

**THE APPLICATION OF THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS
TO FIRST NATIONS' JURISDICTION:
AN ANALYSIS OF THE DEBATE**

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ABSTRACT

This thesis examines the discourse surrounding the debate over whether the *Canadian Charter of Rights and Freedoms* ought to apply to First Nations' governments in Canada. This is a constitutional and legal grey area at present because Section 32 of the *Canadian Charter of Rights and Freedoms* stipulates that this constitutional document applies to the federal, provincial and territorial governments, but does not mention Aboriginal governments. The lack of constitutional clarity on this issue has generated a debate involving three schools of thought. The first school proposes that the *Charter* ought to apply to First Nations' governments just as it does to other governments in Canada. The second school of thought argues that the *Charter* should not apply to First Nations' governments because it is an imposition of western liberal values on their governments that could limit their self-governing authority. Proponents of this view assert that recognition of Aboriginal and treaty rights in the Constitution should entitle First Nations to develop their own rights practices, consistent with Aboriginal laws and customs. A third school of thought suggests that there may be alternatives between accepting the *Charter* as it is and rejecting it altogether. Two options have been advocated by this school. One option is for the *Charter* to apply with a caveat that it be done in a manner that is consonant with traditional Aboriginal laws and customs. The other option is that a parallel Aboriginal Charter of Rights and Freedoms be developed that better reflects Aboriginal traditions on rights. While this debate has been ongoing, the Government of Canada and some First Nations have entered into self-governing agreements that acknowledge the application of the *Canadian Charter* to those particular governments. This thesis concludes that there is no easy resolution to the debate, that it may take the courts to resolve the issue in law, and this outcome itself may be unsatisfactory to First Nations' communities.

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Chapter 1

Introduction

1.0 Background

An important debate is taking place in Canada today over whether the *Canadian Charter of Rights and Freedoms* (the *Charter*) should apply to First Nations' jurisdiction. First Nations' people are seeking greater control over their affairs through modern treaties and administrative agreements. In return, they are being asked by the federal government to agree to the application of the *Charter* to their governments. A debate has unfolded, within and beyond First Nations, about whether the *Charter* ought to apply to First Nations' jurisdiction. This is a grey area in the law at present because although Section 32 of the *Charter* stipulates that this constitutional document applies to the federal, provincial and territorial governments,¹ it does not mention First Nations' governments.

Aboriginal people, and particularly First Nations people, have always had their traditional forms of government in Canada. They have also had their own laws and customs respecting individuals' rights within the community. They do not necessarily accept Ottawa's conceptualization of what form their governments should take, nor whether national laws like the *Charter* should apply to their jurisdiction. One school of

¹ Section 32 of *the Constitution Act, 1982* states: "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislatures and governments of each province in respect of all matters within the authority of the legislature of each province."

thought argues that the *Charter* is an imposition or impingement on First Nations' right to self-governance and their sovereignty. The supporters of this view believe that Aboriginal and treaty rights should allow First Nations to set their own standards of rights protection on First Nations' land in accordance with their traditional laws and customs.

A second school of thought does not share the same degree of concerns about the *Charter's* potential negative impact. This school of thought argues that the *Charter* should apply equally to all Canadians, that First Nations' members should have the same rights vis-à-vis their governments as they have against the federal and provincial governments. The 1996 Royal Commission on Aboriginal Peoples (RCAP) shared this point of view; it recommended that the *Charter* should apply to First Nations' governments. Some scholars goes so far as to suggest that the *Charter* can assist with the struggle toward greater self-government. John Borrows, for example, examined three circumstances where he suggests that the *Charter* assisted First Nations people in the struggle for self-determination.²

A third school of thought proposes that there may be common ground between these two schools of thought insofar as the individual rights in the *Charter* can apply in a manner that respects Aboriginal and treaty rights. Within this school of thought, a proposal has been developed for an Aboriginal Charter of Rights and Freedoms as an alternative to the *Charter*.

² See John Borrows in "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics", in *Charting the Consequences: The Impact of the Charter of Rights on Canadian Law and Politics*", ed. David Schneiderman and Kate Sutherland, (University of Toronto Press, 1997), 169-185.

This thesis reviews the primary arguments articulated by each school of thought. It also examines recent treaties and administrative agreements to see how this issue is being addressed by the federal government and some First Nations across Canada today.

1.1 Importance of the Debate

The debate as to whether the *Charter* ought to apply to First Nations' governments is important for at least three groups of people. First, it is important for First Nations' leaders seeking greater self-governing authority who are being asked directly by the federal government to accept the application of the *Charter* to their governments. They will be interested in the arguments on all sides of this debate to help guide their positions and decisions regarding the application of the *Charter* in the future. Second, the debate is important for citizens who are governed under First Nations' jurisdiction. They will want to know whether they have the same rights vis-à-vis their First Nations' governments as they have against the federal, provincial and territorial governments. Third, the debate is important for non-Aboriginal Canadians, especially those who believe either that the *Charter* embodies important legal principles and moral values that should apply equally to all Canadians, regardless of their ancestry, or that it is a "crucial symbol of citizenship"³ that defines and unifies Canada. Ultimately, the debate regarding the applicability of the *Charter* is important because the outcome will signal whether First Nations' governance systems will be based on their own framework of rights and freedoms, whether they will share part of the same rights framework as other Canadians, or whether there will be a blending of legal traditions on this question.

³ Alan C. Cairns, *Citizens Plus – Aboriginal Peoples and the Canadian State*, (Vancouver-Toronto: UBC Press, 2000), 83.

1.2 Central Objectives and Research Questions

The central objective of this thesis is to examine the primary arguments surrounding this debate. It examines the views of First Nations' leaders as well as those of several academic and legal scholars. Some attention is devoted to the position of the federal government and RCAP. In keeping with that objective, this thesis addresses the following research questions:

- i. What are the concerns of the school of thought that opposes the application of the *Charter*?
- ii. What is the response to these concerns by others? What are the arguments that support the application of the *Charter* to First Nations' governments and communities?
- iii. What are the arguments made by those who maintain that the *Charter* can apply in a manner that respects Aboriginal cultural traditions?
- iv. What does the series of recent treaties and agreements signed by some First Nations and the federal government reveal regarding what has been happening and what is likely to happen in the near future regarding the application of the *Charter*?

1.3 Scope and Limitations of Thesis

This thesis focuses exclusively on the application of the *Charter* to First Nations' governance in Canada today. Broader Aboriginal governance issues are beyond the scope of this thesis. For the purposes of this thesis, First Nations' people are those individuals who are defined by Section 91(24) of the *British North America Act, 1867* as

“Indians”.⁴ Any references to Inuit peoples will be explicit. The thesis does not examine the special concerns of Métis peoples, which are best left to another study. The phrase ‘Aboriginal’ will be used occasionally to embrace all Aboriginal groups. There may be occasional references to confederacies or tribal councils where groups of First Nations have aggregated for the purposes of a treaty or an administrative agreement.

Furthermore, the thesis does not evaluate the merits of First Nations’ self-government or the devolution of either jurisdiction or programs to First Nations’ governments. It accepts that some Canadians, regardless of their ancestry, believe that self-government is an important key to economic success and social development,⁵ while others believe that it is a step in the wrong direction which may impede such development.⁶

For the purposes of this thesis, First Nations’ governments are defined as “distinct political communities having territorial boundaries within which their authority is exclusive.”⁷ The thesis concurs with Anna Hunter’s proposition that there is a “linear continuum” of forms of self-government “from self-regulation to constitutional self-government to self-determination to tribal sovereignty to secessionist independence.”⁸ The thesis focuses on First Nations’ governments that accept some jurisdiction of the

⁴ B.N.A. Act, 1867, Section 91(24), found at:

http://www.solon.org/Constitutions/Canada/English/ca_1867.html.

⁵ Stephen Cornell and Joseph Kalt. “Sovereignty and Nation-building: The Development Challenge in Indian Country Today” in *American Indian Culture and Research Journal*. Volume 22:3. Cornell and Kalt’s central thesis is that stronger governance measures leads to greater economic independence for First Nations.

⁶ Thomas Flanagan. *First Nations? Second Thoughts.*, McGill-Queen’s University Press, 2000. Also see Canadian Federation of Taxpayers, “*Apartheid: Canada’s Ugly Secret*”, Tanis Fiss, Director of Centre for Aboriginal Policy Change, April 2004. This paper proposes discontinuation of the reserve system in favour of fee simple.

⁷ Dan Russell. *A People’s Dream – Aboriginal Self-Government in Canada*, (UBC Press, Vancouver-Toronto, 2000), 16. Attributed to Chief Justice Marshall in *Worcester v Georgia*, 31 U.S. (6. Pet.) 515 (1831).

⁸ Anna Hunter. “Politics of Aboriginal Self-Government”, in *Canadian Politics: Critical Reflections*, ed. Joan Grace and Byron Sheldrick, Pearson, to be published in 2006, 10.

Government of Canada over their affairs⁹ and it assumes that most First Nations see their future within Canada with some degree of overlapping laws and institutions.¹⁰ It does not include a review of those First Nations who have not acceded to Canadian jurisdiction.¹¹ RCAP conceptualized self-government as follows:

Of course, self-government may take a variety of forms. For some peoples, it may mean establishing distinct governmental institutions on an ‘exclusive’ territory. For others, it may mean setting up a public government generally connected with modern treaties or land claims agreements. Alternatively, self-government may involve sharing power in joint governmental institutions, with guaranteed representation for the nations and peoples involved. In other instances, it may involve setting up culturally specific institutions and services within a broader framework of public government.¹²

RCAP explained how many Aboriginal people consider the value of traditional forms of governance and “continue to be guided, to some degree, by traditional outlooks in their approach to matters of governance.”¹³ Whereas in some cases these traditional governments have been replaced or imposed upon by the *Indian Act*, in other cases important elements of traditional forms of government remain. Some people, the Commission authors wrote, identify with their *Indian Act* band as a nation, while others “identify the nation on the basis of a broader traditional affiliation, for example, Cree,

⁹ For a discussion of those who do not accept Canada’s jurisdiction, see Darlene Johnston in “The Quest of the Six Nation’ Confederacy for Self-Determination”, University of Toronto Faculty of Law Review, Vol. 44 – No. 1, (Winter, 1986), 1-31. Johnston chronicles how Six Nations Confederacy never surrendered its sovereignty and accordingly, it should be treated on a nation-to-nation basis as defined in international law.

¹⁰ See Ronald Beiner in *Liberalism, Nationalism, Citizenship: Essays on the Problem of Political Community*, (Vancouver-Toronto: UBC Press, 2003), 173. Beiner reminds Canadians that in the lead-up to the Quebec referendum, Quebec First Nations’ voted overwhelmingly to stay a part of Canada. The vote was 95 - 99% against separation.

¹¹ See Darlene Johnston arguments noted above.

¹² Royal Commission on Aboriginal Peoples, Final Report, 1996. Chapter 3 – Governance, Section 1- 1.1.

¹³ RCAP. Section 1 – 1.1.

Mohawk, Gitksan, Kwakwa ka' waka and Dene. Some First Nations refer to themselves as treaty nations because they have made treaties with the Crown.”¹⁴

1.4 Methodology

The information for this thesis is drawn from four major sources. The first source is the recent literature produced by both Aboriginal and non-Aboriginal scholars that deals explicitly with the interface between *Charter* rights and Aboriginal rights. The second source is the media reports that provide useful insights into the positions of various stakeholders and the discourse that surrounds them. The third source is various government documents such as the RCAP Final Report that reviews government policies related to the application of the *Charter* to First Nations. The fourth source is the contemporary treaties and administration agreements in the post-1993 era for which the application of the *Charter* was a key consideration.

1.5 Organization of the Thesis

In addition to this introductory chapter, the thesis consists of six other chapters. Chapter 2 reviews Canada's liberal democratic traditions regarding individual and group rights and freedoms and how this debate fits into those traditions. It provides a summary of the provisions of the *Canadian Charter of Rights and Freedoms* and reviews Section 35 of the *Constitution Act, 1982* which “recognized and affirmed”¹⁵ Aboriginal and

¹⁴ RCAP, 3 – 3.1.

¹⁵ Section 35 of the *Constitution Act, 1982*, as amended, states: “(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 Metis 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.”

treaty rights in 1982 and related sections. This chapter notes that since 1982, federal, provincial and Aboriginal governments have attempted to spell out these rights in the Constitution without a great deal of success.

Chapter 3 examines the concerns of those who believe that the application of the *Charter* has adverse ramifications for First Nations' jurisdiction. In particular, it examines the concern that the *Charter* is an imposition of western liberal values that could threaten Aboriginal customs and traditions and could limit the ability of First Nations' peoples to be self-governing. This chapter also identifies some of the governance issues within Aboriginal communities that might be open to challenge under the *Charter*.

Chapter 4 examines the position of those who support the application of the *Charter* to First Nations' governments. Their basic position is that the *Charter* should apply to First Nations' governments just as it applies to other levels of government. This school of thought was bolstered by RCAP's recommendation that the *Charter* should apply to First Nations' governments.

Chapter 5 examines the common ground between the two schools of thought on the application of the *Charter* to First Nations' governments. Many scholars, Aboriginal and non-Aboriginal alike, accept that some form of individual rights protection on First Nations' jurisdiction is inevitable. Many scholars believe that the preservation of Indigenous cultures in Canada is an important social good even if this means limiting individual rights in some circumstances. Some theorists believe that Section 25 of the *Charter*, which serves as direction to the judiciary to ensure that important cultural laws, traditions, languages and values are protected from attack by the *Charter*, offers the best

hope in the short term for balancing individual rights with Aboriginal rights.¹⁶ This chapter examines the possibility of developing an Aboriginal Charter of Rights and Freedoms rights to replace the *Canadian Charter of Rights and Freedoms* in areas of First Nations' jurisdiction. The chapter also highlights the views expressed by some who suggests that while the Canadian constitution and law may have some application to First Nations' governments established under the *Indian Act*, it should not apply to traditional or inherency governments that have not acceded to Canadian jurisdiction.¹⁷

Chapter 6 examines several treaty or administrative agreements concluded between the federal government and approximately thirteen First Nations governments since 1993 which acknowledged that the *Charter* will apply to these governments. The acceptance of the *Charter* in these instances may signal a shift in position for some First Nations' leaders. This chapter notes, however, that only a small fraction of Canada's First Nations has agreed to the application of the *Charter* to their jurisdiction. For most First Nations this issue remains unresolved.

Chapter 7 provides a summary of the findings of the thesis and some concluding observations regarding the current and future debate on the application of the *Charter* to First Nations' governments. The major conclusion is that the debate regarding the application of the *Charter* to First Nations' governments is not over, it remains hotly contested within some First Nations' communities, and that the courts are likely to

¹⁶ Section 25 of the *Constitution Act, 1982* states: 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 may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

¹⁷ See Darlene Johnston, in "Six Nations", 1- 31.

intervene in this question. A resolution to the debate is important for all Aboriginal and non-Aboriginal Canadians.

Chapter Two

The Rights Tradition in Canada: The Charter and Other Constitutional Developments (1982-1992)

2.0 Introduction

Canada has a history as a western liberal democracy with a particular interest in human rights. It was a signatory to the *Universal Declaration of Human Rights* in 1948. Parliament passed a *Canadian Bill of Rights* in 1960 and each province and territory has a human rights act. From 1980 to 1982 Canada underwent a process of patriating its central constitutional document, the *B.N.A. Act, 1867*. At the time, Prime Minister Pierre Trudeau was determined to include a charter of rights within the new *Constitution Act*. Although Canada already had a *Bill of Rights*, it was not entrenched in the Constitution and it only applied to the federal government. As a consequence, it was seldom used in advancing or safeguarding the human rights of Canadian citizens. Unlike the *Bill of Rights* the new *Charter* was to clearly have supremacy over other laws enacted by the federal and provincial governments.

At the time Trudeau was seeking to achieve the inclusion of the *Charter* in the *Constitution Act, 1982*, Aboriginal leaders were seeking constitutional recognition of their claims and rights. These leaders won a hard-fought battle when Ottawa and the provinces decided late in the patriation process to include recognition of Aboriginal and rights in the Constitution.¹⁸ This thesis is about the intersection of these two events,

¹⁸ See “*Some Perspectives on the Origin and Meaning of Section of the Constitution Act, 1982*”, found at: http://oldfraser.lexi.net/publications/pps/41/s4_meaning.html. Also see Roy Romanow, John Whyte and Howard Leeson in *Canada...Notwithstanding: The Making of the Constitution 1976-1982*. (Toronto:

inclusion of the *Charter* and recognition of the group rights of Aboriginal peoples. This chapter reviews the provisions of the *Charter* in the context of Canada's traditions as a liberal democracy. It explains the provisions of the *Constitution Act, 1982* that recognized and affirmed Aboriginal rights and it briefly reviews the constitutional negotiations between 1982 and 1992 that attempted to define Aboriginal rights with greater precision.

2.1 Canada's Liberal Democratic Traditions

Citizens' rights against the government date back at least as far as the *Magna Carta* of 1215. J. S. Mill, arguably the father of modern liberalism, said in *On Liberty and Other Essays* that individuals are sovereign over themselves and that government ought not to interfere with this liberty except to "prevent harm to others."¹⁹ Some believe that individual rights are "political trumps" that are held by individuals against the excesses of government and that hold government to account before the courts.²⁰ Citizen rights include the right to liberty and equality.²¹ A right against the government, Ronald Dworkin suggests, is a right "to do something even when the majority thinks it would be wrong to do it."²²

Will Kymlicka is a contemporary political philosopher who has built on the traditions of Mill and Dworkin when it comes to articulating modern liberalism. In *Liberalism, Community and Culture*,²³ he suggests that liberal democratic governments

Carswell/Metheun, 1984), 212 and 268-269. At page 212, the authors credit "ongoing political and legal actions in London by native organizations" for the inclusion of Section 35 into the new *Constitution Act*.

¹⁹ J. S. Mill, *On Liberty and Other Essays*. (Oxford: Oxford University Press, 1991), 14.

²⁰ Ronald Dworkin, *Taking Rights Seriously*, (Cambridge, Mass.: Harvard University Press, 1977), xi.

²¹ Dworkin, 266.

²² Dworkin, 194.

²³ Will Kymlicka. *Liberalism Community and Culture*,(Oxford: Clarendon Press, 1989).

must treat people with “equal concern and respect.”²⁴ This means granting rights to citizens to protect them against infringements on their freedom. Examples of such rights include the right not to be unlawfully or arbitrarily detained by state officials, the right to speak out against one’s government, and the right to vote. Majorities have rights to enact laws consistent with their values, but majorities ought not to abuse their dominant power against minorities. Alexis de Tocqueville referred to the misuse of majority power against a minority as the “tyranny of the majority.”²⁵

Canada has followed these liberal democratic principles for many years. In particular, after the Second World War, Canada agreed to the *Universal Declaration on Human Rights* and in 1960, its Parliament passed a *Canadian Bill of Rights*. In the 1960s and 1970s most provinces enacted human rights codes and established commissions to enforce these codes. Central to these liberal traditions are the principles enshrined in the *Charter* that Canadians are free from government intervention, unless those interventions are justified in law, and that Canadians are equal before and under the law.

2.2 The Canadian Charter of Rights and Freedoms

The *Charter of Rights and Freedoms* was proclaimed in 1982 as part of the patriation of the *BNA Act, 1867*. For the first time in history, Canadians had codified rights which were guaranteed in the Constitution. The *Charter* was preceded in Canada by the *Canadian Bill of Rights* which had been enacted by Parliament in 1960. The *Bill of Rights* contained many of the rights and values later included in the *Charter*, with one notable difference: the *Bill of Rights* was quasi-constitutional in nature; it was not

²⁴ Kymlicka, 13.

²⁵ See Alexis de Tocqueville in *Democracy in America*, (Vintage Books, 1954).

entrenched in Canada's Constitution. It was passed as a piece of federal legislation and therefore could be amended or repealed by another Parliament. It did not apply to the actions of the provinces and while prior inconsistent legislation could be struck down under that statute, Parliament could pass subsequent laws notwithstanding the *Bill of Rights*.²⁶ Consequently, the *Bill of Rights* was seldom used.²⁷

Pierre Trudeau was determined to fix this shortcoming when the *BNA Act, 1867* was patriated in 1982. He wanted a charter of rights embedded in the Constitution that would have paramountcy over federal, provincial and territorial laws in Canada. He ultimately achieved his goal when the Parliament of Canada and nine of the provinces agreed to his proposals in November 1981.²⁸

A complete listing of the provisions of the *Charter* is found in Appendix 1.²⁹ For the purposes of this thesis it is important to note that the *Charter* protects fundamental freedoms – the right to free expression, free assembly, and a free press (Section 2); it provides for democratic rights– the right to vote in elections and run for office (Sections 3-5); it allows citizens the mobility to live and work anywhere in Canada (Section 6); it offers important legal rights upon arrest – the right to a free and fair trial, the right not to incriminate oneself, the right to be free from cruel punishment (Sections 7-14); it provides for equality among citizens (Section 15); and it recognizes Canada's two official languages (Sections 16-22). The *Charter* also protects group rights. It recognizes Canada's multicultural heritage (Section 27); it ensures equality as between genders

²⁶ See Peter Hogg in *Constitutional Law in Canada*. (Toronto: Carswell Company Limited, 1977), 431 to 441. Hogg notes that in only one case, *R v Drybones* [1970] SCR 282, did the courts strike down inconsistent legislation, in that case a provision of the *Indian Act*.

²⁷ Hogg, 433.

²⁸ Quebec dissented. See <http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&Sub=ThehistoryofConstitution#patriation>, retrieved July 24, 2005.

²⁹ Also found at: http://www.solon.org/Constitutions/Canada/English/ca_1982.html.

(Section 28); and it protect minority languages where numbers warrant it (Sections 23). The *Charter* is enforced by the courts in Canada (Section 24). Relevant to this thesis, the *Charter* applies to the federal, provincial and territorial governments (Section 32); it does not apply to the private actions of citizens. The *Charter* may be overridden by the federal or provincial governments using the “notwithstanding” clause (Section 33).

2.3 Rights are consistent with our International obligations

These rights are consistent with several international human rights instruments to which Canada is a signatory. These include the *Universal Declaration on Human Rights, 1948*, the *Convention on the Elimination of All Forms of Racial Discrimination, 1958*, the *Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960*, the *International Covenant on Civil and Political Rights, 1976*, the *Declaration on Race and Racial Prejudice, 1978* and the *Indigenous and Tribal Peoples Convention, 1989*.³⁰

The *Universal Declaration on Human Rights, 1948*, for example, sets out a regime of rights that form a “common standard of achievement for all peoples and all nations.”³¹ The *Convention on the Elimination of All Forms of Racial Discrimination, 1965* commits signatory countries to take “effective measure to review governmental...policies, and to...nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”³² Each state has an

³⁰ See *Human Rights: A Compilation of International Instruments*. Vol. I. (New York: United Nations, 2002).

³¹ United Nations. *Universal Declaration of Human Rights, Resolution, 1948, 217A(III)*, 1948. Preamble.

³² United Nations. *International Convention of the Elimination of All Forms of Racial Discrimination, 1958. Resolution 2106 A (XX)*, 1965.

obligation to “prohibit and bring to an end...racial discrimination by any persons, group or organization.”³³

Christine Chinkin notes that U.N. documents have been ratified “by states from all geographic areas and religious and political ideologies.”³⁴ In other words, they represent a global perspective on rights and values. Chapter 3 will examine other international instruments that protect minority and Indigenous cultures from erosion by the majority members of a state.³⁵ Some have argued that internationally-accepted human rights “provide a yardstick against which to assess governmental performance or non-performance.”³⁶ As Emilio Mignone once observed, “The defence of human dignity knows no boundaries.”³⁷

To summarize, there are those who suggest that liberal democratic rights represent an international consensus respecting individual rights and their relationship to government. Signatory states to international agreements of this kind are obligated to honour the principles enshrined in the agreements and to demonstrate that they are being respected. States who fail to live up to the ideals reflected in these provisions are seen as having less legitimacy than those who do, some would argue. The Government of Canada prides itself on being a leader in promoting human rights at the international level³⁸ even though it has also been criticized for its treatment of Aboriginal peoples.³⁹

³³ *U.N. Convention on the Elimination of Racial Discrimination*.

³⁴ Christine Chinkin, “International Law and Human Rights,” in *Human Rights Fifty Years On: A Reappraisal*. Ed. Tony Evans. (Manchester and New York: Manchester University Press, 1998), 105.

³⁵ Dan Russell is one such advocate. He makes this argument in *A People’s Dream: Aboriginal Self-Government in Canada*, (Vancouver-Toronto: UBC Press, 2000), 122-123.

³⁶ Chinkin 120.

³⁷ Quoted by Andrew G. McGrew in “Human Rights in the Global Age: Coming to terms with globalization”, in *Human Rights Fifty Years On: A Reappraisal*. ed. Tony Evans. (Manchester and New York, Manchester University Press), 197.

³⁸ See <http://www.dfait-maeci.gc.ca/canada-magazine/issue01/1t6-en.asp>, retrieved, July 23, 2005.

³⁹ See 1998 Annual Report of the Canadian Human Rights Commission at http://www.chrc-ccdp.ca/publications/1998_ar/page7-en.asp as well as the Mennonite Central Committee human rights

2.4 Application of *Charter* to First Nations' Peoples

As indicated earlier, First Nations' people have *Charter* rights as citizens of Canada against the federal and provincial governments. They have free speech and free expression; they may vote in elections, they have mobility throughout Canada, they have legal rights upon arrest and they cannot be denied equality. This thesis explores the debate about whether they should possess similar rights against their own governments, whatever form those governments may take.⁴⁰ If the *Charter* were applied to First Nations' jurisdiction, legally, those citizens would have the right to freely criticize those governments without fear of reprisal, they could vote in elections if qualified, they would have mobility rights, important legal rights if arrested by band police, and equality rights on reserves. This is not to suggest that First Nations' governments are currently infringing these rights; the examples are hypothetical only. Nor is this to suggest that First Nations' peoples are without rights. They may possess some of these rights through customary law or through First Nations' constitutions. Indeed, according to their Aboriginal traditions, they may have rights that exceed the *Charter*. The argument is that having the *Charter* apply to First Nations' governance would codify these rights in law and provide constitutional supremacy for these rights, subject to the limitations in the *Charter*.

2.5 Aboriginal Rights – Sections 35 and 25

website at www.mcc.org. This committee is quoted as saying: "A UN committee has identified Canada's treatment of Aboriginal people as 'the most pressing human rights issue facing Canadians'." Overall, Aboriginal people in Canada are poorer, less literate, less healthy and more highly represented in Canada's prisons than any other group. See <http://www.mcc.org/canada/peace/article-election.html>, retrieved July 24, 2005.

⁴⁰ See discussion on various forms of Aboriginal government in Chapter 1.

Parallel to the inclusion of the *Charter* into the *Constitution Act, 1982* were the efforts by First Nations' leaders to have their Aboriginal rights recognized. The failure to recognize these rights in the early rounds of constitutional negotiations between Ottawa and the provinces was a major oversight. When the constitutional accord was reopened to guarantee gender equality in the later part of 1981, First Nations' leaders insisted on recognition of their rights as well.⁴¹ Section 35 of the *Constitution Act, 1982* was ultimately included to recognize Aboriginal rights in Canada. It reads as follows:

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.

This section falls outside the *Charter*. Aboriginal and treaty rights are not rights that are granted as *Charter* rights. They are rights that have been recognized as pre-existing, that have equal status with the rights of the federal, provincial and territorial governments.

In fact, special measures were taken to ensure that Charter rights did not compromise Aboriginal rights. It was precisely for this purpose that Section 25 of the *Charter* reads as follows:

25. 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

⁴¹ For a more complete description of First Nations and other Aboriginal leaders' efforts to include Aboriginal rights in the Constitution, see "Some Perspectives on the Origin and Meaning of Section 35 of the *Constitution Act, 1982*", found at: http://oldfraser.lexi.net/publications/pps/41/s3_origin.html. Also see Romanow, Whyte and Leeson in *Canada...Notwithstanding*, 212.

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Section 25 is referred to as the ‘non-abrogation, non-derogation’ clause later in the thesis.

2.6 Does the Charter apply to First Nations?

For the purposes of this thesis, a third important section of the *Constitution Act, 1982* is Section 32. It reads:

32. (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislatures and governments of each province in respect of all matters within the authority of the legislature of each province.

There is no reference in Section 32 either to First Nations’ governments or municipal governments. Kent McNeil contends that if Canada had intended to include other forms of government like First Nations’ governments, they would have broadened this wording to include all forms of governance in Canada.⁴² In the absence of this recognition, he argues, the wording is so specific that it is clear that political leaders intended the *Charter* to apply only to those administrations listed. Any doubt in this regard should be decided in favour of Aboriginal peoples, McNeil suggests.⁴³

⁴²Kent McNeil, “Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*”, in *Osgoode Hall Law Review*, Volume 34, Issue No. 1, (Spring 1996), 69.

⁴³McNeil, 69.

J. Y. Sakej Henderson agrees. He argues that Section 25, the non-derogation clause, provides “a protective zone from the colonialists’ rights paradigm”⁴⁴ and creates judicial and legislative immunity for First Nations from actions under the *Charter*. Henderson asserts, in line with McNeil’s arguments, that Section 25 “constitutionally assures Aboriginal peoples that the courts will not apply the personal rights of the *Charter*” in a manner that abrogates or derogates from Aboriginal and treaty rights.⁴⁵

2.7 The *Corbiere* Decision - 1999.

While the Supreme Court of Canada has not specifically deliberated on the issue of whether the *Charter* applies to First Nations’ governments, it came close in the decision of *John Corbiere et al. v. Her Majesty the Queen and the Batchewana Indian Band*.⁴⁶ The Court was asked to review the Batchewana band’s decision to deny voting rights to band members who lived off-reserve. The criteria for electors within the band had been established pursuant to Section 77(1) of the *Indian Act* that required electors to be “ordinarily resident of the band”. The Court determined that this provision discriminated against non-residents of the band under Section 15 of the *Charter*, the equality rights section, and the court ordered the Government of Canada to rectify this disadvantage by amending the *Indian Act*. The Batchewana band did not present arguments in this case to the effect that the provision that disenfranchised non-residents was saved by virtue of Sections 35 and 25. Therefore, the Court did not have to rule specifically on whether the *Charter* applied to First Nations. It did find that the *Indian*

⁴⁴ James Y. Henderson, “Empowering Treaty Federalism” in *Saskatchewan Law Review*, Volume 58(2), (1994), 286.

⁴⁵ Henderson, 286.

⁴⁶ *Corbiere, et al v Canada (Minister of Indian Affairs) and the Batchewana Indian Band* [1999] 2 S.C.R. 203, 1999 CanLII 687 (S.C.C.)

Act must comply with Section 15 and one could extrapolate that, by implication, Indian bands which operate under the auspices of the *Indian Act* are subject to the *Charter*.⁴⁷ Two other lower level court decisions made similar findings. In *Scrimbitt v. Sakimay Indian Band Council* (1999)⁴⁸, Scrimbitt was denied the right to vote in a band election because she was a Bill C-31 Indian. A Federal Court Justice found that the actions of the Band violated Section 15 of the *Charter*, the equality rights section. In *Horse Lake First Nation v. Horseman*⁴⁹, a group of women occupied the local band office and the band applied to the courts for an order to evict them. An Alberta Queen's Bench Justice held that the *Charter* should apply to any decision of the band. These are lower level decisions and the Indian bands did not argue in these cases that their Aboriginal rights under Section 35 superseded the *Charter* rights being claimed by the plaintiffs. The courts therefore did not directly address the intersection of Aboriginal rights and *Charter* rights.

Until the Supreme Court of Canada is specifically asked to make a ruling on whether *Charter* rights apply to First Nations residents, this issue remains a grey area in law, particularly given the lack of reference to First Nations' governments in Section 32 of the *Constitution Act, 1982*. One possible outcome, based on an interpretation of the *Corbiere* decision, is that First Nations' governments that are established pursuant to the *Indian Act* will be subjected to the rigors of the *Charter*; inherency governments may

⁴⁷ See analysis at http://www.anishinabek.ca/uoi/roj_0310.htm, downloaded July 24, 2005. Additionally, in a public policy paper in 2004, Ian Peach of the University of Regina, Saskatchewan Institute of Public Policy suggests that off-reserve First Nations people could utilize the *Charter* against the Federal government if they are denied services by the Federal government because they are no longer resident on the reserve. By extrapolation again, such an argument could be made against a band government that similarly denied services to its members living off-reserve. See Saskatchewan Institute of Public Policy, "The *Charter of Rights* and Off-Reserve First Nations People: A Way to Fill the Public Policy Vacuum." Ian Peach, author. Public Policy Paper 24, University of Regina, (March 2004).

⁴⁸ *Scrimbitt v. Sakimay Indian Band Council* (1999)⁴⁸ 2000 1 CNLR 205.

⁴⁹ *Horse Lake First Nation v. Horseman* [2003] 2 CNLR 193.

well be exempted.⁵⁰ Kent McNeil, who argues that the *Charter* does not apply to First Nations, has also discouraged “judicial activism” in making such a finding.⁵¹ He believes this issue should be left to further investigation and negotiation.

2.8 Defining Aboriginal Rights

As far back as the 1987 First Ministers’ Conference, Ottawa proposed that the *Charter* ought to apply to First Nations’ governments and that they should have access to Section 33, the “notwithstanding clause”.⁵² After Section 35 was inserted into the *Constitution Act, 1982*, Ottawa and the provinces committed to holding a series of conferences with Aboriginal leaders to discuss and define the rights set out in Section 35. Very early on, Aboriginal leaders began raising concerns about the potential for conflict between Aboriginal rights and *Charter* rights. A subsequent tri-lateral conference in 1983 was successful in bringing about four amendments to the *Constitution Act, 1982* including a guarantee of equality rights in all matters pertaining to Aboriginal jurisdiction.⁵³ Three subsequent First Ministers’ conferences were held in 1984, 1985 and 1987 for the purposes of defining Section 35 and each failed to achieve consensus on changes to the *Constitution Act, 1982*. The Meech Lake Accord followed

⁵⁰ Patrica Monture-Angus makes the point in *Journeying Forward, Dreaming of First Nations Independence*, (Halifax: Fernwood Publishing, 1999). She asserts “It would be an odd conclusion if government whose independent authority originates outside of any Crown action were forced to submit to the discipline of the *Charter*, itself a Crown Act.”, 150.

⁵¹ McNeil in *Aboriginal Governments*, 98.

⁵² See a summary of these events at: <http://www.sicc.sk.ca/saskindian/a87sum30.htm>.

⁵³ Four amendments to the *Constitution Act, 1982* were agreed to in 1983. Section 25(b) was amended to add the words: “any rights or freedoms that now exist by way of land claims agreements or may so be acquired.” Section 35 was amended to add a subsection (4) to read: “Notwithstanding other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.” Section 35 was also amended to allow for the convening of a First Ministers’ Conference with Aboriginal leaders before any amendments that affect Aboriginal peoples could be introduced. Section 37 was amended to delete the words “identification and definition” and add the words “constitutional matters that directly affect” Aboriginal peoples.

in 1987 to address the concerns of Quebec's status within the federation; Aboriginal issues were excluded from these discussions. In 1992, at Charlottetown, Ottawa and the provinces agreed to amend the *Constitution Act, 1982* substantively. Aboriginal leaders insisted that their issues be recognized as part of this process. Canadian political leaders agreed. The Charlottetown Accord proposed that the *Constitution Act, 1982* be amended "to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada" and that these governments should be recognized as "one of three orders of government in Canada"⁵⁴, alongside the federal and provincial governments.

2.9 The Charlottetown Accord and the Application of the Charter to First Nations

The Charlottetown Accord also contained a provision respecting the application of the *Charter* to First Nations. More specifically, it proposed that the *Charter* should apply to First Nations' governments and that Section 33 should be available to them to over-ride the *Charter* where appropriate, just as it is available to other governments in Canada.⁵⁵ Additionally, it proposed that Section 25, the non-derogation clause, "be strengthened to ensure that nothing in the *Charter* abrogates or derogates from Aboriginal, treaty or other rights of Aboriginal peoples, and in particular any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions."⁵⁶

These proposals were accepted by Aboriginal leaders, the provinces, the territories and the Parliament of Canada. The Canadian public, including a majority of

⁵⁴ Charlottetown Accord, 1992, Section 2(1)(b).

⁵⁵ Charlottetown Accord, Sec 43.

⁵⁶ Charlottetown Accord. Section A.2.2.

First Nations' people on-reserves, had a different view and the Accord was defeated in a national referendum. The Accord proposed sweeping reform of the Senate, the Supreme Court and the Bank of Canada and it recommended that the Constitution recognize Canada as an economic and social union. It offered constitutional protection for the distinctiveness of Quebec. Many of these provisions were controversial and any one of them may have led to the eventual defeat of the proposal⁵⁷. For First Nations' leaders the defeat was particularly difficult given that previous constitutional conferences had been unable to achieve the same degree of consensus.

Since the defeat of the Charlottetown Accord, Ottawa has moved incrementally toward implementing the Accord's proposals through administrative policies and modern treaties. These initiatives will be examined later in Chapter 6.

2.10 Conclusions

The *Charter* embodies many of the norms of Canada's liberal democratic tradition. It provides freedom from state intervention unless that intervention can be justified in law. It protects free speech, free expression and a free press. It guarantees citizens' right to vote and run for office. It allows for mobility throughout Canada to live and work. It provides for important legal rights upon arrest and detention. It guarantees equality among citizens. These rights apply to the federal, provincial and territorial governments and they would apply to First Nations' governments if this were negotiated or ordered by the courts. The question remains regarding how First Nations will fit into this continuum of rights and freedoms in Canada.

⁵⁷ The vote was 54.4% opposed, 44.6% in favour. Taken from <http://www2.marianopolis.edu/quebechistory/stats/1992ref.htm>, downloaded August 20, 2005.

The *Charter* is consistent with Canada's international obligations which represent a "yardstick against which to assess governmental performance or non-performance"⁵⁸ in terms of respecting and safeguarding the rights of citizens. *Charter* rights are generally considered to be individual rights. Individuals have rights to challenge government action that infringes on those rights. *The Constitution Act, 1982* also recognizes the group rights or interests of First Nations' people in Section 35 and the *Charter* stipulates that these rights cannot be diminished by the *Charter*. Some believe that *Charter* rights and Aboriginal rights can co-exist. Others are concerned that the individuals' rights contained in the *Charter* could be used to challenge or diminish the group rights of First Nations' governments. Ottawa, the provinces and First Nations' agreed at Charlottetown to strengthen Section 25 to ensure that Aboriginal rights are not diminished. However, to date, this agreement has not been written into the *Constitution Act, 1982*.

At the judicial level, the courts have not been asked to rule directly on whether the *Charter* applies to First Nations' residents against their tribal governments. This may occur in the future. The courts have found, however, that the *Indian Act* is subject to the *Charter* and, by implication, so might be First Nations' governments that are established under the *Indian Act*.

⁵⁸ Chinkin, 120.

Chapter 3

The Case Against the Application of the *Charter* to First Nations' Governments

3.0 Introduction

As Chapter 2 indicates, the *Charter* is both a sword to advance individual claims against the government and a shield to protect against the excesses of government. The *Charter* has broad public support. A recent poll recorded Canadians' support for the *Charter* at 88%.⁵⁹ The *Charter* has been described as a "statement of nationhood" about Canada⁶⁰ and even a "crucial symbol of citizenship."⁶¹ Yet, during the past quarter century concerns have been expressed about the *Charter* and in particular, its application to First Nations' governments. This chapter articulates three major arguments made by those who have concerns about the *Charter*'s application. The first is that the *Charter* should not be imposed on First Nations' governments and their communities without further study and negotiation. A second argument is that the *Charter* is embedded with European values that at times conflict with Aboriginal communal values and traditions. The third argument is that the *Charter* could limit or stifle First Nations' ability to govern their communities.

3.1 The Argument Against Imposition

To reiterate, Canada's Constitution was patriated in 1982. The *Constitution Act, 1982* included the *Charter* and it recognized Aboriginal rights in Section 35. Aboriginal leaders quickly realized that these two elements of the new *Constitution Act, 1982* might

⁵⁹ From the Centre for Research and Information on Canada, http://www.cric.ca/en_html/guide/charter/charter.html#cric, downloaded March 16, 2005.

⁶⁰ These were the words of former Ontario William Davis, as cited in Romanow, Whyte and Leeson, *Canada...Notwithstanding*, 200.

⁶¹ See Alan Cairns, 83.

be in conflict. Aboriginal people had been subjected to over one hundred years of colonial rule, where the national government essentially made decisions about their governance without their input or control. Still in 1982, with respect to the *Charter*, they again found themselves in a position where they were not consulted on fundamental governance issues. The history of colonialism had bred a deep suspicion of any federal legislation that encroached on Aboriginal sovereignty. Former Assembly of First Nations Grand Chief Ovide Mercredi commented on this cultural subjugation in 1993. He noted that since it was enacted, the *Indian Act* has been used “to deny our people our own identity.”⁶² The resulting dominance, he suggested, had produced a strong sense of victimization for First Nations peoples. “Every time we see the exercise of that dominance again, as in the *Charter* debate, we react as I do, with a sense of indignation.”⁶³

Aboriginal leaders at the time were not necessarily opposed to a charter of rights; they just did not want to see it imposed on their governments, and particularly their governments that were operating or would operate according to traditional Aboriginal norms and approaches. Chief Mercredi articulated their concern this way:

“It is very important for people to understand that we are not opposed to the idea of a Charter, we are opposed to the imposition of the Canadian Charter of Rights and Freedoms on our peoples, which was prepared and adopted without our input.”⁶⁴

Mercredi acknowledged that all governments must respect individual rights and Aboriginal governments are not exempted from this. The problem, he argued, is that

⁶² Ovide Mercredi with Mary-Ellen Turpel Lafond. *Into the Rapids – Navigating the Future of First Nations*, (Penguin Books, 1993), 104.

⁶³ Mercredi, 104.

⁶⁴ Mercredi, 97.

“the Canadian *Charter* is not appropriate for us. We have our own approaches.”⁶⁵ “In restoring ourselves as peoples, it is very important that we are not forced to emulate European-style, democratically-elected governments, since traditional forms of government may be the only way to ensure the recovery of our communities and our peoples”⁶⁶ Chief Mercredi added that First Nations want to ensure that the rights of their peoples are guaranteed, “something they do not enjoy under the Canadian parliamentary system of government.”⁶⁷

Mercredi argued that the *Charter* was designed to fix problems that had been created by the *Indian Act* in the first place, as opposed to it enhancing First Nations’ governments.⁶⁸ His concern turned out to be well-founded. One of the first major legislative changes precipitated by the *Charter* was Bill C-31, the amendment to the *Indian Act* that removed the section of that Act that disenfranchised women who married non-Aboriginal men.⁶⁹

Kent McNeil has addressed Mercredi’s ‘imposition argument’. His central thesis is that First Nations’ governments operate outside the scope of the *Charter*, by virtue of Section 35, 25 and 32 and that Aboriginal peoples must be consulted if this is to change. McNeil suggests that the consent of First Nations’ peoples’ “should be prerequisite” to the *Charter* being imposed on them.⁷⁰ To do otherwise, he suggests, would “turn the clock back in time to when the Aboriginal peoples were often not given the opportunity to participate when important decisions affecting their constitutional rights were

⁶⁵ Mercredi, 97.

⁶⁶ Mercredi, 98-99.

⁶⁷ Mercredi, 98-99.

⁶⁸ Mercredi, 97.

⁶⁹ See Canadian Congress of Aboriginal Peoples (CAP), notes from Harry Daniels, former CAP President in, “Bill C-31 the Abocide Bill”, found at <http://www.abo-peoples.org/programs/C-31/Abocide/Abocide-2.htm>, retrieved July 24, 2005.

⁷⁰ Kent McNeil in *Aboriginal Governments*, 70.

made.”⁷¹ McNeil discourages “judicial activism” in imposing the *Charter* on First Nations as well. He argues that any application of the *Charter* to Aboriginal governments by the courts “should not be decided until the matter has been thoroughly investigated and publicly debated, and the consequences of applying the *Charter* to Aboriginal governments adequately understood.”⁷² He suggests that further “investigation and discussion” must take place that will lead to a political solution where an appropriate balance will be struck between individual and collective rights.⁷³ McNeil’s argument suggests that some political resolution might be possible.

3.2 The *Charter* is embedded with European values Argument

A second argument regarding the application of the *Charter* to First Nations’ governments and communities is that not repeats a pattern of imposition on their Aboriginal rights, but it is an imposition of values that are not shared by many First Nations’ people. This view is articulated by McNeil who suggests that the *Charter* is “designed to apply to parliamentary forms of government based on Euro-Canadian laws and traditions” and that these Western-European values may be inconsistent with Aboriginal traditions.⁷⁴ Cree scholar Mary-Ellen Turpel had already made this argument more fully. Writing in 1991, she suggested that the principles upon which the *Charter* is based are “too individualistic and European” to apply to Aboriginal conceptions of citizenship.⁷⁵ She asserted that the “rights paradigm” in Canada is generally

⁷¹ McNeil, 70-71.

⁷² McNeil, 70-71.

⁷³ McNeil, 99.

⁷⁴ McNeil, 98.

⁷⁵ Mary-Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Canadian Human Rights Yearbook 3, 512.

“unreceptive to cultural differences.”⁷⁶ Turpel also expressed concerns about the Canadian judicial system acting as the adjudicator of Aboriginal rights claims. She described the courts’ operational code as Euro-centric, “elitist and culturally-specific”⁷⁷, one that does not acknowledge cultural differences. She added that the court system in Canada is an “adversarial and impersonal institution (that) is unknown among Aboriginal peoples.”⁷⁸ She maintained that the Canadian judicial system operates within a “conceptual framework of rights derived from the theory of a natural right to private property.”⁷⁹

Patricia Monture shares many of Turpel’s sentiments in this regard. She believes the benefits of having the Charter apply to Aboriginal peoples in Canada has not been adequately demonstrated. She believes the Charter is “narrow instrument” that is not capable of taking into account “discrimination within discrimination” faced by many Aboriginal women.⁸⁰

For his part, Mercredi argued that “the Courts are expensive and slow and the *Charter* has fallen short of its objective of creating equality” for Aboriginal peoples.⁸¹ Joseph Carens concurs with this view. He says the *Charter* is “embedded in a complex, costly, and alien legal system.”⁸² Carens suggests that the conception that all laws must apply equally to all citizens is no longer adequate. He calls for overlapping laws, or differentiated citizenship, as a means of accommodating the cultural concerns of intra-

⁷⁶ Turpel, 527.

⁷⁷ Turpel, 513.

⁷⁸ Turpel, 513.

⁷⁹ Turpel, 513.

⁸⁰ Patricia A. Monture-Angus, *Journeying Forward – Dreaming First Nations’ Independence*. (Halifax: Fernwood Publishing, 1999), 150. Also Patricia Monture-Angus in *Thunder in my Soul – A Mohawk Woman Speaks*, (Halifax: Fernwood Publishing, 1995), 142-145.

⁸¹ Mercredi in *Rapids*, 102.

⁸² Joseph H. Carens. *Culture, Citizenship and Community – A Contextual Exploration of Justice as Evenhandedness*, (Oxford: Oxford University Press, 2000), 193.

national groups like Aboriginal peoples.⁸³ This view has been echoed by other scholars such as John Borrows and James Tully. Borrows argued that rights discourse is often antithetical to First Nations' traditions. "Rights are often dismissed as a tool in overcoming subjugation because they seem *prima facie* incompatible with Aboriginal approaches to land, family, social life, personality and spirituality."⁸⁴ Rights can be applied in a culturally-biased manner, Borrows suggests, and individual rights claims may promote an ideology that everyone should be treated equally, regardless of disadvantages and differences. The reality is that there are economic, social and political factors that create unequal access to justice for First Nations' people.

Borrows cautions that imposing the *Charter* on Aboriginal peoples will be contentious. "Ugly divisions" have already ensued over the integration of formerly disenfranchised women back in to Indian bands, according to Borrows. "[T]he battle over rights and the *Charter* is being fought in many First Nations."⁸⁵ He proposes that a better approach would be to "harmonize" Aboriginal legal values with Western common law to create an even more unique Aboriginal Canadian law, rather than simply imposing Western liberal values on Aboriginal peoples.⁸⁶ Such a melding of inter-societal concepts could benefit both communities: Aboriginal legal values would be recognized for their value and non-Aboriginal Canadians could benefit from Aboriginal solutions to many of today's legal issues.

⁸³ Carens, 176.

⁸⁴ John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics", in *Charting the Consequences: The Impact of the Charter of Rights on Canadian Law and Politics*", eds. David Schneiderman and Kate Sutherland, (University of Toronto Press, 1997), 2.

⁸⁵ Borrows, 7.

⁸⁶ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (University of Toronto Press, Toronto, 2002), 4.

James Tully is a constitutional expert who agrees with those who have argued that the prevailing constitutional language tends to be Euro-centric, male, and colonial in nature.⁸⁷ It promotes exclusion, uniformity, and assimilation, rather than integration, multiplicity, and diversity, he says. Historically, constitutions have held together culturally-homogeneous nations⁸⁸; the language is authoritarian and imperial in nature. Although the modern conception of constitutional language is an improvement over previous language, it is nevertheless inadequate in terms of addressing contemporary demands of a diverse citizenry, such as Canada is experiencing with the Aboriginal population. Tully also advocates a form of differentiated citizenship to address Aboriginal concerns. He calls for overlapping legal and political structures, something he calls ‘diverse federalism’.⁸⁹ Such a system is by no means unprecedented. As Tully notes, Quebec has its own civil code and *Charter of Human Rights and Freedoms* and there is no reason why the Aboriginal population could not have their own rights code. He warns that Canada ignores the cultural claims of Aboriginal peoples at its own peril.⁹⁰

Aboriginal lawyer Dan Russell agrees that the *Charter* represents a collision of cultural values.⁹¹ He proposes that a better balance needs to be struck between the two competing perspectives, where the obligations to the community are given greater weight than they are given in the *Charter*.⁹² Russell acknowledges that individuals have rights within traditional Aboriginal communities, but these freedoms, at least in some

⁸⁷ James Tully. *Strange Multiplicity – Constitutionalism in an age of diversity*, (Cambridge, Cambridge University Press, 1995), 37-38.

⁸⁸ Tully, 41.

⁸⁹ Tully, 140.

⁹⁰ Tully, 209-211.

⁹¹ Dan Russell. *A People’s Dream – Aboriginal Self-Government in Canada*, (UBC Press, Vancouver-Toronto, 2000), 96.

⁹² Russell, 98.

nations, such as Navajo communities, are “tempered by the teaching that they must also have proper regard for their clan duties and obligations.”⁹³ Russell concludes:

If Canadians are truly committed to the goal of Aboriginal people instituting their own forms of self-government, then they must give appropriate regard to Aboriginal expressions of this authority. Moreover, Aboriginal people are not unmindful of the value of protecting fundamental individual rights. Such liberties are perhaps more relevant to young people in Aboriginal communities. Thus, any self-government paradigm will no doubt include some form of individual rights protection – but it must also include some form of collective rights recognition.⁹⁴

Russell’s views are shared by Sto:Lo Nation elder Clarence Pennier. When asked about the balance between individual rights and the interests of the community, elder Pennier said, “I don’t think we should probably reject the *Charter of Rights*. [But] it has to be accommodative of our collective rights.”⁹⁵

In sum, there are leaders and scholars who believe that the existence of the *Charter* creates the potential for a collision between individual rights and collective rights when the *Charter* is applied to First Nations’ people. Some First Nations’ people are seeking a greater balance between the rights of the individual and the duties to the community, where duties to the community are given greater weight.

3.3 The *Charter* Could Limit First Nations’ Ability to Govern

The third major argument regarding the application of the *Charter* to Aboriginal peoples and their governments as expressed by some is that it may limit rather than enhance First Nations’ governance.⁹⁶ Dan Russell, for example, argues that proponents of the *Charter* are underestimating the impact the *Charter* might have on the cultural

⁹³ Russell, 145.

⁹⁴ Russell, 145.

⁹⁵ MacDonald, Denise. *The Sto:Lo World View and the Individualism of Canadian Law*. M.A. thesis, (University of Northern British Columbia, 2000), 76.

⁹⁶ See discussion in Borrows in *Equality*, 2.

rights and practices within Aboriginal communities.⁹⁷ Joseph Carens believes the *Charter* “could greatly limit the capacity of Aboriginal people to develop their own distinctive arrangements for self-governance.”⁹⁸

Dan Russell and Will Kymlicka have identified several potential *Charter* challenges that First Nations might face if the *Charter* were to apply to their jurisdiction. For example, Russell examines how some First Nations choose their leadership through a clan system. He suggests that if the democratic rights in Section 3 were applied to these nations, thereby ensuring that every person has a right to vote or stand for public office, this “would surely constitute an attack on the clan system.”⁹⁹ Russell also suggests that other *Charter* rights, such as the right not to incriminate oneself, might be inconsistent with Aboriginal traditions where one is required to “explain his or her actions” to the community.¹⁰⁰ These values are “centuries old”, he says, and by enforcing these rights, accused First Nations’ individuals may “avoid their responsibilities to their communities.”¹⁰¹ Section 15, the equality rights section, “could prove troublesome for some Aboriginal communities” as well, according to Russell.¹⁰² Some First Nations might require “participation in community activities determined by distinctions of gender, race, age or religion.”¹⁰³ Failure to comply with these activities could result in sanctions being imposed on those who refused. Russell suggests that such sanctions might be challenged using Section 15.¹⁰⁴ He poses these as hypothetical

⁹⁷ Russell, 96.

⁹⁸ Carens, 192.

⁹⁹ Russell, 104.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Russell, 110.

¹⁰³ Ibid.

¹⁰⁴ Russell, 110-111.

examples of challenges that could be faced by First Nations' governments using the *Charter*.

Will Kymlicka identifies several potential *Charter* challenges that face First Nations' governments including: restrictions on voting rights,¹⁰⁵ limitations on mobility rights and First Nations' residents' ability to sell their land,¹⁰⁶ and the right to educate their children in their Aboriginal language ahead of English or French.¹⁰⁷ He suggests that special measures or special rights designed to protect Aboriginal traditions might be necessary to preserve important cultural traditions.¹⁰⁸

In effect, Kymlicka suggests that excessive attachment to the liberal principles of equality may compromise the principle of equity and fairness. Joseph Carens believes these threats to Aboriginal culture are real and that the concerns of Aboriginal leaders are "defensible and plausible."¹⁰⁹

3.4 International Instruments That Preserve and Protect Culture

On the issue of the *Charter* being compatible with international human rights instruments, Dan Russell points to several international agreements that guarantee collective rights or minority rights including the *Convention Against Genocide, 1948*, the *U.N. Declaration on the Rights of Persons Belonging to National Ethnic, Religious and Linguistic Minorities, 1992*, the *UNESCO Declaration of the Principles of International Cultural Cooperation, 1966*, and the *Draft U.N. Declaration on the Rights*

¹⁰⁵ Kymlicka in *Liberalism*, 147.

¹⁰⁶ Kymlicka, 149.

¹⁰⁷ Kymlicka, 149-150.

¹⁰⁸ Kymlicka, 152.

¹⁰⁹ Kymlicka, 192.

of Indigenous Peoples 1994.¹¹⁰ According to Russell, together these documents stand for the “right to protection and continued expression of a people’s culture.” By applying the *Charter* to First Nations, he says, it could be argued that this “offends an Aboriginal community’s collective rights.”¹¹¹

3.5 Conclusions

In sum, concerns with the application of the *Charter* to First Nations appear to revolve around three arguments. The first argument is that the *Charter* was imposed unilaterally in 1982, just as the *Indian Act* was imposed, and that such an imposition is contrary to the recognition of their rights. Some First Nations’ leaders are concerned that the *Charter* was designed more to fix problems created by the *Indian Act* than advancing their claims.

The second argument is that the *Charter* is culturally incompatible with many Aboriginal traditions. The concern is that individual rights under the *Charter* may trump the rights of the community despite the fact that many Aboriginal communities believe that an individual owes duties to the community that supersede her or his own individual rights. Those who share this concern add that such a problem is likely to be compounded when *Charter* claims are adjudicated by a court system that is alien and sometimes even hostile to First Nations’ laws and customs.

The third argument is that the *Charter* may restrict Aboriginal peoples’ hard-fought right to greater self-determination.¹¹² Aboriginal leaders have been very concerned that the application of the *Charter* to their governance system might be a

¹¹⁰ Russell, 122.

¹¹¹ Russell, 123.

¹¹² McNeil in *Aboriginal Governments*, 72.

setback to their right of self-government. They believe that there is a contradiction between having the right to self-government, sovereignty on their territory, and having the *Charter* as an “external restriction” on their activities.¹¹³

This chapter outlines a number of governance issues that could face potential *Charter* challenges. The potential collision of individual rights and group interests has been described as an “emotional minefield”¹¹⁴ and John Borrows suggests that “ugly divisions”¹¹⁵ have already taken place within First Nations’ communities over women’s rights and the application of the *Charter* to First Nations’ jurisdiction. Former Grand Chief Ovide Mercredi summed up his position on the *Charter* as follows:

Who is to say that freedom of conscience and religion, freedom of thought and belief, freedom of association do not exist in our societies? Of course they exist. We believe in maximizing individual autonomy without sacrificing a sense of community responsibility. Our beliefs and values do not exist because the Canadian Charter says they exist. Our societies and cultures are older than Canada’s. Our values are part of who we are. The suggestion that we lack these attributes or that our values are wrong or inferior because they are not the same is insulting.¹¹⁶

These views indicate that the issue of the application of the *Charter* to First Nations’ jurisdiction continues to be hotly contested. A second school of thought does not have this same degree of concern about the application of the *Charter*. This school believes the *Charter* might actually assist in the de-colonization process. Chapter 4 reviews the views of those who support the application of the *Charter* to First Nations’ jurisdiction.

¹¹³ McNeil, 72.

¹¹⁴ Alan C. Cairns, *Citizens Plus*, 6.

¹¹⁵ Borrows, *Equality*, 177.

¹¹⁶ Mercredi, *Rapids*, 102.

Chapter 4

Arguments in Favour of the Application of the *Charter* to First Nations

4.0 Introduction

Chapter 3 focused on the arguments of those who have concerns regarding the application of the *Charter* to First Nations' governments and communities, this chapter reviews the views of those who support the application of the *Charter*. This includes the findings of RCAP. The argument in favour of the *Charter's* application rests on two major propositions: first, that First Nations' citizens should have the same rights against their governments as they have against the federal and provincial governments; and second, that the values and principles embodied by the *Charter* are not necessarily inconsistent with the Aboriginal traditions in some areas. This school of thought was bolstered by the findings of RCAP that recommended in 1996 that the *Charter* should apply to First Nations, just as it applies to other levels of government in Canada.

4.1 First Nations' People Should Have *Charter* Rights vis-à-vis their Governments

Many Canadians, both Aboriginal and non-Aboriginal, believe that First Nations' citizens should have the same rights against their governments as they have vis-a-vis the federal and provincial governments; that "fellow citizens should be subject to the same legal regime."¹¹⁷ This contention has been advanced by at least one Aboriginal organization. The Native Women's Association of Canada (NWAC) has been at the forefront of the debate in arguing that the *Charter* should and does apply to First Nations' governments. Its support for the application of the *Charter* is rooted in the idea

¹¹⁷ Joseph H. Carens in *Culture, Citizenship and Community* credits this objection to Will Kymlicka, 178.

that prior to its entrenchment, reserve-based First Nations' governments did not do enough to oppose the disenfranchisement of Aboriginal women who married outside their band.¹¹⁸ It suggests that this type of discrimination continues today, as revealed in two national consultations held by the Association and a study done by Aboriginal women in British Columbia which found "evidence of Band discrimination against Bill C-31 reinstates and their families, including exclusion from membership, not permitting residency on reserve, discrimination in housing and in education and health funding."¹¹⁹ According to the former President of NWAC, Bill C-31 Indians face "nepotism and favouritism" and "negative stereo-typing" in trying to access Band benefits.¹²⁰ NWAC supports the application of the *Charter* to First Nations' governments. Its position was articulated cogently by John Borrows in "Contemporary Traditional Equality" as follows:

"The Native Women's Association of Canada supports individual rights. These rights are so fundamental that, once removed, you no longer have a human being. Aboriginal Women are human beings and we have rights which cannot be denied or removed at the whim of any government. These views are in conflict with many Aboriginal leaders and legal theoreticians who advocate for recognition by Canada of sovereignty, self-government and collective rights. It is the unwavering view of the Aboriginal male leadership that the 'collective' comes first, and that it will decide the rights of individuals.

[NWAC] recognizes that there is a clash between collective rights of sovereign Aboriginal governments and individual rights of women.

¹¹⁸ Danish academic Liliane Krosenbrink-Gelissen studied the concerns of the Native Women's Association of Canada in 1993. She wrote: "The Canadian Constitution and the Charter have vitally affected aboriginal women as a group. However, aboriginal women's experiences as well as their political concerns have been largely neglected in academic and political discourse on both aboriginal rights and women's rights. Aboriginal rights demands largely reflect the interests of aboriginal men, while women's rights demands, until very recently, have largely reflected the interests of white, middle-class women. In both cases, aboriginal women's distinct perceptions are ignored." See Krosenbrink-Gelissen, Lilianne E., "The Canadian Constitution, the Charter and Aboriginal Women's Rights: Conflicts and Dilemmas," in *International Journal of Canadian Studies*, Vol. 7-8, (Spring-Fall, 1993), 208.

¹¹⁹ Mary Eberts on behalf of the Native Women's Association of Canada in "Aboriginal Rights are Human Rights". Taken from <http://canada.justice.gc.ca/chra/en/eberts.html>, retrieved September 9, 2003, 2.

¹²⁰ Eberts, *ibid*.

Stripped of equality by patriarchal laws which created ‘male privilege’ as the norm on reserve lands, Aboriginal women have a tremendous struggle to regain their social position. We [NWAC] want the *Canadian Charter of Rights and Freedoms* to apply to Aboriginal governments.”¹²¹

Borrows suggests that while the *Charter* has its limitations or disadvantages, on balance it might assist with the development of First Nations’ governance. He examines how some Aboriginal women have been instrumental in affecting the outcome of three issues of importance to First Nations’ people both in shaping and in utilizing the *Charter*.

In explaining their influence in shaping the *Charter*, Borrows notes that some Aboriginal women fought for an amendment to the *Constitution Act, 1982* to guarantee gender equality on matters pertaining to Aboriginal and treaty rights.¹²² They were concerned that Section 25 might be used to neutralize Section 28, where the *Charter* guarantees gender equality. At the 1983 tri-lateral conference of Ottawa, involving the provinces and Aboriginal leaders, all parties agreed to the inclusion of Section 35(4) after intense lobbying by some Aboriginal women’s organizations. Section 35(4) guarantees gender equality in matters under Aboriginal jurisdiction. It is part of the *Constitution Act, 1982* and it operates outside the *Charter*. This provision was originally opposed by some Aboriginal leaders, including the Assembly of First Nations (AFN), because they believed that “sexual-equality protections were already implicit in Section 35 as part of self-government.”¹²³ The AFN based its position on First Nations’ inherent right to determine their own membership and citizenship within their communities. In the end, the AFN ultimately agreed with the proposed amendment.

¹²¹ Borrows, in “Equality”, 182.

¹²² Section 34(4) states: “Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

¹²³ Borrows, 173.

In explaining how Aboriginal women have utilized the *Charter*, Borrows points to two important instances. The first instance was when some Aboriginal women fought for changes to the *Indian Act* to allow formerly disenfranchised First Nations' women to return to their bands. NWAC lobbied the Government of Canada to amend the *Indian Act* on the basis that the disenfranchisement provision was likely out of step with the *Charter*. Ottawa accepted this position and amended the *Indian Act* before litigation was commenced. According to Borrows, Bill C-31 re-instated treaty rights and reconnected many Aboriginal people to their culture. This amendment was partially responsible, he suggests, for the growth of the status-Indian population by one-third in the past twenty years.¹²⁴

The second instance was when Aboriginal women were able to use the equality guarantees in the *Charter* to influence the national agenda during the debate that led to the Charlottetown Accord. Some Aboriginal women, again represented by NWAC, feared that the Accord might include measures that could adversely affect their right to equality. NWAC initiated two court cases against the framers of the Accord; the first sought funding and equal participation in the negotiations leading up to the Accord, and the second attempted to stop the referendum unless and until Aboriginal women secured a guarantee of equality in the Accord. NWAC was able to raise the profile of the equality rights struggle using rights discourse and the *Charter*.¹²⁵

Borrows points to these significant events to conclude that, on balance, the *Charter* might “augment political struggle and contribute to emancipation” of

¹²⁴ Borrows, 173-176.

¹²⁵ See discussion, Borrows, 180.

Aboriginal people.¹²⁶ The *Charter* might actually help Aboriginal people “disentangle” themselves from colonialism, he suggests.¹²⁷

NWAC’s position has been supported to a certain degree by Sharon McIvor and Teresa Nahanee, both Aboriginal lawyers. Writing for the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, McIvor and Nahanee expressed concern for Aboriginal women living on reserves who find themselves without rights protection in law. They called for repeal of Section 67 of the Canadian Human Rights Act, 1985 that provides an exemption for action under the *Indian Act*¹²⁸ and they called for a review of provincial and territorial human rights codes that are not applicable “on Indian lands”.¹²⁹

Borrows and others such as Patricia Monture are concerned with the use of litigation to advance rights claims. Monture said that while she does not fully disagree with NWAC’s approach in raising awareness of the issues facing Aboriginal women, she believes that NWAC’s litigation “wrongly represented Aboriginal women as all the same (or similarly situated)” and that its legal claim was “both adversarial and prefaced on a feminist construction of reality.”¹³⁰ However, Borrows says that for Aboriginal women to litigate their claims is no different than First Nations themselves using rights arguments to advance their claims for self-determination. Borrows notes that accepting

¹²⁶ Borrows, 170.

¹²⁷ Borrows, 171.

¹²⁸ Section 67 of the Canadian Human Rights Act, 1985 states: Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.

¹²⁹ Sharon McIvor and Teresa Nahanee, “Aboriginal Women in the Legal Profession”, Appendix 11 to the *Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession*, August 1993.

¹³⁰ Patricia A. Monture-Angus, *Journeying Forward – Dreaming First Nations’ Independence*. (Halifax: Fenwood Publishing, 1999), 148-149.

the principles of the *Charter* is necessary in order for First Nations' governments to claim legitimacy and to "facilitate the exercise of self-government powers."¹³¹

4.2 Charter Rights Might Not Be Inconsistent with Aboriginal Values

The argument made by those concerned with the application of the *Charter* because of the dissonance between the *Charter* and the traditional Aboriginal values regarding individual rights and individual duties to the community has also been challenged by some scholars. They argue that the *Charter* principles and values may not be entirely inconsistent with Aboriginal values of respect for the community.

One of the most cogent counter-arguments to the cultural inappropriateness of the application of the *Charter* to First Nations' governments and communities was articulated by RCAP. RCAP traced the history of respect for individual freedoms back into Aboriginal traditions, arguing that Aboriginal peoples are "no strangers to the doctrines of freedom and equality that animate the *Charter*"¹³², that these values were recorded as early as 1744 by French historians. In other words, the roots of the *Charter* are found in both Aboriginal and non-Aboriginal traditions. RCAP added that *Charter* rights "can be viewed as the product of cultural fusion, stemming from inter-societal contacts in the villages and forests of North America, with effects that rippled outward into the salons and marketplaces of pre-revolutionary Europe."¹³³

The authors of RCAP also addressed J.Y. Sakej Henderson's argument, articulated earlier, that Section 25 of the *Charter* provides a "protective zone from the

¹³¹ Borrows, 171.

¹³² RCAP, *Partners in Confederation*, 1993, page 40.

¹³³ RCAP, 40.

colonialists' rights paradigm.”¹³⁴ They maintain that this approach “distinguishes between the *right* of self-government proper and the *exercise* of governmental powers flowing from that right.”¹³⁵ In other words, Section 25 protects the right of self-government for Aboriginal peoples, but “individual members of Aboriginal groups, like other Canadians, enjoy Charter rights in their relations with governments and this protection extends to Aboriginal governments.” RCAP accepted the argument that, while Section 35 of the *Constitution Act, 1982* protects the right of self-government, the *Charter* protects the rights of citizens who reside under the jurisdiction of those governments. RCAP concluded that it “would be highly anomalous if Canadian citizens enjoyed the protection of the *Charter* in their relations with every government in Canada except for Aboriginal governments.” It recommended in the *Final Report* that the *Charter* “should hold good against all types and levels of governments, whether federal, Aboriginal, provincial or territorial.”¹³⁶

Borrows advanced similar arguments prior to the release of the RCAP report. He argued that the *Charter* contains precepts that were “traditionally endorsed by a considerable number of First Nations people”¹³⁷ and that these principles need to be revived in order for First Nations’ governments to claim legitimacy. In making this point, Borrows explains traditions in his own family where the circle of life not only encompasses the four directions but encourages “honesty, sharing, strength and kindness.”¹³⁸ Equality rights, he suggests, have added to existing Aboriginal traditions of

¹³⁴ A.Y. S. Henderson, 286.

¹³⁵ Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation*, (Ottawa: Supply and Services, 1993), 39.

¹³⁶ RCAP Volume 2 Chapter 3.

¹³⁷ Borrows in “*Contemporary Traditional Equality*”, 170.

¹³⁸ Borrows, 184.

“gender symmetry and harmony”¹³⁹ to create more equitable First Nations’ governments. In an attempt at reconciliation of the Aboriginal and European governance and legal traditions, Borrows proposes a fusion of traditional Aboriginal law with Euro-Canadian law to form a truly Indigenous Canadian law. He adds that rather than being an obstacle for First Nations, the *Charter* offers them an opportunity to “recapture the strength of principles which were often eroded through government interference.”¹⁴⁰

Patricia Monture argues that the dichotomy of individual rights and group rights does not adequately capture Aboriginal conceptions of collective rights. Individual rights, she proposes, are rights that belong to individuals. Group rights are individual rights “bundle(d)...into a package.”¹⁴¹ Collective rights, she says, are similar to group rights in that they must be held by an identifiable group of individuals, but they are different in that collective rights belong to Aboriginal peoples because of the “distinct relationship with the territory that has become the Canadian state.”¹⁴² Monture suggests that the Canadian courts have had difficulty conceptualizing this difference, to the detriment of Canadian First Nations’ people and that is mischaracterization of Indigenous rights remains “an instrument of colonialism which we have not been able to banish from our lives.”¹⁴³

4.3 Conclusions

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence*,” (Halifax: Ferwood Publishing, 1999), 135.

¹⁴² Monture-Angus, 136.

¹⁴³ Ibid.

This chapter has shown that within Aboriginal communities there are those who believe that the *Charter* ought to apply to First Nations' government. NWAC has been in the forefront of those who want the *Charter* to apply to First Nations' government because of the historical discrimination faced by some Aboriginal women.¹⁴⁴ However, NWAC's position does not have the support of all Aboriginal women.¹⁴⁵ Borrows suggests that Aboriginal traditions on rights need to be revived in order to bring symmetry and balance to these communities and that by and large, the *Charter* can help First Nations' people "disentangle [them]selves from the web of enslavement."¹⁴⁶ This school of thought found support in RCAP which recommended the application of the *Charter* to First Nations.

Chapter 5 examines a third perspective on the application of the *Charter* to First Nations' governments, suggesting that the *Charter* might be acceptable if it does not diminish important Aboriginal customs and traditions. It also explores work that is being done to find alternatives to the *Charter* that might be more acceptable to First Nations' people.

¹⁴⁴ Mary Eberts, in her response to the proposed changes to the *Canadian Human Rights Act* makes reference to several United Nations documents to conclude that "the treatment of Aboriginal women in Canada falls far below the standards set by the international community and adopted by Canada for basic human rights protection." Taken from <http://canada.justice.gc.ca/chra/en/eberts.html>, retrieved September 9, 2003, 3.

¹⁴⁵ See Patricia Monture-Angus in *Thunder in my Soul*. In Chapter 7, Monture-Angus presents a critique of the NWAC position. She states: "Until the sound legal reasons about positive results from the application of the Charter are more than mere exceptions, then I will remain sceptical. I cannot image the way I would use the Charter to advantage Aboriginal women's rights", 146. Also, Mary-Ellen Turpel in Mary-Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 *Canadian Human Rights Yearbook* 3, 512 and Margaret A. Jackson, "Aboriginal Women and Self-Government", in *Aboriginal Self-Government in Canada*, ed. John H. Hylton. [Saskatoon: Purich Publishing, 1994), Chapter 10.

¹⁴⁶ Borrows, in "Equality", 3.

Chapter 5

Alternative Approaches and Accommodations

5.0 Introduction

Chapters 3 and 4 provided an overview of two of the primary arguments over whether the *Charter* should apply to First Nations' governments in Canada. This chapter explores the middle ground or rather the school of thought that says there are alternatives to having the *Charter* apply or not apply to First Nations' governments. It identifies and examines the arguments advanced by those who say that the *Charter* might be acceptable so long as it honours and respects Aboriginal customs and laws. The chapter consists of four sections. The first section examines the views of several prominent Canadian philosophers who have addressed the issue of reconciling individual and group interests and how Section 25 of the *Charter* might be used to protect the group rights of First Nations if the *Charter* were applied to First Nations' governments. The second section examines proposals and efforts to clarify and strengthen Section 25 to ensure, were the *Charter* to apply, that collective rights of First Nations would not be abrogated. The third section provides an overview of a set proposals and efforts to determine whether the *Canadian Human Rights Act* ought to apply to First Nations' governments. The issues and options surrounding the application of the *Canadian Human Rights Act* to First Nations' governments in many ways parallel those that arise in the context of the debate on the application of the *Charter*. The fourth section examines a proposal to develop an Aboriginal Charter of Rights and Freedoms as

an alternative to the *Canadian Charter of Rights and Freedoms*. An Aboriginal Charter, as conceived by its proponents, would be a parallel to the *Canadian Charter* similar in effect to the *Quebec Charter of Human Rights and Freedoms*.

5.1 Section 25 and the Balance of Rights and Culture

To reiterate, some scholars have expressed concerns that the imposition of the *Charter* is a continuation of colonialism and it may compromise important Aboriginal cultural traditions, even stifle Aboriginal governments. Dan Russell describes the imposition of the *Charter* as analogous to pulling a “red thread within a white fabric”¹⁴⁷; it would take only a few lost threads to jeopardize Aboriginal cultural traditions. Many contemporary Canadian political philosophers accept that the preservation of cultural traditions, laws and customs is an important societal good and that special measures may be needed to protect such traditions, even if they are at odds with liberal principles of equal treatment for all. Liberal theorist Will Kymlicka, for example, goes so far as to suggest that “liberalism is incomplete” if it disregards the importance of culture.¹⁴⁸ He and others have called for a sensitive balancing of competing rights, where cultural traditions are balanced alongside individual rights. In a similar vein, John Borrows suggests that individual rights and collective rights need not be “dichotomized”¹⁴⁹ because a strong individual rights regime can co-exist alongside measures to protect vulnerable cultures.

Kymlicka suggests that an affirmation of individual rights together with a preservation of cultural rights will make a more vibrant society within which individuals

¹⁴⁷Russell, in *Dream*, 77.

¹⁴⁸ Kymlicka in *Liberalism*, 153.

¹⁴⁹ See John Borrows in “Contemporary Traditional Equality”, 184.

can lead the good life according to their beliefs. Not all scholars accept Kymlicka's interpretation. Gordon Christie fundamentally disagrees with Kymlicka's conceptions of liberalizing Aboriginal societies. He argues that liberalism itself poses a threat to Aboriginal peoples and may be "one source of the perception of oppression."¹⁵⁰ Kymlicka suggests that the "political task, then, is to devise constitutional provisions...which will be flexible enough to allow for the legitimate claims of cultural membership, but which are also not so flexible as to allow systems of racial or cultural oppression."¹⁵¹ Joseph Carens contributes to this discussion by proposing a paradigm for balancing competing claims where competing interests will be given "appropriate weight under the circumstances within the framework of a commitment to equal respect for all."¹⁵²

The framers of the *Constitution Act, 1982* understood the need for such balance. Section 25 was inserted into the *Charter* to serve as direction for the judiciary to weigh the impact of the *Charter* against the cultural interests of First Nations' communities. In 1995, James Tully examined several court decisions where the judiciary was required to strike a balance between rights and culture within those communities. One such case was *Regina v Sparrow*¹⁵³ where the Supreme Court of Canada reviewed Aboriginal rights to commercial fishing and balanced those rights against the need for conservation measures to replenish fish stocks. The Court set out the principle in that case for balancing rights and culture. It ruled that where a *prima facie* case of an infringement of Aboriginal rights is determined, the onus shifts to the Crown to justify those

¹⁵⁰ Gordon Christie in "Law, Theory and Aboriginal Peoples", *The Indigenous Law Journal*, University of Toronto Faculty of Law, Vol. 2, (Fall 2003), 68.

¹⁵¹ Kymlicka, 255.

¹⁵² Carens, in *Culture*, 12.

¹⁵³ *R v Sparrow* [1990] 1 S.C.R. 1075

restrictions.¹⁵⁴ It upheld the Aboriginal right to fish, but it also recognized the Crown's right to regulate fisheries.

In a second case, *Thomas v Norris*¹⁵⁵, Tully has noted that the British Columbia Superior Court was required to carefully balance the right of individuals to exempt themselves from certain cultural ceremonies of a local band. Thomas claimed that he was falsely imprisoned and forced to go through an Aboriginal initiation ceremony. The defendants argued that their actions were a part of their Aboriginal traditions and were therefore protected by Section 35 of the *Constitution Act, 1982*. Section 25 of the *Charter* was not invoked here since the case was a civil suit and was not initiated against a government action. However, the Court determined that the Aboriginal right claimed under Section 35 was “not absolute” and that the plaintiff's individual rights in the circumstances were “inviolable”. The Court stated, “While the plaintiff may have special rights and status in Canada as an Indian, the ‘original’ rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike.”¹⁵⁶

Given court decisions in such cases, Tully suggests that the courts in Canada are inclined to be even-handed in situations where *Charter* rights come into conflict with Aboriginal rights. Section 25 is there to provide this appropriate balance and Tully suggests this should offer some solace to both *Charter* supporters and to those who fear its effects. Tully suggests that judges use a two-part test to balance rights and culture. They will ask:

- a. Is the cultural right being asserted “pressing and substantial”, and if so,

¹⁵⁴ Analysis taken from <http://www.aand.gov.ab.ca/PDFs/R.%20v.%20Douglas.pdf>, retrieved August 25, 2004.

¹⁵⁵ *Thomas v Norris* [1992] 2 CNLR 139 (BCSC).

¹⁵⁶ *Thomas v Norris*, 28.

b. Is the limit on individual rights proportional?¹⁵⁷

In other words, if the Aboriginal right that is being protected is substantial, it may supersede or trump the individual right. On the other hand, if the Aboriginal right is not substantial and the infringement on the individual right is disproportional, the individual right may be the trump.

This is the “sensitive balancing” of competing claims which Carens noted and promotes.¹⁵⁸ According to Tully, finding this balance should satisfy both individual rights theorists and those who are concerned with the impact of individual rights upon cultural traditions and practices. In his words:

If rights were applied without taking these cultural differences into account, the result would not be impartial. The dominant culture would in fact be imposed in each case. Therefore, there are no grounds for complaint from a defender of rights, for rights are rescued from being a tool of cultural domination. Conversely, a critic of rights has no reason to complain, for the alleged blindness to cultural differences has been corrected, yet without abandoning rights.¹⁵⁹

5.2 Strengthening Section 25 – The Charlottetown Accord and RCAP

Tully believes that the current Section 25 may be the best hope for addressing Aboriginal concerns about the dilution of culture under the *Charter*, short of a constitutional amendment. To be certain that the existence of such protection would not be questioned or compromised, the federal government offered at Charlottetown to strengthen Section 25 to ensure that Aboriginal concerns were addressed. The Charlottetown Accord proposed that Section 25 should be “strengthened to ensure that nothing in the *Charter* abrogates or derogates from Aboriginal, treaty or other rights of

¹⁵⁷ Tully, in *Strange Multiplicity*, 171.

¹⁵⁸ Carens, 12.

¹⁵⁹ Tully, 172-173.

Aboriginal peoples, and in particular any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions.”¹⁶⁰ Four years later RCAP agreed with this approach. In its final report it suggested that under Section 25, the *Charter* must be given a “flexible” interpretation that takes account of the “distinctive philosophies, traditions and cultural practices of Aboriginal peoples.”¹⁶¹ RCAP added that First Nations’ governments have the same access to Section 33, the notwithstanding clause, as other governments. The use of the notwithstanding clause would provide First Nations’ governments with some of the flexibility that they would want if they were to operate within the context of the Canadian Constitution. Section 33 would allow them to pass legislation notwithstanding the Charter to protect important cultural traditions or laws. It must be noted that Section 33 has been seldom used by other levels of government because of the potential political consequences of over-riding the *Charter*.

5.3 Review of the *Canadian Human Rights Act*

One of the most significant efforts at finding ways to reconcile the rights of First Nations’ peoples with the governance powers of First Nations’ governments was undertaken in April of 1999 when Canada’s Justice Minister appointed an independent

¹⁶⁰ Charlottetown Accord, section 43.

¹⁶¹ Final Report – Royal Commission on Aboriginal Peoples – Recommendation 2.3.12.17. The Commission recommends: The *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals falling within their jurisdiction. However, under section 25, the Charter must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses that suspend the operation of certain Charter sections for a period. Nevertheless, by virtue of sections 28 and 35(4) of the *Constitution Act, 1982*, Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments. Taken from http://www.aicn-inac.gc.ca/ch/rcap/sg/sha6a_e.html, retrieved July 25, 2005.

panel to review the *Canadian Human Rights Act, 1985*.¹⁶² The Panel was chaired by Supreme Court Justice Gerald La Forest. The Panel examined whether the current exemption for actions under Section 67 the *Indian Act* in the *Act* ought to be repealed.¹⁶³ The ensuing discussion of that issue paralleled the discussion of balancing rights under the *Charter*. In its final report, the Panel recommended a “balancing of the values of the Aboriginal people and the need to preserve Aboriginal culture.”¹⁶⁴ In practice, this would mean that adjudicators would “...actually hear evidence and representations on the issue of whether the interests of the individual and the community are properly balanced.”¹⁶⁵ In order to ensure that this balance was maintained, the Panel recommended that an interpretative provision should be added to the *Act* which requires the “taking into account of Aboriginal community needs and aspirations in interpreting and applying rights” in cases involving Aboriginal governments. The Panel suggested that the balancing clause should be sufficient to “defeat a claim by an individual, who is unconnected with the community,” who might challenge a decision of the band using the *Act*.¹⁶⁶ It concluded that an outright exemption for Aboriginal governments from human rights laws in Canada was “not appropriate”.¹⁶⁷

In its response to this report, NWAC proposed that the current exemption in the *Canadian Human Rights Act* for the *Indian Act* from the application of *Act* should be

¹⁶² *Canadian Human Rights Act, 1985*. R.S.C. Ch.H-6 as amended.

¹⁶³ Section 67 of the *Canadian Human Rights Act* states: “Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.”

¹⁶⁴ Canada, Canadian Human Rights Act Review Panel, “Promoting Equality: A New Vision”, June 2000, found at <http://canada.justice.gc.ca/chra/en/toc.html>.

¹⁶⁵ CHRC Panel recommendations in Chapter 18 (c) found at: <http://canada.justice.gc.ca/chra/en/frp-c18.html#c>. retrieved August 31, 2005.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

repealed¹⁶⁸ and that a provision similar to Section 25 of the *Charter* should be inserted in the *Act*. They also called for a prohibition of discrimination against Indians who live off-reserve or have had their Indian status restored under Bill C-31.¹⁶⁹ This proposal parallels NWAC's position on the application of the *Charter* to First Nations' governments.

Since the defeat of the Charlottetown Accord in 1992, no further action has been taken to amend the *Constitution Act, 1982* to strengthen Section 25. Until this happens, it is possible that the courts will provide the appropriate balance, perhaps utilizing the considerations proffered by James Tully, when the appropriate cases come before them.

5.4 An Aboriginal Charter of Rights

An alternative means that has been proposed for accommodating First Nations' concerns about the imposition of the *Charter* is the enactment of an Aboriginal Charter that excludes the objectionable features of the *Canadian Charter*. One proponent of this idea is Dan Russell. In *A Peoples Dream*, Russell describes in some detail how an Aboriginal charter could strike a better balance between individual rights and collective rights. It could be drafted by Aboriginal people and would be more "accessible" to Aboriginal peoples because it would be drafted in familiar common language and concepts that Aboriginal peoples understand, rather than the unfamiliar legalist language and concepts contained in the *Charter*.¹⁷⁰ An Aboriginal Charter would more clearly

¹⁶⁸ *The Canadian Human Rights Act*, 1985, Section 67 states: "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

¹⁶⁹ Mary Eberts on behalf of the Native Women's Association of Canada. "Aboriginal Rights are Human Rights". Taken from <http://canada.justice.gc.ca/chra/en/eberts.html>, retrieved September 9, 2003, page 3.

¹⁷⁰ Russell in *Dream*, 138.

spell out the duties owed to the community and the need for individuals to accept responsibility for their actions. It could provide one or more interpretive clause, similar to Section 1 of the current *Charter* that would give guidance to the courts, perhaps Aboriginal courts, on how the Charter was to be interpreted consistent with Aboriginal traditions. In short, it would interject a different language and a different set of cultural values and considerations into the ongoing rights discourse.

In speaking about the possibility of an Aboriginal Charter, Ovide Mercredi suggests that such a document would better “reflect our values customs and aspirations.”¹⁷¹ It would also reflect Aboriginal ways of “dealing with disputes so they can be kept out of Canadian courts and away from the adversarial process.”¹⁷² Even NWAC has done some work towards developing an Aboriginal Charter of Rights.¹⁷³

The idea has its own strengths and weaknesses. On the one hand, one pan-Aboriginal Charter of Rights might not be acceptable to all Indian bands because traditions on rights may vary from one First Nations to another. On the other hand, the idea appears to have found some favour with some First Nations. As Chapter 6 will indicate, some modern treaties are now including provisions for a future Aboriginal Charter of Rights. This concept was given greater impetus in May, 2005 when representatives of the federal government and First Nations’ leaders agreed to a political accord that includes a provision that states, “Canada and the First Nations are committed to respecting human rights and applicable international human rights.”¹⁷⁴ The Accord also urges First Nations to “respect the inherent dignity of all their people, whether

¹⁷¹ Mercredi in *Rapids*, 98.

¹⁷² Mercredi, 98.

¹⁷³ See <http://www.nwac-hq.org/AnAboriginalChaterRightsFreedoms.pdf>.

¹⁷⁴ To view the complete accord, visit: <http://www.ainc-inac.gc.ca/nr/prs/m-a2005/02665afn.pdf>.

elders, women, youth or people living on or away from reserves.”¹⁷⁵ Such an accord provides a political platform from which First Nations can adopt their own human rights laws. The constitutional platform is found in Section 35 of the *Constitution Act, 1982* and Section 25 of the *Charter*. John Borrows argues that this concept of blending traditional Aboriginal laws with western liberal traditions in law may lead to a truly unique form of Canadian law.¹⁷⁶

5.5 Conclusions

In sum, whereas concern exists that *Charter* claims might dilute important cultural practices and traditions, others believe that Section 25 offers the best hope in the short term for protecting significant or important Aboriginal cultural practices and traditions. This school of thought suggests that Section 25 serves as direction to the judiciary to carefully balance competing claims for individual rights against the impact those rights might have on vulnerable and important cultural traditions. Rights and culture need not be always at odds with one another. Scholars from this school argue that given the difficulty with amending the Constitution, Section 25 of the *Charter* may be the best defense available to protect important Aboriginal and treaty rights.

Not everyone agrees however that relying on Section 25 is the ideal solution. Individual First Nations or tribal confederacies may wish to develop their own charter, one that reflects their own traditions of balancing the rights of the individual with the duties owed to the community and one that is enforced by their own judicial system.

¹⁷⁵ A First Nations – Federal Crown Political Accord, Section 8, as referenced above, retrieved July 25, 2005.

¹⁷⁶ John Borrows, *Recovering Canada*, 4.

This option will undoubtedly be explored extensively in the future and could represent the longer term resolution to this debate for those First Nations who cannot accept the application of the *Canadian Charter* in their jurisdiction.

Chapter 6

Negotiating Self-Government in Canada Today

6.0 Introduction

Since the defeat of the Charlottetown Accord, Ottawa has moved incrementally toward implementation of greater self-governing authority for First Nations.¹⁷⁷ A dozen or more modern treaties have been signed with First Nations since 1993 and more than eighty First Nations bands are negotiating self-government agreements across the country today.¹⁷⁸ Canada is engaged in ongoing discussions on the possibility of First Nations' governments as "third order government(s)"¹⁷⁹ which are separate, distinct and substantially autonomous from the federal and provincial governments. This process is guided by a number of federal government policies pertaining to self-government. One policy, the Inherent Right Policy (IRP), has two key elements: first, it accepts that self-government is an inherent right of First Nations; and second, it states that the *Charter* must apply to these governments.

This chapter reviews the IRP and how it has been applied to negotiations with several First Nations' agreements across Canada since the defeat of the Charlottetown

¹⁷⁷ As indicated elsewhere in this thesis, First Nations' governments take many forms. See Royal Commission on Aboriginal Peoples, Final Report, 1993, Chapter 1 – 1.3 as well as Hunter in "Self-government", 10.

¹⁷⁸ As at May 30, 2003. Source: Canada, Indian and Northern Affairs website: http://www.ainc-inac.gc.ca/nr/prs/m-a2003/02324bk_e.html, retrieved April 16, 2005.

¹⁷⁹ This phrase was used in the Charlottetown Accord, Section 2(b) found at: <http://www.ola.bc.ca/online/cf/documents/1992CHARLOTTETOWN.html>.

Accord. It examines the role that the *Charter* is playing in these negotiations. While not definitive on this point, there appears to be a trend developing where some, though by no means either all of even most, First Nations are agreeing to the application of the *Charter* to their jurisdictions. Whether these First Nations believe they are truly free to accept the *Charter* or not is open to question. This chapter reveals that while some First Nations in Canada have been prepared to accept the application of the *Charter* to them, others are not prepared to do so. Whether the *Charter* will be accepted uniformly by all First Nations' governments remains in doubt.

6.1 The Inherent Right Policy (1995)

The Charlottetown Accord affirmed explicitly that First Nations had never given up their inherent right to self-government and that this right continues today. The Accord also recommended that the *Charter* should apply to these governments. After the defeat of the Accord, Aboriginal leaders continued to press their claims for recognition of the right to self-government. With a national election pending, the Liberal Party of Canada promised in 1993 in its policy platform titled *The Little Red Book* that it would implement the provisions of Charlottetown incrementally by way of government policy through modern treaties and administrative agreements. Party Leader Jean Chrétien promised:

The cornerstone of a new relationship with Aboriginal Peoples will be the recognition of the inherent right of Aboriginal self-government. A Liberal Government will act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right within the meaning of section 35 of the *Constitution Act, 1982*.¹⁸⁰

¹⁸⁰ Taken from http://www.dougcutland.com/Columns%20400/column_420.htm, retrieved August 12, 2004.

The Liberals won the 1993 election and two years later the Chrétien government adopted the IRP. This policy states:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.¹⁸¹

This policy has created jurisdictional, if not constitutional, space for First Nations' governments and it has guided federal action since 1995. It provides that Aboriginal self-government is recognized as an 'inherent right' under Section 35 of the Constitution. The types of governance models that could be produced within this self-governance framework would range from municipal-style delegated governments, to governments that have negotiated specific jurisdiction or areas of governance, to tribal or inherent sovereignty governments that operate outside the *Indian Act*.¹⁸²

As RCAP noted, "Many concepts of Aboriginal governance centre on territorial jurisdiction. The Committee envisaged governments that exercise mandatory jurisdiction over a definite territory and all the people located there. However, there is a good deal of variation in the particular arrangements envisaged. Under some proposals, residency in the territory is limited to members of a specific Aboriginal group; under others, it is open to Canadians generally."¹⁸³ RCAP concluded that "other visions of Aboriginal

¹⁸¹Canada, Indian and Northern Affairs Canada. "Federal Policy Guide on Aboriginal Self-Government", resourced at http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html, retrieved March 16, 2005.

¹⁸² For a comprehensive survey of self-governing models, see Hunter in "Self-government".

¹⁸³ RCAP Final Report, Chapter 1-1.3.

governance involve a form of communal rather than territorial jurisdiction. They envisage institutions serving the particular needs of Aboriginal people who live in areas with a mixed population and an existing government. The proposals usually relate to urban and semi-urban areas and centre on the creation of special Aboriginal service agencies, cultural institutions, school boards and so forth. These institutions would exercise voluntary rather than mandatory jurisdiction and so depend on the consent of the people they serve.”¹⁸⁴ RCAP suggested that “these two basic forms of jurisdiction, while different, are not incompatible. As we will see, many Aboriginal visions of governance feature a mixture of territorial and communal elements. For example, some envisage governments that exercise mandatory jurisdiction over a specific territory and also a form of voluntary jurisdiction over citizens located outside that territory. Other proposals contemplate multi-level governmental structures incorporating a variety of semi-autonomous units, some exercising territorial jurisdiction, others communal jurisdiction.”¹⁸⁵

The federal government’s policy in support of self-government is not unconditional. The key condition embodied in the policy is that the *Charter* must apply to First Nations’ governments. The IRP states:

The Government is committed to the principle that the *Canadian Charter of Rights and Freedoms* should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter. Self-government agreements, including treaties, will, therefore, have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities.¹⁸⁶

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Federal Policy Guide.

Those who drafted the IRP anticipated First Nations' concerns regarding the application of the *Charter* to their governance systems. Thus they tried to underscore that the Charter already applies; IRP states:

The *Charter* itself already contains a provision (section 25) directing that it must be interpreted in a manner that respects Aboriginal and treaty rights, which would include, under the federal approach, the inherent right. The *Charter* is thus designed to ensure a sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada.¹⁸⁷

The policy reflected Ottawa's belief that Section 25 provided an adequate safe-guard for cultural traditions and laws.

This policy gave the federal government the authority to begin negotiating new self-government agreements. The notion of linking self-government with the application of the *Charter* was reinforced one year later when RCAP released its final report. As indicated in Chapter 4, it recommended that self-government should be recognized as a Section 35 right and that the *Charter* ought to apply to these governments. Together, the IRP and RCAP's Final Report would accelerate the pace of the federal government's negotiations with First Nations over the next decade to de-construct the *Indian Act* and devolve self-governing authority to some First Nations, thereby establishing new third order governments. This has also precipitated a review by some First Nations' leaders of the arguments for and against the application of the *Charter* to their jurisdiction.¹⁸⁸

¹⁸⁷ Federal Policy Guide, Part I, found at: http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html, retrieved August 31, 2005.

¹⁸⁸ At the time of writing, the IRP may have been superseded by the May 2005 First Nations – Federal Crown Political Accord signed between Ottawa and representatives of First Nations. This accord commits the signatories to cooperation on policy development regarding self-government, presumably as an alternative to unilateral Federal action. According to Grand Chief Phil Fontaine, "This political accord removes the straitjacket from federal policies and programs and sets the stage for a new relationship between First Nations and Canada and a new agenda for First Nations and Canada," said National Chief

Between 1993 and 2004, approximately eleven modern treaties were signed, according to Frances Abele and Michael Prince,¹⁸⁹ while literally dozens of negotiating tables were under way in many parts of the country negotiating administrative agreements or modern treaties. Many of these agreements contain a provision respecting the *Charter*. The objective in the remainder of this chapter is to provide an overview of some of those agreements.

6.2 The Nisga'a Agreement in British Columbia

In British Columbia, negotiations between the Nisga'a Nation and Canada over title to its ancestral lands date back as far as 1887.¹⁹⁰ These negotiations culminated in 1999 in an agreement that was ratified by three parties – the Nisga'a people and the Governments of Canada and British Columbia. This treaty stands out as a truly remarkable piece of modern-day treaty-making. It is a comprehensive agreement that facilitates the transition of the Nisga'a people away from administration by the *Indian Act* toward the Nisga'a Lisims government. It recognizes Nisga'a authority over the management of their land, the education for their children, their child welfare, and protection of the environment.¹⁹¹ The Nisga'a people continue to be recognized as Aboriginal people under Section 35 of the Constitution and they continue to be entitled to the rights and benefits of other Canadian citizens. The treaty touches on ownership of

Fontaine. See AFN website at <http://www.afn.ca/article.asp?id=1218> for the accord and the AFN position on it.

¹⁸⁹ Frances Abele with Michael J. Prince. "Constructing Political Space for Aboriginal Communities in Canada", Paper given to Constructing Tomorrow's Federalism Conference, Saskatchewan Institute of Public Policy, (Regina, March 24-26, 2004).

¹⁹⁰ Tom Molloy with Donald Ward, *The World is Our Witness – the Historic Journey of the Nisga'a Into Canada*, (Calgary: Fifth House Ltd., 2000), 21.

¹⁹¹ The Nisga'a Treaty, 1999 found at: http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html and the Nisga'a Lisims Government homepage, at <http://www.nisgaalisims.ca/treaty.html>.

land regarding, among other things, the right of individuals to own land rather than land being communally-owned. The treaty also phases out the jurisdiction of the *Indian Act* over the Nisga'a Lisim Nation. It also stipulates that Nisga'a laws apply on its lands. Finally it stipulates that the Nisga'a will have a constitution that spells out the structure and functions of its government.¹⁹² The treaty also contains provisions regarding the rights of the Nisga'a Lisim government and people. In line with the IRP, the treaty proclaims:

9. The *Canadian Charter of Rights and Freedoms* applies to Nisga'a Government in respect of all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government as set out in this Agreement.¹⁹³

This provision was agreed to by negotiators for the Nisga'a Lisim Nation and was ultimately ratified by the Nisga'a people. The agreement is likely to become a benchmark for other negotiations as it applies to both the powers that the federal government and the provinces are prepared to recognize for other First Nations, and respecting the provision that the *Charter* ought to apply. Similar terms were agreed to in principle with other First Nations in British Columbia including the Tsawwassen First Nations, the Lheidli T'enneh and Maa-Nul't and other bands in that province.¹⁹⁴ *Charter* rights are extended to the citizens of these First Nations, but Section 25 provides safeguards for preserving important cultural traditions. Tom Molloy, Chief Federal Negotiator in the Nisga'a talks, had this to say about rights and the role of the *Charter* in the Nisga'a agreement:

¹⁹² Nisga'a Treaty.

¹⁹³ Nisga'a. Section 9.

¹⁹⁴ See B.C. Treaty Commission website for the latest updates at: http://www.bctreaty.net/files_3/updates.html, at July 25, 2005.

For those concerned about accountability and democratic processes, the Nisga'a Final Agreement has built-in safeguards comparable to any governmental or organizational constitution in Canada. Subject to restrictions of age and residency, all Nisga'a citizens are eligible to vote and hold office. Under the Agreement, the Nisga'a government must be democratically and financially accountable to its citizens. It must hold elections at least every five years. It must establish financial administration systems and conflict-of-interest rules comparable to standards generally acceptable for governments in Canada. And it must adhere to the General Provisions that explicitly states that the *Charter of Rights and Freedoms* applies to the Nisga'a government and all Nisga'a citizens.¹⁹⁵

This agreement was subsequently ratified by the Nisga'a people and implementation continues today.

6.3 Agreements in the Yukon and Northwest Territories

Similar treaties have been signed in the Yukon. In 1993, the Government of Canada reached an Umbrella Framework Agreement (UFA) with Yukon's fourteen First Nations in 1993 representing some eight thousand Aboriginal people. The UFA includes the right of First Nations to sign self-government agreements separately with Ottawa.¹⁹⁶ Since then, seven First Nations have signed self-government agreements.¹⁹⁷

Parliament passed the *Yukon First Nations' Self-Government Act* in 1994 to provide a legislative framework for self-government to develop in the Yukon Territory. This statute predated the IRP, which stated the position of the Government of Canada more clearly. Indian Affairs and Northern Development Minister, Ron Irwin, told the House of Commons during the debate on the Act in June 1994 that the "principles

¹⁹⁵ Tom Molloy in *Witness*, 191.

¹⁹⁶ See Indian and Northern Affairs Canada website, http://www.ainc-inac.gc.ca/pr/agr/umb/index_e.html for Chapter 24 of The Umbrella Final Agreement Between The Government Of Canada, The Council For Yukon Indians And The Government Of The Yukon.

¹⁹⁷ See Yukon Land Claims and Self-Government Agreement Annual Report, 2001-02 at http://www.ainc-inac.gc.ca/pr/agr/ykn/yar02_e.pdf, retrieved April 14, 2005.

embodied in the *Charter of Rights and Freedoms* and the Constitution of Canada as a whole will continue to apply [to Yukon First Nations]. First Nations constitutions will also provide protections for the rights and Freedoms of First Nations citizens.”¹⁹⁸ The *Yukon First Nations’ Self-Government Act* requires that First Nations’ constitutions provide for the “recognition and protection of the rights and freedoms of citizens.”¹⁹⁹ The Ta’an Kwach’an Council (TKC), which is a signatory to the Umbrella Framework Agreement, approved its constitution with important principles related to the recognition and respect for individual rights and freedoms. It declares that its citizens have “...the right to equal protection and equal benefit of the law of the Ta’an Kwach’an Council without any discrimination, including discrimination based on status, religion, sex or disability.”²⁰⁰ It also provides for freedom of thought, belief, opinion and expression of its citizens, freedom of religion, the right of their citizens to be secure against unreasonable search or seizure, and the rights of its citizens to assembly peacefully.²⁰¹

In the Northwest Territories, former Ontario Premier David Peterson has been appointed as the Chief Federal Negotiator to lead negotiations with First Nations there to settle outstanding land claims and devolve to them governing authority from Indian and Northern Affairs Canada. Issues under discussion include development and management of natural resources as well as control and administration of public lands. The goal is to enable the territories to become “more self-sufficient and prosperous and to play a stronger role in the Canadian federation.”²⁰² The prevalent view among federal

¹⁹⁸ *Hansard*, Government Orders (076), June 1, 1994.

¹⁹⁹ Canada, *Yukon First Nations Self-Government Act*, 1994, Section 8(d).

²⁰⁰ Constitution of the Ta’an Kwach’an Council, taken from www.taanc.ca, retrieved May 19, 2004.

²⁰¹ The Ta’an Kwach’an Council Constitution.

²⁰² Taken from Indian and Northern Affairs Canada, “Devolution in the Northwest Territories”, found at http://nwt-tno.inac-ainc.gc.ca/dv_e.htm, retrieved April 14, 2005.

government officials is that Aboriginal peoples will continue to be citizens of Canada and as such they will continue to enjoy the rights of this citizenship. Consistent with the IRP, the federal government's position is that the *Charter* applies to Aboriginal governments in the far north "just as it does to all governments in Canada."²⁰³

A comprehensive land claim and self-government agreement was concluded with the Dogrib peoples of the Northwest Territories in 2003 that acknowledges the application of the *Charter*. The agreement provides that "The *Canadian Charter of Rights and Freedoms* applies to the Tlicho Government (which governs the Dog Rib Rae Band) in respect of all matters within its authority."²⁰⁴

In sum, First Nations in the Yukon and Northwest Territories are addressing rights issues within their jurisdictions as they negotiate land claims and self-government arrangements.

6.4 Human Rights in Nunavut

Comparable, and arguably even more significant, developments have also taken place in Nunavut where Inuit culture dominates. Nunavut received separate territorial status in 1999 by way of a constitutional amendment and the *Charter* applies by virtue of Sections 30 and 32.²⁰⁵ (See Appendix A). In 2003, the Nunavut legislature adopted a new *Human Rights Act* that addresses both individual rights as well as the preservation of Inuit customs and traditions. The preamble to that territorial statute states that the *Act*

²⁰³ Ibid.

²⁰⁴ Tlicho Land Claims and Self-Government Agreement, found at http://www.gov.nt.ca/MAA/agreements/tliagr2_e.pdf, retrieved April 15, 2005, Section 2.15.1.

²⁰⁵ See Appendix 1.

must be interpreted consistent with Inuit traditions in the far north.²⁰⁶ That *Act* provides that:

3. Nothing in this Act shall be construed as to abrogate or derogate from the protections provided for in the Nunavut Land Claims Agreement.
4. For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from an existing aboriginal or treaty right of the aboriginal peoples of Canada under Section 35 of the *Constitution Act* of 1982.²⁰⁷

This particular section of that Act serves as instruction to the judiciary to balance and accommodate Aboriginal traditions in the North against the individual rights contained in the *Human Rights Code*. This has not been an uncontested matter in Nunavut. The recent debate in the Nunavut legislature regarding human rights protection for gays and lesbians led some to suggest that the recognition and protection of such rights is inconsistent with Inuit traditions. Enoki Irqittuq, MLA for Amittuq, said during the debate on the *Human Rights Act, 2003*: “In the South, people are free to do as they wish; for Inuit, I would outright refuse such a provision in the human rights act. It’s not our lifestyle.”²⁰⁸

This could point to some future disagreements in Nunavut where individual rights collide with cultural traditions. When this occurs, James Tully’s two-part test might assist the courts in deciding which right trumps the other or where the appropriate balance lies. For example, if a landlord denied rental accommodation to a gay couple, based on traditional Inuit beliefs about marriages, a court may have to determine whether such beliefs are grounded in Inuit tradition and then weigh those beliefs against

²⁰⁶ Nunavut Legislative Assembly, Sixth Session, First Legislative Assembly, 2003, Bill 12. Bilingual version (Inuit/English) found at http://www.nunavutcourtofjustice.ca/library/statutes/2003/SNu_2003_12.pdf.

²⁰⁷ Nunavut Human Rights Act, 2003.

²⁰⁸ “Nunavut MLA Denounces Homosexual Legislation”, April 11, 2003. From <http://www.lifesite.net/ldn/2003/apr/03041109.html> , retrieved September 9, 2003.

the individual's right to housing without discrimination to determine where the appropriate balance lies. In doing so, the courts may need to consider evidence on the Inuit custom or tradition in question.

6.5 Agreements in Saskatchewan

In Saskatchewan, First Nations are governed by six numbered treaties: 2, 4, 5, 6, 8, and 10. These treaties set out the relationship between First Nations and the Crown. In recent years, these First Nations have been examining different approaches to governance, including delegating some representative authority upward to tribal councils and ultimately to a provincial umbrella organization, the Federation of Saskatchewan Indian Nations (FSIN). The FSIN is one of Canada's longest-serving provincial Aboriginal organizations, representing some seventy-four First Nations in Saskatchewan. Delegating authority to a provincial First Nations' body would allow for some harmonization of laws among First Nations and would consolidate political bargaining power with a province-wide authority.²⁰⁹ An agreement-in-principle has been signed between the Saskatchewan government and the Federation of Saskatchewan Indian Nations that develops these concepts.

With respect to the *Charter*, the Saskatchewan government adopts the position of the IRP that the *Charter* must apply to First Nations' governments. A comprehensive agreement-in-principle was signed between Saskatchewan and the Meadow Lake First Nations (MLFN) in January of 2001 which states:

²⁰⁹ David C. Hawkes, *Rebuilding the Relationship – The 'Made in Saskatchewan' Approach to First Nations Government*. Presented to a conference: Reconfiguring Aboriginal-State Relations, (Queen's University, Kingston, November 1-2, 2002).

5.03 Relationship of Final Agreement to other rights and freedoms

(1) A MLFN Citizen who is a Canadian citizen or permanent resident of Canada will continue to be entitled to all the rights and benefits of Canadian citizenship.

(2) A Final Agreement will provide that the *Canadian Charter of Rights and Freedoms* applies to a MLFN Government.

(3) A Final Agreement will not be construed so as to limit, prejudice or affect the application of section 25 of the *Canadian Charter of Rights and Freedoms*.

(4) A Final Agreement will provide that, on MLFN Lands, MLFN Citizens and non-MLFN Citizens will have the benefit of the protection of human rights that is equivalent to the protection provided for in federal and provincial laws.

(5) Prior to the form and content of a Final Agreement and a Tripartite Final Agreement being concluded by the negotiators for the Parties and Saskatchewan, the Parties will negotiate with respect to, and attempt to reach agreement on, matters relating to the application of the *Canadian Human Rights Act*.²¹⁰

An agreement in principle was signed between Canada, Saskatchewan and the Federation of Saskatchewan Indian Nations (FSIN) in May of 2000 where the parties committed to a process of negotiating greater self-government for Saskatchewan First Nations, including aggregation of authority from individual bands and tribal councils up to the Federation. This agreement includes a commitment to spell out the role of the *Charter* in the process.²¹¹ To date, this agreement has not yet been ratified by the parties.

Saskatchewan has a Treaty Commissioner who, in consultation with First Nations, is examining treaty renewal in this province. The application of the *Charter* to Saskatchewan First Nations is being discussed as part of this process, but to date no agreement has been reached or publicized.²¹²

²¹⁰ Comprehensive Agreement in Principle on Meadow Lake First Nations [MLFN] Government, January 22, 2001. Found at http://www.graa.gov.sk.ca/aboriginal/html/documents/governance/mltc_caip.pdf, retrieved August 26, 2004.

²¹¹ See the agreement at http://www.fnmr.gov.sk.ca/html/documents/governance/fsin_ct_process2000.pdf, downloaded July 25, 2005, Section 5(5)(vi).

²¹² Personal conversation with the Treaty Commissioner in Saskatchewan, Judge David M. Arnot, April 14, 2005.

Saskatchewan First Nations are treaty First Nations, meaning the relations between the Government of Canada, the Province of Saskatchewan and Saskatchewan First Nations are governing by treaties, most of which pre-date the *Charter*. Some effort has been made to date to modernize these treaties or to strike agreements-in-principle that includes some discussion of the *Charter*, but at the time of writing these discussion have not been conclusive.

6.6 Agreements in Ontario and Quebec

Important self-government agreements have also been signed in Ontario and Quebec. In Ontario, a self-government agreement was concluded in 2003 with one tribal council, the United Anishnaabeg Councils (UAC), which represents four Indian bands in that province. The Anishnaabe Government Agreement is the first self-government agreement-in-principle in Ontario under the IRP. The agreement would “restore governing authority to First Nations members” and it will replace most of the *Indian Act* as it applies to the Anishnaabe peoples.²¹³ In line with the IRP, the agreement proposes that the *Charter* “will continue to apply on First Nations’ land.”^{214 215} Some First

²¹³ Canada, Indian and Northern Affairs, News release: “Gearing up for the First Self-government agreement in Ontario”, December 10, 2003. Taken from http://www.ainc-inac.gc.ca/nr/prs/s-d2003/2-02457_e.html; retrieved April 15, 2005.

²¹⁴ Canada, Indian and Northern Affairs, “Backgrounder Highlights of Anishnaabe Government Agreement”, taken from http://www.ainc-inac.gc.ca/nr/prs/s-d2003/0257bk_e.html, retrieved April 15, 2005.

²¹⁵ At the time of writing, this draft agreement had been rejected by the membership of the four bands that comprise the Council. The reasons for rejecting the agreement have not been publicized, nor is it clear that the application of the *Charter* was a factor in this vote. The parties have agreed to return to the negotiating table. See United Anishnaabeg Councils’ news release: http://www.uac.org/Images/02_release_jul2005.pdf as well as <http://www.turtleisland.org/discussion/viewtopic.php?p=5888#5888>, retrieved July 25, 2005.

Nations in Ontario do not agree with the Anishnaabe approach to negotiating the application of *Charter*.²¹⁶

In Quebec, a political accord was signed between the Nunavik Party and the Governments of Quebec and Canada in 1999 that established a Commission to examine “the structure, operations and powers of a government in Nunavik.”²¹⁷ One of the overriding principles that guided these negotiations is that both the *Charter* and the Quebec *Charter of Human Rights and Freedoms* shall apply to any future Nunavik government.²¹⁸

6.7 The Agreement in Northern Labrador - Nunatsiavut

In Northern Labrador, the Inuit there have recently ratified a treaty similar to the one signed by the Nisga’a Nation in British Columbia. The treaty will result in the creation of the Inuit territory of Nunatsiavut. The agreement is very comprehensive and in line with the IRP in that it confirms that “*The Canadian Charter of Rights and Freedoms* applies to the Inuit Government in respect of all matters within its authority.”²¹⁹ The agreement has an additional important provision regarding the protection of human rights within a constitution for that Inuit territory. The agreement states:

17.3.4 The Labrador Inuit Constitution may provide for the following matters:
(e) the recognition of Inuit customary law and the application of Inuit customary law to Inuit with respect to any matter within the jurisdiction and authority of the

²¹⁶ Johnston in “Six Nations”.

²¹⁷ Quebec, Secretariat aux Affaires Autochtones, Nunavik Political Accord, taken from [http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/inuits/19991105_en.htm](http://www.autochtones.gouv.qc.ca/rerelations_autochtones/ententes/inuits/19991105_en.htm), retrieved April 15, 2005.

²¹⁸ *Ibid.*, Section 5.1(i).

²¹⁹ Labrador Inuit Land Claims Agreement, found at: http://www.ainc-inac.gc.ca/pr/agr/labi/index_e.html 2004, Section 2.18.1.

Nunatsiavut Government, as set out in the agreement, on condition that any recognition or application of Inuit customary law shall be proclaimed, published and registered in accordance with part 17.5; and
(f) an Inuit charter of human rights.²²⁰

This provision opens the door for the development of an Aboriginal or Inuit Charter as described in Chapter 5 and could be a new precedent for future negotiations elsewhere in Canada. It is consistent with agreements in the Yukon and in Saskatchewan. It may also signal a softening of the federal government policy regarding the application of the *Charter* provided there is comparable human rights protection available to the citizens of that First Nation. To date, no details on the nature or scope of an Inuit Charter of Rights have been articulated by the Labrador Inuit. In the meantime, the rights and freedoms guaranteed in the *Charter* apply to the Inuit of Nunatsiavut, subject to the provisions of Section 25, the ‘non-abrogation, non-derogation’ clause.

6.8 Conclusions

First Nations have never given up their right to govern themselves; they have been self-governing for centuries. In the past one hundred and fifty years their ability to be self-governing has been limited by the *Indian Act*. They are now seeking a new relationship in Canada, one that returns to their more traditional governments and one that moves away from the colonialism of the *Indian Act*. Ottawa and the provinces appear willing to negotiate this evolution or devolution, but in exchange, they want to ensure that Aboriginal citizens have the same rights as other Canadians and the same rights as they have vis-à-vis the federal and provincial governments. Some First Nations have been willing to accept this exchange as part of the negotiation process. Acceptance

²²⁰ Ibid. Section 17.3.4 (e) and (f).

of the *Charter* may be occurring as a result of the IRP which stipulates that it is a condition for the federal government to sign self-governing agreements with First Nations.

In reviewing the negotiations and content of such agreements one is reminded of Kent McNeil's assertion that the application of the *Charter* should not be imposed without further investigation and negotiation. This is what is happening in many parts of Canada with some First Nations who have come to terms with the federal and provincial governments on the application of the *Charter*. Citizens under the authority of these agreements have accepted the application of the *Charter*. Consequently, in these jurisdictions the *Charter* may provide an unambiguous legal instrument to shield these citizens from arbitrary or unfair action by their local First Nations' governments. At the same time, First Nations' governments that have allowed the application of the *Charter* are obligated to respect the intent and effect of the *Charter*. Consequently, as John Borrows noted, these governments may have greater legitimacy in the eyes of their own citizens.²²¹

It must be remembered, however, that to date only a handful of First Nations have agreed to the application of the *Charter* to their jurisdictions. For most of the more than six hundred First Nations that are governed under the *Indian Act* and who accept citizenship within Canada, whether the *Charter* applies to them and their citizens remains unclear. If one accepts Kent McNeil's argument, these governments are free to operate outside the scope of the *Charter* unless either they agree or the courts rule otherwise.

²²¹ See Borrows, in *Equality*, 171.

Chapter 7

Conclusions

This thesis has noted First Nations' concerns respecting the application of the *Charter* to their jurisdiction. The *Charter* has the potential to challenge important cultural laws, customs and traditions. It may infringe upon the right to self-government. The history of colonial treatment of First Nations' peoples by the federal government has bred a deep mistrust with legislation that is imposed on them. Many First Nations' leaders and scholars believe that the inherent right to self-government means having the authority to develop or restore Aboriginal traditions respecting the rights of the individual as balanced against the duties owed to the community.

On the other hand, not everyone agrees with this interpretation. Some Aboriginal scholars, backed by the recommendations of RCAP, believe that for those First Nations' who have ceded to Canadian jurisdiction, protection of individual rights is an important aspect of governance in Canada today and that the principles contained in the *Charter* are not necessarily out of step with Aboriginal traditions pre-dating settlement. Those who support the application of the *Charter* to First Nations, point to Canada's rich history of rights protection and maintain that this history is consistent with international developments in the western world. In short, this school of thought believes that rights transcend societies and their borders.

These differences of view, for and against the application of the *Charter*, have the potential to divide First Nations' communities. Some are very much against the

imposition of the *Charter*, while others are in favour. Some are apathetic toward the notion, as they struggle to meet the daily demands of governance on their First Nation. Yet another school of thought will continue to explore alternatives. As more Aboriginal lawyers enter the profession, they will craft compelling Section 25 arguments to convince the courts that the *Charter* ought not be allowed to infringe important cultural traditions.

Within the school of thought that is exploring alternatives, there are those who will continue working on an Aboriginal Charter as an alternative to the *Canadian Charter*. Such a Charter would be drafted and ratified by First Nations' people and would reflect their own particular traditions. These traditions may vary from First Nation to First Nation, depending on the customs and laws in that community. The Labrador Inuit are one of the latest First Nations to have acquired the right through treaty to develop an Inuit Charter and their handling of this issue may serve as a precedent for other First Nations. Central to the development of an Aboriginal Charter is the requirement to have or to develop a First Nations' based justice system to administer and adjudicate such a regime of rights and freedoms. This will take the adjudication of rights issues on-reserve out of the hands of the European-based Canadian court system. Canada's federal system is indeed able to accommodate the concept of a parallel rights process, as demonstrated both in Quebec with that province's *Charter of Rights and Freedoms* and in other provinces with the provincial human rights codes.

While the exploration of this and other alternatives continue, the Canadian court system will continue be called upon to determine whether the *Charter* applies to First Nations. Just as lawyers are likely to develop compelling Section 25 arguments, so are they likely to file claims against First Nations' governments using the *Charter*. First

Nations' peoples in Canada, perhaps more particularly urban First Nations' people who have lived in a liberal rights environment, are likely to utilize the *Charter* to advance their claims for equal access to services and benefits as compared to their counterparts on-reserve. This thesis noted at least three instances where band members filed claims against their band using the *Charter*. In two of the lower court decisions, *Scrimbitt* and *Horseman*, the Court had no difficulty accepting the argument that the *Charter* should apply to the First Nation in question. The third instance was the *Corbiere* case that determined that Indian bands that develop rules under the authority of the *Indian Act* must do so in a manner that respects the *Charter*. The *Corbiere* court decision stops just short of determining that the *Charter* applies to First Nations perhaps preferring to leave this to high-level constitutional negotiations. The next step is to ask the Supreme Court of Canada to address this question directly. But while a judicial finding that the *Charter* applies to First Nations' jurisdiction may clarify a constitutional issue, it will likely lack popular support within many, if not all, First Nations' communities who will see it as being forced upon them by the courts.

Negotiating self-governance agreements with individual First Nations that contain provisions regarding the application of the *Charter*, or a reasonable alternative, seems to be the approach that the federal government will utilize in the near future and supporters of this approach have reason to be optimistic. Since the approval of the *IRP*, federal, provincial and some First Nations governments have been moving ahead with the self-government agenda and these negotiations have included some discussion of the application of the *Charter*. To date, several First Nations' governments have signed agreements that contained provisions regarding the application of the *Charter* to their jurisdiction. Those First Nations' governments that signed such agreements, and had

them ratified by their citizens, have provided their citizens explicitly with the same rights vis-a-vis their band governments as they have against the federal and provincial governments.

For most First Nations however, the application of the *Charter* to their jurisdiction remains questionable. Most have not explicitly agreed to the application of the *Charter* to their affairs and some may never accede to its application. Inherency governments that operate outside of the scope of the *Indian Act* or who have not ceded authority to Canada to pass laws that govern them will continue to maintain that Canadian laws have no application to them, that their relations with Canada should continue to operate on a nation-to-nation basis.

Non-Aboriginal Canadians are very interested in the outcome of this debate. They see the *Charter* as a continuation of the liberal rights traditions in Canada and, as RCAP recommended, many believe the *Charter* ought to apply to all Canadians regardless of ancestry or place of residence. Support for the *Charter* is very high in Canada. According to the Centre for Research and Information on Canada 88% of Canadians support the *Charter*.²²² Yet many Canadians also believe that government policy regarding First Nations' people over the past one hundred and fifty years has been a failure and that many Aboriginal peoples remain economically marginalized.²²³

Non-Aboriginal Canadians may be open to parallel systems, as they have been with the Quebec *Charter of Rights and Freedoms* provided that the basic tenets of western liberalism are respected. Some scholars such as Alan Cairns believe that it is

²²² See http://www.cric.ca/en_html/guide/charter/charter.html#cric. This survey did not analyse the results based on Aboriginal-non-Aboriginal ancestry.

²²³ A recent study was completed by the Saskatchewan Institute of Public Policy entitled: Demographic Trends and Socio-Economic Sustainability in Saskatchewan: Some Policy Considerations by Janice Stokes, SIPP Senior Policy Analyst. Summary found at http://www.uregina.ca/sipp/news/2003_oct31.html.

important for Canada to have national instruments, laws and customs that apply on a fairly uniform basis and that bring Aboriginal and non-Aboriginal Canadians closer together.²²⁴ The *Charter* is viewed as one such instrument, and in many respects among the most important ones.

Whether the *Charter* will apply to First Nations' governments could be decided through negotiations between the federal government and individual First Nations. If the current trajectory of the courts' interpretation of this issue continues along the lines of the Supreme Court's decision in the *Corbiere case* and the lower courts' decisions in the *Scrimbitt and Horseman* cases which found that the *Charter* had some application to the facts in these cases, the *Charter* may well likely end up being imposed either completely or partially by the courts in specific cases. Whether First Nations' citizens want those same rights vis-à-vis their own governments as they along with other Canadians possess vis-à-vis the federal, provincial and territorial governments or whether they favour operating according to comparable rights that exist either under traditional forms of Aboriginal governance, which may or may not be articulated in an Aboriginal Charter, is still unclear and will no doubt be influenced by self-government negotiations and by rulings of the Supreme Court of Canada.

²²⁴See Alan C. Cairns' in *Citizens Plus*, 5-9, as well as in "Bridging the Divide between Aboriginal Peoples and the Canadian State", Centre for Research and Information on Canada Papers, June 2001, which includes a critique of Cairns position.

Appendix 1

*The Canadian Charter of Rights and Freedoms*²²⁵

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

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

²²⁵ Taken from <http://laws.justice.gc.ca/en/charter/>, downloaded March 28, 2005.

Annual sitting of legislative bodies	<p>5. There shall be a sitting of Parliament and of each legislature at least once every twelve months</p>
	<p><i><u>Mobility Rights</u></i></p>
Mobility of citizens	<p>6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.</p>
Rights to move and gain livelihood	<p>(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right</p> <p style="margin-left: 40px;"><i>a)</i> to move to and take up residence in any province; and</p> <p style="margin-left: 40px;"><i>b)</i> to pursue the gaining of a livelihood in any province.</p>
Limitation	<p>(3) The rights specified in subsection (2) are subject to</p> <p style="margin-left: 40px;"><i>a)</i> any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and</p> <p style="margin-left: 40px;"><i>b)</i> any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.</p>
Affirmative action programs	<p>(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.</p>
	<p><i><u>Legal Rights</u></i></p>
Life, liberty and security of person	<p>7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p>
Search or seizure	<p>8. Everyone has the right to be secure against unreasonable search or seizure.</p>
Detention or imprisonment	<p>9. Everyone has the right not to be arbitrarily detained or imprisoned.</p>
Arrest or detention	<p>10. Everyone has the right on arrest or detention</p> <p style="margin-left: 40px;"><i>a)</i> to be informed promptly of the reasons therefore;</p> <p style="margin-left: 40px;"><i>b)</i> to retain and instruct counsel without delay and to be informed of that right; and</p> <p style="margin-left: 40px;"><i>c)</i> to have the validity of the detention determined by</p>

way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

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

Treatment or punishment

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

Self-crimination

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

Interpreter

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

[Equality Rights](#)

Equality before and under law and equal protection and benefit of law

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

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall

be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

- a) there is a significant demand for communications with and services from that office in such language; or
- b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

[Minority Language Educational Rights](#)

Language of instruction

23. (1) Citizens of Canada
a) whose first language learned and still understood is

that of the English or French linguistic minority population of the province in which they reside, or *b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

- a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25. 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.

Other rights and freedoms not affected by Charter

26. 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.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.(93)

Application to territories and territorial authorities

30. A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies
a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration	33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
Operation of exception	(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
Five year limitation	(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
Re-enactment	(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
Five year limitation	(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).
	<u><i>Citation</i></u>
Citation	34. This Part may be cited as the <i>Canadian Charter of Rights and Freedoms</i> .

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