CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Section 1.2 of the *Canadian Human Rights Act*:

Balancing Collective and Individual Rights and the Principle of Gender Equality

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INTRODUCTION

The *Canadian Human Rights Act* (CHRA) was amended in 2008 to repeal a provision that excluded from review any decisions made by the federal government and by First Nations governments under the authority of the *Indian Act* ("the section 67 exemption").[1] The history and the arbitrary impacts of the section 67 exemption have been examined in several studies.[2]

In addition to repealing the section 67 exemption, the 2008 amendments to the CHRA add two interpretive provisions and several transitional provisions. The interpretive provision in section 1.1 provides that, for greater certainty, the repeal of section 67 "shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*." Section 1.2 requires that due regard be given to First Nations legal traditions and customary laws in the interpretation and application of the CHRA, but in a manner "consistent with the principle of gender equality." Section 1.2 also makes particular mention of the need to consider First Nations legal traditions and customary laws where issues arise respecting the balancing of individual rights and interests against collective rights and interests.

Section 1.2 of the *Canadian Human Rights Act* reads as follows in English and French:

> **1.2** In relation a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.
>
> **1.2** Dans le cas d'une plainte déposée au titre de la *Loi canadienne sur les droits de la personne* à l'encontre du gouvernement d'une première nation, y compris un conseil de bande, un conseil tribal ou une autorité gouvernementale qui offre ou administre des programmes et des services sous le régime de la *Loi sur les Indiens*, la présente loi doit être interprétée et appliquée de manière à tenir compte des traditions juridiques et des règles de droit coutumier des Premières Nations et, en particulier, de l'équilibre entre les droits et intérêts individuels et les droits et intérêts collectifs, dans la mesure où ces traditions et règles sont compatibles avec le principe de l'égalité entre les sexes.[3]

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[1] Section 67 reads: "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

[2] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, Minister of Justice and Attorney General of Canada, 2000; Wendy Cornet, "First Nations Governance, the *Indian Act* and Women's Equality Rights" in *First Nations Women, Governance and the* Indian Act*: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, November 2001) 177; Canadian Human Rights Commission, *A Matter of Rights: Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the* Canadian Human Rights Act (Ottawa: Canadian Human Rights Commission, 2005); Canadian Human Rights Commission, *Still a Matter of Rights* (Ottawa: Minister of Public Works and Government Services, 2008).

[3] *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30.

The repeal of the section 67 exemption as it applies to decisions taken under the *Indian Act* by First Nations governments and organizations is delayed until June 18, 2011.[4] This transitional provision affecting the effective repeal date for First Nations governments and organizations does not appear to affect the effective date for section 1.2. Unlike section 1.1, the wording of section 1.2 does not reference the repeal of section 67. Section 1.2 therefore would appear to apply immediately to cases involving a "First Nation government." The term "First Nation government" is not defined, other than to specifically include "a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act.*" Additional transitional provisions require studies and reports to Parliament respecting the impact of the repeal of section 67, and on the resources required by First Nations communities and organizations to comply with the CHRA.

The purpose of this research paper is to analyze "the principle of gender equality" referred to in section 1.2 of the CHRA as it impacts the requirement to give "due regard to First Nations legal traditions and customary laws."[5] This research paper will also examine the research report prepared by Bradley Morse, Robert Groves and D'Arcy Vermette entitled *Balancing Individual and Collective Rights: Implementation of Section 1.2 of the Canadian Human Rights Act* (*Balancing Individual and Collective Rights Report*).A culturally relevant gender-based analysis will be applied to the analysis in the *Balancing Individual and Collective Rights Report* and conclusions will be drawn on how the principle of gender equality could affect the interpretation and application of section 1.2 generally and the balancing of collective and individual rights and interests in particular. For this purpose, this research paper is composed of five parts:

Part 1—Evolution of the Concept of Gender Equality and Aboriginal Perspectives
Part 2—Culturally Relevant Gender-Based Analysis
Part 3—Impacts of the *Indian Act* Regime Using a Culturally Relevant Gender-Based Analysis
Part 4—Review of Frameworks for the Achievement of Balance Proposed by the *Balancing Individual and Collective Rights Report*
Part 5—Conclusion

PART 1—EVOLUTION OF THE CONCEPT OF GENDER EQUALITY AND ABORIGINAL PERSPECTIVES

The concept of "equality" under Canadian law, and the legal requirements and policy approaches for ensuring "gender equality" in particular, have evolved over time and remain a work in progress.

Examining the history of race, culture and the law, Chief Justice Beverley McLachlin has identified three stages in the evolution of equality rights under Canadian law[6]: first, a long period

[4] *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, s. 3.
[5] This paper necessarily focuses on First Nations issues because section 1.2 mentions only First Nations governments. When the context requires, more general references to all Aboriginal peoples in Canada or indigenous peoples in an international context are made.
[6] Hon. Beverley McLachlin, "Racism and the Law: The Canadian Experience," (2002) 1 *J. Law & Equality* 7.

of exclusion and subordination of various racialized groups from the colonial period to the middle of the 20th century; second, a phase from the mid-20th century up to the adoption of the Charter in 1982 where legal concepts of equality relied on "treating likes alike" and third, the adoption of the Charter and the development and evolution of the concept of "substantive equality" and its application under Canadian human rights law, including the CHRA.

Several distinct historical stages can also be identified respecting the treatment of equality in a gender context under Canadian law: first, a stage when explicit sex-based discrimination and patriarchal norms were supported under Canadian law from criminal law to family law to contracts and when even gender-neutral language would be interpreted in a gender-biased manner by the courts; a second stage beginning in the early 20th century marked by the successful *Persons* reference case concerning the eligibility of women for appointment to the Senate and the beginning of legislative reforms to remove some (but not all) explicitly discriminatory aspects of statutory law; a third stage of repeated failures to successfully challenge blatant sex-based discrimination in statutory law using the *Canadian Bill of Rights* (failures arising from the deficiencies of the "treating likes alike" concept of equality and from gender bias in judicial decision making); and fourth, the post-Charter stage of applying the concept of substantive equality in a gender context with mixed results in the view of many commentators on the Charter and the CHRA. One of the most common criticisms is that Canadian human rights legislation and judicial analysis of the concept of substantive equality do not reflect the indivisibility and interdependence of social, cultural and economic rights and civil and political rights.[7] This failure limits the capacity of domestic human rights law to reach the most pressing human rights issues affecting First Nations women, such as poverty, domestic violence, and capacity to access the legal system to enforce rights.

The negative outcomes for gender equality in pre-Charter cases, like *Lavell* and *Bliss*, influenced the drafting of Charter section 15 and led to the inclusion of specific guarantees of gender equality in section 28 of the Charter and in subsection 35(4) of the *Constitution Act, 1982*. In the phase of gender equality advocacy focusing on women's rights that immediately followed enactment of the Charter, some observers maintain there was a tendency in gender equality rights analysis and in the feminist movement to construct a "universal" or "essentialized" woman that fails to recognize the multi-dimensional experience of gender across different cultures and communities. This tendency to universalize all women's experience also fails to give priority to the unique manifestations of gender inequality experienced by racialized women from various communities.[8] In judicial analysis, the same universalizing and distorting effect can occur when issues of gender equality are analyzed separately from other grounds of discrimination that may be asserted by a complainant. There is now a growing recognition in the legal literature and social science literature of how gender, race and cultural bias have been, alternately, and at

[7] See, for example, Canadian Human Rights Commission, *Annual Report 1997* (Ottawa: Canadian Human Rights Commission, 1998); Martha Jackman and Bruce Porter, "Women's Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act*" in Donna Greshner et al. (eds.), *Women and the* Canadian Human Rights Act*: A Collection of Research Reports* (Ottawa: Status of Women Canada, 1999) 45; Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty," (2002) 14 *C.J.W.L.* 184.

[8] See, for example, Sherene Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women," (1990–1991) 4 *C.J.W.L.* 440.

times, simultaneously manipulated throughout Canada's legal history to oppress First Nations women as individuals and First Nations as peoples.

First Nations women scholars and activists have provided their own analyses of the deficiencies of equality rights analysis as it affects First Nations people. There are varying assessments of the capacity of Canadian equality rights theory, legislation and case law to deliver gender equality in a manner that is consistent with other equality interests of First Nations women, including their interest in realizing the right to self-determination of their First Nations.[9]

Joyce Green and Val Napoleon emphasize the importance of contextualizing issues affecting women in all their diversity. These authors argue for much broader efforts to adopt a gendered analysis of indigenous issues while not essentializing indigenous women or the issues affecting them.[10] They also argue that indigenous knowledge traditions can be used to fight oppression and colonialism while drawing on international human rights norms. Green and Napoleon point out that not all gendered oppression has its roots in colonialism and that to deny that Aboriginal peoples are capable of oppression amounts to "sentimentalist essentialism." Indigenous women's experiences with discrimination are shaped by both external and internal political dynamics. They note that international law says that women's human rights cannot be violated by governments invoking tradition. Green and Napoleon are concerned with how cultural traditions are to be evaluated in relation to human rights law, situated as it is alongside numerous structures of oppression constructed by colonization.[11]

One of the biggest points of difference in First Nations gender equality commentary has concerned questions of legal strategy in assessing the utility of Canadian human rights legislation and the legal system as a whole. Domestic litigation has consistently failed to deliver for First Nations women on gender equality and other equality interests arising under federal and provincial laws when it mattered most. This is demonstrated by the negative outcomes for First Nations women seeking gender equality under Canadian law in the following cases:

- *Lavell v. Canada (A.G.)* and *Isaac v. Bedard* [1974] S.C.R. 1349 (two unsuccessful challenges under the *Canadian Bill of Rights* to the sexually discriminatory marrying out rule under the federal *Indian Act*);
- *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285;
- *Paul v. Paul*, [1986] 1 S.C.R. 306; and
- *Native Women's Assn.of Canada v. Canada* [1994] 3 S.C.R. 627.

The failure of the *Canadian Bill of Rights* and the common law to deliver gender equality has been aggravated further by the barrier to using the CHRA represented by section 67. Section 67

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[9] See, for example, Osennontion and Skonagnanleh:ra, "Our World," (1989) 10 *Can. Woman Stud.* 2; Teressa Nahanee, "Indian Women, Sex Equality and the Charter" in Caroline Andrew and Sanda Rodgers (eds.), *Women and the Canadian State* (Montréal & Kingston: McGill-Queen's University Press, 1997) 89; Sharon McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights," (2004) 16 *C.J.W.L.* 106; Patricia A. Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?" in Kerry Wilkins (ed.), *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Edmonton: Centre for Constitutional Studies, University of Alberta, 2004) 39 at 40.

[10] Joyce Green and Val Napoleon, *Seeking Measures of Justice: Aboriginal Women's Rights Claims, Legal Orders, and Politics* (Saskatoon: Canadian Political Science Association, University of Saskatchewan, May 29–June 1, 2007). *[Green and Napoleon, Seeking Measures of Justice]*

[11] *Green and Napoleon, Seeking Measures of Justice*.

has been seen as a bar to challenging gender inequality as well as other forms of discrimination arising from the *Indian Act* and its related policies. In addition, the *Canadian Charter of Rights and Freedoms* has proven to be an expensive and time-consuming vehicle to seek remedies for gender inequality affecting First Nations people, as the long histories of cases such as *McIvor* demonstrate. There has been a general failure of litigation, throughout each of the historical periods marking Canada's legal history on gender equality, to deliver results for First Nations women when their cases have placed gender equality front and centre. The limited success achieved in the *McIvor* decision is the most recent example.

Debate within the First Nations community over the merits and risks of litigation is fuelled by the enormous strategic challenges of how best to use, and whether to use, a domestic legal system that does not fully recognize the right of self-determination of First Nations and which consistently manipulates sex, race and cultural bias in various ways that disadvantage all First Nations people. The resolution of differences of opinion over various legislative reforms affecting First Nations people, and of disputes regarding the strategic use of litigation, has been held back by the failure of many prominent Aboriginal and Treaty rights advocates and theorists (outside of those advising First Nation women's organizations) to integrate any form of gender analysis into their legal analysis of Aboriginal and Treaty rights issues.[12] In the United States, a similar need to integrate race, gender and nation as non-hierarchal categories of analysis has been identified in the field of Native studies.[13]

Thus, in addition to the problem of inclusion of First Nations and First Nations women's perspectives in the development of equality rights theory, there has been negligible gender-based analysis by those most involved in Aboriginal and Treaty rights litigation and legal commentary.

Until the mixed result supporting gender equality for First Nations women represented by the 2008 B.C. Court of Appeal decision in the *McIvor* case,[14] the most notable success for First Nations women seeking gender equality through litigation has been at the international level in the United Nations Human Rights Committee decision in the *Lovelace* case. Though this case represents a "win," it was not successful on the claim of sex-based discrimination. Equality rights litigation, even when unsuccessful or producing mixed results, has at least proved an effective tool, along with protest and lobbying activities, in applying political pressure that has maintained a high political profile for First Nations gender equality issues.[15] This is most recently evidenced by the federal response to the limited win in the *McIvor* case—while a

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[12] Patricia A. Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?" in Kerry Wilkins (ed.), *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Edmonton: Centre for Constitutional Studies, University of Alberta, 2004) 39; Wendy Cornet, "Valuing Indigenous Women: Recognizing and Embracing the Value of Gender-Based Analysis," presentation to Closing the Implementation Gap: A Forum to Follow Up the 2004 Mission to Canada by the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Gender Discrimination Issues Panel, University of Ottawa, October 2, 2006.

[13] Renya Ramirez, "Race, Tribal Nation and Gender: A Native Feminist Approach to Belonging," (2007) 7 *Meridians* 22.

[14] *McIvor* v. *Canada (Registrar of Indian and Northern Affairs*), 2009 BCCA 153 (CanLII); leave to appeal denied 2009 CanLII 61383 (S.C.C.).

[15] Judith H. Aks, *Women's Rights in Native North America: Legal Mobilization in the U.S. and Canada* (New York: LFB Scholarly Pub., 2004); Sharon McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights," (2004) 16 *C.J.W.L.* 106.

narrow legal response has been crafted to respond to the narrow finding by the B.C. Court of Appeal of gender inequality under the Charter, the government has responded to First Nations demands, including First Nations women's demands to undertake a broader policy examination of identity issues and the *Indian Act*.

As the *Balancing Collective and Individual Rights Report* notes, one of the most persistent, contentious and high-profile gender equality issues affecting First Nations women has been the impact of the *Indian Act* on the determination of individual identity through the definition of terms such as "Indian" and "band member" and the issue of discrimination based on sex. A key focal point of debate throughout the 1980s was whether gender equality issues under the *Indian Act* should be corrected before moving on the self-government agenda, including recognizing First Nations rights to determine and define their own membership/citizenship. This debate came to a head during the legislative initiative to address blatant sex discrimination under the *Indian Act* through Bill C-31. The negative impacts of the 1985 amendments to the *Indian Act,* and ongoing analysis of identity and equality issues under the *Indian Act,* have led to a commonly held view in the legal literature and social science literature that continuing to work within the colonial *Indian Act* concept of "Indian" identity will not advance the overall enjoyment of human rights by First Nations people—women or men.[16] In other words, there is a commonly held view that the fundamental concepts underlying legal identity concepts in the *Indian Act* are so fundamentally embedded in a colonial dynamic and have become so hopelessly technical, that neither litigation nor legislative reform using conventional equality rights analysis and remedies can fully or properly address a range of equality issues, from increasing racialization of *Indian Act* identity concepts to gender equality issues.

In her book, *Thunder in My Soul*, Monture-Angus explains her view of the relationship between the current *Indian Act*, as amended in 1985, and equality: "What was secured at the cost of a cumbersome and illogical system of registration was a more equal access to the system of laws which have successfully oppressed our people since the advent of the *Indian Act* in 1876. Equal access to oppressive laws (colonialism) is not progress. I do not see this as a failure of the organizing and politicking of Aboriginal women but as a demonstration of the helplessness and powerlessness of Aboriginal people in Canadian society and the inability of Canadian law makers to respond to the issues in the way that Aboriginal Peoples experience them."[17]

Approaches to realizing the principle of gender equality in a First Nations context will continue to evolve as First Nations' perspectives, including gendered First Nations' perspectives, are explored. What is perhaps most significant about the direction that equality rights analysis is taking now in this area is the importance placed on not treating forms of oppression that can affect and shape various aspects of identity, as completely or necessarily separate. Increasingly,

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[16] See, for example, Patricia Monture-Angus, "Considering Colonialism and Oppression: Aboriginal Woman, Justice and the 'Theory' of Decolonization," (1999)12 *Native Stud. Rev.* 63 at 73; Wendy Cornet, "Indians Status, Band Membership, First Nation Citizenship, Kinship, Gender and Race: Reconsidering the Role of Federal Law" in Jerry White et al. (eds.), *Aboriginal Policy Research: Moving Forward, Making a Difference*, Vol. V (Toronto: Thompson Educational Publishing, 2007) 145; Martin J. Cannon, *Revisiting Histories of Gender-Based Exclusion and the New Politics of Indian Identity*, research paper for the National Centre for First Nations Governance, May 2008.

[17] Patricia A. Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Press, 1995) 183.

legal and social science literature points to the need to recognize and respond to complex forms of discrimination—where multiple forms of inequality and oppression interact and reinforce one another.[18] Complex forms of discrimination, such as the discrimination claimed in cases like *McIvor* (sex and marital status), discrimination based on "Bill C-31 status" or the effects of the second-generation cut-off rule, all impact and manipulate various aspects of identity.

The sum total of equality issues—from the racialization of identity concepts to inherent cultural bias in the law to persistent residual sex discrimination under the *Indian Act*—could come to a head in any equality rights case under the CHRA addressing gender equality issues in the Indian status entitlement provisions.

There is a growing body of literature on First Nations' perspectives on notions of equality and gender equality. In her article, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?,"[19] Patricia Monture stresses the importance of revealing how gender today affects relationships within First Nations communities as a necessary part of "stepping beyond colonial impositions." She also makes the following observations and conclusions:

- Gender relationships and politics unfold differently in First Nations cultures.
- Gender within and across First Nations cultures is exceedingly varied and the diversity of First Nations women (and their perspectives) must be acknowledged.
- Many First Nations knowledge traditions are marked by "gender specificity"; meaning that indigenous knowledge is often gendered—there are men's teachings and women's teachings and there are teachings about gender that belong to everyone; and knowledge is complete only when the complementary stories of women and men have been told and understood. (This observation of Monture's is not dissimilar to the notion of culturally relevant gender-based analysis.)
- External gender hierarchies, including patriarchy, have disrupted (but not destroyed) the fundamental gender balance that is an essential foundation to First Nations knowledge traditions. It must be built by involving both (all) genders.

Monture expresses her scepticism about the capacity of a legal system founded on the doctrine of precedent, to respond to First Nations women's gender equality issues without yet another colonial imposition of values.[20] Gender is socially constructed and therefore variable in its content and meaning across cultures. She argues that existing case precedent is built on socially constructed notions of gender that are different from those of many First Nations, and consequently, there is a substantial risk of law failing to recognize, and take account of, the particular social constructions of gender in First Nations societies. She cites the long history of case precedent (e.g. *Lavell*, *Bedard*, *NWAC v. Canada*) in litigation launched by First Nations women seeking gender equality that has failed on this score. Mary Ellen Turpel has expressed similar doubts about the capacity of legal mechanisms, jurisprudence and concepts of gender

[18] Wendy Cornet, "Indians Status, Band Membership, First Nation Citizenship, Kinship, Gender and Race: Reconsidering the Role of Federal Law" in Jerry White et al. (eds.), *Aboriginal Policy Research: Moving Forward, Making a Difference*, Vol. V (Toronto: Thompson Educational Publishing, 2007) 145; Sherene Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women," (1991) 4 *C.J.W.L.* 440.

[19] Patricia A. Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?" in Kerry Wilkins (ed.), *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Edmonton: Centre for Constitutional Studies, University of Alberta, 2004) 39. *[Monture, The Right of Inclusion]*.

[20] *Monture, The Right of Inclusion* at 46.

equality developed in different legal traditions and different social contexts, to recognize and deliver the appropriate responses that reflect the social and legal context of First Nations.[21] Both authors express similar concerns about the cultural embeddedness of feminist analysis as so far developed. Monture, Turpel, Osennontion and Skonaganleh:ra elaborate on concerns that Euro-Canadian notions of gender equality focus too much on achieving a sameness of role and functions with men, and on attempting to reveal the hidden male standard. If equality as a legal norm is intended to lead to sameness of roles and functions between men and women, many First Nations people, male and female, feel this would undermine the valued and special position, roles and responsibilities of First Nations women that are characteristic of many First Nations cultures (and which can vary across First Nations).[22] Monture explains this point as follows: "Law is a particularly good example of the way in which the male construction of reality is implemented such that the gender specificity of legal relations vanishes.... The construction of woman as "other" must be the fundamental focus of any analysis which hopes to significantly end the oppression of women. When one gender is constructed as "other," then the goal of equality will continue to be elusive.... The examination of the creation of roles of "otherness" must not conclude in the construction of a definition of equality prefaced on sameness. This is equally problematic. Equality when constructed as sameness perpetuates race and gender oppression."[23]

A quite different perspective that strongly supports the utility of existing rights frameworks like the Charter as well as feminist analysis as tools to address gender equality issues affecting First Nations people is represented by the work of Teressa Nahanee and Sharon McIvor. Nahanee has argued that First Nations women have directly benefited from the Charter because it was the enactment of the Charter that finally led to the 1985 amendments to the *Indian Act* to remove sexual discrimination in the Indian status and band membership entitlement provisions. She also advocates that First Nations women embrace the Charter and specifically rejects the position of commentators like Turpel who question the benefits of applying the Charter to First Nations communities.[24] McIvor similarly argues that the strategic use of Charter litigation by Aboriginal women in the 1990s led to positive policy changes, even when they lost in court.[25] McIvor concludes that these early Charter challenges demonstrate that "Aboriginal women's lives make evident the need for interpretations of Aboriginal women's sex equality rights that recognize the

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[21] Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women," in Caroline Andrew and Sanda Rodgers (eds.), *Women and the Canadian State*. (Montréal & Kingston: McGill-Queen's University Press, 1997) 64–78; Aki-Kwe and Mary Ellen Turpel, "Aboriginal Peoples and the *Canadian Charter of Rights and Freedoms*: Contradictions and Challenges," (1989) 10 *Can. Woman Stud.* 149.

[22] Patricia A. Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?" in Kerry Wilkins (ed.), *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Edmonton: Centre for Constitutional Studies, University of Alberta, 2004) 39; Patricia A. Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992) 56 *Sask. Law Rev.* 237; Osennontion and Skonaganleh:ra, "Our World," (1989) 10 *Can. Woman Stud.* 2; Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in Caroline Andrew and Sanda Rodgers (eds.), *Women and the Canadian State* (Montréal & Kingston: McGill-Queen's University Press, 1997) 64.

[23] Patricia A. Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice," (1992) 56 *Sask. Law Rev.* 237.

[24] Teressa Nahanee, "Indian Women, Sex Equality and the Charter" in Caroline Andrew and Sanda Rodgers (eds.), *Women and the Canadian State* (Montréal & Kingston: McGill-Queen's University Press, 1997) 89.

[25] Sharon McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights," (2004) 16 *C.J.W.L.* 106 at 111. *[McIvor, Aboriginal Women Unmasked]*.

indivisibility of civil and political and social and economic rights."[26] Her analysis is supported by the range of gender equality cases brought by Aboriginal women both before and after the Charter (described in her article) on matters from matrimonial property and other land rights, to political participation in constitutional reform, to a range of *Indian Act* issues and economic development issues.

There are several First Nations women scholars who find considerable value in the concept of "gender equality" and are contributing to an emerging body of indigenous feminist analysis.[27] There is also evidence of the influence of Haudenosaunee on early American feminists.[28]
A point on which some First Nations commentators may differ from Monture is her preference for the concept of "gender balance" rather than gender equality. The Assembly of First Nations also prefers the term "gender balance." This term invokes the notion of "gender symmetry" in which there is an implicit assumption of the equal value of the many distinct roles and responsibilities of men and women in many First Nations cultures. However, many First Nations women continue to prefer the norm of "gender equality" as a standard for assessing federal and First Nations laws.

Monture and others see the remedy for disrupted and unhealthy gender relations as lying in the restoration of First Nations cultural and legal values, and the restoration of First Nations notions of power where customary law and the exercise of power have a relational function to restore and maintain balance and harmony, rather than functioning to maintain hierarchies or creating dichotomies (e.g. by placing concepts like male and female in opposition to one another).[29]

Other First Nations writers do identify as indigenous feminists, such as Roseanna Deer,[30] Kim Anderson,[31] Joyce Green[32] and Dawn Martin-Hill.[33] These writers also maintain that the restoration of First Nations cultural values would assist in healing gender relations and the enjoyment of all human rights by First Nations women. However, these writers stress that the process of restoring healthy gender relations requires a feminist, or other form of gender lens rooted in First Nations perspectives, knowledge traditions and experiences. Indigenous feminist perspectives are needed to frankly and freely identify, discuss and address distortions of tradition

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[26] *McIvor, Aboriginal Women Unmasked*.
[27] See, for example, Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Second Story Press, 2000) [*Anderson, A Recognition of Being*]; Joyce A.Green (ed.), *Making Space for Indigenous Feminism* (Blackwood, N.S.: Fernwood Publishing, 2007); Renya Ramirez, "Race, Tribal Nation and Gender": A Native Feminist Approach to Belonging," (2007) 7 *Meridians* 22; Sylvia Van Kirk, "Toward a Feminist Perspective in Native History," (1986) 18 *Papers of the Algonquin Conference*, 377.
[28] Sally Roesch Wagner, *Sisters in Spirit: Haudenosaunee (Iroquois) Influence on Early American Feminists: A Model in Freedom* (Summertown, Tenn.: Book Publishing Company, 2001).
[29] Patricia A. Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice," (1992) 56 *Sask. L. Rev.* 237.
[30] Rosanna Deerchild, "Tribal Feminism Is a Drum Song" in Kim Anderson and Bonita Lawrence (eds.), *Strong Women Stories: Native Women and Community Survival* (Toronto: Sumach Press, 2006) at 97.
[31] *Anderson, A Recognition of Being*.
[32] Joyce A. Green, "Taking Account of Aboriginal Feminism" in Joyce Green (ed.), *Making Space for Indigenous Feminism* (Blackwood, N.S.: Fernwood Publishing, 2007) 20.
[33] Dawn Martin-Hill, "She No Speaks and Other Colonial Constructs of 'The Traditional Woman'" in Kim Anderson and Bonita Lawrence (eds.), *Strong Women Stories: Native Women and Community Survival* (Toronto: Sumach Press, 2006) 106 [*Martin-Hill, She No Speaks*].

and custom that have had specific negative impacts on First Nations women and their place in First Nations society and Canadian society generally. Dawn Martin-Hill explains: "In the name of resisting colonial domination, ideologies develop in which a complex multi-layered 'colonial' version of traditionalism justifies the subordination of Indigenous women. The perversion of traditional beliefs strips women of their historical roles and authority, transforming their status from leaders into servants. In pre-contact culture, we were regarded as Sacred Women and shared in the spiritual, economic and political authority of our societies. But under colonialism…we were devalued and lost our authority and voice."[34]

John Borrows has examined the debate over the utility of First Nations peoples implementing Western concepts of rights within their communities, including the specific debate over the merits of applying the Charter to First Nations communities.[35] He agrees with others that there are "intersections in the objectives of the Charter and traditional First Nations practice." These intersections he says could provide a meeting place for the potential transformation of rights discourse. By creating a conversation between rights and tradition, Borrows says the Charter presents First Nations with an opportunity to recapture the strength of principles which were often eroded through government interference. He acknowledges there are many dangers because rights can be applied in a culturally biased way. He sees the language of rights and the Charter as imperfect, but perhaps useful tools, to partially liberate First Nations people from discrimination. There are nevertheless several strong qualifiers in Borrows' analysis. For example, he suggests that the discourse of rights assists non-Aboriginal people in **partially** understanding First Nations when they use the discourse of rights.

He agrees that equality rights tools have helped at least to highlight the serious gender inequalities that First Nations women have suffered and acknowledges that First Nations women seeking gender equality rights through litigation often did not receive support in parts of the First Nations political community. Borrows sees progress in healing earlier divisions over different agendas to pursue collective and individual rights agendas. He suggests that "Rights talk could not overwhelm traditional convictions of symmetry in gender relationships while tradition could not ignore current concerns about equality in these same associations. Each discourse partook of the other and created an exchange of legitimacy." He calls for First Nations to "reinterpret the language of rights with vision and esteem, to honour and revere the lessons that tradition teaches us in the application of this discourse." The result of such an effort he suggests would be to "enlarge our existing and inherent right to self-government."

Non-Aboriginal experts have also suggested that First Nations governments will need to develop or utilize some form of rights vehicle, informed by their own knowledge traditions, to deal with conflicts within their communities as First Nations governments become more bureaucratized.[36]

PART 2—CULTURALLY RELEVANT GENDER-BASED ANALYSIS

[34] *Martin-Hill, She No Speaks* at 107.
[35] John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics," (1994) 43 *U.N.B. Law J.* 19.
[36] Russel L. Barsh, "Indigenous Peoples and the Idea of Individual Human Rights," (1995) 10 *Native Stud. Rev.* 35; Carole E. Goldberg, "Individual Rights and Tribal Revitalization," (2003) 35 *Ariz. State Law J.* 889.

In considering how best to implement section 1.2, the Canadian Human Rights Commission (the Commission) and the Canadian Human Rights Tribunal (the Tribunal) are faced with the challenge of how to bridge and mediate different knowledge traditions, cultural differences and legal traditions. This task will require the Commission and the Tribunal in their respective mandates to correctly identify and give due regard in the appropriate circumstances to First Nations' "legal traditions and customary law," while simultaneously correctly interpreting and respecting the principle of "gender equality."

Patricia Monture and Sherene Razack both speak of the need to carry out gendered analysis where "rights" issues are at play, but insist gendered analysis must be situated in the appropriate colonial, cultural and racialized contexts.[37] Bonita Lawrence likewise sees the necessity of properly contextualizing equality rights issues in Aboriginal communities, including gender equality issues, within an analysis that recognizes the mutually reinforcing dynamic of racism, sexism and colonialism.[38] Mary Ellen Turpel and Vina Starr have made similar criticisms about the failure of Canadian equality rights analysis to properly situate an understanding of equality within the context of First Nations social and cultural realities.[39]

The Native Women's Association of Canada (NWAC) has developed a general approach to carrying out culturally relevant gender-based analysis, with four key elements[40]:

1. Grounding all policy and legal analysis in an understanding of pre-contact gender relations when First Nations citizens, female and male, were valued equally and lived in self-determining communities.

2. Identifying the negative impacts on individuals, families and nations of colonization and assimilation policies, including the negative impact on gender relations that accompanied colonization.

3. Conducting an analysis of current realities (informed by the first two elements) and identifying areas requiring change to meet all the equality needs and rights of First Nations women (e.g. as women, as indigenous, as disabled) and in a way that reflects the cultural diversity of First Nations and their varying economic and social situations. This can involve collecting relevant socio-economic statistics, analyzing current social conditions and analyzing the impacts of legislation that lead to gender inequalities.

4. Developing and implementing strategies and solutions informed by the first three elements. These strategies and solutions may require sameness of treatment in some cases and, in others, equality may require gender-specific measures, indigenous-specific

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[37] *Monture, The Right of Inclusion* 39 at 48; Sherene Razack, "Beyond Universal Women: Reflections on Theorizing Differences Among Women" (1996) 45 *U.N.B. Law J.* 209.
[38] Bonita Lawrence, "Gender, Race and the Regulation of Native Identity in Canada and the United States: An Overview," (1999) 18 *Hypatia [Special Issue: Indigenous Women in the Americas]* 3.
[39] Mary Ellen Turpel, "Home/Land" (1991) 18 *Can. J. Fam. Law* 17; Vina Starr, "The Charter and Aboriginal Rights" in *The Charter: Ten Years Later*, Proceedings of the April 1992 Colloquium of the Canadian Bar Association and the Department of Justice of Canada (Cowansville, Que.: Les Éditions Yvon Blais, 1992) 153.
[40] Native Women's Association of Canada, *Culturally Relevant Gender Based Analysis: An Issue Paper* (Ottawa: NWAC, 2007).

measures and/or measures specifically developed for indigenous women or women with disabilities or other needs.

These four elements are visually represented as points around a circle with the foundational concept of "balance" situated in the centre. The concept of "balance" represents an approach that recognizes the relationship between gender inequality and other forms of discrimination and oppression **and** embraces traditional Aboriginal values consistent with the equal value of women and men. This approach to gender-based analysis has a broad application to policy and legal issues in general. In this paper, culturally relevant gender-based analysis is applied to equality rights analysis generally, and the potential meaning and application of section 1.2 of the CHRA and its treatment of gender equality.

The methods usually adopted to conduct intersectional analysis of complex forms of discrimination (equality rights analysis examining some combination of grounds such as gender, marital status, family status, race, culture or nation) still tend to compartmentalize First Nations people's experience of identity. The issue here is: Has Canadian equality rights analysis met the standard it has set itself, namely to reflect the way discrimination is actually experienced? Approaches to equality rights analysis that are not Eurocentric must include a culturally relevant gender perspective and a holistic analysis of First Nations men and women's experience of discrimination as it affects collective and individual rights. Such an approach would recognize that the discriminatory impacts of policies and laws affecting gender, race, culture, nation, family, marital status and the collective rights of First Nations people often cannot be separated, and this reality needs to be addressed in equality rights analysis in a First Nations context.

PART 3—IMPACTS OF THE INDIAN ACT *REGIME USING A CULTURALLY RELEVANT GENDER-BASED ANALYSIS*

a. Overview of the Impacts of the Indian Act Regime on Individual and Collective Rights

This Part will review Part III of the *Balancing Individual and Collective Rights Report*, entitled "Impacts of the *Indian Act* Regime," and provide a culturally relevant gender-based analysis of its analysis and findings. This analysis will identify differential gender impacts of the *Indian Act* regime on individual rights and differential gender impacts on the rights of First Nations women to enjoy collective rights. Part III of the *Balancing Individual and Collective Rights Report* is intended to provide "a general context for understanding the documented and potential impacts of the *Indian Act* and its accompanying policies and programs on the social institutions and interactions most relevant to the application of the *Canadian Human Rights Act* to First Nations"[41] through a review of legal commentary and social science literature. The report offers the following specific conclusions about the impact of the *Indian Act* at page 62:

- There is a continuing remnant of the historic discriminatory treatment of women married to non-members, and related distinctions in status and membership entitlements as between cousins and, in some cases, siblings;

[41] *Balancing Individual and Collective Rights,* at 44.

- A non-traditional concept has crept into the dialogue concerning "collective" inclusion and exclusion boundaries, most often associated with status entitlement distinctions, and with reserve residence;

- The contested nature of Band Councils (and in some cases Tribal Councils) as "creatures of the *Indian Act*" remains potent, particularly in relation to claims that First Nations governments are acting in accordance with legal traditions or customary law;

- There is a suspicion common in some communities that "Bill C-31" Indians and long-time non-residents are importing alien and threatening conceptions of "equality" and "individualism," particularly when they cite Charter or Human Rights legislation; and

- The potential isolation and even retribution of *[sic]* complainants is a real concern given the degree of concentration of power and discretion over services vested in First Nations governments.

The first conclusion quoted above speaks to gender equality issues in a very narrow way. From a First Nation cultural perspective that includes a gender lens, problems relating to gender equality and the *Indian Act* extend beyond residual sex discrimination embedded in *Indian Act* provisions. These problems include the lack of protective legislation in key areas relating to family law that reflect First Nations cultural values and legal traditions; and cultural bias in jurisprudence and in legal methods of analysis that affects the perception and resolution of gender equality issues.

The repeated failure of domestic human rights instruments to deliver much-needed protection is a significant and persistent issue. Even the recent *McIvor* decision by the British Columbia Court of Appeal (BCCA) presents problems because of the narrowing of the grounds on which discrimination was found, and the narrowing of the scope of discrimination and the remedy available, in large part due to the application of purportedly neutral legal principles of non-retroactivity and vested rights. Individually, these legal principles have the appearance of neutrality but their combined application to the situation of First Nations women ends up providing a rationale for **not** addressing the multiple aspects and actual scope of discrimination claimed by First Nations women. In addition, some of the techniques used in equality rights analysis, such as the heavy reliance on the use of comparator groups, and the simplifying of analysis by focusing only on one ground of discrimination when more than one is claimed, carry the risk of simplifying the decision maker's understanding of the scope, impact and dynamics of the discrimination when there are multiple grounds, and multiple forms of discrimination on a single ground over a long period of time. The *McIvor* decision demonstrates some of the limitations of equality rights analysis and jurisprudence to respond to complex cases involving multiple aspects of identity and multiple grounds of discrimination (such as race, gender, culture, marital status and family status).

The remaining conclusions (quoted above) in Part III of the *Balancing Individual and Collective Rights Report* appear to focus on political issues within First Nations communities and are somewhat imprecise and narrow in their identification of the collective rights and interests impacted by the *Indian Act* and its judicial interpretation.

It first should be noted that there are several seminal reports that together provide a general picture of the historical and contemporary impacts on the collective and individual rights and interests of the *Indian Act* on First Nations people. These reports include:

- *The Report of the Special Committee on Indian Self-Government* [the "*Penner Report*"] (Canada, Indian Self-Government, minutes of proceedings of the Special Committee on Indian Self-Government, First Session of the Thirty-second Parliament, 1980-81-82-83, Issue No. 40);

- the 1982 report of the House of Commons Subcommittee on Women and the *Indian Act*;

- Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, 1978); and

- the Final Report of the Royal Commission on Aboriginal Peoples, 1997, which includes a chapter on Aboriginal women.

These reports and studies, in addition to the legal and social science literature, have demonstrated that the *Indian Act* has had, and continues to have, significant negative impacts for both individual and collective rights of First Nations people(s). In the area of governance, for example, the *Indian Act* recognizes pre-existing powers of First Nations to determine leadership selection according to custom[42] and independent of the *Indian Act*. However the *Indian Act* also provides the Minister of Indian Affairs the power to impose the *Indian Act* election system as provided by the Act and its regulations. Canada was not able to impose the *Indian Act* system on all First Nations, but over many years made numerous efforts to pressure First Nations to abandon their traditional forms of governance in favour of the federally designed election system under the *Indian Act*.[43] Even today, although First Nations can "revert" to custom forms of governance if they are currently operating elections under the authority of section 74 of the *Indian Act*, federal policy controls this process. The result is that custom forms of band governance as recognized by the Department of Indian Affairs typically do not reflect First Nations traditions. Federal policy in the form of the "Conversion to Community Election System Policy" does not tolerate First Nations deviating from a federally determined baseline of what the federal government regards as acceptable forms of governance.

The *Penner Report* concluded that "Canada is obliged to protect and promote the rights of the peoples of the Indian First Nations in a manner consistent with the rights guaranteed in the international covenants Canada has signed—the *United Nations Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights,* and the *Helsinki Final Act* of 1975. These agreements guarantee both the fundamental collective right of peoples to be self-governing and the basic human rights of individuals." The Special Committee on Indian Self-Government concluded that the implementation of all of its recommendations was required to meet Canada's international human rights obligations. This report also concluded that First

[42] *Bone* v. *Sioux Valley Indian Band No. 290*, 107 F.T.R. 133, [1996] 3 C.N.L.R. 54 (F.C.T.D.); *McLeod Lake Indian Band* v. *Chingee* (1998), 165 D.L.R. (4th) 358, [1999] 1 C.N.L.R. 106 (F.C.T.D.).

[43] Wayne Daughtery and Dennis Madill, *Indian Government Under* Indian Act *Legislation, 1868–1951* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1980); Report of the Royal Commission on Aboriginal Peoples, Vol. 1, Chapter 9; Vic Satzewich and Linda Mahood, "Indian Affairs and Band Governance: Deposing Indian Chiefs in Western Canada, 1896–1911," (1994) 26 *Can. Ethn. Stud.* 40.

Nations should be subject to international human rights standards respecting individual rights in developing membership laws.

The central challenge of addressing the overall negative impact on collective and individual rights and interests from the *Indian Act* remains. In addition, there are equality rights issues that can arise from First Nations government decision-making and lawmaking both under, and outside, the *Indian Act*. The shape of this challenge has changed somewhat as a result of the 1985 amendments to the *Indian Act*, but not the size, scope or complexity of the issues within it.

The 1985 amendments are often characterized as a "compromise" conceived to respond to what was then perceived to be competing agendas to address collective and individual rights. The outcome of the legislative process is commonly regarded within the First Nations community as falling short on both accounts—for all the intended beneficiaries of the legislative project, male and female. The supposed compromise is reflected in the fact that the 1985 *Indian Act* amendments were acknowledged to remove some, but not all, sex-based discrimination and they recognized only delegated, not inherent, law-making powers of First Nations over band membership issues. This state of affairs was further aggravated, for both collective and individual rights and interests, by:

- The retention of federal control over entitlement to Indian status which now almost exclusively relies on descent or blood quantum requirements for those born after 1985[44]; and
- The retention of ultimate federal control over many other matters that affect individual and collective rights and interests, from land management to wills and estates.

Much of the literature concludes that the 1985 *Indian Act* amendments have failed to meet the central challenge of respecting both collective and individual rights. Given the recognized interdependence between the right to self-determination and individual human rights, including the individual human right to be free of discrimination based on sex, culture and race, the central barrier to progress appears to lie in the colonial underpinnings of the Act itself. The *Indian Act*'s colonial inspiration and mindset are reflected in the retention of federal legislative control, its paternalistic governance structures and oversight and the absence of any human rights content, among many other deficiencies. In addition, settler colonialism in North America and elsewhere has used law to manipulate racial definitions of indigenous peoples (among other techniques) as a tool of assimilation to further the acquisition of indigenous land.[45] The way in which this has been carried out through the *Indian Act* and its related policies are fundamentally antithetical to the realization of both individual and collective rights.

As mentioned in Part 2, NWAC has developed a general approach to carrying out culturally relevant gender-based analysis with four key elements. This general approach to examining First Nations legal and policy issues in a culturally relevant and gendered way will be applied in reviewing Part III of the *Balancing Individual and Collective Rights Report*, by focusing on:

[44] This approach also has the impact of reducing the overall number of people who qualify for Indian status.
[45] Patrick Wolfe, "Land, Labor and Difference: Elementary Structures of Race," (2001) 106 *Am. His. Rev.* 966; "Settler Colonialism and the Elimination of the Native," (2006) 8(4) *J. Genocide Res.* 387.

- Issues respecting cultural and gender bias in legal jurisprudence and analysis as well as social science literature;

- The relationship between concepts of gender difference, cultural and racial difference and colonialism and relating these to a substantive equality analysis;

- How concepts of gender difference and gender inequality have been impacted by concepts and representations of cultural difference in the law relating to First Nations people;

- The relationship between the colonial approach in the *Indian Act* to defining collective identity under the *Indian Act* and colonial approaches to defining individual identity categories in law and differential gender impacts flowing from these; and

- The relationship between property concepts introduced under the *Indian Act,* and concepts of gender difference and gender inequality.

In examining the history and the contemporary forms of discrimination flowing from the *Indian Act*, the multi-layered nature of discrimination involving gender, race and culture will be evident in the analysis.

As the *Balancing Individual and Collective Rights Report* observes, the *Indian Act* has disrupted and, at times in its history, attempted to eliminate First Nations governance and property systems through various tools, including legislative and policy assaults on kinship systems and by manipulating gendered definitions of First Nations' identity, family, community and nation. The report also points out the difficulty in identifying the specific impacts of these measures on each individual First Nation. This task is difficult in part due to the scope of political, cultural and legal diversity of First Nations and their diverse experience with colonization and their various strategies to resist colonization.

An additional challenge that deserves more attention, as it may also implicate the handling of evidentiary issues respecting complaints of discrimination where section 1.2 is relevant, is how to manage the risk of cultural and gender bias in legal jurisprudence and analysis as well as social science literature. The *Balancing Individual and Collective Rights Report* asserts that: "The overlay of non-First Nations laws, policies, and institutions has resulted in a challenged authenticity for First Nations legal traditions and customary laws" (at p. 25). The extent and source of such "challenged authenticity" is not sufficiently elaborated on to make such a generalization given the large number and diversity of First Nations. The *Balancing Individual and Collective Rights Report* goes on to conclude that:

> Claims of "authenticity" for collective rights or interests therefore need to be assessed. First Nations practices may not always be held as a valid basis for discrimination against individual rights or interests. Procedures or techniques to distinguish between what is "traditional" and what is derivative of introduced forms need to be considered. The social science and historical literature does offer guidance in considering the nature and meaning of legal traditions and customary laws, what might "balance" individual and collective rights and interests, and where to turn in assessing the authenticity of First Nations legal traditions and customary laws.

A core issue to be kept in mind when examining legal jurisprudence, legal commentary and social science literature is the not small risk of cultural bias, given that the vast majority of this material has been generated by non-Aboriginal people, within institutions and knowledge systems largely controlled by non-Aboriginal people. In a previous study, NWAC has concluded:

> In adopting a multidisciplinary research approach that examines the work of indigenous and non-indigenous authorities, we are confronted with issues about what is considered knowledge, how it is generated and how it is used. We must consider how the conventions of western academic research carried out largely by non-indigenous people have in many cases perpetuated colonial thinking and its twin companions—sexism and racism. In other words, we cannot properly understand gender issues and gender relations within First Nations societies or within Canadian society generally as these affect First Nation women, without grappling with the historical legacy of many of the works considered "authorities" in this area. Several First Nation scholars have argued this point persuasively.[46]

In the context of analyzing gender equality issues, U.S. scholar Devon Mihesuah cautions that "Reconstructions of the intricacies of Indian women's lives must be specific to time and place, for tribal values, gender roles, appearances, and definitions of Indian identity have not been static." [47] She also observes: "Literature about American Indian women has increased dramatically during the past twenty years. Recent works reflect the efforts ethno historians have made in re-creating Indian women's histories, and their publications illustrate sensitivity to their positions as interpreters of the lives, cultures, and histories of Others. While female scholars who study American Indian women have made significant inroads into their histories, many interpretations remain incorrect and undeveloped, providing only partial answers to complicated questions about Native women. Their studies also do not connect the past to the present, which is why we should be writing history in the first place."[48]

Further evidence of the dangers of histories and ethnographic studies of First Nations people by colonial sources is provided in a comparison of Samuel Hearne's notes to the published journal of his notes regarding the situation of Chipewyan women. Significant differences, resulting in a negative picture of gender relations in Chipewyan society, were relied on by social science

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[46] Native Women's Association of Canada, *First Nations Identity, Citizenship and First Nations Women* (Ottawa: NWAC, 2010). The authorities cited for this conclusion include: Bonita Lawrence, "Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada" in Sherene H. Razack (ed.), *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 21; Robert E. Bieder, "The Representation of Indian Bodies in Nineteenth Century American Anthropology," (1996) 20 *Am. Indian Q.* 165; Sandy Gonzalez, "Intermarriage and Assimilation: The Beginning or the End?," (1992) 8 *Wicazo Sa Rev.* 48; Jonathan Peyton and Robert L.A. Hancock, "Anthropology, State Formation and Hegemonic Representations of Indigenous Peoples in Canada, 1910–1939," (2008) 17 *Native Stud. Rev.* 45; Bruce M. White, "The Woman Who Married a Beaver: Trade Patterns and Gender Roles in the Ojibwa Fur Trade," (1999) 46 *Ethnohist.* 109.

[47] Devon A. Mihesuah, "Commonality of Difference: American Indian Women and History," (1996) 20 *Am. Indian Q.* 15 at 16 [*Mihesuah, Commonality of Difference*].

[48] *Mihesuah, Commonality of Difference* at 15.

commentary and have contributed to stereotypes of the traditional role of Chipewyan women as "beasts of burden."[49]

There also are bias issues to address at the core of Canadian jurisprudence and legal culture, as Kent McNeil notes. He cites as an example that the Constitution of Canada has been conceptualized in a way that has excluded Aboriginal peoples from the structures of government.[50] Mary Ellen Turpel and Timothy Dickson similarly discuss how even constitutional law provisions and analyses having the express purpose of respecting First Nations' cultural difference can end up translating their perceived "otherness" into legal "rights" of difference that are still subordinated to the cultural and legal values of the Euro-Canadian legal system.[51] Legal recognition of difference that assumes a significant level of legal subordination at the level of the collective expression of First Nations rights, legal traditions and customary law presents a fundamental challenge to any notion of realizing substantive equality at a collective and individual level.

In arguing for a focus on what justice means for Aboriginal people, Monture states that the Canadian justice system as a whole is a continuous source of oppression for First Nations people and includes in a list of examples, the section 67 exemption in the CHRA.[52] The many examples of explicit discrimination that have oppressed Aboriginal peoples, she says, show that "All oppression of Aboriginal Peoples in Canada has operated with the assistance and the formal sanction of the law. The legal system is at the heart of what we must reject as Aboriginal nations and Aboriginal individuals. Although I have never experienced the mainstream system of law as a just system but only as an instrument of my oppression, I still believe that there ought to exist a relationship between law and justice."[53]

Ways of understanding the world and problem solving through legal process are, in many ways, culturally bound. This reality complicates what Timothy Dickson calls the "challenge of inter-cultural judgment."[54] The characteristics typical of European-sourced legal systems are in many ways distinct from those of the peoples subjected to European colonization.[55] Western (which includes Euro-Canadian) legal analysis, and equality rights analysis in particular, fundamentally rely on problem-solving techniques involving categorization and comparison of categories,

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[49] Heather Rollason, "Some Marked Differences in the Representations of Chipewyan Women in Samuel Hearne's Field Notes and His Published Journal" in David T. McNab (ed.), *Earth, Water, Air, and Fire: Studies in Canadian Ethnohistory* (Montréal: Wilfrid Laurier University Press, 1998), 263.

[50] Kent McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments," (1994) 7 *West. Legal Hist.* 113 at 114.

[51] Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," (1989–1990) 6 *Can. Hum. Rts. Y.B.* 3; Timothy Dickson, "Section 25 and Intercultural Judgment," (2003) 61 *U.T. Fac. L. Rev.* 141 [*Dickson, Section 25 and Intercultural Judgment*].

[52] Patricia Monture-Okanee, "Thinking About Aboriginal Justice: Myths and Revolution" in Richard Gosse, James Youngblood Henderson and Roger Carter (eds.), *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice.* Saskatoon, Sask.: Purich Publishing, 1994, 222. [*Monture-Okanee, Thinking About Aboriginal Justice*].

[53] *Monture-Okanee, Thinking About Aboriginal Justice* at 223.

[54] *Dickson, Section 25 and Intercultural Judgment*.

[55] Kenneth B. Nunn, "Law as a Eurocentric Enterprise," (1997) 15 *Law & Inequality* 323 [*Nunn, Law as Eurocentric Enterprise]*.

including categories of people and categories of aspects of people.[56] While this may seem natural to jurists trained in Canadian law schools, it is not a comfortable approach to problem solving for many First Nations people.[57] The problem of categorizing, and the attendant risk of essentializing the very people equality rights law is intended to help, has also been extensively commented on, and debated, by several noted human rights scholars in Canada concerned with equality seekers of various kinds, including First Nations people.[58]

The heavy reliance of equality rights analysis on categories and on comparisons of abstract concepts of aspects of human experience like gender and race can impair judicial capacity to perceive and understand how discrimination is actually experienced by those subjected to complex forms of intersecting discrimination. This has implications for equality law's capacity to recognize discrimination, and to develop appropriate remedies. For example, the negative outcome in *Lavell* resulted not only from the now rejected concept of equality as formal legal equality, but also from the judicial system not being capable of recognizing and responding to discrimination fuelled both by racial and sex-based discrimination. Kathleen Jamieson notes that the argument that First Nations women faced discrimination on the basis of race and sex was completely left aside in the majority decision.[59]

An intersectional analysis of discrimination grounded in the experience of First Nations women will be especially important in cases arising from discrimination against First Nations women based on their status as persons reinstated pursuant to the 1985 amendments to the *Indian Act* (Bill C-31). Cases have been brought under the Charter and the CHRA raising issues concerning discrimination against persons reinstated under the 1985 amendments to the *Indian Act* by First Nations women against First Nations governments.[60] Cases have also been brought against Canada by First Nations women based on their status as persons reinstated to Indian status under Bill C-31, relying on multiple grounds of discrimination including sex, and marital status.[61]

An intersectional analysis will be important in examining claims of discrimination against First Nations governments in the areas of programs, service and accommodation because of the

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[56] *Nunn, Law as Eurocentric Enterprise*; Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca & London: Cornell University Press, 1990).

[57] See, for example, James [sakéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996) 23 *Man. Law J.* 1; Patricia A. Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice," (1992) 56 *Sask. Law Rev.* 237; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nation Women," (1993) 6 *C.J.W.L.* 174.

[58] Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases," (1993) 6 *C.J.W.L.* 25; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," (1994) 19 *Queen's Law J.* 194; Douglas Kropp, "'Categorical' Failure: Canada's Equality Jurisprudence—Changing Notions of Identity and the Legal Subject," (1997) 23 *Queen's Law J.* 201; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences," (2001) 13 *C.J.W.L.* 37; Denise G. Rheaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law," (2002) 40 *Osgoode Hall Law J.* 113.

[59] Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, 1978) at 85.

[60] *Canada (Human Rights Commission)* v. *Gordon Band Council*, [2001] 1 F.C. 124 (C.A.); Raphael v. Montagnais [1995] C.H.R.D. No. 10; *Scrimbitt* v. *Sakimay Indian Band Council*, [2000] 1 C.N.L.R. 205 (F.C.); *Six Nations of the Grand River* v. *Henderson*, [1997] 1 C.N.L.R. 202 (Ontario Court of Justice).

[61] *McIvor* v. *Canada (Registrar of Indian and Northern Affairs*), 2009 BCCA 153 (CanLII); leave to appeal denied 2009 CanLII 61383 (S.C.C.).

diverse ways in which the combined impact of federal and First Nation decision making can affect individual rights.

Cultural contingency also applies to concepts of property and how to regulate it through law in various forms, because cultural factors shape how different cultures conceive of inanimate objects, land and humans relations: "The kinds of social relations that underlie a conception of property include the way that a culture creates community in the relations among its members with respect to land use, knowledge of territory, entitlements to use, and the procurement of goods, among others. Property is an expression of social relationships because it organizes people with respect to each other and their material environment. Property is not so much a statement of a thing as it is a description of a set of practices that we go through in our daily life with others."[62]

In the absence of clear recognition of First Nations governments through policy, legislation or constitutional amendment, the colonial legal framework of the *Indian Act* continues to operate with its impoverished model of band governance, underpinned by ultimate federal control, and various negative impacts on collective and individual rights and interests in a wide range of matters, which include Indian status, band membership (for those not assuming control of band membership codes under section 10), the legal relationship between Indian status and band membership, reserve land management, wills and estates.

The Commission has recognized the limitations of equality rights litigation alone as a tool to address equality rights issues under the *Indian Act* and has stated its support for "a comprehensive review of the *Indian Act* until an approach to governance that recognizes first nations' inherent right to self-government is in place." The Commission has explained why such a study is needed:

- A case-by-case, section-by-section approach to resolving discriminatory provisions of the *Indian Act*, including issues relating to residual sex discrimination, will be costly, confrontational and time consuming; and
- The CHRA places the burden on complainants, who do not necessarily have access to legal resources.[63]

b. Relationship Between Concepts of Gender Difference, Cultural and Racial Difference and Colonialism

As noted earlier, gender is a socially constructed concept and the understanding of its content subject to cultural variables. Concepts of racial and cultural difference are likewise socially constructed and intimately connected with processes of colonialism in many parts of the world. For example, Edward Said's seminal study of colonialism and colonial thought described Orientalism as a whole system of thought, communication and institutional processes and the exercise of power founded on a belief in inherent differences between "the West" (Europeans) and "the East" (the Orient), differences identified and defined by the West. Orientialism as a

[62] Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership," (2000) 13 *Can. J. Law & Jurisprudence* 3.
[63] Canada, House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Evidence,* 40th Parliament, 3rd Session, Issue 11: 2 (22 April 2010) (Chief Commissioner Jennifer Lynch).

system of thought, Said has argued, pervades academia, law and government administration such that it constitutes a "Western style for dominating, restructuring, and having authority over the Orient," meaning the Western conception of the Orient in which stereotypes play an important role.[64] Meyda Yeğenoğlu has shown in her feminist study of Orientalism that representations of cultural difference can be inextricably linked to representations of sexual difference, and that representations of cultural and sexual difference are constitutive of each other and of colonial difference.[65]

Homi Bhabha has also written incisively about the dynamics and psychology of colonial relationships and the role that stereotyping plays as an instrument of control. Bhabha describes the phenomenon of "mimicry" and comments on the ambivalent nature of colonial stereotypes. This is evident in the impulse of the colonizing power to create and control "a reformed, recognizable Other, as a subject of a difference that is almost the same, but not quite."[66]

In North America, a similar colonial discursive force flows from the *Indian Act* regime in a way that is pervasive and which assumes new forms, even as old ones like paragraph 12(1)*(b)* provision are eliminated. In her important study of how "mixed-blood" urban Native people understand and negotiate their own identities, Bonita Lawrence has observed that the *Indian Act* is much more than a body of law that has controlled every aspect of status Indian life for more than a century, it also provides "a conceptual framework that has organized contemporary First Nations life in ways that have been almost naturalized, and that governs ways of thinking about Native identity."[67]

Colonialism in North America, and the *Indian Act* in particular, has not only imposed gender values reflecting European cultural norms, it has created and imposed specific racialized concepts of gender for application to indigenous cultures. Racialized gender stereotypes signify how racism and sexism can operate simultaneously and inseparably in many instances. In the case of First Nations peoples, NWAC has concluded from a review of legal and social science literature (as well as the everyday experience of First Nations women themselves) that:

> Legally sanctioned gender/sex discrimination under the *Indian Act* aimed at First Nations women was part of a larger pattern of racist and sexist identities created and applied by the settler society to First Nations women and men. Several authorities including Bethany Ruth Berger[68], Sarah Carter[69], Allison Dussias[70], Rose Stremlau[71],

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[64] Edward W. Said, *Orientalism* (New York: Vantage Books, 1979) at 3.
[65] Meyda Yeğenoğlu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism* (Cambridge: Cambridge University Press, 1998).
[66] Homi K. Bhabha, *The Location of Culture* (London & New York: Routledge, 1994) at 122.
[67] Bonita Lawrence, *"Real" Indians and Others* (Vancouver & Toronto: UBC Press) at 25 [*Lawrence, Real Indians and Others]*.
[68] Ruth Bethany Berger, "Indian Policy and the Imagined Indian Woman," (2004) 14 *Kan. J. Law & Public Policy* 103.
[69] Sarah Carter, "Categories and Terrains of Exclusion: Constructing the 'Indian Woman' in the Early Settlement Era in Western Canada" in Joy Parr and Mark Rosenfeld (eds.), *Gender and History in Canada* (Toronto: Copp Clark, 1996) 30–49.
[70] Allison M. Dussias, "Squaw Drudges, Farm Wives, and Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights," (1999) 77 *N.C. Law Rev.* 637.
[71] Rose Stremlau, "To Domesticate and Civilize Wild Indians: Allotment and the Campaign to Reform Indian Families," (2005) 30 *J. Fam. Hist.* 265.

> Kim Anderson[72] and Elizabeth Vibert[73] have described the content and function of these broad stereotypes in the U.S. and Canada. These imposed stereotypes were built on European assumptions and perceptions of the respective gender roles of First Nations women and men, their gender relations and what these relations should be. For example, because First Nations women were typically engaged in agriculture rather than First Nations men, European observers often interpreted this gender role as reflecting oppression of First Nations women by First Nations men who were stereotyped as "lazy" because they left agriculture to women and restricted their food gathering activities to hunting, fishing and trapping. Europeans judged agriculture and hunting activities from a European frame of reference respecting gender and class: men should farm, women should remain in the home and hunting was a leisurely endeavour reserved to the upper classes. As a result, European settler governments failed to recognize that the role of First Nations women in agriculture actually reflected a position of balance, equality and power within their nations. Gendered and racialized stereotypes of First Nations people served to rationalize, among other things, the dispossession of First Nation peoples from their lands, resources and livelihoods[74] and a campaign to replace First Nations women with First Nation men in agricultural activities and to place First Nations men in a position of power over First Nation women.
>
> Sexist and racist values were reflected in Indian Affairs law and policy in the U.S. and Canada in various forms from Indian agricultural policy to laws respecting Indian status to the exclusion of First Nations women from rights to vote and to hold and inherit property among others legal disabilities. A particularly damaging element of this colonial campaign was the negative impact on the status of First Nation women within their own societies through the undermining of the more egalitarian norms of First Nations societies in regard to women's status and gender relations. Another rupture to gender relations within First Nations communities was the devaluation of the traditional subsistence pursuits of First Nations men.[75]

Prior to 1985, the myth of the vanishing native (discussed by Bonita Lawrence and others[76]) was fuelled by the operation of law such as the sexually discriminatory marrying-out rules and other forms of mandatory "enfranchisement." Since 1985, the blood quantum rule implicit in sections 6 and 7 of the Indian status entitlement provisions reinforces the racialization of First Nations

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[72] Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Second Story Press, 2000).
[73] Elizabeth Vibert, "Real Men Hunt Buffalo: Masculinity, Race and Class in British Fur Traders' Narratives" in Joy Parr and Mark Rosenfeld (eds.), *Gender and History in Canada* (Toronto: Copp Clark, 1996) 50.
[74] Sarah Carter, "Categories and Terrains of Exclusion: Constructing the 'Indian Woman' in the Early Settlement Era in Western Canada" in Joy Parr and Mark Rosenfeld (eds.), *Gender and History in Canada* (Toronto: Copp Clark, 1996) 30.
[75] Elizabeth Vibert, "Real Men Hunt Buffalo: Masculinity, Race and Class in British Fur Traders' Narratives" in Joy Parr and Mark Rosenfeld (eds.), *Gender and History in Canada* (Toronto: Copp Clark, 1996) 50; Ruth Bethany Berger, "Indian Policy and the Imagined Indian Woman," (2004) 14 *Kan. J. Law & Public Policy* 103.
[76] Its origins and functions in Canada are discussed by Bonita Lawrence, *"Real" Indians and Others, Mixed Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004) at 5. *[Lawrence, "Real" Indians and Others].* In the U.S., the theory of the "vanishing Indian" is discussed by Kevin Noble Maillard, in "The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law," (2007) 12 *Mich. J. Race & Law* 351 and by Laura Ferguson, "Indian Blood or Lifeblood: An Analysis of the Racialization of Native North American Peoples," M.A. thesis (Montana State University, 2005) at 36.

people and functions as a new means of implementing the vanishing native myth through federal law, regardless of First Nations law in any form. In this way, the *Indian Act* Indian status entitlement provisions and the remaining, though weakened linkage to band membership entitlement, continue to negatively impact the collective identity and rights, and the individual identity and rights of First Nations people.

As Lawrence[77] and others have observed, the lingering, and interrelated, colonial constructs of gender, race and culture applied to First Nations men and women can influence First Nations' decision making to the extent these constructs have been incorporated through colonialism. Entrenched colonial constructs can also influence decision making by outside bodies such as courts and tribunals, which may mistake the gender specificity of First Nations knowledge traditions for gender inequality, as Monture argues (as noted above). Just as important as recognizing discrimination couched as traditional or customary law is the capacity to recognize the ways in which First Nations have been successful in resisting assimilation and in restoring and applying their cultural values and legal traditions.

In a previous research study, NWAC has noted that while some citizens may speak with more authority than others based on their expertise, knowledge or experience, each individual in the collective may hold and express an opinion and participate in collective decision making. In a Canadian context, subsection 35(4) of the *Constitution Act, 1982* recognizes this participatory dimension of collective rights in a gender context, by guaranteeing subsection 35(1) Aboriginal and Treaty rights equally to male and female persons.[78]

Within an international human rights law analysis, Eva Brems maintains that there is a "participatory dimension" to collective rights, meaning that individual members of a culture or people are equally entitled to participate in discussions on what is tradition or culture at any given point.[79] Regarding collective rights protections for culture, Brems argues that when issues regarding protection of cultural values arise, there cannot be a static understanding of "tradition." She further argues that community members, male and female, must have an opportunity to shape the legal expression of contemporary cultural norms.

This analysis is supported by Article 44 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which states that "All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals."

Consistent with these principles is the analysis put forward by John Borrows in *Canada's Indigenous Constitution*, where he provides a thorough analysis of the meaning and scope of First Nations legal traditions and customary law while recognizing the role for international human rights norms in their contemporary application and the need to protect against those who

[77] *Lawrence, "Real" Indians and Others.*
[78] Native Women's Association of Canada, *First Nations Identity, Citizenship and First Nations Women* (Ottawa: NWAC, 2010).
[79] Eva Brems, *Human Rights: Universality and Diversity* (The Hague: Kluwer Law International, 2001) at 490; "Protecting the Human Rights of Women" in Gene M. Lyons and James Mayall (eds.), *International Human Rights in the 21st Century: Protecting the Rights of Groups* (Lanham: Rowman & Littlefield Publishers Inc., 2003) 100.

would distort tradition for their own advantage and the disadvantage of others.[80] (Borrows also supports the application of the Charter to First Nations in a legal framework that includes a harmonization act to explicitly recognize and incorporate First Nations legal traditions.)

c. First Nations Governance Outside the Indian Act Regime

It should also be kept in mind that some First Nations have negotiated their way out of the *Indian Act* regime through self-government agreements. In these cases, the *Indian Act* no longer applies to their citizens, with one notable exception—the Indian status entitlement provisions.

While the federal government generally takes the position that the CHRA must apply to First Nations as an outcome of self-government agreements, and tries to achieve this through general provisions in self-government agreements that address the application of federal law and its relationship to First Nation law, some self-governing First Nations assert that they have an inherent jurisdiction over human rights matters. Still other First Nations accept the application of the CHRA and have specific provisions addressing how the CHRA will apply in their communities.[81] In British Columbia, a provincial human rights tribunal held that jurisdiction over human rights matters involving the Nisga'a Lisims government and its related agencies fell within the exclusive jurisdiction of the federal government because of subsection 91(24) of the *Constitution Act, 1867* and the CHRA and that the provincial human rights body had no jurisdiction regarding these First Nation entities. The British Columbia Human Rights Tribunal also concluded that "Parliament has exercised its legislative authority over the human rights of Indians and lands reserved for Indians in enacting the *Canadian Human Rights Act.*"[82]

Other First Nations have negotiated agreements that partially remove them from the *Indian Act* regime and the section 67 exemption has never applied to these sectoral self-government arrangements. Most notable of this type of "sectoral" Canada–First Nations agreement is the First Nations Land Management Initiative (FNLMI). The FNLMI was launched by a group of 14 First Nations and led to the enactment of the *First Nations Land Management Act* (FNLMA) in 1999. The initiative has since grown to include 26 First Nations that are "operational" under federal implementing legislation, the *First Nations Land Management Act*. To become operational under the FNLMA, a First Nation land code and an individual agreement with Canada must be ratified by the community through a referendum. Each First Nation land code must provide for a community process to develop and consult on the required matrimonial real property law. Through the development of a land code, First Nations can decide what specific individual interests in reserve land can be recognized and registered in the First Nations Land Registry. This registry is maintained by the Department of Indian Affairs and Northern Development under the authority of the land codes of the participating First Nations and the authority of federal regulations.

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[80] Borrows, John, *Canada's Indigenous Constitution* (Toronto, University of Toronto Press, 2010) [*Borrows, Canada's Indigenous Constitution*].

[81] See, for example, section 291 of Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation, section 291.

[82] *Azak* v. *Nisga'a Nation*, [2004] 2 C.N.L.R. 6.

The section 67 exemption never extended to First Nation decision making under the FNLMA. The issue of customary law may arise under the FNLMI legal framework because the FNLMA essentially requires the codification of any customary land interests in reserve lands because while land codes may recognize and regulate customary land interests, they must also identify what specific individual interests in reserve land can be recognized and registered in the First Nations Land Registry. In a 2004 decision, *Many Guns v. Siksika Nation Tribal Administration*,[83] an Alberta court held that First Nations hold a customary interest in reserve lands as an aspect of Aboriginal title and that this interest arises independent of the *Indian Act*. One form of such customary interest is reserve land "held by custom of the band." The court also held that these customary interests are recognized by the FNLMA.

Under the FNLMA, and First Nation laws adopted under the FNLMI legal framework, non-members are precluded from acquiring any permanent legal interest in reserve lands. This restriction also applies in a matrimonial property context. It is necessary in order to implement the principle that the collective interest of the nation to reserve lands cannot be alienated to any person or any entity, except through a formal surrender to the Crown, ratified by members. Without the statutory, constitutional and international human rights protections for the collective land rights of First Nations, it would not be possible to protect the cultural and social human rights of First Nation people as individuals. This does not preclude the option of recognizing interim and even long-term rights of non-members' spouses to use and occupy a family home following marriage breakdown. Under the First Nation matrimonial real property laws adopted under the FNLMI regime, non-member spouses have access to most of the remedies that member spouses have, but non-member spouses cannot apply for any order that would affect the collective interest in reserve lands by permanently transferring landholding rights from a member to a non-member (see, for example, the matrimonial real property laws of the Chippewas of Georgina Island First Nation, Beecher Bay First Nation and MacLeod Lake First Nation).

The *Beecher Bay First Nation Matrimonial Real Property Act* is an example of a First Nation law adopted within the FNLMI legal framework that aims to incorporate customary law, and to balance the individual rights of member and non-member spouses with the inalienable collective lands rights of the First Nation. Article 39 of this Act provides that the Beecher Bay First Nation may be represented in any legal proceeding in a court of competent jurisdiction (e.g. a superior court dealing with family law matters) by the Elders Advisory Council or the Land Management Advisory Committee, and will have standing in any proceedings under this Part. The *Beecher Bay First Nation Matrimonial Real Property Act* also provides that "the court will consider any evidence and representations presented by the First Nation in respect of the Beecher Bay First Nation Laws, Traditional Law or Customs." The *Beecher Bay First Nation Matrimonial Real Property Act* thus provides a mechanism for leading evidence on custom and traditional law in the Canadian legal system.

An examination of the treatment of equality under the FNLMI regime shows that another aspect of understanding substantive equality is the balancing of individual equality rights of spouses, as spouses, and spouses as men and women, in the case of opposite sex couples. In a First Nations context, an analysis of equality rights—whether the spouses are an opposite sex couple or a same sex couple—must include collective rights considerations.

[83] *Many Guns* v. *Siksika Nation Tribal Administration* [2004] 1 C.N.L.R. 176, 341 A.R. 140, 27 Alta. L.R. (4th) 184.

Where the CHRA does apply to a First Nation operating outside the *Indian Act* regime, in whole or in part, there is nothing in section 1.2 to exclude its application to complaints made against the governments of such First Nations.

PART 4—REVIEW OF FRAMEWORKS FOR THE ACHIEVEMENT OF BALANCE PROPOSED BY THE BALANCING INDIVIDUAL AND COLLECTIVE RIGHTS REPORT

a. *Summary of the Proposed Frameworks in the* Balancing Individual and Collective Rights Report

The *Balancing Individual and Collective Rights Report* suggests two frameworks to determine the meaning and function of section 1.2:

- The "Supplemental" Approach: Adapting Human Rights and Charter Law to First Nations Legal Traditions and Customary Laws [Supplemental Approach]; and

- Section 1.2 As a Stand-Alone Justification: The Aboriginal and Treaty Rights Framework [Stand-Alone Justification Approach].

The first framework, the Supplemental Approach, is described as a merger of "Human Rights Law," Charter and Aboriginal rights analysis because they are "so similar in application," with the exception of section 25 of the Charter. The Supplemental Approach is said to be guided by the following statement of principle from the Supreme Court of Canada decision in *Zurich Insurance*: "The underlying philosophy of human rights legislation is that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics. Exceptions to this legislation should be narrowly construed."

The Supplemental Approach is broken down into four stages or steps of analysis that are summarized for the purposes of this paper:

Stage 1—Jurisdiction and Scope:

- Determining whether a claimant's case falls within section 1.2 and therefore involves both "due regard" and "balancing" and determining whether the defendant is either a First Nation government (including First Nations operating under the FNLMI and self-governing First Nations) or other designated First Nation organization that delivers programs and services under the *Indian Act*.

Stage 2—Determination/Characterization of Rights and Interests

- Determining what individual and collective rights and interests are at stake that are relevant to the complaint, and assisting parties in reaching a resolution of the complaint without a formal hearing.

- Determining the degree to which the interest or tradition actually does accommodate or deny the individual's right or interest and "whether it is a genuine and widely regarded expression of community interest or customary law."

Stage 3—Giving Due Regard: Consideration of Legal Traditions and Customary Laws as Justification

- Where a *prima facie* case of discrimination is made out by the complainant, a consideration of First Nations legal traditions and customary laws would occur only if the *bona fide* justification defence in paragraph 15(1)*(g)* of the CHRA is not met by the Defendant.

- Where the assertion of a legal tradition or customary law is not contested by a complainant, such aspects of First Nation law would be considered in the interpretation or application of the Act. In this regard, several principles are suggested:
    1. In the case of a legal tradition, there would need to be some clear evidence that the tradition was genuinely sourced in the First Nation's cultural practices, rather than being adopted because of non-traditional (e.g. *Indian Act*) influences, and that it is still widely accepted.
    2. In the case of customary laws, the courts have provided rather more guidance, including criteria such as:
        - Practices generally acceptable to members of the Band;
        - Practices upon which there is a "broad consensus"; and
        - Practices firmly established, generalized, and followed by the majority of the community.
    3. To these criteria might be added that invoking a legal tradition or customary practice and its enforcement be consistent with the custom or tradition involved (which may involve intermediate bodies such as extended families or clans).

- Where the assertion of a First Nation legal tradition or customary law is contested, "arbitrating whether a legal tradition or customary law remains operative in the circumstances"; this may lead to an analysis like the second framework requiring the determination of the existence of traditions and customs "in the context of section 35 or Aboriginal and Treaty rights law." Any reconciliation of rights and interests at this stage would be subject to the overriding principle of gender equality.

Stage 4—Balancing: The analysis suggests two opposing interpretations for what would happen at this stage without settling on either: either carry out balancing within First Nations legal traditions and customary laws or alternatively balance First Nations legal traditions and customary laws against individual rights and interests.

The second framework, the Stand Alone Justification Approach, is described as providing "the basis for First Nations governments to assert an autonomous justification for what would otherwise be treated as discriminatory treatment." This means that rather than viewing section 1.2 as an interpretive duty, it would somehow operate as a "stand alone" recognition of "Aboriginal legal traditions and customary laws as a defence (available to First Nations governments and other designated First Nations bodies in addition to the *bona fide* justification defence already provided in the Act for all defendants). The Stand Alone Justification Approach involves five stages:

1) Jurisdiction and Scope;
2) Determination/Characterization of Rights and Interests; .
3) Is the Aboriginal Right Infringed by the Individual's Equality Demand under the CHRA?;
4) Justification; and

5) Balancing.

b. *General Comments on the Proposed Frameworks in the* Balancing Individual and Collective Rights Report

Two key questions should be considered in determining what section 1.2 requires. The first issue is to determine the primary focus (or subject matter) of section 1.2, and the second is to determine its function as a legislative provision. As will be elaborated on below, the *Balancing Individual and Collective Rights Report* appears to treat the "balancing of collective rights and interests" as the primary focus of section 1.2, and views its function not primarily as an interpretive provision but either as a form of conflict rule that comes into play where a defence of justification has not been established and where an assertion of First Nations legal tradition or customary law is contested (the Supplemental Approach); or alternatively (the Stand Alone Justification Approach) as an operative provision in the form of a defence in addition to the *bona fide* justification defence in paragraph15(1)*(g)*.

Before considering case law or any legal commentary or other expertise to determine the meaning of section 1.2, the plain language of the provision, its grammar and placement in the Act must be considered, in accordance with well-established principles of statutory interpretation.

The plain language and grammatical structure of section 1.2 suggests that the primary focus of section 1.2 is "giving due regard to First Nations legal traditions and customary laws" in the interpretation and application of the CHRA in relation to a complaint made against a First Nation government or other named First Nation body. Two other important elements of section 1.2 provide subsidiary, but important, clarifying and supplemental direction.

First of all, the reference to the principle of gender equality appears to qualify the primary direction in section 1.2 in a significant way—First Nations legal traditions and customary laws are to inform interpretation and application of the CHRA **only** "to the extent they are consistent with the principle of gender equality." The remaining key element of section 1.2—"particularly the balancing of individual rights and interests against collective rights and interests"—provides direction to the Commission, the Canadian Human Rights Tribunal (the Tribunal), the courts and First Nations governments and other applicable bodies that they must consider how First Nations legal traditions and customary laws may inform the interpretation and application of the Act when issues of balancing individual and collective rights and interests arise. This does not necessarily mean this is the only type of situation in which First Nations legal traditions and customary laws are to be considered in interpreting and applying the Act.

In contrast to this suggested approach, the *Balancing Individual and Collective Rights Report* appears to view the "balancing of collective rights and interests" as the primary focus of section 1.2. In addition, the *Balancing Individual and Collective Rights Report* states that an opposition between collective and individual rights is not only familiar to human rights or Charter law, but is the norm (p. 64). While this may be true of some of the legal commentary respecting the application of the Charter and its relationship to the Aboriginal and Treaty rights protected by section 35, not all commentators subscribe to the existence of such a norm with respect to human rights law generally or Canadian constitutional law in particular. Such a

presumption of opposition is not consistent with international human rights theory, which articulates that all fundamental human rights, including the right of all peoples to self-determination, are indivisible and interdependent. International human rights law further provides that the right to self-determination is a prerequisite to the full enjoyment of other (individual) human rights. The linkage between the collective human right of self-determination and the enjoyment of individual human rights is expressed in the preamble to the Convention on the Elimination of All Forms of Discrimination against Women and in many other international human rights instruments.

An assumption of opposition is more reflective of Western (European-sourced) legal traditions and conceptions of individual rights. While the individualistic focus of Western legal traditions has certainly influenced international human rights law, the collective right to self-determination of peoples has also occupied a central place. Further, international human rights law has evolved with the recognition of indigenous peoples possessing collective and individual rights under international human rights law—most recently through the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.

One of the central challenges presented by section 1.2, for First Nations, the Commission and the Tribunal is to determine how international and domestic human rights norms might find validation of their asserted universality through the recognition of indigenous legal traditions and customary law and Indigenous perspectives on human rights. Indigenous law is often described as seeking balance and harmony through social and legal norms that regulate relationships in a manner that makes the assertion of rights within small communities less of an imperative.[84]

John Borrows articulates a vision of complementarity and mutual accommodation between the Charter and international human rights law on the one hand, and indigenous legal traditions including customary law, on the other.[85] He explicitly states that nothing in his book *Canada's Indigenous Constitution* should be taken as sanctioning ideas or practices that create or reproduce (colonial) discriminatory distinctions that are contrary to Canada's Charter or to international human rights customs and conventions. At the same time, Borrows states with equal force that: "A prominent idea in this book is that the failure to recognize the existence of Indigenous legal traditions as a part of Canadian law is in itself discriminatory. Indigenous peoples have constantly adjusted their laws to take into account the common law or civil law, but Canadian judges and lawmakers have rarely done the same when it comes to Indigenous legal traditions. With one side resisting adjustment to their legal relationships, and thus preventing further harmonization, it might be said that the resistant party is the one who is engaging in discrimination. Equality is not well served by denying Indigenous societies equal participation in the ongoing formulation of Canada's legal system."[86] This conclusion is consistent with the finding in the 2001 decision of the Inter-American Court of Human Rights in the *Awas Tingi* case[87] that failure to recognize and protect the customary property interests of indigenous peoples in Nicaragua and their customary law relating to property constitutes a form of

[84] Russel L. Barsh, "Indigenous Peoples and the Idea of Individual Human Rights," (1995) 10 *Native Stud. Rev.* 35.
[85] *Borrows, Canada's Indigenous Constitution* at 151–153.
[86] *Borrows, Canada's Indigenous Constitution* at 152–153.
[87] *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001).

discrimination. While Borrows does not comment on the CHRA, the analysis he offers in his work does not present a picture of an oppositional relationship between human rights and collective indigenous rights.

James Anaya, in commenting on the contributions of indigenous peoples to international human rights law, states that the progress achieved at the international level in recognizing indigenous rights within the system of international human rights law demonstrates how indigenous peoples have bypassed the individual/State dichotomy of rights and duties, by claiming and articulating their collective rights as human rights within the international human rights system.[88] In a 2008 Report to the United Nations Human Rights Council, as Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Anaya clearly places the *United Nations Declaration on the Rights of Indigenous Peoples* with its protections for collective and individual rights within the prior body of international human rights protections: "The United Nations Declaration reflects the existing international consensus regarding the individual and collective rights of indigenous peoples in a way that is coherent with, and expands upon, the provisions of ILO Convention No. 169, as well as with other developments, including the interpretations of other human rights instruments by international bodies and mechanisms."[89]

In his report as a United Nations Special Rapporteur, Anaya observes that "all general human rights principles and norms apply equally to indigenous peoples, and are to be interpreted and applied with regard to the specific historical, cultural, social and economic circumstances of these peoples."[90]

While the *Balancing Individual and Collective Rights Report* acknowledges "an oppositional presumption is not common within First Nations legal traditions or customary laws" (at p. 64), the two proposed frameworks for balancing collective and individual rights and interests are both grounded in a reading of section 1.2 as some form of conflict rule and a reading of constitutional law as primarily relying on conflict rules to achieve reconciliation between First Nations collective rights generally and individual equality rights. It is perhaps for this reason that the analysis appears to turn to, and rely heavily on, constitutional law analysis respecting the Charter and section 35 of the *Constitution Act, 1982*.

Additional assumptions from the Part I analysis of the *Balancing Individual and Collective Rights Report* inform the framework section. For example, the paper's approach to outlining possible approaches to giving "due regard" is founded on the assumption that section 1.2 requires consideration of First Nations customary law and legal traditions only in limited situations (and these are to be determined primarily by a legal formula drawn from constitutional law rather than simply determining their factual relevance to the facts of any given case: "The primary framework in considering **whether** a First Nation's legal traditions or customary laws

[88] S. James Anaya, "Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law" (2006) 22 *Wash. U. J. Law & Policy* 107.
[89] United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya: The Human Rights of Indigenous Peoples, in Light of the New Declaration, and the Challenge of Making Them Operative*, August 5, 2008, A/HRC/9/9 at para. 43.
[90] Ibid., at para. 20.

must be given 'due regard' comes from both Canadian and foreign case law involving Aboriginal and Treaty rights, especially that of the Supreme Court of Canada's suite of decisions from *Sparrow* through to *Sappier and Gra*y" [p. 17, emphasis added].

As a result, both proposed frameworks treat section 1.2 as an operative provision concerned only with balancing collective and individual rights and propose various options for formal rules to resolve expected conflicts between collective and individual rights in examining complaints of discriminatory practices under the CHRA. In this regard, the *Balancing Individual and Collective Rights Report* relies heavily on its analysis of section 25 of the Charter and its relationship to Aboriginal, Treaty and other rights of First Nations.

This paper argues for an alternative framework (set out in more detail in Part 5) that views the language of section 1.2 of the CHRA, and its placement in the Act, as clearly indicating its function as an interpretive provision in the judicial interpretation of the Act by the Tribunal and the courts, as well as in its day-to-day implementation by First Nations governments and the Commission. In this alternative framework, section 1.2 operates neither as a shield, nor as a defence. Instead it would play an overarching role in bringing a First Nation perspective to the meaning of equality at every stage of decision-making and administration of the CHRA. Under this alternative suggested framework, constitutional analysis is of course relevant, as all judicial and tribunal decision making must be consistent with the Constitution, but this does not mean that equality rights analysis must incorporate complex constitutional analysis to determine every case under the CHRA.

An alternative approach to both frameworks put forward in the *Balancing Individual and Collective Rights Report* would be to build on the existing jurisprudence developed under the CHRA respecting the Act's purpose and function and the nature of CHRA analysis, and the role of the CHRA in implementing international human rights standards as these touch on equality rights issues. Under this approach, with the exception of the principle of gender equality, section 1.2 would not be understood as operating primarily as a conflict rule. Instead, it would function as an enhancement of the existing balancing that must be carried on under the CHRA—as originally suggested by the CHRA Review Panel in recommending an interpretive provision be added to accompany repeal of section 67.

Under this interpretation of section 1.2, where First Nations traditions and customary laws are relevant to a complaint, and to the extent these are consistent with the principle of gender equality, they could be considered at each stage of application of the Act from investigation, mediation or resolution of a claim by a tribunal or a court, including decisions respecting what constitutes a *prima facie* claim of discrimination and any defences asserted under section 15 of the Act.

Section 1.2 has a more nuanced and comprehensive role than section 25 of the Charter. Its role must support the purpose of the CHRA and ensure it is met in a way that is inclusive of First Nations legal traditions and customary law where these are relevant to resolving human rights complaints arising in First Nations communities. Special mention is made of situations involving collective and individual rights and the overriding respect of the principle of gender equality. Arguably, the intent of section 1.2 is to use First Nations customary law and legal traditions in a positive way to meet the purpose of the CHRA. This interpretation is consistent with the original

recommendations of the CHRA Review Panel, which has provided a thorough analysis of the concept of balancing of collective and individual rights in a First Nations CHRA context.

The approach to analyzing equality and discrimination under the CHRA generally should be more flexible than formulaic (Charter analysis is often characterized and criticized as overly formulaic at times). For example, at the stage of determining whether there is a *prima facie* case of discrimination, the Federal Court of Appeal has stated: "...A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities...."[91]

An approach to CHRA interpretation, which assumes a fundamental complementary relationship, rather than an oppositional one between collective and individual rights of First Nations, without sacrificing the principle of the equality and equal value of males and females, is consistent with some of the constitutional legal commentary on sections 25 and 35 of the *Constitution Act, 1982*.

The analysis of section 25 provided by Jane Arbour is a notable example. Arbour sees section 25 of the Charter as standing at the intersection of two highly fact-driven and legally complex set of rights—Charter rights and Aboriginal and Treaty rights, but she does not assume a conflict between Aboriginal peoples' collective rights and Charter rights. In fact, she emphasizes that constitutional analysis should strive for interpretations that support both sets of rights. She also analyzes what direction section 25 provides where there is an actual conflict between collective rights and individual equality rights in a constitutional law context. Where there is an unavoidable conflict, Arbour sees section 25 as providing rules to resolve conflicts between Charter rights and section 25 protected collective rights (which include, but not are not limited to, section 35 Aboriginal and Treaty rights). Her thesis on how section 25 works as a conflict resolution rule can be summarized as follows:

- If vindicating a Charter right would impact a right outlined in section 25, the Court will assess whether section 25 applies by determining the existence and scope of the Aboriginal, Treaty or other right.
- If section 25 is triggered, and vindication of the Charter right would abrogate or derogate from the Aboriginal, Treaty or other right, the Court will protect the section 25 right.[92]

While Arbour suggests section 25 will function as a shield for section 25 collective rights when there is an irreconcilable conflict with Charter rights,[93] her analysis is somewhat nuanced. She states, for example, that section 25 will inform equality rights analysis in an Aboriginal context at each stage but "may rarely be called upon to resolve a conflict" because under the approach she suggests to section 25, the Court will seek to reconcile the two sets of rights by avoiding a hierarchy or preference between them.[94]

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[91] *Canada (Armed Forces)* v. *Canada (Human Rights Commission*); 2005 CarswellNat 1141; 2005 FCA 154; 2003 C.L.L.C. 230-018; 334 N.R. 316; 55 C.H.R.R. D/1; Federal Court of Appeal; May 03, 2005; Docket: A-588-03.
[92] Jane M. Arbour, "The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the *Canadian Charter of Rights and Freedoms*" (2003) 21 *S.C. Law Rev.* (2d) 3 [*Arbour, Analytical Framework for Section 25*].
[93] *Arbour, Analytical Framework for Section 25* at 62.
[94] *Arbour, Analytical Framework for Section* at 59–62.

Kent McNeil also concludes that section 25 would operate as a shield for section 25 collective rights, with the one exception of gender equality rights. Regarding the relationship between the principle of gender equality and section 25 and section 35, McNeil comes to the following conclusion: "To avoid inconsistency, the rights referred to in section 25 should be subject to the same guarantee of gender equality as section 35 rights. This interpretation may be supported by legislative intent, as subsection 35(4) was probably added to accomplish the same purpose *vis-à-vis* subsection 35(1) as section 28 was already thought to accomplish *vis-à-vis* section 25, namely to ensure that no gender discrimination took place insofar as the rights of the Aboriginal peoples are concerned. Moreover, Aboriginal consent to the principle of gender equality in section 28 can be implied from the agreement of the leaders of the four national Aboriginal organizations to the addition of subsection 35(4) in 1983."[95]

On the question of the relationship between section 25 and the principle of gender equality, Arbour comes to a similar but less emphatic conclusion about the primacy of the gender equality principle. While noting there are indications in Supreme Court jurisprudence that section 28 of the Charter respecting gender equality is understood as "a directive to the courts to interpret the scope of Charter rights in a manner consistent with the equality of the sexes" and that this should inform the interpretation of the Charter, statutes, common law and the Constitution as a whole, Arbour rejects characterizing gender equality as a "trump card" among equality rights. She does however conclude that, "subsection 35(4) and section 28 of the Charter (and indeed section 15 of the Charter) stand as clear indicators that the interpretation and application of the Charter (including section 25) and the determination of the existence and scope of Aboriginal and treaty rights must be consistent with the important constitutional value of the equality of men and women."[96] In short, Arbour favours an approach to constitutional interpretation that will not create a hierarchal relationship between either set of rights and suggests there is a heavy duty on the courts to find interpretations and reconciliations that will uphold both sets of rights. In this way, section 25 operates to some extent as an interpretive provision but also as a shield for collective rights when an irreconcilable conflict does arise, with the possible exception of gender equality rights.

Compared with section 25 of the Charter, section 1.2 of the CHRA is more clearly an interpretive than operative provision, and as a general interpretive provision, it has relevance to the overall interpretation and application of the CHRA. Its role in balancing collective and individual rights is similar to the approach suggested by Arbour respecting section 25 of the Charter, in that section 1.2 suggests a strong direction to the Courts to view both sets of rights as complementary, and to harmonize and respect both sets of fundamental rights without sacrificing the principle of gender equality in any consideration of First Nations customary law and legal traditions.

c. The Meaning of "Due Regard"

The fundamental challenge flagged in section 1.2 of the CHRA is how to fulfill the promise of substantive equality in a First Nations context by accommodating the diversity of First Nations,

[95] Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34 *Osgoode Hall Law J.* 61 at 77.
[96] Arbour, Analytical Framework for Section 25 at 39–43.

by giving "due regard" to First Nations customary laws and legal traditions while also realizing substantive equality, particularly where gender issues may be implicated in any given case.

A review of "words judicially considered" through hard copy legal resources and electronic legal search engines reveals that the words "due regard" are so commonly used and are such a common element of legal analysis that they cannot be regarded as a "term of art." The most common sense meaning of these words suggests that First Nations customary laws and legal traditions are to be considered and included as part of CHRA legal analysis, when they are relevant to the facts at hand. This is supported by the French-language version of the Act, which uses the term "à tenir compte" to translate "due regard." This conclusion is also supported by *Black's Law Dictionary*, which defines "due regard" as "consideration in a degree appropriate to demands of the particular case."

However, there could be a debate over the meaning of "due regard" and the equivalent French-language phrase in the CHRA "à tenir compte" due to a degree of inconsistency in federal statutes. In the sixth preambular paragraph of the *Official Languages Act*, a similar phrase calling for "due regard" to be given to a particular principle is translated in a significantly different way. The term corresponding to "due regard" in this statute is the much stronger French-language term "dans le strict respect."

> AND WHEREAS the Government of Canada is committed to achieving, with due regard to the principle of selection of personnel according to merit, full participation of English-speaking Canadians and French-speaking Canadians in its institutions;
>
> Attendu…..que le gouvernement fédéral s'est engagé à réaliser, dans le strict respect du principe du mérite en matière de sélection, la pleine participation des Canadiens d'expression française et d'expression anglaise à ses institutions;

A review of several federal statutes using the English-language phrase "due regard" shows there is some variation in the corresponding French-language term. However, the phrase "à tenir compte" appears to be one of the most common usages.[97]

d. Section 1.2—A Defence or an Interpretive Provision?

Given the placement of section 1.2 in the Act and its language, it does not appear to be intended to function in an operative way as a defence. The consideration of any of the section 15 defences involves balancing individual equality interests against other interests. In this regard, section 1.2

[97] The following federal statutes were examined on this point: *Bretton Woods and Related Agreements Act,* R.S.C. 1985, c. B-7, Article IV; *Canadian Air Transport Security Authority Act*, S.C. 2002, c. 9, s. 6(3); *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), s. 5; *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10, s. 6(1); *European Bank for Reconstruction and Development Agreement Act*, S.C. 1991, c. 12, Article 13(viii); *Food and Agriculture Organization of the United Nations Act*, R.S.C. 1985, c. F-26, Article VIII, s. 3; *Farm Products Agencies Act,* R.S.C. 1985, c. F-4, s. 21; *Geneva Conventions Act,* R.S.C. 1985, c. G-3, Schedule IV, Section 2, Article 64; *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), s. 4 (3); *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), sixth preambular paragraph.

can assist in the interpretation and application of any of the defences established by section 15 of the CHRA.

The most commonly used defences under the CHRA are those of *bona fide* justification in paragraph 15(1)*(g)* and *bona fide* occupational requirement in paragraph 15(1)*(a)*. The consideration of these two defences may open the door for substantive equality rights to be mediated by other rights and interests, including those relating to any relevant First Nations collective rights and interests. However, both the defence of *bona fide* justification and *bona fide* occupational requirement are to take into account the standard established for both defences in subsection 15(2) of "undue hardship." In that regard, any relevant health, safety and cost factors are to be considered in the assessment of undue hardship.

Since *Jacobs v. Kahnawake*, the test applied to determine whether a defence of *bona fide* justification or *bona fide* occupational requirement has been established by a defendant has changed through judicial interpretation (the *Grismer* and *Mieorin* cases[98]) and through statutory amendment (the addition of subsection 15(2)). The defence now requires three elements to be established by a defendant in a complaint that has met the burden of proof for a *prima facie* case: rational connection; good faith; and undue hardship:

1. rational connection—whether the defendant took the impugned decision or action for a purpose or goal that is rationally connected to the employment function or service in question.
2. good faith—the defendant took the impugned decision or action in issue in good faith, in the belief that it is necessary for the fulfillment of its purpose or goal.
3. undue hardship—that the impugned decision or action is reasonably necessary to accomplish its goal, in the sense that it cannot accommodate persons with the characteristics of the complainant, without incurring undue hardship.

It is not clear whether the considerations relevant to the defences of *bona fide* justification, and *bona fide* occupational requirement constitute an open list or whether these defences are limited to consideration of the three factors specifically mentioned in subsection 15(2)—health, safety and cost.

In *Jacobs v. Kahnawake*, consideration of the *bona fide* justification defence under paragraph 15(1)*(g)* included consideration of the need to protect the cultural integrity, as raised by the First Nation defendant in that case. This case was decided before the enactment of subsection 15(2). To some extent, the First Nation respondent in the *Jacobs* case created a high barrier for itself to meet the *bona fide* justification defence by arguing that its very cultural survival was contingent on the particular forms of membership restrictions at issue. It is likely that even the undue hardship test can be met without necessarily having to establish that the very cultural survival of the nation is at stake.

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[98] *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, commonly referred to as the *Meiorin* case; and *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, commonly referred to as the *Grismer* case.

More generally, it could be argued that the broad requirement in section 1.2 to consider First Nations customary laws and legal traditions in determining the balancing of collective and individual rights and interests suggests that the factors listed in subsection 15(2) are not a closed list. This suggests **culturally specific** rationale, meaning rationale grounded in a First Nation's customary law or legal traditions may be considered to determine whether the undue hardship element required by two of the section 15 defences has been established by a First Nation government defendant.

Another significant defence is paragraph 15(1)*(e)*, which allows an employer or service provider to discriminate in a manner allowed under guidelines issued by the Commission under subsection 27(2). The guideline-issuing power of the Commission is significant, and these Commission guidelines have been described by the Supreme Court of Canada as a form of law.[99]

The Commission has issued guidelines specific to Aboriginal employers in the form of the Aboriginal Employment Preference Policy (AEPP). The AEPP applies to First Nations governments in their hiring practices and to any First Nation service organization whose activities fall within the jurisdiction of the CHRA, so long as the primary purpose of the employer is to serve the needs of the Aboriginal people. Under this policy, an employer may give preferential treatment to Aboriginal persons in hiring, promotion or other aspects of employment, when the primary purpose of the employer is to serve the needs of the Aboriginal people. The AEPP refers to international human rights instruments, including the *United Nations Declaration on the Rights of Indigenous Peoples* as supporting rationale as well as the "constitutionally recognized rights of the Aboriginal Peoples, including the inherent right to self-government, and the conditions of disadvantage to which most Aboriginal people are subject."

To the extent that customary law and/or legal traditions are relevant to any defence under section 15 of the CHRA, such considerations cannot be used in any way that would compromise gender equality. However, the content of substantive equality, including the principle of gender equality under the CHRA, arguably is to be informed, and stands to be enriched, by First Nations customary law and legal traditions as well as international human rights standards and the Charter.

e. The Meaning of "Customary Law and Legal Traditions"

The analysis underlying both proposed frameworks in the *Balancing Individual and Collective Rights Report* seems to equate the phrase "First Nations legal traditions and customary laws" with "existing Aboriginal and Treaty rights." This is also evident in the apparent distinction drawn between "customary law" and law the authors describe as "derivative of introduced forms." In this regard, the report asserts that procedures or techniques to distinguish between what is "traditional" and what is derivative of introduced forms are needed.

[99] Bell Canada v. Canadian Telephone Employees Association, [2003] 1 S.C.R. 884 (S.C.C.).

The terms "customary law" and "legal traditions" should not be treated as synonymous or interchangeable. However, many of the aspects of the proposed frameworks, and the conclusions drawn in the *Balancing Individual and Collective Rights Report* about the function and scope of application of section 1., appear to do this. Some examples are:

> The Supreme Court's framework for section 35 is relevant to the possible steps in analysis, and related evidentiary tests, to determining the historic and contemporary existence of a legal tradition or customary law. (p. 12)
>
> Section 35 analysis may apply to section 1.2, as it calls for due regard to be given to "First Nations legal traditions and customary laws." Incorporating the section 35 Aboriginal and treaty rights analysis would also draw a comparison between section 1.2 and subsection 35(4), which protects Aboriginal and Treaty rights equality for women and men. The possible incorporation of the principles from both Charter law and Aboriginal and Treaty rights contributes to the uniqueness of section 1.2. (p. 14)

John Borrows describes the meaning of "legal tradition" as reflecting cultural values about the law—the nature of law, the role of law in society and the way law is, or should be, made.[100] This understanding is consistent both with case law and legal commentary on the general meaning of legal tradition. Kenneth Nunn, for example, cites John Merryman's description of a "legal tradition" as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system and about the way law is or should be made, applied, studied, perfected and taught."[101] Recognizing different legal traditions recognizes that different cultures can have different ideas about what law is, how it is made and its purpose.

For First Nations and other indigenous peoples in Canada, Borrows identifies several possible sources of indigenous law: Sacred law, Natural law, Deliberative law, Positivistic law and Customary law. In the case of any given First Nation, not all of these may be evident and any combination of them may be sources of law and the boundaries between the different sources may overlap.

An abbreviation of the description provided by Borrows for each potential source of law is set out below:

- *Sacred Law*: "Laws can be regarded as sacred if they stem from the Creator, creation stories or revered ancient teachings that have withstood the test of time.[102]
- *Natural Law:* Law that indigenous peoples "find and develop from observations of the physical world around them."[103] Natural law may be developed this way by observing, for example, how a plant interacts with an insect or an insect with a bird and taking guidance from such interactions. The oral teachings of Elders are a way that natural law can be passed on from one generation to the next.

[100] *Borrows, Canada's Indigenous Constitution* at pages 7–8.
[101] Kenneth B. Nunn, "Law as a Eurocentric Enterprise" (1997) 15 *Law & Inequality* 323 at 326–327.
[102] *Borrows, Canada's Indigenous Constitution*, at p. 24.
[103] *Borrows, Canada's Indigenous Constitution* at p. 28.

- *Deliberative Law* is formed through processes of persuasion, deliberation, council and discussion.[104] Laws passed by Chief and Council in accordance with proper procedure (including any requirements for community consultation or ratification) are examples of deliberative law. Deliberative laws draw upon a people's historical and contemporary legal ideas and values—values that community members find relevant or important.

It is clear that customary law may in some cases also meet the test for an existing Aboriginal and Treaty right, but failure to meet that test should not be determinative of whether customary law can be recognized for the purposes of interpreting and applying the CHRA. Common-law tests for recognizing customary law exist independent of Aboriginal and Treaty rights analysis.[105] It can also be argued that section 1.2 incorporates by reference First Nations legal traditions and customary law in a way that is not necessarily constrained by common-law tests, especially in view of international human rights principles confirming the status of indigenous peoples as peoples with the right to self-determination.

Therefore, it can be argued that there are at least four different ways First Nations customary law may be found to be part of Canadian law: the common law (independent of Aboriginal and Treaty rights law); constitutional law relating to Aboriginal and Treaty rights; statutory recognition or incorporation; and international human rights law.

One of the risks facing First Nations when their governments engage in such a dialogue as part of a defence to a complaint under the CHRA is the risk of the co-option, distortion and colonization of indigenous systems of thought. This risk demonstrates the importance of ensuring section 1.2 provides a means for a respectful intercultural dialogue on the meaning of substantive equality in a First Nations context.

f. Scope of CHRA Application to Decisions of First Nations Governments

A pragmatic starting point for determining the meaning of section 1.2 and its role in the interpretation and application of the CHRA is to consider Parliament's purpose in establishing a specialized tribunal to deal with equality rights issues generally, and First Nations equality rights issues in particular. This approach is consistent with the approach taken to interpreting the CHRA in the recent *Conway* decision.[106] The purpose of establishing a specialized tribunal to deal with human rights issues respecting employment, provision of services, and accommodation is to provide an expedient, more streamlined process to access justice than the superior courts that are charged with working out complex issues of constitutional and other areas of substantive law. Employment, provision of services, and accommodation (housing decisions) are practical day-to-day interests for First Nations women and men. They are vital resources for survival in a modern wage economy and a country with a history of various forms of racial and gendered discrimination in such matters. In addition, access to many programs and services on reserves is

[104] *Borrows, Canada's Indigenous Constitution* at p. 35.
[105] Norman Zlotkin, "From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada" in Catherine Bell and Robert K. Paterson (eds.), *Protection of First Nations Cultural Heritage: Laws, Policy and Reform* (Vancouver, Toronto: UBC Press, 2009) 343.
[106] *R.* v. *Conway*, 2010 SCC 22 (June 11, 2010).

dependent upon Indian status entitlement, band membership, or both depending on the program or service in question.

As the *Balancing Individual and Collective Rights Report* concludes, the areas of decision making that are subject to the CHRA relate to modern economic wage activities and government services, and this may suggest to some that First Nations legal traditions and customary laws would be infrequently relevant in the determination of a complaint. However, as discussed elsewhere in this paper, the concept of "legal traditions" appears to be much broader than that of "customary law," and therefore may encompass more recent forms and norms of First Nations governance. It could also be argued, in regard to customary law, that it reflects and expresses core cultural norms on questions of how collective resources of any kind should be allocated. The fact that collective resources now include program and service monies as well as funds from economic development, settlement funds and resource revenue-sharing arrangements means these may occupy a place not unlike that of traditional territories and natural resources in the past. Even jobs with a First Nations government might be regarded as a collective resource of the First Nation.

The *Balancing Individual and Collective Rights Report* also expresses some general doubt about the extent to which First Nations bylaws would be reviewable under the CHRA based on the law at the time the report was written—that the Tribunal does not have jurisdiction to declare invalid and strike down statutory provisions although it can declare provisions to be inoperative. Since then, however, the 2010 decision of the Supreme Court of Canada in *Conway* has opened the possibility of some authority for the Tribunal to declare provisions of federal statutes invalid where the Tribunal has concurrent jurisdiction over a Charter issue related to a CHRA case before it.

The Federal Court of Appeal decision in *Canada (Attorney-General) v. Druken*[107] is authority for the principle that the Tribunal has the power to declare a provision of federal legislation, including subordinate legislation such as a regulation or bylaw, inconsistent or in conflict with the CHRA, and declaring the provision "inoperative." In this case, the Federal Court of Appeal applied the Supreme Court of Canada decision in *Winnipeg School Division v. Craton*,[108] where the Court stated: "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 dear legislative pronouncement."

It was this power presumably that led to the enactment of section 67 in the first place—to shield the provisions of the *Indian Act* that recognized and protected exclusive rights of First Nations people as First Nation people. For decades, section 67 has also been considered a barrier to First Nations women being able to challenge various forms of sex-based discrimination in *Indian Act*

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[107] *Canada (Attorney General)* v. *Druken* [1989] 2 F.C. 24, leave to appeal denied (1989), 55 D.L.R. (4th) vii (S.C.C.) [*Druken*].

[108] [1985] 2 S.C.R. 150.

provisions and First Nation bylaws, and this in turn was one of the rationale for the movement to repeal section 67.

Now, however, there may be a new barrier for First Nations people to challenge residual sex discrimination and other forms of discrimination under the *Indian Act* itself and bylaws enacted under it. This new barrier is uncertainty about the extent to which decisions made under the authority of the *Indian Act,* including First Nation bylaws, constitute "services" within the meaning of section 5 of the CHRA.

The scope of the Tribunal's jurisdiction to use its power to declare a provision inoperative (federal or First Nation) is uncertain because of uncertainty in recent case law about when the carrying out of a statutory function by a public official constitutes the provision of a "service" ordinarily available to the public within the meaning of the CHRA. In *Watkin,*[109] the Federal Court of Appeal held that public authorities can, but do not necessarily always, engage in the provision of services in the fulfilling of their statutory functions. On the other hand, the term "services" is not limited to "market place activities."[110] The case law has produced a range of different outcomes that are not easily reconciled. For example, a grant of citizenship is not a service,[111] but consideration and processing of an application for landed immigrant status is.[112] The federal government has recently challenged the jurisdiction of the Tribunal to hear complaints from First Nation complainants, including complaints relating to Indian status entitlement, based on arguments that the particular decisions or actions alleged to be discriminatory are not "services" within the meaning of section 5, and therefore cannot be reviewed by the Tribunal.

There is now uncertainty about whether the Tribunal has jurisdiction to deal with claims relating to federal laws determining Indian status and band membership under the *Indian Act* and First Nations bylaws under the *Indian Act* determining band membership entitlement. If First Nation membership laws are more akin to citizenship than federal laws determining entitlement to Indian status, there may be a different treatment of the service issue where Indian status decisions are concerned compared to that regarding band membership entitlement decisions. This is because, since 1985, Indian status entitlement is primarily used to determine entitlement and federal funding responsibility for a range of programs and services, while band membership under the *Indian Act* determines entitlement to vote in First Nations band council elections and determines access to most other collective rights and interests under the *Indian Act*.

The uncertainty about how the term "services" applies to various decisions (federal and First Nations) taken under the authority of federal legislation enacted under subsection 91(24) of the *Constitution Act, 1867* extends beyond *Indian Act* matters. At the end of May 2010, before the Standing Senate Committee on Human Rights examining a government bill to address matrimonial real property on reserves, Deputy Chief Commissioner David Langtry noted that recent case law suggests a possible narrowing of the meaning of "service" in section 5 and made

[109] *Canada (Attorney General) v. Watkin*, 2008 F.C.A. 170.
[110] *Re Singh*, [1989] 1 F.C. 430 (C.A.).

[111] Forward and Forward v. CIC, 2008 CHRT 5.

[112] *Anvari v. Canada (Employment and Immigration Commission)* (1991), 14 C.H.R.R. D/292 (Can. Rev. Trib.).

the following comments: "Since the repeal of section 67 of the CHRA, all complaints the commission has received have been challenged by the attorney general on several issues, including what constitutes a 'service'. Therefore, we cannot say with certainty that a First Nation's matrimonial real property regime will be considered a 'service' under our act."[113] Commissioner Langtry went on to say that it was also unclear whether the Commission's jurisdiction under section 6, respecting discrimination involving residential accommodation, would necessarily provide jurisdiction to review First Nation bylaws respecting matrimonial real property.

Before the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Chief Commissioner Jennifer Lynch described recent challenges to Tribunal jurisdiction in complaints concerning decisions under the *Indian Act* regarding entitlement to Indian status: "Some testimony heard by this committee has pointed to the commission's complaint process as an available mechanism to remedy discrimination under the Indian Act, including any possible residual discrimination not covered by Bill C-3. My key message to you today is that this is by no means definite. The commission's ability to redress allegations of discrimination under the Indian Act remains uncertain. Since the passage of the section 67 repeal, we have received challenges to the commission's jurisdiction in this area. For example, the commission has received several complaints related to Indian status. Three of these are similar to the McIvor case, in that they each involve Indian status and raise questions of residual discrimination following the passage of Bill C-31. We have referred all three complaints to the tribunal. The Attorney General of Canada has given notice that it will be challenging the commission's jurisdiction, claiming that determination of status by the registrar is not a service under section 5 of the CHRA [...] By extension, this could raise similar questions as to whether or not the determination of band membership is a service. The commission is intervening in a current case before the tribunal, in the public interest, to put forward a legal analysis that indeed the determination of status is a service."[114]

These concerns are certainly relevant to the impact the 2008 CHRA amendments may have on securing gender equality under the *Indian Act* and under First Nation bylaws enacted under the *Indian Act* or other legislation. The challenges being made by the federal government to the jurisdiction of the Tribunal in *Indian Act* cases (and other cases) have implications for gender equality, given the historic vulnerability of First Nations women under *Indian Act* provisions and more recently, some First Nation bylaws. If the federal government succeeds in its arguments, a lack of Tribunal jurisdiction to review issues relating to Indian status, band membership and matrimonial real property (and possibly other matters) would, in large part, render the impact of repealing section 67 minimal, as far as many of the gender equality concerns of First Nations women.

The challenges now being made by the federal government to the Tribunal's jurisdiction do not appear to accord with Minister Prentice's testimony before the Standing Committee on

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[113] Canada, Standing Senate Committee on Human Rights, *Minutes of Proceedings,* 40th Parliament, 3rd Session, Issue 3: 63–65 (31 May 2010).

[114] Canada, House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Evidence,* 40th Parliament, 3rd Session, Issue 11: 2 (22 April 2010).

Aboriginal Affairs and Northern Development on Bill C-44, an earlier attempt in 2007 to repeal section 67 when he suggested that band membership decisions (which can be made under federal law or First Nations law) would be reviewable upon repeal of section 67: "The repeal of section 67 will provide first nation citizens, in particular first nation women, with the ability to do something that they cannot do right now, and that is to file a grievance in respect of an action either by their first nation government, or frankly by the Government of Canada, relative to decisions that affect them. This could include access to programs, access to services, the quality of services that they've accessed, in addition to other issues, such as membership, I assume, as well."[115]

More recently, officials from the Department of Indian Affairs and Northern Development expressed the same understanding that the repeal of section 67 would enable the review of First Nation membership codes: "Where a first nation controls its membership and an individual has regained status but is not accepted to a first nation because of the membership code, that individual will have a right to appeal that decision to the Canadian Human Rights Commission as of June 2011, pursuant to Bill C-21, which contained the changes to the *Canadian Human Rights Act*. So the *Canadian Human Rights Act* will be applicable to first nations governments as of June 2011."[116]

g. Substantive Equality Under the CHRA—First Nations Customary Law and Legal Traditions and the Principle of Gender Equality as Two Required Considerations at Each Stage of CHRA Analysis

It can be argued that section 1.2 has a role in informing equality rights theory under the CHRA by recognizing First Nations customary law and legal traditions as an additional resource to determine the meaning of substantive equality in a CHRA context.

The Supreme Court of Canada has articulated some guidelines for the interpretation of human rights laws generally. Human rights laws are of a special nature and their words are to be interpreted in a broad and liberal manner, and read in the context of the Act as a whole, in order to give effect to their purpose of removing discrimination and ensuring human dignity.[117] The courts have incorporated the concept of "substantive equality" in their approach to interpreting the purpose of human rights legislation generally. In the *Meiroin* case, the Supreme Court of Canada stated that: "Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination, as this Court acknowledged in *Action Travail*."

While the concept of "substantive equality" as articulated by the Supreme Court of Canada appears to be a core concept informing notions of equality under both the Charter and the

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[115] Ibid., 39th Parliament, 1st Session, Issue 42: 10 (22 March 2007).

[116] Ibid., 40th Parliament, 3rd Session, Issue 7: 14 (1 April 2010).

[117] *Action Travail des Femmes* v. *Canadian National Railway Company et al*. [1987] 1 S.C.R. 1114 (S.C.C.); *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.); *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 S.C.R. 150 (S.C.C.); *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.).

CHRA, it remains somewhat of an enigma in terms of its content in Supreme Court of Canada jurisprudence. Beverley Baines notes the concept did not appear in Supreme Court of Canada equality jurisprudence until after the enactment of the Charter and, apart from aligning substantive equality with discrimination and dignity, "no member of the Court has given it independent content" and the Court's jurisprudence does not contain any definition of substantive equality."[118] Further, she notes that the Court has never relied on substantive equality to sustain a Charter section 15 claim based on the ground of sex.[119] Some of the significant advances in Supreme Court of Canada jurisprudence relating to the meaning of gender equality have resulted from litigation arising from provincial human rights legislation—notably, *Janzten v. Platy Enterprises Ltd*. (sexual harassment is a form of sex discrimination and sexual harassment in the workplace is unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment); *Brooks v. Canada Safeway* (discrimination based on pregnancy is discrimination based on sex) and the *Meiroin* case (affirming the use of affirmative hiring action to remedy systemic discrimination in employment based on sex).

In cases, under both the Charter and the CHRA, the approach to equality as an enforceable right has focused on what Beverly Baines calls the "discrimination principle."[120] This approach involves protecting a general notion of equality, defined in a functional and historically contingent way by identifying specific and concrete forms of imposed harm or disadvantage relative to a comparator group and determining whether such harm or disadvantage is tied to socially and historically significant classifications such as sex, race or sexual orientation. In the case of the CHRA, this list of suspect classifications is finitely defined by the Act, while in the case of the Charter, section 15 provides a list of grounds that may be supplemented by judicial decision where an analogous ground is established.

Peter Hogg has observed that even when one moves from formal equality to substantive equality, the problem remains that the idea of equality does not by itself supply the criteria for determining which distinctions are consistent with the idea of equality and which are not.[121] Chief Justice McLachlin has described equality as "the most difficult right."[122] A central challenge for any legal system choosing to be inspired by the concept of substantive equality is that the most common models are characterized by a normative indeterminacy.[123]

Keeping in mind the ongoing evolution of the meaning of substantive equality under Canadian law, in all cases involving a First Nation government defendant under the CHRA, section 1.2 now requires that the concept of substantive equality under the CHRA be informed by First

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[118] Beverley Baines, "Is Substantive Equality a Constitutional Doctrine?," available at: http://ssrn.com/abstract=1028944.
[119] Ibid.
[120] Ibid.
[121] Peter W. Hogg, "What Is Equality? The Winding Course of Judicial Interpretation," (2005) 29 *S.C. Law Rev.* (2d) 39 at p. 41 [*Hogg, What Is Equality*]
[122] Rt. Hon. Beverley McLachlin, "Equality: The Most Difficult Right," (2001) 14 *S.C. Law Rev.* 17 [*McLachlin, Equality: The Most Difficult Right*].
[123] Clíona J.M. Kimber, "Equality or Self-Determination?" in Conor Gearty and Adam Tomkins (eds.), *Understanding Human Rights* (London: Institute of Advanced Legal Studies, 1996) 266 [*Kimber, Equality or Self-Determination?]*.

Nations customary law and legal traditions. Further, the outcome must be consistent with the Charter, including sections 15, 25 and 28 and section 35 of the *Constitution Act, 1982*, including the gender equality guarantee in subsection 35(4). This conclusion flows from the requirement for consistency with the principle of gender equality incorporated in section 1.2 and from the recent decision in *R. v. Conway*[124] where the Supreme Court of Canada reviewed, summarized and reconciled a series of decisions respecting the power of tribunals to determine constitutional law issues and to order Charter remedies. The *Conway* decision suggests that in exercising any statutory discretion under the CHRA, both the Commission and the Tribunal must act in a manner that is consistent with Charter equality guarantees, the Constitution generally (including section 35), their respective statutory mandates under the CHRA, the rule of law and administrative law generally.

Conway also suggests that the decision in *Ermineskin Cree Nation v. Canada (Canadian Human Rights Tribunal)*[125] respecting the expertise of the Tribunal on section 35 issues would be decided differently now, and especially in view of the expanded mandate of the Commission and the Tribunal as a result of the repeal of section 67, the requirement in section 1.2 to consider First Nations customary law and legal traditions and the reference to Aboriginal and Treaty rights in section 1.1. In *Ermineskin Cree Nation v. Canada (Canadian Human Rights Tribunal)*, the issue before the Court was whether the Tribunal has jurisdiction to determine a constitutional question relating to section 35 rights and whether the Court should exercise any concurrent jurisdiction over a constitutional issue involving section 35. The Court determined that the Tribunal had jurisdiction but that because of its lack of expertise in dealing with section 35 rights, that the matter should be determined by the Court. In *Conway*, the Supreme Court of Canada has spoken out strongly against any bifurcation between superior courts and tribunals respecting issues of constitutional rights linked to matters properly before a tribunal. Such bifurcation would unnecessarily create barriers for vulnerable populations to access justice as quickly as possible (see paragraph 79). The Court in *Conway* not only mentioned Charter issues, but also specifically referred to the *Paul v. B.C. (Forest Appeals Commission*)[126] decision respecting the power of administrative tribunals with statutory mandates impacting section 35 rights to decide questions of law regarding section 35 as it touched on their statutory mandate. In articulating its conclusions, the Court in *Conway* stated that "…administrative tribunals with the authority to decide questions of law and whose Charter jurisdiction has not been clearly withdrawn have the corresponding authority—and duty—to consider and apply the Constitution, including the Charter when answering those questions."

Tribunals under the CHRA have not typically engaged in much, if any, substantive analysis of what the concept of "equality" means. A review of Tribunal decisions under the CHRA reveals that the concept of substantive equality has been referenced in only three decisions, and that it has been used in these cases to underline the rejection of formal legal equality (always treating likes alike) and the corresponding need, in some cases, to accommodate difference by different

[124] *R.* v. *Conway*, 2010 SCC 22 (June 11, 2010).
[125] (2002) 2 W.W.R. 138 (Moen J., Alta Ct of Q.B.). But see *Ermineskin Cree Nation* v. *Canada (Canadian Human Rights Tribunal)* [2006] 5 W.W.R. 528 another decision of Alta. Ct. of Q.B. expressing doubt about the correctness of Justice Moen's 2001 decision in view of the Supreme Court of Canada decision in *Paul* v. *B.C. (Forest Appeals Commission*). .
[126] 2003 SCC 55, [2003] 2 S.C.R. 585.

treatment. In *Kavanagh v. Attorney General of Canada*, a Canadian Human Rights Tribunal stated: "...it is the essence of the principle of accommodation that it is sometimes necessary to treat historically disadvantaged people differently than others, in order to achieve substantive equality." In *Buffett v. Canadian Armed Forces*, a Tribunal stated that "…equal treatment does not always mean identical treatment.... Occasionally, a different treatment may be called for in order to achieve substantive equality between the comparator groups." In *Popaleni, Janssen, McAllister-Windsor v. Department of Human Resources Development Canad*a, the Tribunal stated: "My task, however, is not to apply the *Canadian Human Rights Act* so as to achieve formal equality, but rather in a manner that achieves what the Supreme Court of Canada described in *Meiorin* as 'the promise of substantive equality.'"

Under the CHRA, legal analysis of a complaint involves three main elements:

- A preliminary assessment of a complaint to determine if it falls within the jurisdiction of the CHRA (e.g. is the defendant a federally regulated employer or service provider as provided by the Act and in the case of First Nations until June 2011, does the impugned decision or action fall within the section 67 exemption?);

- A determination whether the complainant has established a *prima facie* case that the defendant has engaged in a discriminatory practice on one or more of the 11 and finite list of grounds; and

- Where a *prima facie* case is established by the complainant, has the defendant asserted and established on the balance of probabilities any applicable defence under section 15 of the Act?

Depending on the facts of a given case, and the existence of any relevant First Nation legal tradition or customary law, the direction provided by section 1.2 may come into play in interpreting and applying the Act by a First Nation government, the Commission or the Tribunal in regard to any of these three elements of CHRA analysis; and section 1.2 may be engaged at any of the stages of the CHRA complaints process, from assessment to investigation to judicial determination.

Where the jurisdiction of the Commission or the Tribunal is challenged by a defendant, this is a fundamental issue of jurisdiction requiring determination by the Tribunal before analysis could turn to the typical elements of CHRA analysis—whether there is a *prima facie* case of discrimination and consideration of any CHRA defence. This includes any challenge based on a section 35 Aboriginal or Treaty rights argument related to self-government or inherent jurisdiction.

Judicial review of a Commission or Tribunal decision on any jurisdictional issue or issue of constitutional law is, of course, available. Section 35 issues could conceivably arise and overlap issues relating to the determination of First Nations customary law and legal traditions, depending on how a First Nations government chose to respond or defend itself against a complaint by asserting the relevance of First Nations customary law or legal traditions. *Conway* can be read as suggesting that the Tribunal has both jurisdiction, and a duty, to determine any section 35 issues arising in the course of dealing with a complaint under the CHRA.

Likewise, because of the overriding nature of the requirement stated in section 1.2 respecting the principle of gender equality, a culturally relevant and gendered analysis will be required at each stage of dealing with a complaint against a First Nation government under the CHRA. The institutional challenge of properly respecting difference in a First Nations context where gender equality issues are raised bears some similarity to the challenge of responding to the intersection of gender equality issues and freedom of religion issues in cases where religious and cultural differences are simultaneously implicated. However, the legal analysis of gender equality issues in a First Nations context will necessarily be distinct in many cases in many significant ways because of the constitutional status of First Nations as Aboriginal peoples, their status under international law as peoples with the right to self-determination, and the potential for constitutional issues under section 35 of the *Constitution Act, 1982* (including self-government agreements in their status as treaties) to intersect with CHRA equality rights issues. Chief Justice L'Heureux-Dubé has noted that while the guarantee of existing Aboriginal and Treaty rights in section 35 of the *Constitution Act, 1982* is not strictly speaking an equality provision, it implicitly plays a role as a tool to prevent marginalization and to advance actual substantive equality.[127] In a similar vein in a Charter equality analysis context, Chief Justice L'Heureux-Dubé in the *Corbiere* case suggested that "the contextual approach to section15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and Treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history."[128]

There is little discussion, in the *Balancing Individual and Collective Rights Report*, of the possible role of international human rights law in interpreting section 1.2's role. In this regard, in *Canada v. Taylor* where a provision of the CHRA was subjected to a Charter section 1 analysis, the Supreme Court of Canada determined that "the stance taken by the international community in protecting human rights" was relevant. This suggests the possibility that "the stance taken by the international community in protecting human rights" is relevant in giving due regard to First Nations law under the CHRA, particularly when balancing collective and individual rights and interests. While Canadian courts are not strictly bound to apply international norms unless these are contained in a ratified Treaty or alternatively, form part of international customary law, courts can rely on international human rights instruments to "inform" the interpretation of domestic human rights laws even where the instruments are declarations or other non-binding instruments.[129]

There are implications for the Commission and the Tribunal as national human rights bodies, charged with some of the responsibility for implementing Canada's international human rights obligations. For example, could the United Nations Human Rights Committee decision in *Lovelace* be used as an interpretive aid in developing CHRA jurisprudence dealing with First Nation membership laws? The *Lovelace* decision employed the concept of a person being

[127] Hon. Beverley McLachlin, "Racism and the Law: The Canadian Experience," (2002) 1 *J. Law & Equality* 7.
[128] *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203, para. 54.
[129] Anne Warner La Forest, "Domestic Application of International Law in Charter Cases: Are We There Yet?," (2004) 27 *U.B.C. Law Rev.* 157; Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System," (2004) 37 *U. B.C. Law Rev.* 113.

"ethnically Indian" in the sense of belonging to a particular nation of "Indians," separate from any gendered and statutorily defined notion of "Indian" under federal law.

The equality rights aspect of indigenous rights at the international level has been recognized in various ways. As one example, the United Nations Committee on the Elimination of Racial Discrimination (CERD) has explicitly stated that discrimination against indigenous peoples falls under the scope of the *International Convention on the Elimination of All Forms of Racial Discrimination* and has called upon state parties to ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[130] The *United Nations Declaration on the Rights of Indigenous Peoples* suggests that the meaning of substantive equality must be informed by the principle of equality of peoples just as much as by the equality of individuals. This is clear throughout the Declaration but it is most explicitly stated in Article 2: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." The Commission has acknowledged the significance and relevance of the *United Nations Declaration on the Rights of Indigenous Peoples* to the advancement of human rights implementation in Canada.[131]

Clíona Kimber has suggested there is value in incorporating a principle of self-determination in domestic equality rights theory in an analysis of the advantages and disadvantages of several models of equality rights theory. Her analysis includes an examination of "the subordination principle" that she says underlies the Supreme Court of Canada's concept of substantive equality, which she says aims to recognize issues of hierarchy and dominance.[132] Kimber observes that the Supreme Court has moved some distance away from seeing equality as issues of sameness and difference by focusing more on equality of results through the adoption of the concept of substantive equality. She argues that this particular articulation of equality is still limited by indeterminacy—that is, by the difficulties of identifying the boundaries of its equality principle. Kimber suggests a new model is needed that would include a principle of self-determination. This approach would have the following advantages:

- it would clearly hold as an objective the ending of relations of hierarchy and domination;
- it would affirm the values of a group or individual, recognizing both as having an inherent worth in themselves and as being entitled to respect on that basis; and
- it would recognize that self-determination is a process as well as a substantive right (of individuals and collectives), evidenced by rights to participation, representation and political control.

While it is less clear how workable this model would be for the broad range of applications, Kimber suggests (which appears to extend to all marginalized groups regardless of their status as peoples) the notion of incorporating the right of self-determination as an aspect of equality rights

[130] Committee on the Elimination of Racial Discrimination [CERD], United Nations, General Recommendation No. 23: Indigenous Peoples, para. 4 (1997).

[131] Canadian Human Rights Commission, *Public Statement on the Declaration on the Rights of Indigenous Peoples* (February 16, 2008), available at www.chrc-ccdp.ca/media_room/speeches-en.asp?id=455&content_type=2.

[132] Kimber, Equality or Self-Determination?

theory as applied to indigenous peoples in Canada would be consistent with the fundamental principle of the equality of peoples under international human rights law and confirmed most recently by the *United Nations Declaration on the Rights of Indigenous Peoples*. In interpreting section 1.2, the right of self-determination, as an aspect of the equality of peoples, should be a guiding principle in ensuring that collective and individual rights are "balanced" properly when dealing with equality rights issues involving the laws and other decision making of First Nations that may be subject to review under the CHRA.

Human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the *United Nations Declaration on the Rights of Indigenous Peoples*, also provide direction on gender equality issues. Article 5 of the CEDAW requires State parties to take all appropriate actions to eliminate prejudices, customary and all other practices "which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." This is a very comprehensive reference, capturing "prejudices" and "all other practices" as well as "customary" practices. Canada's obligation to respect this provision in the implementation of its national human rights legislation, and First Nations' obligations under their own laws therefore extend beyond customary law alone. Article 2 of the CEDAW also contains broad obligations to address discrimination against women in all its forms, customary or otherwise:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
>
> (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
>
> (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
>
> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
>
> (g) To repeal all national penal provisions which constitute discrimination against women.

The principles recognized in the *United Nations Declaration on the Rights of Indigenous Peoples* would require respect for the capacity and contributions of indigenous peoples to identify what needs to be done to implement equality rights in their nations and communities, while respecting

the principle of gender equality. Article 22 of the Declaration requires that particular attention be paid to the rights and special needs of indigenous Elders, women, youth, children and persons with disabilities in the implementation of the Declaration.

Arguably, an inherent part of "balancing" and giving "due regard" to First Nations legal traditions and customary laws will involve recognizing the different ways that First Nations cultures may give expression to equality rights, including "the principle of gender equality." This is not tantamount to "cultural relativity," but recognition that claims of the universality of human rights values requires efforts to recognize the potential contributions of all cultures on how human rights values might be realized in different ways. This interpretation is also consistent with the finding of the Supreme Court of Canada in *Action Travail* that the purpose of the Act is not to punish or assign blame but to educate and to prevent discrimination primarily by persuasion.

Jack Donnelly has spent considerable time examining the notions of the universality of human rights and of cultural relativity. The breadth of this complex debate in the academic and legal community cannot be analyzed here. However, some of Donnelly's observations may be useful in developing a pragmatic approach that on the one hand, recognizes that the concept of "human rights" as "rights" is very much a product of Western law, political systems, history and Western knowledge traditions and, on the other hand, that knowledge traditions, norms and values in other parts of the globe and those outside the Judeo-Christian religious norms and values can support internationally recognized human rights norms.[133] Section 1.2 provides an opportunity to test this thesis in a Canadian indigenous context. Section 1.2 clearly requires some form of bridging exercise between indigenous legal traditions and those of European-sourced legal traditions. Donnelly also notes how the concept of universal human rights is a response to some of the threats to human dignity and freedom that typically flow from market economies and bureaucratic governments of states: "Human rights represent the most effective response yet devised to a wide range of standard threats to human dignity that market economies and bureaucratic states have made nearly universal across the globe. Human rights today remain the only proven effective means to assure human dignity in societies dominated by markets and states."[134]

The CHRA is situated in a legal system that treats the Universal Declaration, the Covenants and other aspects of international human rights law as authoritative sources to inform the interpretation of domestic human rights laws. Consideration of this fact is part of adopting a contextual approach to interpreting the CHRA. As Donnelly notes, the global human rights regime relies on national implementation of internationally recognized human rights. While norm creation has been internationalized through the United Nations system of human rights instruments and international customary law, enforcement is the responsibility of sovereign states that must answer for what happens within their borders. Together, the *United Nations Declaration on the Rights of Indigenous Peoples*, the leading role that indigenous peoples played in the development of that instrument, Charter section 25, subsections 35(1) and 35(4) of the

[133] Jack Donnelly, "The Relative Universality of Human Rights," (2007) 29 *Hum. Rts. Q.* 281–306. [*Donnelly, The Relative Universality of Human Rights]*.
[134] *Donnelly, The Relative Universality of Human Rights*.

Constitution Act, 1982 and the adoption of section 1.2 of the CHRA now makes a dialogue inclusive of First Nations' perspectives on human rights essential.

PART 5—CONCLUSION

As a result of the enactment of section 1.2, a culturally relevant and holistic framework for analyzing equality rights claims is needed in cases where the respondent is a First Nation government. Such a framework must be consistent with the principle of the universality of human rights while simultaneously being open to indigenous visions of equality and how equality may find expression in First Nations customary law and legal traditions.

Section 1.2 provides an entry point for First Nations customary laws and legal traditions to inform both CHRA jurisprudence and the overall implementation of the CHRA by the Commission and the Tribunal. The previously assumed universalism and superiority of Western legal traditions has been a barrier to actually realizing the universal application of international human rights values—by ignoring the perspectives and contributions of other legal traditions to human rights theory and practice. An analytical framework is needed that is consistent with the primary purpose of the CHRA (to provide expedient resolution of equality rights complaints outside of superior courts) while also meeting the purpose of section 1.2 (to be as culturally relevant as possible by respecting and exploring First Nations knowledge and legal traditions as these may relate to equality and discrimination issues in First Nations communities).

Several analytical techniques may be needed to ensure a non-assimilative engagement between the cultures and legal traditions of First Nations and European-sourced legal traditions and Canadian case precedent. The latter have largely failed to explore the human rights values of First Nations peoples. The proper application of section 1.2 will require, to different degrees, depending on the facts and issues implicated in any given case, a culturally relevant and gendered perspective. An intersectional analysis of equality rights and interests and collective rights and interests will often be required—especially where a complaint is based on multiple grounds of discrimination and/or engages collective rights and interests.

Such techniques should be considered at each stage—from the first assessment of complaints to the final determination of a complaint—because of the risk of inherent cultural biases within a settler-determined legal process and its body of legal precedent, on which the CHRA relies.[135] Similar issues arise in turning to legal literature or the social sciences for guidance or information about First Nations legal traditions, customary law and gender issues.

Section 1.2's particular mention of the role of First Nations legal traditions and customary laws when balancing collective and individual rights and interests is a significant element of the provision. It is precisely on such matters that First Nations legal traditions can often be distinguished from those of cultures grounded in European liberal-individualistic traditions. A

[135] Benjamin L. Berger, "The Cultural Limits of Legal Tolerance," (2008) 21 *Can. J. Law & Jurisprudence* 245; Sonia N. Lawrence, "Cultural (in)Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom," (2007) 13 *C.J.W.L.* 107; Kenneth B. Nunn, "Law as a Eurocentric Enterprise," (1997) 15 *Law & Inequality* 323; Joanne St. Lewis, "Race, Racism and the Justice System" in Carl James (ed.), *Perspectives on Racism and the Human Services Sector* (Toronto: University of Toronto Press, 1996) 100 at 111.

holistic, complementary perspective on the relationship between individual and collective rights is more typical of indigenous perspectives. As Holder and Corntassel note: "...the ways in which indigenous groups conceive of groups and their relation to respect for individual dignity are not only more complex than the liberal-individualist or corporatist approaches that they have been used to illustrate, but offer a more sophisticated understanding of the relationship between individuals and groups than either theoretical approach [...] indigenous peoples generally recognize that collective and individual rights are mutually interactive rather than in competition."[136]

The role of section 1.2 in the CHRA in balancing the collective rights and interests of a First Nation and the rights of individual First Nation citizens may be similar, but not precisely equivalent, to that of section 1 of the Charter. In a 1996 article, Beverley McLachlin described section 1 of the Charter as a balancing provision that "expressly recognizes that sometimes it is right and just that individual freedoms should give way to the greater good as expressed by Parliament or the legislators. As such, it provides a mechanism for balancing individual rights and freedoms against the considered majoritarian view as expressed by the legislators."[137]

With respect to section 1.2 of the CHRA, there is unlikely to be a formulaic answer for balancing First Nations collective and individual rights given the diversity of First Nations in Canada. A flexible approach open to what First Nations knowledge and legal traditions have to offer is needed. In addition, current analytical approaches that rely heavily on categorization and comparison may need to be adapted, or even reconsidered, in order to properly reflect and use First Nations traditions and values respecting problem solving and conflict management when fundamental values and rights are being contested within a nation or community.

Conventional approaches in Western legal discourse to equality rights analysis are "full of the language of abstract universalism" and contain unstated reference points and perspectives grounded in Western legal traditions.[138] Alternative analytical approaches, such as Martha Minow's "social relations approach," are concerned about the risks of relying too much on comparison of abstract categories. Minow describes some of these risks as follows: "Errors will be made in efforts to assign people to group categories because people do not 'fit' categories. Some people fall between categories. All people are artificially reduced to one feature when typed by race, disability, or any single category. Any given trait is both too limiting and too general to do justice to an individual. Every person has a race and a gender, along with perhaps countless characteristics, and each modifies and inflects the others…. Being assigned to categories and choosing to embrace a category involve complex interactions among people, historical settings, and events. No clear answer has been found to resolve who is in and who is out of any given category once we compare how people identify themselves, how groups identify themselves, how groups identify their own members, and how non-members attribute traits to others."[139] A social relations approach tries to balance these risks by assuming there is a basic

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[136] Cyndi Holder and Jeff J. Corntassel, "Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights," (2002) 24(1) *Hum. Rts. Q.* 126 at 128–129.
[137] Beverley McLachlin, "The Canadian Charter and the Democratic Process" in Conor Gearty and Adam Tomkins (eds.), *Understanding Human Rights* (London: Institute of Advanced Legal Studies, 1996) 20 at 22–23.
[138] Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca & London: Cornell University Press, 1990) at 59–62. *[Minow, Making All the Difference]*.
[139] *Minow, Making All the Difference* at 20.

connectedness between people "instead of assuming that autonomy is the prior and essential dimension of personhood."[140] This approach focuses on identifying the relationships and interdependency of people and considers the dynamic and evolving nature of human relationships. Assertions of difference, Minow tells us, are often statements of relationships and a means of distributing power.

a. An Intercultural Human Rights Approach

In examining discrimination claims against First Nations governments under the CHRA, an intercultural human rights approach is needed to assist in bridging differences between First Nations and Western knowledge traditions, legal traditions and approaches to problem solving in an equality rights context. The term "intercultural" signifies that our understanding of what substantive equality means, and specifically of what is required for the enjoyment of equality rights by First Nations people, can be enriched as much by First Nations customary law and legal traditions as by Western legal traditions and by dialogue between different cultures and legal traditions.

An intercultural human rights approach to interpreting and applying section 1.2 would view the right of self-determination and the individual human rights of First Nations people as interdependent, as complementary and as reinforcing of one another, consistent with international human rights theory and law.[141]

An intercultural human rights approach to interpreting and applying section 1.2 would aim to achieve the following objectives:

- promote an understanding of discrimination as understood, and experienced, by First Nations people and an understanding of how discrimination claims might be resolved in a manner consistent with First Nations customary laws and legal traditions **and** the principle of gender equality; and

- avoid replacing the repealed section 67 exemption with an approach to section 1.2 that would require complex constitutional analyses to be undertaken every time a claim of discrimination claim against a First Nation government or organization arose in a First Nation community (as this would create a new barrier to First Nations people needing to access the CHRA complaint process).

b. General Principles for Implementing an Intercultural Human Rights Approach

Some general principles to guide implementation of the suggested approach are set out below:

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[140] *Minow, Making All the Difference* at 110.

[141] It should be noted that while the application of the CHRA to First Nations governments may be rationalized as an integral part of Canada's accountability to the international human rights system to ensure the universal application of human rights to all people in Canada, this rationale does not answer how Canada is accountable for ensuring respect of First Nations' right to self-determination consistent with international law as articulated by the *United Nations Declaration on the Rights of Indigenous Peoples.*

- An intercultural human rights approach would take account of First Nations customary laws and legal traditions, where relevant, at each stage of the Commission and the Tribunalthe Tribunal processing of claims.

- An intercultural human rights approach would recognize that although the CHRA requires that claims be grounded in a finite list of abstract identity categories (grounds of discrimination), this does not preclude an examination of:
    - how the content of socially constructed notions such as race, culture, gender and other CHRA grounds of discrimination are shaped by cultural, social and historical factors and how indigenous concepts of race and gender may differ from those of Western legal traditions;
    - how discrimination on any given ground may relate to, and be influenced by, the way the law affects other aspects of identity; or
    - how the larger social and legal context of any given First Nation is relevant to understanding the facts giving rise to a discrimination complaint and its resolution whether through "alternative dispute resolution" or through tribunal decision.
- An intercultural human rights approach would explore the intersectional nature of discrimination, particularly where a case involves multiple grounds or "complex" forms of discrimination and/or interplay between collective rights and individual rights.

- An intercultural human rights approach would also be alert to the impact of factors from outside First Nations legal systems that may affect relations and distinctions made within the community, particularly where gender equality issues are in question.

- An intercultural human rights approach would be alert to the possibly different ways First Nations laws and legal traditions may contribute to realizing equality, including gender equality; and would treat First Nations knowledge traditions and legal traditions as resources for identifying creative and culturally relevant resolutions to discrimination claims by bringing in a culturally relevant and gendered perspective. The holistic and relationship-focused nature of many First Nations knowledge and legal traditions makes consideration of First Nations customary laws and legal traditions especially important in cases involving the balancing of collective and individual rights and interests. First Nations laws or decisions challenged under the CHRA should be examined in the context of the First Nation's overall legal traditions in order to fully understand how any given law or decision may impact individual equality rights.

- Gender distinctions arising under First Nations laws and other decision making within the ambit of the CHRA must be examined closely given the requirement in section 1.2 that consideration of First Nations customary law and legal traditions is to be consistent with the principle of gender equality; and given the well-known history of the *Indian Act* in introducing patriarchal values into First Nations law.

- There is a participatory dimension to collective rights, meaning that individual members of a culture or people are equally entitled to participate in discussions on what is tradition or culture at any given point. This particularly applies to matters affecting gender equality

and governance and the rights of women and men to equally determine what constitutes custom.

- Consideration should be given by the Commission and the Tribunal to what First Nations laws or mechanisms may have been used by the First Nation to resolve the complaint.

These general principles are elaborated on below by discussing examples drawn from published literature. These examples are used for discussion purposes only as they represent very abbreviated and incomplete descriptions of First Nations legal traditions and customary laws. Additional examples are drawn from CHRA jurisprudence. It should be kept in mind that this discussion lacks the benefit of the proper evidentiary base required by the CHRA to draw sound conclusions about the extent to which any particular law may or may not comply with the CHRA.

An intercultural human rights approach would take account of First Nations customary laws and legal traditions, where relevant, at each stage of the Commission and the Tribunal processing of claims.

Under this approach, section 1.2 is not treated as an exemption or a technical defence. If this were the purpose of this provision, it would have been placed in section 15 where all other CHRA defences are listed. Section 1.2 is best viewed as a general interpretive guideline that may have application at each stage of processing, resolving and determining a complaint against a First Nation respondent under the CHRA, including in the assessment and application of any defence asserted by a First Nation defendant.

An interpretive provision like section 1.2 must by nature be flexible. This approach also happens to be consistent with the approach taken to determining what constitutes a discriminatory practice under the CHRA. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* the Federal Court of Appeal held that "a flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation." The Federal Court of Appeal went on to note that "To make the test of a *prima facie* case more precise and detailed in an attempt to cover different discriminatory practices would unduly "legalise" decision-making and delay the resolution of complaints by encouraging applications for judicial review. In my opinion, deciding what kind of evidence is necessary in any given context to establish a *prima facie* case is more within the province of the specialist Tribunal, than that of the Court." The Federal Court of Appeal also noted that discrimination takes new and subtle forms and that the legal definition of a *prima facie* case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act. Accordingly, at the stage of determining whether there is a *prima facie* case of discrimination against a First Nation government, we may conclude that any party may rely on relevant evidence concerning First Nations customary law or legal traditions, given that the determination of whether there is a *prima facie* case is a mixed one of fact and law.

In some cases, a First Nation respondent might argue that a gender distinction arising from First Nations customary law or legal tradition is not patriarchal, does not result in disadvantage or place a higher value on men and men's roles over those of women and women's roles. If established, such a finding of fact and law may mean a *prima facie* case was not made out in a particular case, and the question of *bona fide* justification or other defence may not need to be considered. In such a case, a gender-based distinction may nevertheless be consistent with the principle of gender equality.

If a *prima facie* case of discrimination is made out by a complainant, the First Nation respondent can argue that some aspect of First Nations customary law or legal traditions is relevant to determining whether a defence has been established under section 15 such as *bona fide* justification; so long as the aspect of First Nation law being relied on is consistent with "the principle of gender equality." Section 1.2 suggests that a defence of *bona fide* justification by a First Nation government may be established by examining First Nations customary law and legal traditions on equality rights matters generally, and equality as it may intersect with collective rights and interests in particular, but not in any way that would compromise "the principle of gender equality." The issue may be whether gender distinctions arising from First Nations customary law and legal traditions are gender neutral in their impact on women's value and dignity. Not every distinction based on gender is necessarily discriminatory.

The defence of *bona fide* justification under the CHRA was asserted unsuccessfully by a First Nation government in a membership law case in *Jacobs v. Kahnawake*, a case where the First Nation's perspective on the appropriate balance between collective and individual rights was clearly raised. The First Nation argued that a blood quantum requirement and a gender-neutral marriage out rule for marriages entered into after 1982 could be justified because the First Nation genuinely believed there was a rational connection between these exclusions and First Nation objectives of cultural survival and preserving the cultural integrity of the First Nation. The Tribunal found the First Nation held a genuine belief that these exclusions were necessary for the asserted objective, but that, in fact and in law, the exclusions were not necessary to preserve the cultural integrity and survival of the First Nation. The Tribunal held that in order for the First Nation government to satisfy the objective part of the test relating to *bona fide* justification, it must demonstrate that the alleged discriminatory practice is based on "sound and accepted ... practice and there is no practical alternative" (applying *Zurich Insurance Co. v. Ontario (Human Rights Commission)*). The Tribunal accepted that there is some basis for determining membership by considering blood lineage and blood quantum, but was not satisfied that the legitimate objectives of the community would not be met by including persons who were non-Indian, adopted in infancy and raised as Mohawks in every way.

A similar finding of the relevance of blood lineage and blood quantum (but not as exclusive criteria) was made in a Charter case respecting band membership—*Grismer v. Squamish Indian Band*.[142] In this case, a Squamish First Nation Membership Law excluded from membership two adults adopted by a member of the First Nation. The status of the applicants as adopted children was found to be an analogous ground under section 15 of the Charter. (Under the CHRA, this case might have been argued as discrimination based on family status.) The Federal Court in *Grismer v. Squamish Indian Band* held that the respondent First Nation had demonstrated that a

[142] [2007] 1 C.N.L.R. 146 (F.C).

bloodline connection requirement is not only a rational way of protecting Squamish culture and identity among its members, but according to the evidence led, was part of Squamish heritage and culture and constituted a practice followed by the Squamish since before contact with the Europeans. The *Jacobs* and *Grismer v. Squamish Indian Band* cases together demonstrate the importance of the specific evidence led, and the particular histories and legal traditions of the peoples concerned. Both cases demonstrate that blood quantum criteria are not necessarily discriminatory. However how, and whether, such criteria operate with other factors in determining identity may affect whether this defence can be established.

The Tribunal in *Jacobs* made a declaration that the First Nation had engaged in a discriminatory practice contrary to the CHRA in its exclusion of Mr. Jacobs from membership based on his adopted status and blood quantum. Even though the impugned law was clearly adopted outside of the authority of the *Indian Act* and was viewed by the First Nation as an exercise of inherent or sovereign authority by the First Nation, the Tribunal nevertheless assumed jurisdiction over this law-making activity. With the enactment of section 1.2, such an assumption of jurisdiction may be supported by the reasoning applied by the Federal Court in cases dealing with custom election and leadership selection. In *Francis v. Mohawk Council*, the Federal Court referred to this line of cases as clear on the point that the Federal Court had jurisdiction to review custom election and leadership cases because of the recognition of customary law by federal statute.[143] However, the issue of whether First Nations have an inherent jurisdiction over human rights matters that excludes the jurisdiction of the Commission and the Tribunal under the CHRA is likely not considered settled by many First Nations, especially with the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.

In *Jacobs*, the Tribunal stated it would refrain from making any pronouncements on what is or is not part of the Mohawk tradition, culture and Great Law because "That is not our mandate. Our function is to determine whether unjustified discrimination occurred in this case within the meaning of the CHRA." On this point, the addition of section 1.2 to the CHRA would appear to have changed the mandate of the Tribunal in a significant way. The Tribunal still has the core functions of determining whether a *prima facie* case has been established and where there is a *prima facie* case, determining whether such a practice is unjustified. In doing so, section 1.2 now appears to require the Tribunal to examine and make findings on the content of First Nations customary laws and legal traditions. This includes determining whether these conform, or not, to the principle of gender equality where gender equality is at issue.

Since *Jacobs*, an additional element was added to the defence of *bona fide* justification. In addition to the objective element (that the respondent took the impugned decision or action for a purpose or goal that is rationally connected to the employment function or service in question),

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[143] 2003 FCT 115 (CanLII); [2003] 3 C.N.L.R. 86; 227 F.T.R. 16.

and a subjective element (evidence the respondent held a good faith belief that the impugned measure is reasonably necessary), a respondent must also meet a duty to accommodate to the point of undue hardship. This means the impugned decision or action must be proven to be reasonably necessary to accomplish its goal in the sense that the respondent cannot accommodate persons with the characteristics of the complainant, without incurring undue hardship.

In its 2000 final report, the CHRA Review Panel suggested that repeal of section 67 and the addition of a duty to accommodate might not favour an Aboriginal government if it had to show that it had tried to accommodate non-Aboriginal individuals, because the concept of accommodation is aimed at reducing exclusions. For this reason the Panel suggested an interpretive provision was required to assist with this stage of CHRA analysis in the event of the repeal of section 67. Building on this analysis, the inference can be drawn that section 1.2 is intended to extend the protection of individual equality rights under the CHRA to First Nations communities without sacrificing the constitutionally protected rights of First Nations or their right to self-determination that is recognized in international law.

An intercultural human rights approach would recognize that although the CHRA requires that claims be grounded in a finite list of abstract identity categories (grounds of discrimination), this reality does not preclude an examination of:

- *how the content of socially constructed notions such as race, culture, gender and other CHRA grounds of discrimination are shaped by cultural, social and historical factors and how indigenous concepts of race and gender may differ from those of Western legal traditions;*
- *how discrimination on any given ground may relate to, and be influenced by, the way the law affects other aspects of identity; or*
- *how the larger social and legal context of any given First Nation is relevant to understanding the facts giving rise to a discrimination complaint and its resolution whether through "alternative dispute resolution" or through tribunal decision.*

An intercultural human rights approach would explore the intersectional nature of discrimination, particularly where a case involves multiple grounds or "complex" forms of discrimination and/or an interplay between collective rights and individual rights. An intercultural human rights approach would also be alert to the impact of factors from outside First Nations legal systems that may affect relations and distinctions made within the community, particularly where gender equality issues are in question.

A holistic analysis will often be required in order to accommodate intercultural issues such as different approaches to problem solving (holistic vs. linear analytical). A holistic analysis will often be needed in order to fully understand complex complaints of discrimination, such as those related to Bill C-31 status or residual sex discrimination coupled with marital or family status. Tools such as culturally relevant gender-based analysis could assist in this task. This would involve exploring the possibility of interrelated impacts of the *Indian Act* on identity and interests, in terms of gender, race and culture as well as collective rights. For example, in any given case does gender-based discrimination reinforce racialization? Are concepts of race being employed that are gendered in a way that oppresses First Nations women by manipulating gendered concepts of citizenship, culture or race? How does the federal *Indian Act* employ

concepts of race and gender to regulate First Nations collective rights and interests in ways that may impact the operations of First Nations governments/organizations?

An intercultural human rights approach is alert to analytical approaches or processes that may distort understanding of the discrimination as experienced by a complainant—such as aiming to "simplify" claims based on more than one ground by reducing analysis to a single ground. While the CHRA requires that only one ground need be established to prove a claim of discrimination, failure to analyze the possible relationship or dynamic between multiple grounds may affect the capacity to craft an appropriate remedy or even to fully understand the discrimination experienced.

In complaints made against First Nations governments or organizations, an intercultural human rights approach would examine what role First Nations legal traditions and customary laws play in shaping identity concepts or other distinctions in First Nations law that engage CHRA grounds of discrimination in ways that relate to individual access to programs, services, accommodation or employment. In other words, do First Nations legal traditions or customary laws employ concepts of identity that are relevant to determining whether:

- a *prima facie* case of a discriminatory has been established pursuant to section 5 and other provisions of the CHRA; and
- any defence asserted by a First Nation respondent under section 15 has been made out.

This approach would mean, for example, in appropriate cases, that the socially constructed nature of identity concepts like "Indian," "band member" or "First Nation citizen" would be examined as they are used in First Nations laws, policies and other decision making that determines access to programs and services, accommodation or employment (to the extent these are controlled by First Nations governments or organizations as opposed to the federal government).

Such an approach would seek to uncover the assumptions underlying the content and application of specific socially constructed concepts of identity or "difference." Colonial European notions of "race" (as a supposed marker of biological characteristics simultaneously assumed to be tied to notions of social and cultural characteristics) and the shaping of the racial concept of "Indian" emerged and evolved over a long period of time.[144] This history may have affected socially constructed identity concepts within individual First Nations.

In cases like *Jacobs* or *Grismer*, it will be important to consider in precisely what ways lineage is used to determine a given definition of First Nations citizenship, band membership or "Indian" status—is it a controlling concept defined by blood quantum only? And how does the law determine the relationship between lineage and marriage or adoption? An intercultural human rights approach would examine the parties' respective understanding of how the impugned law, policy or decision has been shaped by First Nations law and legal traditions and how it may also, or alternatively, have been shaped by colonial notions of race and gendered notions of race. This requires going beyond the "common sense" everyday notions of race and identity concepts like

[144] Michael Banton, "The Classification of Races in Europe and North America: 1700–1850" in Tania Das Gupta et al. (eds.), *Race and Racialization: Essential Readings* (Toronto: Canadian Scholars Press Inc., 2007) 15.

"Indian" because these concepts can have a racial, cultural or political meaning depending on their content, function, and the underlying assumptions of those using them.

For example, the membership law at issue in *Jacobs* used a rather large number of identity-related terms such as "Indian," "non-Indian," "Mohawk," "Mohawk Indians," "mixed marriages," "non-Indian women," "Indian man," "Indian child, "Indian people," "Mohawks of Kahnawake," "Onkwehonwe," "the People and the Mohawk Council of Kahnawake," "the Whiteman," "Mohawk man," "Mohawk women," "Widowed, Divorced, Destitute Mohawk Men & Women."

It is clear that the term "Indian" in this law did not necessarily correspond to that of the *Indian Act* with the notable exception of the treatment of marriages between "Indian" men and "non-Indian" women before 1981. Apart from this exception (which raises gender equality issues similar to some of those raised in the *McIvor* case concerning the gender inequities arising from the application of the concept of "vested rights"), the Kahnawake membership law was adopted with the express purpose of deviating from the *Indian Act* definitions of "Indian" and "band member" for all or most purposes relating to the collective and individual rights of Kahnawake and for determining the rights of individuals resident on the Kahnawake reserve.

The term "Indian" at issue in the Kahnawake law, like that of the *Indian Act*, has a broad, somewhat racialized meaning in that it extends beyond Mohawks of Kahnawake and Mohawks generally to a group of people who can trace lineage with a certain minimum "blood quantum" from persons anywhere with status as "Indians" under the *Indian Act*. This modified incorporation of the concept of "Indian," based on previous colonial and federal impositions and control of Indian status, appears somewhat at odds with the asserted goals of "cultural integrity" and self-determination.

However, the *Jacobs* decision does not provide any analysis of the parties' understandings of the content of these various terms, and to what extent these terms are racial, cultural or have citizenship content, nor how they reflect or relate to Mohawk customary law, legal traditions or knowledge traditions respecting Mohawk as a people and their relationships to each other and to people identified as outsiders.

An intercultural human rights approach would be alert to the possibly different ways First Nations laws and legal traditions may contribute to realizing equality, including gender equality; and would treat First Nations knowledge traditions and legal traditions as resources for identifying creative and culturally relevant resolutions to discrimination claims by bringing in a culturally relevant and gendered perspective. The holistic and relationship-focused nature of many First Nations knowledge and legal traditions makes consideration of First Nations customary laws and legal traditions especially important in cases involving the balancing of collective and individual rights and interests. First Nations laws or decisions challenged under the CHRA should be examined in the context of the First Nation's overall legal traditions in order to fully understand how any given law or decision may impact individual equality rights.

In cases where gender-based discrimination is in issue, this principle would require looking at how gender-based concepts and gender roles are understood, used and reflected in a First Nation

law or policy—in ways that may control access to programs, services, accommodation or employment. This line of inquiry would focus on whether gender distinctions or gender-specific roles reflect balance and equality between the sexes or, alternatively, reflect discriminatory patriarchal values (values that treat men and men's roles as more important than women and women's roles). This might be phrased as a question: Are there gender-based distinctions in the impugned law or decision that arise from, or are consistent with, First Nations customary law or legal traditions and are these consistent or not consistent with men and women, boys and girls being valued equally?

As Patricia Monture has argued, this is possible in First Nation cultures characterized by distinct gender roles but where socially constructed gender differences are not tied to patriarchal values that place men in a position of power and control over women or which value the roles of men over those of women. Devon A. Mihesuah likewise concludes that North American indigenous women often held roles and status at least equal to men, despite the many gendered aspects of indigenous cultures and societies: "In many cases Indian women did indeed have religious, political, and economic power—not more than the men, but at least equal to men. Women's and men's roles may have been different, but neither was less important than the other. If we look at tribal societies at contact and trace the changes in their social, economic, and political systems over time through interaction with Euroamericans and intertribal relations, we will find that women did have power taken from them and so did Indian males."[145] Similarly, Daniel Maltz and JoAllyn Archambault have concluded that while the relation between power and gender varies across "Native North America," the following generalized observations can be made: "What makes the Native North American case so interesting for the study of gender and power is that it is a region in which gender is central to the cultural system but not closely linked to either biology or power. This point is made most clear by comparing Native North American gender concepts to those of other world regions. Like Southeast Asia, North America is noted for complementary gender relations, but whereas gender distinctions are muted in Southeast Asia (Atkinson and Errington 1990), they are elaborated in much of North America. As in Melanesia and the Mediterranean, gender is culturally elaborated in Native North America, but unlike these regions, in which gender concepts are closely tied to the notions of biology and sexuality, the gender concepts of North America are tied to behavioral as opposed to biological differences. Finally, whereas many of the ideologies stemming from world religious systems, such as Christianity and Islam, elaborate patriarchal gender systems in which gender relations are expressed in terms of authority, the ideologies of Native North America rarely express the relation between the genders in political terms."[146]

The literature provides some examples of how different perspectives of equality and gender equality might become evident through a close examination of First Nations customary laws and legal traditions. Determination of such concepts as they affect equality rights under the CHRA, however, would require a proper evidentiary base as led by the parties to any given complaint.

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[145] Devon A. Mihesuah, "Commonalty of Difference: American Indian Women and History," (1996) 20 *Am. Indian Q.* 15 at 20.

[146] Daniel Maltz and JoAllyn Archambault, "Gender and Power in Native North America—Concluding Remarks in Klein, L. and Ackerman, L. (eds.), *Women and Power in Native North America* (Norman: University of Oklahoma Press, 1995) 230 at 231.

Albert Peeling has described the traditional governance system of the *Gitanyow* Nation as a "functioning traditional system, with a well established hierarchy within its clans and houses, a structure of precedence among its chiefs, and their *ayoowkwx*—traditional law—is strong within their territory, and is maintained by feasts (*li'ligit*)."[147] There are eight *Gitanyow Wilp* or houses, four of which belong to the *Lax Gibuu* or wolf clan, and four of which belong to the *Lax Ganada* or frog clan. Each house has exclusive rights to *Wilp* names, *adawaak* (oral histories), *ayuuk* (wilp crests), *git'mgan* (poles) and *lax yip* (territories). This traditional matrilineal system has survived alongside the *Indian Act* system with its long history of patrilineal and patriarchal values.

Peeling says that membership in the *Gitanyow* Nation is possible through adoption in the case of both indigenous and non-indigenous people, and regardless of the *Indian Act* rules respecting Indian status. Membership by birth or by adoption is determined matrilineally according to the *Gitanyow* Constitution and membership cannot be passed down to descendants in the case of adopted members:

> 5.7 WILP MEMBERS
> A *Gitanyow Wilp* member means a person "who is a member of a *Gitanyow Wilp* because of birth into the *Wilp* of his/her Mother or by adoption." In the latter case, the membership must be validated at a *Wilp Li'ligit*. There are two types of adoptions, described as follows:
> - *Siidaxgyet*—"strengthen." A woman and her descendants who have been formally adopted at a *Li'ligit* have full rights, benefits and responsibilities.
> - *Tsi'limgodit*—"taken in" adoption. An individual *Wilp* member may initiate the adoption of a non-*Gitanyow* or non-Aboriginal into a *Wilp* with the consent of a *Simooyghet* and other *Wilp* members and validated at the *Li'ligit*. This adoption provides for a seat at the *Li'ligit* along with a non-hereditary name and access rights with the consent of the *Simooyghet* and *Wilp* members. These rights are only for the lifetime of the individual and cannot be passed down.[148]

Conceivably, such a matrilineal descent rule could be challenged as a form of sex-based discrimination; and the limitations on the powers of adopted members to pass on membership to their descendants might be challenged as discrimination based on family status. Dealing with any such complaint, however, would require evidence from the parties to more fully understand how gender operates and its consequences for men and women and how it may interact with other aspects of *Gitanyow* governance (the larger legal tradition of the *Gitanyow* Nation) in ways that reflect the equal value of males and females. Are there other aspects of the *Gitanyow* legal system that balance this matrilineal descent rule in ways that ensure gender equality? Evidence would likewise be needed to assess the meaning, purpose and function of adoption in the *Gitanyow* Nation before an assessment of whether there was a discriminatory practice within the meaning of the CHRA, and whether there is any defence under section 15 of the Act.

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[147] Albert C. Peeling, *Traditional Governance and Constitution Making Among the Gitanyow*, paper prepared for the First Nations Governance Centre, October 11, 2004; available at www.fngovernance.org/pdf/Gitanyow.pdf. [*Peeling, Traditional Governance and Constitution Making Among the Gitanyow*].
[148] *Peeling, Traditional Governance and Constitution Making Among the Gitanyow.*

Lake Babine First Nation provides an example of a traditional legal system in which a mix of matrilineal and patrilineal rules are applied for different purposes within the overall traditional legal system. The complexity of this system is evident in the fact that a two-year participatory research project was reported to be able to share only a portion of this system: "...it is not possible to capture the entirety of its legal order in one study. Just as the Canadian legal order is complex, so is the Babine legal order."[149] This suggests the importance of having protocols with First Nations or evidentiary guidelines to deal with the evidentiary challenge of cases involving First Nation respondents under the CHRA.

The *balhats* (potlatch) system has been described by Fiske and Patrick as the legal order of the Babine. The *balhats* function as a means of recording and regulating relationships, property and other important matters between the four clans of the Babine Nation—*Likhc'ibu* (Bear), *Jilhtsehyu* (Frog), *Gilantin* (Caribou), *Likht-semisyu* (Beaver). Each clan is further divided into Houses or families identified by matrilineal ties, but individuals also maintain close ties with his or her father's House. According to Fiske and Patrick, the father's House, *yits'alts'it,* "he comes from" is known as the "sponsoring clan," because the father's House is the primary social group obliged to assist a person in times of need and the father's House sponsors the person in his or her elevation within the *balhats*.[150] The *balhats* therefore identifies certain statuses, obligations and duties within Babine society through a mixture of matrilineal and patrilineal "rules" and the traditional governance system governs relationships between families and determines so many day-to-day matters within the community.

"Big names" or hereditary titles can be ranked and can be "paid for" at the *balhats*, a ceremonial feast where the Babine conduct public business before an assembly of witnesses. Fiske and Patrick explain that eligibility for a name requires more than the right family ties or the capacity to accumulate the requisite wealth—"It demands the strength to strive for exemplary behaviour and to endure criticism and misunderstandings that inevitably arise in moments of upset and crises. For young chiefs, it means restrictions not required of those in their peer group."[151] It is the names that are ranked, not the people who hold them according to Fiske and Patrick, because a name holder is expected to behave well in all aspects of life in order to retain the respect the community holds for the name. In addition, "Paying dearly for a name symbolizes a personal commitment to look after others and to act with dignity."[152]

Fiske and Patrick report that "names" are inherited in the maternal line by males or females and are usually kept in the subclan and that the sponsorship requirement is determined by paternal relatives according to Babine Elders.[153] The complexity and apparent gender balance in this system are evident in the following commentary by Fiske and Patrick: "Close patrilineal ties are understood as being fundamental to the *balhats* and to family organization. Contemporary elders see no conflict between a matrilineal clan system and a ceremonial expression of a father's ties to his children. In fact, strong patrilineal ties and reliance on the father's clan are found throughout

[149] Jo-Anne Fiske and Betty Patrick, *Cis Dideen Kat, When the Plumes Rise: The Way of the Lake Babine Nation* (Vancouver: UBC Press, 2000) at 9 and 58 [*Fiske and Patrick, Cis Dideen Kat*].
[150] *Fiske and Patrick, Cis Dideen Kat* at 48–49.
[151] *Fiske and Patrick, Cis Dideen Kat* at 53–54.
[152] *Fiske and Patrick, Cis Dideen Kat* at 51.
[153] *Fiske and Patrick, Cis Dideen Kat* at 50–52.

the Babine's neighbours, who also organize themselves in matrilineal clans."[154] The complex relationship and interrelationship between matrilineal and patrilineal rules in this case suggest that specific issues of gender equality could not be properly analyzed in isolation from the overall legal system.

Peeling identifies some of the difficulties experienced by First Nations in the cross-cultural judgments made by people from other legal traditions during claims and self-government negotiations. Peeling describes how *Gitanyow* law on how to achieve equality through voting systems is different from those of non-Aboriginal perspectives because of the reality of communities composed of several families of differing size. He suggests that different cultural notions about what democracy can mean and how equality can be implemented is reflected in different views on how to achieve voter equality. From a *Gitanyow* legal perspective, decision making based on clans or families means that there is more equality for individuals regardless of family status because smaller family groupings are not dominated by the larger families as they would be if decision making was carried out using only one person-one vote.

> "The [federal] government insists on the inclusion of ideas they take from their own culture, including democratic elections, and one man one vote. It is not that the *Gitanyow* disagree with these principles, but they cannot agree with the way the governments want to apply it in the context of the *Gitanyow* government. For example, although Canada and British Columbia insist on one man one vote for the *Gitanyow*, neither Canada nor British Columbia apply this principle inflexibly themselves. The ridings which determine the number of seats in the legislature are not of uniform size in either the Provincial legislature or the federal Parliament. Further, the interaction of federal principles with democratic principles weight the voting power in favour of provinces with smaller populations. There is nothing fundamentally undemocratic or unrepresentative about the house and clan system of government which the *Gitanyow* describe. In many ways it allows and encourages more participation by the citizens than the system of government in Canada. Furthermore, owing to the small size of many First Nations, and the predominance of family voting, a simplistic notion of voting equality in First Nations may lead to substantive inequality."[155]

Interpreting the meaning of family status or marital status may also raise issues of cultural difference. What constitutes "family" or "marriage," and therefore what constitutes discrimination on the grounds of family status or marital status, may be interpreted differently in different First Nations communities based on the content requirements of First Nations legal traditions and customary law. First Nations may also have "band bylaws" that define their understanding of family status and marital status.

The case law respecting accommodation of family status in an employment context is not well settled, and again this may be an area where First Nations legal traditions and customary law may provide direction specific to a given First Nation in a way that reflects the First Nation's cultural and legal values on the importance of family life and perceptions of the needs and duties of family members and what constitutes undue hardship in accommodating family status.

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[154] *Fiske and Patrick, Cis Dideen Kat* at 52.
[155] *Peeling, Traditional Governance and Constitution Making Among the Gitanyow.*

Gender distinctions arising under First Nations laws and other decision making within the ambit of the CHRA must be examined closely given the requirement in section 1.2 that consideration of First Nations customary law and legal traditions is to be consistent with the principle of gender equality; and given the well-known history of the Indian Act in introducing patriarchal values into First Nations law.

In addition to contemplating the possibly different ways gender equality might be realized through First Nations customary laws and legal traditions, there will be a need to consider whether there are distinct gender roles or treatments of gender that under the guise of tradition, or under the excuse of tradition, place women at a distinct disadvantage because of incorporated sexist or patriarchal values. As Dawn Martin-Hill cautions, there have been powerful and damaging stereotypes of what "traditional" means when applied to First Nations women—too often through the media and from sources within and outside First Nations communities. Sometimes, "tradition" when applied to First Nations women has meant a person with no voice, particularly when it comes to addressing abuses within the community.[156] Cyndi Banks has identified the risk of "the privileging of male discourse concerning custom."[157] Rosalva Aída Hernández Castillo has concluded that inequalities of power affecting indigenous women can exist within both national and traditional justice systems in examining the situation of indigenous women in Chiapas, Mexico. Castillo also notes that customary law cannot be assumed to be a "harmonious space free of contradiction" or existing in isolation from national law.[158]

There is a participatory dimension to collective rights, meaning that individual members of a culture or people are equally entitled to participate in discussions on what is tradition or culture at any given point. This particularly applies to matters affecting gender equality and governance and the rights of women and men to equally determine what constitutes custom.

Several authorities (including Eva Brems, Monique Deveaux[159] and John Borrows) argue that there cannot be a static understanding of "tradition" and that all community members, male and female, must have an opportunity to shape the legal expression of contemporary cultural and legal norms. In cases dealing with custom election and leadership issues, various courts similarly have said that custom and tradition are not static or frozen, that they change with circumstances and the needs of the people (see, for example, *Harpe v. Massie and Ta'an Kwäch'än Council*,[160] *McLeod Lake Indian Band v. Chingee*[161] and *Francis v. Mohawk Council*[162]).

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[156] *Martin-Hill, She No Speaks*.
[157] Cyndi Banks, "Women, Justice, and Custom: The Discourse of 'Good Custom' and 'Bad Custom' in Papua New Guinea and Canada," (2001) 42 *Int. J. Comparative Sociol.* 101.
[158] Rosalva Aída Hernández Castillo, "National Law and Indigenous Customary Law: The Struggle for Justice of Indigenous Women in Chiapas, Mexico" in Maxine Molyneux and Shara Razavi (eds.), *Gender Justice, Development, and Rights* (New York: Oxford University Press, 2002) 384.
[159] Monique Deveaux, "A Deliberative Approach to Conflicts of Culture," (2003) 31 *Political Theory* 780.
[160] [2006] YKSC 1.
[161] (1998), 165 D.L.R. (4th) 358 (F.C.T.D.).
[162] 2003 FCT 115 (CanLII); [2003] 3 C.N.L.R. 86; 227 F.T.R. 16.

In *Francis v. Mohawk Nation*, the Federal Court attempted to summarize the legal principles that have developed in that court respecting the determination of custom in the context of elections and leadership selection issues:

> First of all, those who rely upon "custom" must establish what it is and the derivation thereof. The Act fails to furnish any guidelines as to how custom is to be identified. In *Bigstone*, Strayer J. said that "custom" would include practices generally acceptable to band members and as to which there was a broad consensus. The "practices" could be established either by acts repeated over time or by a single act such as the adoption of an electoral code. Custom is not frozen in time but changes in response to changed circumstances. A question remains as to whose consent must be obtained to establish custom. Several cases have dealt with the test of a "broad consensus." The answer depends upon a number of factors. A further question is whether the approval by a majority of both resident and non-resident members is required for it to be said that the Community's voice as whole has been heard.
>
> It was necessary to ascertain how an electoral code has been applied in practice to such questions as who is entitled to vote and who will administer the conduct of elections. Behaviours arising through attitudes, habits, abstentions, shared understandings and tacit acquiescence often develop alongside a codified rule and these may colour, specify, complement and even limit the text of a particular rule. These behaviours may become the new band custom. For a rule to become custom, a practice contemplated thereby must be firmly established, generalized and followed consistently by a majority of the community. If there is evidence of a broad consensus, the views of an insignificant number of members who have persistently objected to the rule can be disregarded. Upon a review of the case law, the question could be framed as: whether the resolution, decision or code was based on a majority consensus of all those who, on the evidence, appear to be Band members, regardless of residency.

Within the elections and leadership cases, considerable flexibility and a broad range of factors have come into play in the judicial determination of the existence and content of custom law. Two cautions should be kept in mind. The first caution is that not all customary practices can necessarily be equated with customary law. An example of this perhaps is the finding in the Tribunal decision in ***Raphael v. Montagnais***,[163] that the evidence in that case showed "it is an aboriginal custom to share one's residence with one's brothers and sisters as well as one's parents and grandparents." The generalization to all Aboriginal people is not consistent with what section 1.2 would now require, which is an examination of customary law and legal traditions in a First Nations specific context; and whether the sharing of a residence with extended family members is a customary practice, economic necessity or a customary law might need to be further explored. The second caution is that legal principles developed in the specific context of custom election and leadership issues may not be suitable to all situations involving First Nations customary law. This may become clear one way or the other as evidence and arguments are led before the Tribunal in other matters involving customary law and equality rights.

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[163] *Raphael* v. *Montagnais du Lac Saint-Jean Council*, 1995 CanLII 2748 (C.H.R.T.).

In *Harpe*, the issue of gender equality and customary law arose in a custom leadership selection case. This issue arose in the transition from an oral system of customary law to a written constitution that modified and incorporated the customary law of a Yukon First Nation respecting leadership rules. Whether or not customary law supported the appointment of an acting Chief pending an election for Chief, and the appointment of a Chief who was female, were some of the issues before the Supreme Court of the Yukon Territory. To resolve this conflict, the Court applied the principle enunciated in previous decisions of the Federal Court that custom can be established when there is evidence that the customary rule at issue has received general acceptance within the community. In *Harpe*, the Court found that a change in the First Nation's written constitution for the election of a male or female person as Chief indicates a general acceptance that a traditional custom had "evolved to become gender equal." The Court also held that custom, as an Aboriginal right, is constitutionally guaranteed equally to male and female persons. (The Court referred to subsection 35(4) of the *Canadian Charter of Rights and Freedoms* and presumably meant subsection 35(4) of the *Constitution Act, 1982*.) The Court held that the power of the Elders Council to appoint an acting Chief was part of the First Nation's customary or traditional law as well as an Aboriginal right and as an Aboriginal right, the power to appoint an Acting Chief included both male and female persons even though there had been a history prior to the adoption of the written constitution of only males being appointed hereditary Chiefs under customary law.

Where equality rights issues arise in a customary law or other First Nation law context, the broad principles outlined in the recent *Conway* decision suggest that tribunal decision making of any kind must conform to Charter equality requirements and section 35 Aboriginal and Treaty rights protection. Section 25 of the Charter may reinforce, and make mandatory, the direction provided in section 1.2 to consider how First Nations customary law and legal traditions "balance" (protect and implement) both collective and individual rights in accordance with international human rights norms. Where gender equality issues are at stake, the analysis suggested by Kent McNeil suggests that gender equality would take primacy where there is an actual conflict between a collective right referenced in section 25 and a gender equality interest.

All of this suggests that the principle of gender equality referred to in section 1.2 represents a bottom line of compliance with Charter equality values and the gender equality guarantee in subsection 35(4) of the *Constitution Act, 1982* in any interpretation or application of First Nations customary law or legal traditions in a CHRA context.

International human rights norms also include advice and guidance under the CEDAW and the *United Nations Declaration on the Rights of Indigenous* Peoples. Article 44 states that "All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals" and article 21(2) requires special measures to be taken in improving economic and social conditions of indigenous elders, women, youth, children and persons with disabilities. Article 22(1) requires that particular attention be paid to the special needs of these same groups in the implementation of the United Nations Declaration and article 22(2) requires measures be taken to ensure that indigenous women and children enjoy protection against all forms of violence and discrimination.[164]

[164] Article 44 of the UN Declaration.

Consideration should be given by the Commission and the Tribunal to what First Nations laws or mechanisms may have been used by the First Nation to resolve the complaint.

This may be relevant at two different stages. First at the initial stage of assessing the Commission's jurisdiction to accept a claim pursuant to paragraph 41(1)*(a)* and *(b)* because the Commission may refuse to deal with complaints where the complainant has not first exhausted other grievance or review procedures or where procedures under other legislation could deal with the issue more appropriately. Subsection 42(2) requires that before dismissing a complainant on the basis of paragraph 41(1)(a), the Commission shall satisfy itself that the failure to exhaust another grievance or review procedure was attributable to the complainant and not to someone else. Therefore, the existence of a First Nations dispute resolution process to deal with equality rights issues may be relevant at the complaint assessment stage.

Secondly, the existence and the outcome of a First Nation dispute resolution process may also be relevant as part of the evidentiary record in determining what First Nations customary law and legal traditions provide respecting the balance between collective and individual rights and interests. The outcomes of First Nations dispute resolution processes could be an important part of the evidentiary base regarding First Nations customary law and legal traditions.

c. Wrapping Up

At the heart of section 1.2 of the CHRA, consistent with international human rights law, is the assumption that there are universal human rights values concerning equality that can find relevance and expression in laws of different nations and cultures. In developing an approach to understanding the direction provided in section 1.2, while grappling with the potential influence of colonial- or customary-sourced concepts or practices that are discriminatory toward women, as well as the risk of cultural bias in the institutions and processes of law itself, guidance may be found in international human rights law.

The repeal of section 67 along with the adoption of sections 1.1 and 1.2 of the CHRA provides an opportunity to encourage the expression of First Nations' perspectives on human rights and engage in much-needed intercultural dialogue on what measures are needed to ensure that international human rights standards are upheld by Canadian and First Nations law. This would include examining First Nations' perspectives on how the principle of gender equality is being implemented in First Nations' decision making as well as identifying where there are gender equality gaps under First Nations law.

In interpreting and applying section 1.2, the approach suggested in this paper is more flexible than formulaic. This is necessary because of the more informal nature of tribunal decision making. A flexible approach is also necessary because of the diversity of First Nations, and the challenge of mediating significant cultural differences, and differences in legal traditions about how to achieve the ideal of individual respect and dignity; an ideal that is captured by the concept of substantive equality under Canadian law and by the international human rights standards that inform Canadian human rights law.

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