FIRST NATIONS' GOVERNMENT AND THE CHARTER OF RIGHTS:

IN DEFENSE OF THE CHARTER

By Bill Rafoss

Presented to

The Centre of Canadian Studies

University of Edinburgh, Scotland

FIRST NATIONS – FIRST THOUGHTS

May 5, 2005

ABSTRACT

This paper explores the intersection of Aboriginal rights and human rights in Canada today. Since Aboriginal rights were recognized in the *Constitution Act, 1982*, First Nations have been seeking greater control over their affairs. In doing so, Aboriginal leaders often use rights discourse to advance their claims. They believe self-government is an inherent right of First Nations.

And yet ironically, many of these leaders have opposed the application of the *Canadian Charter of Rights and Freedoms* to their governments. This is a grey area of the law at present: Section 32 states that the *Charter* applies to the Parliament of Canada, the Provinces and the Territories. It makes no mention of Aboriginal governments.

This paper explores the concerns of Aboriginal leaders and it examines the counter-arguments. It suggests there is evidence that attitudes toward the *Charter* might be changing among Canada's Aboriginal leadership. Finally, it suggests there are compelling reasons why First Nations ought to adopt the *Charter*.

April 22, 2005
Bill Rafoss
Saskatoon, Saskatchewan

First Nations' Government and the Charter of Rights[1]

1.0 Introduction

In 1982, Canada patriated the *British North America Act, 1867* and approved a new *Constitution Act, 1982.* Canadian political leaders agreed to include the *Canadian Charter of Rights and Freedoms* within this document. For the first time, Canadians had human rights guaranteed in the Constitution. These rights included protection for fundamental freedoms such as the right to free speech, free association and the right to a free press. It includes democratic rights, the right to elect their government and run for office. Canadians have mobility rights, the right to live and work in any province. There are important legal rights upon arrest, including the right to a fair trial, the right not to incriminate oneself, the right to be free from cruel and usual punishment. There are important equality rights and minority language rights.[2]

The *Constitution Act, 1982* also "recognized and affirmed" Aboriginal rights and treaty rights in Section 35.[3] Since then, Aboriginal leaders have been pressing their claims for greater control over their affairs. In particular, they are looking for recognition of their right to self-government, the right to manage their affairs in a manner that will preserve and protect their cultural laws, practices and traditions.

In the process, Aboriginal leaders often use rights discourse to advance these claims. They assert that they have an inherent right to self-government. Yet ironically, many of these same leaders have traditionally expressed reservations about the application of the *Canadian Charter of Rights and Freedoms* to their governments. They see the *Charter* as an impingement on their sovereignty, one that is laden with liberal values that are not entirely consistent with their own. They have concerns that the *Charter* might limit rather than enhance their governments.

Not all Canadians, indeed not all Aboriginal people, agree with this position. Aboriginal women in particular have been in the forefront of ensuring that the *Charter* applies to Aboriginal

---

[1] This paper is a summary of Bill Rafoss' M.A. Thesis in Political Studies at the University of Saskatchewan. Bill expects to defend the thesis in the spring of 2005.

[2] A complete listing of the rights in the *Charter* can be found at: http://www.solon.org/Constitutions/Canada/English/ca_1982.html.

[3] Section 35(1) states: (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

governments. Some *Charter* supporters believe there are Aboriginal traditions that are consistent with the values in the *Charter*.

Since 1993, eleven modern treaties have been signed in Canada and many more agreements-in-principle have been signed that devolve self-governing authority to First Nations bands away from the *Indian Act,* and most of these agreements have a component that touches on the application of the *Charter*.

This paper proposes that they are good reasons, compelling reasons, why First Nations ought to adopt the *Charter*. It will grant important rights to its citizens and in the process give these governments greater legitimacy. The *Charter* has strong support among the Canadian public; it has become a symbol of Canada's national identity. By adopting the *Charter*, First Nations will signal to the rest of Canada that they see their destiny in a united Canada. There is evidence that attitudes toward the *Charter* may be changing among Canada's Aboriginal leadership.

2.0 Aboriginal Concerns

This paper deals primarily with the concerns of Canada's First Nations' leadership. It does not address the unique governance issues facing the Métis community. The concerns of First Nations' leaders fall generally into three categories:

- One, the *Charter* was imposed on them when the Constitution was patriated, just as the *Indian Act* was imposed on them, and this imposition is an affront to their inherent sovereignty.[4]
- Two, the *Charter* is laden with liberal values that are at odds with Aboriginal values. Where the *Charter* grants rights to individuals, Aboriginal traditions promote the concept that individuals owe duties to the community and these duties may override individual rights.[5] Furthermore, *Charter* issues will be adjudicated by a Euro-centric court system that has traditionally been unsympathetic to Aboriginal claims.[6]

---

[4] See Ovide Mercredi with Mary-Ellen Turpel. Into the Rapids – Navigating the Future of First Nations, Penguin Books, 1993 and Kent McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms",* in Osgoode Hall Law Review, Volume 34, Issue No. 1, Spring 1996.

[5] For a greater elaboration of this concern, see Dan Russell in *A People's Dream – Aboriginal Self-Government in Canada,* UBC Press, Vancouver-Toronto, 2000, particularly at pages 138.

[6] See McNeil, 40, and Mary-Ellen Turpel Lafond, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Canadian Human Rights Yearbook 3 at page 512.

- Third, the *Charter* may limit, rather than enhance, self-government.[7] The *Charter* could be used to challenging fragile Aboriginal customs.

Former Assembly of First Nations Grand Chief Ovide Mercredi articulated his concerns this way in 1993:

> "It is very important for people to understand that we are not opposed to the idea of a *Charter,* we are opposed to the imposition of the *Canadian Charter of Rights and Freedoms* on our peoples, which was prepared and adopted without our input."[8]

Some Aboriginal leaders and their supporters suggest that the wording of Section 32 of the *Charter*, the application section[9], exempts Aboriginal governments from it.[10] Kent McNeil argues that, Section 35 has created constitutional space for self-government and Aboriginal peoples are "free to choose their own forms of government in accordance with their own traditions, values and present needs" without restriction by the *Charter*.[11]

"Sakej Henderson says that the wording of Section 25, the non-abrogation, non-derogation clause[12], provides "a protective zone from the colonialists' rights paradigm"[13] and creates judicial and legislative immunity for First Nations from actions under the *Charter*.

---

[7] See McNeil, 8, as well as Joseph H. Carens. *Culture, Citizenship and Community – A Contextual Exploration of Justice as Evenhandedness,* Oxford: Oxford University Press, 2000 at page 193 and Dan Russell. *A People's Dream – Aboriginal Self-Government in Canada,* UBC Press, Vancouver-Toronto, 2000. Page 96.

[8] Mercredi and Turpel Lafond in Navigating, 97.

[9] Section 32(1) states: This Charter applies (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (*b*) to the legislatures and governments of each province in respect of all matters within the authority of the legislature of each province.

[10] This is the key point in McNeil's paper, supra.

[11] McNeil, 66-67.

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

[13] James Y. Henderson, "Empowering Treaty Federalism" in Saskatchewan Law Review, Volume 58(2), 1994, page 286.

McNeil proposes that any doubt in this regard should be decided in favour of Aboriginal people. He also discourages "judicial activism" in applying the *Charter* to First Nations.[14]

3.0 Charter Supporters

Not all Aboriginal people agree with this perspective. Aboriginal women in particular have been at the forefront of ensuring that the *Charter* applies to Aboriginal governments. The position of the Native Women's Association of Canada (NWAC), is as follows:

> The Native Women's Association of Canada supports individual rights. These rights are so fundamental that, once removed, you no longer have a human being. Aboriginal Women are human beings and we have rights which cannot be denied or removed at the whim of any government. These views are in conflict with many Aboriginal leaders and legal theoreticians who advocate for recognition by Canada of sovereignty, self-government and collective rights. It is their unwavering view of the Aboriginal male leadership that the 'collective' comes first, and that it will decide the rights of individuals.
>
> [NWAC] recognizes that 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.[15]

Aboriginal women have been instrumental in affecting the outcome of a number of issues of importance to First Nations' people utilizing the *Charter*, according to John Borrows.[16] They used the *Charter* to restore the franchise of Aboriginal women who married non-Aboriginal spouses, they succeeded in bringing about Section 35(4) of the *Constitution Act, 1982*[17] that guarantees gender equality under First Nations' jurisdiction, and they applied to the courts to ensure that women had a voice in the Charlottetown Accord discussions. John Borrows credits

---

[14] McNeil at 98.

[15] As quoted by John Borrows in "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics", in *Charting the Consequences: The Impact of the Charter of Rights on Canadian Law and Politics*", David Schneiderman and Kate Sutherland (eds.), University of Toronto Press, 1997, 182.

[16] See Borrows in "Equality", 176.

[17] Section 35(4) was added to the *Constitution Act, 1982* in 1983. It states: Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

the *Charter* with re-uniting Aboriginal families through Bill C-31. It has been responsible for the growth of the First Nations' population by one-third in the past twenty years, he says.[18]

4.0 Cultural Appropriateness

Some scholars, backed by the findings of the Royal Commission on Aboriginal Peoples (RCAP), suggest that the precepts underlying the *Charter* may not be totally antithetical to Aboriginal traditions. RCAP noted in *Partners in Confederation* in 1993 that Aboriginal peoples are "no strangers to the doctrines of freedom and equality that animate the *Charter*"[19] and that these values were recorded as early as 1744 by French historians.[20] *Charter* rights, the report's authors assert, "can be viewed as the product of cultural fusion, stemming from inter-societal contacts in the villages and forests of North America, with effects that rippled outward into the salons and marketplaces of pre-revolutionary Europe."[21] RCAP's Final Report recommended that the *Charter* ought to apply to First Nations, suggesting that it "would be highly anomalous if Canadian citizens enjoyed the protection of the *Charter* in their relations with every government in Canada except for Aboriginal governments."[22]

Kiera Ladner made similar findings in her research. She suggest "there is abundant evidence demonstrating that not only did Indigenous peoples in North America have democracy, nationalism, individualism, liberty, rights and freedoms, but that these political traditions wielded an enormous influence over the western Euro-centric traditions."[23]

John Borrows agrees that equality rights have added to existing Aboriginal traditions of "gender symmetry and harmony"[24] to create more equitable First Nations governments and in doing so, these governments will have greater legitimacy among their citizens.

5. Liberalism and the Preservation of Culture

---

[18] Borrows at 176.
[19] Royal Commission on Aboriginal Peoples (RCAP), *Partners in Confederation,* 1993, page 40.
[20] RCAP, *Partners,* 40.
[21] Ibid.
[22] Royal Commission on Aboriginal Peoples, Final Report, Volume 2 Chapter 3.
[23] As quoted by Patricia Monture-Angus, in "Citizens Plus: Sensitivities versus Solutions", Centre for Research and Information in Canada (CRIC), *Bridging the Divide between Aboriginal peoples and the Canadian State,* Montreal: June 2001 in reference to Kiera Ladner, "*Women and Blackfoot Nationalism*", Journal of Canadian Studies**,** Vol. 35, No. 2, Page 5.
[24] Borrows in "Equality", 184.

Most contemporary political philosophers accept that the preservation of culture is an important social good. Liberal theorist Will Kymlicka goes so far as to suggests that "liberalism is incomplete," if it disregards the importance of culture.[25] He and others, like Joseph Carens, have suggested that what is required is a "sensitive balancing" of rights claims against their impact on culture, where competing interests will be given "appropriate weight under the circumstances within the framework of a commitment to equal respect for all."[26]

The framers of the *Constitution Act, 1982* understood this. They inserted Section 25 into the *Charter* to serve as direction to the judiciary to weigh the impact of the *Charter* on legitimate cultural concerns of Aboriginal communities. James Tully has examined a number of court decisions where the judiciary was required to strike a balance between culture and rights within First Nations' communities.[27] He concluded that the courts should adopt a two-part test where individual rights collide with culture. They should ask:

a. Is the cultural rights being protected a "pressing and substantial" one, and if so,

b. Is the limit on individual rights proportional?[28]

In other words, if the cultural practice is significant, Section 25 should shield that right from a *Charter* challenge. For instance, where Mohawk clan mothers select their leaders rather than elect them by one-person, one-vote, the courts may well find that this is a significant cultural practice that is worth preserving.

On the other hand, if the infringement on the individual right is out of proportion and the cultural tradition is not significant, the courts may favour individual rights. In *Thomas v Norris*[29], Thomas claimed that he was falsely imprisoned and forced to go through an Aboriginal initiation ceremony. The defendants argued that their actions were a part of their Aboriginal traditions that were protected by Section 35 of the *Constitution Act, 1982.* The court found that the Aboriginal right being claimed for protection was "not absolute" and that the plaintiff's individual rights in the circumstances were "inviolable". The court stated, "While the plaintiff may have special

---

[25] Will Kymlicka. *Liberalism Community and Culture,* Oxford: Clarendon Press, 1989, 153.
[26] Joseph H. Carens. *Culture, Citizenship and Community – A Contextual Exploration of Justice as Evenhandedness,* Oxford: Oxford University Press, 2000, 12.
[27] Tully refers specifically to *R v Sparrow* [1990] 1 S.C.R. 1075 and *Thomas v Norris* [1992] 2 CNLR 139 (BCSC) in James Tully. *Strange Multiplicity – Constitutionalism in an age of diversity*, [Cambridge] Cambridge University Press, 1995.
[28] Tully, 171.
[29] *Thomas v Norris* [1992] 2 CNLR 139 (BCSC).

rights and status in Canada as an Indian, the 'original' rights and freedoms he enjoys can be no less that those enjoyed by fellow citizens, Indian and non-Indian alike."[30]

This is the "sensitive balancing" of competing claims that Joseph Carens referred to earlier.[31] Finding this balance should satisfy both individual rights theorists and communitarians. Tully writes:

> If rights were applied without taking these cultural differences into account, the result would not be impartial. The dominant culture would in fact be imposed in each case. Therefore, there are no grounds for complaint from a defender of rights, for rights are rescued from being a tool of cultural domination. Conversely, a critic of rights has no reason to complain, for the alleged blindness to cultural differences has been corrected, yet without abandoning rights.[32]

6.0 Are Attitudes toward the Charter changing?

Increasing urbanization and globalization of the Aboriginal population in Canada may signal a change of attitudes toward the *Charter.* As many as one-half of the Aboriginal population is now living in urban Canada.[33] Many Aboriginal people are using the *Charter* to advance their own claims. And there is further evidence that attitudes toward the Charter may be changing. Since 1993, eleven modern treaties have been signed and many more agreements-in-principle are under negotiation.[34] Most of these agreements have two essential components: they devolve greater authority to First Nations from the *Indian Act*, and they contain a component relating to the *Charter*.

This linking of self-government and the *Charter* has its roots in an administrative policy adopted by the Federal Liberals in 1995 called the "Inherent Right Policy" (IRP). This policy recognizes self-government as an inherent right, but the *Charter of Rights* must apply to these

---

[30] Ibid. 28.
[31] Carens in *Culture*, 12.
[32] Tully, 172-173.
[33] Alan C. Cairns, *Citizens Plus – Aboriginal Peoples and the Canadian State,* Vancouver-Toronto: UBC Press 2000 at page 14.
[34] See Frances Abele with Michael J. Prince. "Constructing Political Space for Aboriginal Communities in Canada", Paper given to Constructing Tomorrow's Federalism Conference, Saskatchewan Institute of Public Policy, Regina, March 24-26, 2004 and Canada Indian and Northern Affairs website: http://www.ainc-inac.gc.ca/nr/prs/m-a2003/0203bk_e.html, downloaded May 30, 2003.

governments.[35] First Nations, from the Nisga'a on the West Coast to the Labrador Inuit on the East Coast north into the Territories, are agreeing to the application of the *Charter* over their affairs as part of these negotiations.[36]

For example, the recent treaty with the Labrador Inuit will establish the new government of Nunatsiavut. The partiers to the Treaty, Canada, Newfoundland-Labrador and the Labrador Inuit, agreed that the *Charter* will apply to this new government. It also makes allowances for a future Inuit charter of rights.[37] This perhaps signals the next stage of rights development with First Nations. Some activists, such as Aboriginal lawyer Dan Russell, favour Aboriginal people adopting an Aboriginal charter, one that incorporates Aboriginal values and customs. [38]

In Saskatchewan, First Nations are governed by six numbered treaties: 2, 4, 5, 6, 8, and 10. These treaties set out the relationship between First Nations and the Crown. Saskatchewan First Nations have never surrendered their right to sovereignty on their land and accordingly have continued to operate their traditional governments. In recent years, these First Nations have been examining different approaches to governance, including delegating some decision-making authority upward to a provincial umbrella organization. With respect to the *Charter,* the

---

[35] The IRP states: The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

The Government is committed to the principle that the *Canadian Charter of Rights and Freedoms* should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter. Self-government agreements, including treaties, will, therefore, have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities.
Found at: Canada, Indian and Northern Affairs Canada. "Federal Policy Guide on Aboriginal Self-Government", resourced at http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html, downloaded March 16, 2005.

[36] For a complete listing of recent agreements, with links to these agreements, see Canada Indian and Northern Affairs website: http://www.ainc-inac.gc.ca/pr/agr/index_e.html#Agreements-in-Principle2, downloaded April 21, 2005.

[37] The agreement can be found at: http://www.nunatsiavut.com/en/agreement.php, Section 17.3.4 (e) and (f).

[38] Dan Russell has proposed an Aboriginal Charter of Rights as a better alternative for First Nations than the Canadian *Charter*. See Dan Russell. *A People's Dream – Aboriginal Self-Government in Canada,* UBC Press, Vancouver-Toronto, 2000 at page 138. Such a document might have more meaning to Aboriginal people, he suggests, if they were involved in its drafting and it might be more "accessible" to Aboriginal people because it could be drafted in language and concepts that Aboriginal people understand traditionally, as opposed to the more legalistic and individualistic notions contained in the *Canadian Charter of Rights*. An Aboriginal Charter of Rights would more clearly spell out the duty owed to the community and the need for individuals to accept responsibility for their actions. It could provide an interpretive clause, similar to Section 1 of the current *Charter*, that would give guidance to the courts on how the Aboriginal *Charter* was to be interpreted. Little more has been done to articulate an Aboriginal Charter of Rights, perhaps because traditions respecting rights may vary from First Nation to First Nation. The concept, however, may be the way of the future for First Nations.

Government of Saskatchewan adopts the position of the IRP that the *Charter* must apply to First Nations governments. A comprehensive agreement-in-principle was signed between Saskatchewan and the Meadow Lake First Nations (MLFN) in January of 2001 that states that the Final Agreement will provide that the *Canadian Charter of Rights and Freedoms* applies to the Meadow Lake First Nations Government.[39]

Saskatchewan has a Treaty Commissioner who is currently reviewing treaties with a view to providing a modern interpretation of these documents. The application of the *Charter* to Saskatchewan First Nations is being considered as part of this process, but to date no agreement has been reached or publicized on whether the *Charter* will find its way into the modernized treaties.[40]

In Ontario, the first self-government agreement was concluded in 2003 with the United Anishnaabeg Councils (UAC). The Anishnaabe Government Agreement will "restore governing authority to First Nations members" and it will replace most of the *Indian Act* as it applies to the Anishnaabe peoples.[41] In line with the Inherent Right Policy, the *Charter* "will continue to apply on First Nations' land."[42]

In Quebec, a number of modern treaties have been signed in recent years, some of them economic treaties. *Les Paix des Braves* was signed by the Government of Quebec in February 2002 with the Quebec Crees[43] and in March 2004, an agreement-in-principle was signed between the Governments of Canada and Quebec with the four Innu nations of Mamuitun Mak Nutashkuan in Northern Quebec.[44] Both agreements move Quebec First Nations and Innu toward greater self-sufficiency and self-government. A political accord was signed between the Nunavik Party and the Governments of Quebec and Canada in 1999 that established a Commission to

---

[39] Comprehensive Agreement in Principle on Meadow Lake First Nations [MLFN] Government, January 22, 2001. Found at http://www.graa.gov.sk.ca/aboriginal/html/documents/governance/mltc_caip.pdf, downloaded August 26, 2004.
[40] Personal conversation with the Treaty Commissioner in Saskatchewan, Judge David M. Arnot, April 14, 2005.
[41] Canada, Indian and Northern Affairs, News release: "Gearing up for the First Self-government agreement in Ontario", December 10, 2003. Taken from http://www.ainc-inac.gc.ca/nr/prs/s-d2003/2-02457_e.html; downloaded April 15, 2005.
[42] Canada, Indian and Northern Affairs, "Backgrounder Highlights of Anishnaabe Government Agreement", taken from http://www.ainc-inac.goc.ca/nr/prs/s-d2003/0257bk_e.html, downloaded April 15, 2005.
[43] Taken from http://www.gcc.ca/printable.php?id=16, downloaded April 14, 2005.
[44] See http://www.ainc-inac.gc.ca/nr/prs/j-a2004/2-02484_e.html, downloaded April 14, 2005.

examine "the structure, operations and powers of a government in Nunavik."[45] One of the over-riding principles that guide these negotiations is that the Canadian *Charter of Rights* and the Quebec *Charter of Rights* shall apply to any future Nunavik government.[46]

The IRP then has created jurisdictional, if not constitutional, space for First Nations' government and it has guided the federal position on the application of the *Charter* since 1995. A number of First Nations bands have agreed to this *quid pro quo*, but for many of Canada's six hundred First Nations bands, this remains a grey zone in law.

8.0 Conclusions

2005 marks the 23rd year anniversary of the adoption of the *Canadian Charter of Rights and Freedoms*, and it marks the 20th anniversary of the proclamation of Section 15, the equality rights section.[47] Recent polls indicate the *Charter* has growing support among Canadians, as much as 88% support according to the Centre for Research and Information in Canada.[48] It has been variously described as a "statement of our nationhood"[49] by a former premier and a "crucial symbol of our national identity" by Alan Cairns.[50] The *Charter* is a reflection of the liberal democratic traditions that have shaped our country for one hundred and fifty years. It offers important constitutional rights to the citizens of Canada: the right to elect our government, to be free from arbitrary government restrictions on liberty, equality rights, mobility rights and more.[51]

Similar rights would accrue to Aboriginal peoples if the *Charter* were to apply to First Nations' government: they would have the right to speak out against their governments, or have a free press on reserve. They would have democratic rights, subject to Section 25, and they would have the right to move on and off-reserve. They would have the right to be free from

---

[45] Quebec, Secretariat aux Affaires Autochtones, Nunavik Political Accord, taken from http://www.autochtones.gouv.qc.ca/relations_autochtones/ententes/inuits/19991105_en.htm, downloaded April 15, 2005.
[46] Ibid. Section 5.1(i).
[47] Section 15(1) states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
[48] From the Centre for Research and Information on Canada, http://www.cric.ca/en_html/guide/charter/charter.html#cric, downloaded March 16, 2005.
[49] Roy Romanow, John Whyte and Howard Leeson. *Canada Notwithstanding: The Making of the Constitution, 1976-1982.* Methuen, 1984. Attributed to Ontario Premier Bill Davis at page 200.
[50] Allan C. Cairns, *Citizens Plus – Aboriginal Peoples and the Canadian State,* Vancouver-Toronto: UBC Press 2000, 83.
[51] A complete listing of the *Charter's* provisions can be found at: http://laws.justice.gc.ca/en/const/annex_e.html#equality.

discrimination because of quantum of blood or nepotism or Bill C-31 status.[52] *Charter* rights are consistent with an international standard of governance, as articulated by United Nations' human rights instruments. Adopting the *Charter* would give First Nations' governments greater legitimacy.

I sum, there are good reasons, compelling reasons, why First Nations ought to adopt the *Charter* as having application over their affairs. And there is evidence that at least some First Nations' leaders are accepting this argument. Where Ovide Mercredi expressed concern about the imposition of the *Charter* a number of years ago, some First Nations appear willing to negotiate its application as part of the modern treaty-making process.

This paper has addressed the intersection of rights and culture. The two can exist; John Borrows suggests the two need not be "dichotomized".[53] Many Canadians appreciate individual rights but they also recognize that the preservation of fragile Indigenous cultures is important as well. Section 25 serves as notice to the judiciary in Canada to sensitively balance the two: keep important cultural customs, traditions, and laws, but ensure that individuals have rights against their governments both on-reserve and off. Section 25 may offer the best hope in the short and medium term for the preservation of important Aboriginal cultural traditions, given the complex amending formulae in the *Constitution. Act, 1982*.

Perhaps most of all, this paper is about national unity. Canada is its Aboriginal and non-Aboriginal populations. The two cannot be separated without ending the country we know today. The legend of the two-row wampum suggests our two societies can go down the river together, in separate vessels, neither trying to steer the other. But what is important is that we have a common destiny. Alan Cairns remind us that we must spend as much time discussing what keeps us together as we spend discussing what separates our two cultures. The *Charter* is one such tie that binds Canadians together. By adopting it over their affairs, Aboriginal Canadians will send an important signal to the rest of Canada that they do see our destinies being tied together.

---

[52] These latter concerns were articulated by Mary Eberts on behalf of the Native Women's Association of Canada in "Aboriginal Rights are Human Rights". Taken from http://canada.justice.gc.ca/chra/en/eberts.html, downloaded September 9, 2003 at page 2.

[53] Borrows in "Equality", 184.

Bibliography

Frances Abele and Michael J. Prince in "Alternative Futures: Aboriginal Peoples and Canadian Federalism", in *Canadian Federalism – Performance, Effectiveness and Legitimacy*, Herman Bakvis and Grace Skogstad, editors, Oxford: Oxford University Press, 2002.

Beiner, Ronald. *Liberalism, Nationalism, Citizenship: Essays on the Problem of Political Community*, UBC press, Vancouver Toronto, 2003.

Borrows, John. *Recovering Canada: The Resurgence of Indigenous Law,* University of Toronto Press, 2002.

- - - - "Contemporary Traditional Equality", in *Charting the Consequences – The Impact of Charter Rights on Canadian Law and Politics,* David Schneiderman and Kate Sutherland, eds, Toronto: University of Toronto Press, 1997.

Cairns, Alan. *Citizens Plus: Aboriginal Peoples and the Canadian State*, Vancouver: UBC Press, 2000.

- - - - Institute for Research on Public Policy paper: Aboriginal Peoples' Two Roads to the Future, Jan-Feb. 2000,

Canada, Canadian Human Rights Act Review Panel, "Promoting Equality: A New Vision", June 2000.

Canada, Indian and Northern Affairs Canada. "Federal Policy Guide – Aboriginal Self-Government", Ottawa, 1995.

Carens, Joseph H. *Culture, Citizenship and Community. A Contextual Exploration of Justice as Even-handedness*, Oxford: University of Oxford Press, 2000.

Chinkin, Christine. "International law and human rights," in Human Rights Fifty Years On: A Reappraisal. Edited by Tony Evans. Manchester and New York: Manchester University Press, 1998, page 105.

"The International Bill of Human Rights", United Nations, New York, 1976.

Kymlicka, Will. *Liberalism Community and Culture***,** Oxford: Clarendon Press, 1991.

Krosenbrink-Gelissen, Lilianne E., *"The Canadian Constitution, the Charter and Aboriginal Women's Rights: Conflicts and Dilemmas",* International Journal of Canadian Studies, Vol. 7-8, 1993.

Labrador Inuit Land Claims Agreement, January 22, 2005.

Ladner, Kiera. "Women and Blackfoot Nationalism," Journal of Canadian Studies Vol 35, No. 2:5.

McDonald, Denise. *The Sto:Lo World View and the Individualism of Canadian Law*, M.A. thesis, University of Northern British Columbia, 2000.

McNeil, Kent. *Aboriginal Governments and the Canadian Charter of Rights and Freedoms.* For the Royal Commission on Aboriginal Peoples, 1996. Found at: http://www.yorku.ca/ohlj/PDFs/34.1/mcneil.pdf. Downloaded March 2, 2005.

Mercredi, Ovide with Mary-Ellen Turpel. *In the Rapids – Navigating the Future of First Nation*s, Penguin Books, 1993.

Molloy, Tom. *The World is Our Witness: The Historic Journey of the Nisga'a into Canada*. Calgary: Fifth House, April 2000.

Nisga'a Final Agreement, May 11, 2000.

Nunavut Department of Justice, **"**Human Rights Consultation Workshop – March 17, 19, 2001**"**, Iqaluit, 2001.

Report of the Royal Commission on Aboriginal Peoples, 1996.

Romanow, Roy with John Whyte and Howard Leeson. *Canada Notwithstanding: The Making of the Constitution, 1976-1982*. Methuen, 1984.

Russell, Dan. *A People's Dream – Aboriginal Self-Government in Canada*, Vancouver-Toronto: UBC Press, 2000.

Saskatchewan Institute of Public Policy. "Demographic Trends and Socio-Economic Sustainability in Saskatchewan: Some Policy Considerations"**,** Janice Stokes, lead researcher. Public Policy Paper #19, University of Regina, October 2003.

Sieghart, Paul. *The International Law of Human Rights*, Clarendon Press, Oxford, 1983.

UNESCO, UNESCO and Human Rights – Standard Setting Instruments, Major Meetings and Publications, Second Edition, Paris, 1999.

Tully, James. *Strange Multiplicity – Constitutionalism in an age of diversity*, Cambridge: Cambridge University Press, 1995.

Turpel, Mary-Ellen. "*Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences, Constitutional Interpretation*," Canadian Human Rights Yearbook, Vol. 6, 1989-90.

---- "*Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women*," Canadian Journal of Women and the Law, Volume 6, 1993.

United Nations. Human Rights – A Compilation of International Instruments**,** Vol. 1 (First Part-Second Part), New York, 2002.