
Aboriginal Peoples and the Canadian Charter of Rights and Freedoms

Contradictions and Challenges

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

(Preamble to Part I, Canadian Charter of Rights and Freedoms)



"Your religion was written upon tables of stone by the iron finger of your God so that you could not forget. The Red Aboriginal people could never comprehend nor remember it. Our religion is the traditions of our ancestors — the dreams of our old men, given them in solemn hours of night by the Great Spirit; and the visions of our sachems: and it is written in the hearts of our people."

(Chief Seattle to the Governor of Washington Territory, 1854)

"When anthropologists, government officials, and churchmen have argued that our ways have been lost to us, they are fulfilling one of their own tribal rituals — wish fulfillment."

(Chief George Manuel, *The Fourth World*)

The contemporary world of Aboriginal politics is inhabited by discussions about rights — the right to self-government, the right to title to land, the right to equality, the right to social services, and the right to practice spiritual beliefs. None of this is very new, nor is it surprising, given that non-Aboriginal people have been writing on behalf of the 'rights' of Aboriginal People since the 16th century.

The earliest of these works were concerned primarily with how the colonial powers (Spain) should treat the 'uncivilized' and savage peoples discovered in America.¹ Many would argue that there have been no real advances in 'rights' for Aboriginal people in America since the 16th century, but to seek advances in 'rights' presupposes the acceptance of terminology. It strikes me that when Aboriginal people discuss rights and borrow the rhetoric of human rights in contemporary struggle, we are using the paradigm of human rights, both nationally and internationally, as an instrument for the

recognition of historic claims — and in many cases as the 'only' resort. Is that really buying into the distinctly western and liberal vision of human rights concepts?

Underlying the use of human rights terminology is a plea for recognition of a different way of life, a different idea of community, of politics, of spirituality — ideas which have existed since time immemorial, but which have been cast as differences to be repressed and discouraged since colonization. In asking for recognition by another culture of the existence of your own, and for toleration of, and respect for, the practical difference that it brings with it, there seems to be something at stake which is larger than human rights, and certainly larger than the texts of particular documents which guarantee human rights, such as the *Canadian Charter of Rights and Freedoms*: a more basic request — the request to be recognized as peoples. I believe that from early colonization up to the present, no government or monarch has ever genuinely recognized Aboriginal Peoples as distinct Peoples with cultures different from their own. In other words, as Peoples whose ways of life should be tolerated and respected, even though certain customs may challenge the cultural assumptions of the newcomers.

I also believe that one reason for this,

aside from the obvious one of the assertion of government power and the quest for economic dominance, is that Aboriginal ways have been and still are presumed to be primitive, in the sense of "lesser" states of development. This presumption denies genuine differences by presuming that another culture is the same, just not quite as "civilized" yet. Hence, it is important for the colonial governments to take jurisdiction over Aboriginal Peoples in order to guide them to a more reasoned state of being where they can become just like them (it is not surprising here that the church was usually the state's best ally).

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Aboriginal Peoples on an equal basis — without seeing us as means to an economic goal (settlement and development), as noble savages, the pagans without civilization, or as specimens for anthropological investigation and scientific collection.² Genuinely recognizing another People as another culture is more than recognizing rights of certain persons. It's not simply recognizing Peoples of another colour, translated in European terms as "race," nor is it recognizing the presence of a minority because the minority is always defined by and in subordination to the majority. Placing the emphasis on race or minority (and consequently on rights) has the effect of covering over the differences at work to the majority's advantage. Aboriginal cultures are not simply difference 'races' — a difference explained in terms of biology (or colour): Aboriginal cultures are the manifestations of a different human (collective) imagination.

To borrow the words of a non-Aboriginal writer, [Aboriginal] cultures "are oriented as wholes in different directions. They are travelling along different roads in pursuit of different ends, and these ends and these means in one society cannot be judged in terms of those of another society because essentially they are incommensurable..."³ While it seems that, in the Canadian context, Aboriginal Peoples and non-Aboriginal persons have some understanding and recognition of each other, it seems that Aboriginal Peoples have been the ones who have had to suffer for tolerance (even by force and imprisonment).⁴

It is true that there have been treaties between Aboriginal Peoples and the British Crown. However, these do not amount, in my view, to a genuine recognition of diverse Indigenous cultures; they were really Western-style (written in a highly legalistic form in most cases) methods to make way for progress, with "progress" defined according to the standards of the newcomers. After all, it was the British

practice in almost all of the colonies, irrespective of cultural differences among those they 'discovered' or 'conquered.' It is no wonder then, that in studying the law of treaties, we quickly learn that, according to Anglo-Canadian legal standards, treaties (even before Confederation) are not seen as agreements between sovereign Peoples or nations. When we inquire as to why treaties are not viewed as agreements between two (or more) sovereign Peoples, we are generally led to the theory that Aboriginal People (either at the time of treaty-making or now) were not sufficiently 'civilized' and organized to qualify as 'sovereign' Peoples, or that they had already 'lost' their sovereignty through some predestined and mysterious process (for example, by virtue of being "discovered").

Of course, there is no compelling reason, according to the doctrines and principles of international law, to view treaties between Aboriginal Peoples and the Crown as anything other than treaties between sovereigns, or *international* treaties. Nor does there seem to be any compelling reason for continuing to pretend that Aboriginal Peoples do not have distinct cultures, cultures which are deserving of recognition by the dominant (European) one which has been imposed in Canada. Why is it then that Aboriginal

Peoples, and Aboriginal claims, must be 'fit-in' to the categories and concepts of a dominant culture, in some form of equivalence, in order to be acknowledged? There appears to be a contradiction at work in areas like human rights—that is, a contradiction between pretending on the one hand to accept Aboriginal Peoples as distinct Peoples, and on the other of accepting something called Aboriginal Peoples' rights. This contradiction, which I explore briefly in the following pages, has led to a great deal of misunderstanding, and has given the dominant culture (as represented by the government of Canada) plenty of scope in which to manoeuvre, while avoiding a difference-based approach to Aboriginal Peoples as equals or as sovereigns.

'Aboriginal rights' are a category, primarily a category of law, in which most discussions about our historic claims and cultural differences are carried out in Canadian society. It is a category with severe limitations politically and legally; limitations which have been set, whether or not intentionally, by those who thought up the category—mostly non-Aboriginal people. It is a realm in which discussions focussing on strange expressions like 'title,' 'usufructory rights,' 'mere premises,' 'status,' 'referential incorporation,' 'extinguishment,' and 'existing' take on enormous significance, even though they do not seem to have anything to do with the everyday lives of Aboriginal people. A frightening and frustrating thing about the centrality of these expressions is that they were thought up by the same non-Aboriginal people that brought us the 'rights' category: they seem incompatible with Aboriginal ideas about land, family, social life, and spirituality. Yet somehow they are supposed to be helping us out, assisting us in our struggle to continue to practice our cultures. Could it be that they just serve to limit the possibilities for genuine acknowledgement of the existence of Aboriginal Peoples as distinct cultures and political communities possessing the ability to live without external regulation and control?

I chose the first two quotations prefacing this article to illustrate the contradiction here—a *Charter* based on the supremacy of a foreign God and the (Anglo-American) rule of law just doesn't seem to be the kind of constitution that Aboriginal Peoples can get too excited about. Rather,

it is the kind of constitution which we can get rather angry about because it has the effect of excluding Aboriginal vision(s) and (diverse) views about the land and the society now called Canada. Clearly, as a historical document, it represents only one story of Canada—that is, the story of the colonialists. As a document held out to be the "supreme law of Canada" (according to Section 52 of the *Constitution Act*, 1982), it represents an act of ethno-centrism and domination, acknowledging at no point The Great Law of customary laws of the First Peoples of this territory (except unless through wish-fulfillment section 35 is read this way).⁵

Could Aboriginal spirituality ever be

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represented by the likes of the preamble to the *Canadian Charter of Rights and Freedoms*? Do Chief Seattle's words render this impossible? Are we travelling along a different road, one which doesn't need formal written declarations to convince ourselves of what kinds of societies we are? Should we even try to do things this way? Who are we trying to please in doing so? Is it inevitable that Aboriginal traditions and customs have to take the form of 'rights' which are brought to courts, proven to exist then enforced? Isn't the fundamental problem here the fact that everything has to be adjusted to fit the terms of the dominant system?

I view the problems in the Aboriginal Peoples-human rights area as further evidence of the fact that the dominant culture has never recognized Aboriginal Peoples as distinct Peoples and cultures. I suppose that the exclusion or repression of the "Aboriginal fact" of Canada in the

present *Constitution Act* in a strange way bolsters the idea that Aboriginal Peoples are sovereign and distinct (yet entrapped) nations. Unless there was a conscious strategy of "ignore them and they'll go away," one would presume more ink would have been spilt on setting out the nature of the relationship between the Crown and the First Peoples of Canada; or at least on mentioning it more directly than in two perfunctory sections in the *Constitution Act*.

Larger questions loom over all of these problems. What does it mean for Aboriginal Peoples to advance claims enveloped in the rhetoric of human rights? While there is no question that there are serious human problems in Aboriginal communities which seem to warrant redress as 'human rights' violations, are such claims too piecemeal? Is there a difference between having discrete 'rights' incrementally recognized, and being recognized as a People? What alternative to rights-based claims are available? In the very pragmatic-oriented work of human rights lawyers and activists in Canada, a discourse about litigation strategies and legal doctrines, there hardly seems to be an opportunity to stop and consider these kinds of questions about Aboriginal rights and the *Canadian Charter of Rights and Freedoms*. I wonder to what extent those who support struggles for the recognition of Aboriginal rights have really considered these issues?

Generally, we have never really had to address these problems during the first five years of the *Charter* because we were preoccupied with negotiations to recognize (both within the *Charter* and within another specific section the *Constitution Act*) the 'right to self-government.'¹⁶ When these negotiations failed miserably at the final meeting of First Ministers in 1986, a failure which was something of a foregone conclusion given that Aboriginal Peoples were never seen as equal parties in the negotiation process from the beginning (instead we were given special 'observer' status), people returned to the *Charter* and the vague provision on Aboriginal Rights in section 35 of the *Constitution Act* to consider legal challenges and claims based upon these provisions. It is my belief that questions regarding which forums and laws are especially urgent now and can hardly be avoided any longer, especially in light of

the fact that Aboriginal Peoples are turning more so to the *Charter* for recognition of their rights *vis-a-vis* the Canadian Crown, and perhaps more disturbingly, turning to the *Charter* to fight out internal battles in communities.

I would like to explore some of the layers of contradiction or conflict which are raised in the context of Aboriginal Peoples' claims and the *Charter*, and describe briefly an effort to meet one aspect of these contradictions which has been made by Aboriginal women through the Native Women's Association of Canada. The views put forward here are my own, many of which have been developed in the course of advising the Native Women's Association of Canada on human rights matters in recent years. I have been greatly influenced in these questions by situations facing the Association and its constituents, and by both my mixed education and ancestry.⁷ I don't propose to consider in any detail traditional and customary practices of specific Aboriginal Peoples, both for reasons of the limits of space here and because I have reservations about the extent to which knowledge about these matters can be transmitted in such a medium. There is valuable information on Iroquois customs and the idea of rights in the introductory article in this collection entitled, "Our World According to Osenntonion and Skonaganleh:r " (p. 6).

The Origins of Human Rights

While it might seem obvious that human rights and the *Canadian Charter of Rights and Freedoms* are incompatible with Aboriginal culture and traditions, it is helpful to trace the origin of the idea of human rights in the modern era in order to locate the differences here. The Anglo-American concept of rights was set out, for the most part, by two 17th century English political theorists, Thomas Hobbes and John Locke.⁸ Locke is the more famous of the two on these matters. He developed a theory of 'natural rights' — later 'human' came to be substituted for 'natural,' after the recognition (post-Holocaust) that Peoples are capable of barbaric actions in the name of what is 'natural.' Locke's theory of natural rights was based around his idea that every *man* (and emphasis should be on *man* because Locke is also famous for his theory that society was naturally patriarchal) possesses a right

to private property, or the right to own property. This right, he suggested, flowed from the fact the human beings are God's property ('God' as in the preamble to the *Canadian Charter*). He argued that people enter into 'civil society' for the central, and negatively conceived, purpose of protecting their right to private property against random attack.

The idea of the absolute right to property, as an exclusive zone of ownership, capable of being transmitted through the family (through males according to a doctrine called 'primogenitor'), is the cornerstone of the idea of rights — the idea that there is a zone of absolute individual right where the individual can do what he chooses: "The right is a loaded gun that the right holder may shoot at will in his corner of town."⁹ It doesn't take much of a stretch of the imagination to see where slavery and the subordination of women found legitimacy in the Anglo-American tradition — with absolute ownership of property, and autonomous domains, 'naturally' rights will extend "even to another person's body."¹⁰

Although there is no pan-Aboriginal culture of iron-clad system of beliefs, this notion of rights based on individual ownership is antithetical to the widely-shared understanding of creation and stewardship responsibilities of First Nations Peoples for the land, or for Mother Earth. Moreover, to my knowledge, there are no notions among Aboriginal Nations of living together for the purposes of pro-



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tecting an individual interest in property. Aboriginal life has been set out in stories handed down through generations and in customary laws sometimes represented by wampum belts, sacred pipes, medicine bundles, and rock paintings. For example, the teachings of the Four Directions is that life is based on four principles — trust, kindness, sharing and strength. While these are responsibilities which each person owes to others, they represent the larger function of social life — that is, to honour and respect Mother Earth. There is no equivalent of 'rights' here because there is no equivalent to the ownership of private property. The collective or communal bases of Aboriginal life does not really have a parallel to individual rights; they are incommensurable. To try to explain to an Elder that, under Canadian law, there are carefully worked-over doctrines pertaining to who owns every square inch of the country, the sky, the ocean, and even the moon, would provoke disbelief and profound sadness.

The Structure of the *Canadian Charter*

Nevertheless, the Canadian human rights system, having been distanced in time and space somewhat from its origin and conceptual basis in the theories about the right to individual ownership to property, seems little less foreign, especially since so much is said of Aboriginal matters in the context of human rights. Some writers even argue that in Canada, the *Charter* recognized certain collective rights, such as Aboriginal rights, and not merely individual rights. However, my reading of the law leads me to believe that the individual property basis of human rights is still entirely with us and is revealed clearly in the text of the *Canadian Charter*, as well as in recent cases which have been decided under the *Charter*. The language of the *Charter* refers to the human rights enjoyed by 'every citizen of Canada,' 'every one,' 'every individual,' 'any person,' etc. The section of the *Charter* on enforcement applies to "[a]ny one whose rights or freedoms... have been infringed," permitting them to apply to a court for the order the court considers appropriate in the circumstances — almost always the singular subject.

The extent to which a human rights law set out in such individualist terms could ever either (i) be interpreted as including

a collective understanding of rights, or (ii) lead to judges acknowledging that other Peoples might not base their social relations on these individual 'rights' notions, is highly questionable. There is nothing strong enough in the *Charter* to allow for either a collectivist idea of rights (or responsibilities), if such a theory is conceivable, or toleration of a community organized around collective values. When cases involving Aboriginal Peoples come before the courts, it is doubtful that different standards of legal analysis will be applied. Already the case law has taken a disturbing course from the viewpoint of Aboriginal Peoples.

With shades of private property notions in mind, the Supreme Court of Canada in the recent *Morgentaler* case on abortion, suggested that "the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence."¹¹ In an earlier decision, involving Aboriginal persons, the Federal Court of Canada took the view that "in the absence of legal provisions to the contrary, the interests of individual persons will be deemed to have precedence over collective rights. In the absence of law to contrary, this must be as true of Indian Canadians as of others."¹²

Even in the area of language rights — an area said to be a cornerstones of collective rights in the *Charter* — the Supreme Court of Canada in the recent case involving Quebec's former *Bill 101* has indicated that the basic understanding of this right is somehow both an individual and a collective one: "Language itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality."¹³ How to go about reconciling these two aspects when they conflict is no easy task, and the Court gives little guidance here on its view of collective rights — except to say that the individual's rights to speak their language must be protected at law against the community's prohibition of it.

Even in the area of equality rights, as recognized in section 15 of the *Charter*, the text applies to "every individual." This provision has been interpreted by the courts not as a general recognition of the

idea of equality (which if read as 'sameness' would be deeply disturbing to Aboriginal people), but simply as a principle relating to the application of given laws. In a recent equality case, the Supreme Court of Canada stated that section 15, "is not a general guarantee of equality, it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equality treatment to others. *It is concerned with the application of the law.*"¹⁴ The scope for Aboriginal rights claims under section 15 is limited, even if such a course was seen as desirable by Aboriginal leaders.

Moreover, we can begin to see the broader implications of these cases for Aboriginal Peoples or Aboriginal claims. It is difficult to move in a certain direction as a People if individuals can challenge collective decisions based on infringements of their individual rights and if collective goals will not be understood or prioritized. Some people may view this as the triumph of democracy, but it makes the preservation of a different culture and the pursuit of collective political goals almost impossible.

In Aboriginal communities where customary political and spiritual institutions are the guiding force (even alongside the imposed *Indian Act* system of Band Councils), such as the Haudenosaunee of the Iroquois Confederates, recourse to an individual-rights based law like the *Char-*



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ter could result in further weakening the cultural identity of the community. This could take one of two forms: either a member of the community would challenge Aboriginal laws based on individual rights protections in the *Charter* arguing that they have not been respected by their government (an internal challenge); or a non-Aboriginal person could challenge the laws of an Aboriginal government on the basis that they do not conform with charter standards (an external challenge).

In the case of an external challenge, for example, on the basis of voting or candidacy rights where a non-Aboriginal complainant argued that they could not vote or stand for elections in an Aboriginal community because of cultural restrictions, the court would be given the authority to decide an important part of the future of an Aboriginal community. It would have to consider the protections of Aboriginal rights in the *Charter* and weigh these against the individual right to vote recognized in section 3. Should Canadian courts (and non-Aboriginal judges) have authority in these cases? Given the highly individualistic basis of the *Charter*, and of the history of human rights, would the collective Aboriginal right stand a chance? I doubt it. As the Assembly of First Nations argued, before the Parliamentary Committee on Aboriginal Affairs in 1982: "[as] Indian people we cannot afford to have individual rights override collective rights. Our societies have never been structured that way, unlike yours, and that is where the clash comes... If you isolate the individual rights from the collective rights, then you are heading down another path that is even more discriminatory... *The Canadian Charter of Rights* is in conflict with our philosophy and culture..."¹⁵

The other possible challenge, the internal challenge, where a member of an Aboriginal community felt dissatisfied with a particular course of action the Aboriginal government was taking, and turned to the *Charter* for the recognition of a right, is equally if not more worrisome. This kind of challenge would be a dangerous opening for a Canadian court to rule on individual versus collective rights *vis-a-vis* Aboriginal Peoples, it would also break down community methods of dispute-resolution and restoration. Here, the example of the *Indian Civil Rights Act*¹⁶ in the United States is instruc-

tive. This act, based on the idea that protections for the *American Bill of Rights* should be extended to Aboriginal communities, along with the establishment of tribal courts which would have the same function as American courts generally, has been greatly criticized by Aboriginal people as imposing alien ways of life.

As two noted scholars suggest:

In philosophical terms, it is much easier to describe the impact of the... Act. Traditional Indian society understood itself as a complex of responsibilities and duties. The [Act] merely transposed this belief into a society based on rights against government and eliminated any sense of responsibility that the people might have felt for one another. Granted that many of the customs that made duties and responsibilities a serious matter of individual action had eroded badly in the decades since the tribes had agreed to move to reservations, the impact of the [Act] was to make these responsibilities impossible to perform because the act inserted the trial court as an institution between the people and their responsibilities. People did not have to confront one another before their community and resolve their problems; they had only to file suit in tribal court.¹⁷

The lessons of the *American Indian Civil Rights Act*, and of the establishment of tribal courts, are important ones in light of the *Charter*. If internal disputes are brought before Canadian courts, it will seriously undermine the Aboriginal system of government based on responsibility (like the Four Directions) and interpose a system of individual-based rights. It also has the effect of encouraging people to go outside the community, and outside of custom, to settle disputes in formal courts — instead of having to deal with a problem within the community.

This might sound like a hard line to take, especially when one considers the extent to which customs and traditional methods of governance and dispute-resolution have been dislodged in Aboriginal communities after more than a century of life under the *Indian Act*. The experience of gender-based discrimination

was employed as a technique of assimilation up until the 1985 amendments to the *Indian Act* (many see the gender-based discriminatory provisions as having continuing effect despite the amendments), and scarred many Aboriginal communities as male-dominated Band councils frequently sided against women and with the Canadian government in the belief that to do otherwise would undermine the Crown's trust responsibility for Aboriginal Peoples.

As a consequence, women were forced to go outside the community to resolve the injustices of gender-discrimination, so cases were brought under the *Canadian Bill of Rights* and eventually under the *United Nations Covenant on Civil and Political Rights*. Changes were made to the *Indian Act*, but many of the after-effects of gender-discrimination still plague Aboriginal communities, including problems associated with women returning to communities, and being able to take up residence, educate their children, share in social services, and receive per capita payments from resource exploitation on Aboriginal lands.

Communities have been slow to address questions related to the aftermath of gender-discrimination in the *Indian Act*, and the mechanisms available to resolve disputes according to customary practices are not necessarily available. This places a great deal of pressure on Aboriginal communities, which could lead to cases being taken to Canadian courts pursuant to the *Charter* for recognition of rights against Aboriginal governments. As a result of concern over what this could lead to, in light of the individual-

based notions of rights under Canadian law, and in light of lessons derived from the United States experience with the *Indian Civil Rights Act*, Aboriginal women have been working on projects to encourage the development of First Nations laws in areas like 'citizenship' and human rights and responsibilities — laws based, as far as possible, on inherent First Nation jurisdiction and customary practices.

An Alternative Approach: First Nations Human Rights and Responsibilities Laws

The Native Women's Association of Canada has addressed questions relating to gender-discrimination in the *Indian Act*, and related problems in Aboriginal communities since the late 1970s. In 1985, when amendments to the *Indian Act* aimed at eliminating gender-discrimination were finally passed, the Native Women's Association took the position that, while Aboriginal women could support the end of unfair bias against women, they could not simply support the Federal government's efforts to 'improve' the *Indian Act* and the extension of legislative control over the lives of Aboriginal Peoples through its paternalistic provisions. Consequently, the Association turned its attention to the development of a 'First Nation Citizenship Code,' or a model law which would address the issues of membership or citizenship in a First Nation, but would base its principles and jurisdiction not on Canadian law, but on the inherent jurisdiction of First Nations to regulate citizenship as practices since time immemorial.

The model codes were distributed to every Aboriginal community in Canada with a letter encouraging communities to take a First Nations approach to citizenship, and not an *Indian Act* approach, and to set up local mechanisms based, as much as possible, on customary principles for settling disputes, so that problems regarding citizenship could be addressed in the community itself and not in Canadian courts. As it became clear that citizenship was not the only area of concern in communities (although the



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issue of Indian status was by far the most divisive), it was evident that some other efforts would need to be expended to discourage internal challenges of Aboriginal government actions getting into Canadian courts under the *Charter*. In 1986 the Native Women's Association of Canada began to consider the development of another model law, parallel to the Citizenship Codes, which would be a First Nations human rights and responsibilities law.

It appears that this Code, which at the time of writing is still in the draft stages, will be based on the inherent jurisdiction of First Nations to make laws for their Peoples. It will include a very loosely and generously worded part on human rights and responsibilities, corresponding to four groups of rights and responsibilities which come from the teachings of the Four Directions. Hence, there are the following responsibilities and rights:

- (i) *kindness* — social rights
- (ii) *honesty* — political and civil rights
- (iii) *sharing* — economic rights
- (iv) *strength* — cultural rights.

For example, the responsibility and rights category of strength/cultural rights would include provisions on the right to pursue traditional occupations, the right to education in Aboriginal languages, the right to customary marriage and adoptions, the right to participate in ceremonies according to the laws and traditions of the Nation, and, most importantly, the recognition of the fundamental importance of Elders and spiritual leaders in the preservation of ancestral and customary law and in the health and well-being of the community as a whole.

The provisions on the model law developed by the Native Women's Association on dispute-resolution provide options for a particular community to consider in creating a law which fits in its customs and aspirations. These include mediation, the establishment of a Human Rights Committee, and a Council of Elders. Also included are options for setting up methods to deal with conflicts on a regional basis (e.g. an Iroquois or Ojibway council of Elders). It is hoped that the work of the Association will contribute to the development of commu-

nity laws and less formal community solutions to reduce the possibilities that individual members of First Nations communities will have to go outside their communities (to foreign courts) for redress of grievances. It seems that the development of community codes is the best available solution to the problems in communities and to the threat of the (further) imposition of a Western individualistic human rights system on Aboriginal Communities.

Future Challenges

The work of the Native Women's Association of Canada really only addresses the problem of internal challenges based on the *Charter* by members of First Nations communities. It does not attempt to deal with other areas of concern, such as external challenges, or claims brought by non-Aboriginal peoples pursuant to the *Charter*, calling into question the collective basis of Aboriginal communities.¹⁸ Even claims brought by Aboriginal communities against the Federal Government based on provisions of the *Charter* seem to present a dangerous opportunity for the court to take a restrictive view of collective-based community goals. Any case which presents a Canadian court with the opportunity to balance or weigh an individual right against a collective right, or Aboriginal collective understanding of community, will be an opportunity to delimit the recognition of Aboriginal Peoples as distinct cultures.

This is something different than dealing on an equal footing with Aboriginal Peoples about historic claims and cultural differences which have to be addressed and settled. These cases permit the court

to say "yes, we do have jurisdiction over you, and we will decide what is best for you under Canadian law." It is not that different from the imposed system of rule under the Indian Act; except in *Charter* cases, the court can cloak its decision in the rhetoric of democratic freedom, emancipation, multiculturalism and human rights for 'all Canadians.' The only way to really consider the political and cultural differences between Aboriginal Peoples and the Canadian state is through discussions which are quasi-international so that the respective 'sovereignty' of the parties will be respected.

Aboriginal Peoples have been trying to pursue this (international) course during the past decade. The United Nations has established a special Working Group on Indigenous Populations to consider the human rights violations (really historic claims under international law) of Indigenous Peoples from around the globe. During the past seven years, there have been six meetings of the Working group, and recently efforts have been directed at the development of a United Nations Declaration on Indigenous Rights. Although Aboriginal Peoples have been participating quite actively in this process of development of a United Nations Declaration, once again, we are really on the outside of the United Nations system. Nevertheless, certain States which are part of the United Nations structure have been willing to advocate for the recognition of Indigenous Rights in a Declaration.¹⁹

The matters dealt with in the proceedings of the Working Group and in the Draft Declaration can hardly be ignored, when one considers the extent to which they are present in all areas of the globe. As one noted international scholar has suggested. "[t]he peoples of entrapped nations are a sleeping giant in the workings of power politics."²⁰ A cornerstone of an eventual declaration would have to be, from the Aboriginal perspective, a recognition and explicit extension of self-determination to Indigenous Peoples under International law. There are persuasive arguments that, even without a specific declaration, international law already recognizes the right of all Peoples (including Abo-



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iginal Peoples) to self-determination.

Self-determination is something different than self-government, although it could include the latter. Self-government (which has been the pinnacle of all human rights discussions in the Canadian context) implies that Aboriginal Peoples were not previously able to govern themselves, because they were not at an advanced enough stage of civilization, can now take on some responsibility for their own affairs.²¹ Very few people make a distinction between self-government and self-determination. In a recent report by the Canadian Bar Association special committee on Native justice, the idea of self-government is used throughout without any distinction as to its historical context or political implications.²² On this point, again Aboriginal women in Canada, through the voice of the Native Women's Association, have made their position in support of self-determination over self-government quite clear.²³

In the international context, the draft declaration on Indigenous rights is silent on the issue of self-determination. It contains many disturbing provisions on lesser notions like 'autonomy... in local affairs' and the 'right to exist.' While these might seem progressive in some situations where the very life of Aboriginal People is systematically threatened on a daily basis, the provisions do not go far enough in recognizing Aboriginal Peoples as distinct cultures and political entities, equally as capable of governing and making decisions as European sovereigns, except with different political and cultural goals.

A great deal more work will have to be done in the next few years to ensure that the text of the Draft Declaration is one which will recognize Indigenous Peoples as legitimate, though different, governments and cultures. The only way to do this, in international law and in national law, is through a recognition of self-determination. To do this will require broad-based support

from international society, manifested in the work of non-government organizations, women's movements, and sympathetic States. The Canadian government and Canadian people could do much to assist the international process if the Government would simply recognize Aboriginal Peoples as distinct Peoples with different but equally legitimate cultures and ways of life. This can't be done through Canadian courts and in the rhetoric of Canadian human rights — it has to be done through a joint Aboriginal-Can-

dian discussion process where, unlike the series of discussions held on Canadian constitutional amendments, Aboriginal Peoples are equal participants in the process, along with the Prime Minister and perhaps Provincial Premiers.

In the meantime, Aboriginal women will continue to do what can be done to ensure that Aboriginal communities are governed by customary laws and practices, through the development of First Nations laws, and through the political and spiritual voice of the Native Women's Association of Canada as guided by its Elders and affiliated women's organizations.

¹See for instance Bartolomé de Las Casa, *The Tears of the Indians* (tr. Phillips, 1656), and Vittoria, *De Indis Et De Juri Belli Reflectiones*. (tr. Nys, 1917).

²Here I am mindful of the rise of the museums of so-called 'natural history' which were dedicated to the study of primitive peoples and the collection of cultural objects for display as curiosities. It was not only cultural or spiritual objects that were collected during the rise of the museum and curatorial science, but also human specimens. For example, see Harper, *Give Me My Father's Body* (1986), or a recent article in *Harper's* magazine (March 1989) suggesting that the New York Museum of Natural History has the skeletal remains of 15,000 Aboriginal persons in its collection, each carefully boxed and numbered.

³See Ruth Benedict, *Patterns of Culture* (1935).

⁴For just a few examples, the prohibition of the potlatch under the *Indian Act*, the burning of the Longhouses of the Iroquois Confederacy at the turn of the century, and the convictions of the Innu in Labrador for protesting low-level military flights over their territory.

⁵Aboriginal rights are mentioned only twice within the text of the *Constitution Act*, 1982. The first is in the *Charter*, in section 25 interpretative provi-



sion which provides (in part) that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada...;" the second is in Part II of the *Constitution Act* in section 35 which recognized and affirms "existing aboriginal and treaty rights."

⁶ Of course, not all Aboriginal Peoples participated in this process of negotiation. Many perceived it as a process designed to compromise historic claims and treaties in a document (the *Canadian Constitution*) which would suit the needs of the Federal and Provincial governments first, and Aboriginal Peoples second.

⁷ Mixed education meaning both formal legal training, and the significant teachings of my Grandmothers, Sisters, and the Lodge; and mixed ancestry — Cree and Anglo-Canadian, which seems to focus the mind on contradictions like those discussed in this article.

⁸ In, respectively, *Leviathan* (1651), and *Two Treaties on Civil Government* (1690).

⁹ Unger, *Critical Legal Studies Movement* (1986).

¹⁰ Hobbes, *Leviathan*.

¹¹ Madame Justice Wilson writing in *Morgentaler, Smoling & Scotty, The Queen & Attorney General of Canada* [1988] 1 S.C.R. 164.

¹² Mr. Justice MacGuigan writing in *Boverly, Canada*, [1986] 35 N.R. 305.

¹³ *Attorney General of Quebec & Brown & Ford & McKenna et al v. La Chassure Brown's Inc.* (as yet unreported).

¹⁴ Mr. Justice McIntyre, *Law Society of British Columbia et al v. Andrews et al* (unreported), emphasis added.

¹⁵ Minutes and Proceedings, House of Commons Standing Committee on Aboriginal Affairs, Evidence no. 58 (September 29, 1982).

¹⁶ U.S., *Statutes at Large*, 82:77.



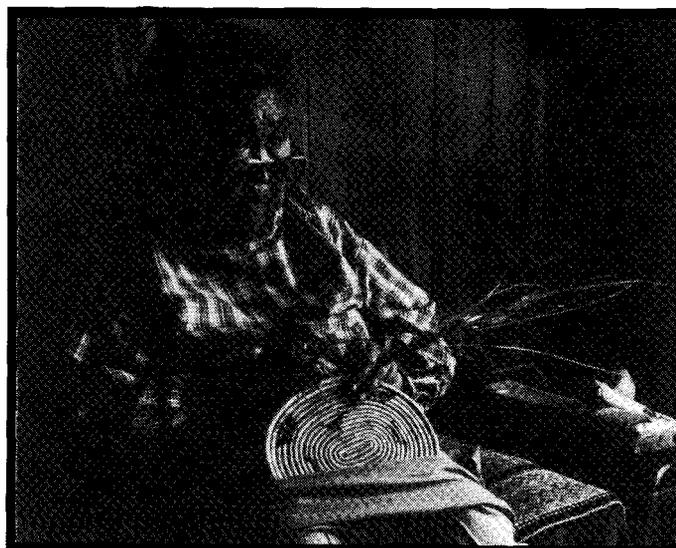
¹⁷ Deloria and Lytle, *The Nations Within* (1984).

¹⁸ Section 25 of the *Charter* mentioned in footnote 5 above is supposed to guard against such challenges, but it is difficult to predict whether the court will take a generous view in favour of collective rights, especially when everything else in the *Charter*, and in the history of human rights, seems to be directed to the protection of the individual from the community or government.

¹⁹ The Scandinavian states have been particularly supportive here.

²⁰ Falk, "Promise of Natural Communities," in *The Rights of Indigenous Peoples in International Law* (1987).

²¹ The idea that Aboriginal communities are not sufficiently advanced enough to control their own affairs is recognized in the *Indian Act*, where, under the provisions for Band Council control over financial decisions, a band can make laws for financial issues only when the Minis-



ter determines whether or not they have reached a sufficient stage of 'development.'

²² See, *Aboriginal Rights in Canada: An Agenda for Action* (1988).

²³ They have done so through a special declaration adopted (unanimously) at an Annual Meeting (Whitehorse, 1986).

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In addition to winning numerous awards and scholarships in the law field, Ms. Turpel has acted as an advisor to the Department of Indian/Northern Affairs and the Indian Law Resource Centre. Ms. Turpel has worked and volunteered for the Native Women's Association of Canada, and the Ontario Native Women's Association. She is an equally serious student of traditional law, clan teachings and Nishnawbe good life.

Aki-Kwe is an auntie, sister, daughter and friend — roles which she finds more important than her other titles. Aki-Kwe believes it is time to turn our attention to our environment, our relationships and learning to live peacefully.