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CONSTRUCTING CANADIAN IDENTITIES

Kenneth McRoberts

The theme of "constructing Canadian identities" is an especially provocative one, suggesting that identities result from a deliberate process. In popular writing, there often is a sense that identities emerge in some spontaneous fashion through which peoples finally become conscious of their existence. Yet, social scientists have long established that the rise of new identities results from a conscious act of creation.

All the elements that make up a collective identity, including the definition of the collectivity itself, reflect choices and emphases. A leadership must define criteria for membership in the group and designate the central values which distinguish a collectivity. And it must devise a strategy through which the would be people can pursue its collective interests and maximize its values. None of these matters is self-evident.

If they are to be adopted, identities cannot be constructed from thin air. They must have a certain popular resonance. They must stress values, qualities; experiences that the members of the would be collectivity do seem to share. But, in the last analysis they are indeed constructed.

What is special about contemporary Canada is the role which *governments* have played in constructing identities. The case of Quebec in the 1960s is well-known. Clearly, the Liberal government of Jean Lesage played a central role in articulating and establishing a new distinctly Québécois identity. Among the French-speakers of Quebec, nationalism was not new. A coherent nationalist ideology can be traced back to the early 19th century. But a nationalism based on Quebec, as opposed to French-Canada, was new.

In this paper, I would like to develop the ways in which *English Canada* (or "Canada Outside Quebec")¹ has become increasingly wedded to an identity, a *Canadian* identity, that was constructed by a government, the *federal* government. More specifically, under the leadership of Pierre Elliott Trudeau the federal government consciously sought to define and institutionalize a new Canadian identity. In fact, it is hard to imagine a more deliberate, conscious act of identity construction. This is probably the clearest instance in Canadian history. It also may be one of the most successful — even if only *half* successful.

Moreover, this attempt at identity construction is closely linked to the Quebec case of identity construction, since it emerged from an effort to define a counter-identity to the Quebec identity. The key elements of the identity clearly reflect this intent. Yet, there is some irony here: despite the fact that it was constructed for this purpose, this identity has had an enormous impact, not on Quebec, where it has been largely dismissed, but in English Canada.

THE TRUDEAU GOVERNMENT'S CONSTRUCTION OF A NEW CANADIAN IDENTITY

Within this new Canadian identity, there are at least five discrete components: official bilingualism; a charter of rights; multiculturalism; absolute equality of the provinces and reinforcement of national institutions. Each of these elements of Canadian political nationality can be directly traced to the fundamental objective of defeating the Quebec independence movement.

Official Bilingualism

Through official bilingualism the Trudeau government sought to establish the myth that the French language, and French-speakers, were present throughout Canada. Demographically, this manifestly is not the case, and never has been. The use of French has always varied enormously from province to province. Only in Quebec does the majority (82%) use French; the next largest Francophone proportion, New Brunswick's, is only 31%. Moreover, in all provinces but Quebec and New Brunswick assimilation has been very high. As a result, in most provinces the proportion of the population which uses primarily French at home is now below 3%.² Nonetheless, official bilingualism gave French the same formal status as English throughout the country, at least for federal purposes, however marginal it might be to day-to-day life.

Official bilingualism thereby promised to nullify Quebec's claim to distinctiveness on the basis of language by making all of Canada like Quebec. Canada as a whole, rather than just Quebec, would be the home of Francophones. As Trudeau declared in 1968:³

[I]f minority language rights are entrenched throughout Canada then the French Canadian nation would stretch from Maillardville in BC to the Acadia community on the Atlantic Coast Quebec cannot say it alone speaks for French Canadians ... Mr. Robarts will be speaking for French Canadians in Ontario. Mr. Robichaud will be speaking for French Canadians in New Brunswick, Mr. Thatcher will speak for French Canadians in Saskatchewan. Nobody will be able to say, "I need more power because I speak for the French Canadian nation."

The Charter of Rights and Freedoms

Reinforcement of the status of French was, in turn, the central purpose of the second element of the Trudeau government's pan-Canadian counter identity to Quebec's: an entrenched bill of rights. The *Charter of Rights and Freedoms* deals with many other rights than linguistic ones: political, legal,

mobility, social, and so on. But language rights clearly were its *raison d'être*.

Trudeau acknowledged this when in the fall of 1980, having released his project for constitutional revision, he addressed the Quebec City *Chambre de commerce*. He explained that the entrenchment of language rights alone would have provoked English Canadian cries of "French Power;" other rights had to be added to the project.⁴ For that matter, federal priorities are clearly reflected in the fact that the provision for minority-language education rights is the only section of the *Charter* not to be subject to the notwithstanding clause, along with the mobility provision, and, thankfully, the requirement of elections every five years (along with the various interpretive clauses).

Multiculturalism

The Trudeau government's adoption of a policy of multiculturalism often is seen simply as a response to the demands of Canadians whose origins were neither British or French. Many of their leaders campaigned against the concept of biculturalism, which the government of Lester B. Pearson had enshrined in 1963 through the creation of the Royal Commission on Bilingualism and Biculturalism. Contending that it necessarily excluded their components of the population, they argued for a more inclusive term. But the Trudeau government clearly had an additional purpose in rejecting biculturalism for multiculturalism: by recognizing a multitude of cultures, multiculturalism could rein in the notion of duality and nullify Quebec's claim to distinctiveness on the basis of culture.

From the moment the B&B Commission was created, Trudeau and his fellow Quebec anti-nationalists had been deeply suspicious of the notion of biculturalism. Their reasoning can be seen in a *Cité libre* assessment of the B&B Commission's Preliminary Report:⁵

[The government and the Commission] voluntarily abandon the linguistic dimension (which provides some concepts which are nonetheless applicable) so as to slip into "biculturalism" and to talk of equality of citizens in as much as they participate in one of two cultures And what is the meaning in practice of a Confederation which "develops according to the principle of equality between the two cultures?..." the idea of equality between peoples underlies the concept of national sovereignty, and it would have been interesting to see how the Commission intends to interpret its mandate without being led necessarily to propose the division of Canada into two national states.

In presenting his government's policy of multiculturalism in 1971, Prime Minister Trudeau was explicit in his rejection of biculturalism. He declared:⁶

The very title of the Royal Commission whose recommendations we are now in the process of implementing seems to suggest that bilingualism and biculturalism are inseparable. But the term biculturalism does not accurately depict our society; the word multiculturalism is more precise in this respect.

In effect, then, French Canada's language may be one of two official languages, but its culture is only one of a vast multitude of "cultures," many of which have at best a very nebulous existence.

The Equality of the Provinces

The Trudeau government's fierce commitment to the principle of absolute equality among the provinces also was clearly rooted in its determination to counter the claims of Quebec nationalists.

Insisting that "federalism cannot work unless all the provinces are in basically the same relation to the central government,"⁷ Trudeau declared on one occasion that, "I think particular status for Quebec is the biggest intellectual hoax ever foisted on the people of Quebec and the people of Canada."⁸

Reinforcement of National Institutions

Finally, this insistence on a uniform federalism was coupled with a determination that the federal government play a significant role in the lives of all Canadians (Québécois included), whether it be through programmes of direct transfer payments, such as Family Allowances, or major national undertakings, such as the National Energy Program. From the late 1960s onwards Ottawa was greatly concerned that its actions be "visible" to Canadians. As Anthony Careless has noted:⁹

[The] growing desire at Ottawa to secure a greater visibility of federal policies [can be seen as stemming] *in the first instance*, from the increasing strength of and effectiveness of Quebec's separatist claims and, in later years, from the growing belligerency of rich provinces...

CONTRADICTORY IMPACT OF TRUDEAU GOVERNMENT'S "COUNTER-IDENTITY"

Clearly, each of these elements of a new "pan-Canadian" identity has had a certain resonance in English Canada. Many English Canadians have embraced them as the basis of their own conception of Canada, sometimes transforming them somewhat so as to better accord with English Canadian social reality. Ironically, this new pan-Canadian identity has fared much less well in French Quebec, the population for which in fact it had been designed. By and large, Québécois have remained

indifferent to these new principles of Canadian political life. As a consequence, rather than leading to national integration, federal dissemination of this new "pan-Canadian" identity has driven Canadians further apart.

Official Bilingualism

Official bilingualism is perhaps the least securely established as a political principle in English Canada. Nonetheless, support for it has been manifested in a variety of ways. For instance, English Canadian reaction to Bill 178 reflected, at least in part, a commitment to the notion that linguistic justice means the official equality of both languages within the same territory. For a good number of English Canadians Quebec was breaking the central element of a contract into which it had entered with the rest of the country.

The attachment of many English Canadians to official bilingualism as a central tenet of Canadian nationality can also be seen in the way in which they have adapted it so as to make it part of their own social reality: through French-language immersion. Acquisition of bilingualism was not a central theme of the deliberations and recommendations of the B&B Commission; they were much more concerned with the ability of Canadians to live in their first languages. There are many factors behind the remarkable growth in French-language immersion programs outside Quebec over the last three decades. But a major one clearly is the belief of a good number of English Canadians that part of their responsibility as Canadians is to ensure that their children acquire a knowledge of the other official language. In effect, they are seeking to apply in their personal lives, or at least those of their children, this new principle of Canadian nationality.

For their part, Quebec Francophones have resisted these developments. They may generally support official bilingualism in federal institutions but clearly would not want the principle applied to the Quebec government, as is demonstrated by their widespread support for both Bill 101 and Bill 178. Nor has the popularity of French immersion in English Canada led Quebec nationalists to drop their opposition to English immersion for Francophone children in Quebec.

The Charter of Rights and Freedoms

Most commentators agree that the *Charter* has had a profound impact on the political culture of English Canada. A variety of far-reaching effects have been ascribed to it. It has heightened public sensitivity to conventional individual rights. It has strengthened the conviction that a wide variety of groups are entitled to rights, in the process mobilizing the members of these groups to defend the *Charter* and to seek to strengthen its application. More generally, it is presumed that the *Charter* has led people to conceive of Canadian society itself as a composite of groups, whose relative status is delineated in the *Charter*. Finally, through entrenching both individual and group rights the *Charter* is believed to have expanded the meaning of Canadian

citizenship, in the process providing a new focus for Canadian nationalism.¹⁰

On the other hand, the *Charter* clearly has not acquired the same sanctity in Quebec. Not only did Robert Bourassa have widespread support for his use of the notwithstanding clause to counter the Supreme Court's decision on "the sign law"¹¹ but the ostensibly federalist Quebec Liberal Party adopted the Allaire Report without modifying its recommendation that Quebec should constitutionalize its own charter, and that appeals from Quebec courts to the Supreme Court should be abolished.¹²

Multiculturalism

Just as with official bilingualism, the principle of multiculturalism continues to encounter opposition in English Canada. Nonetheless, it has acquired strong bases of support among precisely the parts of English Canada that could not be easily accommodated within the notion of biculturalism. Clearly, the initial adoption of multiculturalism did respond to strong pressures from within English Canada, even though I argue that more was involved. These pressures have only grown over the years as Canadian society has itself become more diverse.

To be sure, by combining bilingualism with multiculturalism the federal government created a certain tension. Ottawa committed itself to support "all cultural groups with a demonstrated will to develop," yet under bilingualism was committed to support of only two languages. What is the logic of supporting a cultural group and not its language? Many of the advocates of multiculturalism have seized on this contradiction to secure state support for "non-official languages;" and have met with a certain success.

Not surprisingly given its origins, the federal government's notion of multiculturalism has been firmly resisted in Quebec. While Québécois may be prepared to support application of the principle within Quebec, as with the Quebec government's program of "interculturalisme," they have firmly resisted any notion of seeing Quebec's place in Canada within these terms.

Equality of the Provinces

Clearly, the notion of absolute equality of the provinces has become established as a preeminent principle in English Canada. Not only has it become the primary basis for resisting Quebec's pretensions to distinctiveness, but it has been used by Western Canadian and Atlantic Canadian provinces against Ontario as well. In the process, arrangements that even the Trudeau government had been prepared to live with became unacceptable. For instance, at the Victoria Conference all English Canadian provinces accepted a constitutional amendment formula which would have guaranteed a veto to Ontario and to Quebec, and to no other province. By the mid-1970s this was no longer acceptable. British Columbia declared that as a fifth region it too should have a veto. Alberta proposed that *all* provinces should have a veto. The principle of equality among the provinces was reiterated at an interprovincial meeting in Edmonton. By the

same token, it is an integral element of proposals for "Triple E" Senate reform.

It goes without saying that Quebec Francophones have remained as committed as ever to the belief that theirs is a province unlike the others, even a nation.

National Institutions

In recent years, there have been several demonstrations of strong English Canadian commitment to the defense or reinforcement of national institutions. In each case, this has meant taking positions that were rejected in Quebec.

The Free Trade Agreement was opposed by the majority of English Canadians, many of whom feared that national programs would be endangered; it had overwhelming support in Quebec.

English Canadian opposition to the Meech Lake Accord was in part based on fear that the provinces would assume too much power over the Senate and the Supreme Court, and that the federal spending power would be undermined. All these arguments were firmly rejected in Quebec.

Finally, within English Canada national institutions have become the new focus for schemes to resolve regional grievances; especially in the case of Senate reform. In Western Canada one finds little of the 1970s agitation to devolve powers to the provincial government so that they can better defend regional interests. Now the concern is for better regional representation at "the centre." For their part, Quebec nationalists remain as focused as ever on strengthening the powers of the government of Quebec.

In sum, over recent years English Canadians have displayed a much clearer sense of a Canadian identity than has been the case for a long time. By and large, it derives from the pan-Canadian "counter-identity" which the Trudeau government constructed in its effort to defeat Quebec nationalism. However, this identity does not appear to be shared by the majority of Quebec Francophones.

CONCLUSIONS

A first conclusion to be drawn about this new pan-Canadian identity is that it has greatly complicated the arrangement of any accommodation of Quebec's constitutional demands. After all, this pan-Canadian identity was constructed precisely to exclude Quebec's. During the 1960s English Canadian intellectual and political elites were quite prepared to examine such notions as "two nations" and "opting out" by Quebec from national programs. For instance, the Liberal government of Lester Pearson not only gave the B&B Commission a mandate to determine the conditions necessary to create "an equal partnership between the two founding races"¹³ but allowed Quebec to "opt out," with compensation, from a large number of federal programs. By the late 1980s, even the essentially symbolic "distinct society" clause of the Meech Lake Accord was unacceptable to most English Canadians.

A second point to be noted is that this "pan-Canadian" identity is very much a top down identity, designed and disseminated by government officials. One might wonder what would be the elements of a more popularly derived identity for English Canada. The network of social movements which formed the anti-free trade coalition of the late 1980s points to some interesting possibilities.

Finally, it is exceedingly difficult to address the Aboriginal question within such a resolutely liberal vision of Canada. Its logic was clearly revealed in Trudeau's initial and widely rejected policy proposal for Native peoples: elimination of any distinctive status or treatment. Nonetheless, English Canada has finally recognized that the question must be addressed. Within the Charlottetown Accord, Aboriginal culture stood as the basis for not only creation of a new level of government but corporate representation within national institutions. Does this require a rethinking of fundamental categories? After all, in the effort to deny Quebec's pretensions, the new Canadian identity had been designed to minimize the role of culture as a basis for political institutions. Can it accommodate the needs of another culturally distinctive collectivity — or collectivities?

Clearly, the process of construction and reconstruction of identities for English Canada, and Canada, is bound continue. An interesting question for the coming years is whether governments will lose some of the dominance of this process in favour of other more popularly based leadership groups. English Canada's recent rejection of the Charlottetown Accord perhaps has set the stage for a new period of change and creativity.

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Author's Note:

*This paper is based upon a presentation to the conference on "Canadian Identities in an Era of Globalization" sponsored by the Canadian Studies Program and Centre for Constitutional Studies, University of Alberta, February 4-5, 1993. Parts of that presentation were drawn from Kenneth McRoberts, *English Canada and Quebec: avoiding the issue*, Sixth Robarts Lecture (North York: Robarts Centre for Canadian Studies, York University, 1991). The underlying argument will be more fully developed in *Separate Agendas: English Canada and Quebec* (Toronto: McClelland & Stewart, forthcoming).*

1. There are in fact a number of terms that have been developed as substitutes for "English Canada." Beyond "Canada Outside Quebec," possibilities are "The Rest of Canada" and "Canada Without Quebec." But they are not in public usage nor do they offer a term to denote the populations themselves. Thus, *faute de mieux* I will use "English Canada" in this paper.
2. Calculated from Statistics Canada, *Adjusted Language Data*, April 1988.

IT'S THE LAW OF THE LAND: GENDER AND THE GEOGRAPHY OF HOPE

Donna Greschner

*"What is a human being?
Legal theorists must, perforce,
answer this question:
jurisprudence, after all, is about
human beings."¹*

These two sentences begin an influential article by Robin West, a feminist legal scholar from the United States. Writing in 1988, she states that mainstream legal theory embraces, as an answer, the separation thesis: a human being, whatever else he is, is physically separate from all other human beings. What separates us is both epistemologically and morally prior to what connects us. We are distinct individuals first and then we form relationships.

West argues that the separation thesis is irretrievably and essentially masculine. The cluster of claims that comprise the separation thesis, while perhaps trivially true for men, is patently untrue for women. Women are connected to other human life during at least four recurrent and critical experiences, the most visible and indivisible being pregnancy. West states that the central insight of feminist theory over the last decade is that women are essentially connected, not essentially separate, from the rest of human life. Feminist theory embraces the connection thesis; so too, she argues, should legal theory.

West also argues that this question and its answer have importance for legal theory because jurisprudence is persistently utopian. It represents a constant and usually sincere attempt to articulate a guiding utopian vision of human association. In conventional legal theory, these utopian visions begin with a particular image of a human being. According to West, feminist jurisprudence ought to respond to the utopian images written into law by male law-makers. We ought to correct and improve upon these images, and participate in them as utopian images, not just as apologies for patriarchy.

No one would deny the importance of this challenge. Every feminist legal scholar has accepted the challenge because feminist work is deliberately, openly, and thoroughly aspirational and utopian. West offers much insight and guidance for the task of creating a more inclusive and feminist jurisprudence. However, her analysis calls for two extensions, two further developments.

First, the question "what is a human being" may well be an appropriate and illuminating place from which to criticize the utopian images behind the laws of patriarchy, since malestream legal theory begins with a vision of one individual.

The following article was first presented in Saskatoon in March 1993 as an address which formed part of the University of Saskatchewan's Colloquium Series.

But if our objective is the creation of new utopian images, not just the critique of old ones, then the question's implicit assumption of separateness is troubling. The singularity of the question — what is a human being — assumes individuation. If the connection thesis does

describe women, and if we take women's experiences as seriously as men's, then feminist legal theorists must begin with a question that puts association and connection at centre stage, a question that assumes connection.

Perhaps that question is simply: how do we form human relationships? This formulation takes the fact of relationships as a given, and declares that their formation is a group activity — the pronoun is we, not I. The question involves how people live together, the ways in which they share the same time and space, as reflected in or underlying legal rules. The analysis would proceed from the social to the individual rather than, as West does, from the individual to the social.

My second extension relates to the lack of context in the analysis and guidelines offered by West. She recounts many stories of women's experiences to illustrate the connection thesis. But she does so without regard to the diversity amongst women. As many women have declared lately, the pressing agenda for feminism in this decade is the diversity question. We must pay scrupulous attention to the ways in which race, class, language, culture and sexual orientation shape our bodily experience, our social experience of oppression, and our strategies for liberation.

Feminist theory and practise has begun this task, due to the hard, plodding and often still unappreciated activity and writings within the feminist movement by First Nations and Metis women, by women of colour, lesbians and working-class women. For instance, overcoming the dynamics of racism and promoting cultural diversity have become, finally, legitimate goals, though still not primary ones, of feminist action within the universities.

One missing context, however, one difference absent from discussions in jurisprudence and feminism, is geography. Does the form of human association depend on the place, the landscape, the physical environment? Geographers would answer yes to this question — legal theorists have rarely asked it.

I argue that feminist legal theory ought to answer "yes" as well. The physical environment in which people live is a highly

influential context and variable of human associations. Feminist legal theory must be, literally, grounded. To do so takes the connection thesis one step further — we are not only connected to each other but to the land. It is this lesson which First Nations and Metis women try to teach us, a lesson we continue to ignore at our peril and at risk of our survival.

With these two additions, the challenge posed by West can be restated. The challenge is to articulate utopian visions of human associations in the context of particular places. As my particular place, I choose the West, and not merely because of the fortuitous coincidence of the word "west" naming both a professor and a place.

I choose the West because of its aspirational mythology. For immigrants over four centuries, the West presents the possibility of utopian realization. The land offers wide open spaces, with unlimited opportunities and the potential for progressive change. Optimism marks the spirit and philosophy of the West. Life may be difficult now, but it will get better; the West generates an eternal optimism encapsulated neatly in the phrase "next year country." There will always be a future and the future will always be brighter. Westerners know with enduring, and endearing certainty, that we not only create new worlds out here on the prairies, but that we create better worlds. Wallace Stegner, one of the great writers of the West, eloquently describes this region as the "geography of hope."²

Let us accept that the geography of hope has been true for most immigrant men, and that western laws reflect and advance manifestations of a western brand of utopian vision. What about from the perspective of women? Has the West presented women with the same possibilities for change and freedom, for new communities and visions of equality? Where within the utopian vision of the West, as an ideology and narrative, do we as women find the opportunities for liberation? Or has the western utopian vision been profoundly patriarchal, as Robin West shows with legal theory? In short, what do we see if we engage in a gender analysis of the geography of hope?

Such an analysis of the West will be structured around the law of the land. I use that phrase in at least two ways. First, it covers land law, the rules that govern the ownership, control and use of physical space, what lawyers call real property. It is, of course, tritely true that different types of land generate different sorts of laws because of their respective economic activity. Wheat production calls forth agricultural laws and ore deposits call forth mining laws. The answer to a deeper question appears less obvious. Do different landscapes also nurture different visions of human association, and have they been utopian for women?

Second, the phrase "law of the land" also connotes the fundamental law, the basic or supreme law. This meaning is more clearly expressed in the full phrase "It's the law of the land" — words difficult to mouth without sounding authoritative

and commanding. These are the laws that govern everyone, that determine what the other rules will be and how to make them, the "ground rules" of action. They encompass the rules about the political system, both those contained in ordinary laws and in entrenched constitutional rules. Indeed, the definition of a constitution includes supremacy, that these rules take precedence over others.

If the "geography of hope" does express western mythology accurately, then we ought to see its reflections in the constitutional arrangements, aspirations and arguments made by westerners. Again we need to engender our analysis. Have constitutional structures and positions reflected a geography of hope for women, as well as for men?

In looking at these two types of law, and the myriad of laws between them, I find that the almost automatic response to the question is yes. There is an official story of the West that women take as much pride in as men. This official story seems remarkably compatible with the connection thesis articulated by Robin West, more consistent at least than many other official stories of distinctive societies.

The official story has a cast of strong women who laboured tirelessly for political and economic equality, and for economic and social relationships grounded in the interdependence and connection between human life. They met with less resistance and more cooperation than their eastern sisters, and thus achieved many gains much faster.

Several events comprise the major scenes in this official narrative. On the level of land law, exclusive male control and ownership of land was challenged by homestead laws that gave women a limited but still crucial role in the transfer of land. The move to make the family farm more truly the family's, and not the husband's, took another step forward in the seventies. It was Mrs. Rathwell, a Saskatchewan farm woman, who successfully challenged in the courts the patriarchy embedded in the matrimonial property regime. It was the Saskatchewan legislature, almost twenty years ago, which led the way in enacting more progressive matrimonial property legislation.

At the constitutional level, it was on the prairies that white women first received the right to vote and hold political office. It was five Alberta women who struggled all the way to the Privy Council in London to be recognized as "persons" in the British North America Act, the primary constitutional text. And the Alberta government supported their claim, the only government to do so. The West still sees many political "firsts" for women — the first woman as leader of an opposition party (Sharon Carstairs in Manitoba), the first woman as premier, albeit unelected (Rita Johnson in British Columbia), and most recently the first woman finance minister (Janice MacKinnon in Saskatchewan).

But western mythology perhaps has the greatest hold on our imagination when we consider our economic and social arrangements. Especially in Saskatchewan, we see our cultural traditions as involving close cooperation and community responsibility. We worked together to overcome the hardships of local climate and distant economic dictators. The West gave rise to wheat pools and coops, to public economic ownership in the form of Crown corporations and public social responsibilities in the form of medicare. Even Alberta, the province with the brash rhetoric of rugged cowboy individualism, has a long-standing reality of public ownership. In the 1970's, for instance, Progressive Conservative Alberta had more Crown corporations than New Democratic Saskatchewan.

This mythology springs directly from the land. The prairies may present open skies and opportunities, but the land is also harsh and unforgiving. The best way of surviving, sometimes the only way, is with each other.

So the official story is a proud recitation of hope realized, of opportunities seized, of freedom gained.

But as with all stories, the West has a sub-text, an unofficial story that tells of a much bleaker picture. For instance, in the official story, freedom and social justice come from the land, arise in the country. It is in the country, the rural expanse of the prairies, that cooperation and the form of equality inherent in cooperation, took root. In the country we find the unique mix of community and individualism that forms the basis of western mythology.

In the unofficial story, the country appears much more confining and oppressive than the cities. Consider, for instance, the impossibility of obtaining an abortion in a small Saskatchewan town. In this respect, Saskatchewan is no more liberatory for women than distant Prince Edward Island. This oppression by local community led the Supreme Court to strike down the restrictive abortion law in 1987. Consider also the high incidence of teen-age pregnancies in rural Saskatchewan. As numerous studies have shown, young girls become pregnant more often when they perceive their lives to be without hope, without choices, without any significant chance of improvement. The unofficial story sees less hope for young women here than many places elsewhere.

A recent example of the freedom offered by cities over the country can be found in the controversy about amending the Human Rights Code to include sexual orientation as a prohibited ground of discrimination. Saskatchewan remains one of the few provinces that fails to protect lesbians and gay men from discrimination in employment, housing, and other public arenas of life. The primary source of opposition to the change is small-town and rural Saskatchewan. Every week the Human Rights Commission receives dozens of letters about the amendment, most of them opposed and almost all of those from rural areas. Many letters from opponents spill forth venomous hatred and

dangerous anger toward lesbians and gays. When they cross my desk, I feel the chill of January blizzards. I also have received several supportive letters from lesbians who live in the country. Their lives in small towns involve either secrecy and deception about their sexual orientation, or constant exposure to harassment and deliberate exclusion from community life. Many lesbians would agree with Virginia Woolf's claim that freedom and autonomy for women is found in the cities.

In the official story about Western economic activity, cooperatives have a strong and permanent place. They embody, as an organizational form, the principle of equality — one person, one vote, regardless of wealth.

In the unofficial story, corporations, with their explicit hierarchy and with power determined by wealth, continue to be the primary method of economic arrangements. Even public ownership of resources is achieved through the vehicle of Crown corporations — we have not yet created new vehicles more egalitarian in operation or conceptual design.

Moreover, the corporate structure also pervades administrative agencies, including those established to pursue necessary and progressive social change. I use as my example an agency I know well, the Human Rights Commission. Here is an organization created to promote equality. Yet its structure is corporate in nature. There is a board of directors, namely the commission, a chairperson of the Board, the Chief commissioner, a chief executive officer, the Director of the Commission, and employees organized in a hierarchical manner. This structure has not just grown up through the years by bureaucratic accretion, it is embodied within the legislation and regulations.

Constitutional politics also has an official Western story. It focuses on the need and desire to assert strong control by local communities, in this instance each province, in order to achieve the particular utopian visions generated by the West. Hence the virtually unceasing chorus, since Saskatchewan became a province in 1905, of many political voices calling for enhanced provincial powers. In this vision, the idea of Canada approaches a commonwealth, a somewhat loose collection of separate communities.

The unofficial story tells of disenchantment and distrust of provincial politics. It emphasizes the commonality that westerners, including western women, have with their fellow citizens from sea to sea. The unofficial story supports the abstract, pan-Canadian Charter of Rights and Freedoms, for example, as essential to guaranteeing minimum attributes of citizenship. Westerners resoundingly defeated the Charlotte-town Accord last October. I wonder to what extent the Accord's rejection foretells a greater acceptance of the unofficial story.

A full gender analysis of the geography of hope requires a scrutiny of many fields of legal life. We need to chart further the economic models of corporations and cooperatives, the physical

sites of cities and of country, the constitutional choice of commonwealth or charter.

Today I have drawn merely one line of the chart. Further exploration is necessary if we are to answer the question — how do we form human communities — from a western perspective. We have not yet seen a distinctly western canadian legal theory — but I hope we will soon, and that the theory will respond with as much attention to women's experiences as to men's. The stories of the West are being told again with women's voices. Many scholars across many disciplines are now engendering the mythology of the West. Right here at home, the cooperation between the colleges of law and agriculture has garnered a joint chair and promises to produce rich intellectual fruit. "The law of the land" may yet signify a conversation between land and law, rather than express a command.

I wish to conclude with two points. The first draws upon the cultures of First Nations and Metis women, for whom a discussion of the West as a geography of hope during the past 100 years must seem like a cruel colonial joke.

The objective of feminist jurisprudence is the creation and realization of utopian visions in which everyone participates without subordination or conquest. In order to form such communities, legal theory may need to rethink not only its substance but its method. Laws classify and categorize; many a legal theorist has pointed out that the essence of the legal imagination, at least for a very long time, has been categorization. Like computer logic, legal logic operates on dichotomies, on sets of "either-or" pathways. Lawyers drop human issues into legal boxes for purported resolution.

Consider what laws would be like if the metaphor of method was the circle, not the box; if we thought in terms of circles, not categories; if we took our methodological vision from the circularity of seasons and the limitless possibilities in open skies rather than from the straight lines and fixed sides of man-made boxes. I do not know yet how we would do this, how different our legal methods of conflict resolution would be if we did. I hazard to guess that we would be more inclined toward the warmth of consensus than the war of courtrooms, more likely to continue conversations than to issue commands. Here we have much to learn from indigenous cultures.

Second, I want to return to Robin West and the connection thesis. She also declares loudly at the end of her major work that the connection thesis is not always true for women, just as the separation thesis is not always true for men. Human beings are far too complex to be categorized that neatly. We are all capable of connection with, and separation from, each other. I would add that we all connect to land and place as well, though in what ways, and with what consequences, we do not yet fully understand.

I illustrate that point with the work of two Saskatchewan artists. Here is a short excerpt from Guy Vanderhaeghe's disturbing story about a man's connection to his land, a connection so deep it could bear no sharing with anyone except his son, and which leads to his destruction. The story is called "Home Place," the man is called Gil.

Over the years the MacLean family acquired other holdings but the home place was special. Situated in a valley, it was a mix of rich bottom land and steep, wooded hills. In the spring, down by the river, blizzards of gulls floated in the wake of tractor and disk, pursuing easy pickings, while hawks rode the air high above the lean hills and, shrieking, fell to plunder these lazy storms of white birds. To Gil it had all been beautiful. It was all he had ever wanted, to possess that place and those sights. A day spent away from the farm made him restless, cranky. Returning to it, even after the briefest absence, he acted oddly, dodging through the wires of a fence in his city clothes to wade about in his crop, hands running back and forth lightly over the bearded heads the way another man might absent-mindedly stroke a cat. Or he might suddenly strike off for the hills with all the energy and purpose of someone hurrying off to keep an appointment, tie flying over his shoulder.

His wife used to say: "Gil's gone off to satisfy himself that nobody so much as shifted a cup of dirt on this place when he was away."

What Gil never confided to his wife was that he felt more present in the land than he did in his own flesh, his own body. Apart from it he had no real existence. When he looked in a mirror he stood at a great distance from what he regarded, but with the land it was different. All that he had emptied of himself into it, he recognized.³

And here is a song about a woman's fierce connection to the land, land that gave her everything, especially independence. She represents my grandmother, the grandmothers of many prairie women. The song, of course, is *Grandmother's Song*, by Connie Kaldor.

I was a young girl
When I came to this land
From a country far away
To a language I didn't understand

I worked on a farm
And I married me a man
We got ourselves a homestead
On a section of land

And blow you old winds of time
 You've wrinkled my face with your blowing
 Well you've given me all that I have
 But you've taken away my youth without me knowing

Well we sure had our bad times and our fun
 And we paid all our taxes to the government of old
 Saskatchewan
 I raised up my kids 'till they finally raised away
 And they drop in now and then
 To visit on their holidays

Now they say I'm too old to cook and sew
 And there's an old folks home in town they want me to go
 But I'll stay here on my own 'till that wind blows me away
 I've been through harder times than this
 On less than pension pay

You say that I'm old
 But I've just been through a lot
 And the fact that I've lots of wrinkles
 Just shows how hard I fought

I won't go in, and you hear me
 You can't take me away
 For I've a will, and I've decided
 I'm going to stay

But blow you old winds of time
 You've wrinkled my face with your blowing
 Well you've given me all that I've got
 But you've taken away my life without me knowing.

Donna Greschner, College of Law, University of Saskatchewan,
 Chief Commissioner, Saskatchewan Human Rights Commission.

1. Robin West, "Jurisprudence and Gender" (1988) 55 U. Chi. L.R. 1.
2. Wallace Stegner, *Where the Bluebird Sings to the Lemonade Springs* (New York: Random House, 1992).
3. Guy Vanderhaeghe, *Things As They Are?* (Toronto: McClelland & Stewart, 1992) 173.

CONSTRUCTING CANADIAN IDENTITIES

Kenneth McRoberts

(Continued from page 96)

3. Speech to Quebec Liberal Convention, 28 January 1968, reported in Ottawa Citizen, (29 January 1968), as quoted in George Radawanski, *Trudeau* (Scarborough: Macmillan — NAL Publishing Ltd., 1978) at 286.
4. "Des provinces ont prié Ottawa de leur imposer le respect du français," *le Devoir* (23 October 1980) 1.
5. Comité pour une politique fonctionnelle, "Bizarre algèbre" (1965) *XX Cité libre*, [Albert Breton, Claude Bruneau, Yvon Gauthier, Marc Lalonde, Maurice Pinard] at 14. Pierre Trudeau reportedly was closely involved in the preparation of the document but did not sign it since he had already entered federal politics.
6. This constitutes a translation of extracts from the French text, as reproduced in *le Devoir* (13 October 1971).
7. Peter Newman, *Toronto Star* (2 April 1966), as quoted in Richard Simeon, *Federal-Provincial Diplomacy: the making of recent policy in Canada* (Toronto: University of Toronto Press, 1972) at 68.
8. Don Peacock, *Journey to Power: The Story of a Canadian Election* (Toronto: 1968), as quoted in Simeon, *Ibid.* at 90.
9. Anthony Careless, *Initiative and Response* (Montreal: McGill-Queen's University Press, 1977) at 177 (emphasis added).
10. See Peter H. Russell, "The Political Purposes of the Canadian Charter" (1983) 61 Canadian Bar Review, and Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms," in Alan Cairns and Cynthia Williams, eds, *Constitutionalism, Citizenship and Society in Canada*, Vol. 33, Collected Research Studies, Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
11. For instance, a January 1989 survey found that 69% of Francophone respondents agreed that the Quebec government was justified in restricting the right to erect signs in English or another language so as to protect French; 16% disagreed. ("Francophones et anglophones sont insatisfaits de la loi 178" *La Presse* (23 January 1989) A1).
12. In adopting the Allaire report a party convention did pass amendments specifying that it is only the Senate ("dans sa forme actuelle") that would be abolished and that the *Charter of Rights and Freedoms* would continue to apply in Quebec ("Bourassa choisit d'abord le Canada" *le Devoir* (11 March 1991)).
13. Royal Commission on Bilingualism and Biculturalism, *Preliminary Report* (Ottawa: Queen's Printer, 1965) at 151.

THE SUPREME COURT ENTRENCHES PARLIAMENTARY PRIVILEGE OUT OF THE CHARTER'S REACH: *DONAHOE v. CBC*

Andrew Heard

The Supreme Court of Canada recently delivered its judgment in *Donahoe v CBC*,¹ a case from which repercussions will be felt for some time to come. While its immediate effects are limited, the reasons given by the court ultimately will be applied in a wide range of cases dealing with both the *Charter of Rights* and the federal division of powers.

INTRODUCTION

Donahoe primarily resolves a dispute between the Nova Scotia House of Assembly and the Press Gallery over the right of TV journalists to cover the proceedings in the legislature, using their own hand-held cameras from the balcony press box. The Supreme Court of Canada rejected, 7-1, the media claims that the *Charter of Rights* entitled them to such access to the chamber.

Regardless of the outcome of this case, its immediate effects on the litigants were going to be limited. Although there was no television coverage of the House of Assembly when a local TV station first initiated the suit, the legislature had responded to losses in the trial and appellate courts with the introduction of its own closed circuit coverage of debates. The Assembly installed a system of remote-controlled cameras that focused on the MLA who had the floor, as has been the practise in the House of Commons for over a decade, and provided a live feed to the media. Pending the appeal to the Supreme Court, hand-held TV cameras were allowed in the press gallery for the 1992 session in order to provide broader camera angles and reaction shots. However, the local TV stations relied on the legislature's TV feeds for the vast majority of the footage used in their newscasts. Thus, the Supreme Court's decision that the Assembly may now exclude those cameras in the gallery will have only a limited impact on the television coverage that Nova Scotians enjoy.

At stake, however, was not simply whether TV cameras should be given access to legislative debates and committee hearings. The fundamental issue dealt with the reach of the *Charter of Rights* into the internal workings of the legislatures. Both the majority opinion written by McLachlin J. and the concurring opinion written by Lamer C.J. assert that the courts simply should not be allowed to apply the *Charter* to the privileges of our legislative bodies.

It is evident that the majority firmly believe that parliamentary privilege is an essential part of the general constitution of Canada that requires protection from the *Charter*. McLachlin J. and Lamer C.J. clearly depict the necessity of parliamentary privilege to the functioning of our form of

democracy. The essence of the privilege lies in ensuring that the internal workings of a legislative assembly are not subject to scrutiny or interference from the courts; in many ways it is the corollary of judicial independence. All the courts may do is determine whether a matter is one of privilege. The test that has been developed by courts in Britain and Canada is that the privilege must be necessary to the functioning of the legislative body. If the assembly's control over the issue is necessary, then the courts have no jurisdiction to comment on the particular manner in which the legislature chooses to exert that control. Thus, McLachlin J. concludes that the nature and importance of parliamentary privilege is such that even subjecting a particular exercise of privilege to Charter scrutiny effectively destroys that privilege. These privileges are put out of reach of the *Charter* by declaring that they form part of the formal Constitution of Canada.

The majority's opinions present challenges for future resolution, since the desired outcome appears to have driven the justifications given. The convoluted reasoning used to explain this outcome will come back to haunt the Court in a number of future cases.

THE CHARTER AND THE HOUSE OF ASSEMBLY

The first issue that had to be resolved is whether the *Charter of Rights* applies to the House of Assembly. Chief Justice Lamer's concurring opinion takes the most remarkable position in deciding that s. 32(1) of the *Charter* defines the application of the *Charter* to include only the legislature as a whole, and not its constituent parts; in a basic reminder he points out that a legislature is composed of both the Assembly and the Lieutenant Governor. Lamer C.J.'s position is actually an expansion of the position argued by McIntyre J. in *Dolphin Delivery*, when he examined the meaning of s. 32(1): "[L]egislation is the only way in which a legislature may infringe a guaranteed right or freedom."² While this view was originally given in *obiter*, its importance was underlined when it was quoted with approval again by LaForest J. in *McKinney*.³

In a blunt exhibition of distinguishing, McLachlin J.'s majority decision simply brushes these two precedents aside by saying that in neither instance did the judges consider the issues involved in the present case. McLachlin J. concludes that the constituent parts of the legislature are indeed subject to the *Charter*. There are two threads to her inclusion of the legislative chambers within the *Charter's* purview. She argues in the first instance that certain sections only make sense if they apply to the chambers, such as the language rights in ss. 17 and 18. McLachlin J. also explores an alternative line that may have

significant future implications. Without conclusively settling the issue, she argues that legislative assemblies may well fall under the rubric of "government" referred to in s. 32(1). This approach is explicitly developed by Cory J. in his dissenting opinion. He concludes that the effect of s. 32(1) was to extend the *Charter* to "public actors;" since the legislative assemblies are public actors, they must be covered by the *Charter*.

Curiously, none of the judges who wrote opinions in *Donahoe* dealt with the implications of a decision made at the initiation of this suit in Nova Scotia's Supreme Court Trial Division. Nathanson J. ruled that the original action had to be amended to involve all 52 MLAs, since the House of Assembly is not a legal entity that can be sued. If the House of Assembly cannot be the subject of a legal suit, there is a very strong argument that the *Charter* simply cannot apply to it. *Charter* claims against political parties have been dismissed for this very reason.⁴ Because of Nathanson J.'s finding, this case proceeded against the individual members of the House. None of the judges considered whether the *Charter* can be enforced against the individual members of a legislative body.

THE CHARTER AND PARLIAMENTARY PRIVILEGE

With McLachlin J.'s finding that the *Charter* does apply to the component chambers of a legislature, the only means left by which to achieve the objective of protecting parliamentary privilege from judicial review was the principle laid down in the *Education Act Reference*:⁵ the *Charter* cannot invalidate another part of the Constitution. Thus for McLachlin J. to safeguard parliamentary privilege she had to find that it forms part of the formal Constitution. It is this quest that leaves an unsettling legacy.

In *Donahoe*, the Supreme Court enters into the murky area that distinguishes the "constitution" of Canada from the "Constitution." The "constitution" involves all the formal legal documents (such as legislation, royal proclamations, letters patent and orders-in-council) as well as the informal constitutional conventions and traditions that together define the manner in which our system of government operates. The "Constitution," however, is a much smaller subset of the formal rules. Section 52 of the *Constitution Act, 1982* defines the Constitution of Canada to "include" a specific group of documents listed in an appendix that collectively comprise the "supreme law." Because these rules are equally supreme law, one rule cannot be invalidated by another; hence, the *Charter* does not nullify anything in the Constitution. There is no doubt that parliamentary privilege is part of the larger constitution of Canada, but McLachlin J. goes further and asserts that it belongs to the formal Constitution.

McLachlin J. decides that the privileges of provincial legislatures enjoy constitutional status because of the declaration in the preamble of the *Constitution Act, 1867* that the uniting

provinces would be joined in a country "with a constitution similar in principle to that of the United Kingdom." She reasons that these privileges are inherently necessary for the legislatures to function and are thus an essential element of the Constitution that defines the parliamentary democracy inherited from Britain. Her decision is somewhat unclear as to whether parliamentary privilege is part of the Constitution simply because it flows from the words in one of the Constitution Acts, or whether some extra justification is needed. She launches into a discussion of the exhaustiveness of the definition of the Constitution of Canada in s. 52 of the 1982 Act. Her conclusion is that the list of documents is not exhaustive and that other rules may well be included in the formal Constitution. Her conclusion is an elegant display of curial articulation:⁶

I would be unwilling to restrict the interpretation of that section [s. 52] in such a way as to preclude giving effect to the intention behind the preamble to the *Constitution Act, 1867*, thereby denying recognition to the minimal, but long recognized and essential, inherent privileges of Canadian legislative bodies.

McLachlin J. essentially argues that the preamble of the 1867 Act clearly intends that Canada enjoy the parliamentary democracy developed in Britain and that subsequent constitutional amendments accommodate certain prerequisites. She reflects:⁷

... I do not understand the entrenchment of written rights guarantees, or the adoption of specific written instruments, to negate the manifest intention expressed in the preamble of our Constitution that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested.

This use of the 1867 Act's preamble to entrench an unwritten principle may seem quite startling, but the Supreme Court has done this before. In the *Senate Reference*,⁸ the Court unanimously held that the preamble's reference to "a constitution similar in principle to that of the United Kingdom" meant that Canada's Senate was intended to be an appointed chamber like the House of Lords. As a result, legislation to abolish the senate or to provide for indirect senate elections would be unconstitutional.

What is unusual in *Donahoe* is the implication that a whole range of constitutional rules may now be considered part of the formal Constitution, because they are considered essential to parliamentary democracy. McLachlin J. clearly envisions parliamentary privilege as just one aspect of our British constitutional framework referred to in the preamble of the *Constitution Act, 1867*.

However, McLachlin J. also places some limitations upon what might be imported through the preamble:⁹

This is not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental to the constitutional regime which Canada adopted in its Constitutional Acts, 1867 to 1982. Nor are we here treating a mere convention to which the courts have not given legal effect; the authorities indicate that the legal status of inherent privileges has never been in doubt.

She is clearly trying to restrict her argument to rules whose legal nature is already firmly recognized.

PROBLEMS WITH ENTRENCHED PRIVILEGE

The constitutional status that the Court has accorded parliamentary privilege poses some tangible difficulties, as Sopinka J. points out in his concurring opinion. If a provincial legislature's privileges truly are part of the Constitution of Canada, their amendment is out of reach of simple legislation by that legislature. Under the amending formula of the *Constitution Act, 1982*, the provincial legislatures may change the "constitution of the province" by ordinary legislation. But this flexible amending power does not extend to provisions relating to the province that are contained in the Constitution of Canada. Such an amendment requires the agreement of at least the national parliament under s.43; some provincial matters in the Constitution even require unanimous consent. As Sopinka J. dryly comments: "It seems to me that the prospect of losing legislative control over its rights and privileges would be a high price for the appellant to pay in order to escape the *Charter*."¹⁰

McLachlin J.'s majority decision blithely ignores these tremendous consequences of her reasoning. In its determination to save legislative privileges from judicial scrutiny under the *Charter*, the Supreme Court majority may have entrenched many aspects of provincial constitutions beyond the reach of their legislatures.

The *Donahoe* decision leaves a number of related issues unresolved. If a legislature's privileges are not subject to the *Charter*, problems arise in deciding what force remains in those provisions of the *Charter* that do explicitly relate to the legislatures. For instance, the regulation of what language is spoken in a chamber is essential to a chamber's efficient functioning and, through the necessity test, could be considered a matter of privilege; if members spoke in languages that none of their colleagues understood there would be little business conducted in the House. And yet, ss. 17 and 18 of the *Charter* declare that either French or English may be used in Parliament and the New Brunswick legislature. Under the logic of the majority decision, parliamentary privilege must be entirely exempt from judicial scrutiny under the *Charter*; the language rights would be unenforceable since they appear to be largely co-extensive with a parliamentary privilege.

However, McLachlin J. does leave the Court some elbow room in her decision. She makes an undeveloped comment that:¹¹

Absent specific Charter language to the contrary the long history of curial deference to the independence of the legislative body, and to the rights necessary to the functioning of that body, cannot be lightly set aside... (Emphasis added).

An enterprising judge may find some way to distinguish *Donahoe* and argue that judicial review of parliamentary privilege should be permitted if a right enumerated in the *Charter*, such as one of the language provisions, can only be exercised in a context considered to be a matter of privilege.

A situation developed during the 1993 Nova Scotian elections that might see the *Donahoe* decision applied in a different setting. Conservative Premier Don Cameron refused to sign the papers for Paddy Fitzgerald, who had won his riding's nomination, because of a 1979 conviction for rape. Fitzgerald then threatened legal action against his party leader.¹²

Several aspects of *Donahoe* could be brought to bear in a case like Fitzgerald's. Previous attempts to launch Charter claims against political parties have been dismissed on the grounds that parties do not have the legal status to be sued. But legislative chambers cannot be sued either, and this was not even considered as an impediment in *Donahoe*. The broad sweep given to the Charter's application to "government" could conceivably be extended to include political parties. Political parties are so intricately enmeshed in both the legislative and executive branches of government that it is difficult not to describe them as "public actors;" party groupings structure and determine the main decisions made by the executive and legislature. Thus, a party leader's refusal to endorse a candidate's nomination could be argued to be an infringement of a person's Charter right to be a candidate.

Since McLachlin J.'s comments about the broad application of the *Charter* to "government" were made in *obiter*, there is some chance that another judge in a future case would give these comments the same short shrift given McIntyre J.'s statement about the *Charter* only applying to the legislative output of a legislature. A chaotic Pandora's box would be opened if *Donahoe* were used to apply the *Charter* to political parties.

CURIOSITIES OF LOGIC

Some anomalies emerge in the positions taken in the various opinions offered in *Donahoe*. McLachlin J.'s decision seems to assume that legislative privileges are a fairly settled and defined set of principles; which is not entirely the case. Since McLachlin J. appears to exempt all parliamentary privilege from the *Charter*, it seems that even statutes that embody or extend rules of privilege are not subject to the *Charter*. It is unclear how the majority of the Court would react to fresh assertions of completely new privileges that arise because of unforeseen developments. The courts may come to assess claims to new privileges in the light of the *Charter*, in order to determine whether these privileges are truly necessary and defensible under contemporary legal norms.

Some strange consequences flow from Lamer C.J.'s position that the *Charter* applies to legislation but not to the legislative chambers. While Lamer C.J. would permit any assertion of privileges by legislative chambers to go unexamined by the courts, his rationale would subject any legislation relating to privilege to *Charter* scrutiny.

Lamer C.J. is the only member of the Court to avoid a glaring oversight, but in doing so leaves his opinion with a troublesome inconsistency. His colleagues manage to discuss the privileges of the Nova Scotia legislative assembly without once mentioning s. 36 of the *House of Assembly Act*¹³ which provides the legal basis for the privileges that are at issue in this case:

36(1) In all matters and cases not specially provided for by an enactment of this Province, the House and committees and members thereof respectively shall hold, enjoy and exercise such and like privileges, immunities and powers as are from time to time held, enjoyed and exercised by the House of Commons of Canada, and by the committees and members thereof respectively.

Even though Lamer C.J. does include this section in his list of legal provisions relating to the case, he never refers to it again. This is odd in the extreme since he concludes: "The legislation that the provinces have enacted with respect to privileges will be reviewable under the *Charter* as is all other legislation."¹⁴ In their efforts to achieve their objective of isolating legislative privilege from the *Charter*, the judges have plainly ignored the existence of ordinary legislation that provides the basis for the actions of the House of Assembly which are at issue.

One consequence of McLachlin J.'s decision, which builds on the *Education Act Reference*, is that Parliament could circumvent any future scrutiny of a range of matters simply by legislating them into the Constitution of Canada. Section 44 of the *Constitution Act, 1982* permits Parliament to amend the Constitution by simple legislation if it relates to a range of matters dealing with "the executive government of Canada or the

Senate and the House of Commons."¹⁵ And, a province may entrench many matters in its jurisdiction out of reach of the *Charter* if the national Parliament agrees.

CONCLUSION

With its decision in *Donahoe*, the Supreme Court of Canada has broken some novel constitutional ground. The range of privileges claimed by Canadian legislatures has largely been protected from judicial scrutiny. While *Dolphin Delivery* prevented the *Charter* from applying to many actions of the courts, *Donahoe* has placed limits on the *Charter*'s application to the legislatures. Students of the Constitution should note that the *Charter of Rights* does not govern all actions by state institutions and officials.

The consequences of *Donahoe*, however, reach far beyond this limitation on the *Charter*. The Court has entrenched a range of constitutional principles in the Constitution, because they are necessary to the "Constitution similar in principle to that of the United Kingdom" referred to in the preamble to the *Constitution Act, 1867*. Just how far this range of entrenched principles extends and how amendments to them may be affected will be left for the Supreme Court to decide in future cases.

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1. [1993] 1 S.C.R. 319.
2. *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 599.
3. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 263.
4. *McKinney v. Liberal Party of Canada et al.* (1987), 61 O.R. (2d) 680 (Ont. H.C.J.); *McKinney v. Mazankowski et al.* (23 November 1988), (Ont.H.C.J.) [unreported].
5. *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.
6. *Supra* note 1 at 378.
7. *Ibid.* at 377.
8. *Reference re Legislative Authority of Parliament to Alter or Replace the Senate*, [1980] 1 SCR 54.
9. *Supra* note 1 at 377-378.
10. *Ibid.* at 396.
11. *Ibid.* at 372.
12. *Vancouver Sun* (30 April 1993) A9.
13. R.S.N.S. 1989, c.210.
14. *Supra* note 1 at 364.
15. This amending power is regulated by ss. 41 and 42, which stipulate that certain matters can only be achieved with the participation of the provinces.

THE POSSIBILITIES OF *SCHACHTER*: A RESPONSE TO PROFESSOR DUCLOS

Ryan Rempel

This article was submitted to Constitutional Forum Constitutionnel in response to an article by Professor Nitya Iyer, then Nitya Duclos, titled "A Remedy for the Nineties: *Schachter v. R.* and *Haig & Birch v. Canada*," which appeared in Volume 4, No. 1.

Since no legal analysis can exist entirely bereft of context, for Professor Duclos to call the reasoning in *Schachter v. Canada*¹ "decontextualized" can only mean that she believes that the discussion would have developed better in a different context.² Indeed, Professor Duclos specifically complains that the "issue of the appropriate remedy in *Schachter* itself" is left for the return to the discussion of the facts at the end of the decision.³ Yet the Court did state its reason for analyzing the appropriateness of "reading in" as a technique under s. 52 of the *Charter* in a wider context than the context of the facts presented in *Schachter* itself.

Lamer C.J. begins his analysis by voicing "dissatisfaction" with the factual context presented to the Court.⁴ The violation of s. 15 had been conceded, and no s. 1 argument was offered. Usually a court is only too happy to be relieved of the duty to hear futile argument. However, Lamer C.J. mentions doubts which "may or may not exist"⁵ on the question of whether the *Charter* had been violated, and La Forest J. goes further by stating that he was "by no means sure" that a violation had been established.⁶ Since an attempt is typically made to have the remedy fit the violation, these doubts would provide a reason to analyze remedial techniques in a more abstract manner than in a case where the violation is clear.

Media reports of the decision in *Schachter* invariably described the factors presented to guide the choice of technique under s. 52 as "complex," and no doubt there is some truth to that characterization. However, the persuasive force of the decision can be put relatively simply. La Forest J. sums up the decision in a few words early in his concurrence: "As the Chief Justice points out, there is a long tradition of reading down legislation; and I see no reason, where it substantially amounts to the same thing, why reading in should not also be done."⁷ In Lamer C.J.'s judgment, the facts of cases, though not the facts of *Schachter*, provide persuasive force. Most striking is the reference to *Nova Scotia (Attorney General) v. Phillips*⁸ in which a court struck down a benefit given to single mothers rather than extending it to include single fathers as well. Lamer C.J. also points out the absurdity involved in making the style of drafting the conclusive determinant of which remedial techniques are available to the court.⁹

If the virtue of reading in is considered to be only common sense, then what is accomplished by the abstract discussion? One

way of putting the discussion in context would be to examine it in light of the traditional arguments against a court's ability to read in. Those traditional arguments are that writing legislation and making appropriations from the Consolidated Revenue Fund are matters for legislatures, not the courts, and that reading in is therefore beyond the jurisdiction of the courts no matter what the circumstances. These are arguments of the highest abstraction, turning as they do on the proper roles of the legislature and the courts.

If one examines Lamer C.J.'s discussion in the context of these arguments, it appears that the discussion turns the arguments back upon themselves. Lamer C.J. begins by discussing generally the purpose of the commonplace technique of reading down, or severance. The idea behind the technique is said to be that only the offending portion of legislation should be declared inoperative by the courts, so that as much of the intention of the legislature as is constitutionally permissible may be given effect.¹⁰ This is subject to the limitation that where reading down the legislation would fundamentally change its character, the Court should not assume that reading down would in fact protect legislative intent.¹¹ Thus, according to Lamer C.J., the whole point of the practice of reading down and the limitations on that practice is to keep the Court in its proper sphere and role.

The Chief Justice then argues that reading in has the same purposes as reading down, and is subject to the same limitations.¹² Making the argument in this way turns the traditional argument against reading in back on itself: instead of taking it outside its appropriate role, the technique of reading in is meant to minimize the interference of the Court in the legislative sphere. The argument based on appropriations from the Consolidated Revenue Fund is also turned into a criteria rather than a prohibition. The real question, argues Lamer C.J., is whether the inevitable budgetary implications of any remedial choice are sufficiently serious to raise doubts as to whether the Court would in fact be preserving legislative intent through the technique it proposes to apply.¹³

Thus, the "decontextualized" discussion in *Schachter* would seem to offer a basis for dealing with the traditional abstract arguments against reading in, if considered in the context of those arguments. However, Professor Duclos is not convinced that *Schachter* goes very far in providing a justification for

reading in. She argues that the criteria relating to respect for the intent of the legislature are paramount and invalidation is still seen by the Court as the better option. She says:¹⁴

The subtext of Lamer C.J.'s apparently neutral remedies formula is an overriding concern with avoiding excessive interference with the legislative function. His conviction, true to legal tradition and apparently unshaken by academic criticism, remains that invalidation accomplishes this objective more successfully than extension.

It would seem that Professor Duclos is right in concluding that the Chief Justice's overriding concern is to avoid excessive interference with the legislative function. In fact, his theoretical justification for the proposition that the courts may use the technique of reading in is that reading in is sometimes the better way to achieve that objective. The evidence for her claim that the decision retains a bias towards invalidation should therefore be examined carefully.

Professor Duclos notes that Lamer C.J. requires that the mode of extension be sufficiently precise before the technique may be used. Since this "remedial precision" criterion applies to extension and not invalidation, Professor Duclos argues that it "strongly favours invalidation."¹⁵

The remedial precision requirement flows from the structure of Lamer C.J.'s argument supporting the Court's jurisdiction to read in. When the Court reads down legislation, it identifies something in the legislation which is inconsistent with the Constitution which, if removed, would render the legislation constitutional. Reading in, he argues, is the same except that the inconsistency is something that was left out of the statute rather than something that was included. If the omission is then declared inoperative, the logical result is that what was omitted is now included.¹⁶

The problem which Lamer C.J. addresses with the remedial precision requirement is that to specify exactly what was wrongly omitted from legislation is not always a simple task. As Professor Duclos points out, it would have been a simple task in *Schachter* itself,¹⁷ but in other cases it would not be. Lamer C.J.'s examples are *Hunter v. Southam*¹⁸ and *Rockett v. Royal College of Dental Surgeons of Ontario*.¹⁹ The Chief Justice points out that if it is possible to define the extent of the inconsistency with the Constitution in terms of what the statute excludes, then the absence of appropriate procedural safeguards in *Hunter* and the absence of exceptions for legitimate advertising in *Rockett* could conceivably have been declared inoperative, and the required safeguards and exceptions would then be made operative.²⁰ But what are the required safeguards or exceptions, he asks? Conceivably, such reasoning could allow the Court to put into place whatever scheme it happened to fancy. The requirement for remedial precision aims at avoiding this possibility.

The requirement has the additional consequence of drawing a box around some of the Court's more discouraging pronouncements in prior cases on the availability of reading in. In *Hunter* the Court said: "It should not fall to the courts to fill in the details that will render legislative lacunae constitutional."²¹ In *Rockett* the Court said: "Because the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators."²² Both these statements seem diametrically opposed to aspects of Lamer C.J.'s reasoning in *Schachter*. He deals with these statements by constructing a more limited principle consistent with the facts of those cases. In fact, what Lamer C.J. says these statements mean is worth some attention.²³

These cases stand for the proposition that the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.

Professor Duclos suggests that the availability of more than one way to extend a statute is sufficient, on this analysis, to render reading in insufficiently precise.²⁴ However, Lamer C.J. says that reading in would be inappropriate where there is no natural manner of extension, not that it would be inappropriate where there is more than one conceivable response. Indeed Lamer C.J. acknowledges that where a court does use the technique of reading in, the legislature remains free to adopt whatever alternative response it desires.²⁵ Thus, if Professor Duclos were correct, reading in would never be appropriate.

Indeed, Professor Duclos is mistaken when she argues that Lamer C.J. rejected extension in *Schachter* because it was an insufficiently precise remedy.²⁶ The reasons Lamer C.J. states for rejecting extension in *Schachter* are that there was insufficient evidence concerning the intent of the statute to show that extension would do more to preserve Parliament's intention than invalidation, and that the budgetary implications of extension were sufficiently different from the budgetary implications Parliament had foreseen so as to amount to a fundamental change in the legislation.²⁷

The requirement for remedial precision therefore would not seem to support a charge that Lamer C.J.'s judgment in *Schachter* retains a bias towards invalidation. However, Professor Duclos makes additional arguments for this conclusion:²⁸

Moreover, extension is the only remedial option which must satisfy all of these criteria before it can be ordered. Invalidation is the default remedy and, importantly, Lamer C.J. does not require courts to

consider whether striking down a law would "interfere" with the legislative objective.

Lamer C.J. does say that extension (be it by way of reading down or reading in) must meet all of the criteria he outlines.²⁹ However, this is not quite as onerous as it sounds, since the remaining criteria are really just different ways of asking the same question — whether extension would protect legislative intent better than invalidation. Lamer C.J.'s first criteria is whether extension would be a lesser interference with legislative intent than striking down.³⁰ Thus he does require courts to consider whether striking down a law would interfere with the legislative objective. Indeed, as Professor Duclos implies, it is obvious that striking down legislation interferes with legislative intent, so in that sense it is extension that is the default and invalidation that must be justified by some unusual circumstance. Lamer C.J. implies as much earlier in the judgment.³¹

The remaining criteria are merely pointers to what sort of circumstances can show that reading in or reading down would not protect legislative intent. Lamer C.J. argues that sometimes the state of affairs which would result from reading in or reading down was so specifically and unequivocally rejected by the legislature that the assumption that saving the underlying program in that manner would protect legislative intent is unsound. Lamer C.J. further argues that sometimes the consequences of reading in or reading down, budgetary or otherwise, would constitute such a fundamental change to the character of the legislation that it cannot be assumed that saving the underlying program in that way would protect legislative intent. But Lamer C.J. also requires a consideration of the importance of the underlying program, arguing that the more important it is the more sound is the assumption that saving it would protect legislative intent.³² Thus, it is not as though the extension remedy must fulfill a host of unrelated criteria. It is really one question asked in a variety of ways.

Like the remedial precision requirement, the nature of the other tests which reading in must meet does not seem to support the charge that Lamer C.J.'s decision retains a bias towards invalidation. Instead, the various tests for when reading in is appropriate seem to be elaborations of Lamer C.J.'s central argument supporting the jurisdiction of the Court to read in.

But Professor Duclos is not convinced that the reading in technique as elaborated by Lamer C.J. will be of dependable benefit to equality-seeking groups. She notes that one of the reasons that Lamer C.J. thought reading in to be inappropriate on the facts of *Schachter* was that there was insufficient evidence of the legislative objective, and that the Court regretted the fact that there had been no s. 1 defence which might have provided such evidence. Professor Duclos argues that to make the remedial technique so dependent upon what kind of s. 1 defence the government offers, if any, gives the government a "disturbing degree of control over the remedial outcome in cases of underinclusion."³³

However, if the court requires evidence as to legislative objective, it does not really matter what form that evidence takes or who provides it. While a s. 1 defence is the traditional arena in which such evidence has been explored, if it is relevant to the choice of remedial technique it can be tendered for that purpose, whether there is a s. 1 defence or not. Furthermore, there would seem to be no reason why the plaintiff could not put such evidence forward. While it is true that the government is in a better position to gather this sort of evidence, much of it would be in the public domain in any event, and it might be that the rest could be discovered.

Professor Duclos also expresses concern about the fact that the judgment allows a suspension of a declaration of invalidity in some circumstances. She points out that to suspend a declaration of invalidity is a "convenient" course for a court to adopt, since the plaintiff receives a symbolic victory, and the court can rest assured that the legislature has the final word in the matter.³⁴ Professor Duclos suggests that the Court should have recognized that an order extending legislation could also be suspended.

The Court does, by implication, reject the proposition that an extension order could be suspended. Lamer C.J. argues that the sole reason for suspending an order should be the adverse effects an immediate declaration would have upon the public.³⁵ Extension would rarely, if ever, lead to such consequences. Therefore, the only reason to suspend an extension order would be to protect the courts from the charge that they were interfering with the legislative function. However, Lamer C.J. argues that a suspended order itself constitutes a kind of interference with the legislature, and does not promote Charter values as well as either reading in or invalidation, since either course immediately reconciles the statute with the *Charter*.³⁶

The separation of the criteria for suspension from the question of intrusion into the legislative function also has a sharpening effect upon the kind of analysis a court will have to perform in the circumstances. Since the convenient way of dealing with the question of legislative intrusion is taken away, the Court must squarely face the two options open to it in these kinds of cases: invalidate the underlying program, or extend it in the way that would make it constitutional. Given these options, and given the basic criterion of protecting as much of the legislative intent as possible, it would seem likely that extension will not be an unusual choice. Indeed, as Professor Duclos discusses, the first case to apply *Schachter* did opt for extension.³⁷

Nevertheless, Professor Duclos argues that the fact that extension is an uncertain remedy places equality-seeking groups in a difficult position. The possibility of extension is attractive, but since invalidation is also possible, the potential plaintiffs know that by litigating cases of underinclusion they risk attaining nothing more than a hollow victory that only threatens those who originally benefitted from the program in question, and throws

the plaintiffs back upon the legislative process that failed them in the first place.³⁸

There is truth to these arguments. However, the dilemmas faced by those challenging underinclusive legislation could not have been eliminated no matter what course the Court had adopted. Had the Court issued a ringing endorsement of extension in the vast majority of circumstances, equality-seekers would still have been subject to the vicissitudes of the political process. Even when the Court orders extension, the Legislature may alter the underlying legislation as it wishes, within the boundaries set by the Constitution. Thus, in cases of underinclusion, no matter what remedial technique the Court adopts, all it can ultimately achieve is to force the Legislature to choose between its incompatible desires to benefit one group but not another. Given legislative inertia, extension does place the equality-seeking group in a better tactical position to face the vicissitudes of legislative choice, but it cannot provide a complete shield. And while invalidation is hardly the preference of equality-seekers, even it provides some small tactical assistance, since it may widen the field of potential allies in the attempt to influence legislative choice.

For these reasons, it is fair to say that *Schachter* is not everything that equality-seekers might have hoped for. However, it would seem that *Schachter* has more possibilities than Professor Duclos allows.

Ryan Rempel, of the Saskatchewan Bar.

Author's Note:

This article is not a reflection of the views of my current or former employers.

1. [1992] 2 S.C.R. 679.
2. Nitya Duclos, "A Remedy for the Nineties: *Schachter v. Canada* and *Haig & Birch v. Canada*" (1992) 4 Constitutional Forum 22 at 23.
3. *Ibid.*
4. *Supra* note 1 at 695.
5. *Ibid.*
6. *Ibid.* at 727.
7. *Ibid.* at 726-27.
8. (1986), 34 D.L.R. (4th) 633 (N.S.C.A.).
9. *Supra* note 1 at 698-99.
10. *Ibid.* at 696.
11. *Ibid.* at 697.
12. *Ibid.* at 700-702.
13. *Ibid.* at 709-10.
14. *Supra* note 2.
15. *Ibid.*
16. *Supra* note 1 at 698.
17. *Supra* note 2 at 25.
18. [1984] 2 S.C.R. 145.
19. [1990] 2 S.C.R. 232.
20. *Supra* note 1 at 706.
21. *Supra* note 18 at 169.
22. *Supra* note 19 at 252.
23. *Supra* note 1 at 707.
24. *Supra* note 2 at 25.
25. *Supra* note 1 at 717. Professor Duclos also makes this point (at 26), but argues there that the Court did not mention this aspect of the matter.
26. *Supra* note 2 at 25.
27. *Supra* note 1 at 728.
28. *Supra* note 2 at 23.
29. *Supra* note 1 at 718.
30. *Ibid.*
31. *Ibid.* at 696.
32. *Ibid.* at 712-15.
33. *Supra* note 2 at 24.
34. *Ibid.*
35. *Supra* note 1 at 717.
36. *Ibid.* at 716-17.
37. *Supra* note 2 at 25.
38. *Ibid.* at 24.

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CONSTITUTIONALISING THE PATRIARCHY: ABORIGINAL WOMEN AND ABORIGINAL GOVERNMENT

Joyce Green

INTRODUCTION

During the pre-Charlottetown Accord politicking, a tension became apparent between Aboriginal women represented by the Native Women's Association of Canada (NWAC) and 'male-stream'¹ Aboriginal organisations, particularly the 'status' organisation, the Assembly of First Nations (AFN). The AFN, Metis National Council (MNC), Native Council of Canada (NCC), and Inuit Taparissat of Canada (ITC) were given participant status in constitutional negotiations,² and lobbied successfully to have the matter of the explicit³ inclusion of the inherent right of self-government in the Constitution to be settled during this "Canada Round." As part of this package, the AFN advanced the proposition that the *Charter of Rights and Freedoms* not apply to Aboriginal governments. In this it was apparently supported by the other Aboriginal organisations.

It is important to note that three broad-based national feminist organisations had asked for and been denied participant status in the negotiations. The National Action Committee on the Status of Women (NAC), NWAC, and the newly-minted National Metis Women of Canada⁴ all claimed that women's voices had to be explicitly included for the new constitutional package to adequately reflect Canadian /Aboriginal aspirations. They argued that their participation would provide content, context and analysis not presented by the First Ministers and the favoured lobby organisations. The First Ministers and the Aboriginal lobby organisations declined to support the inclusion of these women's organisations.

When NWAC sought status at the constitutional table equivalent to that of the four included organisations, the federal government encouraged NWAC to work through the 'male-stream' organisations to advance its interests rather than to promote them separately. NWAC attempted to do this; however on some issues NWAC and these organisations, in particular the AFN, are in substantial opposition. This is particularly apparent where Native women identify a shared experience of oppression as women within the Native community, together with (instead of only as) the experience of colonial oppression as Aboriginals within the dominant society. Not for the first time,⁵ the AFN sought to deny the reality of sex oppression in Aboriginal communities and to resist women's attempts to put these issues on the political agenda.⁶

The MNC similarly was criticized by Metis women for not incorporating women's agenda, and for not making space for women's voices at the table. Marge Friedel, speaking to the

Royal Commission on Aboriginal Peoples on behalf of the Women of the Metis Nation of Alberta, said:⁷

Metis women firmly believe that for the constitutional process to reflect a true Metis women's involvement it must ensure that our voices are heard, that our experiences are understood and that our expectations are given a respectful and responsive hearing. ... Aboriginal women have been and continue to be discriminated against by the un-accountable male dominated political organisations.

NWAC raised three issues at variance with the Canadian and Aboriginal 'male-stream' participants at the constitutional table. First, NWAC wished to be a full participant, with status equal to the other four Aboriginal organisations. In support of this, NWAC argued that it represented a constituency whose interests were not articulated by any of the other Aboriginal players, and whose interests were being negatively affected by negotiations. Second, NWAC wanted equal funding with which to advance its position. Third, NWAC wanted the *Charter* to continue to apply to constitutional Aboriginal governments, at least until an equally authoritative Aboriginal Charter, whose terms would protect women's equality rights, was in place.

NWAC was excluded from full participation in the constitutional negotiations, and from equal federal funding for the negotiation process. The process of exclusion of Aboriginal women by key players in the constitutional sandbox, with the tacit approval of all other players, is characteristically sexist, and indicative of political and policy hegemony by men. It is this process that is of primary interest here.

Ultimately the process excluded women *qua* women. That is, despite a significant court ruling⁸ that the Charter rights of NWAC members were abrogated by the exclusionary process, despite the court's acknowledgement that the participant organisations, and particularly the AFN, acted in ways inimical to NWAC interests, and despite the court's acknowledgement that NWAC was the only valid voice of those interests, *nothing changed*. The select group of first ministers and Aboriginal lobby organisations, exclusive of explicit women's representation, was not expanded.

Perhaps this result could have been predicted, based on the difficult and frustrating experience of women organising to ensure protection for women's rights in the *Charter* in the 1980-1982 period. As Sue Findlay put it:⁹

The resistance of the state — including both federal and provincial governments — to consultations with feminists about ways to guarantee women's rights in the new Constitution was a stunning display of the limits of state commitment to actively promote women's equality.

The political choreography of the state apparatus and the key players throughout the Charlottetown process was no less stunning. For Aboriginal and non-Aboriginal feminists alike, it seems a categorical rejection by the power-brokers of women's inclusion in the "unequal structure of representation."¹⁰ This suggests the conclusion that the ideology of patriarchy is more fundamental to the premises on which the Canadian state is founded than is the principle of democracy.

The exclusion of Aboriginal women from the Charlottetown round has implications for all women, for the prospects for our inclusion in political processes, and for the unlikelihood, despite Charter guarantees, of a genuine societal accommodation of our interests. The state apparatus appears to be designed to maintain the existing power relations, not to integrate powerless groups like Aboriginal people or women in some equitable fashion.¹¹ The case study of NWAC's experience suggests that even when we win, (for example, the judicial decision that NWAC's Charter rights were offended by the exclusionary political process) we lose.

ABORIGINAL FEMINISM

The existence of a critical mass of Aboriginal women who identify as feminists — as evidenced by the viability of NWAC — is a relatively new phenomenon. Feminist identification and feminist analysis is weak within Aboriginal communities and organisations, and is not widespread among individual women. Indeed, Aboriginal women have been urged to identify as Aboriginal, in the context of the domination and exploitation by the newcomer community, to the exclusion of identification as women with women across cultures, and with the experience of exploitation and domination by men within Aboriginal communities. Nevertheless, many Aboriginal women from disparate contexts identify commonalities in the experience of being women and Native that are both dual oppressions,¹² and a unique way of understanding the world.

Many Aboriginal women do not adopt the label "feminist." Reasons for this range from those shared with many non-Aboriginal women — that is, a misunderstanding of feminism as an alienating ideology that negates the possibility of male-female relationships and detracts from the value of the family — to a refusal to identify with what is seen to be a middle-class white women's movement which has no understanding of race oppression. This, however, is changing as more individual women and more organisations share an analysis that is characterised by Aboriginality and gender, and in the case of organisations, whose internal organisation and political objectives

and strategies are characteristically feminist.¹³ A good example of this can be found in the presentation of the Manitoba Indigenous Women's Collective to the Royal Commission on Aboriginal Peoples:¹⁴

As Aboriginal women, we face discrimination and racism because we are Aboriginal and because we are women. We lack access to jobs, to support, to training programs, and to positions of influence and authority. ... All across Canada, Aboriginal women are involved in the struggle for equal rights.

The analysis of inequitable relations between men and women has much in common with the feminism of other Canadian women, and provides a basis for solidarity between women's organisations.

Feminism has been represented by Aboriginal organisations and by many prominent male and female Aboriginal activists as undermining the "greater" objective of Aboriginal liberation; women have been assured that their needs, where they differ from those of the male-dominated political power structure, will be addressed by "traditional" mechanisms at some future point when Aboriginal governments have political, economic, social and cultural power.

While NWAC does not use the language generally associated with feminist theory, it pursues woman-identified objectives in a manner that is characteristically feminist. Before Charlottetown, the most prominent of the issues NWAC pursued included the fight to end the sexist status provisions of the *Indian Act* and its internalisation by some band governments, and the recognition of violence against women and children as a reality and a high priority issue. NWAC articulates Aboriginal women's experiences by way of a uniquely Aboriginal feminist analysis. Its political rifts and liaisons indicate that this analysis is being tested by implementation.

By virtue of being a national voice of Aboriginal women as women, NWAC (and its sister organisation, the National Metis Women of Canada) promotes gender equality. It does so by existing despite a hostile political environment, by offering women's analysis in a male policy arena, and by speaking for women's inclusion despite a climate of exclusion. NWAC's existence is an organised response by Aboriginal women to the sexism within male-dominated Aboriginal communities and organisations, and the failure of those organisations to respond to or to validate women's issues as defined by women's experiences. That is, NWAC's existence is a response to the political void left by the AFN and others.

ASSIMILATING THE PATRIARCHY

Most Aboriginal women acknowledge that traditional, that is, pre-contact Aboriginal societies, valued women and women's work.¹⁵ However, the trauma of colonisation and the realities of social change in contemporary societies have changed social roles and expectations. The European model of the patriarchal family is now normative in most Aboriginal communities;¹⁶ the dominant society's low valuation of women and women's work has been laid over Aboriginal values.

Combined with the social pathologies of wife assault, child abuse and sexual abuse, contemporary Aboriginal societies often manifest the worst of the European patriarchy. According to the Canadian Panel on Violence Against Women, eight out of ten Aboriginal women experience physical, sexual, psychological or ritual abuse, a rate twice as high as in non-Aboriginal society.¹⁷ Similar findings led other researchers to conclude that "[t]his sadly confirms the family unit as a place of danger and high risk, instead of security and protection."¹⁸ In a client survey of native women in Lethbridge, Alberta, of 63 respondents:

- * 91% had personal experience with family violence
- * 75% grew up as targets of family violence
- * 46% identified alcohol as a factor
- * 29% experienced violence without the alcohol factor
- * 70% suffered violence at the hands of relatives
- * 50% were currently single
- * 75% lived on monthly incomes of less than \$1,100
- * 50% were supporting children

The writers concluded that "[f]amily violence is a constant reality in the lives of urban Native women."¹⁹

Violence against women and children has become a primary concern for many Aboriginal women, and is viewed as a priority for the political agenda. Many women worried that male politicians would make decisions around constitutional renewal and Aboriginal government structures and processes without integrating women's agenda, or understanding women's reality. "As women, we're saying, you're (men) making the decisions and you don't even know what the hell we need out here or what we want, said Lil Sanderson, a NWAC representative from La Ronge."²⁰

This view was reiterated by Marilyn Fontaine, for the Aboriginal Women's Unity Coalition, in a presentation to the Royal Commission on Aboriginal Peoples. Fontaine stated that her organisation had no confidence in the primarily male Manitoba Indian leadership.²¹

Aboriginal women have been reluctant in the past to challenge the positions taken by the leadership in the perceived need to present a unified front to the outside society which oppresses us equally However it must

be understood that Aboriginal women suffer the additional oppression of sexism within our own community. Not only are we victims of violence at the hands of Aboriginal men, our voices as women are for the most part not valued in the male-dominated political structures.

Fontaine declared that "the abuse and exploitation of women and children is a political issue of equal importance to achieving recognition to govern ourselves."²²

In an address to the Royal Commission on Aboriginal Peoples, Doris Young of the Indigenous Women's Collective said:²³

We believe that we have the inherent right to self-government, but we also recognize that since European contact, our leaders have mainly been men. Men who are the by-products of colonization ...

A June 25th, 1993 *Edmonton Journal* story featuring Chief Felix Antoine of Rosseau River proposing an amnesty for child and wife abusers illustrates some of the problems suggested by Fontaine, Sanderson and others.²⁴

By allowing them time to talk about their problems without fearing arrest, those who abuse their children or beat their spouses can work with others in the community and "begin to feel like a human being," he said.

The Chief was speaking to a Native task force investigating charges of political interference by chiefs in Native child welfare cases. Nothing was reported about the Chief's concern with the safety and humanity of victims, nor of the responsibility of abusers. Indeed, one gets the sense that the abusers *are* the victims.

Systemic violence has come to be understood as a political expression of issues of power and control. Violence is one measure of the crisis in Aboriginal communities, and women's experience as primary victims of that violence is a measure of women's political marginalisation. The issue of violence against women and children is only beginning to be taken seriously by Aboriginal organisations and by some band councils. However, measurable response (such as programs for victims and batterers, and zero-tolerance of violence) to the issue is slow coming. This is consistent with the slow response or non-response of existing Aboriginal politics to other issues identified by Aboriginal women.

OLD ISSUES NEVER RESOLVED

In 1869, the federal government passed the first *Indian Act* by that name. The *Act* defined who was an Indian, and in so doing, applied European notions of patriarchal social and family

structure, and of legitimate birth. Indian women who married anyone other than a status Indian man lost their status; their children took the status or non-status of their fathers. This discriminatory provision persisted through a Supreme Court challenge²⁵ and in violation of international law,²⁶ until the Bill C-31 amendments to the *Indian Act* in 1985. The amendments were motivated by the *Charter of Rights and Freedoms*, which prohibits discrimination on the basis of sex, and under which the offensive provisions of the *Indian Act* would have inevitably been struck down.²⁷ While the discriminatory law no longer exists, its effects linger, a legacy of colonial legislation. Many band councils (also creations of the *Indian Act*) defend the old status provisions as "tradition," and are bitterly opposed to reinstatement.²⁸

The refusal of many band councils to accept the legitimacy of women and children reinstated under the 1985 *Indian Act* revisions is another example of political intransigence on women's issues. The political marginalisation of women as a consequence of *Indian Act* 'status' provisions continues. The *de facto* opposition from many band governments prevents many reinstates from exercising their *de jure* legislative and constitutional rights. 'We're going to be left out for the rest of our lives,' said [Philomena] Aulotte, who was one of a number of Indian women in Alberta who fought for years to have the old discriminatory section of the *Indian Act* struck down.²⁹ Now, eight years after the amendment, "C-31" people are finding the *realpolitik* remains a barrier to going home.

Much of NWAC's constituency are women who lost their status under the old *Indian Act*. Of those who are eligible for "reinstatement" as status Indians, 91,112 of 165,571 persons who have applied have been re-instated — at least on the federal membership list.³⁰

However, "(i)n Alberta, it is estimated that less than two per cent of the 9541 persons Indian Affairs has added to the membership lists of the 43 bands in the province have been accepted by the bands."³¹ Many more wait for an inadequate bureaucracy to process their applications to recognize their constitutional rights.³² And only 2% of reinstated displaced native women have been able to return to their reserves since the 1985 amendments, due in large measure to the political and tactical opposition by band governments. This continued discrimination by bands invoking both tradition and the inherent right to control membership or citizenship has left many native women sceptical of the ability and political will of future Aboriginal governments to respect women's rights. NWAC suggests Aboriginal women's distrust of Aboriginal governments is a consequence of the latter's demonstrated resistance to women's rights.

Some chiefs and status Indians from Alberta, led by Senator Walter Twinn, Chief of the Sawridge Band, are asking the Federal Court of Canada to declare the C-31 amendment to the *Indian Act* to be unconstitutional and contrary to the *Charter*.

The *Twinn* case argues that only Indian bands, and not the federal Parliament, can say who can be on the membership list. The case, one of several court challenges to C-31 amendments, is expected to be heard in September 1993.

THE (E)QUALITY OF RIGHTS

The injustices experienced by Indian women at the hands of the Canadian government have, since the 1985 *Indian Act* amendments, been continued by some bands. Some women first stripped of their Indian political rights by discriminatory federal legislation find that they now are being prevented from exercising their rights by certain hard-liners. These women have no immediate recourse apart from appeal, through the Canadian legal system, on the grounds of infraction of their *Charter* and other rights. However, many bands and the AFN, take the view that the *Charter* is itself an infringement on the inherent right of self-government. The pre-Charlottetown political discussions that included the AFN and other Aboriginal lobby organisations and the First Ministers, while excluding Aboriginal women's organisations, sought to find consensus on the elements of self-government. One of the points on which consensus was ultimately achieved was the possibility of suspending the *Charter* in relation to traditional practices in the exercise of self-government.

The split over whether the *Charter of Rights and Freedoms* should apply to Aboriginal governments came early. In January of 1992 NWAC was reported to support the inherent right of self-government but, in opposition to the AFN, was insisting traditional Aboriginal government practices be subject to the *Charter*.³³ Further, NWAC did not support Aboriginal governments' access to s. 33, the notwithstanding clause, fearing male-dominated Native governments would override women's equality rights.³⁴ NWAC was not standing alone on this issue: many feminists and other scholars of constitutional law agreed. Instructionally, within the Aboriginal feminist community there was solidarity on this point. Speaking to the Royal Commission on Aboriginal Peoples, Doris Young asserted: "We, therefore, want the Charter of Rights and Freedoms enforced in Aboriginal self-government until such time as when our own Bill of Rights is developed that will protect women and children."³⁵

The Charter guarantees of equality rights were thought to be vulnerable to such an override, invoked to shield exercise of the inherent right and 'tradition.' Section 15(1), equal protection and benefit of the law regardless of (among other differences) gender, could conceivably be suspended by s. 33. The existence of s. 35(4) of the *Constitution Act 1982* is no comfort: it guarantees Aboriginal and treaty rights equally to men and women, but it is not clear that s. 15 would be considered to be a component of Aboriginal and treaty rights. Therefore, it is conceivable that an abuse of gender equality rights could be insulated from judicial remedy by invoking s. 35 inherent rights as legitimating gender discrimination. This kind of constitutional possibility, together with the recent history around *Indian Act* status provisions,

moved NWAC to insist on Charter application to Aboriginal governments.

At a Native women's constituent assembly in Toronto on January 19th, 1992, Jeanette Corbiere Lavell said that Native women need the *Charter's* protection because they have no other. Lavell had challenged the discriminatory membership provisions of the pre-1985 *Indian Act* in the Supreme Court of Canada, alleging it violated the Canadian *Bill of Rights*. In that decision, the Court ruled that, as all Indian women were treated the same way under the legislation, the legislation was not discrimination in law, and therefore was not in violation of the *Bill of Rights*. The National Indian Brotherhood and some bands intervened against Lavell at that time. Lavell pointed out it was a chief who initially appealed the Federal Court of Canada's favourable decision in her case.

Speaking of the situation of many women since the 1985 *Indian Act* amendments, Lavell pointed out:³⁶

Many of the provincial and national First Nations political organisations, as we begin the transition to self government, have fought this legislation, Bill C-31, all the way, and many of our communities are still in effect refusing to implement it today.

NWAC promptly found itself roundly criticized by other Aboriginal women for its position.³⁷ Women advocating the explicit protection of women's equality rights were attacked for undermining the greater cause of Aboriginal rights. Chief Wendy Grant of the Musqueam band, a regional vice-chief of the AFN, charged that "[d]ivision between First Nations people based upon the non-native fascination with extreme individualism simply supports the assimilation of our people into the non-native culture."³⁸ This debate continues. Over a year later, at the annual conference of the National Association of Women and the Law³⁹ lawyer Nancy Sandy, speaking in place of Chief Grant, argued that First Nations do not need external agents telling them how to handle rights. Lawyer Theresa Nahanee argued that the collective right to self-determination is premised on individuals being able to express rights to self-determination. She went on to answer the charge of "extreme individualism" in this way:⁴⁰

I think it is wrong to characterize the struggle by First Nations women for sexual equality rights as a struggle between individual versus collective rights. Why? The women have been trying since 1967 to erase the artificial, legal barriers which separate women from the collective.

NWAC, representing a largely disenfranchised community, found itself marginalised by the powerbrokers shaping the constitutional discourse. NWAC wanted a role in the form of a seat at the discussion table, and funding for constitutional participation. It had been surviving on grant money funnelled through the other organisations, primarily the AFN. This had the

effect of incorporating NWAC into the AFN in terms of political access to the negotiation table, as well as with respect to priority agenda items for discussion at those tables. NWAC took the position that, by funding the AFN to promote its anti-Charter position and by not funding NWAC, the government was "expressing an unconstitutional preference for the promotion of views which will lead to the extinguishment of Aboriginal women's equality rights."⁴¹

Unwilling to continue to engage in an apparently fruitless negotiation process, NWAC initiated legal action against the federal government. In a March 18th, 1992 press release, NWAC said it had⁴²

brought this action to demand recognition at the Constitutional negotiation table. NWAC also demands funding equal to that which is provided to the four recognized Aboriginal organisations beginning April 1, 1992. Without those two essential conditions, NWAC asks the Federal Court to prohibit the government of Canada from giving any funds to the four organisations participating in the Canada Round.

Citing discrimination, NWAC asked the Federal Court of Canada to stop disbursement of the federally-allocated \$10 million to AFN, NCC, ITC and MNC until NWAC was granted an equal share.⁴³ NWAC also argued it was an infringement on women's freedom of expression for the federal government to fund only male-dominated groups to speak on Aboriginal issues in the Constitution, while refusing to fund NWAC.⁴⁴

At the trial level, Mr. Justice Walsh decided that there was no sex discrimination or infringement of freedom of speech in the federal government's refusal to include NWAC in the talks.⁴⁵

... to hold that freedom of expression creates a right for everyone to have a voice in these discussions would paralyse the process ... With respect to discrimination as to sex the disproportionate funds provided for the [NWAC] results not from the fact that they are women but from the unwillingness of the government to recognize that they should be considered as a separate group within the Aboriginal community from the four named groups ... I find nothing unfair or contrary to natural justice in the selection of the said four groups to represent the Aboriginals at this conference.

NWAC appealed.

THE 'CANADA ROUND': NO ROOM FOR WOMEN

As regards the constitutional specifics of the inherent right of self-government, NWAC wanted the *Charter* to apply, at least until an Aboriginal charter is developed. It argued that failing to apply the *Charter* to Aboriginal government could jeopardise Native women's equality rights. NWAC president Gail Stacey-Moore insisted that self-government must guarantee basic human rights.⁴⁶ AFN National Chief Ovide Mercredi argued that Aboriginal people want and need their own charter. Stacey-Moore responded that Aboriginal women want their human rights guaranteed one way or another.⁴⁷ At the same time, Mercredi told reporters questioning whether there was a rift between the AFN and Native women, "there's no issue here."⁴⁸ The AFN rejected the application of the *Charter* because it is "white;" its imposition would be a "continuation of imperialism, with one set of values imposed upon another culture" according to Mercredi.⁴⁹

This is interesting, in light of the appeals Aboriginal peoples frequently make to the *Universal Declaration of Human Rights* and the *Covenants on Economic, Social and Cultural Rights*, and on *Civil and Political Rights*. The *Charter* reiterates many of the guarantees in the international instruments. The latter are taken to be universal standards for state behaviour. Presumably, Aboriginal governments would not be exempt nor would they want to be exempt from these standards.

In a July 8th, 1992 letter to all First Ministers, NWAC President Gail Stacey-Moore wrote "It is obvious from the 'deal' you have now concluded that in the absence of Aboriginal women at the table — women elected to represent the interests of women — that our issues are not dealt with fairly and justly."⁵⁰ On July 10th, she wrote AFN National Chief Ovide Mercredi: "If, as you have publically (sic) stated, the Assembly of First Nations represents Aboriginal women as well as Chiefs, we demand to know the basis for the decision to reject demands by Native women for entrenchment of their sexual equality rights."⁵¹

And the First Ministers were apparently as willing as Aboriginal leaders for Native women's rights to be put on the back burner. The text of the Premiers' unity proposal, printed in the *Globe and Mail* on July 10th, commented:⁵²

On **gender equality**, the chair ... reported the agreement of the principles not to change section 35(4) already in the Constitution (guaranteeing Aboriginal and treaty rights equally to male and female persons) and to *add the issue of gender equality to the agenda of the future First Ministers' Conference (FMC) on Aboriginal matters.* (emphasis mine)

NAC cited this deferral of a discussion of Aboriginal women's equality rights in its campaign to have the Referendum on the Charlottetown Accord defeated.⁵³

The exemption of Aboriginal governments from *Charter* application raised the spectre of some Aboriginal governments invoking "inherency" and "tradition" to support various kinds of sex discrimination (such as in relation to membership). NWAC feared, with some justification, that the existing section 35(4) would not shield women in such situations. As Michele Landsberg wrote:⁵⁴

Native women have good cause to fear the 'collective rights' that the Aboriginal men are demanding. Nations around the world have used similar collective rights to suppress women's equality on grounds of 'tradition, custom, and history.'

Reacting to the not unexpected betrayal by First Ministers and the Aboriginal organisations, Sharon McIvor, speaking for NWAC, said "This constitutional 'deal' wipes out the 20-year struggle by Native women for sexual equality rights in Canada."⁵⁵ McIvor said Native women would not be protected from "male-dominated" native governments because gender equality provisions in the *Charter* would not apply to Aboriginal governments. She pointed out that existing *Charter* guarantees could be insufficient in any case, as Aboriginal governments could resort to section 33, the notwithstanding clause.⁵⁶ (For those who think McIvor overstates the danger of this, consider how many First Nations would like to invoke a legal or political override of the C-31 status provisions; and watch the *Twinn* case in the Federal Court of Appeal this fall.) NWAC continued to request a seat in future negotiations.

Interestingly, the Native Council of Canada had unsuccessfully pressed for changes to accommodate NWAC's concerns; it did not get support from the other Native organisations.

ALL FOR ONE AND ONE FOR ALL: FEMINIST SOLIDARITY

In its response to the Beaudoin-Dobbie Report⁵⁷, the National Action Committee on the Status of Women (NAC) had served notice that it would be supporting NWAC in regard to applicability of the *Charter* and the principle that the notwithstanding clause not be available to Aboriginal governments. Subsequently, NAC support translated into solidarity with NWAC in opposing the Charlottetown Accord. "NAC strongly supports the (NWAC). We've agreed with them that they would take the lead on this issue — it's their issue — and we would back them" said then-NAC president Judy Rebick.⁵⁸ In a position paper issued by NAC shortly after the publication of the Accord, NAC called the Accord "a bad deal for women." It went on to warn that "There is no guarantee of gender equality for Aboriginal women in the text and NWAC and the National Metis Women of Canada believe that their rights will be threatened under this self-government agreement."⁵⁹ In a special edition of *Action Now*, the NAC newsletter, NAC issued a call

to members to vote no in the October 26th referendum and to engage in the "No" campaign because, among other reasons, "(The Accord) does not protect Aboriginal women under self-government."⁶⁰

This support was a logical expression of NAC's commitment to accepting women's definition of their realities. NAC's feminist analysis includes an identification as women, with an obligation of solidarity with other women, because of the shared experience of gender oppression regardless of race or caste.⁶¹ As Mary Daly put it, "Sisterhood is the bonding of those who are oppressed by definition."⁶²

Some observers sought to discredit the alliance as poorly conceived or politically opportunistic. However, NAC has a long history of supporting Aboriginal women's struggles, notably since 1972. Further, some activists in NWAC have also held NAC membership, and as full and influential participants at senior levels. For example, NWAC leader Gail Stacey-Moore has been co-chair of the NAC committee on Aboriginal women.⁶³

On August 24, 1992, NAC and NWAC sponsored a meeting attended by over 150 leaders of women's groups from across Canada to discuss the constitutional proposals. The consensus of the group was that the agreement threatened social programs and equality rights. By the end of the conference, and further to the decision by the Federal Court of Canada that the NWAC had suffered discrimination by its exclusion from the constitutional table, NAC had reaffirmed that position⁶⁴ and called upon the federal government to ensure that NWAC and the National Metis Women of Canada would get participant status in the pending First Ministers Conference.⁶⁵

On August 26th, NAC sent a letter to Prime Minister Brian Mulroney asking for a "seat at the table", and:

- (1) that the Prime Minister invite a delegation of Aboriginal women including NWAC and the National Metis Women of Canada "to sit as a full delegation at Thursday's meeting of First Ministers and in any future multilateral negotiations."
- (2) that a delegation from the conference, organised by NAC, be given time on the agenda to present proposals and concerns and to discuss these with the First Ministers.⁶⁶

Denied participation in discussions and negotiations, and faced with the prospect of constitutionally permissible discrimination if the Charlottetown package was adopted in its entirety, NWAC changed its strategy to obtaining a court injunction halting the constitutional referendum. The request by NWAC to halt the referendum was delayed until less than three weeks before the vote by Mr. Justice Yvon Pinard of the Federal Court of Canada, at the request of the AFN, which intended to intervene.

INVOKING THE CHARTER

On August 20, 1992, NWAC won the Federal Court of Appeal decision⁶⁷ ruling that its right to free speech had been violated by its exclusion from the constitutional talks. Mr. Justice Mahoney wrote:

... it is in the interests of Aboriginal women that ... they continue to enjoy the protections of the Charter ... The interests of Aboriginal women were not represented by the AFN ... nor ... the NCC and the ITC on this issue ... By funding the participation of the four designated organisations and excluding the equal participation of the NWAC, the Canadian government accorded the advocates of male dominated Aboriginal self-governments a preferred position ... by including the AFN, an organisation proved to be adverse in interest to Aboriginal women, while excluding NWAC, an organisation that speaks for their interest, in a constitutional review process, the federal government restricted the freedom of expression of Aboriginal women in a manner offensive to ss.2(b) and 28 of the Charter.⁶⁸

Making its case, NWAC documented that the organisation had been ignored in its requests to participate, and alleged that the constitutional provisions on Aboriginal government did not protect Native women's equality rights. NWAC asked the court to "halt the referendum and prohibit other native groups from further constitutional talks with the federal and provincial governments."⁶⁹ However, the court said it had no power to order the federal government to invite NWAC to join the talks. No remedy was granted.

WELL-PLACED DISTRUST

When it was revealed on August 26th, the Charlottetown Accord, while not dealing with the issue of native sexual equality, suggested it should be on the agenda for future Aboriginal constitutional conferences. Apparently the old boys had incorporated the premiers' earlier package of proposals with regard to deferring consideration of gender equality. This "wait your turn" approach to Aboriginal women's concerns did not sit well with NWAC, NAC, and many other social justice groups.

And then the political negotiations and legal haggling began. The Accord would be interpreted and implemented by means of legal text and political accords, which were being drafted in elite working groups behind closed doors. The legal text was not available to the public until short days before the national referendum. NWAC was not alone in articulating anxiety about the process and the possible compromises that would be made behind the scenes: many "No" groups sprang up across the country to mobilise public rejection of the Accord.⁷⁰ Rumours abounded that the legal text substantiated NWAC's fears of political isolation and marginalisation.

NWAC had expressed concern that its exclusion from the federal, provincial and native officials' on-going discussions on a legal text of the political accord further jeopardized its position.⁷¹ Subsequent events proved NWAC right. NWAC warned that the draft legal text contained changes that negated the guarantee in the political accord to have the Charter apply to Aboriginal governments.⁷² Anne Bayefsky, a noted human rights scholar and legal adviser to NWAC, publicly charged that the draft legal text showed that native women's rights had been sold out.⁷³

When the legal text was finally released, it proved those fears to be well grounded. The draft legal text of October 9, 1992, for example, provided for access by Aboriginal legislative bodies to Section 33, the notwithstanding clause.⁷⁴ The draft legal text went on to entrench "the inherent right of self-government" as "one of three orders of government", that right to be exercised by "duly constituted legislative bodies ... each within its own jurisdiction" ... "to safeguard and develop their languages, cultures, economies, identities, institutions and traditions."⁷⁵ There was some concern that this provided a legal arsenal for such bodies to defend discriminatory policy by invoking the right to "safeguard and develop ... tradition"; that is, to claim that exclusion of women in various circumstances was traditional and therefore justified.

Joan Bryden, writing for the Calgary Herald, reported that "The consensus report says the Charter ... will apply to Aboriginal self-government. But the draft legal text effectively negates that provision, adding a clause specifying that nothing in the charter abrogates or derogates from the inherent right to self-government or the rights of Aboriginal governments to protect native languages, cultures and traditions.

It further amends the charter to ensure that Aboriginal governments do not have to be elected." ...⁷⁶

Mary Eberts for NWAC argued for an injunction to stop the October 26 referendum outside of Quebec. NWAC alleged that it was wrongly excluded from constitutional talks leading to the Accord, and that the Accord threatened native women's rights. The legal result, argued Eberts, "could allow male-dominated native self-governments to discriminate against women, using traditions to justify denying women the right to vote, band membership or even proper protection from sexual assault and other abuse."⁷⁷ By way of example, Eberts cited the judicial response to the defence of 'tradition' to the gang rape of a 13-year-old Inuit girl:

In the case, three Inuit men were given light sentences — that were eventually raised to four months in jail — because a judge ruled that under Inuit tradition a girl is ready for intercourse when she is 13.

The girl became pregnant as a result of the rape but

the judge said she suffered no harm because Inuit tradition accepts children born out of wedlock.⁷⁸

The drafting of the Accord, and of the more specific political accords, and of the critically important legal text was done with consultation with the four other Aboriginal organisations, but without NWAC. The referendum timetable clashed with the significant constitutional questions raised by NWAC in its largely successful appeal from the Federal Court decision. NWAC and political fellow-travellers could only interpret the process of constitutional evolution as willfully exclusionary of Aboriginal women, and as blind to the historical record of injustice to them at the hands of both Aboriginal and mainstream governments.

On October 26, 1992, Canadians overwhelmingly voted against the Charlottetown Accord. Analysts have suggested the rejection was more of the process that created it than of the package itself; most commentators were quick to say that of any component in the package, the Aboriginal government portion was perhaps the most supported and should survive despite the Accord's demise.

Expressing relief the day after the national rejection of the Charlottetown Accord, NWAC's regional executive director Sharon McIvor said "There are currently about five cases in Canada where women have taken their band councils to court because of sexual discrimination. Those cases could have been 'thrown into limbo' if the vote had gone Yes."⁷⁹

THIS IS A SONG THAT NEVER ENDS

The Charlottetown Accord may be dead, but its issues have a life of their own. The Aboriginal desire for self-determination has not been satisfied by the political process that resulted in the failure of the Charlottetown Accord. Aboriginal governments of various descriptions hold the view that the inherent right to Aboriginal government is implicitly contained in section 35 of the *Constitution Act 1982*. Many intend to exercise that right, and allow the Canadian political and legal institutions to respond to direct political action asserting Aboriginal sovereignty.

Issues of Aboriginal government, shared bilateral and trilateral jurisdictions, land claims, treaty modernization, and constitutional renewal now exist in an apparent policy vacuum. The federal government, by way of its largely discredited "community-based self-government" initiative⁸⁰, the Yukon government's land claims and band government initiatives, the Aboriginal government implications of Northwest Territories division, and provincial initiatives such as B.C.'s promising Treaty Commission, all attempt to inject some policy parameters into this vacuum. All governments are mindful that they can no longer pretend the issue of a third order of government does not exist, or that it does not have compelling merit. But none seem to be willing to grapple with the concomitant issue of gender

oppression within Aboriginal communities. Perhaps the issue is too close to home — for the sex oppression in Aboriginal communities is patterned on the sex oppression in Canada generally. Perhaps addressing the systemic gender oppression of Aboriginal women would logically lead to examining the oppression of non-Aboriginal women, and a host of discriminatory relationships. And perhaps white guilt is stifling any critique of Aboriginal social and political relations.

Aboriginal peoples, and especially some Indian bands, are not prepared to forgo self-government because of the referendum failure. Some have declared their intention to assert their political autonomy, and to replace mainstream institutions with Aboriginal ones. Women's interests are not often central to the analysis of the new order. A case in point is illustrated by the current tensions at the Rosseau River Reserve in Manitoba.

The Manitoba Chiefs have taken the position that gaming — gambling — is within the jurisdiction of Aboriginal governments. The potential creation of gaming establishments on-reserve offers economic benefits; similar establishments on American reserves have done much to improve reserve economies. However, the provincial government is not prepared to concede the jurisdiction, and Rosseau River decided to act in advance of any agreement, by setting up gambling machines on the reserve, without the requisite provincial permit. In accordance with the existing law, the RCMP removed the gambling machines, assisted by the tribal police. The tribal government responded by ordering the tribal police off the reserve.

On January 26, 1993, CBC Radio ran a story in which women from the reserve said they were worried about their safety and security in wake of eviction of RCMP and tribal police by the band council. The police were replaced by a warrior society, also known as the Peacekeepers. The eviction was over an RCMP-led raid on unlicensed gambling operations on the reserve, in violation of provincial law. The band council insists it has the right to jurisdiction in this matter.

The women wished to be anonymous, out of fear of harassment. Said one woman, "They (the band council and warriors) say they want to work with the women, but then they tell us to shut up." One woman's abusive former boyfriend, on probation for assaulting her, is a warrior. The women are afraid. They don't trust the warriors or the band council to guarantee their safety.⁸¹

On January 28, women from Rosseau River met with AFN National Chief Ovide Mercredi, to voice concerns about the handling of policing on the reserve, and the safety of the community. The women told Mercredi that they feared for their safety; several had been threatened or had witnessed threats by the Warriors to those who supported the tribal police.⁸² They told how one woman had been told to "leave the reserve if she knew what was good for her." Phil Fontaine of the Manitoba Chiefs disagreed with the women's analysis; he argued this is part

of self-government; and that self-government has its risks and they must be accepted.⁸³

Those Aboriginal women who have a political analysis of their experience as women in addition to as Aboriginal are intimidated in the process of activism. As I have written elsewhere,

Aboriginal organisations and many First Nations are bludgeoned dissent with the argument that dissent on this matter undermines the political strength of the organisations; and is orchestrated by "white Toronto feminists", and that Indian women are not feminists and do not support feminism, i.e. equal rights; and that Indian government, returning to traditional ways or basing processes on traditional values, will put something in place (but not the Charter) to ensure equality among citizens.

Aboriginal women are vulnerable to being branded as puppets of the 'white' feminist movements, as being unAboriginal, if they speak up for women's participation and protection of women's rights in Aboriginal contexts. This kind of powerful silencing technique is familiar to women of all races. Sadly, it is often effective.⁸⁴

Speaking of C-31, Nellie Carlson, a prominent activist for repeal of discriminatory sections of the *Indian Act*, said: "Indian women worked so hard to have that bill passed. We had no money; our lives were threatened, we were followed everywhere we went, our phones were tapped — that's how Indian women were treated for speaking out."⁸⁵

Aboriginal feminists take great risks and display real courage in continuing their activism. This intimidation is shared by all feminists who find themselves targets of ridicule, marginalisation, and other sanctions including physical assault. However, it is a more profound threat for Aboriginal women, because the attackers deny the validity of their analysis as authentically Aboriginal. It is a painful thing to be labelled as a dupe of the colonizing society for undertaking to name and change women's experience.

The single most influential factor determining the exclusion of NWAC from the constitutional arena was the collective refusal to see Aboriginal women's concerns (or, for that matter, other women's concerns) as distinct from and equally legitimate with Aboriginal men's concerns; and to see 'male-stream' organisations as precisely that. Closely tied to this was the collective denial of the reality of the experience of the NWAC constituency — an experience of marginalisation and persecution.

In terms of policy outcomes, it is important to remember that neither the Court nor the political alliances and advocacy created a remedy for NWAC. Had the Charlottetown Accord

been approved and implemented, NWAC's concerns would not have changed the Accord's composition.

No one speaking for NWAC, NAC, or the National Metis Women of Canada is opposed to constitutional affirmation of the inherent right of Aboriginal peoples to their own governmental powers. But the women's organisations do not accept that a choice must be made between justice for Aboriginal societies vis a vis the dominant society, and justice between Aboriginal women and men. As the late Sally Weaver wrote, "First Nations women have continued to pursue socio-economic equality in Canadian society, while simultaneously seeking their primary targets of equality of Indian rights and human rights for Indian women."⁸⁶ Liberation from colonialism will be of no assistance to Aboriginal women, if sexism maintains a colonial relationship between Aboriginal men and women. So far Aboriginal organisations have been unwilling to be internally critical, to tolerate any criticism, or to accept responsibility for discriminatory behaviour and politics. In the wake of the Charlottetown fracas, the problem of sexism persists.

Once again, women who object to the exclusion of their interests as women are told that there is no issue; and that the political interests of the First Nations are served by denying women's issues. While male leaders speak for "their people", dissident women's voices are silenced. La plus ca change, la plus la meme chose.

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1. This term was coined by feminist theorist Mary Daly, to describe what are often represented as "main-stream" organisations but in fact are culturally and structurally male, primarily staffed by males, and pursue a male-identified and prioritised agenda.
2. Commenting on behalf of the Women of the Metis Nation to the Royal Commission on Aboriginal Peoples, on May 11, 1992, Marge Friedel observed: "The Government of Canada treats these self-interest groups as though they are governments. ... because these groups are treated like governments, they now believe that they are governments ... this is totally unacceptable and somewhat ludicrous."
3. The argument has been persuasively made that the inherent right of self-government is implicit in s.35 of the *Constitution Act 1982*.
4. Metis women formed the National Metis Women of Canada on October 26, 1991. Throughout the last round of constitutional negotiations the NMW operated with the financial assistance of NWAC and the Native Council of Canada. Formerly under the NWAC umbrella, the NMW decided a parallel Metis-specific organisation would better articulate the views of Metis women. In an interview with the writer in March 1993, Marge Friedel, President of the NMW, indicated the NWAC preoccupation with status issues was not shared by Metis women; however the two organisations have a good relationship and share many views on women and on constitutional development relating to Aboriginal peoples. Because of the relatively greater prominence of NWAC, due in no small part to its longer presence on the political scene, it was a more significant player in the constitutional arena, and so this paper focuses particularly on NWAC.
5. *AG v. Lavell and Isaac v. Bedard*, [1974] S.C.R. 1349. The National Indian Brotherhood, the precursor of the AFN, had intervened against Jeanette Corbiere Lavell in her Supreme Court challenge of the discriminatory provisions of the Indian Act.
6. R. Platiel, "Women seek to block grants to other native groups in Charter fight" *Globe & Mail* (19 March 1992).
7. Presentation by Marge Friedel and Wendy Walker, on behalf of the Women of the Metis Nation, to the Royal Commission on Aboriginal Peoples" May 1992.
8. *Native Women's Association of Canada v. Canada* (1992), 4 C.N.L.R (F.C.A.).
9. "Facing the State: The Politics of the Women's Movement Reconsidered" H.J. Maroney and M. Luxton, eds, *Feminism and Political Economy: Women's Work, Women's Struggles* (Methuen, 1987) at 31.
10. Rianne Mahon, "Canadian Public Policy: The Unequal Structure of Representation" in L. Panitch, ed., *The Canadian State*, (Toronto: Univeristy of Toronto Press, 1977) at 165-198.
11. Findlay, *supra* note 9.
12. Arguably a third experience common to Aboriginal women, poverty, creates a third oppression, that of class.
13. For example, the Women of the Metis Nation in Alberta, the National Metis Women of Canada, NWAC, and the Manitoba Indigenous Women's Collective.
14. Evelyn Webster, Vice-President, Indigenous Women's Collective of Manitoba, to the Royal Commission on Aboriginal Peoples, 22 April 1992.
15. D. Hoffman, "A call for a return to historical values" *Saskatoon Star-Phoenix* (19 September 1992). "Equal, respected, revered. Historically, this is how aboriginal societies viewed women." See, also, Karen Anderson, "A Gendered World: Women, Men, and the Political Economy of the Seventeenth-Century Huron" in Maroney and Luxton, eds, *supra* note 9, for a discussion of the differently gendered but equally respected roles of traditional Huron society; and NWAC's Discussion Paper "Matriarchy and the Canadian Charter," reviewing the traditional Iroquoian matriarchy.
16. See, for example, T. Nahanee, "First Nations Government Without Women" (Presented to the National Association of Women and the Law, Vancouver, 20 February 1993) [unpublished].
17. *Supra* note 15.
18. B. Bastien, E. Bastien and J. Wierzba, "Native Family Violence in Lethbridge" (1991) 7 *Native Studies Review* 139.
19. *Ibid.* at 146.
20. *Supra* note 15.
21. R. Platiel, "Aboriginal Women challenge leadership" *Globe & Mail* (24 April 1992).
22. *Ibid.*
23. Indigenous Women's Collective of Manitoba, to the Royal Commission on Aboriginal Peoples, 22 April 1992.
24. "Amnesty proposed for child abusers", *Edmonton Journal* (25 June 1993) A-11.
25. *Supra* note 5.
26. *Re Sandra Lovelace*, United Nations Human Rights Commission 6-50 M 215-51 CANA. Canada was found to be in violation of s. 27 of the Covenant on Civil and Political Rights.
27. For a more thorough discussion of this issue, see J. Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act" (1985) 1 *Native Studies Review*; and K. Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Supply and Services, 1978).
28. Nahanee, *supra* note 16. "Many of our First Nations people believe paternalism, patriarchy and patrilocal customs are the great traditions to which we will return once we have cast off our oppressors."
29. Jack Danylchuk, "The long road home" *The Edmonton Journal* (30 January 1993).
30. *Ibid.*
31. Jack Danylchuk, "Bands challenge legality of amendment" *The Edmonton Journal* (30 January 1993).
32. Nahanee, *supra* note 16: "50,000 people are still waiting, and some may pass on to that other life before ever having their right to membership recognized."
33. R. Platiel, "Native women to challenge proposal on aboriginal rights" *Globe and Mail* (17 January 1992).
34. *Ibid.*

35. Indigenous Women's Collective of Manitoba, to the Royal Commission on Aboriginal Peoples, 22 April 1992.
36. R. Platiel, "Aboriginal Women divide on constitutional protection" *Globe and Mail* (20 January 1992).
37. *Ibid.*
38. *Ibid.*
39. Held in Vancouver, B.C., 19-21 February 1993.
40. *Supra* note 16.
41. *Supra* note 6.
42. NWAC, Press Release (18 March 1992).
43. *Supra* note 6.
44. "Native Women lose bid for spot at talks" *Globe and Mail* (1 April 1992).
45. *Supra* note 8 at 68-69.
46. S. Delacourt, "Self government must guarantee basic human rights - NWAC president Gail Stacey-Moore" *Globe and Mail* (14 March 1992).
47. *Ibid.*
48. *Ibid.*
49. *Supra* note 15.
50. NWAC correspondence to all First Ministers, signed by Gail Stacey-Moore, 8 July 1992.
51. NWAC correspondence to AFN National Chief Ovide Mercredi, signed by Gail Stacey-Moore, 10 July 1992.
52. "Text of premiers' unity proposal" *Globe & Mail* (10 July 1992).
53. "NAC says NO to this Constitutional Deal," undated NAC publication circa September 1992.
54. M. Landsberg, "Feminists have backed native women from outset" *Toronto Star* (31 March 1992).
55. R. Platiel, "Native women fear loss of rights" *Globe & Mail* (13 July 1992).
56. R. Platiel, "Native groups disunited over gender equality" *Globe & Mail* (20 July 1992).
57. NAC's Response to the Report of the Special Joint Committee on a Renewed Canada, 4 May 1992, at 6, 12, and 19.
58. *Supra* note 54.
59. NAC Constitution Position paper, undated, circa September 1992.
60. National Action Committee on the Status of Women, *Action Now*, September/October 1992.
61. Speaking of the feminist response to constitutional change in the earlier Meech Lake fiasco, Donna Greschner spoke of the logic of support for Aboriginal women: "Taking the perspective of aboriginal women as the standard of assessment for constitutional proposals is consistent with the feminist method of looking to the bottom, of asking who is buried beneath the social heap, why and what can be done about it. At the least, constitutional change should meet the Rawlsian standards of not making worse the position of the worst-off." "Commentary" *After Meech Lake: Lessons for the Future*. (Saskatoon: Fifth House Publishers, 1991) at 223.
62. M. Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (Boston: Beacon Press, 1973) at 59.
63. *Supra* note 54.
64. "Conclusions of the Women's Constitutional Conference," NAC fax, 25 August 1992.
65. R. Platiel, *supra* note 21: "In light of last week's court decision that the federal government had discriminated against the Native Women's Association of Canada by denying them a seat at the Constitutional table, participants called for a delegation of aboriginal women, including representatives of [NWAC] and the National Metis Women, to be seated as full participants at the upcoming First Ministers' Conference."
66. Correspondence from NAC President Judy Rebick to Prime Minister Brian Mulroney, 26 August 1992.
67. *Supra* note 8.
68. *Ibid.* at 72-73.
69. *Ibid.*
70. Apart from the NWAC-NAC alliance, there was no "No" coalition to oppose the Charlottetown Accord. It is as untrue as it is distasteful to suggest (as some commentators did) that "NAC is in bed with the Reform Party." There was a "Yes" coalition, however.
71. "Judge delays attempt by native women to halt referendum" *Globe & Mail* (September 1992).
72. *Ibid.*
73. J. Bryden, "Secret reports show unity deal reworked" *Calgary Herald* (19 September 1992).
74. "Draft Legal Text," a 'best efforts' text prepared by officials representing all First Ministers and Aboriginal and Territorial Leaders, 9 October 1992.
75. *Ibid.*
76. *Supra* note 75.
77. "Judge, lawyer disagree on loss of rights" *Calgary Herald* (15 October 1992).
78. *Ibid.*
79. W. Dudley, "Natives greet the vote with bitterness, relief" *Calgary Herald* (27 October 1992).
80. A federal Department of Indian and Northern Affairs policy initiative, this process is limited in access to a select number of bands, and in result, to a delegated municipal form of government within a legislated framework. Many First Nations, and the Assembly of First Nations, have criticized the "CBSG" process for being inadequate for real change, inappropriate for constitutional change affirming Aboriginal and treaty rights, and pernicious in that it potentially undermines more comprehensive political initiatives.
81. CBC Radio News, (26 January 1993).
82. "Native Women Fearful" *Globe & Mail* (29 January 1993).
83. CBC Radio news, (29 January 1993).
84. J. Green, "The Parthenogenic Child of the Fathers" (published as "A Comprehensive Analysis of the Charlottetown Accord"), (1982) 3 *The Womanist*.
85. J. Danylchuk, "Sweet taste of victory soured by band reaction" *The Edmonton Journal* (30 January 1993).
85. "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict" in S. Burt, L. Code and L. Dorney, eds, *Changing Patterns: Women in Canada* (Toronto: McClelland & Stewart, 1993) at 128-129.

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