

Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government

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I. INTRODUCTION¹

THE 1992 CHARLOTTETOWN ACCORD proposed the entrenchment of an inherent Aboriginal right of self-government and has brought the issue of self-government to the forefront of the constitutional debate. While the proposals are laudable, they have raised the concerns of Aboriginal women² interested in protecting their rights not only as Aboriginal people, but also as women. Some Aboriginal women believe that an inherent right of self-government might have the effect of curtailing their individual rights as women.

This paper explores the constitutional concerns of Aboriginal women about their individual rights as women under Aboriginal self-government and concludes that such concerns are well-founded with respect to the discouraging historical discrimination to which Aboriginal women have been subjected. However, the more troubling issue facing Aboriginal women is not the existing constitutional provisions, but

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¹ This article does not purport to represent the views of Aboriginal women nor does it attempt to offer Aboriginal people advice on what steps are appropriate for them. The article simply explores some of the legal issues surrounding the inherent right of Aboriginal self-government and its effect on Aboriginal women.

² The use of the term "Aboriginal" in this paper usually refers to Aboriginal people as defined by s. 35(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Aboriginal people includes the Indian, Métis and Inuit people of Canada. The term "Indian" is used with specific reference to status Indians under the *Indian Act*, R.S.C. 1985, c. I-5. See also D. Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 McGill L.J. 656; D. Sanders, "Indian Status: A Women's Issue or an Indian Issue?" [1984] C.N.L.R. 30; W. Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 Queen's L.J. 279; P.A. Monture, "Reflecting on Flint Woman" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 351.

rather the replacement of the *Canadian Charter of Rights and Freedoms*³ with an Aboriginal charter of rights, and whether Aboriginal governments in the future will be subject to the *Charter* or an Aboriginal charter. It is unclear the extent to which the rights of Aboriginal women would be protected under an Aboriginal charter. In this light, the concerns of Aboriginal women as they relate to an inherent right of Aboriginal self-government subject to the *Charter* and an Aboriginal charter will be examined.

II. HISTORICAL PERSPECTIVE

BEFORE THE ARRIVAL OF the Europeans, many Aboriginal societies were egalitarian in nature and based on matriarchal systems of kinship as opposed to European patriarchal systems. For example, the Iroquois matriarchy operated within the Iroquois Confederacy which was a political system of six Aboriginal nations, which now live on lands reserved for their use in southern Quebec, Ontario and the state of New York.⁴ The matriarchal system was based on the concepts of equality, caring in human relations and respect for the environment. The system was not authoritarian like that of patriarchal systems, but rather, egalitarian.⁵

In the Iroquois matriarchal system women had "great economic, political and legal power enshrined in the Iroquois Constitution."⁶ For example, the decision-making power was divided between male and

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁴ Native Women's Association of Canada, *Matriarchy and the Canadian Charter: A Discussion Paper* (Ottawa: N.W.A.C., 1991) at 2. The six Iroquois nations are the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora peoples.

⁵ *Ibid.*

⁶ *Ibid.*

female persons and women held property and hereditary title.⁷
Iroquois women

... played a profound role in Iroquois political life. ... The basic unit of government was the "hearth," which consisted of a mother and her children. Each hearth was part of a wider group called an otianer, and two or more otianers constituted a clan. The word otianer specifically referred to the female heirs to the chief-tainship titles of the League. The otianer women selected one of the males within the group to fill any of the fifty seats in the League. ... Iroquois political philosophy was rooted in the concept that all life was spiritually unified with the natural environment and other forces surrounding people. ... Iroquois youth were trained to enter a society that was egalitarian, with power more evenly distributed between male and female, young and old, ...⁸

In many Aboriginal languages, there was no distinguishing between "he" and "she." Both were seen as being the same (to the extent that they were equal).⁹ In 1841, a commission was established to investigate the conditions of Indians in Upper and Lower Canada and reported in 1847 that Indian women were the primary providers for their families.¹⁰ Indeed, the notion of egalitarianism in Aboriginal societies was not restricted to the Iroquois. Robert Campbell of the Hudson's Bay Company reported in 1838 that the Chieftainess of the Nahany, a hunting tribe in the Yukon Territory, "commanded the respect not only of her own people, but of the tribes they had intercourse with."¹¹ The Eurocentric notion of superiority over Aboriginal people is evident in the following passage by a noted commentator writing in the mid-1800s:

⁷ In their book *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: University of California, 1991), Donald Grinde and Bruce Johansen explore the nature of historical Aboriginal government and its effects on the constitutional development of the United States. They note that Iroquois women "... held pivotal positions in native political systems. Iroquois women, for example, nominated men for positions of leadership and could 'dehorn' or impeach these leaders for misconduct. Women's approval was usually a necessary precondition for conducting war. In a matrilineal society — and nearly all of the confederacies that bordered the colonies were matrilineal — women owned all household goods." *Ibid.* at 221.

⁸ *Ibid.* at 27–28.

⁹ V. Kirkness, "Emerging Native Women" (1987–88) 2 C.J.W.L. 408 at 411.

¹⁰ K. Jamieson, "Sex Discrimination and the *Indian Act*" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) at 116.

¹¹ C. Wilson, *Campbell of the Yukon* (Toronto: Macmillan, 1970) at 28.

Not the least remarkable among their institutions, was that which confined the transmission of all titles, rights and property in the female line to the exclusion of the male. It is strangely unlike the canons of descent adopted by civilized nations, ...¹²

Thus today, with constitutional talks centering around "power" and "government," Aboriginal people are placed in a position of attempting to reconcile the language and reality of their past with the language and reality of the present. As Sharon McIvor, of the Native Women's Association of Canada, stated:

I have ... come to the conclusion that the terms in which we're speaking are non-aboriginal terms. This is particularly true about the concept of power. As aboriginal communities, we don't have power. What we have, and what we have had traditionally, is responsibility. We have responsibility for our people. ... In aboriginal communities, we don't have one person speaking for the community without consulting the community. That's the difference between power and responsibility.¹³

McIvor's statement illustrates the dichotomy which exists in this debate. On the one hand, there are some Aboriginal communities putting into place systems of government akin to "white" standards (i.e. elected band councils). On the other hand, there is the substantial movement by Aboriginal people to get in touch with their heritage and to build on their rich history for survival in the future. In many instances, this means a return to some form of traditional government and, in some cases, will underscore the important responsibilities that women have in many Aboriginal societies. While these aims are not necessarily mutually exclusive, their similarities are not readily apparent. Aboriginal women fall between these two positions. They recognize their individual rights as Aboriginal women, which some call "un-Aboriginal" (to the extent that it promotes individual as opposed to collective rights), and they also promote their collective rights as Aboriginal peoples.¹⁴

Aboriginal people have a history of egalitarianism which remains in many of their government structures. However, the mass influx of

¹² L.H. Morgan, *League of the Iroquois* (New York: Corinth Books, 1962) at 84.

¹³ "Sharing Power: How Can First Nations Government Work?" in F. Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, B.C.: Oolichan Books, 1991) 82 at 82.

¹⁴ Aboriginal women face an abnormally high level of physical and mental abuse. For example, "[T]oday, eight out of 10 aboriginal women experience physical, sexual, psychological or ritual abuse ... This is twice as high as the rate of abuse in non-aboriginal society." D. Hoffman, "A Call for a Return to Historical Values" *The [Saskatoon] Star Phoenix* (19 September 1992) C3.

European culture and governmental apparatus has changed this. Along with the influence of Christianity, Europeans successfully imposed on Aboriginal communities their own patriarchal means of government (e.g. elected band councils/chiefs). This is not new for Europe and it is not limited just to Aboriginal people. For example, Christianity fell victim to the influence of patriarchal Europe around the second and third centuries A.D. Prior to that, women held powerful positions in the Christian church and indeed were integral to its operation and early success. However, this changed with the systematic take-over by men to make Christianity "male," as opposed to its early beginnings which were truly egalitarian. Just as Christian women are attempting to write themselves back into Christianity,¹⁵ so too Aboriginal women are attempting to restore to some degree their place in Aboriginal governments.

Aboriginal women find themselves in a difficult position. They are not only disadvantaged because they are members of a minority group which has been subject to adverse discrimination (Aboriginal people), but they are also disadvantaged because of the adverse discrimination they have received as a result of their sex (female). In this way, Aboriginal women are "dually disadvantaged." One author writes that:

... native females suffer multiple jeopardy on the basis of a number of objective indicators of social and economic well-being. The fact that Indians as a group are and Indian females in particular suffer the greatest disadvantage suggests that Indian status, with its historical trappings of colonial dependency, does indeed create additional barriers to economic and social health. The position of Indian women with respect to labour-force participation and income, suggests that they are the most severely handicapped in their exchange relations with employers.¹⁶

In 1869, the federal Parliament enacted the first legislation dealing with Indians,¹⁷ (although the first act actually titled the "Indian Act" was enacted in 1876). This was done under the auspices of s. 91(24) of the *Constitution Act, 1867*.¹⁸ Section 91(24) allows the federal gov-

¹⁵ See for example E.S. Fiorenza, *In Memory of Her: A Feminist Theological Reconstruction of Christian Origins* (New York: Crossroad Publishing, 1983).

¹⁶ G.M. Gerber, "Multiple Jeopardy: A Socio-Economic Comparison of Men and Women Among the Indian, Metis and Inuit Peoples of Canada" (1990) 22 *Can. Ethnic Stud.* 69 at 80.

¹⁷ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6* [hereinafter *1869 Act*].

¹⁸ *Constitution Act, 1867* (U.K.), 30 & 31 *Vict.*, c. 3.

ernment to enact legislation respecting "Indians, and lands reserved for the Indians." The *1869 Act*, along with the current *Indian Act*, did not reflect Aboriginal customs and traditions. Instead, it imposed Eurocentric ideals and norms upon the affected Aboriginal peoples. For example, prior to European contact, many Aboriginal women possessed that which can be compared to the right to vote, which took European women hundreds of years to attain. The "imposition of the *Indian Act* in Canada actively destroyed traditional government."¹⁹ One author summarizes the three main functions of the *Indian Act* legislation as follows:

(1) "civilizing" the Indians — that is, assimilating them (and their lands) into Euro-canadian citizenry; (2) while accomplishing this, the ever more efficient "better management" of Indians and their lands was a always a goal to be pursued and, following on this, an important element in better management was controlling expenditure and resources; (3) to accomplish this efficiency it became important to define who was an Indian and who was not.²⁰

The *1869 Act* imposed many changes on the traditional ways in which Indian women were treated. Upon the death of an Indian male, his goods and possessions were passed on to his children and not to his wife.²¹ She was excluded because her maintenance was seen (by the Eurocentric males who wrote the Act) as being the responsibility of the children. The band councils were to be elected, which is non-traditional to Indians, and those entitled to elect the councillors were adult males.²² Adult females and children had no role. This is a far cry from traditional Indian government. Section 6 of the *1869 Act* provided that any Indian women who married a non-Indian lost her status as an "Indian" under the Act. Her children also lost their status. (This eventually became s.12(1)(b) of the current *Indian Act*). Finally, an Indian women marrying an Indian man from another band lost her status in her own band (as did her children), and automatically became a member of her husband's band. Indian women were accorded fewer rights than Indian men. By making "gender" an issue,

¹⁹ *Supra* note 9 at 411.

²⁰ *Supra* note 10 at 117.

²¹ *Supra* note 17 at s. 9.

²² *Ibid.* at s. 10.

with regard to rights, the Act represents the epitome of the Europeanization of Indians.²³

The *1869 Act* advocated the principle of assimilation.²⁴ In addition, the Act affirmed the principle that, like European women, Indian women should be subject to their husbands and by law the children belonged to him. In 1876 the first act to bear the name "Indian Act" was enacted. In addition to embodying all of the above principles, it expanded the definition of "Indian" by emphasizing the legitimacy of descent through the male line (as opposed to traditional Indian matrilineal descent). While some of the above sections of the Act disappeared with time, the provision whereby Indian women lost their status upon marrying a non-Indian man was not abolished until 1985. It provides an interesting case study of the precarious situation in which Indian women find themselves.

III. SECTION 12(1)(B) OF THE *INDIAN ACT*

SECTION 12(1)(B) OF THE *Indian Act* stated that Indian women marrying non-Indian men lost their "Indian" status and thus could not receive the benefits accorded to status Indians. Two Supreme Court of Canada decisions and an appeal to the United Nations' Human Rights Committee concluded with an amendment being made to the *Indian Act* in 1985 with the enactment of Bill C-31.²⁵ The following outlines this process.

In the 1969 decision of *R. v. Drybones*,²⁶ the Supreme Court of Canada dealt with s. 94(b) of the *Indian Act* which stated that it was an offence for an Indian to be intoxicated off a reserve. Mr. Drybones was charged with the offence and ultimately appealed the decision of lower courts to the Supreme Court of Canada. The Supreme Court

²³ This is not to suggest that "gender" was not an issue in traditional Aboriginal societies. However, in many societies, gender was complementarian as opposed to hierarchical. The "Europeanization" of Indians refers to the imposition of a hierarchy of gender; one gender being better than the other. Ivan Illich in *Gender* (Berkeley: Heyday Books, 1982) argues that gender itself does not necessarily produce discrimination, but rather the denigration of gender produces inequality in that the special roles and status are undermined by their objectification and thus made genderless. This paves the way for patriarchy and hierarchy.

²⁴ *Supra* note 10 at 118.

²⁵ *An Act to Amend the Indian Act*, S.C. 1985, c. 31 [hereinafter Bill C-31].

²⁶ [1970] S.C.R. 282, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473 [hereinafter *Drybones*].

held that the use of the racial classification of "Indian" in s. 94 of the Act violated the equality guarantee set out in the *Canadian Bill of Rights*.²⁷ The *Bill of Rights* had the effect of limiting the extent to which the *Indian Act* could discriminate against Indians as opposed to other Canadians. The *Drybones* decision was the first and only decision by the Supreme Court to hold that a federal statute was inconsistent with the *Bill of Rights*.²⁸ While the future appeared hopeful for the use of the *Bill of Rights*, this was dampened by the Supreme Court's 1973 decision of *Canada (A.G.) v. Lavell*.²⁹

In *Lavell*, the issue was whether s. 12(1)(b) of the *Indian Act* violated the *Bill of Rights*' "equality before the law" provision. In this way, *Lavell* was similar to *Drybones*. Section 12(1)(b) denied an Indian woman who married a non-Indian her Indian status, including her right to hold property and live on an Indian reserve. A male Indian who married a non-Indian retained his Indian status. *Lavell* and *Bedard*, two Indian women who married non-Indian men and thus lost their "Indian" status, argued that s. 12(1)(b) constituted discrimination by reason of sex.

The Supreme Court held five to four that s. 12(1)(b) did not constitute a violation of equality before the law. Justice Ritchie, writing the majority decision for the court, stated that the *Indian Act* might discriminate against women, but so long as the provision was applied equally to all women it affected, there was no violation of equality before the law. It is difficult to reconcile this decision with that of *Drybones*, which was also written by Ritchie J.

The broader implication of the *Lavell* case was that it opened up the possibility that the entire *Indian Act* could be deemed racist and thus null and void. If this was the case, the implementation of the federal government's white paper, which advocated assimilation, might be strengthened and this needed to be avoided.³⁰ Ironically,

²⁷ S.C. 1960, c. 44, s. 1, reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*].

²⁸ It is important to note that the *Bill of Rights* is not a constitutional document and is, therefore, equal to normal federal statutes. Unlike the *Charter*, which is a constitutional document and thus forms a part of the supreme law of Canada pursuant to s. 52 of the *Constitution Act, 1982*, the *Bill of Rights* can be repealed by Parliament at any time.

²⁹ [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 [hereinafter *Lavell*].

³⁰ Issued in 1969, the federal government's white paper [Canada, *Statement of the Government of Canada on Indian Policy* (Ottawa: 1969)] called for the integration of Indians into mainstream Canadian society; assimilation. In a speech given in Vancouver, B.C. on 8 August 1969, then Prime Minister Trudeau stated:

the National Indian Brotherhood and all of its provincial constituents intervened in the case and argued against Lavell and Bedard. This was due to their fear that the whole *Indian Act* may be declared racist and thus affirming the 1969 white paper's conclusions and recommendations. When the decision was handed down by the Supreme Court in August 1973, the National Indian Brotherhood and most status Indians "heralded the judgment as a victory in defending the *Indian Act* against possible nullification or further erosion."³¹ The conflict between imposed "white" norms and the well-being of all Aboriginal people was again fuelled.

The discrimination in the *Indian Act* is an institutional feature of the Act. As Professor Douglas Sanders reported to the Standing Committee on Indian Affairs and Northern Development,

Section 12(1)(b) is not an aberration; it reflects the main thesis in the membership system of the Indian Act which is determining membership on the basis of kinship and not on the basis of race. ... The Indian Act focused on nuclear family units, and to ensure that all members of the nuclear family unit could reside on the reserve or not reside on the reserve, it was determined that the units should be single status units. To achieve that, the male was used as the head of the household to determine status for all members of the nuclear family unit. This of course did not coincide with traditional Indian kinship systems, which were not always patrilineal, nor did it align itself with another characteristic of Indian kinship systems which is that they did not focus on nuclear family units but on extended family units.³²

The problem with s. 12(1)(b) did not remain static. Sandra Lovelace, an Indian women divorced from her non-Indian husband, tried unsuccessfully for three years to obtain housing for herself and her son on her former reserve in New Brunswick. Her repeated attempts were frustrated and eventually she took her complaint to the New Bruns-

We have set the Indians apart as a race. We've set them apart in our laws. ... So this year we came up with a proposal. It's a policy paper on the Indian problem. ... They should become Canadians as all other Canadians and if they are prosperous and wealthy they will be treated like the prosperous and wealthy and they will be paying taxes for the other Canadians who are not so prosperous and not so wealthy whether they be Indians or English Canadians or French or Maritimers and this is the only basis on which I see our society can develop as equals. "Remarks on Aboriginal and Treaty Rights" in P.A. Cumming & N.H. Mickenburg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972) at 331-332.

³¹ S.M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981) at 199.

³² Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, *Minutes of Proceedings and Evidence of the Sub-Committee on Indian Women and the Indian Act*, (Issue No. 5, 14 September 1982) at 13.

wick Human Rights Commission. By late 1977, Dr. Noel Kinsella, Chair of the Commission at the time, concluded that non-status Indian women had exhausted all possible avenues for amending s. 12(1)(b) of the *Indian Act* and thus decided to petition the United Nations' Human Rights Committee on behalf of Sandra Lovelace. In her communication she stated:

I, Sandra Nicholas Lovelace herewith communicate in writing with the Human Rights Committee and state that I have not been able to enjoy certain rights enumerated in the International Covenant on Civil and Political Rights because of Canada's Indian Act. ... I submit that all domestic remedies have been exhausted insofar as the jurisprudence rests on the decision of the Supreme Court of Canada. ... I am a Maliseet Indian living in the Province of New Brunswick, Canada. Having married a non-Indian I lost my rights and status as an Indian. This occurred because of the following section in the Indian Act ... 12(1)(b).³³

In July 1981, the Human Rights Committee issued its final decision³⁴ on the matter and declared that s. 12(1)(b) was inconsistent with the United Nations' *International Covenant on Civil and Political Rights*.³⁵ However, because the Human Rights Committee's decision had no direct domestic legal impact, it took until 1985 before the provisions were amended.

After much public pressure, including the negative decision by the United Nations' Human Rights Committee, Parliament passed Bill C-31, to bring the *Indian Act* into accord with the *Charter*. Its purpose is to ensure equal treatment for men and women. Changes were made to the Act to recognize the right of Aboriginal governments to control their own membership. The amendments also abolished the concept of "enfranchisement," which permitted Indians to give up their Indian status and band membership for a number of reasons. The term "enfranchisement" originated at a time when the termination of Indian status was the only means for Indians to gain the right to vote in federal and provincial elections.

³³ New Brunswick Human Rights Commission, *Selected Documents in the Matter of Lovelace versus Canada Pursuant to the International Covenant on Civil and Political Rights* (Fredericton: N.B.H.R.C., September 1981) at 24-25.

³⁴ *In the Matter of Lovelace versus Canada Pursuant to the International Covenant Civil and Political Rights* (30 July 1981), No. CCPR/C/DR (XIII)/R.6/24 (N.B.H.R.C.) in *ibid.* at 155-165.

³⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of December 16, 1966. Entered into force on March 23, 1976.

For the purposes of this paper, the most significant change brought about by Bill C-31 was that women who lost their Indian status and band membership because of sexual discrimination under s. 12 of the Act were once again eligible to have their Indian status and band membership restored. As well, children of these women were accorded the right to have their status and band membership restored.

The positive effects of Bill C-31 are obvious. Bands received increased control over membership and the *Indian Act* was brought into accord with the equality provisions of the *Charter*. Women and their children regained their status as Indians. Indeed, between June 1985, when the Act was amended, and June 1990, the Department of Indian and Northern Affairs received more than 75,000 applications. The applications represented more than 133,000 individuals seeking registration. By June 1990, more than 73,000 (55%) individuals seeking registration were approved for registration. Out of that number, 58% were female.³⁶

Once registered, status Indians gain access to a number of positive benefits including education and health-care. As well, registrants regain treaty rights and the psychological/symbolic benefit of being legally recognized as an "Indian."

However, there are some negative impacts. An example is found in s. 6(2). One author writes:

Section 6(2), the so-called "second-generation cut-off" or "half-descent" rule, terminates Indian status for persons with fewer than two "Indian" grandparents — Indian meaning with legal status as an "Indian" under the *Indian Act*. This rule applies to children born after, and children of women, *but not men*, who married out prior to 17 April 1985. In the case of descendants of Indian men who married out before 1985, a quarter-descent rule applies. ... The new by-law powers of band councils over residency on reserves have been exercised by some in a restrictive manner, effectively excluding reinstated women and their children from band membership and access to services. ... These problems are by no means universal.³⁷

Thus, some Aboriginal communities are placed in a catch-22 situation. The backlash against Indian women from within Indian communities may be the result of losing historical touch with their rich

³⁶ Canada, Indian and Northern Affairs, *Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report* (Ottawa: 1990) at 8–9. See also J. Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31" (1985) 1 *Native Stud. Rev.* 81.

³⁷ W. Moss, "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 *Queen's L.J.* 279 at 281.

history and the limited economic resources of most bands. Some communities are unwilling to give back to Indian women that which was taken away by non-Indians. This exemplifies the confusion that is faced with adopting "white" forms of government, etc. Band members who resist the "Indian" status of reinstated Indian women base their arguments on the fact that the women who are calling for reinstatement have been co-opted by white society in that they have manipulated white law in order to have their Indian status recognized. What these band members have failed to recognize is that the reason Indian women lost their status in the first place was because of white law.

A recent decision by a Canadian Human Rights Tribunal underscores the deficiency and inherent contradictions in the 1985 amendments. In *Courtois v. Canada (Dept. of Indian Affairs & Northern Development)*,³⁸ Louise Courtois and Marie-Jeanne Raphael, Indian women reinstated under Bill C-31, complained to the Canadian Human Rights Commission that they and their children were being discriminated against by the Department of Indian Affairs in that the department was not permitting their children to have access to the Pointe-Bleue School. Since 1980 the school has been controlled by the Pointe-Bleue Band. The discrimination asserted related to a moratorium declared by the band council under s. 11(2) of the *Indian Act*, which suspended for two years the provision of services to reinstated Indian women under Bill C-31 (in areas within the jurisdiction of the band). The Department of Indian Affairs agreed with the band council's decision. Both women filed complaints of discrimination against the department on the grounds of sex and marital status under the *Canadian Human Rights Act*.³⁹

The Human Rights Tribunal concluded that the department's proposal to educate the children of reinstated Indian women off-reserve had the effect of creating distinctions between band and non-band members on the basis of sex and marital status. The Tribunal held that the "moratorium was clearly aimed at women reinstated by Bill C-31."⁴⁰ It was found that the department should have "taken action to ensure school service was provided to children of reinstated women at Pointe-Bleue."⁴¹

³⁸ [1991] 1 C.N.L.R. 40 (C.H.R.T.) [hereinafter *Courtois*].

³⁹ R.S.C. 1985, c. H-6.

⁴⁰ *Courtois*, *supra* note 38 at 41.

⁴¹ *Ibid.*

The preceding indicates that Aboriginal women have not yet won their struggle and even though some have had their rights legally entrenched, the implementation of such rights is continuing to be hampered. With this in mind, it sets the background for the demands of Aboriginal women at the constitutional negotiations.

IV. THE CONSTITUTION AND THE INHERENT RIGHT OF ABORIGINAL SELF-GOVERNMENT

THE 1992 CHARLOTTETOWN ACCORD proposed that Aboriginal peoples should be guaranteed an "inherent right of self-government."⁴² Some Aboriginal women's groups have maintained that any such right must be placed within the Constitution in such a way so as to guarantee equality of treatment between men and women. To discuss these concerns, a brief overview of the relevant existing constitutional provisions, and the interpretation thereof, shall be presented. The Charlottetown Accord will also be examined and discussed with respect to the concerns of Aboriginal women.

There are a number of sections of the *Charter* which are noteworthy to Aboriginal women. Section 15(1) reads:

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

This is the equality provision of the *Charter* and ensures that individuals receive equal treatment before and under the law without, in particular, discrimination on the basis of sex.⁴³ Section 25 of the *Charter* reads

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

⁴² "Section 35.1(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada."

⁴³ See W. Black and L. Smith, "The Equality Rights" in G. Beaudoin and E. Ratushny, *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 557.

Section 25 is the only provision of the *Charter* which refers specifically to Aboriginal people. It is an interpretive section, and does not create rights but simply maintains them. It serves as a prism through which other rights in the *Charter* are to be viewed. In this way, it serves as

... a shield which protects Aboriginal, treaty and other rights from being adversely affected by other Charter rights. In particular, section 25 is intended to protect the rights of Aboriginal peoples from obliteration by the equality rights guarantee contained in section 15.⁴⁴

Section 28 of the *Charter* reads: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Like s. 25, s. 28 is an interpretive section. It does not grant rights per se. Finally, s. 32 of the *Charter* is important, in that it states that the *Charter* shall apply to the federal and provincial governments (including the territories). For Aboriginal people in general, and Aboriginal women in particular, the real question is to what extent will Aboriginal governments be subject to the *Charter*, if at all?

Presently, Aboriginal women have little to be concerned about with respect to the *Charter*. Sections 15 and 28 outline in very precise language the equal protection afforded male and female persons. Indeed, in this respect, it is highly unlikely that a *Lavell*-type judgment would be affirmed by the courts.

However, the Native Women's Association of Canada has expressed concerns about the existing *Charter* provisions. Specifically, they are concerned that s. 25, to the extent that it limits the negative effects of *Charter* rights on Aboriginal and treaty rights, may be used to derogate or abrogate from individual rights held by Aboriginal women. They suggested that an additional paragraph be added to s. 25 which would read:

Notwithstanding anything in this Charter, all rights and freedoms of the Aboriginal people of Canada are guaranteed equally to male and female Aboriginal persons.⁴⁵

⁴⁴ W. Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982* — Part I: The Interpretive Prism of Section 25" (1988) 22 U.B.C. L. Rev. 21 at 28.

⁴⁵ Native Women's Association of Canada, *Native Women and Self-Government: A Discussion Paper* (Ottawa: N.W.A.C., 1991) at 14.

This provision would ensure that Aboriginal women continue to receive the benefit of the equality provisions of the *Charter* notwithstanding anything else, including an Aboriginal charter of rights. The creation of an Aboriginal charter of rights, with constitutional status, may conflict with the existing *Charter* by virtue of s. 26 of the *Charter*:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

The result of s. 26 is that any constitutional Aboriginal charter would have a defined place in the laws of Canada and would not necessarily be superceded by the *Charter*. While the above proposal for the amendment of s. 25 is laudable and indeed, would not cause any substantive change to the *Charter*, it is not clear that such a clause is necessary. While s. 25 refers to "certain rights and freedoms" in the *Charter*, s. 28 reads "notwithstanding anything in this Charter." The result is that s. 25 refers to the rights guaranteed in the *Charter* and s. 28 speaks to everything in the *Charter*. Since s. 28 does not guarantee rights, it is not affected by s. 25.

Some Aboriginal groups have been calling for the development and entrenchment of a constitutional Aboriginal charter of rights.⁴⁶ The introduction of such a charter raises other questions. Aboriginal women have every reason to be concerned because there is no guarantee as to what the contents of an Aboriginal charter would be. The effect of an Aboriginal charter on Aboriginal women is dependent upon the relationship that the Aboriginal charter has with respect to the *Charter*. That is, would the *Charter* supersede an Aboriginal charter or would the Aboriginal charter prevail over the *Charter*, to the extent that it affects the rights of Aboriginal people? At this point, it suffices to say that Aboriginal women have many legitimate concerns with respect to the notion of an as yet undefined Aboriginal charter.

The *Charter* is Part I of the *Constitution Act, 1982*.⁴⁷ Part II deals with the rights of Aboriginal peoples. Important to note is that Part II is outside of the *Charter* and is, therefore, not subject to its provisions per se. Section 35 of the *Constitution Act, 1982* reads:

⁴⁶ S. Delacourt, "Natives divided over Charter" *The [Toronto] Globe and Mail* (14 March 1992) A7.

⁴⁷ *Constitution Act, 1982*, as am. by the *Constitution Amendment Proclamation, 1983*, R.S.C. 1985, App. II, No. 46.

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

(2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) *Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.* [emphasis added]

Section 35 is the substantive guarantee of existing Aboriginal and treaty rights of the Aboriginal people of Canada. Because it is not part of the *Charter*, it is not subject to the *Charter's* s. 1 limitation clause nor to the s. 33 legislative override provision. Most proposals for the inclusion of an Aboriginal right of self-government into the Constitution are made within the confines of s. 35. To date, the only Supreme Court of Canada decision to interpret s. 35 is that of *R. v. Sparrow*.⁴⁸

The May 1990 *Sparrow* decision held that the rights guaranteed in s. 35 are substantive in nature.⁴⁹ Such rights are to be "interpreted flexibly so as to permit their evolution over time." However, the court also noted that such rights are not absolute in nature and that the federal legislative powers under s. 91(24) of the *Constitution Act, 1867* continue. The court provides an analysis for justifying certain infringements upon s. 35 rights. The important point about *Sparrow* is that it gave substantive meaning to s. 35 and that the Aboriginal rights contained therein are not "empty."

For the purposes of this discussion, s. 35(4) is noteworthy. It ensures that whatever rights s. 35 recognizes and affirms, including those rights contained in land claims agreements (s. 35(3)), such rights shall be guaranteed equally to female and male persons. The *Sparrow* decision is also important in this regard. By making the rights of s. 35 subject to a flexible interpretation that allows the rights to evolve over time, such rights would most likely be held subject to the prevailing notion that constitutional rights are to be guaranteed equally to female and male persons. This is consistent not only with existing constitutional provisions, but also with contemporary Canadian society. A recent decision by the British Columbia Supreme Court gives credence to this view.

⁴⁸ [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160 [hereinafter *Sparrow* cited to D.L.R. (4th)].

⁴⁹ T. Isaac, "The Honour of the Crown: The Significance of *R. v. Sparrow*" (1992) 13:1 Policy Options/Politique 22 at 23.

In *Thomas v. Norris*⁵⁰ the plaintiff, David Thomas (a status Indian), was grabbed from a friend's house and taken to the Somenos Long House by the defendants. He was imprisoned at the Long House for four days and while there he underwent an initiation ceremony for spirit dancing which included assault, battery and unlawful imprisonment. Thomas contended that at no time did he voluntarily agree to the events which took place and claimed relief for the breach of his common law rights against assault, battery and unlawful imprisonment. The defendants argued that spirit dancing is a protected Aboriginal right under s. 35 and thus made inoperative the plaintiff's common law rights. Mr. Justice Hood held that Thomas was subjected to breaches of his common law rights against assault, battery and unlawful imprisonment. He held that the defendants failed to prove the existence of a right to dance in general and a right to practise spirit dancing in particular. However, what is noteworthy about the decision is that after deciding in favour of the plaintiff, Hood J. continued by deciding the case as though the defendants did have a right to spirit dance under s. 35. He concluded that even if the defendants had such a right, their defence would not hold. It is this aspect of the decision which is important to this discussion.

The result is that Hood J. decides in favour of individual rights over group rights to the extent that the group rights inflict involuntary harm on an individual. At the core of this discussion is the notion that group rights and individual rights are mutually exclusive. However, this is not the case. This decision affirms that one can have group rights and retain some level of individual rights. The very nature of group rights is to protect the well-being of each member of the group. Thus, if group rights are exercised in a manner that does not protect the security of individual Aboriginal persons, such as Aboriginal women, the justification for protecting group rights is questionable. Needless to say, this leaves plenty of room for interpretation. Professor Richard Simeon writes:

... it is clear that the assertion that there is a fundamental dichotomy between individual and group rights is false. In fact, it is by virtue of our membership in a larger community, and through the protection of its institutions, that we have rights at all. Community is implicit in rights. Conversely, the only justification for community is that its strength and vitality is essential to the well-being, indeed the rights, of each of its members.⁵¹

⁵⁰ [1992] 2 C.N.L.R. 139 (B.C.S.C.).

⁵¹ *Supra* note 13, 99 at 103.

Section 52 of the *Constitution Act, 1982* is noteworthy in that it states explicitly the relationship between the Constitution and the laws of Canada and the provinces. Section 52(1) reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The result is that the Constitution can nullify any legislation, or part thereof, that goes against its provisions. In this way, the Constitution is the "supreme law" and supersedes all other laws. Thus, all of the constitutional provisions guaranteeing the equal treatment of the rights of female and male persons and the relative interpretive provisions have the affect of ensuring that legislation must conform to the Constitution. If not, the legislation is inoperative to the extent of its inconsistency.

The inherent right of Aboriginal self-government has been a primary goal for Aboriginal people in Canada for more than two decades and has recently come to the forefront of constitutional discussions. The entrenchment of an Aboriginal right of self-government into the Constitution has been gaining momentum. In February 1992, the Royal Commission on Aboriginal Peoples released a proposal to recognize an inherent right of self-government in the Constitution. The Royal Commission recommended that a new subsection (5) be added to the existing s. 35 of the *Constitution Act, 1982*. It would read: (5) For greater certainty, Subsection (1) includes the *inherent* right of self-government.⁵²

The Special Joint Committee of the House of Commons and the senate released its "unity-report" in late February 1992. The Special Committee recommended that a new subsection be added to s. 35 to include the inherent right of self-government. In so doing, it adopted an approach similar to that presented by the Royal Commission.⁵³

Important for Aboriginal women in the above proposals is that s. 35(4) would remain. It ensures that the rights in s. 35(1) are applied equally to female and male persons. Thus, the inherent right of self-government, under s. 35(1) by way of a new s. 35(5), would remain subject to the equality guarantee in s. 35(4). The problem however,

⁵² Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: 1992) at 28.

⁵³ Canada, Special Joint Committee on A Renewed Canada, *A Renewed Canada* (Ottawa: Queen's Printer, 1992) at 107-108.

may be that while the application of the right is guaranteed to female and male persons, the implementation may not be. That is, it could remain possible that through band by-laws, etc., discrimination could be implemented. This underscores the importance of making any right of self-government subject to the *Charter*, subject to ss. 25 and 28, or to an Aboriginal charter which guarantees individual rights for women.

The March 1992 Conference of First Peoples and the Constitution reinforced the position of Aboriginal peoples in their goal of having a right of self-government recognized. The Conference concluded with a united front in support of Aboriginal self-government. However, the unity in favour of self-government was not without its problems. Aboriginal women stated that any right of Aboriginal self-government must be subject to the *Charter*. Gail Stacey-Moore of the Native Women of Canada stated that they "will not accept a regime of self-government without guarantees of basic human rights."⁵⁴

Ovide Mercredi, National Chief of the Assembly of First Nations, called for the establishment of an Aboriginal charter of rights to replace the Canadian *Charter*. Stacey-Moore stated:

When we see an Aboriginal charter acceptable to us, one which can be entrenched in the Constitution and be enforceable in the courts, we may be willing to accept it instead of the Canadian Charter.⁵⁵

The inherent problem between historical Aboriginal ways and the institutions of today is illustrated by the above. While the Aboriginal charter and self-government would be inherent, they would still be subject to be enforced by the courts; "white" courts which continue to be dominated by men. This fundamental dichotomy is one which must be balanced out between both sides. An obvious problem with an Aboriginal charter is that of definition. What rights and freedoms would an Aboriginal charter contain and, in particular, would such rights be guaranteed equally to female and male Aboriginal persons? Without such assurances, the history of the treatment of Aboriginal women suggests strongly that they must be wary of an Aboriginal charter. The Quebec Native Women's Association has stated:

It must be clearly understood that we have never questioned the collective rights of our Nations, but we strongly believe that as citizens of these Nations, we are also entitled

⁵⁴ *Supra* note 46.

⁵⁵ *Ibid.*

to protection. We maintain that the individual rights of Native citizens can be recognized while affirming collective rights. This is why we would like to be in a position to rely on a Charter guaranteeing the rights and freedoms of all Native Citizens. The only model that we have at the present time is the Canadian Charter of Rights and Freedoms.⁵⁶

The above statement echoes that of Professor Simeon noted earlier. That is, the protection of individual rights, such as those of Aboriginal women, does not imply the weakening of collective rights. Indeed, using Professor Simeon's approach, only by guaranteeing individual rights can the true purpose of collective rights be realized.

The Native Women's Association of Canada released a position paper on Aboriginal women and self-government. The paper outlines some of the specific concerns which Aboriginal women possess. If the *Charter* applies to Aboriginal government

... it is not clear just how much protection there will be for Native women if the *Indian Act* no longer exists and each band has complete control over its membership. Because of section 25 and, especially section 33 of the Charter (the power to make laws "notwithstanding" ... the Charter), a band or First Nation might still be able to discriminate against Native women, both on the subject of membership and other issues.⁵⁷

However, not all Aboriginal women have the same position on this matter. Chief Wendy Grant of the Musqueam Band in British Columbia recently stated that the "divisions between First Nations people based upon the non-native fascination with extreme individualism simply support the assimilation of our people into the non-native culture."⁵⁸

The above noted statement has a few inconsistencies. First, the equal treatment of female and male persons does not exemplify "extreme individualism," nor does it support the assimilation of Aboriginal people into non-Aboriginal society. This is simply unfounded. Indeed, the opposite appears to be true. Historical evidence suggests strongly that in many Aboriginal communities, prior to European contact, Aboriginal men and women were treated equally and with mutual respect. The codification of equality into an Aboriginal charter does nothing to hamper the enjoyment of collective rights.

⁵⁶ Quebec Native Women's Association, *Presentation to Hearing on the First Nations Constitutional Circle* (Montreal: Q.N.W.A., 5 February 1992).

⁵⁷ *Supra* note 45 at 13-14.

⁵⁸ R. Platiel, "Aboriginal women divide on constitutional protection" *The [Toronto] Globe and Mail* (20 January 1992) A6.

For example, the Sechelt Band of British Columbia was one of the first self-governing Aboriginal communities when, in October 1986, federal legislation was enacted which restored ownership and the power to govern to the Sechelt people. One commentator notes that while the structure of government has changed for the Sechelt people (elected council versus family and clans), the "... role and responsibility of women as keepers of the culture remains in place."⁵⁹ As a result, the Sechelt language is making a revival. Thus, the protection of "certain" individual rights, such as the right to equality between men and women does not necessarily promote assimilation but rather may enhance the true nature and history of the relationships between Aboriginal men and women.

V. CONCLUSION

THE 1992 CHARLOTTETOWN ACCORD proposed to delete the existing s. 35(4) of the *Constitution Act, 1982* and replace it with an general clause that would ensure gender equality between Aboriginal people. The proposed s. 35.7 read: "Notwithstanding any other provisions of this Act, the rights of the Aboriginal peoples of Canada referred to in this Part are guaranteed equally to male and female persons." Section 25 of the *Charter* would not adversely affect the application of s. 28 of the *Charter*, since the Aboriginal and treaty rights to which s. 25 refers are subject to the equality rights guarantee in s. 35.7. Thus s. 28 would continue to apply to s. 25 since it would not abrogate or derogate from it. This clause is significant for the wide application of protection it offers.

The Accord also provided for the inclusion of s. 35.5(2) which stated: "For greater certainty, nothing in this section abrogates or derogates from section 15, 25 or 28 of the Canadian Charter of Rights and Freedoms or from subsection 35(7) of this Part." This clause would have ensured that Aboriginal governments are subject to ss. 15, 25, 28 and 35.7 of the *Charter*.

The equality rights provisions of the Charlottetown Accord were more comprehensive than the existing provisions in that they ensured that Aboriginal governments would be bound not only by the *Charter* but specifically that no other constitutional provision could override the equality provisions of the *Charter*.

The failure of the Charlottetown Accord is not the end of the Aboriginal agenda. Indeed, the Aboriginal debate will likely continue

⁵⁹ T.M. Jeffries, "Sechelt Women and Self-Government" (1991) 89 BC Studies 81 at 85.

and renewed demands, either by way of constitutional amendment or through negotiated agreements, will move forward.⁶⁰ The Accord will serve as a starting point for constitutional amendments and negotiated agreements, and in this way, it served a useful purpose.

The provisions of the Charlottetown Accord may be satisfactory to Aboriginal women in general, but clearly the process is not. The Native Women's Association of Canada claims that the voices of Aboriginal women were silenced by the Association's non-inclusion in the 1992 constitutional discussions between the four national Aboriginal associations and the federal and provincial governments. Regardless of the equality provisions, the process itself must undergo scrutiny to ensure Aboriginal women a voice with which they can feel comfortable. Aboriginal women want treatment that is equal and respectable in accordance with Aboriginal customs.⁶¹

If an Aboriginal charter is proposed in the future, then Aboriginal governments must be subject to this charter and included in it must be a guarantee of equality for Aboriginal women. It is also submitted that any forms of Aboriginal self-government created under s. 35 would be subject to s. 35(4) which guarantees sexual equality. However, because of the problem of interpretation, all Aboriginal governments should be made subject to either the Canadian *Charter* or to an Aboriginal charter which protects the rights of women. This would negate any confusion about the legal equality of men and women.

Some advocates of Aboriginal rights suggest that the notion of protecting individual rights goes against the fabric of Aboriginal society and culture. Such is not the case. The protection of individual rights does not go against Aboriginal collective rights. Indeed, the protection of women enhances the historical position and responsibilities which Aboriginal women have held. The very purpose of collective rights is to protect the individuals in the community. Finally, it may be the case where the protection of individual rights, vis-à-vis Aboriginal women, is the price the Aboriginal leadership has to pay for constitutional status. This approach is strengthened by the Supreme Court in

⁶⁰ See G. York, "Hope remains for self-government" *The Globe and Mail* (27 October 1992) A1.

⁶¹ "Native women seeking injunction against referendum" *The [Saskatoon] Star Phoenix* (18 September 1992) A8; and J. Green, "A Comprehensive Analysis of the Charlottetown Accord" (1992) 3:2 *The Womanist* 23.

Sparrow when it states that Aboriginal rights must be "affirmed in a contemporary form."⁶²

Whatever the future holds, it will be up to Aboriginal people to decide the course of their internal relations. Perhaps the language of "individual and collective rights" is not the appropriate discourse to use.⁶³ This may be so. But the purpose of the debate and its potential effects on Aboriginal societies is certainly noteworthy. The discourse may have to change to meet the needs of Aboriginal people, but the fundamental goals should remain, such as the protection, in some form, of Aboriginal women. The language of "rights" is liberal-democratic in nature and outside of traditional Aboriginal thought. However, the purpose of rights is not. The Constitution can be used by non-Aboriginal and Aboriginal people alike to achieve certain goals. The challenge will be to reconcile Aboriginal concerns with the existing legal system. Only by movement on both sides can an accommodation be reached.

It should be noted that while the constitutional discourse presently used does not necessarily represent traditional or historical Aboriginal ideas, the use of "a constitutional" discourse is not foreign. For example, the Iroquois Great Law of Peace [Kaianerekowa] was used as an instrument of peace between the various Iroquois tribes. The Great Law was "very sensitive to the rights of individuals and the potential abuses of the state."⁶⁴ Thus, although modern Canadian constitutional terminology and discourse are foreign to historical Aboriginal constitutional discourse, the notion of "a constitution" is not, and neither is the notion of protecting the individual.

The historical treatment of Aboriginal people in Canada is troubling, to say the least. The treatment of Aboriginal women in particular is discouraging. As the debate over self-government progresses, the rights of Aboriginal women must not be forgotten. The historical responsibilities of Aboriginal women in Aboriginal societies must be secured and realized. The mistakes of the past cannot continue. The rights of Aboriginal women in Aboriginal society and government must be constitutionally guaranteed.

⁶² *Supra* note 48 at 397. "Contemporary form" may mean the adoption of what some consider to be liberal-democratic institutions, such as gender equality.

⁶³ In her article, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90) 6 *Can. Hum. Rts. Y.B.* 3, M.E. Turpel notes that the language of "rights" may not be appropriate for Aboriginal people's discourse in that it is culturally void from the Aboriginal perspective.

⁶⁴ *Supra* note 7 at 194.