

Seeking Measures of Justice:
Aboriginal Women's Rights Claims, Legal Orders, and Politics

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1.0 INTRODUCTION

Too often mainstream academia, political parties, and the media insist on understanding Aboriginal women through a short list of issues, including violence, poverty, and matrimonial property on reserve. In so doing, they fail to see Aboriginal women in their diversity, and in the complexity of their lives. The result pressures Aboriginal women, especially those who are professionals within academia, politics and the media, to frame their analyses and prescriptions of Aboriginal experience and condition by those particular issues. Additionally, Aboriginal women are expected, especially by Aboriginal political elites and communities, to frame political analyses with perspectives that are maternalist and culturally essentialist, drawing on motifs of "preservation" of culture. At the same time, much of the writing done by Aboriginal men, and by non-Aboriginals, fails to provide a gendered analysis, and where it does so, it leans heavily on a limited set of roles, analysts, and analyses, and hence, similar political prescriptions for Aboriginal women. The consequence has included the obliteration of alternative discourses and the marginalization of Aboriginal women who take these positions. Thus, both political discourse and academic writing construct Aboriginal women in a limited and limiting fashion, and, to the extent these processes affect how women are perceived, they also limit the view of the broader spectrum of experience, theory, politics and policy.

In the first section of this paper, we propose that all of these issues need to be contextualized in a broader political frame, which situates them as part of an historical agenda shaped by colonialism and patriarchy. We warn against capturing Aboriginal Woman in a limited discursive framework. We illuminate some of the contradictions and conflicts facing Aboriginal women who operate within the academy, the political arena, and the media. In doing this, we problematize the dominant indigenist rhetoric about culture and tradition in relation to Aboriginal and treaty rights, land claims and governance, and citizenship. We call for more nuance in both prescription and analysis, and much more inclusion of women and of gendered analysis in Aboriginal and mainstream Canadian elite academic and political circles.

In the second section, we explore a case study, to ask whether and how the larger political dynamics that surround indigenous peoples are mirrored by and acted upon by indigenous women at the community¹ level and in their relationships with one another. The case study concerns an issue involving the contested control and interpretation of cultural knowledge – between Aboriginal women.²

We also consider the intellectual processes and social capital that are contained within Indigenous legal traditions that might enable Indigenous peoples to challenge internal

¹ In this paper, community is used very broadly and includes geographic communities (e.g., bands or Métis settlements), communities of interest (e.g., academic, political, etc.), and affiliations (e.g., groupings of urban Aboriginal peoples).

² Cultural knowledge in this example refers to oral histories generally and is specifically related to cultural practices, ceremonies, and material culture. Otherwise, the authors' definition of culture is a much broader and describes more generally the "horizon" of meaning that surrounds around individuals and groups, and includes political, legal, social, economic systems and institutions.

oppression generally, and sexism specifically.³ By drawing on rights discourse from the global commons, and on legal mechanisms and values encoded in Aboriginal legal traditions, we argue that it is possible to find discursive space and constitutional and policy formulas for a vigorous rights practice by contemporary Aboriginal and settler peoples. Our work traces the fine line between rights discourse and (contested) community cultural and traditional legal processes.

This paper is an interdisciplinary project drawing primarily on political science and law, and as such represents different perspectives and analytical processes. This is also an ongoing project with the authors continuing to bring their disciplines together on a subject that both care very deeply about.

2.0 ABORIGINAL WOMEN'S RIGHTS ARE HUMAN RIGHTS

Aboriginal rights, themselves a species of human rights, (Anaya 2004, Falk 2000) are sites of struggle and resistance to colonialism. In Canada, these rights are “recognized and affirmed” by the *Constitution Act, 1982*.⁴ They are also, implicitly and occasionally even explicitly, part of international human rights documents to which Canada is signatory, in particular the International Labour Organization section 169; the Convention on Social, Cultural and Economic Rights; the Convention on Civil and Political Rights; the Universal Declaration of Human Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the now sidelined Draft Declaration on the Rights of Indigenous Peoples (for a comment on the latter, see Cosentino 2006). However, these documents (with the exception of the CEDAW) do a poor job of gendering rights – that is, of conceptualizing rights as though gender mattered. Yet women’s human rights are protected by international law and by the Canadian Charter, and aboriginal women are entitled to rights and to recognition as *aboriginal women* – that is, without having to privilege one identity at the expense of the other. Women’s rights, too, are, at international law, human rights (Friedman 1995:39).

Yet, the international and domestic laws of rights tend to imply a gender-neutral citizen located in gender-neutral communities. This false neutrality is a male-default paradigm. Thus, Aboriginal women’s rights tend to be invisible to the extent that their existence arises from the difference between male and female experience in relation to oppression. For example, few men go to the barricades to protest male violence against Aboriginal women, especially when that violence in Aboriginal communities and families, although Aboriginal women routinely go to the barricades to defend Aboriginal territory or political autonomy. This reality raises the question: how is commitment to Aboriginal women’s human rights to made part of – to be made visible in and essential to – contemporary indigenous struggles for a measure of self-determination and contemporary

³ Javier Mignone describes social capital in a northern Manitoba First Nation context as the extent to which resources are socially invested – a culture of trust, norms of reciprocity and collective action are present; participation is facilitated; and inclusive, flexible and diverse networks are in place. See Javier Mignone, *Measuring social capital: A guide for First Nations communities* (Ottawa: Canadian Institute for Health Information, 2003).

⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

state rights guarantees?

To date, few mainstream or Aboriginal activists have been willing to consider gender oppression within contemporary Aboriginal communities and governments as a serious problem to be dealt with by having Aboriginal women's rights vigorously protected. Some have suggested that sex oppression is a consequence of colonial violations of Aboriginal practices, and thus, that decolonization will delete sex oppression. This view implies that Aboriginal peoples are incapable of oppression and that there is no need for rights guarantees in relation to Aboriginal governments. We consider this to be sentimentalist essentialism.

And how are cultural traditions to be evaluated, in relation to human rights law, and in relation to structures of oppression such as those that were constructed by colonization? Most indigenous women are staunch defenders of cultural traditions. Indeed, indigenous women require access to traditional ways and places in order to deploy their rights as indigenous peoples; and have been deprived of them by state oppression. Yet not all traditional practices are innocent of oppression. Fay Blaney writes: "The best defence against assimilation is to sustain culture and tradition, but what are we to do when reinstated tradition is steeped in misogyny?" (Blaney 2004:167). Others have noted the way in which certain Aboriginal elites invoke traditions to sustain contemporary *prima facie* women's human rights violations (Green 1993, 2001, 2007; LaRocque 1997; Eikjok 2007). There is no consensus on the relationship between Aboriginal women's rights and a generalized, but male dominant formulation of Aboriginal rights;⁵ there is, however, some useful direction in existing international law and in critical and feminist theory.

It is not possible to advance Aboriginal rights without guaranteeing Aboriginal women's human rights, unless the objective is simply to guarantee Aboriginal men's rights and privileges over women. Aboriginal rights guarantees are part of the entitlement of Aboriginal people to fundamental human rights. Human rights for Aboriginal peoples include Aboriginal rights guaranteed equally to Aboriginal men and women, even if they enjoy them in culturally and gender-specific, hence different ways. Fundamental human rights include the full panoply of human and citizenship rights. No government can successfully defend contemporary or traditionally-constructed sex or race discrimination against human rights obligations; thus, the guarantees of the rights of Aboriginal peoples imply responsibilities of states and indigenous governments to protect these rights.

Aboriginal (or indigenous) rights are human rights – but they are not universal. They arise only in conditions of oppression, notably colonial oppression. They are a relational right that emerges in a particular historical context. The Aboriginal right, then, is a claim for a measure of justice against the imposition of colonialism, and it is the context that makes many other human rights meaningful. Analogously, women's human rights are framed by the context of being female, and being gendered women in conditions of patriarchal

⁵ See Val Napoleon, "Indigenous Discourse: Gender, Identity, and Community" in Kent McNeil & Ben Richardson, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (UK: Hart Publishing, forthcoming); and Gerdine Van Woudenberg, "Placing Gender in the Mediation of Aboriginal Resource Claims and Conflicts" (2004) 34:3 *Recherches Amérindiennes au Québec*.

oppression. Universal human rights are dependent on context for their enablement. The right, for example, to enjoy culture in community (section 27 of the United Nations *Covenant on Civil and Political Rights*) took on meaning in the case of Sandra Lovelace's case against Canada, for implementing the sexist, racist pre-1985 *Indian Act* (Green 2007:146, note 9).

The 1948 United Nations *Universal Declaration of Human Rights* is largely silent on women, but Article 2 entitles everyone to the Declaration's rights and freedoms "without distinction of any kind" (Bunch 1995). The vast majority of states are unwilling to guarantee women's human rights. Charlotte Bunch writes "Most women's experiences of human rights violations are gendered ... The lack of understanding of women's rights as human rights is reflected in the fact that few governments are committed, in domestic or foreign policy, to women's equality as a basic human right" (1995:12). Settler states such as Canada have also routinely and systematically violated Aboriginal rights. Indeed, Canada is now refusing to sign off on the Draft Declaration on the Rights of Indigenous Peoples,⁶ thus resisting the entrenchment of Aboriginal rights and state obligations in a specific instrument of international law. The DRIP does not use gendered analysis. Still, "thousands of ... Indigenous women from around the world see it as key to securing their rights as women within their communities as well as safeguarding their rights as Indigenous Peoples" (Susskind 2006). Aboriginal women endure rights violations by the governments of the states that have occupied their historic territories and disrupted the socio-political and economic practices of their nations. Additionally, and without addressing here the complex explanations why, sexist oppression by Aboriginal organizations, governments, and men is prevalent, and also violates Aboriginal women's human rights.

Too much of the theorizing and polemics around Aboriginal self-determination are silent on the question of Aboriginal women's human rights, or on human rights in general. Where women are taken up, there is a tendency to paint in broad brush-strokes an indigenous pre-colonial past innocent of patriarchal oppression or other human rights abuses, and to claim liberatory power in the uncritical reinstatement of cultural practices (Green 2004, Blaney 2003). Moreover, there is a virulent anti-feminist climate in indigenous politics and academia, one which shares much in common with the same sentiment in reactionary elements in the dominant society (Green 2007, Kuokkanen 2007, St. Denis 2007).

On most of the measures listed by the Universal Declaration of Human Rights and to the Covenants attached to it, and to related human rights declarations and conventions such as the Convention for the Elimination of Discrimination Against Women (CEDAW) and the Draft Declaration on the Rights of Indigenous Peoples, Aboriginal women lack basic conditions for personal or economic security. Instead, they are likely to suffer from conditions of political and economic marginalization. These conditions are so egregious as to be a set of fundamental human rights violations. The United Nations Human Rights Commission criticized Canada in 2003, saying:

⁶ Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). <http://www1.umn.edu/humanrts/instree/declra.htm>, accessed November 21, 2006. As of early 2007 Canada was not supporting the DRIP. See Cosentino 2006 for a fuller account of these politics.

...the Committee is seriously concerned about the persistent systematic discrimination faced by aboriginal women in all aspects of their lives.... The Committee urges the State party to accelerate its efforts to eliminate de jure and de facto discrimination against aboriginal women both in society at large and in their communities, particularly with respect to the remaining discriminatory legal provisions and the equal enjoyment of their human rights to education, employment and physical and psychological well-being.⁷

In their study of urban Aboriginal women in Montreal, Jaccoud and Brassard define exclusion or marginalization as “the relative absence of certain social groups from the labour market and, more generally, from participation in society’s core institutions ... [and are] one aspect of social isolation, poverty, and economic insecurity.” They make the point that Aboriginal marginalization “begins in early childhood and is rooted in a much broader social context associated with the consequences of (the) colonization” This context becomes what they call a “defining path” that makes marginalization probable: “poverty, non-integration into the conventional job market, involvement in gainful activities that are socially frowned upon, unacceptable or even criminal, violence, alcohol, drugs, homelessness, reliance on food banks and shelters, minimal informal social network and strong institutional social network” (2003:143).

This difference is not a consequence of cultural differences or deficiencies. Rather, it is the consequence of colonialism, a set of politico-economic and cultural practices that are not only historic, but also contemporary. Canada is built on Aboriginal lands and resources which have been taken over, in many cases stolen, by political representatives of the settler communities. The contemporary subordination of Aboriginal people is maintained by a political culture of racism and interlocking systems of white privilege (Green 2006, 2005a, 2005b). The dominant societies’ ability to ignore colonialism is closely tied to their own complicity in colonialism, and to their beneficiary status at the expense of Aboriginal immiseration. These practices have become normalized into the political culture of the dominant societies, and confronting and destabilizing it is a difficult theoretical and political task (Kuokkanen 2005; Green 2005).

Canada has been criticized for failing to honour, or to improve, the Aboriginal and gendered human rights of Aboriginal peoples. For example, in 2007 the United Nations Human Rights Committee criticized Canada for failing to meet its obligations to Aboriginal women under the CEDAW⁸. The respected non-governmental organization Amnesty

⁷ Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee: Canada* (2003) (A/58/38), paras. 361, 362. Cited in “Women’s Civil and Political Rights in Canada 2005”, submitted by the Canadian Feminist Alliance for International Action (FAFIA) to the United Nations Human Rights Committee, on the occasion of its review of Canada’s 5th report on compliance with the *International Covenant on Civil and Political Rights*, September 2005:9.

⁸ See FAFIA, www.fafia-afai.org and http://www.fafia-afai.org/images/pdf/CEDAW_anniversary_english.pdf.

International has also criticized Canada for the breathtaking numbers of missing and murdered Aboriginal women. On every index of wellness measured by Statistics Canada, Aboriginal populations do significantly less well than does the Canadian population as a whole.

Canada exempts First Nations governments from the most basic commitment to human rights. Section 67 of the *Canadian Human Rights Act* says that: “Nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that Act”, and has “immuniz(ed) Band Council from challenges when their decisions are discriminatory ... women cannot seek a remedy for this discrimination under human rights legislation, because section 67 bars their complaints” (FAFIA 2005:11). This is not state respect for “self-government”: the state has no problem enforcing other legislative and regulatory requirements on First Nations. The Canadian state has failed to protect Aboriginal women’s rights from both Aboriginal and mainstream government oppression.

Aboriginal and treaty rights, and *Charter*⁹ rights are constitutionally guaranteed to Indians, Inuit and Metis in Canada. That is, as “citizens plus”, Aboriginal people are entitled to Aboriginal and treaty rights, in addition to all of the rights that Canada guarantees to its citizens. It is worth noting here that, while we use the category “Aboriginal”, the fact is that status Indians on reserves are the Aboriginal category most recognized by the Canadian government and the non-Aboriginal Canadian communities as claimants of rights, and of public policy and public spending flowing from recognition. Indians living off reserve, non-status Indians, Inuit and Métis have a much more difficult time claiming Aboriginal and treaty rights, and are not perceived as legitimate rights claimants by governments or the dominant communities.

The overwhelming majority of Aboriginal and treaty rights are designed to be enjoyed in community. Exclusion from Aboriginal communities effectively renders many of these rights meaningless. Thousands of Indian women have systematically been forced from First Nations communities by sexist, racist colonial legislation, and by patriarchal power relations in both colonial and Aboriginal communities. Thus, women’s fundamental human rights are violated. Aboriginal peoples are also entitled to the rights and freedoms named in the *Charter*. This includes mobility rights and other incidents of Canadian citizenship – and exercising these rights should not result in the effective loss of rights because one is not “on reserve”. These, and many more public policy and political conflicts, corrode Aboriginal women’s human rights.

International law says that women’s human rights cannot be violated by governments invoking ‘tradition’; the CEDAW is very clear on this. Chris Weedon writes that “Successful resistance to domination is necessarily rooted in culture and experience. ... identities are an important dimension of cultural struggle since the forms of subjectivity which we inhabit play a crucial part in determining whether we accept or contest existing power relations” (Weedon 2000:119-120).

⁹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

The public – private dichotomy informs women’s gendered social location, and defines separate gendered social space for men and women. In Canada, “(g)ender roles reflect a social consensus forged by patriarchal elites, and construct a dichotomy in which women are private subjects, not public citizens. ... Women’s disproportionate confinement in the private sphere correlates with women’s subordinate status” (Green 2000:412). Yet, Peters and Wolper tell us that “... human rights work has traditionally been concerned with state-sanctioned or -condoned oppression, that which takes place in the ‘public sphere,’ away from the privacy to which most women are relegated and in which most violations of women’s rights take place” (1995:2). In other words, the conditions that most immediately affect Aboriginal women’s and most women’s lives, those in home, family and community, are the least likely to be the subjects of public policy designed to guarantee women’s human rights.

Further, Stetson writes: "Western human rights theory accepts, without question, the patriarchal assumptions that the modern state must protect and further the liberties of citizens in the public sphere but that the private sphere of the family and sexuality is outside its concern." (Stetson 1995, 72) Governments have historically been unwilling to legislate relational behaviours in the private sphere, especially within the home. And it is in the private sphere, especially in the home, that most women are primarily located. Thus, Friedman argues, “Promoting women’s human rights ... clearly involves efforts within areas of life considered to be ‘private’” (1995, 20). Aboriginal women’s human rights must be guaranteed, taking into consideration women’s lives in the public and especially, the private spheres. No Canadian government is going to be willing or able to take account of Aboriginal women’s public and private locations, nor of the gendered nature of oppression, liberation and rights, without also routinely taking into account the same kinds of considerations for all women.

Yet, both Canadian and Aboriginal governments are bound by international law, reinforced by the *Charter*, to protect women’s fundamental human rights and Aboriginal rights. These must be read together, as Aboriginal women are simultaneously all of their rights-bearing identities. The state is bound to protect these rights, but the state limits its reach to the “public sphere” (Green 2000). This has the effect of eliminating most of women’s lives from the scrutiny of rights law. The combination of patriarchal, racist, colonial, and neoliberal forces create a legal and political culture in which Aboriginal women’s human rights are minimized, and where there is little incentive to improve them.

Consider the submission of the Canadian Feminist Alliance for International Action (FAFIA) to the United Nations Committee on the Elimination of Discrimination Against Women, on the occasion of the Committee’s review of Canada’s 5th report, January 2005 in New York.¹⁰ FAFIA, founded in 1999, is comprised of forty Canadian women’s equality-seeking organisations.¹¹ In it’s submission, FAFIA notes that Aboriginal women are the

¹⁰“Canada’s Failure to Act: Women’s Inequality Deepens”. Submission of the Canadian Feminist Alliance for International Action to the United Nations Committee on the Elimination of Discrimination Against Women, on the occasion of the Committee’s review of Canada’s 5th report. January 2003. Available online: www.fafia-afai.org.

¹¹ FAFIA’s goals are seeks to develop the capacity of women’s organisations to work at the international level;

most impoverished people in Canada; are vulnerable to violence; that status Indian women do not enjoy the same matrimonial property rights as other women; nor the same protection from “human rights legislation when they are discriminated against by [Indian Act] Band Councils and Band officials”. FAFIA notes that Aboriginal women are “disenfranchised from self-government discussions” and that the federal government fails to fund Aboriginal women’s groups so as to enable their participation. The vexed legislation on Indian status continues to be discriminatory for some status Indian women and their children.¹²

“Women’s poverty and economic inequality restrict women’s enjoyment of their civil and political rights”.¹³ There is racism in the criminal justice system.¹⁴ Aboriginal women are less likely to complete school than non-Aboriginal students.¹⁵ While women as a statistical category suffer from wage disparity with men, “Aboriginal women earn 15% less ... than the average for all employed women.”¹⁶ All of these factors converge to have a “particularly harsh effect on the health of Aboriginal women”¹⁷ and ultimately, reduce their life expectancy by 11 years relative to the Canadian female norm.¹⁸ Canadian intergovernmental bickering over jurisdictional responsibility has been identified as a factor in the negative health profile of status Indian people.¹⁹ All of these matters are discussed in more detail in the FAFIA report.

What FAFIA documents, then, is a set of disadvantageous circumstances that afflict Aboriginal women in Canada, in conditions that the Canadian state is bound to ameliorate because of its international human rights obligations. And the result of its careful, documented, scholarly presentation was the criticism of Canada by the UN Human Rights Committee. This, in turn, puts political pressure on the Canadian government to make some changes.

2.1 Royal Commission on Aboriginal Peoples

The most weighty and research-substantiated report (and to that point, the most expensive royal commission) in Canadian history, the five-volume Report by the Royal Commission on Aboriginal Peoples (RCAP) reported in 1996. Thus, we thought it important to know how the RCAP had approached Aboriginal women’s rights. The RCAP is profoundly about human rights of Aboriginal peoples, in the context of the Canadian settler state and its history of colonization. The RCAP, however, is weak on gender analysis. There is no evidence that the researchers or commissioners grasped the gendered distinctiveness of

to make links between international instruments and agreements and domestic policy-making; and to hold Canadian governments accountable to their commitments pursuant to Canada’s human rights obligations. *Ibid.* at 6.

¹² *Ibid.* at 9.

¹³ *Ibid.* at 18.

¹⁴ *Ibid.* at 45.

¹⁵ *Ibid.* at 70.

¹⁶ *Ibid.* at 71.

¹⁷ *Ibid.* at 82.

¹⁸ *Ibid.* at 83.

¹⁹ *Ibid.* at 83, citing Roy Romanow, Commissioner of the Royal Commission on the Future of Health Care in Canada, at 212.

Aboriginal women's rights and thus, made no claims for their implementation. This was an egregious lapse in a public document of substantial import to Canadians' understanding of colonial relationships. The RCAP makes only three recommendations flowing from Chapter 2, "Women's Perspectives": it asks for federal funding for women's organizations; it asks Aboriginal governments and organizations to ensure participation of Aboriginal women; and it requests an inventory of existing services, organizations and networks from Aboriginal governments and planning bodies.²⁰

However, on the first recommendation, there is no guarantee that the resulting participation must be accommodated by bands and organisations. On the second – why limit women's participation to health and healing institutions, instead of extending it to all structures of government? And on the third, so women get to inventory existing human services infrastructure. Big deal.

The section 'Women's Perspectives' briefly traces the historical sociological gender roles, the impact of colonialism and the state's policies on indigenous peoples, especially those of the *Indian Act*, and the sociological consequences of those policies. It talks about violence against women, the emergence of women's organisations and their critiques of existing male-dominated band councils and organisations. It talks about the issues that arise in most women's lives – the family, care of children, economic crises and single motherhood, deadbeat dads, the plight of youth, the role and care of elders, and labour-force opportunities and constraints. This discussion occupies eighty-nine pages, and the focus is primarily on women as mothers, caregivers, and survivors of subordination through the *Indian Act*.²¹

The section does not give much space to the powerful and important interventions by individuals and organisations who spoke of the vicious reprisals inflicted on Aboriginal women who are politically active as women, or who contest male power, or who identify as feminist. This is unfortunate, as it avoids documenting or critiquing the extent to which patriarchal power is used to subordinate contemporary indigenous women, and the ways in which Aboriginal organisations, governments, and the colonial state support these processes. It suggests rather that the existing power relations in Aboriginal politics are unconflicted; are about resistance to the oppressor state and responsiveness to the consequences of colonialism. This avoids looking at the fundamentalist and oppressive practices that

²⁰ 4.2.1 The government of Canada provide funding to Aboriginal women's organisations, including urban-based groups, to (a) improve their research capacity and facilitate their participation in all stages of discussion leading to the design and development of self-government processes; and (b) enable them to participate fully in all aspects of nation building, including developing criteria for citizenship and related appeal processes.

4.2.2. Aboriginal governments and organisations provide for the full and fair participation of Aboriginal women in the governing bodies of all Aboriginal health and healing institutions.

4.2.3. Aboriginal governments and planning bodies with a mandate to develop new structures for human services undertake, in collaboration with women's organisations, an inventory of existing services, organizations and networks with a view to building on existing strengths and ensuring continuity of effort.

²¹ *Indian Act* R.S.C. 1985, c.I-5

subordinate women as women, and further dignifies these practices as beyond critique because they are expressions of Aboriginal traditions.

Even the RCAP's limited consideration of eighty-nine pages of 'Women's Perspectives' shows that gender-specific analysis is peripheral to the bulk of RCAP's focus. Compare this, for example, with 'Métis Perspectives' (in which the subject of 'Women' gets 1 page) which takes 187 pages; and 'The North', which takes 110 pages and never mentions women; or 'Governance' in Volume 2, which takes 313 pages and has three pages on women and 'traditions of governance', but only mentions either rights or responsibilities of governments towards their citizens in the brief one and one-half pages on 'citizenship', and without reference to gender.

And yet it is women who are recorded as critiquing the existing power relations and principles and processes of political accountability, and arguing for gender equality in politics. A sampling of RCAP's quotes in Volume 4 reveals this. "(M)echanisms must be put into place to ensure that women are equally represented in all decision-making processes and on all decision-making bodies" (Martha Flaherty of Pauktuutit); "We also need a system of responsible government ... that is a more accountable, representative method of conducting government, which has recognizable and respected rules of conduct" (Bernice Hammersmith, Metis Society of Saskatchewan); "The Native Women's Association of Canada has stated previously and maintains that self-government should be granted ... to nations, not to band councils" (Sharon McIvor, NWAC); "we are not a special interest group ... our organization represents many nations" (Marlene Pierre, Ontario Native Women's Association). Native women called for "a values clarification process within the context of reviving traditional values" (Marilyn Fontaine, Aboriginal Women's Unity Coalition); warned of "the irrationality behind defining the level of status a person has by your gender" (Linda Ross, Kingsclear Indian Band).

Women raised the experience and the fear of political persecution: "The response of the Assembly of Manitoba Chiefs to some of the issues that we have raised ... has brought to the foreground the potential for the abuse of human rights in the existing political and service delivery structures of Aboriginal government. It highlighted the lack of democratic mechanisms that would allow for the full and equal participation of women and off-reserve people in decisions and concern and affect them." (Marilyn Fontaine, Aboriginal Women's Unity Coalition); "there is a real deed for the entrenchment of women's rights within self-government" (Sarah Kelleher, NWT Family Services); (Women's) initiatives ... are found to be intimidating and threatening to the male-dominated organisations that claim to represent us. ... They are in the process of negotiating self-governance while they actively try to exclude their female counterparts" (Melanie Omeniho, Women of the Metis Nation).²² Some presentations called for Aboriginal governance to be accountable, representative, responsible government (Bernice Hammersmith, volume 4, 73). Some rejected the proposition that bands were the proper locus of government, arguing for nations (Sharon McIvor, NWAC, volume 4 at 73).

²² Royal Commission on Aboriginal Peoples, *Perspectives and Realities*, Vol.4, (Ottawa: Supply and Services Canada, 1996) at 73-80.

RCAP did not document the more vile forms of repression, such as threats of physical violence and even death to women and to their children, for speaking out on political issues; for threats of loss of jobs and for actual loss of jobs; for the use of tactics such as slander to suggest politically active women were sexually promiscuous or the use of homophobia to silence vocal women. Some of this is documented in the submission of Women of the Métis Nation to the Royal Commission,²³ and undoubtedly in other submissions on deposit in the RCAP archives. It appears that the RCAP air-brushed the most startling allegations of sexism, indicating that gender analysis is intensely controversial. It was a mistake, however: it is a political disservice to women and a compromising of the research to pretend that things are not as bad as they are.

2.2 SUMMATION

Aboriginal women's human rights, including their Aboriginal rights, have not been honoured by the State. Nor have gendered human rights been of concern to Aboriginal governments. Even the premier public research event of this century on Aboriginal peoples, the Royal Commission on Aboriginal Peoples, failed to gender its analysis in general, or to sufficiently attend to Aboriginal women's gendered human rights in the contexts of colonial – settler society and Aboriginal communities. Aboriginal women have suffered from state-sanctioned and malestream indigenous political elite-sanctioned evasion and denial of women's oppression. The emerging governance regimes of Aboriginal communities have not been concerned with Aboriginal women's rights or with confronting male oppression of women. This has perpetuated the violation of women's rights – and sometimes, violations have been legitimized as expressions of “tradition”, itself a right of peoples. Aboriginal women have had to resort to creating organizations, allying with social movements, and taking international action to win a measure of recognition of their rights.

3.0 INSIDE THE POLITICAL DYNAMICS

While the experiences of Indigenous women are shaped by both the external and internal political dynamics that surround and pervade Indigenous peoples' struggles, they also bear the brunt of sexist oppression in all its various forms. As described previously, the external dynamics are those that form the often conflicted relationships between Indigenous peoples²⁴ and the rest of Canada, and usually involve contested lands, resources, and power. For the purposes of this paper, Indigenous peoples means those larger political groups with shared histories, lands, languages, legal orders, and governance.

²³ Joyce Green, "Women Who Own Themselves", The report of Women of the Metis Nation on their conference on Metis Women and Governance, June 11-12, 1993, Edmonton, Alberta.

²⁴ Former “Indian Bands” pursuant to the *Indian Act* (R.S.C. 1985, c.1-5) have begun to call themselves “First Nations”. While the original intent of this renaming may have been to emphasize the fact that indigenous nations were in Canada prior to European contact, therefore they are the *First Nations*, calling each band a First Nation is problematic. Bands are groups of varying sizes that are part of larger nations which have been legally, socially, and economically fragmented by the political reorientation to small, geographically bound communities. See Canada, Report of the Royal Commission on Aboriginal Peoples, *Reconstructing the Relationship* vol.2 (Ottawa: Supply and Services Canada, 1996) at 234.

The internal political dynamics referred to here are those within Indigenous peoples. These internal dynamics occur inside the many local, regional, or national political configurations such as bands, nations, assorted communities, and other organizations. It is in this internal frame that the personal faces of colonialism can be seen more clearly because it is the faces of our families, friends, and neighbours where it pervades our relationships and our communities. And, as we well know from the horrific example of the 500 missing Aboriginal²⁵ women in Canada, this personal face of colonialism is sexist, oppressive, and violent.²⁶

Obviously these internal and the external dynamics are connected along the numerous intersecting and shifting axes of power that surround Indigenous peoples at all levels – locally, provincially, nationally, and internationally. As explained previously, women’s issues are still characterized those that are internal such as membership, marital property,²⁷ violence, family, health, culture and language, education, and poverty.²⁸ The external issues are those broader indigenous matters such as self-determination, self-government, and Aboriginal rights which for the most part lack a gendered analysis.²⁹

The purpose of this section is to examine how some of the internal dynamics specifically impact Indigenous women at a more local level in Canada. The first question posed is this; are the larger political dynamics that surround indigenous peoples mirrored by and acted

²⁵ This includes First Nations, Inuit, and Métis peoples as per the *Constitution Act, 1982*. We also use “indigenous” to describe people in Canada and when referring to indigenous peoples elsewhere in the world.

²⁶ See for example, Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada* (2004) [Available online: http://www.amnesty.ca/campaigns/sisters_overview.php]. Also see Christine Welsh’s documentary film, *Finding Dawn* (2006) National Film Board. For a summary of the levels of violence experienced by indigenous women in Australia, New Zealand, United States, and Canada see Jane Dickson-Gilmore & Carol LaPrairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) 112-118 [Dickson-Gilmore & LaPrairie].

²⁷ Issues of membership and marital property on reserve have primarily involved Aboriginal (i.e., First Nations, Indian) women who are registered under the *Indian Act*. The *Indian Act* does not apply to Inuit or Métis women, or to First Nations women who are not registered as status Indians under the *Indian Act*. And obviously, on-reserve marital property issues do not apply to status First Nations women who live off reserve.

²⁸ See for example see generally, Beverly Jacobs, President, Native Women’s Association of Canada, Review of Beijing from an Indigenous Perspective, Secretariat Permanent Forum on Indigenous Issues (March 3, 2005), available online: United Nations

<www.un.org/esa/socdev/unpfii/documents/presentation_jacobs_en.doc>; Emma LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications” in Michael Asch, ed., *Aboriginal Treaty Rights in Canada: Essays on Law and Respect for Difference* (Vancouver: UBC Press, 1997); and NWAC website. NWAC and some of the other Aboriginal women’s groups are expressly “anti-feminist”. So while these groups are working to address violence against Aboriginal women and other symptoms of sexist oppression, they do not recognize any feminist theory as useful to their mandates.

²⁹ But see Joyce Green, ed., *Making Space for Indigenous Feminisms* (Halifax: Fernwood Publishing, 2007). Also see Sharon McIver, “Self-Government and Aboriginal Women” in Enakshi Dua & Angela Robertson, eds., *Scratching the Surface: Canadian Anti-Racist Feminist Thought* (Toronto: Women’s Press, 1999). McIvor argues that Aboriginal women’s rights are existing Aboriginal rights and form part of the inherent right to Aboriginal self-government (169-172).

upon by indigenous women at the community³⁰ level and in their relationships with one another? The example through which this exploration will take place is an issue involving the contested control and interpretation of cultural knowledge.³¹ The second question is: What intellectual processes and social capital are contained within Indigenous legal traditions that might enable Indigenous peoples to challenge internal oppression generally, and sexism specifically?³²

To explore these questions we will first draw from the authors' experiences to describe a local disputes involving cultural knowledge including oral histories. Second, we will develop and apply a legal and political analysis to explore the dimensions of power and colonialism that pervade and surround the conflict. Finally, we conclude this section with suggestions for future strategies that indigenous peoples might employ to deal with sexism and internal oppressions that are deeply engrained in the rhetoric of culture and the Aboriginal discourse.

3.1 A Slice of Local Experience

Recently in northern British Columbia, a not uncommon situation developed wherein the currency of power at play was that of cultural knowledge.³³ Specifically, at issue was who controls the telling of the oral histories, who can tell the history, and whose version of history is the "truth". This difficult and complex situation arose during a collaborative research project with a number of small Aboriginal communities and tribal umbrella organization in northern British Columbia. Two of the researchers, Xena and Donna,³⁴ involved are women from one of the Aboriginal communities participating in the research project. Neither of the researchers is fluent in their language.

A very small historical snapshot will help to contextualize this conflict. In Canada, Aboriginal peoples have moved across vast landscapes into other peoples' held territories. Historically, external boundaries have always been sites of ongoing negotiations in accordance with each indigenous group's laws and political structures. Each group's legal order extends over their territory, and at its farthest reaches, another group's territory begins. Each indigenous group's territory was the area they could defend both physically and legally

³⁰ In this paper, community is used very broadly and includes geographic communities (e.g., bands or Métis settlements), communities of interest (e.g., academic, political, etc.), and affiliations (e.g., groupings of urban Aboriginal peoples).

³¹ Cultural knowledge in this example refers to oral histories generally and is specifically related to cultural practices, ceremonies, and material culture. Otherwise, the authors' definition of culture is a much broader and describes more generally the "horizon" of meaning that surrounds around individuals and groups, and includes political, legal, social, economic systems and institutions.

³² Javier Mignone describes social capital in a northern Manitoba First Nation context as the extent to which resources are socially invested – a culture of trust, norms of reciprocity and collective action are present; participation is facilitated; and inclusive, flexible and diverse networks are in place. See Javier Mignone, *Measuring social capital: A guide for First Nations communities* (Ottawa: Canadian Institute for Health Information, 2003).

³³ In the experience of the authors, this is not an isolated conflict. Rather, such disputes pervade many Aboriginal communities, often spanning generations.

³⁴ The names have been fictionalized.

according to their indigenous legal orders.³⁵ International indigenous laws and protocols enabled each group of people to maintain and protect their relationships with other peoples through time. There are oral histories that describe the movements, experiences, and settlements of people across the land.³⁶

Before contact and the early treaties, indigenous peoples in northern British Columbia deliberately negotiated arrangements for recognition of lands, trade, marriage, resource sharing, and access. There were also formal laws and informal processes of “taking in” citizens from other areas to allow the merging of new peoples and settlement.³⁷ Through these processes, they established enduring political, economic, and legal relationships.³⁸ Certainly, there were conflicts among Indigenous peoples prior to contact, but they also had effective systems to manage conflict. When these international protocols broke down, war ensued.

Unfortunately, indigenous institutions of governance and law have been damaged, undermined, and distorted by recent history. Consequently, varying levels of ongoing and sometimes paralyzing conflict permeate many Aboriginal communities. While conflict in and of itself is not a problem, what is problematic is an increasing inability to manage it – arguably a direct result of the extent to which indigenous peoples’ governing and management systems have been impacted by colonialism.

In the example we explore, serious tensions developed around who has the authority to discuss the oral histories and which oral histories should be considered the legitimate version. This is a complicated conflict that has become deeply sedimented and highly personalized over time. For our purposes here, the aspect of the dispute that we want to focus on is how the conflict is currently manifested between several older and younger women. The conflict itself concerns the apparent individualization of the formerly collective oral histories.

The elements of the dispute are thus. Several older women, Fanny and Norma, have determined that they are the only legitimate holders of the oral histories of five extended families. The basis of their claim is that they (1) are of the only proper and ethnically pure family lineage, (2) know the oral histories, (3) they speak the language, and (4) are generally qualified with the proper training and background.

None of the women involved in the dispute live in the Aboriginal community of origin. The older women married out and left when younger, and both the researchers were raised off-reserve. One of the younger women, Xena, is directly related to both older women. Xena has been the driving force behind the research project. She is also working on her MA and for

³⁵ This is not to suggest that a single physical space can only be occupied by a single legal order or system. Rather, it is suggested that historically, as in contemporary times in Canada, a number of legal systems are functioning in one geographic space and any given time.

³⁶ Art Napoleon, *Bush Land Spirit: Our Elders Speak* (Moberly Lake, BC.: Twin Sisters Publishing, 1998).

³⁷ See for example, Neil J. Sterritt, “Ts’imil Guut, To Bring in One’s Own” (2004) [unpublished, archived with author.]

³⁸ For example, in Alberta, there are four Nakota bands in traditional Cree, Blackfoot, and Dene lands. There are also several groups of Mohawk and Saulteaux.

her thesis, Xena intended to document how her ancestors travelled across Canada to arrive in northern B.C.

The two older women have objected to the research and to Xena's thesis topic in particular (she has already completed much research). The various grounds for their objections have been; (1) Xena and Donna do not speak the language, (2) they suspect Xena of wanting to commercialize the oral histories and the sacred sites, (3) neither Xena nor Donna have been properly trained in the culture, (4) and the main objection, is that the researchers want to interview other elders in the community. According to Fanny and Norma, the other elders are of questionable lineage and therefore have no authority to discuss the oral histories or anything else of cultural importance.

Despite assurances that there is no intention to commercialize or publicize any sacred sites or oral histories, Fanny and Norma have withdrawn their support from both the research project and Xena's thesis. There have been long conversations about these issues. Donna and Xena have both argued that through time, all history is political and is always contested. Xena and Donna's other arguments included, (1) other versions of history are valid and people must work out the collective history together, (2) such narrow restrictions based on racialized notions of ethnicity are colonial constructs that are similar to those created by the *Indian Act* and simply serve to fracture the people further, and (3) the maintenance of cultural practices or knowledge in and of itself in isolation is not enough to create social change, but rather that such knowledge needs to be an active part of a people's intellectual and social capital.

Fanny and Norma have refused to be swayed and have declared that the oral histories will die with them. Their behaviours have been fairly destructive and include much rumour mongering and personal attacks. Donna and Xena are "too white", they are "too academic", and they do not "know how to take correction from an elder". In the case of Donna, Fanny and Norma question the purity of the lineage of one of her grandmothers. Again, Donna and Xena are not authentic because they do not speak the language and do not possess the requisite cultural knowledge.

Consequently, Fanny and Norma have decided to disclose their cultural knowledge and oral histories to Xena's brother who has secured his a government contract for his own research project. Unfortunately, this contract is not for a community-based project and there is no process of sharing the collected information with the rest of the community members. Nor does Xena's brother speak the language, but that no longer seems to deter Fanny and Norma.

What is the upshot of this conflict? The original collaborative research project will continue with those elders and community members that want to be a part of it. Xena has chosen to drop her thesis topic and will turn her research over to Fanny and Norma. There is a lot of necessary local fence mending because of the extensive personal attacks made about the credibility of Xena and Donna at the community level. The oral histories and sacred site information will be stored in some mysterious government site, and there are ongoing questions about its availability for local people. Fanny and Norma have maintained their

power and control over their versions of the oral histories, which remain uncontaminated by the voices of other families.

3.2 Analysis

All of the women involved with this dispute care about their community. There are no villains. It is a story that is as common as dishwater.³⁹ And, while it is tempting to simply attribute the behaviour of Fanny and Norma to internalized colonialism, this does not adequately deal with the question of their agency. Internalized oppression and sexism in Aboriginal societies is often rationalized as a legacy of colonialism, but questions about how individual and collective agency factors usually remain unexamined and unanswered.⁴⁰ In other words, how does agency factor into the adoption and continuance of oppressive and sexist practices that are antithetical to the way many Aboriginal societies are described?⁴¹ How do we consider and learn from the critical present-day interplay between agency, colonialism, and neo-colonialism?

Secondly, there is another question of cognitive dissonance.⁴² When describing the multiple oppressions experienced by Aboriginal women, there is a tendency to describe Aboriginal women as solely victims. Can one validate the oppression and suffering of Aboriginal women while still honouring their agency? Indeed, the agency of Aboriginal women is demonstrated by the many ways they survived and continue to survive. In fact, this question also extends to Aboriginal people more broadly. If we focus on the experiences of colonization, are we disregarding all the ways that Aboriginal peoples survived? We are referring here to the everyday living that entails getting up each day, supporting families, building communities, and working.

In the end, how does one account for the agency of Fanny and Norma? What is their responsibility in a conflict that ended up targeting and attacking the integrity of Xena, and to a lesser extent, Donna? Obviously there are deeper roots to this conflict because over the years it has flared up again and again with different subject matters, but the question of agency still stands.

As mentioned previously, an underlying but as yet, unstated, issue is that of collective versus individual histories. History is political – because it is fundamentally about who gets to say what happened?⁴³ A people's history is always contested and challenged by the group

³⁹ Often these disputes are related to language or other aspects of culture.

⁴⁰ For an interesting article causes one to think about this question, see Jean Barman, "Taming Aboriginal Sexuality: Gender, Power, and Race in British Columbia, 1850-1900" (1997/98) 115/116 BC Studies 237.

⁴¹ For example, see Jo-Anne Fiske and Evelyn George, *Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law* (Ottawa: Status of Women, 2006) [Fiske & George]; also see Laura F. Klein & Lillian A. Ackerman, eds., *Women and Power in Native North America* (Norman: Oklahoma University Press, 1995).

⁴² Cognitive dissonance is meant here as the inability of the mind to accept opposite concepts at the same time. Consequently, when met with opposite truths, one version simply eclipses the other.

⁴³ Similarly, it is arguable that all research is fundamentally political. See Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" (2001) 7:1 Journal of the Royal Anthropological Institute 95.

members because that is how it becomes the group's collective history. For example, the Gitksan had formal processes of managing and challenging oral histories,⁴⁴ while other indigenous peoples had less formal processes. Nonetheless, we argue here that in order for a people to have a sense of themselves as a people, they had to collectivize their history – albeit their contested history. Individuals would recount histories to the next generations, but they could also be challenged to keep their version of history within that which was generally accepted by the larger group.

Arguably, Fanny and Norma learned their cultural knowledge, including oral histories, in a more intact and collective context than exists today (although, their lives were also very turbulent and difficult). Through each generation, these collective systems of accountability and contestation have been further eroded. In other words, historically, there would have been a larger group of knowledgeable people involved who would have ensured the maintenance of a collective people's history. Those systems of accountability and bounded contestation, which are also the basis for indigenous legal orders and law, have been undermined and consequently the histories have been individualized – and inadvertently reduced to personal currencies of power.⁴⁵

To return to the first question that was posed earlier; Are the larger political dynamics that surround indigenous peoples mirrored by and acted upon by indigenous women at the community level and in their relationships with one another? It appears that the behaviours of Fanny and Norma are basically oppressive to Donna and Xena (and others). It is arguable that the oral histories and cultural knowledge at the centre of the dispute have been distorted into individualized versions that are controlled as personal currencies of power. Furthermore, it seems that the focus on “cultural knowledge” has been done in such a way that it has been narrowed and disconnected from its larger political and meaning-giving context. In this case, cultural knowledge has been reduced to cultural remnants that have survived, but have been distorted by colonialism.

This phenomena of narrowly restricting cultural knowledge to practices, ceremonies, or materiality and disconnecting them from their deeper and collective cultural moorings (i.e., culture as horizon) has been commented on in the field of Aboriginal justice.

Rather, the issue here is that the elevation of culture per se and the selective reification of certain aspects of tradition are too often a means for resisting change, or a justification for moving in a particular, too often unclear, direction.

...

The absence of social justice in First Nations is the leading cause of over-representation [in prison], and yet we continue to ignore this, preferring instead to cling to culture as a way out of the morass. Perhaps this is because ignoring socio-

⁴⁴ See Val Napoleon, “A Legal Straight for Oral Histories” (2005) 20:2 Canadian Journal of Law and Society 123.

⁴⁵ This raises questions about anthropologists and other researchers who focus on individuals without properly situating them within their political and social milieu thereby decontextualizing and individualizing the informant's history and cultural knowledge. There are many currencies of power which are always at play in people's relationships – education, suffering, language, wealth, confidence, lineage, social standing, etc. In the Aboriginal discourse, many of these currencies are related to credentials of “Aboriginal authenticity”.

economic conditions in the majority of communities in favour culture enables us to turn a blind eye to the costs of colonialism to First Nations, and assert instead that the problems are caused by our failure to address those aspects of Aboriginal cultures that have survived colonialism.⁴⁶

Perhaps Fanny and Norma's treatment of their cultural knowledge is similar to that which is criticized by Dickson-Gilmore and LaPrairie. In other words, Fanny and Norma appear to be protecting those elements of culture that have survived, but to the exclusion of the larger public good and or larger issues of social justice.

There is another aspect to the dispute wherein one might characterize Fanny and Norma's behaviour as representing the colonially generated dynamic of a threatened community. From this space, ethnic identity is expected to be internally homogenous and it is from this basis of purity (often racialized) that the threatened community interacts with the larger society. Consider Fanny and Norma's declarations regarding the impurity of Donna's lineage and the questionable lineage of the other elders. What this has created is a lack of respect for diversity whether it is academic, cultural, or biological (racialized versions).

To what extent are Fanny and Norma simply buying into the sexist oppression in a way that enables them to garner some personal power? That is, through the internalization and maintenance of sexism, Fanny and Norma are able to step on the backs of Xena and Donna for a higher position in the local hierarchy. This is an important question because this situation is replicated across the land in many communities where some women maintain local positions of power at the expense of other women. The uncomfortable questions about agency must always be asked.

Finally, Georg Simmel wrote that "[c]onflict is thus designed to resolve divergent dualisms; it is a way of achieving some kind of unity, even if it be through the annihilation of one of the conflicting parties."⁴⁷ What unity might be achieved by the conflict between Fanny and Norma, on the one hand, and Xena and Donna on the other? What are the women in this situation getting out of the maintenance of oppressive sexist regimes and the resultant conflict?⁴⁸ This is not simply a matter of finding another way to blame the oppressed for their oppression. Rather, it is about considering the complexity and discomfort in a local conflict in order to better understand how the surrounding political dynamics are perpetuated.

3.3 Indigenous Legal Orders and Law

The second question posed earlier is about the intellectual processes and social capital within Indigenous legal traditions that might enable Indigenous peoples to challenge internal oppression generally, and sexism specifically?

⁴⁶ Dickson-Gilmore & LaPrairie, *supra* note __ at 228-229, 231 respectively.

⁴⁷ Georg Simmel, *Conflict: The Web of Group-Affiliations* (New York: The Free Press, 1955) at 13.

⁴⁸ Deutsch, "Conflicts: Productive and Destructive" in Fred. E. Jandt, ed., *Conflict Resolution Through Communication* (New York: Harper & Row, 1973) 155 at 158.

There is no one Aboriginal nation, but rather some fifty-plus diverse Aboriginal nations across Canada. Given this, there is no one Aboriginal legal order or single set of Aboriginal laws. While many Aboriginal peoples in Canada had decentralized systems of governance, they still had legal orders⁴⁹ and law, and political authorities. It is necessary to reconceptualize law much more broadly so that our thinking is not limited to considering law as only that which is formally enacted and deriving from centralized states. This is a creative way of thinking about law that is more useful to dealing with issues of gender and oppression.

We propose that it is useful to reconceptualize law as a collaborative process that large groups of people engage in order to manage themselves. This theory holds that law derives from the everyday social interaction of people over time rather than formal enactments and centralized state machinery.⁵⁰ In other words, there are at least two kinds of law: (1) explicit, formal law that is enacted or authoritatively declared by centralized governments, and (2) implicit, informal interactive law. It is this language of social interaction that enables people's behaviours to generally fall within predicable patterns that are discernable through time.⁵¹

To be effective for the purposes of large groups of people managing themselves, such social interactive law must withstand and adapt to ongoing norm contestation and conflict that are necessary aspects of every society for every generation.⁵² In other words, there is no perfect, harmonious state without conflict, but rather, continual conflict is an integral part of how groups of people work out how to live together.⁵³ In non-state Aboriginal societies, these decentralized institutions and interactive processes result from the exercise of individual and collective agency and collaboration, and will be maintained and adapted as only as long as they are considered legitimate by the group.⁵⁴

While much of this interactive law is implicit,⁵⁵ Aboriginal societies also made law explicit through deliberate public processes of legal reasoning, interpretation, and application.⁵⁶

⁴⁹ "Legal system" describes state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions. In contrast, "legal order" describes law that is embedded in social, political, economic, and spiritual institutions. Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 49-50.

⁵⁰ Lon L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" (1975) B.Y.U.L. Rev. 89 [Fuller, Law as Instrument].

⁵¹ *Ibid.* at 2.

⁵² Jeremy Webber, Legal Pluralism and Human Agency, (2006) 44:1 Osgoode Hall Law Journal 167 at 171.

⁵³ See generally, Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000).

⁵⁴ According to Jeremy Webber, dialogic theories of consent conceptualize "a community's legitimacy as a function of the quality of its interactions, rather than of an historic (and indeed generally mythical) act of adherence". See Jeremy Webber, "Challenges of Consent", (Paper prepared for the Inaugural 2004 Conference of the Consortium on Democratic Constitutionalism: "Consent as the Foundation for Political Community"), online: University of Victoria http://www.law.uvic.ca/demcon/2004_program.htm at 22 [Webber].

⁵⁵ Gerald Postema, "Implicit Law" in Willem Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 255-275.

⁵⁶ See Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" (2004), paper presented at Consent as the Foundation for Political Community, Consortium on Democracy and Constitutionalism, University of Victoria. The conference papers will be published in an inaugural consortium journal, forthcoming in 2007. Many peoples recorded their legal principles, precedents and decisions, and law

Arguably, law still functions as law whether it is centralized or decentralized in accordance to the culture that gives rise to it.⁵⁷ All law requires interpretation and legal reasoning processes to produce collectively owned outcomes, but these intellectual processes are often not understood across cultures.⁵⁸

Fundamentally, this approach is about creating the necessary intellectual space in which people are able to think critically and rigorously about indigenous legal orders and law. From this perspective, an open exploration indigenous legal traditions can actually facilitate the (1) building of intellectual capacity, (2) developing indigenous citizenship, (4) developing ways to challenge internal oppression, and (4) understanding law as a form of social capital. Such local deliberations should include discussions about sources of law, decision-making and problem-solving processes, reasoning and interpretation, change and challenge, accountability, and application).

4.0 CONCLUSION

We have argued for the inseparability of Aboriginal women's human rights, a manifestation of rights and responsibilities that are available to Aboriginal women, who are simultaneously all of their identities. Aboriginal women's rights include gendered rights in all contexts, and Aboriginal rights in the context of legacies of colonization by settler states. We also suggest that there are processes within Aboriginal legal traditions and practices to re-animate and to protect Aboriginal women's rights. However, these are not unequivocally appropriate and must be evaluated community by community, against both rights regimes and the struggles of communities to survive in the context of colonization.

Aboriginal women are a diverse political constituency, with no single analysis or

in their oral histories (e.g., Gitksan, Wet'suwet'en), place names (e.g., Tlicho), kinship systems (e.g., Cree, Gitksan), and traditions (e.g., Tlicho). Also see H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law*, 2nd Ed. (Oxford: Oxford University Press, 2004).

⁵⁷ Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) 39. Fuller argues that there are a minimum of eight requirements for formally declared law to function effectively:

1. There must be established rules or baselines.
2. People have to know about the rules.
3. The laws can't be applied to the past, only to the present or future.
4. The laws have to be clear.
5. The laws have to make sense together – they can't be contradictory.
6. There has to be a consistency of law through time.
7. The actions of the lawmaker and the declared law have to make sense together – they can't be at odds with each other.
8. A person can only have a legal obligation that is within his or her power to fulfill.

⁵⁸ Gerald J. Postema, "Classical Common Law Jurisprudence (Part II)" (2003) 3:1 Oxford University Commonwealth Law Journal 1 at 6-9. Postema argues that there are six distinctive features of legal reasoning in the common law:

1. It focuses on problem solving.
2. There is deliberate regard for the larger public good beyond individual interests.
3. It requires skilled and knowledgeable adjudicators or mediators.
4. It cannot be turned into technical formulas to be followed by rote without thought.
5. There is a deliberate and planned reasoning process.
6. The legal reasoning and decisions are considered common or shared among the collective.

political project, and thus we warn against simplistic stereotypes of the Aboriginal Woman. Both Aboriginal and settler political elites, academics, policy makers and others must gender their analyses. They must also take account of the complexity of Aboriginal thought, and not reflexively insist on maternalist and traditionalist identities as the only legitimate identity for Aboriginal women to take.

We conclude with a call for more nuance in both prescription and analysis. We warn against the limitations of capturing Aboriginal Woman in a limited discursive framework. We suggest that Aboriginal women begin imagining ourselves beyond the rhetoric of only culture, rights, and resistance to oppression. We need also to think about tradition and change; about reconceptualizing law, power and relations of equality; about issues of community and citizenship; and legitimacy and authority of indigenous and Canadian legal and political orders. And fundamentally, we prescribe a discourse and politics in which “best practices” includes the explicit protection of the fundamental human rights of Aboriginal peoples, including women.

Indigenous women can also draw on the resources of indigenous legal orders to deal with sexism, violence, and gender oppression. We can build the intellectual capacity of our families and communities to enable us to deal with internal oppression. At the end of the day, intellectual capacity and viable indigenous legal orders can form part of our social capital to enable us to build non-colonial relationships with each other and the rest of the world.

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