

Criminal Justice 426---Aboriginal Government and Law
Assignment 2---Research Essay

Women and Aboriginal Government

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Introduction:

Traditional Aboriginal societies appeared to have achieved an egalitarian relationship between the sexes. While women and men had vastly different roles within their communities, both roles were valued, and it was implicitly understood that each was as intrinsic to the functioning of the society as the other.

Colonization changed this dynamic. The dominance of the male over the female evidenced and perpetuated in tenets related to Christianity was in conflict with traditional Aboriginal teachings where the concept of equality and balance was central. European political systems and laws inflicted tremendous loss on Aboriginal women, the nadir of which was the *Indian Act*, which legally stripped many long established rights of women and left them with fewer rights than men.

For the purposes of this paper, I will be using the following terms to reference specific meanings: Indian¹, Aboriginal², traditional³, equality⁴, colonization⁵, and egalitarian⁶. Through the course of this paper, I will show that traditional Aboriginal societies were egalitarian and that because of the holistic nature of traditional society, women held a strong role in traditional governance.

Furthermore, I will outline how this egalitarian society and women's role were

¹ A person who is defined as having status under the *Indian Act*

² A person who can trace their ancestry back to the original inhabitants of North America, but not specifically including Métis or Inuit people

³ Systems of culture and governance that pre-date colonization

⁴ Parity between the sexes

⁵ The event that occurred when Europeans began projecting non-Aboriginal rules and values on Aboriginal people

⁶ Different roles, equal value

undermined by the colonizing society, and replaced by an absolute patriarchy. I will explore the entrenchment of the patriarchy and Aboriginal women's movement to re-establish their voice in society. Finally, I will explore the current treaty negotiation process in British Columbia and the movement towards Aboriginal self-government.

Some observers feel that women will only regain their traditional role in governance through specific equality provisions in treaty. While I agree that the future role of women in self-government and the current role of women in Aboriginal government should be viewed through an understanding of the institutionalization of European patriarchy and its impact on traditional Aboriginal roles, I feel that constitutionalizing gender parity within self government provisions to make it compulsory countermands democracy and undermines equality.

Time Immemorial: Women in Pre-Colonial Aboriginal Society

Introduction

Traditional roles of Aboriginal men and women were more egalitarian due to differing relational practices between the genders prior to colonization. While societies were often divided along gender lines, each gender's role was unique and valued. Judeo-Christian principles of male gender primacy and teachings such as,

“The man was not made for the woman, but the woman for
the man (1 Corinthians 11:8)”; and

“Thy desire shall be to thy husband. He shall rule over thee”
(Genesis 3:16),

which establish male supremacy, conflicted with traditional Aboriginal beliefs.

Traditional beliefs express that “the female was created simultaneously with the male, that neither was accorded supremacy, and that each was made dependent on the other for existence” (Kirkness 1987: 409). According to Kirkness (1987), many Aboriginal languages did not distinguish between ‘he’ and ‘she’, both being the same to the extent that they were equal. Women were both highly regarded and occupied positions of authority in civil and spiritual affairs.

Women were advisors, held names and gave names to the people according to their potential; some societies were matrilineal and the family line, names, dances, songs, etc. passed through women (Sayers and MacDonald, 2001).

Women were teachers and givers of life. Women chose the leaders; their role was endless and varied from community to community (Sayers and MacDonald, 2001). Communal models of Aboriginal governance acknowledged respect for and the authority of women. Gender egalitarianism was practiced by many Aboriginal societies, who used both matrifocal and patrifocal councils to negotiate consensus. As with modern day society, Aboriginal women tended to enjoy more longevity in their Elder status and therefore provided matrilineal continuity in their roles as “Clan Mothers” (Jaimes-Guerrero, 2003). Anderson (2001) also notes

that Aboriginal women had political authority because it was recognized that there is value in having input from all members of society.

Plateau Society

In the Plateau societies of the Columbia River basin, a complementary sexual division of labour existed. There was a different but balanced access to the economic, political, and religious social spheres of the culture (Ackerman, 1995). Though there was little overlap between the work of men and women, genders were socially and economically equal. For example, whether it was a girl's first collection of plant food or a boy's first kill, a celebration was had for the advent of a new group provider (Ackerman, 1995). Both ceremonies were identical, indicating that the economic skills of both genders were highly valued (Ackerman, 1995). The means for accumulating wealth was equally available to either gender, and both genders held their personal property independently from their spouse. Because personal property was held independently, and that property was specific to gender (i.e. hunting and fishing equipment etc. of men, and plant gathering and food preparation etc. equipment of women), it also signals the equal interdependence between the genders. Superior economic skills were also used to measure political influence. Again, this influence was open to both genders (Ackerman, 1995). Another example of gender equity in the Plateau culture is the berdache institution. This institution allowed both women and men to change their gender roles, and take on the economic role of

the opposite gender (Ackerman, 1995). This again suggests that economic contributions of both genders were equally valued.

Tlingit Society

Within Tlingit society, gender was not the primary consideration in issues of power and authority (Klein, 1995). The society equally valued and perceived both sexes with regard to the kinship and wealth criteria of individual rank, respect and authority; the rank system applied to both women and men in the same fashion (Klein, 1995). Tradition also mandated that marriage occur between a man and a woman of equal rank. In general, the highest ranking member of a matriline⁷ was considered to be the head of that house. While this was not usually who the European traders recognized as chiefs, the two positions did, from time to time, overlap (Klein, 1995). It has also been established that Aboriginal women had trading autonomy and were very effective traders. Some Aboriginal women obtained great wealth, and were even acknowledged by European traders as being highly effective mediators and traders (Klein, 1995).

Traditional Aboriginal societies appeared to have achieved an egalitarian relationship between the sexes. As seen in Plateau culture and Tlingit society, while women and men had vastly different roles within their communities, both roles were equally valued, and it was implicitly understood that each was as

⁷ Extended family based on inheritance from the mother's mother

intrinsic to the functioning of the society as the other. The success of the subsistence economy required a partnership between men and women.

Colonization changed this dynamic.

Changing Governments, Changing Needs: Colonization and Women

Introduction

Traditional Aboriginal societies had an equitable version of property ownership, which was disturbed by the western attitude toward private property and capital.

Generally speaking, women were farmers in many societies, and were often directly responsible for providing food for the community. Women, who produced life through giving birth, were the only appropriate group to bring life from the soil, and as such, women were seen as the keepers of the land (Anderson, 2001).

This began to change under the influence of the missionaries, who insisted that women stay in the home, and that men take up farming. Not only did this strip away women's economic independence, it destabilized the traditional notions of women's deep connectedness to the earth (Anderson, 2001). The land was then divided up among the male heads of the family, and in short order, land, livestock and housing all before within the shared purview of women, now belonged to individual men.

Missionaries and the church reinforced the reason behind this division of property as being the superiority of men. "In many societies, gender was

complementarian as opposed to hierarchical. The 'Europeanization' of Indians refers to the imposition of a hierarchy of gender, one gender being better than another" (Isaac and Maloughney 1992:459). The denigration of women's roles in contemporary society is directly related to colonization.

The Influence of the Church

The stratified, gendered hierarchies of the Christian churches did not allow for women in positions of power or influence. They were run by priests and men who methodically excluded them from the spiritual centre, which systematically eradicated their political power. The Christian churches undermined and suppressed Aboriginal spirituality, which went hand in hand with the loss of female political and spiritual authority. The medieval church doctrine of original sin, and its particular emphasis on women as perpetrators, had special implications for Aboriginal women (Brodrigg, 1984).

Menstruation taboos are clear examples of how traditions can be distorted, filtered and interpreted through Christian notions of sin as it relates to womanhood. (Anderson, 2001) Many Aboriginal groups have thought about it as the sacred manifestation of a woman's power, which is why women abstain from participating in certain practices and ceremonies during that time. Menstruation was considered the creative female power and taboos created around this event, such as isolation, were not a reflection of the thinking that women were impure, but rather a time when women exerted a phenomenal amount of power.

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“You are like Mother Earth, who once a year in the spring, washes herself down the river to the ocean. Everything...all the debris is washed away. Same thing with a woman, except it's every month. It's the power you have.” (Cree Elder George Kehewin, as quoted in Anderson, pg.74)

In many Aboriginal cultures, menstruation was a sign of the incredible power of the feminine. Judeo-Christian cultures largely understood menstruation not as a manifestation of female power, but rather the manifestation of woman's sin, contamination and inferiority (Anderson, 2001). This bias was reinforced through punishment and humiliation in Residential Schools, and therefore changed the meaning of the taboo and the power of women in the spiritual realm. (Anderson, 2001) Within the context of the holistic nature of Aboriginal cultures, with the spiritual being intricately linked with the governance of a community, this loss of power signaled a loss of power throughout the society.

The enforcement of European family values were a keystone in the conquest strategy. The introduction of the patriarchal family structure degraded the powerful role of the mother and the role of women in the family. Traditionally, Cree women are considered the centre of the Circle of Life (Turpel, 1993). Women gave birth to the physical and spiritual sense of the social, political, and cultural life of community. As women were the focus of the community, the history of legislative discrimination was directed at women by the Canadian government (Turpel, 1993).

The dominance of the male over the female in Christian religious beliefs and churches was in conflict with traditional Aboriginal spiritual and philosophical teachings in which the concept of equality and balance was central. European political systems and laws inflicted tremendous loss on Native women, who had once held spiritual and political authority. Colonization affected all Aboriginal people through loss of culture, loss of land, but through legislation women suffered loss of membership, loss of children, and loss of their traditional roles as Aboriginal women (Sayers and MacDonald, 2001).

The Influence of Legislation: Women under *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs* (1869)⁸ and the *Indian Act* (1876)

The first strictly enforced legislative discrimination against women by the Canadian Government occurred in 1869 in the *Gradual Enfranchisement Act*. The second piece of legislation was the 1876 *Indian Act*. The *Indian Act* and *Gradual Enfranchisement Act* did not reflect Aboriginal customs and traditions and imposed a Eurocentric set of ideals and norms upon Aboriginal communities (Isaac and Maloughney, 1992). The *Gradual Enfranchisement Act* of 1869 held that women who married outside their bands either had to move to the bands of their husbands, relinquishing any claim to the bands of their birth and losing all rights in their home community or, in the case of marriage to non-Aboriginal men, had to move off reserve and lose all rights as a Indian (Jamieson, 1978).

⁸ To be referenced as *Gradual Enfranchisement Act*

The *Indian Act* of 1876 ostensibly stripped many long established rights of Aboriginal women and left them with fewer rights than Aboriginal men. Women were denied the right to vote in band elections, hold office and speak at public meetings (Anderson, 2001). The *Indian Act* reflects the legal, social, and religious attitudes of Euro-Canadian society. In particular, the *Indian Act* legislated into obliteration the matrilineal structures of many Aboriginal societies, forcing a patrilineal social structure on Aboriginal people (Kirkness, 1987). It was not until the 1950 amendment that women were granted the right to vote in band elections. The *Gradual Enfranchisement Act* and the *Indian Act* had the effect of dividing communities, families, and homes.

The *Indian Act* has contributed to the exclusion of women from decision-making bodies pursuant not only to the regressive membership regime but to the importation of European governance practices. The sexist rule of the *Indian Act* resulted not only in women losing the association with and benefits such as housing and cultural and social amenities of their communities, but also in legislated deprivation of the important social and political positions occupied within them. The *Indian Act* internalized the European patriarchy and its devaluation of women (Sayers and MacDonald, 2001).

Unfortunately, in speaking out about the inherent patriarchy and sexism of the *Indian Act*, “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” (Green, 1993: 118). Opponents deny these women’s positions by labelling them as “a dupe of the colonizing society” (Green, 1993: 118)⁹.

Patriarchal Colonialism and the cry for change

Author Jaimes-Guerrero (2003) defines patriarchal colonialism as the erosion of indigenous rights that caused a double burden on Aboriginal women because of both racist and sexist attitudes, and the discrimination that resulted from such practices. Unfortunately, the erosion of traditional roles for women has gone hand in hand with the contemporary devaluation of those roles. Forced education at residential schools, imposed male dominated political structures, and gender discrimination with regard to recognized Indian status all influenced today’s political milieu, and women now face the patriarchy both outside and inside their communities.

The gendered nature of women’s traditional roles can be perverted if interpreted through the filter of a western patriarchal framework. Tradition can be used by Aboriginal men to build and maintain the sexism they have learned from the colonizer. For an example of the seepage of patriarchy into traditionally understood gendered relations and roles, Ojibway women are expected to sit

⁹ This stems from the belief that the assertion of individual rights, such as gender equality, detracts from the collective battle against racism. As I will argue later, there does not need to be a dichotomy between the assertion of individual and collective rights.

with their legs to one side while in a sweat lodge, which is meant to be an acknowledgement of the power that comes from a woman's centre (Anderson, 2001). The reason for this practice is often left unexplained. As noted earlier, menstrual taboos are another area where alienation can occur. Unlike traditional practices of abstention from participation in cultural events when menstruating because of the power women were seen as possessing, these taboos can be distorted when filtered through the learned notions of menstruation being unclean. "We can be made to feel alienated, embarrassed or excluded when we are simply or abruptly told to leave because we are menstruating...traditions around menstruation can be oppressive when they lack context" (Anderson, 2001: 38). The failure to explain the values behind certain cultural practices and the negative way in which some traditions are enforced can alienate women (Anderson, 2001).

There is the argument that group rights should supersede the rights of individuals. However, if group rights are exercised without protecting the security of the individual the justification for protecting group rights becomes questionable. The only justification for community is that its strength and vitality is essential to the well-being of each of its members. The equal treatment of men and women does not exemplify "extreme individualism" as argued by those that call women on the forefront of the cry for change "dupes of the colonizing society." As has been shown in previous sections, traditionally, Aboriginal women enjoyed various forms of equity and respect; therefore, a traditional

notion of equality rights must have existed. Unfortunately, some see women's struggles against the patriarchy as divisive and a devaluation of the common struggle of racism.

It is clear that the male leadership of the First Nations organizations do not consider women's rights as a human rights issue. The male dominated discourse on self-government suppresses and denies how much we as First Nations have integrated patriarchy in ourselves, our families, communities and nationalists movements. The situation ignores the reality of gender politics and sustains sexist oppression. Sexist oppression has regulated the lives of First Nations women in two ways, by not recognizing women's rights within the collective rights and by violence. Women's rights are defined within a sexist context of being individual rights and therefore seen as not fitting into traditional collective rights ideology (Herbert, as quoted in Sayers and MacDonald, 2001: 12).

The sexism of the *Indian Act* is a matter of public record. Until the 1985 amendment to the *Indian Act*, known as Bill C-31, a woman who married outside her band could not live on her birth reserve, hold property on reserve, inherit property from her parents, or be buried on reserve (Jamieson, 1978; Anderson, 2001). Additionally, if she married a non-Aboriginal man, she also relinquished all of her rights as an Indian (Jamieson, 1978; Isaac and Maloughney, 1992). As well, until 1985, children born into such a marriage were not Indian and could not participate in the cultural and social amenities of their mother's community (Anderson, 2001). Even upon being widowed, divorced, separated or in need or

ill, a woman could be prevented from returning to live with family on reserve (Jamieson, 1978; Anderson, 2001).

A number of legal challenges were levelled at the *Indian Act*. Sandra Lovelace challenged section 12(1)(b) of the Act (which removes benefits and Indian status from women who marry non-Indian men) (Borrows, 1994). After trying for three years to obtain housing on reserve for herself and her son after her divorce from her non-Indian husband, Lovelace exhausted domestic appeals (Isaac and Maloughney, 1992). Her challenge was brought before the United Nations Human Rights Committee. The Committee found Canada and the *Indian Act* in breach of s.27 of the International Covenant on Civil and Political Rights by denying band membership and concomitant access to culture (Borrows, 1994). This decision caused Canada considerable international embarrassment. Legal challenges to the *Indian Act* and Bill C-31 have reinforced the conflict between imposed norms and the well-being of all Aboriginal people. Indians opposed to reinstatement of Aboriginal women argue that they have been co-opted by Euro-Canadian society through their manipulation of the Canadian legal system to have their Indian status recognized (Isaac, T. and M.S. Maloughney, 1992). There does not seem to be a recognition that the reason the status was lost was because of Canadian law.

The objectives of Bill C-31 were to 'remove discrimination on the basis of gender, to restore Indian status and band membership to eligible persons enabling bands

to assume control over membership (Borrows, 1994). Bill C-31 was aimed at removing the gender discrimination outlined in the *Indian Act*, and reinstating women who had been involuntarily enfranchised¹⁰. Unfortunately, being a person that has been reinstated as an Indian, does not ensure that the person is guaranteed acceptance by her home community. As well, Bill C-31 does not completely remove discrimination on the basis of gender, and because of section 6(2), may only postpone enfranchisement.¹¹

The Canadian Charter of Rights and Freedoms¹², British Columbia Treaty Commission¹³, and Beyond

Introduction

The loss of membership and status continue to have an impact on roles in Aboriginal governments. Women have been excluded from their traditional roles of political influence in many Aboriginal nations. Some women were involuntarily enfranchised, or were removed from their community to live in that of their husbands. Bill C-31 was aimed at righting this wrong, a wrong that was recognized by the United Nations Human Rights Commission. However, newly reinstated members have lived away from and been disenfranchised from their communities for many years.

¹⁰ Legal term used in *Gradual Civilization Act*, *Gradual Enfranchisement Act*, and *Indian Act* referring to the removal of all legal distinctions between Indians and non-Indians.

¹¹The provisions of s. 6(2) do not allow status to be passed on to future generations. Borrows (1994: 39) uses the following example to explain the second generation cut-off clause to highlight the veiled sexual discrimination in the new legislation: "This had led to the unequal treatment of male and female siblings, as women who lost status prior to 1985 cannot pass status through successive generations, while their brothers who married non-Indian women prior to 1985 can do so."

¹² To be referenced as *The Charter*

¹³ To be referenced as BCTC

Now, post Bill C-31, women may be excluded because *Indian Act* elected governments will not let them return to their home communities (Turpel, 1993). It would seem that some reserve communities have internalized and accepted colonial structures and do not support the women attempting to secure their status (Green, 1993). Green (1993: 113) stated that “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”. These women are now turned away due to housing shortages, and discriminated against because they are Bill C-31 Indians (Sayers and MacDonald, 2001). The *Charter* and its ancillary Bill C-31 caused an influx of newly instated Indians to their home communities, causing life-long band members to view returning members as competitors for scarce resources, jumping to the head of the line, even though they had previously been excluded from the line (Borrows, 1994).

It is necessary for both women and men to deconstruct their colonial history, understand how much Aboriginal people have assimilated patriarchy into their lives and reconstruct Aboriginal cultural beliefs that include liberation for both genders (Sayers and MacDonald, 2001). Simply stated, it is necessary to recognize that,

The discrimination they suffered was forced upon us through a system imposed upon us by white colonial government through

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the *Indian Act*. It was not the result of our traditional laws, and in fact would not have occurred under our traditional laws (Assembly of First Nations, quoted in Borrows, 1994:31).

The band councils and Chiefs who preside over our lives are not our traditional forms of government. The Chiefs have taken it upon themselves to decide that they will be the final rectifiers of the Aboriginal package of rights. We are telling you, we have a right, as women, to be part of that decision. Recognizing the inherent right to self-government does not mean recognizing or blessing the patriarchy created by a foreign government (Native Women's Association of Canada¹⁴, as quoted in Borrows, 1994: 41).

Aboriginal rights are enshrined in the Constitution and include Aboriginal women's civil and political rights founded on their traditional roles and responsibilities (Sayers and MacDonald, 2001). These rights are shored up by section 35(4) that entrenched sexual equality in the Constitution (Sayers and MacDonald, 2001).

The Charter

Aboriginal scholar, John Borrows (1994) writes that the *Charter* presents Aboriginal people the opportunity to recapture the strength of principles eroded through government interference. The *Indian Act* had a profound impact on Aboriginal identity and politics. The *Charter's* underlying principles could facilitate and enhance self-determination without overpowering customs, laws,

¹⁴ To be reference as NWAC

and traditions (Borrows, 1994). The *Charter's* principles have had the greatest impact in Aboriginal gender politics by highlighting sexual inequity¹⁵. The difficulty with The *Charter* may be that rights may be applied in a culturally biased way, which could include thinly veiled sexual discrimination.

...there is a clash between collective rights of sovereign Aboriginal governments and individual rights of women. Stripped of equality by patriarchal laws which created 'male privilege' as the norm on reserve lands, Aboriginal women have a tremendous struggle to regain their social position. We want the *Canadian Charter of Rights and Freedoms* to apply to Aboriginal governments (NWAC as quoted in Borrows, 1994: 44).

Treaty Negotiations in BC and the Status of Women: Nisga'a and Maa-nulth

In the past 30 years, there have been three particularly important decisions in respect to the affirmation of Aboriginal rights and title by the Supreme Court of Canada. These landmarks in Canadian law are of particular importance to British Columbia (Athabasca University, 2001):

1973 – *Calder*: represented first modern recognition of aboriginal title in Canadian common law.

1990 – *Sparrow*: interpreted Section 35 of the Constitution and established a framework for addressing justifiable government infringement of aboriginal rights.

1997 – *Delgamuukw*: recognized aboriginal title, set out test for its proof, and established framework for justifiable government infringement of aboriginal rights.

¹⁵ For example, as quoted in Borrows (1994:24), M. Eberts states, "...taking action now under the *Charter* provides them (Aboriginal women) with perhaps their only opportunity to secure a future in which they will have available at least some tools with which to fight the massive, persisting systematic discrimination, on the grounds of gender and race..."

Consequently there is now a broader conception of which aboriginal rights include title and a firm statement by the Supreme Court of Canada that the ability of government to infringe those rights is constrained.

Following the *Sparrow* decision, the British Columbia Claims Task Force released a report that contained 19 recommendations. Two key recommendations included the establishment of a new relationship among the First Nations, Canada and British Columbia, based on mutual trust, respect and understanding, through political negotiations, and it recommended the establishment of a BCTC to facilitate the process of negotiation (British Columbia Treaty Commission, March 2005). The recommendations were unanimously accepted by Canada, British Columbia and the First Nations Summit as the basis for the current treaty negotiation process. In 1993 the BCTC was formed.

The Nisga'a (Canada, 2005) live in the Nass Valley, a fairly remote area of northwestern B.C. The Nisga'a social structure is based on kinship, organized in four clans: Killer Whale, Raven, Wolf and Eagle (Canada, 2005). Each clan contains a number of lineages, headed by hereditary chiefs and matriarchs. In 1890, the Nisga'a formed their first Land Committee in the quest for a treaty (Canada, 2005). Canadian laws passed in 1927 however, made it illegal for Indians to raise money to advance land claims (Canada, 2005). After these laws were repealed in 1951 the Nisga'a Land Committee re-established itself as the Nisga'a Tribal Council, and following the *Calder* decision, the federal government began treaty negotiations with the Nisga'a in 1976 (Canada, 2005). The B.C.

government joined the two parties at the table in 1990, prior to the formation of the BCTC. The *Nisga'a's Final Agreement Act* was passed on April 13, 2000 by Parliament, making the Nisga'a Treaty the first modern-day treaty in B.C. (Canada, 2005).

The Maa-nulth First Nations are negotiating within the BCTC process with Canada and British Columbia on behalf of the Huu-ay-aht, Toquaht, Ucluelet, Ka:'yu:'t'h'/Chek:k'tles7et'h', and Uchucklesaht First Nations. These First Nations are affiliated with the Nuu-chah-nulth Tribal Council (NTC) and, until recently formed a part of the Nuu-chah-nulth treaty table (Government of British Columbia, 2005). On March 10, 2001, chief negotiators for the NTC, British Columbia and Canada initialled a draft Agreement-in-Principle (AIP). Each of the 12 First Nations that made up the Nuu-chah-nulth treaty table undertook a community consultation and approval process. Six First Nations, representing approximately one-third of the total population, approved the AIP and six First Nations did not approve (Government of British Columbia, 2005). Five of the six First Nations that approved the AIP joined to form the Maa-nulth First Nations. The Maa-nulth First Nations approached British Columbia and Canada about negotiating a Final Agreement based on the draft 2001 NTC AIP, which ultimately led to the negotiation and signing of the current Maa-nulth AIP (Government of British Columbia, 2005).

The Nisga'a Agreement and the Maa-nulth AIP do not incorporate specific gender equality provisions. With the Nisga'a's agreement, "The *Canadian*

Charter of Rights and Freedoms applies to Nisga'a Government in respect to all matters within its authority, bearing in mind the free and democratic nature of Nisga'a Government as set out in this (the Final) Agreement" (Canada et al, 1998: 18). The *Charter* will also apply to all agreements negotiated under the BCTC process (British Columbia Treaty Commission, *Concerns* 2005).

While the *Charter* applies, Eligibility and Enrollment under the treaty is negotiated (British Columbia Treaty Commission, *Eligibility* 2005). Nisga'a defines eligibility under the treaty as an individual is either:

1. of Nisga'a ancestry and whose mother was born into one of the Nisga'a tribes;
2. a descendant of an individual described in 1. or 2.;
3. an adopted child of an individual described in 2.; or
4. an aboriginal individual who is married to someone described above and has been adopted by one of the four Nisga'a tribes as an accepted member of that tribe in the presence of witnesses from the other Nisga'a tribes (Canada et al, 1998).

According to the terms of the Final Agreement, this definition includes all Bill C-31 women, but does not include their husbands unless they are Aboriginal and have been adopted into their wife's tribe. It also does not include non-aboriginal wives of Nisga'a men or their children. The later category would have been considered band members, and remain status Indians under the *Indian Act*. The

children would likely be eligible if they were adopted into the tribe (Canada et al, 1998).

The Maa-nulth AIP (Canada et al. 2003) defines eligibility as an individual who is either:

1. registered on the band list of a Maa-nulth Indian Band;
 2. of Maa-nulth ancestry;
 3. adopted as a child under Canadian law or Maa-nulth custom;
- or
4. descended from someone who is eligible.

This definition should include all Bill C-31 women, but does not include their husbands unless they are Aboriginal and have been adopted into their wife's band. The Maa-nulth are trying to include pre-Bill C-31 non-Aboriginal wives of Maa-nulth men, while excluding the children of a union between those women and a non-Aboriginal man (Canada et al. 2003). Negotiation on this topic was deferred to the Final Agreement, and is still under negotiation (Canada et al. 2003).

Gender neutral language is used throughout these agreements, and with the *Charter* applying, it is intended that all rights and privileges laid out in the agreements apply to both genders equally. A treaty, once ratified is given effect by federal settlement legislation. Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing aboriginal and treaty rights, thereby

constitutionalizing the treaty (British Columbia Treaty Commission, *Overview* 2005). Any amendment to the agreement must be done with two-thirds agreement from the Aboriginal Government, a resolution of the Legislature of British Columbia, and an order of the Governor in Council by Canada. Simply stated, once an agreement is reached, it is purposely made difficult to change in order to give the Parties certainty.

Analysis

The possibility of reconstructing traditional Aboriginal social organizations is limited by two considerations: the rapid cultural and economic disruption of Native societies due to trade and colonization, and the patriarchal, ethnocentric biases of early observers (Brodrigg, 1984). Aboriginal people are today faced with reconciling the language and reality of the past with the language and reality of the present. However, culture is not static, and adding new understandings to traditional practices is another way culture reproduces itself. The current situation in many Aboriginal communities needs to be remembered within the context of tradition itself changing by enveloping new concepts, and historical remembrances of gender relations need to take into account the current notions of sexual equality.

Balance and harmony in gender relations is a condition to return to, but there is a disagreement on how to achieve this. The current discussion of self-government centres on the concepts of power and government as a force.

Self-government is a prerequisite for achieving equality, human dignity and freedom from discrimination, and full enjoyment of all human rights (Sayers and MacDonald, 2001). To have good governance therefore, a strong role for women must be present. If group rights are exercised in a manner that does not protect the security of individual Aboriginal persons, the justification of protecting group rights is questionable. Stated another way, groups are made up of individuals, and if the rights of those individuals are not protected, the functioning of the group as a whole can be compromised. Besides, how effective or meaningful can self-government and existing governance structures be if the issues concerning women are not addressed?

“First Nation women have too often been excluded from the circle of decision-making. This has led to male bias and has perpetuated the disintegration of harmony between male and female in Aboriginal societies...While colonialism is at the root of our learned disrespect of women, we can not blame colonialism for our informed actions today...It is no longer enough to say the *Indian Act* was responsible” (Borrows, 1994: 46).

Dr. Judith Sayers, Chief of the Hupacasath First Nation, and Kelly A. MacDonald (2001) have argued that in order to ensure the full and equal participation of Aboriginal women in governance, specific provisions for gender equity and the role of women should be included in self government agreements, treaties, and Aboriginal charters and constitutions. Specific gender equity clauses or guaranteed representation is resisted or opposed in treaty by non-Aboriginal governments because of the *Charter* and the fact that all Canadians are

perceived to have the same rights, whether man or woman. Judge Mary Ellen Turpel (1993) expressed that equality is inappropriate conceptually and culturally for Aboriginal women and should not be an important political or social concept for Aboriginal governments. Here, traditional focus is on the responsibilities of women and men to the community rather than on equality. Aboriginal women are committed to a relationship that does not translate into equality as it has been conventionally understood (Turpel, 1993).

It is clear that there is a split between Aboriginal theorists, some, such as Turpel (1993), writing that once true self-government is achieved, traditional forms of gender relations will be reestablished with women automatically regaining their voices in the political sphere. Other writers, such as Sayers and MacDonald (1993), clearly feel that without a transitional period with specific gender equity clauses written into treaty, women will not be given their voices back. It is true that equality rights do not have to be applied to mean sameness. Individual and collective rights do not have to be dichotomized. A contemporary discourse of equality rights can build upon traditional understandings of gender symmetry and harmony. I also feel that Absolon *et al* are correct in their assessment that,

“the issue of race has superseded the issue of sexism. Many aboriginal people believe that if the aboriginal worldview is embraced, women and men will return to an idyllic form of reality where gender hierarchies do not exist. This will not happen if first nations people do not undergo a process of decolonization that strives to remove the shackles of sexist ideologies, a pervasive

element of their colonial baggage” (Absolon et al., as quoted in Sayers and MacDonald, 2001: 14).

What is clear is that the *Indian Act* ensured patriarchy and male dominance of foreign governments leached into Aboriginal governments. Many of these governments still exclude women from decision making, and fail to protect these women and their children. Many of these same governments also refuse to acknowledge women affected by Bill C-31, stating that they are out of touch with the workings of reserve life, and have been co-opted by Canadian laws that state equality, a term not understood within the framework of traditional Aboriginal societies. If women are without a voice now, who will guarantee their voice post-treaty?

Conclusion

The attributes of good government are legitimacy, power and resources (Royal Commission, 1996). The physical means by which a government runs is its resources. The legal capacity to act is the government’s power. The government’s legitimacy is the confidence and support given to it by the people. If any one of these three components is missing, the operation of the government would be seriously undermined. The question raised by women’s role in current *Indian Act* government and future treaty self-government is how effective or meaningful can self-government and existing governance structures be if the issues concerning women are not addressed? “If group rights are exercised in a manner that does not protect the security of individual Aboriginal persons, such

as Aboriginal women, the justification of protecting group rights becomes questionable” (Isaac and Maloughney 1992: 469). Colonial history and its assimilated patriarchy have had a deep impact on the role of women in Aboriginal government. How can it be ensured that women have a voice without further imposing Western ideals on Aboriginal communities? Should one mistake, The *Indian Act*, be fixed by the return swing of the pendulum, and guaranteed representation?

Traditional Aboriginal government is broken; Missionaries, the Canadian Government and the *Indian Act* are responsible, but we as the colonizing society cannot fix it. The Crown cannot, in good faith, and should not, be responsible for redefining ‘Aboriginalness’. Aboriginal communities must work through their differences, and represent themselves as they choose through treaty. Specific gender equity clauses or guaranteed representation should not be written into treaties. This only serves to constitutionally protect another form of European belief with regard to Aboriginal peoples. It should be remembered that,

“Tradition is not static; what behaviour was deemed traditional 50 to 100 years ago has changed with the socio-political context in which we live today. Given the opportunity to reflect and act with a decolonized view of tradition, a more inclusive and non-oppressive definition of traditional could be created by First Nations women” (Herbert, as quoted in Sayers and MacDonald 2001: 10).

It is possible that tradition could be recreated by the entire community. Equal opportunity is guaranteed under The *Charter*, which will apply to modern-day

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treaties, and equal representation could act as a cap to both genders.

Transparent government, with rights to all those represented as eligible, should guarantee the most capable persons are represented as leaders.

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