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Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights

Sharon Donna McIvor

Since 1969, Aboriginal women have used Canadian courts to advance their sex equality rights based first on the *Canadian Bill of Rights* and, following 1985, based on sections 15(1) and 28 of the *Canadian Charter of Rights and Freedoms*.[1] Despite many adverse rulings, Aboriginal women and their organizations have made repeated attempts to place themselves on a level playing field with Aboriginal men and other Canadians. This broad struggle for recognition of their sex equality rights represents the effort by Aboriginal women to shed the shackles of oppression and colonialism.

Aboriginal women's sex equality litigation is a story of women striving to achieve the most basic incidents of citizenship: equal status and membership within Aboriginal communities, equal entitlement to share in matrimonial property, and equal participation in Aboriginal governance. It is also a story of proud, persistent, and dangerous protest by vulnerable Aboriginal women who live at the crossroads of colonialism and patriarchy. As Art Solomon, an Aboriginal elder from Ontario, has said, "when the woman falls, the nation falls." Colonial and patriarchal federal laws have fostered the acceptance and practice of patriarchy in Aboriginal communities, where women have been oppressed since 1869, stripped of their Indian rights and shunted from their homelands.[2] As a result, women's recognition as equal persons and full members of their communities has been denied. They are not equal in their enjoyment of Indian status and band membership, and they are denied matrimonial property rights enjoyed by all other Canadians.

Further, because government legislation, policies, programs, and services now constantly reinforce this systemic patriarchy, many in the Aboriginal communities believe that their traditions were originally patriarchal, and men are accepted as the "boss," politically, economically, spiritually, psychologically, and physically. In turn, Aboriginal women have been denied opportunities to hold leadership positions within their communities and organizations and have been excluded from high-level negotiations among

Aboriginal and Canadian political leaders. Male Aboriginal leaders and male Canadian politicians have colluded in excluding Aboriginal women from participation in governance.

Today, Aboriginal women are among the poorest of the poor in Canada. In 2000, 36 percent of Aboriginal women were living in poverty in Canada.[3] Aboriginal women are poorer than their male counterparts and other women. These well-documented figures reveal that issues of poverty, rights, and social citizenship – key concerns of this book – are inextricably linked for Aboriginal women. Their legal and political inequality deprives them of social and economic benefits, affecting their right to enjoy an adequate standard of living. Aboriginal women's quest for sex equality is an all-encompassing struggle to establish their place as partners politically, economically, socially, spiritually, psychologically, and physically along with men in their communities and in society.

This chapter sets out the successes and failures of Aboriginal female litigants in their attempt to have their sex equality rights recognized. The litigants put their faith in the justice promised by law and the courts. This chapter traces Aboriginal women's struggle from the early pre-*Charter* cases against loss of Indian status and rights, to the legal struggles for sex equality rights under sections 15 and 28 of the *Charter*, to their struggle for matrimonial property rights, and, finally, to their struggle for recognition of their right to participate in shaping the policies, programs, and laws to which they will be subjected by Canada, the provinces and territories, and Aboriginal governments.

The assertion of Aboriginal women's sex equality rights under the *Bill of Rights* by early litigants such as Jeanette Corbière-Lavell and Sandra Lovelace was met with resistance by the predominantly male Indian leadership.[4] Litigation was seen as using the "master's tools,"[5] an approach that was, and often still is, considered foreign to the Aboriginal theory of harmony in family and community relations. More recently, Inuit women who have challenged the federal government and male-dominated Inuit organizations have been told that it is not culturally appropriate for Inuit women to engage in litigation against Canada and, indirectly, against other Inuit. Moreover, the use of the courts to advance women's collective and individual rights has pitted these women not only against Canadian and Aboriginal patriarchy but also against other women in the Aboriginal community who do not share their view of women's equality. Women litigants and their supporters are viewed as "feminists," whose struggle against societal and Aboriginal patriarchy detracts from the drive for self-determination and self-government. For these women, to stand up in court is to be subject to the harshest treatment from their own communities, locally, regionally, and nationally, whether they are Indian, Inuit, or Métis.

The conflict between feminists and non-feminists within the Aboriginal community has resulted in an organized effort by the predominantly male Aboriginal organizations to provide women's forums within their own groups over which they have more control.[6] This effort by Aboriginal men has detracted from the strength of the women's movement and its drive for sex equality. It has also taken federal dollars from women's organizations and channelled them to the women's bureaus within men's groups such as the Assembly of First Nations (AFN) and the Métis National Council (MNC). To tackle the legacy of colonialism in the Aboriginal community and in Canadian society is to confront a complex and tough opponent. However, individual Aboriginal women have taken on the challenge of changing this history by asserting their right to equality. As we shall see, it takes only one woman to put her name on the writ to get the courtroom ball rolling.

In these struggles, Aboriginal women are seeking recognition from the Canadian government and from men in their own communities of their rights as equal persons to be Indians, to pass on their Indian status to their children and grandchildren, to hold property on an equal footing with men, and to participate fully as Aboriginal women where decisions are being made about the rules for their communities and the distribution of resources and opportunities. At first glance, the cases may appear to be about civil and political rights, but, in fact, they all involve issues of social and economic inequality. These issues are inseparable for Aboriginal women, and Aboriginal women's lives make evident the need for interpretations of Aboriginal women's sex equality rights that recognize the indivisibility of civil and political rights and social and economic rights.[7]

Aboriginal Women's Equality Cases

Indian Status: Pre-*Charter* Challenges

Jeanette Corbière-Lavell

Court battles for Aboriginal women's sex equality rights began in 1969 when a young Corbière-Lavell protested her loss of Indian status and band membership for marrying a non-Indian.[8] By 1969, the laws of Canada had discriminated for a century against Indian women who intermarried. Yet no Indian woman before Corbière-Lavell had ever claimed her right to equality in a court. Not only did Indian men not lose their Indian status and band membership for marrying non-Indian women under section 12(1)(b) of the 1970 *Indian Act*, but Indian status and band membership were extended to their non-Indian wives.[9] Loss of Indian status and band membership for women who "married out" had become one of the patriarchal "Indian traditions" in Canada. Corbière-Lavell's court case made headlines in the regular and Aboriginal media when she initially lost her case and then won in the Federal Court of Appeal in 1971.[10] An excellent example of the mobilizing

effects of Aboriginal women's litigation, the high profile litigation led directly to the formation of the first national Aboriginal women's organization in 1972, the National Committee on Indian Rights for Indian Women (IRIW). The IRIW was composed of Aboriginal women's organizations from all provinces and territories.

Having won the hearts of women who supported equality, Corbière-Lavell caused a storm of controversy among the Indian male leadership, including the National Indian Brotherhood, later known as the AFN, and its male-dominated regional affiliates. By the time her case reached the Supreme Court of Canada, the entire organized Indian men's movement had sided with the government of Canada against Corbière-Lavell. In meetings held between the 1971 win at the Federal Court of Appeal and the hearing at the Supreme Court of Canada, the Indian leadership remained convinced that should Corbière-Lavell's challenge to the discriminatory marriage provisions in the 1970 *Indian Act* prevail, it would mark the end to the special rights of all Indians conferred under the *Indian Act*.[11] Moreover, the government of Canada funded the intervenors that were opposed to Corbière-Lavell.[12]

In 1973, the Supreme Court of Canada restored the trial judge's decision,[13] in which a formal equality approach to the *Bill of Rights* was used.[14] The trial judge had compared married Indian women to Canadian married women and held that Corbière-Lavell had equality of status with all other Canadian married females.[15] Under this logic, a woman derives her status from her husband. Thus, if an Indian woman marries a man not registered under the *Indian Act*, she gains his Canadian status and loses her Indian status and band membership. Comparing Indian women to Indian men would have produced a different result, as the four dissenters pointed out. The majority of the Supreme Court of Canada adopted a narrow, procedural notion of "equality before the law" and also held that the *Bill of Rights* could not amend or alter the terms of any legislation validly enacted by Parliament, exercising the exclusive authority over "Indians" vested in it by the *British North America Act*.[16] Although Corbière-Lavell had become the pariah of the organized Indian men's movement and lost her case in the Supreme Court of Canada, her cause had ignited a new Indian women's movement.

Mary Two-Axe Early

Once the Canadian courts closed their doors on Indian women seeking equality rights, the women hit the streets in public protest and won the support of Canadian women. In 1971, Florence Bird, chair of the Royal Commission on the Status of Women in Canada, advocated the abolition of section 12(1)(b) of the 1970 *Indian Act*.[17] The feminist movement in Canada had become aware that Indian women were struggling under the yoke of a paternalism worse than that experienced by other women in Canada. At the

Strategy for Change Conference, which was held in Toronto in 1972, a resolution was passed supporting the IRIW and inviting it to join the newly formed National Action Committee on the Status of Women.[18]

Bolstered by this feminist support, elder Mary Two-Axe Early of the IRIW attended the United Nations's first world conference on women, held in Mexico City in 1975. At the conference, Two-Axe Early, a non-status Mohawk living on the Kahnawake reserve in Québec, explained to the delegates how Canadian law discriminated against Indian women. She and other Indian women then sent a telegram to Prime Minister Pierre Trudeau calling for an end to such discrimination.[19] In 1982, Two-Axe Early also appeared before the Sub-Committee on Indian Women and the Indian Act at the House of Commons Standing Committee on Indian Affairs and Northern Development to advocate for Indian women's sexual equality rights. Stripping Indian women of their status and band membership, she said, was the equivalent of rape.[20]

Sandra Lovelace

Sandra Lovelace, a young Maliseet woman who had lost her Indian status and band membership under section 12(1)(b) of the 1970 *Indian Act*, took her case to the United Nations Human Rights Committee.[21] When Lovelace separated from her non-Indian husband and returned to her Maliseet community, Canadian and reserve politicians attempted to prevent her from living on her reserve and to remove her for trespassing. Other Maliseet women soon joined her struggle to remain in the community, and she eventually gained the support of the Indian women's movement represented by the IRIW. The Maliseet women and their children became the core of the Native Women's March, which took place in July 1979 from Oka, Québec, to Ottawa, protesting sex discrimination in the 1970 *Indian Act*.

Since Lovelace had married and lost her Indian status before the *International Covenant on Civil and Political Rights* (*ICCPR*)[22] came into force in Canada on 19 August 1976, the Human Rights Committee declined to rule on the issue of whether her past loss of Indian status constituted sex discrimination in violation of Articles 2, 3, and 26 of the *ICCPR*. Nonetheless, the committee did find that section 12(1)(b) of the 1970 *Indian Act* violated Article 27 (the right to culture, religion, and language) under the *ICCPR* because it resulted in an ongoing denial to Lovelace of access to her Maliseet language and culture, which was available only on her reserve in New Brunswick.[23]

This ruling made it evident to Canada that an Indian woman who married after 1976 could win her case before the UN Human Rights Committee on sex discrimination grounds. Moreover, Canada had ratified the *Convention on the Elimination of All Forms of Discrimination against Women* in 1981,[24] and patriation of Canada's Constitution was well underway, with section

15, the equality rights provision of the *Charter*, to take effect in April 1985.[25] New equality rights for Indian women were thus visible on the horizon when Canada received the *Lovelace v. Canada* decision in 1981, presenting new legal means for Aboriginal women to contest patriarchy.

Bill C-31

Spurred on by the Supreme Court of Canada's decision in *Lavell v. Canada (A.G.)*[26] and encouraged by the decision of the UN Human Rights Committee in *Lovelace*, the IRIW continued the political struggle for Indian women, both to stop their loss of status and membership by having the *Indian Act* changed and to secure recognition of their sex equality rights in Aboriginal and Canadian society. In 1982, the IRIW successfully lobbied the Ministry of Indian Affairs and Northern Development to call for special hearings by a parliamentary sub-committee into Indian women and the *Indian Act.*[27] This concession to Indian women was part of Canada's agenda to study Indian self-government. The resulting report on self-government was published and distributed by the federal government, but the report on Indian women and the *Indian Act* was simply tabled by the standing committee.[28] While these studies were part of the Liberal government's strategy, this government was voted out of office before it took any action on Indian women's legal rights or self-government. The Conservative government was elected to replace the Liberals, and the new minister of Indian affairs and northern development was given a mandate to review the 1970 *Indian Act*, with the aim of bringing it into line with the *Charter* before June 1985.

In 1985, the federal government amended the *Indian Act* by passing Bill C-31, *An Act to Amend the Indian Act*, the express intention of which was to eliminate sex discrimination.[29] Under the 1985 *Indian Act* as amended, Indian women no longer lost Indian status upon marriage to non-Indian men, as section 12(1)(b) was repealed.[30] Bill C-31 also reinstated Indian women who had lost Indian status and band membership under section 12(1)(b) of the 1970 *Indian Act*, as well as their children, war veterans, university students, and other Indians who had been enfranchised under previous *Indian Acts* and had consequently lost Indian status.[31] Bill C-31 stopped Indian women from being legislatively transformed into non-Indians when they married men who did not have Indian status, but it did not bring to an end the sex discrimination inherent in the *Indian Act.*

Under the 1985 *Indian Act*, the grandchildren of Indian men who married out before 1985 and the grandchildren of Indian women who married out before 1985 are treated differently: the Indian women's grandchildren lose their right to Indian citizenship and to the resources accompanying that citizenship, while the grandchildren of Indian men who married out before 1985 have full status. In other words, discrimination against women that was embedded in previous versions of the *Indian Act* continues to affect the

status and rights of their children and grandchildren. This legislative disenfranchisement has important and far-reaching consequences, including exclusion from rights to the resources accompanying status.[32] This continuing discrimination has resulted in disappointment, ongoing pain, and division within Aboriginal communities.

The grandchildren of women who married out under the 1970 *Indian Act*, or predecessor legislation, have become known as "section 6(2) Indians." The discriminatory rule, which precludes many of them from registering, is often referred to as the "second-generation cut-off." Under the 1985 amendments, the reinstated grandmothers cannot pass Indian status and band membership to their grandchildren, while grandfathers of their generation have an unequivocal right to pass Indian status to their grandchildren.[33]

Therefore, with the passage of the 1985 amendments to the *Indian Act*, the struggle shifted from achieving reinstatement for women who "married out" and their first-generation children to achieving the same rights for the grandchildren of these women. Some Indian bands even joined the equality fight when young Indian men started losing their Indian status and band membership at the age of twenty-one because their mothers and paternal grandmothers were considered non-Indians.[34] The struggle against the impact of Bill C-31 may appear to differ from the fight that was waged by women such as Corbière-Lavell and Lovelace against section 12(1)(b). However, it is still a struggle for sex equality for the women who lost status and band membership under this section. Now it is about their entitlement to pass their Indian status to their children and grandchildren on the same basis as their male counterparts. This status can bring access to resources through band memberships, which may bring rights to live on reserve, participate in band elections and referendums, own property on reserve, and share in band assets. It also provides individuals with the opportunity to live near their families and within their own culture.[35]

Charter Cases

Under the 1985 amendments to the *Indian Act*, I have been designated as a section 6(2) Indian. As a result, in 1987, my three children, all of whom were born prior to 1985 and are now young adults living in the area of their ancestral home, were denied registration as Indians. My designation, I was told by the registrar of Indian Affairs, was the result of my grandmother having married a non-Indian man. My children were denied registration because as a section 6(2) Indian married to a non-Indian, I cannot pass my Indian status and band membership to my children. I have brought suit, personally and on behalf of my three children under the section 15(1) equality guarantee of the *Charter*, to challenge the continuing discrimination against Aboriginal women and their children and grandchildren under the 1985 *Indian Act*. *McIvor v. Canada (Registrar, Indian Affairs and Northern*

Development and A.G.) is at the forefront of protest against this ongoing discrimination and will determine the rights of more than 100,000 second-generation descendants of section 12(1)(b) women.[36] These children can neither be registered as Indians under the 1985 *Indian Act* nor attain band membership. After 135 years, it is now time for Parliament to end this sex discrimination.

Matrimonial Property

Rose Derrickson

The matrimonial property cases show clearly how the unequal treatment of Aboriginal women under Canadian laws impedes their access to a key resource: land. Canadian law has long impeded Aboriginal women's rights to hold land. The relegation of property to a usufructuary interest held only by reserve Indians has provided a tool for the oppression of women. Historically, it was common practice that Indian men could obtain a certificate of possession under section 20(2) of the 1970 *Indian Act*, but women either were prevented from holding land in their own right or could only accidentally become landholders when fathers or husbands died. Female heirs could be shunted aside by male relatives and dispossessed through violence, for which men were rarely punished. By the 1980s, in the Indian world, men held title to most reserve lands unless a father chose to give some of his land to his daughter(s).[37]

In the early 1980s, Rose Derrickson, a member of the Westbank Indian Band in British Columbia, divorced her husband, William Joseph Derrickson, also of the Westbank Indian Band. Rose asked the court to grant her a one-half interest in various lands on reserve held by her husband, invoking what was then section 43 of the BC *Family Relations Act* (*FRA*) to support her claim.[38] The trial judge considered the application of the provincial statute and the awarding of an interest in land on reserve in the context of section 24 of the *Indian Act*, which governs possession of Indian lands.[39] Due to the paramountcy of federal over provincial law, the trial judge had no jurisdiction to apply the BC *FRA* provisions in relation to land on Indian reserves in the province. In other words, while the BC Supreme Court has jurisdiction under the BC *FRA* to order division of matrimonial property on divorce, it has no jurisdiction to override the powers of the federal Ministry of Indian Affairs and Northern Development to approve a transfer of the right to possess reserve land. The trial judge also held that the court could not award compensation in lieu of an interest in reserve land under the BC *FRA*. The Court of Appeal agreed with the lower court's findings on paramountcy but held that compensation could be ordered. In November 1986, the Supreme Court of Canada confirmed the decision of the BC Court of Appeal,[40] holding that the BC *FRA* provisions for division of matrimonial property upon

divorce, "while valid in respect of other immovable property, cannot apply to lands on an Indian reserve."[41] The Court also affirmed that a judge may award compensation for the purpose of adjusting assets between the spouses.

Since *Derrickson*, provincial courts have struggled with the dilemma of matrimonial property rights of women separating from male property holders on reserves. Although courts can award compensation in lieu of land, divide off-reserve property, or assign a rent value to the on-reserve property, women generally cannot collect these awards against Indians on reserve. In order to protect male landholders, some band councils have declared family homes on reserves to be band homes or have simply passed Band Council resolutions (BCR) to have wives expelled from reserves. If the wife is from another reserve, or is a non-Indian, she can be ordered off the reserve by use of a BCR. In other words, she can be dumped at the border of the reserve, with or without her children, and, in effect, be banished from her home.

Pauline Ester Paul

Pauline Paul, her husband, and their children, all members of the Tsartlip Indian Band, had lived in the family home for sixteen years before their separation. The matrimonial home was situated on the South Saanich Indian Reserve and was held by a certificate of possession in the husband's name. Pauline had earlier obtained an interim order of occupation of the matrimonial home for herself and the children, as well as a restraining order against her husband, preventing him from entering both the on-reserve and off-reserve homes.[42] In this proceeding, Justice Lloyd McKenzie distinguished occupation from possession and held that awarding an order for interim occupancy in no way affected the husband's certificate of possession. Later, after an unsuccessful attempt to reconcile, a new action under the BC *FRA* was filed in 1984. The BC Supreme Court again held that it had jurisdiction to make an order for interim occupation on reserve land because occupation was distinguishable from, and did not affect, lawful possession under a certificate of possession.[43] Pauline's husband successfully appealed this order to the BC Court of Appeal, with a strong dissent by Justice William Esson.[44] On a further appeal, the Supreme Court of Canada held against Pauline Paul in March 1986, without considering sex equality rights under section 15(1) of the *Charter,* due to its coming into force after the original litigation and appeal.[45] Although Pauline Paul sought an order of interim occupancy, not division of real property, the Supreme Court of Canada rejected the distinction.[46]

Since the *Derrickson v. Derrickson* and *Paul v. Paul* cases were decided, no similar case has been heard by the Supreme Court of Canada, so no opportunity has arisen to raise *Charter* arguments at this level.[47] The lower courts have relied on *Derrickson* to find that the *Indian Act* takes precedence over provincial statutes in relation to matrimonial property located on reserve.[48]

The federal government has taken little substantive action since 1986 to bring the 1985 *Indian Act* in line with the *Charter* to ensure that spouses of Indian landholders on reserve have federal guarantees of access to matrimonial property division similar to that of other Canadians.[49] The UN Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the Human Rights Committee have all called upon Canada to address this situation.[50]

BC Native Women's Society (BCNWS), Jane Gottfriedson, and Teressa Nahanee (1997-9)

The latest effort to challenge the matrimonial property problem was taken to the Federal Court in 1997 by the BCNWS, Teresa[51] Nahanee, and Jane Gottfriedson.[52] In their statement of claim, the plaintiffs argued that the *Framework Agreement on First Nations Land Management* was contrary to sections 7 and 15(1) of the *Charter* and in breach of the Crown's fiduciary duty because it failed to provide for the equal treatment of Indian women on reserves in regard to matrimonial property rights.[53] The Squamish Indian Band intervened on behalf of all bands wishing to sign a framework agreement on First Nation land management between themselves and the minister of Indian affairs and northern development, after introduction into Parliament of the *First Nations Land Management Act* (*FNLMA*).[54] This legislation sets out the terms and conditions under which an Indian band can establish its own land management regime and remove its reserve lands from the management provisions of the 1985 *Indian Act*. Gottfriedson and Nahanee challenged the federal government's failure to provide for equal division of matrimonial property at the time of their respective relationship breakdowns under the *FNLMA* and the framework agreement.

The federal government brought an unsuccessful motion to strike out portions of the statement of claim in December 1998. Prothonotary John Hargrave rejected the Crown's argument that there was no reasonable case to be argued on the issue of fiduciary duty to Indian women on reserves: "[T]he fiduciary duty owed by the Crown to Indians is still in a state of flux and evolution."[55] Rather, Hargrave P. held that there was "an arguable case that there is a duty to Indian women on reserves to give them the same property rights on the breakdown of a relationship as are enjoyed by other Canadian women."[56] Hargrave P. also held that there is an arguable case that the Crown has the discretion and power to rectify the present situation, and said that the Crown can unilaterally exercise the power to affect the legal and practical interests of both married and marriageable Indian women living on reserves.[57] Further, it was arguable that since the Crown has an obligation to act in the best interests of Indians, "it could here be held accountable for failing to act in the best interests of Indian women on reserves."[58] Hargrave P. also noted that Indian women are particularly

vulnerable to the discretion of the Crown.[59] He rejected the Crown's assertion that the case was premature because the *FNLMA* was merely enabling legislation and the land codes contemplated thereunder had not yet come into effect: "This argument misses the point made by the plaintiffs in their statement of claim ... that the Crown has abrogated its [fiduciary] duty to married and marriageable Indian women on reserves by omitting what ought to be contained in the Framework Agreement by way of protection from discrimination."[60]

The Crown, supported by the band intervenors, took the position that the plaintiffs' action for breach of fiduciary duty was premature because Indian women could insist on matrimonial property rights being dealt with in specific land codes. Hargrave P. again found that this position missed the point: "The plaintiffs' complaint is not with what the First Nations may or may not do, but rather with the Crown for not only omitting to deal, in the Framework Agreement, with a fiduciary duty but for, in effect, assigning the fiduciary duty."[61]

The *FNLMA* became law in June 1999, and at least forty-one Indian bands are developing their community land management codes.[62] The *FNLMA* requires that division of matrimonial real property must be dealt with in any land management code but that any such rules and procedures must not discriminate based on sex.[63] The argument made by the BCNWS in this case appears to have had a positive influence on the framework agreement at least. It must be noted, however, that the *FNLMA* applies only to those bands developing land management codes and is not a complete answer to the problem of access to matrimonial property for Aboriginal women living on reserves.

The Right to Participate in Decision Making

Native Women's Association of Canada, Gail Stacey-Moore, and Sharon Donna McIvor (1992-4)

In 1992, the Aboriginal peoples of Canada were engaged in talks leading to the development of the *Charlottetown Accord*, a constitutional reform agreement that, had it been ratified, would have included recognition of the Aboriginal right to self-government.[64] For ten years and through four constitutional meetings, federal, provincial, and territorial political leaders met with (mainly male) Aboriginal leaders and attempted to iron out the specifics of "the right to self-government." The male-dominated Aboriginal groups, including the AFN, the Native Council of Canada (NCC), the Inuit Tapirisat of Canada (ITC), and the MNC received $10 million from the federal government to fund their negotiations. The Native Women's Association of Canada (NWAC), Pauktuutit, and the Métis National Council of Women (MNCW) were excluded from these constitutional talks and so were faced

with exclusion in the political domain. To gain access to a constitutional meeting anywhere in Canada in 1992, delegates were given "passes" to the meeting rooms by the convenors of the meetings. The AFN, for example, might have twenty passes that it divided between its mainly male leaders, its lawyers, and its provincial or territorial representatives. The same applied to the other male-dominated national Aboriginal groups. The NWAC, Pauktuutit, and the MNCW did not receive passes.

In order to get an item such as the sex equality rights of Aboriginal women on the agenda of a constitutional meeting, Aboriginal women's representative organizations had to have their issues approved by Aboriginal men's representative organizations. The AFN did not accept any wording from the NWAC on sex equality rights in the entire process leading to the final text of the *Charlottetown Accord*. After encountering this intransigence in every meeting room from Charlottetown to Whistler, Gail Stacey-Moore, and I persuaded the NWAC's board of directors to bring a court case to, *inter alia,* stop the referendum on the *Charlottetown Accord* because the process had excluded us and infringed our sex equality rights.[65] The late Jane Gottfriedson of the Similkameen Band of British Columbia deserves credit for her willingness as a political leader to use the courts to advance women's equality rights. Litigation was a strategic choice. The male-dominated MNC had gone to court and, after losing their court bid to sit at the constitutional table in their own right, got their seat. The government of the Northwest Territories also went to court and lost in its bid to sit at the constitutional table as a full government rather than as a delegate of the federal government.[66] After its court loss, it too was given its own seat at the constitutional table. Perhaps the same approach would work for Aboriginal women.

Even while we were in court, though, we continued to protest in public against sex discrimination in Canadian law. We protested on Parliament Hill on a cold and blustery day in March 1992 with signs that read "No Self-Government without the *Charter*" and "No Self-Government without Sexual Equality." After 135 years of sex discrimination by Canada, we were afraid of self-government. Why would neo-colonial Aboriginal governments, born and bred in patriarchy, be different from Canadian governments?

In a separate Federal Court case, the NWAC applied for an order of prohibition against further federal disbursements of funding to certain Aboriginal groups for participation in the constitutional review process until such a time as the NWAC received equal funding and the right to participate in the review process on equal terms.[67] The application was dismissed by the trial division. On appeal, the Supreme Court of Canada ruled against the NWAC, holding that "there was no evidence to support the contention that the funded groups were less representative of the viewpoint of women with respect to the Constitution [or that] the funded groups advocate a male-dominated form of self-government."[68] This major hurdle in *Native Women's*

Association of Canada v. Canada (*NWAC* case) could not be bridged.[69] The evidence was not successfully brought forward, to the severe disadvantage of the plaintiffs. The AFN obtained intervenor status and introduced evidence that it represented Aboriginal women as well as men. This evidence was not subject to cross-examination prior to the Supreme Court of Canada hearing because of internal dissension within the NWAC board of directors. In her dissent, Justice Claire L'Heureux-Dubé held that "when the government does decide to provide a specific platform of expression, it must do so in a manner consistent with the *Charter*."[70]

Within a year, the NWAC was invited in its own right to attend the federal-provincial-territorial meeting of ministers of Aboriginal affairs along with the predominantly male Aboriginal leadership. The NWAC became one of the five recognized Aboriginal organizations, along with the AFN, the NCC, the ITC, and the MNC. As Margot Young writes in this volume, "[t]he *Charter* and its equality rights stand out as a beacon in a dark and inhospitable political landscape."[71] This observation has certainly been true for Aboriginal women. While still fighting for their cause through political channels, the NWAC has entered the court arena both to escape the "inhospitable political landscape" and to seek the rightful place of Aboriginal women among the recognized Aboriginal groups.

Two other victories flowed from the *NWAC* court case. One was the success of our "No" campaign to stop endorsement of the *Charlottetown Accord*. Indian (male) filmmaker Rene Norman Nahanee[72] from British Columbia produced a one-minute "No" video, asking Aboriginal people and their supporters to vote "No" to the *Charlottetown Accord*. The video was played on national, regional, local, and Aboriginal television every time the "Yes" campaign ran a video.[73] Aboriginal people at the community level voted "No" to the *Charlottetown Accord* in high numbers.

The other legacy of the *NWAC* case is the firm endorsement by Canada of a policy to the effect that there will be no self-government to which the *Charter* does not apply.[74] Whenever Canada introduces legislation to give Indians more control over Indians and lands reserved for Indians, the *Charter* will ensure that Aboriginal women are no less protected in their dealings with delegated Indian governments than in their dealings with the federal government. Without doubt, the NWAC's challenge, while unsuccessful in court, was instrumental in ensuring that Aboriginal women are not excluded from the protection that *Charter* rights are supposed to offer to all women in their interactions with all levels of government. Now, there is an ongoing challenge to ensure that Aboriginal women's *Charter* protections against federal government discrimination are not diminished through the process of federal government delegation of responsibilities to First Nations governments. The point of ensuring that the *Charter* applies to First Nations governments is to ensure that both levels of government are accountable.

Pauktuutit, the Inuit Women's Association, and President Veronica Dewar and the BCNWS and President Jane Gottfriedson (2000-1)

In 1999, Pauktuutit, the Inuit Women's Association, and its president, Veronica Dewar, brought a court action alleging that Human Resources Development Canada (HRDC) had discriminated against Inuit women and Pauktuutit by signing multimillion-dollar, five-year-funding agreements for Aboriginal job creation with male-dominated Inuit organizations to provide jobs and training for Inuit in the Northwest Territories, northern Québec, and Labrador. Under the Aboriginal Human Resources Development Strategy (AHRDS), Canada signed contribution agreements with the ITC and its regional affiliates. Pauktuutit claimed that Canada had discriminated against Inuit women and their national representative organization on the basis of race and sex because, while Pauktuutit was not funded, both the ITC and the NWAC were. Two similar cases were brought by the BCNWS and its president, Jane Gottfriedson. Hargrave P. dealt with the *Pauktuutit, Inuit Women's Association of Canada v. Canada* and *British Columbia Native Women's Society v. Canada* (*BCNWS* case) together.[75] In June 2001, Hargrave P. refused to strike out the plaintiffs' claims for damages under section 24(1) of the *Charter*, rejecting the Crown's position that "declaratory relief and damages could not possibly be awarded in the present instance."[76] Hargrave P. also refused to strike the plaintiffs' claims that their section 7 *Charter* rights to life, liberty, and security of the person had been violated by the Crown's failure to provide adequate resources for job-creation programs and services to Aboriginal women under the disputed job-creation programs.[77] He held that the plaintiffs' claim that placing job-creation dollars in the hands of men was a violation of section 7 of the *Charter* was justiciable. The plaintiffs asserted in their statement of claim that Indian, Aboriginal, and Inuit women move off reserves to escape the disproportionately high levels of violence on reserves and as a means of finding a livelihood. He also held that the circumstances asserted by the plaintiffs could be construed to fall within the protection of personal autonomy provided by section 7 of the *Charter*.[78] Finally, Canada sought to strike Pauktuutit's claim for protection of its section 15 equality rights on the grounds that those rights apply only to individuals or to groups of individuals and cannot be construed as organizational rights. Hargrave P. held that striking the groups' equality claims would not take into account that the Supreme Court of Canada had "recognized as an important aspect of section 15 of the *Charter* the protection of both individuals and groups who may be vulnerable or disadvantaged."[79]

The *Pautkuutit* and *BCNWS* cases were subsequently withdrawn. But a similar case brought by urban Aboriginal people in Winnipeg and Toronto was decided in favour of the section 15 *Charter* rights of urban Aboriginal people.[80] At trial, Justice François Lemieux held that the plaintiffs had been discriminated against compared to on-reserve Indians and ordered the

department to provide community control over training programs. Lemieux J. found that the HRDC's exclusion of urban Aboriginal persons "violate[d] their human dignity in a fundamental way and ignor[ed] their community [and therefore] stereotype[d] them as less worthy of recognition."[81]

MNCW and President Sheila Genaille

In 1998, the MNCW and its president, Sheila Genaille, decided to use a court strategy to achieve sex equality with the male-dominated MNC. During the *Charlottetown Accord* process, the MNC assisted Métis women in the formation of the MNCW under the leadership of Genaille. As with the NWAC and Pauktuutit, the MNCW was excluded from the *Charlottetown Accord* process, denied a seat at the constitutional table with the recognized Aboriginal groups, and denied funding apart from the predominantly male-dominated organizations. As a result, all three national Aboriginal women's organizations found themselves underfunded in the constitutional process[82] and without their own seat at the constitutional table. The MNCW refused to take part in the *NWAC* case challenging the *Charlottetown Accord*, as did Pauktuutit. The NWAC representatives took this case on their own initiative with private financing. By 1998, it was evident that Canada was continuing its practice of recognizing only the predominantly Aboriginal men's organizations including the MNC, the AFN, the NCC/Congress for Aboriginal Peoples (CAP), and the ITC (now the Inuit Tapiriit Kanatami [ITK]). By 1998, only the NWAC had been added to the list.

From 1993 to 1998, the NWAC enjoyed a recognition denied to both Inuit and Métis women, including a share of the funding arrangements provided under the AHRDS and its predecessor program. Under this program and its predecessor, Canada signed multimillion-dollar agreements with the five recognized Aboriginal national organizations and their affiliates to deliver job-creation and job-training programs aimed specifically at Aboriginal peoples across Canada. The bulk of the funding went to regional affiliates of the recognized national Aboriginal organizations and to tribal groups for on-reserve Indians, to Inuit regional organizations for Inuit, and to Métis affiliates across Canada. The NWAC received its own contribution agreement comparable to those signed with the AFN, the NCC/CAP, the MNC, and the ITC/ITK. The NWAC distributed its funds to its regional affiliates. Pauktuutit and the MNCW were not invited to sign a contribution agreement or contract with the HRDC for job creation and job training for the women they represented. Inuit and Métis women were expected to obtain their funding from the national and regional affiliates of the MNC and the ITC/ITK.

In 1998, the MNCW challenged this sex discrimination by seeking an order from the courts to require the HRDC to enter into agreements with the MNCW for job creation and job training for Métis women.[83] In January 2000, Associate Senior Prothonotary Peter Giles allowed a motion by the

defendant Crown to strike the plaintiffs' statement of claim on the grounds that the relief claimed was properly a matter for judicial review rather than an injunction or declaration. Giles P. noted that the statement of claim stated that the MNCW "is an independent and autonomous organization not affiliated with or related to the Métis National Council ('MNC') in any formal or organization[al] manner. The MNC is governed by a council predominantly made up of men."[84] President Genaille was described in the statement of claim as "a seventh generation Métis alleged to have a personal and direct interest in the matter set out in the claim [who] has been actively attempting to obtain job training and creation funding for Métis women."[85]

The federal court, however, made findings of fact fatal to the MNCW's claim. The trial judge found "insufficient evidence that Métis women are not properly represented by the MNC, or that Métis women have encountered difficulties in accessing programming or funding under current arrangements."[86] This decision was upheld by the Federal Court of Appeal.[87] Unfortunately, the judgment seems to permit the federal government to hold on to the paternalistic assumption that funding men includes funding women.

Conclusion

In 1969, Jeanette Corbière-Lavell began the struggle by Aboriginal women for sex equality rights in law and in government policies, programs, and services. Since that time, other individual Aboriginal women litigants and three Aboriginal women's organizations – the NWAC, Pauktuutit, and the MNCW – have sought to vindicate their rights in Canadian courts. When the NWAC took its case against the *Charlottetown Accord*, it was alone. By 1998, both Pauktuutit and the MNCW were ready to develop and implement their own legal strategies to challenge political and bureaucratic patriarchy. The NWAC, Pauktuutit, and the MNCW realized that it was not only the neo-colonial Aboriginal male leadership that was suppressing women within the community but also Canada itself that was playing a dominant role in reinforcing patriarchy in law, policies, programs, and services for Aboriginal people. Just as the early missionaries, fur traders, and Indian administrators promoted and entrenched patriarchy as a way of life among Aboriginal peoples wherever they found them, so too do modern federal bureaucrats. Canada's reinforcement of patriarchy continues to subject Aboriginal women and their children to violence in the home in the form of spousal abuse and child sexual abuse at the hands of men. It also consigns Aboriginal women to poverty and to various forms of social and political marginalization.

The courts have turned a blind eye in the name of blind justice to the abuses heaped on Aboriginal women, with the *Lavell*, *Derrickson*, *Paul*, *NWAC*, and MNCW cases being prime evidence that justice is not always found in

the courts. In decisions before and after the advent of the *Charter*, the Supreme Court of Canada has almost always ruled against Aboriginal women, forcing them to use other public fora both inside and outside Canada, including the UN Human Rights Committee in *Lovelace*. As Bruce Porter says of poor people litigating for economic rights, "it is only natural that [they] turn to rights claims before courts, tribunals and other adjudicative venues for redress against these prevailing imbalances of rights that deny them equal citizenship."[88] The Aboriginal women's movement since the 1970s has reinforced the view that success in the sex equality struggle will come only if women are willing to engage broadly. Success in the streets has resulted in national media coverage for Aboriginal women's struggles for sex equality, including the Native Women's March in 1979 and the Parliament Hill protests against the *Charlottetown Accord*. The court failures have also resulted in media coverage explaining the plight of Aboriginal women and have gained a seat for at least one national association, the NWAC, at intergovernmental meetings. Winning or losing has not been the yardstick for success, rather, it is our willingness to take action, to protest, to use courts, to use the media, and to take advantage of the various fora.

The continuing discrimination against Aboriginal women is morally reprehensible. It assigns Aboriginal women to poverty and a general lack of economic security. It damages Aboriginal communities as well as individual women. It distorts and corrupts Aboriginal culture, past, present, and future. However, I am among the women who hold out hope that justice will be done for the Aboriginal women of Canada. The fact that the victories in the courts have been "tiny" has not stopped Aboriginal women. If the tiniest victory can lift up the hands of Aboriginal women here and there, then it is a beginning.

Acknowledgments

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Notes

1 *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1, reprinted in R.S.C. 1985, App. III [*Bill of Rights*]. *Canadian Charter of Rights and Freedoms*, *Part* I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act, 31st Victoria, Chapter 42*, S.C. 1869, c. 6. Section 6 provides: "[A]ny Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians ... [and] any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only."

3 Statistics Canada, *Women in Canada: A Gender-based Statistical Report* (Ottawa: Statistics Canada, 2006) at 200.

4 Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 McGill Law Journal 656 at 666 and 669-72. See also "Indian Leader Predicts Violence If Women Push Too Far," *Globe and Mail* (22 February 1973) at W7; and "Indian Act Defended, Said Discriminatory," *Globe and Mail* (27 February 1973) at 13.

5 "*For the master's tools will never dismantle the master's house*. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change" [emphasis in original]. Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, NY: Crossing Press, 1984) 110 at 112.

6 In 1992, Canada provided funding for four male-dominated native organizations (the Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Métis National Council (MNC), and the Inuit Tapirisat) to participate in the Federal-Provincial Conference of First Ministers on the Constitution in Charlottetown. Aboriginal women's groups were initially not funded, but, after some lobbying, each was allotted $250,000 in indirect funding payable by their "corresponding" funded organization. For example, the AFN and NCC were required to allot funds to the Native Women's Association of Canada (NWAC). Instead, the AFN established its own Women's Forum with the intention of giving the funds to the in-house forum rather than to the NWAC. The AFN Women's Forum was comprised of approximately forty female chiefs out of over six hundred chiefs, and the conference meetings were attended by female AFN staff rather than elected representatives. The AFN was not able to withhold the NWAC monies, and the Women's Forum did not replace the NWAC as an Aboriginal representative organization. In contrast, the MNC helped to establish the Métis National Council of Women (MNCW) in 1992 and allocated its $250,000 to the MNCW. Other national Métis women's groups received none of the funds.

7 See generally Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 Canadian Journal of Women and the Law 185.

8 *Re Lavell and Attorney-General of Canada* (1971), 22 D.L.R. (3d) 182 (Ont. Co. Ct.).

9 *Indian Act*, R.S.C. 1970, c. I-6 [*Indian Act* 1970]. Section 12(1) provided: "The following persons are not entitled to be registered, namely ... (b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11." Section 12(1)(b) remained unchanged in the 1985 *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act* 1985], but was amended by Bill C-31 (discussed later in this chapter).

10 *Lavell v. Canada (A.G.)*, [1971] F.C. 347 (C.A.).

11 Rudy Platiel, "To Mrs. Lavell, It's a 'Question of Human Rights,'" *Globe and Mail* (22 February 1973) at W6; and "Indian Groups to Be Consulted before Rulings," *Globe and Mail* (28 February 1973) at 10.

12 Many of the intervening organizations were federally funded as status organizations: Sanders, *supra* note 4 at 666. Further, some chiefs and other male leaders travelled to Ottawa at public expense for consultations: "Women Oppose Act's Discrimination," *Globe and Mail* (22 February 1973) at W7.

13 *Lavell v. Canada (A.G.)*, [1974] S.C.R. 1349 [*Lavell* SCC].

14 *Bill of Rights*, *supra* note 1.

15 *Lavell* SCC, *supra* note 13.

16 *British North America Act*, *Constitution Act, 1867* (U.K.), 30 and 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

17 *Indian Act* 1970, *supra* note 9; and Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) at 238 (chaired by Florence Bird).

18 Anne Molgat, "Herstory," National Action Committee on the Status of Women, http://www.nac-cca.ca/about/his_e.htm (30 August 2004).

19 Theresa Nahanee, "Why Some Indian Women Are More Equal Than Others," *Chatelaine* (April 1976) at 28.

20 House of Commons, *Minutes of Proceedings and Evidence of the Sub-Committee on Indian Women and the Indian Act of the Standing Committee on Indian Affairs and Northern Development*, 32d Parl., 1st Sess., No. 4 (13 September 1982) at 46.

21 See generally Camille Jones, "Towards Equal Rights and Amendment of Section 12(1)(b) of the Indian Act: A Post-Script to *Lovelace v. Canada*" (1985) 8 Harvard Women's Law Journal 195. Lovelace was assisted by the Atlantic Human Rights Centre at St. Thomas University in Fredericton, New Brunswick, where students under the guidance of Professor Donald Fleming prepared the formal communication to the committee on her behalf. "Origins of the Atlantic Human Rights Centre," St. Thomas University, http://www.stthomasu.ca/~ahrc/origins.html_ (30 August 2004). Documentation of the Lovelace complaint is archived at the New Brunswick Human Rights Commission, which was formed in 1985.

22 *International Covenant on Civil and Political Rights,* 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976, entered into force in Canada 19 August 1976) [*ICCPR*].

23 *Report of the Human Rights Committee, Lovelace v. Canada*, UN GAOR, 36th Sess., Supp. No. 40, Annex XVIII, UN Doc. A/36/40 (1981) 166 at 174 [*Report on Lovelace*]. For further analysis, see Anne F. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 Canadian Yearbook of International Law 244.

24 *Convention on the Elimination of All Forms of Discrimination against Women,* 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981, ratified by Canada 10 December 1981).

25 *Charter*, *supra* note 1.

26 *Lavell* SCC, *supra* note 13.

27 House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, 32d Parl., 1st Sess., No. 58 (20 September 1982). This volume includes the *Report of the Sub-Committee on Indian Women and the Indian Act.*

28 House of Commons, *Minutes of Proceedings of the Special Committee on Indian Self-Government*, 32d Parl., 1st Sess., No. 40, published separately as *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983) (chaired by Keith Penner).

29 Bill C-31, *An Act to Amend the Indian Act*, S.C. 1985, c. 27, reprinted in R.S.C. 1985, 1st Supp., c. 32 [Bill C-31]. Section 4 of this act re-enacted section 5 to 14 of the predecessor, the 1985 *Indian Act*, *supra* note 9.

30 Bill C-31, *supra* note 29, also repealed the requirement that Indian women who married Indian men from another band be automatically transferred to their husband's band list. Such women would remain on their own band list, as did men who married them or non-Indian women. The amendment did not correct sex discrimination for women who had already been transferred involuntarily to other band lists. They were required to remain with their husband's bands. Bill C-31 did stop the inclusion of non-Indian women as Indians and band members upon marriage to Indian males.

31 "Enfranchisement" is a term applied to Canada's practice, since 1869, of depriving registered Indians of their Indian status and registration in an Indian band. Although previous Indian acts also provided for voluntary enfranchisement, war veterans were required by law to give up their Indian status, as were persons who attended universities to further their education. Under section 12(1)(b) of both the 1970 *Indian Act* and the 1985 *Indian Act,* both *supra* note 9, prior to Bill C-31, Indian women who married non-Indian men were forced to give up their Indian status and band membership and were involuntarily enfranchised.

32 Under the 1985 *Indian Act*, *supra* note 9, status terminates after two successive generations of "marriage out." This "second-generation cut-off" applies equally to men and to women. Since marriage no longer affects status, the only registrants in the future will be children born into status, and the grandchildren of both men and women who are born after two successive generations of "marriage out" after 17 April 1985 will be disenfranchised. On the potential for an ever-decreasing status Indian population as a result of the 1985 legislation, see Stewart Clatworthy and Anthony H. Smith, *Population Implications of the 1985 Amendments to the Indian Act: Final Report* (Winnipeg: Four Directions Consulting Group, 1992), which was prepared for the AFN.

33 See generally NWAC, *Guide to Bill C-31: An Explanation of the 1985 Amendments to the Indian Act* (Ottawa: NWAC, 1986). The 1985 *Indian Act* is problematic in other ways. Prior to 1985, female children born of a common-law relationship between an Indian man and

a non-Indian woman were excluded from registration, while male children could be registered. Under the 1985 amendments, female children born between 4 September 1951 and 17 April 1985 became eligible for registration under section 6(2). Thus, only the females in this category have to consider the potential application of the "second-generation cut-off" to their children.

34 Section 12(1)(a)(iv) of the 1970 *Indian Act*, *supra* note 9, known as the "double mother" clause, provided that a person whose parents married on or after 4 September 1951, and whose mother and paternal grandmother had not been recognized as Indians before their marriages, could be registered at birth but would lose status and band membership on his or her twenty-first birthday. The purpose of the section was to de-list male and female children of women who gained status and band membership through marriage through two generations. Bill C-31 repealed the "double mother" clause, and persons removed from the Indian register under this rule are entitled to registration under section 6(1)(c). The 1985 *Indian Act, supra* note 9, essentially ended the struggle by men against the "double mother" clause but reinforced and resurrected the loss of status for females whose mother and grandmother had "married out." The difference in the "cut-off" generation arises from the maintenance of the historical distinction between non-Indian women who "married in" (who are not delisted under the 1985 *Indian Act* and retain "full Indian" status) and non-Indian men (who did not historically, and do not under the 1985 *Indian Act*, gain Indian status). Children such as my son Jacob are affected by the new "double mother" clause because he has a mother and a grandmother who married out. In contrast, children whose father and grandfather married out are "full Indians" and can pass their status to their children.

35 Sex discrimination also influences band membership. Section 10 of the 1985 *Indian Act, supra* note 9, limits the rights of reinstated Indians by giving bands increased authority to determine band membership. Prior to 1985, entitlement to band membership usually accompanied entitlement to Indian status. Under section 10, bands are given control of membership if and when they develop their own band membership codes. As a result, persons may possess Indian status but not be members of a band. Bands may not exclude anyone who was a member prior to June 1985, including non-Indian women who married into the band, but they may develop membership codes with criteria very different from federal government rules for registration as a status Indian. If a band enacts a membership code before persons (usually women) are reinstated to Indian status, it may exclude these women from the band list. See, for example, *Sawridge Band v. Canada*, [2003] 4 F.C. 748 (T.D.), aff'd (2004), 316 N.R. 332 (F.C.A.), where the court ordered the band to add eleven elderly women to the band list. The band took control of its band list barely ten days after Bill C-31 was assented to. Its membership code included onerous requirements including a forty-three-page application form with essay questions and interviews.

Furthermore, some bands have refused to provide services to some women until a membership code was passed. See generally Joan Holmes, *Bill C-31, Equality or Disparity? The Effects of the New Indian Act on Native Women* (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 20 and 35. In June 1995, the Canadian Human Rights Commission ordered the Montagnais du Lac Saint-Jean Band Council to pay damages totalling approximately $26,000 to four women who had regained their status under Bill C-31. The band council had placed a moratorium on various rights and services for reinstated band members until a band membership code was in place. Although the moratorium was subsequently lifted, the commission ruled that there had been discrimination against the women. *Raphaël v. Montagnais du Lac Saint-Jean Council,* [1995] C.H.R.D. No. 10 (QL); see also Wendy Cox, "Human Rights Panel Rules Indian Band in Quebec Discriminated against Women," *The [Montreal] Gazette* (28 June 1995) at A13. Over 100,000 persons have been added to the Indian register, and approximately 7,500 are still waiting for a decision from the registrar. "The Indian Register," Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/pr/info/tir_e.html (30 August 2004).

36 *McIvor v. Canada (Registrar, Indian Affairs and Northern Development and A.G.),* Vancouver, Doc. A941142 (B.C.S.C.) (amended Writ of Summons filed 16 November 2001) [*McIvor*].

37 The practice of giving certificates of possession to men only has shifted, with more joint certificates being issued as well as certificates in women's names only. House of Commons,

Minutes of Proceedings and Evidence of the Standing Senate Committee on Human Rights, 37th Parl., 2d Sess., No. 6 (15 September 2003).

38 *Family Relations Act,* R.S.B.C. 1979, c. 121 [*FRA*]. Section 43(1) of the BC *FRA* provides: "[E]ach spouse is entitled to an interest in each family asset."

39 The trial decision is unreported. This account of the trial judgment is from *Derrickson v. Derrickson* (1984), 9 D.L.R. (4th) 204 at 205-6 (B.C.C.A.) [*Derrickson* BCCA].

40 *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 [*Derrickson* SCC].

41 *Ibid.* at 296.

42 *Paul v. Paul* (1982), 141 D.L.R. (3d) 711 (B.C.S.C.).

43 *Paul v. Paul* (1984), 9 D.L.R. (4th) 220 at 223 (B.C.S.C.).

44 *Paul v. Paul* (1984), 12 D.L.R. (4th) 462 (B.C.C.A.).

45 *Paul v. Paul*, [1986] 1 S.C.R. 306 [*Paul* SCC].

46 *Ibid.* at 311. Chouinard J., writing for the Court, stated: "This case is indistinguishable from *Derrickson*."

47 *Derrickson* SCC*, supra* note 40; and *Paul* SCC*, supra* note 45.

48 See, for example, *Pine v. Pine* (1996), 24 O.T.C. 321 (Ont. Gen. Div.) (non-native wife denied order for equalization of net family property in relation to reserve property under the Ontario *Family Law Act*, R.S.O. 1990, c. F.3).

49 However, see "On-Reserve Matrimonial Real Property," Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/wige/mrp/index_e.html (30 August 2004), for several studies on matrimonial reserve property commissioned by the federal government in the past decade. See also Canada, Standing Senate Committee on Human Rights, *A Hard Bed to Lie in: Matrimonial Real Property on Reserve* (Ottawa: Canada Government Publishing, 2003) (chaired by Hon. Shirley Maheu), http://www.parl.gc.ca/37/2/parlbus/commbus/senate/Com-e/huma-e/10app2-e.pdf?Language=E&Parl=37&Ses=2&comm_id=77 (4 August 2004).

50 *Concluding Observations of the UN Committee on Economic, Social and Cultural Rights, Third Periodic Report: Canada*, UN ESCOR, UN Doc. E/C.12/1998/Add.31 (1998) at paras. 29 and 41, http://www.unhchr.ch/tbs/doc.nsf/0/c25e96da11e56431802566d5004ec8ef?Opendocument (30 August 2004); *Report of the Committee on the Elimination of Discrimination against Women, 28th Session*, UN GAOR, 58th Sess., Supp. No. 38, UN Doc. A/58/38 (2003) at paras. 361-2; Human Rights Committee, 85th session, *Concluding Observations of the Human Rights Committee: Canada,* UN Doc. CCPR/C/CAN/CO/5 (2005) at para. 22; Committee on Economic, Social and Cultural Rights, 36th session, UN ESCOR, UN Doc. E/C.12/CAN/CO/5 (1-19 May 2006) at para. 11d.

51 Teressa's name is spelled "Teresa" in many court documents and "Theresa" in the *Chatelaine* article, *supra* note 19. Teressa had spelled her name "Theresa" since grade school and only learned the original spelling of her name when she applied for a birth certificate to get a passport while working in Ottawa.

52 *B.C. Native Women's Society v. Canada*, [2000] 1 F.C. 304 (T.D.) [*BCNWS*].

53 The *Framework Agreement of First Nation Land Management* is available online at First Nations Land Management Resource Centre, http://www.fafnlm.com/LAB.NSF/39e36a26f6235821852568c3005dc7af/c367db5e6523f58b852568e7006ed01b?OpenDocument (4 August 2004).

54 Bill C-49, *An Act Providing for the Ratification and the Bringing into Effect of the Framework Agreement on First Nation Land Management*, 1st Sess., 36th Parl., 1999 (assented to 17 June 1999); *First Nations Land Management Act*, S.C. 1999, c. 24 [*FNLMA*].

55 *BCNWS*, *supra* note 52 at 317.

56 *Ibid.* at 318.

57 *Ibid.*

58 *Ibid.* at 320.

59 *Ibid.* at 319.

60 *Ibid.* at 322.

61 *Ibid.* at 323.

62 The *Framework Agreement on First Nations Land Management* website currently lists fourteen "member communities" as operational (with land codes ratified) and twenty-seven

as developmental, http://www.fafnlm.com/LAB.NSF/vSysSiteDoc/Members+Communities?OpenDocument (7 July 2005).

63 *FNLMA, supra* note 54 at s. 6(1)(f) and 17(1). Section 4(1) of the *FNLMA* ratifies and brings into effect Article 5.4 of the framework agreement, which provides: "In order to clarify the intentions of the First Nations and Canada in relation to the breakdown of a marriage as it affects First Nation land a First Nation will establish a community process in its land code to develop rules and procedures, applicable on the breakdown of a marriage, to the use, occupancy and possession of First Nation land and the division of interests in that land; (b) for greater certainty, the rules and procedures referred to in clause (a) shall not discriminate on the basis of sex."

64 An unsuccessful referendum on the *Charlottetown Accord* was held on 26 October 1992. See Kenneth McRoberts and Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993).

65 The NWAC applied for injunctive relief to prevent the continuation of discussions between the federal government and certain Aboriginal groups until the NWAC was afforded the opportunity to participate in the constitutional review process on equal terms and to prohibit the federal government from proceeding with the 26 October 1992 referendum on the *Charlottetown Accord*. The NWAC also claimed damages under section 24 of the *Charter*. *Native Women's Association of Canada v. Canada*, [1993] 1 F.C. 171 (applications for injunctions struck out as disclosing no reasonable cause of action), aff'd (1992), 97 D.L.R. (4th) 548 (F.C.A.) (appeal considered after referendum on *Charlottetown Accord* and dismissed on grounds of mootness). Pauktuutit later sought judicial review of the Crown's decision not to consult with Pauktuutit during constitutional talks leading up to the *Meech Lake Accord* and the *Charlottetown Accord* and to exclude Pauktuutit from the founding board of directors of the Federal Aboriginal Health Institute (now called the Organization for the Advancement of Aboriginal People's Health). The portion of the statement of claim relating to the constitutional process was struck on grounds of mootness, while the action for judicial review of the composition of the board of directors of the Federal Aboriginal Health Institute was allowed to proceed. *Pauktuutit, Inuit Women's Association of Canada v. Canada* (2003), 229 F.T.R. 8 [*Pauktuutit*].

66 *Sibbeston v. Canada*, [1987] N.W.T.J. No. 128 (S.C.) (QL), aff'd (1988), 48 D.L.R. (4th) 691 (N.W.T.C.A.), leave to appeal to S.C.C. refused (1988), 48 D.L.R. (4th) viii; the government of the Yukon Territory brought a similar action with a similar result. *Penikett v. Canada* (1987), 43 D.L.R. (4th) 324 (Y.T.S.C.), rev'd (1987), 45 D.L.R. (4th) 108, leave to appeal to S.C.C. refused (1988), 46 D.L.R. (4th) vi.

67 *Native Women's Association of Canada v. Canada*, [1992] 2 F.C. 462 (T.D.) (prohibition denied), rev'd, [1992] 3 F.C. 192 (F.C.A.) (declaration of violation of *Charter* rights issued, but prohibition not granted). The NWAC argued sections 2(b), 15(1), and 28 of the *Charter*.

68 *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 at 657-8 (Sopinka J.) [*NWAC* SCC]. Melina Buckley examines approaches to evidentiary issues particularly as they relate to proving claims of adverse effect discrimination that are worth consideration in the Aboriginal cases. See Melina Buckley, "The Challenge of Litigating the Rights of Poor People: The Right to Legal Aid as a Test Case," in this volume.

69 *NWAC* SCC, *supra* note 68.

70 *Ibid*. at 667.

71 Margot Young, "Why Rights Now? Law and Desperation," in this volume.

72 Independent film producer and member of the Squamish Nation, North Vancouver, British Columbia. The media advertisement was televised coast to coast.

73 The referendum rules required broadcast media to run ads representing the opposing positions in the campaign consecutively to provide balance. The NWAC "No" ad was translated into French and Ojibway to run in northern Ontario and nationally when no other ad representing the "No" campaign was available.

74 See, for example, Department of Indian Affairs and Northern Development (DIAND), *Aboriginal Self Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: DIAND, 1994), http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html (30 August 2004).

75 *British Columbia Native Women's Society v. Canada*, [2001] 4 F.C. 191 (T.D.) (striking portions of the statements of claim and striking the second *BCNWS* action, *supra* note 52, in its entirety) [*BCNWS* 2001]; and *Pauktuutit, supra* note 65. Both plaintiffs claimed that their rights under sections 6, 7, 15, and 28 of the *Charter* had been violated. An earlier action by both plaintiffs challenging the New Relationship/Post-Pathways job-creation program on similar grounds was dismissed on grounds of mootness because this program had been replaced by the Aboriginal Human Resources Development Strategy. *British Columbia Native Women's Society v. Canada*, [2000] F.C.J. No. 588 (T.D.) (QL).
76 *BCNWS* 2001, *supra* note 75 at 224.
77 *Ibid*. at 231.
78 *Ibid*.
79 *Ibid*. at 233.
80 *Ardoch Algonquin First Nation v. Canada (A.G.)*, [2003] 2 F.C. 350 (T.D.), aff'd [2004] 2 F.C.R. 108 (C.A.).
81 *Ibid*. at 395-6.
82 The Aboriginal women's organizations received from Canada approximately $250,000 each per year compared to $10 million per year for the predominantly men's groups.
83 *Métis National Council of Women v. Canada*, [2000] F.C.J. No. 62 (T.D.) (QL).
84 *Ibid*. at para. 2.
85 *Ibid*. at para. 3.
86 *Métis National Council of Women v. Canada (Attorney General),* 2006 F.C.A. 77 at para. 9.
87 *Ibid*.
88 Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship," in this volume.