bill C-31 than pre-Bill C-31 population (see Figure 9). At the national level, nearly 72 percent of the Bill C-31 population registered under Section 6(1) is female, compared to about 50 percent of the pre-Bill C-31 population. Females outnumber males by a wide margin among the Bill C-31 population, both on and off reserve.²⁷⁰

What the above illustrates is that the persons reinstated under sections 6(1)(c) and 6(2), will bear a disproportionate impact of “second generation cut off rule” as illustrated above.²⁷¹

1. Do sections 6(1)(c) and 6(2) impose differential treatment between the those reinstated under them and those under sections 6(1)(a) and (b), in purpose or effect?

The effect of Bill C-31, recalling the statistics set out above, is to perpetuate what Bill C-31 was supposed to address – gender discrimination against Indian women who married non-Indian men pre-Bill C-31. Bill C-31 draws a clear distinction between those who are entitled to the full benefit of the *Indian Act, 1985* and everyone else. The s.15.(1) analysis compares the condition of the claimant with the condition of others (the comparator group) in the social and

²⁶⁹ S. Clatworthy, ‘Re-assessing the Population Impacts of Bill C-31’, February 26, 2001, p. 14. For a complete copy of the report go to: <http://www.ainc-inac.gc.ca/pr/ra/rpi/rpi_e.pdf>.

²⁷⁰ Ibid. at p. 9.

²⁷¹ Ibid. at p. 14.

political setting in which the question arises.²⁷² As Binnie J. said recently in *Hodge v. Canada (Minister of Human Resources Development)*, “A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison.”²⁷³ Further, as stated in *Hodge*, Binnie J. described the proper comparator group as:

...one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter*...²⁷⁴

In *Auton*, McLachlin C.J. said:

The comparators, as noted, must be like the claimants in all ways save for characteristics relating to the alleged ground of discrimination.²⁷⁵

The appropriate comparator group consists of Indian men who married non-Indians pre-Bill C-31, and their children, who were not similarly targeted by Bill C-31. The pre-Bill C-31 Indian men were not penalized for marrying non-Indian women. But it is clear that section 6(1)(c) has a disproportionate effect on Indian women who marry non-Indian men prior to Bill C-31, as well as their children. The children of reinstated women under section 6(1)(c), in distinction to those registered as status Indians under section 6(1)(a) and (b), are differently registered under Bill C-31, and their children may not be entitled to be registered at all. Under Bill C-31, Indian women still bear the sexual discrimination that Bill C-31 was supposed to address. Prior to Bill C-31, section 12(1)(b) created a class of Indian women who were penalized for marrying outside of their race. Such sex discrimination was explicitly recognized

²⁷² *Granovsky v. Canada (MEI)*, [2000] 1 S.C.R. 703, 2000 SCC 28 [*Granovsky* hereinafter cited to S.C.R.] at para. 45. As cited in the Factum of the Appellant in the case of *R. v. Kapp* [2005] B.C.J. No. 874, 2005 B.C.C.A. 247 [hereinafter *Kapp*, Factum] at p. 31.

²⁷³ *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65 [hereinafter *Hodge* cited to S.C.R.] at para. 1 as referred to in *Kapp*, Factum at p. 31.

²⁷⁴ *Ibid.* para. 23 and see *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78 [hereinafter *Auton* cited to S.C.R.] at para. 26 and 53 as referred to in *Kapp*, Factum at p. 32.

²⁷⁵ *Ibid.*, *Auton*, at para. 55.

by Bill C-31 but is still found to exist by virtue of the impact of the differential registration, under section 6(1)(c) and 6(2) of the *Indian Act, 1985*, on the children and grandchildren of such women. The differential treatment found in section 6(1)(c) and 6(2) did not arise merely because of the class of persons eligible to apply under these sections, but rather because the class of persons is one that is generally dominated by Indian women and their children, as per section 6(2).

In the case of *Benner v. Canada (Secretary of State)*,²⁷⁶ the SCC ruled that the 1977 *Citizenship Act* derogated from section 15.(1) of the *Charter* because it required that children born abroad to Canadian mothers undergo a more rigorous process to obtain Canadian citizenship than those children born abroad to a Canadian father. The SCC ruled that such a distinction constituted a denial of equal benefit of the law as guaranteed by section 15.(1) of the *Charter*, in particular, based on the sex of the child's parent – which is a prohibited ground under section 15.(1). The SCC agreed with the dissenting opinion in the Federal Court of Appeal that there were two classes of Canadian citizens in Canada as result of the amendments to the 1977 *Citizenship Act*²⁷⁷ and that such distinction demonstrated a lack of equal benefit of the law.²⁷⁸ In the case of Bill C-31, there are not just two classes of status Indians but rather

²⁷⁶ *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358, [1997] S.C.J. No 26 [hereinafter *Benner* cited to S.C.R.].

²⁷⁷ *Ibid.* at para. 70: "The impugned provisions of the 1977 Citizenship Act expressly distinguish between children born abroad before 1977 to Canadian mothers and children born abroad before 1977 to Canadian fathers. Linden J.A. aptly explained the operation of these provisions in his reasons in the Federal Court of Appeal, at p. 266:

... for those born before 1977, there are now two separate citizenship schemes in place in Canada: one for those relying on maternal lineage and one for those relying on paternal lineage. Those claiming Canadian citizenship based on maternal lineage encounter a more onerous process with more burdensome requirements and more serious implications than individuals relying on a paternal link."

²⁷⁸ *Ibid.* at para. 72.

eleven classes with those registered under section 6(1)(c) and 6(2) having restricted means to pass on Indian status to their children.

The SCC in *Benner* rejected the majority opinion of the Federal Court Appeal on the following issue:

77 The respondent also submits that any discrimination imposed by the Act is really imposed upon the appellant's mother, not upon him. No reference whatsoever to the sex of applicants themselves is made in the impugned provisions -- only the sex of the applicant's parent is important. As a result, the respondent claims, the appellant is attempting to raise the infringement of someone else's rights for his own benefit. This argument was accepted by Marceau J.A. in the Federal Court of Appeal. With respect, I cannot agree. As I will now discuss, the appellant is the primary target of the sex-based discrimination mandated by the legislation, and in my opinion possesses the necessary standing to raise it before us.²⁷⁹

Similarly, in the case of Bill C-31, persons reinstated under section 6(2), the majority of whom are the children of persons reinstated under section 6(1)(c), are the primary target of the sex-based residual discrimination perpetuated by Bill C-31.

In *Benner*, the SCC goes on to state:

80 In this case, on the other hand, there is a connection between the appellant's rights and the differentiation made by the legislation between men and women. The impugned provisions clearly make Mr. Benner's citizenship rights dependent upon whether his Canadian parent was male or female. In these circumstances, I do not believe permitting s. 15 scrutiny of the respondent's treatment of his citizenship application amounts to allowing him to raise the violation of another's *Charter* rights. Rather, it is simply allowing the protection against discrimination guaranteed to him by s. 15 to extend to the full range of the discrimination.²⁸⁰

This reasoning is equally applicable in the case of Bill C-31, where there is a connection between the persons reinstated under section 6(2) and the differentiation made by the

²⁷⁹ Ibid. at para. 77.

²⁸⁰ Ibid. at para. 80.

legislation between those persons reinstated under section 6(1)(a) and (b) and those reinstated under section 6(1)(c). Perhaps the most telling statement in *Benner* is the following:

The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own. In Miron, supra, McLachlin J. wrote at p. 495 that the fundamental consideration in identifying analogous grounds under s. 15 is:

... whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?

83 One indicator suggested by McLachlin J. that a characteristic may be able to serve as a basis for such unequal treatment is the personal nature of the characteristic. As McIntyre J. wrote at pp. 174-75 in *Andrews*, supra:

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.²⁸¹

Similar to *Benner*, the children reinstated under section 6(2) had no choice about their parents and to signal them out for differential treatment because of their parentage is discriminatory. As stated in *Brenner*, "...[i]n this situation, the discrimination against the mother is unfairly visited upon the child. This is surely as unjust as if the discrimination were aimed at the child directly".²⁸² Clearly, the persons reinstated under section 6(2) are being discriminated against because their mothers made a personal life choice to marry a non-Indian pre-Bill C-31. There is no other rationalization.

Bill C-31 may have expanded the class of persons entitled to be registered as status Indians but it maintains the distinction between those children born to Indian women who

²⁸¹ Ibid. at para. 82-83.

²⁸² Ibid. at para. 85.

married non-Indian men pre Bill C-31 and those children born to Indian men who married either an Indian women or non-Indian women.²⁸³ By maintaining this distinction, it is clear that Bill C-31 maintained the stereotype it was supposed to remedy.²⁸⁴ Sections 6(1)(c) and 6(2) seem to suggest that persons reinstated under these sections are not worthy of passing on what it takes to be a “good Indian”. In fact, sections 6(1)(c) and 6(2) seem to reinforce an impression that if you married outside of Indian culture you made a “bad choice” and deserve the consequences. It is clear that sections 6(1)(c) and 6(2) do amount to differential treatment based upon sex and thus derogate from section 15.(1) of the *Charter*.

2. Do sections 6(1)(c) and 6(2) create differential treatment based on an enumerated or analogous ground of discrimination?

Not only do sections 6(1)(c) and 6(2) differentiate based upon sex, it could also be argued, as per 3(A)(b) of the *Law* test, that sections (6)(1)(c) and 6(2), by failing to take into account the disadvantaged position of Indian women within Canadian society, result in substantively differential treatment between those registered as status Indians under sections 6(1)(a) and (b) because their of sex and race and other Indian women. To establish that there is a conflict between section 6(1)(c) and 6(2) and the purpose of section 15.(1) of the *Charter*, one is required to look at the contextual setting of the claim that sections 6(1)(c) and 6(2) are discriminatory. The ultimate issue is whether the differential treatment “has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society”.²⁸⁵ The residual discrimination found in section 6(1)(c) and 6(2) is viewed by the persons reinstated under these sections as confirmation that their role in their respective Aboriginal communities is less valued

²⁸³ Ibid. at para. 89.

²⁸⁴ Ibid.

²⁸⁵ *Supra*, note 239 at para. 88.

then those granted Indian status under sections 6(1)(a) and (b). Bill C-31 reinforced an inferior status on persons reinstated under sections 6(1)(c) and 6(2) that was supposed to be remedied pursuant to section Bill C-31. Bill C-31 perpetuated and entrenched the idea that persons reinstated under section 6(1)(c) and 6(2) are less worthy than those registered under section 6(1)(a) and (b) for no reason other than that they were women who married non-Indian men and are the children of such marriages.

3. Ameliorative Purpose or Effect

Sections 6(1)(c) and 6(2) have a limited ameliorative purpose in relation to the persons eligible to be registered under the *Indian Act, 1985* as status Indians. Sections 6(1)(c) and 6(2) perpetuate and reinforce the ameliorative purpose that Bill C-31 sought to end – discrimination based upon gender.

4. The Nature and Scope of the Interest Affected by the Impugned Law

The nature and scope of the interest affected by sections 6(1)(c) and 6(2) must be considered. As noted in *Law*, “the more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s.15(1).”²⁸⁶

The clear message sent to persons reinstated under sections 6(1)(c) and 6(2) is that they are not as deserving as those persons registered under sections 6(1)(a) and (b). This engages the dignity of such persons and results in the denial of substantive equality of persons reinstated under sections 6(1)(c) and 6(2). As in the *Lovelace* case, sections 6(1)(c) and 6(2) will eventually lead to a whole class of persons disconnected from their respective cultures.

²⁸⁶ *Supra*, note 243 at para. 88.

5. Can sections 6(1)(c) and 6(2) be saved by Section 1 of the *Charter*?

Assuming that sections 6(1)(c) and 6(2) are discriminatory, the next step is determine if they are justifiable pursuant to section 1 of the *Charter*. Section 1 of the *Charter* “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

It is submitted that any piece of legislation that perpetuates and reinforces discrimination based upon sex is a very serious matter. However, as set out in the case of *Newfoundland (Treasury Board) v. N.A.P.E.*,²⁸⁷ the SCC stated the following:

Oakes itself cautioned that “rights and freedoms guaranteed by the *Charter* are not, however, absolute” (p. 136). Section 1 permits a law to limit a *Charter* right provided it is a “reasonable” measure that “can be demonstrably justified in a free and democratic society”. Demonstration of a reasonable limit involves consideration of five related questions with close attention to the factual context:

1. Does the law address a sufficiently important legislative objective? “It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial.” (*Oakes*, at pp. 138-39)
2. Is the substance of the law “rationally connected to the objective”? (*Oakes*, at p. 139)
3. Does the law impair the right no more than is reasonably necessary to accomplish the legislative objective, i.e., impair “as little as possible the right or freedom in question”? (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 352)
4. Is there proportionality between the effects of the legislation and the objective which has been identified as of “sufficient importance”? (*Oakes*, at p. 139)
5. Even if the importance of the objective outweighs the adverse effect of the measure on protected rights, do the adverse effects of the measure outweigh its

²⁸⁷ *Newfoundland (Treasury Board) v. N.A.P.E.*, [1996] 2 S.C.R. 3, [1996] S.C.J. No. 54 [hereinafter *N.A.P.E.* cited to S.C.R.]

“actual salutary effects”? (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 888 (emphasis deleted))²⁸⁸

6. Was There a Pressing and Substantial Legislative Objective?

Clearly Bill C-31 was introduced to satisfy two pressing issues, one political and the other legal. First, the political pressure was recognized by the Honourable David Crombie, then Minister of Indian Affairs, when he introduced Bill C-31 for its second reading in the House of Commons: “...the Federal Government has been under pressure from many fronts for many years, both in and out of Parliament, to remove sexual discrimination from the Indian Act.”²⁸⁹ For one scholar: “The 1985 amendments are regarded as a compromise between the positions of Indigenous women and unregistered Indians on the one hand and the national status Indian group, the Assembly of First Nations (AFN), on the other.”²⁹⁰ Second, the pressing legal objective was to bring the *Indian Act* into conformity with the *Charter* and to that end, it was backdated to April 17, 1985 so as to comply with the equality provisions of the *Charter*, in particular, section 15.(1).²⁹¹

Although not articulated in great detail back in 1985, there is one issue that needs to be addressed, specifically what has been referred to as the “dollars versus rights” controversy that has arising in recent *Charter* litigation.²⁹² In essence, the Supreme Court of Canada has stated: “It was thus clear from an early date that financial considerations wrapped up with other public

²⁸⁸ Ibid. at para. 53.

²⁸⁹ House of Commons Debate, March 1, 1985 (Hon. David Crombie (Minister of Indian Affairs and Northern Development)) [hereinafter Crombie] at 2644.

²⁹⁰ W. Moss, “Indigenous Self-Government in Canada and Sexual Equality under the Indian Act: Resolving Conflicts between Collective and Individual Rights,” (1990) *Queen’s Law Journal*, Vol. 15, 1990, p. 286 [[hereinafter Moss, Conflict].

²⁹¹ *Supra*, note 213 at Issue 35, pp. 34-35.

²⁹² *Supra*, note 287 at para. 65.

policy considerations *could* qualify as sufficiently important objectives under s. 1²⁹³ but the court would look with “strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints.”²⁹⁴ The “dollars versus rights” argument is relevant in the case of a finding that section 6(1)(c) and 6(2) derogate from section 15.(1) of the *Charter* and the court was asked for the specific remedy that all persons reinstated under sections 6(1)(c) and 6(2) be reinstated under section 6(1)(a). However, for the Federal Government to come within the four corners of *N.A.P.E.*, it would have to produce evidence that an increase in the number of persons registered under 6(1)(a), as a result of the remedy set out below, would lead to a “fiscal crisis” for the Federal Government.

7. Was There a Rational Connection Between the Legislative Measure and the Pressing and Substantial Objective?

The reinstatement of persons under sections 6(1)(c), as described earlier, was rationalized so as to comply with section 15.(1) of the *Charter*.²⁹⁵ The rationalization for section 6(1)(c) is as follows, as per the statement of Minister Crombie,:

It is clear that there is little disagreement on the first principle. Sexually discriminatory sections should be removed from the Indian Act. Where there is disagreement, it is on the question of reinstatement of those persons who have been affected in the past by the discriminatory provisions. Some say there should be no reinstatement in any way, shape or form. On the other hand, there are others who want reinstatement to revert to Confederation, giving Indian status and band membership to anyone with any degree of Indian ancestry.²⁹⁶

The reinstatement of persons under 6(2) was rationalized upon the basis of “fairness”.²⁹⁷

Again, in the words of Minister Crombie:

²⁹³ Ibid. at para. 69.

²⁹⁴ Ibid. at para. 72.

²⁹⁵ *Supra*, note 289 at p. 2645.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal government.²⁹⁸

The reinstatement of the first generation children on the basis of "fairness" raises a very fundamental core concept in the ordering of a just society. How does one rationalize, on the basis of "fairness", that the children of persons reinstated under 6(1)(c) possess less rights to transmit to their children Indian status in comparison to those children of persons confirmed as status Indians under section 6(1)(a) who consequently have the automatic right to transmit Indian status to their children?

8. Minimal Impairment

Were the *Charter* rights of the persons reinstated under sections 6(1)(c) and 6(2) impaired no more than was reasonably necessary to achieve the pressing and substantial legislative objective of ending discrimination based upon sex in the *Indian Act, 1951*? If the Federal Government had kept to its original rationalization as articulated by Minister Crombie, it might have been able to justify sections 6(1)(c) and 6(2). However, in 1988, Minister McKnight, stated the following in response to the following question:

Mr. St. Julien: Bill C-31 was to eliminate discrimination. Many witnesses have told us that this objective has not been met. I would like you to comment on this aspect.

Mr. McKnight: I have said before that you cannot legislate people's minds. If you were able to, we would. The discrimination I think you refer to is the difference between Indian males and Indian females in maintaining Indian status. I believe I am correct in drawing to your attention that Bill C-31 spent a very long time in committee. The legislation that was written, as I recall,

²⁹⁸ Ibid.

received passage with a voice vote in the House of Commons. I think it was a compromise that all members from all parties recognized should be put forward and supported because it did bring about a change and remove some of the sexual discrimination that is there.²⁹⁹ [Emphasis added.]

Also in *N.A.P.E.*, the SCC stated:

81 If an individual's *Charter* right or freedom is violated by the state, it is no answer to say the violation was driven or is justified for political reasons. Indeed forms of state discrimination that are undertaken for political reasons are among the most odious, as the recent history of parts of the world from South Africa to the Balkans can attest.³⁰⁰

Arguably, assuming that the Federal Government can justify the "fairness" of section 6(2), the comments of Minister McKnight become a strong aggravating factor to conclude that section 6(2), and section 6(1)(c), were no more than a political compromise of an important *Charter* right – the right not to be discriminated against on the basis of one's sex – a course of conduct that would not receive strong support from the SCC.

In a Federal Government of Canada report dealing with Bill C-31, entitled "The Fifth Report to the House", the following was noted:

This rule [referring to section 6(2)] is said to disproportionately affect 12(1)(b) women and the many bands with a high rate of intermarriage with non-Indian or non-status Indian populations. The Whispering Pines Band in British Columbia in its evidence reported an intermarriage rate of 90% and fears the band's eventual extinction as a result of the operation of this rule.

...

²⁹⁹ House of Commons Debates, 37, 17 March 1988 at 13 (Hon. William McKnight, Minister of Indian and Northern Affairs) as referenced in Moss, Conflict, *supra*, note 290 at p 282.

³⁰⁰ *Supra*, note 287 at para. 81.

For example, a representative of the Chiefs of Ontario stated that whether a person is registered under s. 6(1) or s. 6(2) has become a factor to be considered in selecting a spouse.³⁰¹

The possible extinction of an Indian band and the restriction on considering who should become one's spouse are further factors to suggest that sections 6(1)(c) and section 6(2) do not minimally impair the legislative objective of Bill C-31.

9. Proportionality of Means to Objective

The salutary effects of sections 6(1)(c) and 6(2) were minimal. Section 6(2), if allowed to remain in place, has the ability to terminate the Indian status of the descendants of such persons in two generations. Before Bill C-31, the federal government rationalized the definition of Indian to halt any possible erosion of an Indian band's reserve lands when an Indian woman married a non-Indian.³⁰² Now, as a result of Bill C-31, an Indian with no Aboriginal blood can seize her former husband's assets on reserve, including lands held pursuant to a Certificate of Possession. If the Bill C-31 amendments remain in place, then the federal government is dictating by legislative means who belongs to Indian culture and how long Indian culture will survive. Somehow, this seems more than a little odd.

10. Remedy

Section 52 of the *Constitution Act* declares that the Constitution of Canada, including the *Charter*, "is the supreme law of Canada" and provides that, "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

³⁰¹ Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development on consideration of the implementation of the Act to amend the Indian Act as passed by the House of Commons on June 12, 1985, The Firth Report to the House, August 1988 at 28.

³⁰² *Supra*, note 290 at p. 280.

It has been recognized by the SCC that section 52 of the *Constitution Act* allows the Court flexibility in determining what remedy is appropriate where a law is found to be in violation of the *Charter*, and not saved under section 1. In the case of *Schachter v. Canada*, Lamer C.J. identified four remedial options that are available to the Court in such cases:

- (1) to strike down the unconstitutional law;
- (2) to strike down the unconstitutional law, but temporarily suspend the declaration of invalidity;
- (3) to read down the legislation so as to render it in conformity with the constitution; or
- (4) to read in that which is necessary to render the law constitutional.³⁰³

In the case of *Schachter*, Chief Justice Lamer, recognized two principles which should govern where a court is considering the remedy of "reading in" under section 52 of the *Constitution Act*. In the words of the Chief Justice, reading in should be considered in cases where "it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of the legislation that do not themselves violate the Charter".³⁰⁴

It is arguable that, of these two governing principles, consistency with the purposes of the *Charter* must be recognized as being paramount. It could be argued further that that the courts should only be concerned with preserving the intentions or objectives of Parliament which "do not themselves violate the *Charter*". Finally, it could be argued that legislative objectives which are directly contrary to the values which underlie the *Charter* cannot be allowed to stand in the way of a reading-in remedy where such remedy is consistent with the purposes of the *Charter* and considered appropriate by a court.

³⁰³ *Shachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No 68 [hereinafter *Shahcter* cited to S.C.R.] at 695.

³⁰⁴ *Ibid.* p. 702.

In *Schachter*, the SCC identified three steps which should be followed in deciding which of the identified remedial options should be adopted:

- (1) the Court must define, with as much precision as is possible, the extent to which the law is inconsistent with the *Charter*;
- (2) if it is determined that the inconsistency is such as to allow for more than one remedial option, the Court must decide whether reading in or reading down is more appropriate than striking down;
- (3) where the Court determines that striking down is more appropriate than reading in or reading down, the Court must then determine whether or not to temporarily suspend its declaration of invalidity.³⁰⁵

It is arguable that all of the factors cited by the SCC in *Schachter* are relevant to a determination of the most appropriate remedy -- i.e., remedial precision, avoiding interference with the legislative objective, whether the significance of the remaining portion of the legislation would be substantially changed and the significance or long-standing nature of the remaining portion of the legislation. All the factors favour reading in over striking down as the appropriate remedy in the case of sections 6(1)(c) and 6(2).

If a reading in remedy is granted, there is no need for a court to order a declaration of invalidity because it is not a factor to be considered at the stage of deciding which remedy, reading in or striking down, is most appropriate. A declaration of invalidity only becomes relevant once striking down has been determined to be the more appropriate remedy. Any concerns that a court may have about the budgetary or resource implications of granting a reading in remedy with respect to Bill C-31 will have to be informed by what, if any, financial crisis the federal government would face by a reading in remedy.

³⁰⁵ Ibid. at pp. 718-719.

4.4 Remedial options to address Bill C-31

The questions raised with respect to Bill C-31 go the crux of the very purpose of the *Canadian Charter of Rights and Freedoms* in the constitutional fabric of this country in ensuring that Aboriginal women, and their children, reinstated under Bill C-31, are accorded the same benefits under the *Indian Act*. Persons reinstated under sections 6(1)(c) and 6(2) are the very class of persons that the *Charter* was meant to protect, in particular, the children reinstated under section 6(2) – who had no choice about the gender of their parents but are unjustly discriminated against because of Bill C-31. The legislative process to date makes it clear that the federal government, from the moment it introduced Bill C-31 in the House of Commons and in subsequent Committee hearings, would never achieve the objective it sought: to rid the *Indian Act* of gender discrimination. More fundamentally, however, it is arguable that the choice made by the federal government is not one which is open to it under the *Charter* – to perpetuate discrimination based upon gender. Suggested wording for the reading in remedy is:

1. **Section 6(4): A woman, who prior to or on April 16, 1985, married a person who is not an Indian shall be deemed to be entitled to be registered under paragraph (1)(a)**
2. **Portion of section 6(1)(c) that reads “paragraph 12(1)(b)” be deleted.**

This remedy would achieve completely what Bill C-31 half delivered: gender equality without political compromise. If the remedy suggested above is granted, which would reinstate all persons under section 6(1), it would treat all pre-Bill C-31 and Bill C-31 persons in the same way. Under this scenario, the class of persons entitled to be registered as status Indians will peak in 2049 at 1,260,200 and then decline to 690,700 by 2099. Although under this scenario,

by 2099 the class of status Indians may be less than the number under the status quo scenario, this outcome would extend the registration period for six generations.³⁰⁶ If the above remedy is not granted, the total class of persons entitled to registration will peak at 1.1 million persons by 2049 and then decline to 768,500 by 2099. In addition, based upon the current wording of section 6(1)(c) and 6(2), by the year 2074, which represents three generations, "individuals who are not entitled to registration are projected to form the majority of the population."³⁰⁷ Under this scenario, the number of persons not entitled to registration will increase from 21,700 persons in 1999 to nearly 400,00 in two generations in the year 2049. By the year 2099, the total number of persons not entitled to registration will stand at 1,306,000 persons. In plain language, the class of persons entitled to register as status Indians will decrease dramatically.³⁰⁸

4.5 Conclusion

The discussion of Bill C-31 and section 6 of the *Indian Act*, and the significant gender discrimination impacting status Indians in Canada which has resulted through the operation of such legislation, underscores the need to more fully develop an Aboriginal theory of human rights. The duty to consult and accommodate, as it is now understood in Canadian law, was not recognized at the time Bill C-31 was enacted. A full consultation process which addressed and recognized Aboriginal human rights might have provided an opportunity to squarely address the conception of gender equality as a substantive universal human right, with the Aboriginal human right to determine membership of a unique community. These issues were

³⁰⁶ *Supra*, note 269 at p. 48.

³⁰⁷ *Ibid.* at p. 39.

³⁰⁸ *Ibid.* at p. 45.

not squarely addressed with the enactment of Bill C-31. If section 67 is repealed, these issues can be brought forward in a meaningful way.

CHAPTER V - CONCLUSION

This thesis set out to suggest a statutory means for the development of an Aboriginal perspective with respect to human rights. The means to allow this to happen, it is submitted, is through the repeal of section 67 of the *Canadian Human Rights Act*. There is broad support for the repeal of section 67 by, inter alia, Canadian Aboriginal organizations, the United Nations Special Rapporteur, the Canadian Human Rights Commission, and the Canadian Human Rights Act Review Panel.

Within Canada, there is a growing trend towards a patchwork application of the *CHRA*. The Nisga'a Treaty allows for the application of the *CHRA*. The *First Nations Land Management Act*, which operates outside of the *Indian Act*, is subject to the *CHRA*. In the *Westbank Agreement* and *UAC Final Agreement*, there are interpretative clauses that seek to modify the application of the *CHRA* to some degree. Upon review of the *Westbank Agreement* and *UAC Final Agreement*, it is clear that there is no clear federal policy on what language is to be used in an interpretative clause with respect to the negotiation of self-government agreements.

By adhering to the directions set out in *Haida*, *Taku*, *Marshall* and *Mikisew*, both the federal Crown and Aboriginal peoples can reconcile their respective views on human rights through the repeal of section 67 and in the process ensure that the "honour of the Crown" is upheld. More importantly, the repeal of section 67 would present an opportunity to develop a uniform wording on an interpretative clause. I conclude by advocating for wording similar to that of section 10 of the *Indian Act* to allow for the development of Indian band human rights

by-laws. This approach would enable all of the Indian bands across Canada an opportunity to develop human rights regimes that are in accordance with their respective views on human rights. The human rights bylaws would be subject to the approval of the Minister of Indian Affairs to ensure that they comply with Canada's international and domestic obligations with respect to human rights – as contemplated, arguably, by the *First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Government*.

Any legal challenge to Bill C-31 is fraught with danger and an uncertain outcome - as is all litigation. I have presented a legal argument as to why section 6(1)(c) and 6(2) of the current *Indian Act* violate section 15.(1) of the *Charter*. Upon the repeal of section 67, the Canadian Human Rights Commission, or Indian bands through human rights bylaws, will be faced with challenges respecting section 6(1)(c) and 6(2) almost immediately. Bill C-31 is not consistent with the human rights values that are embodied in the *Canadian Human Rights Act* and the various international documents with respect to human rights that have as their goal the movement towards inclusiveness and diversity. A resolution to the residual discrimination found in sections 6(1)(c) and 6(2) of the *Indian Act* could be dealt with in conjunction with the repeal of section 67.

The federal government's policy of recognizing Aboriginal self-government, and the Supreme Court of Canada's tacit agreement with this federal policy as intimated in the decision in *Pamajewon*, suggests that there is a strong prima facie claim to an Aboriginal right to self-government. Evidenced by *Sawridge*, there may be strong views held by some First Nations that the *CHRA* does not apply to Aboriginal self-governments. First Nations that adhere to this view will have to provide sufficient information to justify why the *CHRA* should not apply to

their respective self-governments. Further, such arguments will have to contend with the *First Nations-Federal Crown Political Accord* and the SCC's view that the *CHRA* has quasi-constitutional status. Because the push for the repeal of section 67 is in its formative stages, there is no excuse not to ensure that the input and comments of Aboriginal peoples are canvassed. Because repealing section 67 will impact upon Indian bands across the country, they are the proper bodies to consult with, or the representatives they chose to negotiate for them. The repeal of section 67 will require Indian bands to expend not just human capital but money. There should be sufficient funding made available to Indian bands to ensure that their views are presented in a principled manner with respect to the repeal of section 67. In a recent report entitled "*Walking Arm-in-Arm To Resolve The Issue of On-Reserve Matrimonial Real Property*",³⁰⁹ the Standing Committee on Aboriginal Affairs and Northern Development stated:

For the Committee, the third governing principle that must be observed in the development of any legislative approach relates to the need for extensive consultation of and collaboration with First Nations. This imperative was stressed by witness after witness, for whom adequate input from First Nations themselves as integral partners in the process of devising solutions was key to implementation of those solutions. The Committee considers, more ever, that the active involvement of First Nations women's groups and representatives is especially indispensable to the endeavour of resolving longstanding grievances in the area of on-reserve matrimonial real property. The Committee is mindful that, in the main, the lives and concerns of First Nations women and their children are in play here. First Nations women must play a prominent role in defining appropriate solutions.³¹⁰ [Emphasis added]

Any consultation with Aboriginal peoples with respect to the repeal of section 67 of the *CHRA* must be extensive and involve First Nations as equal partners in setting up the procedural

³⁰⁹ Canada, Parliament, "Walking arm-in-arm to resolve the issue of on-reserve matrimonial real property", Report of the Standing Committee on Aboriginal Affairs and Northern Development, June 2005 at 22 [hereinafter *Matrimonial Report*].

³¹⁰ Ibid. at p. 22.

means by which Aboriginal human rights can be articulated, defined and implemented.³¹¹ The presumption that the *Canadian Human Rights Act* applies to an Aboriginal governmental structure is ripe for challenge. The repeal of section 67 of the *Canadian Human Rights Act* represents an opportunity for the intercultural exchange of ideas with respect to human rights and, if required, to reconcile Aboriginal and non-Aboriginal views on human rights.

³¹¹ *Supra*, note 309 where it is stated that: "Any effort to deal with the section 67 issue must ensure adequate input from Aboriginal people themselves."

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