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

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Les femmes autochtones au Canada ne jouissent pas des mêmes droits que les autres citoyennes et citoyens du Canada. Depuis 1969, les lois fédérales, à caractère colonialiste et patriarcal—plus particulièrement la Loi sur les Indiens*—ont favorisé le patriarcat dans les communautés autochtones et soumis les femmes autochtones à la perte de leur statut d'Indienne et de leurs privilèges liés au statut de membre d'une bande, à l'expulsion de leurs foyers dans les réserves et à la négation d'une part égale dans les biens matrimoniaux. Le colonialisme et le patriarcat ont également favorisé la collaboration entre le leadership masculin des autochtones et les gouvernements du Canada pour résister à l'inclusion des femmes autochtones dans le gouvernement autochtone. Ces dénégations et ces exclusions perpétuent la vulnérabilité à la violence des femmes autochtones et de leurs enfants et les condamnent à une indigence extrême. Depuis 1969, les femmes autochtones ont eu recours aux tribunaux en vue d'obtenir leurs droits à l'égalité. Le présent article passe en revue les contestations judiciaires intentées en vertu de la* Déclaration canadienne des droits, *de la* Charte canadienne des droits et libertés *et des conventions internationales sur les droits de la personne. En s'inspirant de sa propre lutte pour que ses enfants obtiennent le statut d'Indiens, l'auteure met en lumière les dispositions discriminatoires qui persistent dans le Projet de loi C-31. Finalement, elle discute des causes intentées par des organisations de femmes autochtones, métisses et Inuit en vue de faire reconnaître leurs droits de participer au processus décisionnel dans les politiques et programmes qui leur sont destinés. De nombreuses revendications n'ont pas porté fruit, mais le fait d'intenter une contestation judiciaire a, en soi, facilité l'organisation politique et la négociation pour l'obtention de changements positifs. Le recours au droit pour obtenir l'égalité n'est pas de dernier ressort, mais un élément qui peut aider les femmes à s'assumer dans la vaste lutte politique, sociale et juridique en vue d'éliminer la discrimination fondée sur le sexe à l'encontre des femmes autochtones.*

Aboriginal women in Canada do not enjoy rights equal to those shared by other Canadians. Since 1869, colonialist and patriarchal federal laws—most notably the Indian Act*—have fostered patriarchy in Aboriginal communities and subjected Aboriginal women to loss of Indian status and the benefits of band*

membership, eviction from reserve homes, and denial of an equal share of matrimonial property. Colonialism and patriarchy have also enabled cooperation between male Aboriginal leadership and Canadian governments to resist the inclusion of Aboriginal women in Aboriginal governance. These denials and exclusions perpetuate the exposure of Aboriginal women and their children to violence and consign many to extreme poverty. Since 1969, Aboriginal women have turned to the courts to advance their sex equality rights. This article reviews legal challenges brought under the Canadian Bill of Rights, *the* Canadian Charter of Rights and Freedoms, *and international human rights instruments. Drawing on her own struggle to have her children accorded Indian status, the author highlights discriminatory provisions that persist in* Bill C-31. *Finally, she discusses cases brought by Aboriginal, Inuit, and Métis women's organizations to recognize their right to participate in shaping policies and programs directed at them. Many claims have not succeeded, but the act of bringing legal challenges has itself facilitated political organizing and negotiation to achieve positive change. Litigation for equal rights is not a last resort, but an empowering element of the broad political, social, and legal struggle to eradicate sex discrimination against Aboriginal women.*

Introduction

Beginning in 1969, Aboriginal women have used Canadian courts to advance their sex equality rights, based first on the *Canadian Bill of Rights*[1] and, after 1985, on sections 15(1) and/or 28 of the *Canadian Charter of Rights and Freedoms*.[2] While the bid for sex equality in the courts has often resulted in adverse rulings, Aboriginal women and their organizations have made repeated attempts to place themselves on a level playing field with men and other Canadians. The broad struggle for recognition of their sex equality rights represents the effort by Aboriginal women to shed the shackles of oppression and colonialism.

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1. *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*]. Section 1 provides: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely ... (b) the right of the individual to equality before the law and the protection of the law."
2. *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 [hereinafter *Charter*]. Section 15(1) provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 28 provides: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

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: "[W]hen 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.[3] 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 constantly reinforce this systemic patriarchy, many in the Aboriginal communities now 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. Forty-three per cent of Aboriginal women live in poverty in Canada, not taking into account on-reserve poverty and poverty in the northern territories.[4] Aboriginal women are poorer than their male counterparts and other women. These simple facts reveal that the issues of poverty, rights, and governance are inextricably linked for Aboriginal women. The treatment of Aboriginal women as subordinates of men when issues of Indian status and property holding are at stake and their exclusion from participation as equals in decision-making about the governance of their communities have direct material consequences. Aboriginal women's legal and political inequality deprives them of social and economic benefits, affecting their right to enjoy an adequate standard of living. The quest of

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3. *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."

4. Lissa Donner, *Women, Income and Health in Manitoba: An Overview and Ideas for Action*, revised edition (Winnipeg: Women's Health Clinic, 2002), available online at <http://www.cwhn.ca/resources/women_poverty/summary.html> (date accessed: 4 August 2004).

Aboriginal women for sex equality is an all-encompassing struggle to establish their place as partners with men politically, economically, socially, spiritually, psychologically, and physically in their communities and in society.

By reviewing a number of cases since 1969, this article sets out the successes and failures of Aboriginal female litigants in their attempt to have the sex equality rights of Aboriginal women recognized. The litigants essentially put their faith in the justice promised by law and the courts. If a right is held but has been denied, there will be consequences for those responsible. The article traces their 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*,[5] 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.

Early litigants such as Jeanette Corbiere-Lavell in 1969 and Sandra Lovelace in 1979 chose to assert their sex equality rights under the *Bill of Rights* and were met with resistance by the predominantly male Indian leadership.[6] Litigation was seen as using the "master's tools"[7]—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.

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.[8] This effort by Aboriginal men has detracted

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5. *Charter, supra* note 2.
6. Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 McGill Law Journal 656 at 666, 669-72; see also "Indian Leader Predicts Violence If Women Push Too Far," *Globe and Mail* (22 February 1973) at W7; "Indian Act Defended, Said Discriminatory," *Globe and Mail* (27 February 1973) at 13.
7. "*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 Lord, *Sister Outsider: Essays and Speeches* (Trumansburg, NY: Crossing Press, 1984) 110 at 112.
8. In 1992, Canada provided funding for four male-dominated native organizations (Assembly of First Nations [hereinafter AFN], Native Council of Canada [hereinafter NCC], Métis National Council [hereinafter MNC], and Inuit Tapirisat) to participate in the Federal-Provincial

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).[9] 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 in more detail later in this article, Jeanette Corbiere-Lavell did it at the Supreme Court of Canada in 1969. Elder Mary Two-Axe Early did it in 1975 at the World Conference of the International Women's Year in Mexico City. Sandra Lovelace did it at the United Nations Human Rights Committee in 1981. Since 1989, I have played my part in *McIvor* v. *Canada (Registrar, Indian Affairs and Northern Development and A.G.)*—a case against sex discrimination in Bill C-31.[10] Gail Stacey-Moore and I took on the challenge in 1992 in the two Native Women's Association of Canada (NWAC) cases. Jane Gottfriedson and Teressa[11] Nahanee did it in the BC Native Women's Society (BCNWS) matrimonial property case. Rose Derrickson and Pauline Paul did it when they challenged their inability to obtain an equal division of matrimonial property when their marriages broke down. Martha Flaherty and now Veronica Dewar, leaders of Pauktuutit, the Inuit Women's Association of Canada, are doing it in the cases they have brought to the Federal Court regarding women's exclusion from decision-making about job-training funds. Métis leader Sheila Genaille of the Métis National Council of Women (MNCW) has been a litigant since 1998 against Canada and against

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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 the NCC were required to allot funds to the Native Women's Association of Canada [hereinafter 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 [hereinafter MNCW] in 1992 and allocated its $250,000 to the MNCW. Other national Métis women's groups received none of the funds.

9. Sanders, *supra* note 6, notes that federal funding patterns may have contributed to the male domination of aboriginal organizations. When the government began to extend funding to non-status groups in the 1970s, it insisted that women's groups "represent both status and non-status women" equally (*ibid.* at 667). This constraint "divided the organizations from the start and made agreement upon any controversy concerning status virtually impossible" (*ibid.*). When the NWAC brought its Charlottetown Accord cases in 1992, it alleged that the AFN and the MNC were male-dominated organizations. See also discussion in note 8.

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

11. Teressa's name is spelled "Teresa" in many court documents and "Theresa" in the Chatelaine article, *infra* note 27. 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.

patriarchy within the Métis community. It takes only one woman to put her name on the writ to get the courtroom ball rolling.

These Aboriginal women share a dedication to claiming their rights despite the threats, coercion, enticements, and violence heaped on them for daring to use the "master's tools" in their attempts to achieve collective and individual equality rights for women. For the women, to stand up in court is to be subject to the harshest treatment from their own communities locally, regionally, and nationally—be they Indian, Inuit, or Métis. It is a hard and lonely road, but sometimes a necessary one. Aboriginal women have stepped up their court strategies since the early 1990s, when they unsuccessfully brought the two NWAC cases. Even when they lost in court, they sometimes gained in the political arena. In all of these cases, litigation has represented a claim by Aboriginal women for the right to participate as equals in decision-making.

The *Charter* challenges of Indian, Inuit, and Métis women have generated positive changes in government policy since 1990, and, hopefully, these changes will increase as Aboriginal women continue their litigation and public strategies. As Gwen Brodsky notes, "[c]ourts can be an important venue for protest when dialogue with the Government breaks down."[12] For example, in the face of exclusion from government consultations with Aboriginal groups on programs, policies, services, and legislative amendments, Pauktuutit and the MNCW are using the courts to gain access for Inuit and Métis women. In these struggles, which are described in more detail later in this article, Aboriginal women are seeking from the Canadian government and from men in their own communities recognition 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, rather than social and economic, rights. In fact, all the cases involve issues of civil and political inequality as well as social and economic inequality. As noted earlier, 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 and social and economic rights.[13]

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12. Gwen Brodsky, "Charter Rights and Government Choices," in Margot Young, Susan Boyd, Gwen Brodsky, and Shelagh Day, eds., *Poverty: Rights, Citizenship, and Governance* (forthcoming 2005).
13. 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.

Aboriginal Women's Equality Cases

*Indian Status: Pre-*Charter *Challenges*

Jeanette Corbiere-Lavell

Court battles for Aboriginal women's sex equality rights began in 1969 when a young, married Lavell protested her loss of Indian status and band membership for marrying a non-Indian.[14] By 1969, the laws of Canada had been discriminating against Indian women who intermarried for a century. Yet no Indian woman before 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*,[15] but their non-Indian wives also had Indian status and band membership extended to them. Loss of Indian status and band membership for women who "married out" had become one of the patriarchal "Indian traditions" in Canada. 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.[16] An excellent example of the mobilizing effects of Aboriginal women's litigation, the high-profile *Lavell* 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, Lavell caused a storm of controversy among the Indian male leadership, including the National Indian Brotherhood (NIB), which was 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 Lavell.[17] In meetings held between the 1971 victory at the Federal Court of Appeal and the hearing at the Supreme Court of Canada, the Indian leadership remained convinced that, should Lavell's challenge to the discriminatory marriage provisions in the 1970 act prevail, it would mark

14. *Re Lavell and Attorney-General of Canada* (1971), 22 D.L.R. (3d) 182 (Ont. Co. Ct.) [hereinafter *Re Lavell*].
15. *Indian Act,* R.S.C. 1970, c. I-6 [hereinafter *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 [hereinafter *Indian Act* 1985], but was amended by Bill C-31 (discussed later in this article).
16. *Lavell* v. *Canada (A.G.)*, [1971] F.C. 347 (C.A.).
17. See note 8 and accompanying text.

the end to the special rights of all Indians conferred under the *Indian Act*.[18] Moreover, the government of Canada funded the interveners opposed to Lavell.[19]

In 1973, the Supreme Court of Canada restored the trial judge's decision,[20] in which a formal equality approach to the *Bill of Rights*[21] was used. The trial judge had compared married Indian women to Canadian married women and held that Lavell had equality of status with all other Canadian married females.[22] Under this logic, a woman derives her status from her husband, and, 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." In addition, the majority 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 American Act*.[23] Although Lavell had become the pariah of the organized Indian men's movement and lost her case in the Supreme Court of Canada, her cause 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*.[24] While surveying the position of women in Canadian society, the feminist movement in Canada became aware that Indian women were struggling under the yoke of paternalism, which was worse than that experienced by other women in Canada. At the Strategy for Change Conference held in Toronto in 1972, a resolution supporting the IRIW and inviting it to join the newly formed National Action Committee on the Status of Women was passed.[25] Bolstered by this feminist support, elder Two-Axe Early of the IRIW attended the

18. Rudy Taniel, "In One Corner, the Bill of Rights, in the Other, the Indian Act," *Globe and Mail* (22 February 1973) at W6; "Indian Groups to Be Consulted before Rulings," *Globe and Mail* (28 February 1973) at 10.
19. Many of the intervening organizations were federally funded as status organizations: Sanders, *supra* note 6 at 666. Further, some chiefs and other male leaders travelled to Ottawa at the public's expence for consultations: "Women Oppose Act's Discrimination," *Globe and Mail* (22 February 1973) at W7.
20. *Lavell* v. *Canada (A.G.)*, [1974] S.C.R. 1349 [hereinafter *Lavell* S.C.C.].
21. *Bill of Rights, supra* note 1.
22. *Re Lavell, supra* note 14.
23. *British North American Act, Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
24. Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) at 238 (Chair: Florence Bird).
25. Anne Molgat, "Herstory," available online at <http://www.nac-cca.ca/about/his_e.htm> (date accessed: 30 August 2004).

first World Conference on Women held in Mexico City in 1975.[26] At the conference, Two-Axe Early, a non-status Mohawk living on the Kahnawake reserve, 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.[27] In 1982, Two-Axe Early also appeared before the Sub-Committee on Indian Women and the *Indian Act* of 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.[28]

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.[29] 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 eventually she 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 that took place in July 1979 from Oka, Québec, to Ottawa, protesting sex discrimination in the 1970 *Indian Act*.

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26. There have been four world conferences to date: the 1975 UN World Conference of the International Women's Year in Mexico City and the Non-Governmental Organization (NGO)-related International Women's Year Tribune; the 1980 World Conference of the United Nations Decade for Women with the parallel NGO Forum, held in Copenhagen; the 1985 World Conference to Review and Appraise the Achievements of the UN Decade for Women with the parallel NGO Forum, held in Nairobi; and the 1995 Fourth World Conference on Women with the parallel NGO Forum on Women, held in Beijing. See generally Margaret Gallagher, *From Mexico to Beijing and Beyond: Covering Women in the World's News* (New York: United Nations Development Fund for Women, 2000), available online at <http://www.unifem.org/index.php?f_page_pid=75> (date accessed: 4 August 2004).
27. Theresa Nahanee, "Why Some Indian Women Are More Equal Than Others," *Chatelaine* (April 1976) at 28; see discussion regarding the spelling of Teressa's first name in note 11.
28. 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*, 32nd Parl., 1st Sess., No. 4 (13 September 1982) at 46.
29. 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, available online at <http://www.stthomasu.ca/~ahrc/origins.html> (date accessed: 30 August 2004). Documentation of the *Lovelace* complaint is archived at the New Brunswick Human Rights Commission, formed in 1985.

Since Lovelace had married and lost her Indian status before the *International Covenant on Civil and Political Rights (ICCPR)*[30] 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*. Yet the committee did find that section 12(1)(b) of the *Indian Act* violated Article 27 (the right to culture, religion, and language) under the *ICCPR*[31] because it resulted in an ongoing denial to Lovelace of access to her Maliseet language and culture, available only on her reserve in New Brunswick.[32]

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. This likelihood was underlined by the fact that in this same period, women acquired rights under new human rights instruments, building firmer foundations for their challenges to *Indian Act* discrimination. Canada ratified the *Convention on the Elimination of All Forms of Discrimination against Women* in 1981.[33] In addition, the process of patriation of Canada's constitution was well underway, with section 15—the equality rights provision of the *Charter*—to take effect in April 1985.[34] New sex equality rights for Indian women were thus visible on the horizon when Canada received the *Lovelace* 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* 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 minister of Indian affairs and northern development to call for special hearings by a parliamentary sub-committee into

30. *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) [hereinafter *ICCPR*].

31. *Ibid.* Article 27 provides: "In those States in which ... minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

32. *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 [hereinafter *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.

33. *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).

34. *Charter, supra* note 2. Section 32(2) provides that section 15 shall not take effect until three years after section 32 comes into force. This provided an opportunity for the federal and provincial governments to review their legislation for compliance.

Indian women and the *Indian Act*.[35] This concession to Indian women was part of Canada's agenda to study Indian self-government through the same parliamentary process. 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, which then proceeded to appoint the new Sub-Committee on Indian Self-Government.[36] 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, the Honourable David Crombie, was given a mandate to review the *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*.[37] The express intention of Bill C-31 was to eliminate sex discrimination. Under the 1985 *Indian Act* as amended, Indian women no longer lost Indian status upon marriage to non-Indian men.[38] Further, Bill C-31 reinstated Indian women who had lost Indian status and band membership under section 12(1)(b) of the 1970 *Indian Act*.[39] Also made eligible for reinstatement were their children, war veterans, university students, and other

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

36. House of Commons, *Minutes of Proceedings of the Special Committee on Indian Self-Government*, 32nd Parl., 1st Sess., No. 40, published separately as *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983) (Chair: Keith Penner). The Sub-Committee on Indian Women and the Indian Act had nine sittings, all in Ottawa, during September 1982. 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*, 32nd Parl., 1st Sess., No. 5 (20 September 1982) at 10. Its report, *supra* note 28, was forty-five pages long in both official languages. In contrast, the Sub-Committee on Indian Self-Government asked for an enlarged mandate to allow for more public hearings, travel, and paid staff. In December 1982, the House of Commons upgraded the sub-committee to a Special Committee and enlarged its order of reference to include eight matters recommended for further study by the Sub-Committee on Indian Women and the Indian Act, as well as to consider the March 1983 constitutional conference. The special committee held sixty public meetings, more than half of them outside of Ottawa, heard 567 witnesses, and travelled to Washington, DC, and New Mexico. Its final report was over two hundred pages long in one official language.

37. Bill 31, *An Act to Amend the Indian Act*, S.C. 1985, c. 27, reprinted in R.S.C. 1985, 1st Supp., c. 32 [hereinafter Bill C-31]. Section 4 of this act re-enacted sections 5 to 14 of the predecessor 1985 *Indian Act*, *supra* note 15.

38. This was accomplished by the repeal of section 12(1)(b) of the predecessor 1985 *Indian Act*, *supra* note 15. Bill C-31, *supra* note 37, also repealed the legislative requirement that an Indian woman transfer to her husband's band upon marriage. Under the 1970 *Indian Act*, *supra* note 15, Indian women who married Indian men from another band were automatically transferred to their husband's band list. After Bill C-31 became law, such women remained on their own band list, as did men who married them or married non-Indian women. The amendment, however, 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.

39. The reinstatement provisions are contained in section 6 of the 1985 *Indian Act*, *supra* note 15.

Indians who had been enfranchised under previous Indian acts with the consequential loss of Indian status.[40] 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 stop sex discrimination. A woman disenfranchised under section 12(1)(b) or its predecessors is entitled to be reinstated pursuant to section 6(1)(c) of the 1985 *Indian Act*, which provides a right of registration to "a person [who] was omitted or deleted from the Indian Register, or from a band list ... under ... paragraph 12(1)(b)." The children of a woman's section 12(1)(b) marriage are entitled, under section 6(2) of the 1985 *Indian Act*, to register as "person[s] one of whose parents is ... entitled to be registered under subsection (1)." Thus, both the previously disenfranchised mother and her children have a right to be registered under the 1985 *Indian Act*. However, no clearly defined right of registration was legislated for the next generation—that is, the grandchildren of women disenfranchised under section 12(1)(b). In fact the legislation effectively precludes registration of members of that generation who are not born to two section 6 parents.

The grandchildren of women reinstated pursuant to section 6(1) do not derive an entitlement to registration through their mother's section 6(2) status, as the mother is not a "person ... entitled to be registered under subsection (1)," as required by the language of section 6(2). A second-generation parent registered under section 6(2) has no right independent of marriage to another section 6 registrant to pass status to his or her children, and therefore the grandchildren of the woman disenfranchised under section 12(1)(b) will derive a right to be registered only if both of their parents are entitled to be registered under section 6. If one of the second-generation parents is entitled to be registered under section 6(1), the third-generation grandchild will qualify under section 6(2) as "a person one of whose parents is ... entitled to be registered *under subsection (1)*" [emphasis added]. If the parent is entitled to be registered under section 6(2), the grandchildren will qualify for registration under section 6(1)(f) as "person(s), both of whose parents ... are ... entitled to be registered *under this section*" [emphasis added]. Under the 1985 legislation, grandchildren who are the children of a marriage between a section 6(2) parent and a person with no right of registration are precluded from registration. Thus, it is likely that many of the grandchildren of women disenfranchised under section 12(1)(b) of the 1970 *Indian Act* and reinstated under the 1985 amendments will be part of a newly disenfranchised generation.[41]

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40. "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* 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.

41. Under the 1985 *Indian Act, supra* note 15, 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

Under the registration regime of 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 women's grandchildren do not have a right to Indian citizenship if their section 6(2) parent has not married another section 6 parent. This legislative disenfranchisement has important and far-reaching consequences, including exclusion from rights to the resources accompanying status. 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 all of their grandchildren, while grandfathers of their generation have an unequivocal right to pass Indian status to all of their grandchildren.[42]

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.[43] Superficially, the struggle against the impact of Bill C-31 may

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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. For comments 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), prepared for the AFN.

42. Under the 1985 *Indian Act*, *supra* note 15, the grandmother who married out could be reinstated under section 6(1)(c), even if not alive, and her daughter could be registered under section 6(2). If the grandmothers had brothers who married non-Indians, those men remained Indians and their wives obtained Indian status and band membership. Their children held full Indian status as if they were "full bloods." Under the new registration scheme, however, blood diminishes with each successive generation that "marries out." Cousins who are the grandchildren of men and women married prior to 29 July 1985, then, have different entitlements to Indian status. Indian men who "married out" pass their Indian status and band membership through two generations, while Indian women who "married out" can pass their Indian status and band membership to only one generation with certainty. See generally Native Women's Association of Canada, *Guide to Bill C-31: An Explanation of the 1985 Amendments to the Indian Act* (Ottawa: NWAC, 1986).

43. Section 12(1)(a)(iv) of the 1970 *Indian Act*, *supra* note 15, 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 that rule are entitled to registration under section 6(1)(c). The 1985 *Indian Act*, *supra* note 15, 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-

seem to be different from the fight that was waged by women such as Lavell and Lovelace against section 12(1)(b) of the 1970 *Indian Act*. In fact, it is still a struggle for sex equality for the women who lost status and band membership under section 12(1)(b) of the 1970 *Indian Act* and its predecessors. Now it is about their entitlement to pass their Indian status to their children and grandchildren on the same basis as their male counterparts.[44]

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off" generation arises from the maintenance of the historical distinction between non-Indian women who "married in" (who are not de-listed 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 like my son Jacob are affected by the new "double mother" clause because he has a mother and grandmother who married out. In contrast, children whose father and grandfather married out are "full Indians" and can pass their status to their children.

44. The 1985 *Indian Act*, *supra* note 15, is problematic in other ways as well. 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 born of such a relationship before 1985 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). As a consequence, only the females in this category have to consider the potential application of the "second-generation cut-off" to their children.

Section 10 of the 1985 *Indian Act* also limits the rights of reinstated Indians by giving bands increased authority to determine band membership. Membership 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. Prior to 1985, entitlement to band membership usually accompanied entitlement to Indian status. A major feature of section 10 is that Indian bands are given control of band 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, 35. In June 1995, the Canadian Human Rights Commission ordered the Montagnais du Lac Saint-Jean Band Council to pay damages totalling approximately $26 thousand 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" *[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," available online at <http://www.ainc-inac.gc.ca/pr/info/tir_e.html> (date accessed: 30 August 2004).

Charter *Cases*

Sharon Donna McIvor

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.[45] 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*. The *McIvor* case,[46] as it is known, 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. These children can neither be registered as Indians under the 1985 *Indian Act* nor attain band membership. After 135 years, it is finally time for Parliament to do the right thing—end sex discrimination now.

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 (CP),[47] but women either

45. On 23 September 1985, I applied to the registrar to be registered as an Indian pursuant to the 1985 *Indian Act*. I also applied for registration on behalf of my children, Jacob, Jaime, and Jordana. The registrar advised me that I was registered as an Indian under section 6(2) of the 1985 *Indian Act* and that my children had been denied registration on the basis that they could be registered only if both of their parents were registered. Letter from the Registrar (12 February 1987). Section 2(1) of the 1985 *Indian Act* defines "registrar" as "the officer in the Department [of Indian Affairs and Northern Development] who is in charge of the Indian Register and the Band Lists maintained in the Department."

46. *McIvor*, *supra* note 10.

47. Under both the 1970 *Indian Act* and the 1985 *Indian Act*, section 20(2) provides: "The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein." The Royal Commission on Aboriginal Peoples found that there was a general perception that women were not entitled to hold a certificate of possession despite there being no legislative

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 most reserve lands unless a father chose to give some of his land to his daughter(s).[48]

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)*,[49] in order to support her claim. The trial judge[50] 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 1970 *Indian Act*, which governs possession of Indian lands. The trial judge held that due to the paramountcy of federal over provincial law, he had no jurisdiction to apply the BC *FRA* provisions in relation to land on Indian reserves in the province. Before an Indian can pass on an interest in reserve land, permission of the minister is required.[51] In other words, while the British Columbia 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 where the court could not award an interest in reserve land under section 43 of the BC *FRA*, neither could it award compensation in lieu under section 52(2)(c) of the BC *FRA*.[52] The Court of Appeal agreed with the lower court's findings on paramountcy but held that compensation could be ordered in lieu of a division of property.[53]

In November 1986, the Supreme Court of Canada confirmed the decision of the BC Court of Appeal.[54] The court held that the BC *FRA* provisions for division

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prohibition: "In the past, the Department of Indian Affairs has [issued CP's] solely to the oldest male member of the family. This tradition has been carried over from European notions of land holding and succession and it has resulted in the dismantling of many Aboriginal systems." BC Native Women's Society, "Aboriginal Women and Divorce," (brief), in Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996), c. 2.

48 The practice of giving certificates of possession to men only has shifted somewhat, 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., 2nd Sess., No. 6 (15 September 2003), excerpted in Appendix 1.

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

50. The trial decision is unreported. This account of the trial judgment is from *Derrickson* v. *Derrickson* (1984), 9 D.L.R. (4th) 204 at 205-206 (B.C.C.A.) [hereinafter *Derrickson* BCCA].

51. The section provides that "no transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister." Section 24 remains unchanged in the 1985 *Indian Act, supra* note 15.

52. The section provides that the court may "order a spouse to pay compensation to the other spouse ... for the purpose of adjusting the division" of marital property.

53. *Derrickson* BCCA, *supra* note 50 at 211.

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

of matrimonial property upon divorce, "while valid in respect of other immovable property, cannot apply to lands on an Indian reserve."[55] The Supreme Court of Canada also affirmed that where equal division of property was not possible and assets could not be divided, a judge may award compensation for the purpose of adjusting assets between the spouses.[56]

Since *Derrickson* v. *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 the reserve. 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 had lived in the family home for sixteen years before their separation. All were members of the Tsartlip Indian Band. The matrimonial home was situated on the South Saanich Indian Reserve and was held by CP in the husband's name under section 20 of the 1970 *Indian Act*. In an earlier separation proceeding, Pauline had successfully applied for an interim order of occupation of the matrimonial home for herself and the children, as well a restraining order against her husband, preventing him from entering both the on-reserve and off-reserve homes.[57] In that proceeding, the judge had distinguished occupation from possession and held that awarding an order for interim occupancy in no way affected the husband's CP.[58] Subsequently, the parties made an unsuccessful attempt to reconcile. A new action under the BC *FRA* was filed in 1984. The BC Supreme Court held, as it had in 1982, that it had jurisdiction under the BC *FRA* to make an order for interim occupation on reserve land because interim occupation was distinguishable from, and did not affect, lawful possession under a CP.[59] Pauline's husband successfully appealed this order to the British Columbia Court of Appeal.[60] There was a strong dissent by Justice William Esson.

The Supreme Court of Canada heard a further appeal and held against Pauline in March 1986.[61] The court did not consider sex equality rights under section

55. *Ibid.* at 296.
56. *Ibid.* at 304.
57. *Paul* v. *Paul* (1982), 141 D.L.R. (3d) 711 (B.C.S.C.) [hereinafter *Paul* BCSC].
58. *Ibid.* at 714.
59. *Paul* v. *Paul* (1984), 9 D.L.R. (4th) 220 at 223 (B.C.S.C.).
60. *Paul* v. *Paul* (1984), 12 D.L.R. (4th) 462 (B.C.C.A.).
61. *Paul* v. *Paul*, [1986] 1 S.C.R. 306.

15(1) of the *Charter,* due to its coming into force in 1985 after the original litigation and appeal. Although Pauline sought an order of interim occupancy, rather than a division of real property, the Supreme Court of Canada rejected the distinction.[62]

Since the *Derrickson* and *Paul* v. *Paul* cases were decided, no similar case has been heard by the Supreme Court of Canada, and so no opportunity has arisen to raise *Charter* arguments at this level. 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.[63] 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 some federal legislation guaranteeing them access to matrimonial property division similar to that for all other Canadians.[64] The UN Committee on Economic, Social and Cultural Rights has called upon Canada to address this situation.[65]

British Columbia Native Women's Society

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[66] Nahanee, and Jane Gottfriedson.[67] In their statement of claim, the plaintiffs argued that the Framework Agreement on First Nations Land Management[68] was contrary to

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

63. 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).

64. Yet see online at <http://www.ainc-inac.gc.ca/wige/mrp/index_e.html> (date accessed: 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) (Chair: Hon. Shirley Maheu), available online at <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/Com-e/huma-e/10app2e.pdf?Language=E&Parl=37&Ses=2&comm_id =77> (date accessed: 4 August 2004).

65. *Concluding Observations of the U.N. Committee on Economic, Social and Cultural Rights, Third Periodic Report: Canada*, UN ESCOR, 1998, 57th Mtg., UN Doc. E/C.12/1998/Add.31 at para. 29, 41, available online at <http://www.unhchr.ch/tbs/doc.nsf/0/c25e96da11e56431802566d5004ec8ef?Opendocument> (date accessed: 30 August 2004): "The Committee notes that Aboriginal women living on reserves do not enjoy the same right as women living off reserves to an equal share of matrimonial property at the time of marriage breakdown ... The Committee calls upon the State party, in consultation with the communities concerned, to address the situation described in paragraph 29 with a view to ensuring full respect for human rights."

66. With respect to this name, see explanation in note 11.

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

68. See the Framework Agreement of First Nation Land Management, available online at <http://www.fafnlm.com/LAB.NSF/39e36a26f6235821852568c3005dc7af/c367db5e6523f58b852568e7006ed01b?OpenDocument> (date accessed: 4 August 2004).

sections 7 and 15(1) of the *Charter*[69] and in breach of the Crown's fiduciary duty, in that it failed to make provision for the equal treatment of Indian women on reserves in regard to matrimonial property rights. 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 Ministry of Indian Affairs and Northern Development, after the introduction into Parliament of the *First Nation Land Management Bill*, which was enacted as the *First Nations Land Management Act* (*FNLMA*).[70] 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 relationship breakdown under the *FNLMA* and the Framework Agreement on First Nations Land Management.

The federal government brought an unsuccessful motion to strike out portions of the statement of claim in December 1998.[71] 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. He held that "the fiduciary duty owed by the Crown to Indians is still in a state of flux and evolution"[72] and 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."[73] Hargrave P. also held that "there is an arguable case that the Crown has the discretion and power to rectify the present situation, can unilaterally exercise the power to affect the legal and practical interests of both married and marriageable Indian women living on reserves and the potential beneficiaries of all of this are in a particularly vulnerable position."[74] 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."[75] Hargrave P. also noted that Indian women are particularly vulnerable to the discretion of the Crown.[76] 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

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69. See *Charter*, *supra* note 2, for the text of section 15(1). Section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
70. 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 [hereinafter *FNLMA*].
71. *BCNWS*, *supra* note 67.
72. *Ibid.* at 317.
73. *Ibid.* at 318.
74. *Ibid.*
75. *Ibid.* at 320.
76. *Ibid.* at 319.

[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."[77]

The Crown, supported by the band interveners,[78] 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. said, however, that this position missed the point that "[t]he 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."[79]

The *FNLMA* became law in June 1999, and at least thirty-four Indian bands are developing their community land management codes.[80] The *FNLMA* requires that division of matrimonial real property must be dealt with in any land management code. However, significantly, a further requirement that any such rules and procedures must not discriminate based on sex is found only in the framework agreement itself.[81] The argument made by the BCNWS in this case appears to have had a positive influence on the framework agreement at least.

77. *Ibid.* at 322.

78. In *British Columbia Native Women's Society* v. *Canada*, [1998] F.C.J. No. 108 (T.D.) (QL), the Squamish Nation unsuccessfully applied to the court to be joined as a defendant and further argued that the plaintiffs lacked standing. In denying the motion, Wetston J. stated: "I do not believe it is appropriate for this Court to entertain an argument regarding the standing of a party to bring this action as against the Crown. It is for the defendant to make such an argument, and Counsel for the defendant made no representations whatsoever on this motion" (at para. 13).

79. *BCNWS*, *supra* note 67 at 323.

80. The Framework Agreement on First Nations Land Management website currently lists fourteen "member communities" as operational (with land codes ratified) and twenty as developmental, available online at <http://www.fafnlm.com/LAB.NSF/vSysSiteDoc/Members+Communities?OpenDocument> (date accessed: 30 August 2004). See Appendix 2.

81. *FNLMA, supra* note 70 at s. 6(1)(f), 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."

Right to Participate in Decision-Making

NWAC, 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,[82] which, had it been ratified, would have included recognition of the Aboriginal right to self-government. 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 Métis National Council (MNC), who received $10 million from the federal government to fund their negotiations, met with government representatives to finalize the wording of the Charlottetown Accord. While the accord dealt mainly with relations between Canada and the province of Québec and federal-provincial-territorial jurisdiction, it also included proposed wording on changes to section 25 of the *Charter*[83] and section 35 of the *Constitution Act, 1982*.[84] The NWAC, Pauktuutit, and the MNCW were excluded from these constitutional talks beginning in 1984 and ending in 1992.[85]

As with other women in Canada for whom discrimination and poverty are central facts of life, all Aboriginal women's organizations were faced with exclusion in the political domain. The NWAC took the adjudicative challenge in

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82. The Charlottetown Accord was a constitutional reform agreement. Following the failure of the Meech Lake Accord in 1990, a series of deliberations took place on the future of confederation. This led to a federal report (Canada, *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa: Special Joint Committee of the Senate and the House of Commons, 1992)), and negotiations among the federal government, the provincial governments, territorial governments, and representatives from the AFN, the NCC, the Inuit Tapirisat of Canada, and the MNC. These negotiations resulted in what is now referred to as the Charlottetown Accord, which was concluded on 28 August 1982. An unsuccessful referendum on the Charlottetown Accord was held on 26 October 1992. The accord is set out in the appendices to Kenneth McRoberts and Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993). For further discussion of the constitutional reform process, see Peter Hogg, *Constitutional Law of Canada*, student edition 2003 (Scarborough, ON: Thomson-Carswell, 2003) at 61-102.

83. *Charter, supra* note 2. Section 25 provides: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

84. *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35 provides: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

85. See also the discussion in note 8.

1992. To gain access to a constitutional meeting anywhere in Canada in 1992, delegates were given "passes" to the meeting rooms by the conveners 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.

As a result, 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 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.[86] 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.[87] After its court loss, it too was given its own seat at the constitutional table. Perhaps the same approach would have worked for Aboriginal women: go to court, lose, and get our seat!

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86. 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. See note 82 for an explanation of the 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, which was considered after referendum on Charlottetown Accord, dismissed on grounds of mootness). In a later action, Pauktuutit 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 excluding 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). On motion from the Crown, 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.

87. *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.

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 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 time as the NWAC received equal funding and the right to participate in the review process on equal terms.[88] 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."[89] This major hurdle in *Native Women's Association of Canada* v. *Canada* (*NWAC*)[90] could not be bridged—the evidence was not successfully brought forward, to the severe disadvantage of the plaintiffs. The AFN obtained intervener 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 dissenting opinion, 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*."[91]

Within a year of losing the case before the Supreme Court of Canada, 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. Margot Young has stated that "[t]he *Charter* and its equality rights stand out as a beacon in a dark and inhospitable political landscape."[92] This observation has certainly been true for Aboriginal women. While still fighting for its cause through political

88. *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*.

89. *Native Women's Association of Canada* v. *Canada*, [1994] 3 S.C.R. 627 at 657-58, Sopinka J. [hereinafter *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 Social and Economic Rights: The Right to Legal Aid as a Case Study," in Margot Young, Susan Boyd, Gwen Brodsky, and Shelagh Day, eds., *Poverty: Rights, Citizenship, and Governance* (forthcoming).

90. *NWAC* SCC, *supra* note 89.

91. *Ibid.* at 667.

92. Margot Young, "Why Rights Now? Law and Desperation," in Margot Young, Susan Boyd, Gwen Brodsky, and Shelagh Day, eds., *Poverty: Rights, Citizenship, and Governance* (forthcoming).

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 also arose 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[93] 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.[94] Aboriginal people at the community level voted "No" to the Charlottetown Accord in very high numbers. In northern Ontario, for example, 80 per cent of the Aboriginal community voted against the Charlottetown Accord.

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.[95] Whenever Canada introduces legislation to give Indians more control over Indians and lands reserved for Indians, the *Charter* is there, ensuring that Aboriginal women are no less protected in their dealings with delegated Indian governments than they are in their dealings with the federal government. Without doubt, the challenge of the NWAC, while unsuccessful in court, was nonetheless 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.

At the current time, an ongoing challenge is to ensure that Aboriginal women's *Charter* protections against federal government discrimination are not diminished through the process of the federal government's delegation of responsibilities to First Nations governments. When the federal government delegates its responsibilities to First Nations governments, it expects to shield itself from charges of discrimination brought by First Nations women. This approach is problematic. The point of ensuring that the *Charter* applies to First Nations governments is not to allow the federal government to escape from accountability under the *Charter,* but rather to ensure that both levels of government are accountable.

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93. Rene Norman Nahanee is an independent film producer and member, Squamish Nation, North Vancouver, British Columbia. The media advertisement was televised coast to coast.

94. 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.

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

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

In 1999, Pauktuutit, the IWA, and its president Veronica Dewar brought a court action alleging that the Human Resources Development Canada (HRDC) discriminated against Inuit women and Pauktuutit by signing multi-million 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 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 funded under the AHRDS. Two similar cases were brought by the BCNWS and its president, Jane Gottfriedson. Hargrave P. dealt with the Pauktuutit and BCNWS cases together.[96] In June 2001, on defendant's motion to strike portions of the statement of claim for want of a reasonable cause of action, 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."[97] 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.[98] 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*.[99]

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

96. *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 in its entirety) [hereinafter *BCNWS* 2001]. 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 that program had been replaced by the AHRDS: *British Columbia Native Women's Society* v. *Canada*, [2000] F.C.J. No. 588 (T.D.) (QL).

97. *BCNWS* 2001, *supra* note 96 at 224.

98. *Ibid.* at 231.

99. *Ibid.*

into account the fact that the Supreme Court of Canada has "recognized as an important aspect of section 15 of the *Charter* the protection of both individuals and groups who may be vulnerable or disadvantaged."[100]

The Pautkuutit and BCNWS cases are still before the courts. A similar case brought by urban Aboriginal people in Winnipeg and Toronto has already been decided in favour of the section 15 *Charter* rights of urban Aboriginal people.[101] At trial, Justice François Lemieux held that the plaintiffs had been discriminated against compared to on-reserve Indians.[102] The court ordered the department to eliminate the discriminatory effect by providing community control over training programs.[103] 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."[104] While Pauktuutit and the BCNWS have yet to see if the courts will ultimately uphold their claim that women, not men, should administer job creation and training programs for Inuit and Aboriginal women, Canada holds to the paternalistic assumption that funding men includes funding women.

MNCW and Its 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,[105] 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. As a result, all three national Aboriginal women's organizations found themselves underfunded in the constitutional process[106] and without their own seat at the constitutional table. The MNCW refused to take part in the *NWAC* court case that challenged 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 male Aboriginal organizations, including the MNC, the AFN, the NCC/Congress for Aboriginal Peoples (CAP), and the ITC (now Inuit Tapiriit Kanatami [ITK]). Added to this list by 1998 was the NWAC.

From 1993 to 1998, the NWAC enjoyed a recognition denied to both the Inuit and Métis women. This recognition included sharing in the funding arrangements

100. *Ibid.* at 233.
101. *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.) [hereinafter *Ardoch*].
102. *Ibid.* at 389-90.
103. *Ibid.* at 398.
104. *Ibid.* at 395-96.
105. See the discussion on the accord in note 82.
106. 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.

provided under the AHRDS and its predecessor program. Under this program and its predecessor, Canada signed multi-million 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, Inuit regional organizations for Inuit, and 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 decided to challenge 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.[107] 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 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."[108] 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."[109] The matter is still before the courts. The struggle of Sheila Genaille and the MNWC for representation and inclusion continues.

Conclusion

In 1969, Jeanette Corbiere-Lavell began the struggle by Aboriginal women for equality in all fields by entering the courts to fight 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. Pauktuutit gained its own seat with federal,

107. *Métis National Council of Women* v. *Canada*, [2000] F.C.J. No. 62 (T.D.) (QL).
108. *Ibid.* at para. 2.
109. *Ibid.* at para. 3.

provincial, and territorial ministers of Aboriginal affairs and with the five recognized Aboriginal representative organizations in October 2002. The NWAC, Pauktuutit, and the MNCW realized that it was not only neo-colonial Aboriginal male leadership that suppresses women within the community but also the government of Canada that plays 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 extreme 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*, and *NWAC* 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. This fact has forced Aboriginal women 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, "[i]t 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."[110] The Aboriginal women's movement since the 1970s, along with its successes and failures in the courts and on the streets, 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 of 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

110. Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship," in Margot Young, Susan Boyd, Gwen Brodsky, and Shelagh Day, eds., *Poverty: Rights, Citizenship, and Governance* (forthcoming).

been "tiny" has not stopped Aboriginal women—if the tiniest victory can lift up the hands of Aboriginal women here and there, it is a beginning.

Appendix 1: Certificates of Possession

In 2003, the Standing Senate Committee on Human Rights discussed the gendered practice of issuing certificates of possession:[111]

Senator Jaffer: "Are certificates of possession or occupation now issued in joint names if the people are married, or is it automatically still in the name of the husband? I want to understand the history. It was in the name of the man normally, and I know the history, it was the same for all women. However, has there been a change in practice?"

Mr. Larose: "In some bands, depending on the advancement of the band—in most cases in the past, the common practice was for the lands to be allotted to the male member only. This has evolved in some communities. Houses are being built and often the two parties participate in paying for it, paying the mortgage. Given the new mortgage availability reserve, there is more and more of a trend to have both names on the certificate of possession.

...

There are two ways this is done—joint tenancy and tenancy in common. In joint tenancy, a house automatically reverts at death to the surviving joint tenant. In tenancy in common, it goes to your heirs. Basically, that is the difference."

Mr. Kipping: "We have done some work in this area. Of the 40,520-plus reported active certificates of possession we currently have, over half, 54 per cent, belong to male possessors; 46 per cent are in the name of the female. As well, many of them are in joint tenancy. An increasing number of First Nations are allocating certificates of possession in joint tenancy now."

111 House of Commons, *Minutes of Proceedings and Evidence of the Standing Senate Committee on Human Rights*, 37th Parl., 2nd Sess., No. 6 (15 September 2003), available online at Parliamentary Internet <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/06ev-e.htm> (date accessed: 30 August 2004).

Appendix 2: Land Codes

This issue was raised by the Senate Standing Committee holding hearings on matrimonial property on Indian reserves. One senator stated to witnesses that there were now as many as forty Indian bands using the legislation in an attempt to put in place their own land management code. Both Sharon McIvor and Teressa Nahanee (for the BCNWS) appeared before that Senate Committee to make presentations.[112]

Mr. Nault: "The First Nations Land Management Act, which is a mechanism of section 91.24, allows First Nations, after they develop their land codes, to include the matrimonial property right segment within the land code. Only four codes have been developed since that legislation passed in 1999, so we have opened up the First Nations Land Management Act to a rotating 30 every two years. We have approximately 100 First Nations interested in entering into the First Nations Land Management Act. It requires that the matrimonial property rights portion be included. That is one solution. However, at the rate we are going, it will take many years, and there may be gaps within that structure. There is one area where we tried to develop some policy to improve our abilities to deal with the individual rights in a more traditional and collective way with the First Nations involved. You may want to have those communities come to talk about some of their codes and their solutions."

112. House of Commons, *Minutes of Proceedings and Evidence of the Standing Senate Committee on Human Rights*, 37th Parl., 2nd Sess., No. 5 (18 June 2003), available online at <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/05ev-e.htm> (date accessed: 30 August 2004).