Practicing Human Rights Law in an Aboriginal Context:
Balancing individual and collective rights[1]

I. Introduction

In Canada, as in most western societies, we have become familiar with rights of the individual. Human rights and employment legislation are aimed mainly at the protection of individual civil liberties, as are most sections of the *Canadian Charter of Rights and Freedoms*[2]. Even beyond human rights law, many areas in our common law tradition are based on rights of individuals.[3] Collective rights, on the other hand, are less visible, less common and therefore, may be less understood.[4]

As lawyers practicing in the area of Aboriginal law, we regularly encounter the tension between the collective rights of First Nations and the rights of individual members of those groups. Aboriginal peoples as groups hold certain unique collective rights which are constitutionally protected under section 35 of the *Constitution Act, 1982.*[5] These collective rights include Aboriginal title and rights, as well as Treaty rights for those First Nations who have entered treaties with the Crown. Such collective rights are held by an Aboriginal group as a whole, but may be exercised by individuals of the group.[6] Aboriginal collective rights are, by definition, not available to non-Aboriginal Canadians.

In this paper, we examine the tension between the collective rights of First Nations and the rights of individual members or sub-groups by referring to three recent areas of legislative reform:

1. Bill C-3, *Gender Equity in Indian Registration Act*;

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[2] *Canadian Charter of Rights and Freedoms (*Part 1, of the *Constitution Act, 1982,* being *Schedule B* to the *Canada Act*, 1982 (UK), 1982, c.11) ("*Charter*").
[3] For example, tort law concerns more often than not an individual's "right" not to be harmed or injured by another: Lewis Klar, Tort Law, Fourth Edition (Thomson Carswell: Toronto, 2008) p. 10
[4] One example of a non-Aboriginal collective right recognized by the common law is the public's right to access fisheries in territorial tidal waters (see Halsbury's Laws of England, 3rd Ed.Vol.17, Pt. 1, Sect. 2, para. 512)
[5] *Constitution Act, 1982,* being *Schedule B* to the *Canada Act*, 1982 (UK), 1982, c.11).
[6] *R. v. Kapp*, [2008] 2 S.C.R. 483 ("*Kapp*") at para. 4

2. Bill S-4, *Family Homes on Reserves and Matrimonial Interests or Rights Act;* and
3. Bill C-21, the repeal of s. 67 of the *Canadian Human Rights Act.*

II. Conflict Analysis

There are three different models that appear helpful when characterizing and analyzing conflicts involving collective rights: (1) inter-group, (2) intra-group and (3) individual-group models. The examination of each model is important because it helps us understand the nature of particular conflicts, power dynamics between groups in conflict and also how we might want to address or remedy conflicting rights.

The first model of conflict is inter-group and applies to very different situations than the other two. It best applies to conflict between two or more distinct, non-overlapping groups. The second and third models, intra-group and individual-group, respectively, best apply to situations where conflict arises between a group and its members and therefore, seem most appropriate for examining conflicts between the collective rights of Aboriginal peoples and the individual rights of Aboriginal persons.

The intra-group model views groups as overlapping and contained within each other. It also recognizes that groups are not homogeneous and that a group right may not actually benefit all members. Nancy Fraser, a political and social science professor concerned with feminist conceptions of justice, explores this concept through the theory of "participatory parity", a term describing the need for groups to have full and equal participation in society.[7] At the intra-group level, where assertion of a collective right conflicts with the rights of a minority within, Fraser states that reconciliation cannot be achieved through a typical balancing of interests as in the inter-group model. According to the theory of participatory parity, the larger group must not assert a right if it affects and denies the rights of minority members.

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[7] Nancy Fraser & Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange,* (Verso: 2003) at 28.

The third model, individual-group conflict, is very similar to the intra-group model. Susan Moller Okin, a feminist political philosopher, claims group rights are dangerous because they fail to properly recognize individuals' rights and often further oppress and subordinate them. She criticizes group rights on two major fronts. First, proponents of group rights present cultural groups as monoliths, with no diversity within. Second, group rights proponents tend to fail to recognize the private sphere. Okin's main concern is that "multiculturalism" provides defences to and excuses for oppressing and disadvantaging women.[8] However, women are not the only people that are vulnerable to conflicting rights within a larger group. Any sub-group or individual who falls within a minority or historically oppressed section of the larger group is at risk.

Like Fraser, Okin speaks of the need for minorities within a larger group to have more influence in the negotiation of group rights. Due to the difficulty in many communities or societies for minorities to be heard over the majority, top down state intervention is sometimes necessary and effective. The challenge lies in ascertaining what is oppressive and what is acceptable in the cultural, religious, or other context. Proponents of a more formal equality argue that the same rules must apply equally to all Canadians. However, proponents of substantive equality argue that rules must be flexible to accommodate differences. This is especially so given the unique nature and constitutional status of the collective rights of Aboriginal peoples.

III. Collective Rights of Aboriginal Peoples

In all three conflict models, group rights are referred to in different ways and can mean different things. However it is important to note that, while all collective rights are group rights, the reverse is not necessarily true. For example, all group rights, like the right to religious freedom, are considered group rights typically due to their exercise as a group and their foundational and defining functions in communities and cultures. Freedom of religion is a right that can be held by one individual. On the other hand, collective rights like Aboriginal rights and title exist only in relation to the collective. They are unique or *sui generis* rights that have arisen as concepts in

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[8] Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press: 1999) at 11.

Canadian law as a result of the particular histories of the nations. As explained by Chief Justice Dickson in *R. v. Sparrow:*

> [Aboriginal rights] are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, supra, at p. 382, referred to as the "sui generis" nature of aboriginal rights.[9]

Jeremy Webber, law professor at the University of Victoria in the areas of cultural diversity and constitutional theory, explains the uniqueness of collective rights of Aboriginal peoples in the context of Aboriginal justice systems. He argues that the collective right to a separate Aboriginal justice system for Aboriginal peoples is more than an inherent right to assert a group identity. [10] It is also a "connection to the richness of their past", by which all people define themselves, at least to an extent. Webber argues that the purpose of parallel aboriginal justice systems is to create institutions through which Aboriginal communities can have distinct conversations about justice allowing them to grow while maintaining a connection to their past rather than imposing a static, unchanging vision of Aboriginal identity on those particular groups.[11]

Aboriginal rights are also unique in the constitutional protection afforded to them. Section 35(1) of the *Constitution Act, 1982,* provides independent protection of Aboriginal and Treaty rights as follows:

> **35(1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 35 lies outside the *Charter* (which ends at section 34 of the *Constitution Act, 1982*). Thus the exercise of section 35 rights cannot be qualified by section 1.[12] However, gender equality is

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[9] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at para. 68. See also *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010; *R. v. Van der Peet,* [1996] 2 S.C.R. 507.

[10] Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice," in Royal Commission on Aboriginal Peoples, ed., *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Minister of Supply and Services, 1993), 133 at 140.

[11] *Ibid.*

[12] Peter Hogg, Constitutional Law of Canada, Fifth Edition, ~~(Toronto:~~ (Toronto: Carswell~~:~~, 2007 – Supplemented), ("Hogg") Vol. 1, pp. 28-43

an overriding constitutional imperative. Section 35(4) guarantees Aboriginal and Treaty rights equally between male and female persons.[13]

Notwithstanding the placement of section 35 in the *Constitution Act, 1982*, section 25 of the *Charter* provides that individual civil liberties do not abrogate or derogate from Aboriginal rights:

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

The Supreme Court of Canada has only recently begun to develop the jurisprudence respecting section 25 of the *Charter*. Writing only for himself in concurring reasons in ~~*R. v. Kapp*~~, Mr. Justice Bastarache explained the purpose of section 25 as follows:

> The enactment of the Charter undoubtedly heralded a new era for individual rights in Canada. Nevertheless, the document also expressly recognizes rights more aptly described as collective or group rights. The manner in which collective rights can exists with the liberal paradigm otherwise established by the Charter remains a source of ongoing tension within the jurisprudence and the literature. This tension comes ~~o~~to a head in the aboriginal context of s.25....
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> [Section 25] serves the purpose of protecting the rights of aboriginal peoples where the application of the Charter protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group ....
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> I believe that the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status....

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[13] See *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 at paras. 61 and 79 for a brief discussion by the Supreme Court of Canada of possible interpretations of section 35(1) and (4), and how those provisions relate to the *Charter*. See also section 28 of the *Charter:* "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

> Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. What is called for, in essence is a contextualized interpretation that takes into account the cultural needs and aspirations of natives....
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> Section 25 was not meant to provide for balancing Charter rights against aboriginal rights. There should be no reading down of s.25 while our jurisprudence establishes that aboriginal rights must be given a broad and generous application, and that where there is uncertainty, every effort should be made to give priority to the aboriginal perspective. It seems to me that the only reasons for wanting to consider s.25 within the framework of s.15(1) is the fear mentioned earlier that individual rights will possibly be compromised.[14]

With respect to law reform initiatives, however, the starkness of section 25 as envisioned by Bastarache J. has not been embraced by legislators, who tend to take a pragmatic approach to balancing individual and collective rights. The following three sections explore recent legislative initiatives in which Parliament has engaged in the business of balancing rights and the inherent challenges within.

IV. Bill C-3, *Gender Equity in Indian Registration Act*

Bill C-3, the *Gender Equity in Indian Registration Act,* was given first reading in the House of Commons on March 11, 2010. It responds to the British Columbia Court of Appeal decision in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*[15]. The Bill represents the first time in twenty-five years that Parliament has considered the registration provisions of the *Indian Act*[16]. Although Bill C-3 is recent, the debate regarding the discriminatory nature of the registration provisions of the *Indian Act* has been ongoing for decades.

Registration as an "Indian" under the *Indian Act* is significant as not all Aboriginal or indigenous persons are registered Indians. Being registered as an "Indian" provides certain benefits to the individual, including the ability to hold land on reserve, treaty entitlements, tax benefits, and

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[14] *Kapp, supra*, at paras. 78, 89, 103, 109-110. Interestingly, the majority adopted an entirely different approach to resolve the case, involving an analysis of subsections 15(1) and (2) of the *Charter* instead. Given the result of that analysis, the majority found it unnecessary to consider section 25.
[15] *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153.
[16] *Indian Act,* R.S.C. 1985, c. I-5.

qualification for receipt of particular funding or assistance. One significant benefit is that Indian registration can provide membership in an Indian band, "band" being the statutory term for "a body of Indians" under the *Indian Act.*[17] For many First Nations which function as Indian bands, their membership is dictated by the *Indian Act* so that those with Indian status are automatically members of their respective band.

The history of Indian status registration is long and complex and the provisions themselves at any point in time are convoluted. For the purposes of this paper, we focus on what are probably the most widely controversial provisions. Starting in 1867 and up to 1985, the *Indian Act* traced "Indian-ness" through the male line of a family. If an Indian man married a non-Indian woman, his wife and children were entitled to register as Indians. By contrast, as early as 1869, the *Indian Act* was amended such that an Indian woman who married a non-Indian (i.e. the "marrying out" rule) lost her entitlement (and through her, her children's entitlement) to registration as Indians.[18]

This blatant sex discrimination was challenged through the courts and otherwise several times prior to 1985 as part of the movement for women's rights that sought to eradicate the differential treatment of men and women with respect to entitlement to Indian status registration.[19] However, during the same period "a second movement, which may be characterized as an Aboriginal rights movement, sought increased powers of self-government for bands."[20] With the coming in force of the *Charter* approaching in April 1985, Parliament debated how to deal with the discriminatory status provisions. Legislators found themselves having to find a balance between the collective rights of the bands to indigenous self-government with the individual equality rights of their female members. In the trial decision of *McIvor v. Canada,* Madam Justice Ross summarized the conflict as such:

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[17] *Indian Act,* s. 2 "band".
[18] An historical review of the *Indian Act* suggests that Canada's intention since 1867 has not been to maintain the historical connection with Indian communities that treated with the Crown, but has been instead to reduce those populations by imposing narrower and narrower provisions for registration as an Indian to minimize Canada's statutory and Treaty obligations.
[19] See *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349 and *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981)
[20] *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2007 BCSC 827 at para. 40.

> **46** Arguably, at least in part due to the complexity of the interaction of these forces, the process leading eventually to the passage of *Bill C-31* was particularly protracted. For example, in 1984 Minister Munro, speaking in relation to *Bill C-47* stated:
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> > The difficulty that has delayed presentation of this Bill is the same delay that has attended the work of both the sub-committee on the rights of Indian women and the special committee on Indian self-government; this is, we are dealing with a conflict between two deeply cherished ideas.
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> > On the one hand, there is the right of women to be treated equally with men; on the other hand, Indian bands want to be able to decide, without outside interference, who is and who is not a member of an Indian band. This latter position is recognized as being a key power of Indian nation governments.
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> > (Standing Committee, June 26, 1984 at p. 17:9.)[21]

The outcome of the legislative process was significant amendments to the *Indian Act*, known as "Bill C-31", passed in 1985. Bill C-31 provided equal treatment of male and female Indians prospectively for entitlement to registration as a status Indian. Since April 1985, all registered Indians have been subject to the "second generation cut-off rule" which occurs as a result of two successive generations of parenting with non-Indians of either sex, regardless of whether the Indian parent is male or female.[22]

However, Parliament intentionally did not fully remedy historical gender discrimination in the *Indian Act* through the 1985 amendments. Bill C-31 did not restore or grant "full" Indian status to all of those women and their descendents who had lost their Indian status, or entitlement to it, as a result of the previous "marrying out" rule.[23] This persisting discrimination was seen as a legislative compromise between two competing rights.[24] Had the equality rights of women and their descendents been the only consideration, Parliament may have chosen to restore Indian

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[21] *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2007 BCSC 827

[22] There are two levels of Indian status under the current *Indian Act:* section 6(1) and section 6(2). A section 6(1) Indian who has a child with a non-Indian passes section 6(2) status to the child. In contrast, a section 6(2) Indian cannot pass status to the child if the other parent is a non-Indian. Section 6(2) applies what is known as the "second generation cut-off" rule. It extends Indian status to a person with one Indian parent, but, significantly, does not allow such a person to pass on Indian status to his or her own children unless those children are the product of a union with another person who has Indian status.

[23] A section 6(2) Indian has the same rights under the *Indian Act* as a section 6(1) Indian. However, as discussed below, a section 6(2) Indian cannot transmit his or her cultural identity as an Indian to subsequent generations in the same way as a section 6(1) Indian. Furthermore, there can be prejudice within First Nation communities against a "6(2)". We understand that some go so far as to exclude "6(2)"s from their membership lists.

[24] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 ("*McIvor*") at para. 31

status of all individuals who had lost it under previous versions of the *Indian Act.* But, as noted above, First Nations were pushing for greater control of their own membership as an exercise of their Aboriginal right to self-government. First Nations argued strongly that they and they alone should define who was and was not an Indian.[25] The result was Bill C-31.

As anticipated, after 1985 many individuals like Sharon McIvor and her son, Jacob Grismer experienced continued discrimination as a result of Parliament's attempt to balance competing rights in Bill C-31. Ms. McIvor and Mr. Grismer faced the "second generation cut-off" rule one generation sooner than male Indians who married and had children with non-Indians prior to 1985. Accordingly, they brought a legal challenge to the 1985 amendments to the *Indian Act*, arguing that the registration provisions continued to prefer descendents who traced their Indian ancestry along the paternal line over those who traced their ancestry along the maternal line.[26]

At trial, Madam Justice Ross held that the *Indian Act* status provisions violated the equality rights of Ms. McIvor and Mr. Grismer under equality guarantees in section 15 of the *Charter* and that the discrimination was not justified under section 1. She found that the benefit of law at issue was the right to transmit Indian status and cultural identity to future generations. The trial judge ruled the relevant sections of the *Indian Act* unconstitutional, and made an order granting the right to Indian status to anyone with a female ancestor who had lost her status upon marriage to a non-Indian.[27]

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[25] Canada strongly disagreed and reserved to itself the sole right to define statutorily who is and is not an "Indian": see the *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development Respecting: Bill C-31, An Act to Amend the Indian Act, House of Commons, First Session of the Thirty-third Parliament, 1984-85*, Issues No. 12-48 at Issue12, p. 8. (We are indebted to Kelly Russ and his unpublished 2006 master's thesis, noted below, for providing us with this distinction and reference.) Canada did concede that First Nations have the right to define their own membership, hence the amendments in Bill C-31 that resulted in sections 10 and 11 of the *Indian Act.*

[26] Ms. McIvor lost her entitlement to registration as an Indian when she married a non-Indian man. Consequently, her offspring including Mr. Grismer were not entitled to registration. Under Bill C-31, individuals who had status prior to 1985 retained their status under section 6(1)(a). Individuals who had lost their status prior to 1985 as a result of marrying out or under another previous rule were reinstated under section 6(1)(c). Ms. McIvor was one of these people. Mr. Grismer, on the other hand, was not reinstated as a section 6(1) Indian. Under the Bill C-31 rules, Mr. Grismer's entitlement flowed only from his mother because his father was a non-Indian. The second generation cut-off rule dictated that Mr. Grismer was only entitled to registration under section 6(2). Because Mr. Grismer also parented with a non-Indian, he lost his ability to pass Indian status to his children. In contrast, Ms. McIvor's hypothetical brother would have retained Indian status under section 6(1)(a), as would have his children, enabling descendants of the hypothetical brother to pass Indian status one generation further than Ms. McIvor's.

[27] *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2007 BCSC 827

Canada appealed and the BC Court of Appeal allowed the appeal in part. In a complex decision, giving rise to many legal uncertainties, the Court of Appeal found that the status provisions of the *Indian Act* discriminated on the basis of sex, but on the basis of a much narrower point of law than did the trial judge.[28] As a result, the Court of Appeal struck down the main status provisions of the *Indian Act*, but also suspended its judgment to enable Parliament to respond by way of further legislative amendment guided by the court's judgment. In November 2009, the Supreme Court of Canada denied Ms. McIvor leave to appeal.

In March 2010, Parliament proposed Bill C-3 in response to the *McIvor* decision. Bill C-3 would amend the *Indian Act* to provide new Indian status to some people disentitled under Bill C-31. Individuals meeting all of the following criteria would gain new status:

- whose grandmother lost Indian status as a result of marrying a non-Indian,
- who has one parent currently registered, or entitled to be registered, under sub-section 6(2) of the *Indian Act*, and
- who was born on or after September 4, 1951.

Unfortunately, even Bill C-3 would not completely eliminate discrimination from the registration provisions of the *Indian Act*. Bill C-3 is specifically designed to address the narrow grounds of discrimination found by the BC Court of Appeal, and would limit its remedial effect to those born after 1951. That date is when the "double mother rule" was introduced into the registration scheme of the *Indian Act*. No statutory remedy was provided to women (or their descendants) who "married out" prior to September 1951 and, as a result, lost their status as Indians due to sex

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[28] The Court of Appeal agreed with the trial judge that the right to transmit cultural identity to future generations was protected by section 15(1) of the *Charter*. See the trial decision at paras. 176-198 for a discussion of this. However, the Court of Appeal parted company with the trial judge by selecting a different comparator group. Under the pre-1985 version of the *Indian Act*, a grandchild of the hypothetical brother of Ms. McIvor would have lost Indian status at age 21 (the "double mother rule", which was added to the registration scheme with the 1951 amendments to the *Indian Act*). After the 1985 amendments, the hypothetical brother's grandchildren would have Indian status and be able to transmit status to any children that they have with persons with status. In essence, the court held that Bill C-31 went beyond preserving rights by enhancing the right to transmit status to those who formerly lost status under the double mother rule. These people were the appropriate comparator group to Ms. McIvor and Mr. Grismer in the view of the Court of Appeal.

discrimination. The remedy proposed by the trial judge would have included these women and children as well, but Parliament has yet to see fit to address the effects of sex discrimination to that cohort of Aboriginal people.[29]

For those Indian bands whose membership is determined by Indian and Northern Affairs Canada under section 11 of the *Indian Act*, applicants are added automatically by Canada to the band list at the time of registration. For Indian bands that have assumed control of their membership under section 10 of the *Indian Act*, an applicant's membership is determined by rules adopted by that band. Bill C-3 fails to provide additional resources to First Nations to address an influx of persons with status, particularly for section 11 bands. The absence of funding is regrettable, in light of the federal government's estimates that up to 39,763 individuals will be newly entitled to registration. Regrettably, this may invite some First Nations to adopt more restrictive membership codes, as occurred after the passage of Bill C-31 in 1985.[30]

V. Bill S-4, *Family Homes on Reserves and Matrimonial Interests or Rights Act*

Matrimonial real property ("MRP") on reserve is another current Aboriginal law reform initiative where conflicts between collective and individual rights are at the forefront of the legislative discussion. The issue of MRP on reserve has been the subject of Parliamentary scrutiny in recent years.[31] Bill S-4, *Family Homes on Reserves and Matrimonial Interests or Rights Act,* attempts to balance two legitimate policy objectives:

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[29] Bill C-3 received second reading in the House of Commons on March 29, 2010 and was referred to committee. The Standing Committee on Aboriginal Affairs and Northern Development made amendments to the bill in April 2010. However, the government objected to the amendments. The Speaker concluded that the amendments were invalid and ordered a reprint of the bill on May 11, 2010 as it was at second reading. As of the date of writing (October 15, 2010), Bill C-3 has yet to go to third reading in the House of Commons. The Court of Appeal has given Parliament until January 29, 2011 to legislate a remedy before the court's judgment will take effect; 2010 BCCA 338.

[30] *Sawridge Band v. Canada*, 2004 FCA 16..

[31] In November 2003, the Senate Committee on Human Rights issued an interim report entitled "A Hard Bed to Lie In: Matrimonial Real Property on Reserve", which may be accessed at: http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep08nov03-e.pdf. As a result of that paper, and much other work, what has became known as Bill S-4 was developed and table in the Senate by the government. The bill was first introduced as Bill C-47 during the 2nd Session of the 39th Parliament in 2007. Bill C-47 died on the Order Paper when Parliament was dissolved in 2008. It was reintroduced as Bill C-8 during the 2nd Session of the 40th Parliament, but it died on the Order Paper once again when Parliament was prorogued in December 2009.

- protection of individual rights of spouses and common-law partners (in particular women) to matrimonial property located on reserve; and
- protection of the collective rights and interests of Bands in their reserve lands.

The main concern of Bill S-4 is the "jurisdictional gap" in the *Constitution Act, 1867.*[32] Property and civil rights fall under provincial power by virtue of section 92(13), and under territorial jurisdiction as delegated by the federal government, giving provinces and territories jurisdiction over the division of matrimonial real and personal property.[33] However, real property on Indian reserves is exempted from the application of provincial and territorial law under section 91(24), which provides for federal jurisdiction over "Indians and Lands Reserved for Indians".[34] The *Indian Act* does not address MRP issues on reserve. While the *First Nations Land Management Act*[35] provides a mechanism to address MRP issues, it is a statutory regime to which First Nations voluntarily choose to subscribe. Its provisions are not mandatory for First Nations in Canada.[36]

The federal government, in collaboration with the Native Women's Association Canada and the Assembly of First Nations ("AFN"), commissioned a series of consultations, resulting in a 2007 report. That report concluded that the simple application of provincial and territorial MRP law to reserves would be insufficient to deal with current deficiencies, and instead recommended a concurrent jurisdiction model. Remedial federal legislation should address the presently unequal distribution of property rights on reserves between married and common-law partners by providing certain interests in, or rights to matrimonial property during and after a conjugal

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[32] *Constitution Act, 1867* (U.K.) 30 & 31 Vict. C.3, reprinted in R.S.C. 1985, App. II, No. 5.
[33] *Constitution Act, 1867,* s. 92(13).
[34] *Constitution Act, 1867,* s. 91(24).
[35] *First Nations Land Management Act,* S.C. 1999, c. 24.
[36] Canadian Bar Association, National Aboriginal Law and Family Law Sections, "Bill S-4, Family Homes on Reserves and Matrimonial Interests or Rights Act", (prepared for the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law and Family Law Sections of the Canadian Bar Association, May 2010) [unpublished] at p. 2.

relationship. In addition to equality in property rights, such legislation should address other family law issues, like domestic violence and the best interest of the child.[37]

Of the areas of conflicting rights discussed in this paper, the issue of MRP on reserve is unique because it requires application of all three conflict models. Like the issue of Indian status registration, the intra-group and individual-group models are appropriate to view the competing rights of Aboriginal women and their respective First Nations. However, Bill S-4 also engages the inter-group model because it aims to protect the individual rights of all women (and potentially their children), whether or not Aboriginal, who find themselves in these particular circumstances.

Bill S-4 is conceptually divided into two parts. The first deals with First Nation law-making power to enact MRP laws. The second proposes Provisional Federal Rules ("PFR") to provide a comprehensive MRP scheme for all First Nations across Canada until each First Nation enacts its own MRP scheme. The PFR do not duplicate or mirror any existing provincial or territorial MRP regime, but amalgamate various approaches.

In support of an Indian band's collective right to self-governance, Bill S-4 provides for the enactment of First Nation MRP laws. However, the Bill requires that a mandatory "verification process" be followed by a First Nation to enact MRP laws.[38] Aboriginal governance is an independent legal right, and does not depend for its existence on any grant of authority from the executive or legislative bodies of Canada.[39] In this vein, the Bill may be too prescriptive and may infringe a First Nation's Aboriginal right of self-governance to legislate MRP according to their own indigenous legal traditions, including the process for making decisions that affect the

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[37] *Ibid.*

[38] For example, section 8 enables the Minister to designate an "organization" to assist in the verification process. Sections 9 and 10 provide for appointment of a verification officer to determine whether the proposed process of community approval conforms to the Act and whether the actual process follows that proposal. Sections 11 to 15 prescribe the minimum requirements of the community approval process to be followed.

[39] *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), at paras. 83 to 86, and for greater detail, paras. 83 to 143. See also Lisa Chartrand, "Exercising Jurisdiction Over Collective Rights" (Discussion Paper prepared for the Indigenous Bar Association, November 2005) [unpublished], pp. 3, 13-15.

community as a whole.[40] Furthermore, Bill S-4 provides for provisional federal rules to govern MRP on reserves where the Indian band does not enact its own MRP regime. Given the reality that most are severely under-resourced in terms of governance development of their own MRP regimes, the PFR are apt to become the *de facto* regime for many First Nations. The PFR provisions could effectively bury existing indigenous legal traditions,[41] which is likely an unintended and undesirable result of the legislators.[42]

In attempting to balance individual and collective rights, Bill S-4 potentially creates long term rights to, or interests in, reserve lands for non-band members and non-Aboriginal people. Under section 2 of the *Indian Act*, a reserve is a tract of land "that has been set apart by Her Majesty for the use and benefit of a Band". Section 18 of the *Indian Act* provides:

> **18. (1)** Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective Bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the Band.
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> **18.1** A member of a Band who resides on the reserve may reside there with his dependent children or any children of whom the member has custody.

The Supreme Court of Canada in *Derrickson v. Derrickson* summarized that the purpose of section 18 is "to ensure that lands reserved for Indians are and remain used for the use and benefit of the Band."[43]

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[40] By way of comparison, the *First Nations Land Management Act,* S.C. 1999, c. 24 contains an equally prescriptive verification and approval process for land management codes, but the *FNLMA* is a statutory regime to which First Nations voluntarily subscribe. In contrast, Bill S-4 would impose default MSP and mandatory verification scheme on First Nations.

Kelly Russ argues for a similar approach to human rights codes for Indian bands, advocating that the *Indian Act* be amended to grant Indian bands the statutory, but not mandatory, power to develop their own human rights by-laws "in accordance with their respective views on human rights" that nonetheless comply "with Canada's international obligations [with respect] to human rights": see Kelly Russ, *Modern Human Rights: The Aboriginal Challenge* (L.L.M. Thesis, University of British Columbia, 2006) [unpublished] pp. 66-67, 75.

[41] For example, customary practices of some of the Métis Settlements in northern Alberta enable surviving spouses (common-law or married) and their children to retain lands following the death of a spouse regardless of the surviving spouse's status: see Chartrand, *supra*, p. 8, footnote 4.

[42] Canadian Bar Association, *supra,* pp. 8-9.

[43] *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at par. 22.

Section 28(1) of the *Indian Act* prevents Indians from alienating their rights to possession, except by lease or permit:

> **28. (1)** Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a Band or a member of a Band purports to permit a person other than a member of that Band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> **(2)** The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the Band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Due to section 50(1), persons who are not members of the band also cannot acquire a right to reside on or possess reserve lands by inheritance:

> **50. (1)** A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

The rule of inalienability is a necessary bulwark against eroding band ownership in reserve lands. Bill S-4 attempts to find a balance between that rule and protecting the family obligations towards dependent children and spouses of band members, whether or not they are themselves band members. Both domestic law and international treaties insist that inalienability cannot be an excuse for disregarding the interests of children or married or common law partners, but neither can domestic rights become the thread that unravels the fabric of band ownership and indigenous governance.

While the Bill does not purport to "alienate" reserve lands from a First Nation, it does allow for a potential life interest in property on reserve to non-Indians and non-band members, effectively removing that property from the use and benefit of the band during that period. This potential interest could include not only the former family home but also the land contiguous with the structure necessary for the use and enjoyment of, and access to the structure. If a relationship breakdown occurs, a non-Indian, non-member spouse could be granted exclusive occupation of the family home with the children for the rest of that spouse's life. If that person is young, exclusive occupation could amount to 60 or more years.

Also of concern is that none of the factors that a court must weigh when making certain orders under the Bill include the indigenous legal traditions or cultural context of the First Nation. The cultural context and indigenous legal traditions of the particular First Nation should not be the only or even the predominant factor, but should be acknowledged in Bill S-4 as relevant. This is essential for the multi-juridical nature of Canada's legal system to have meaning for First Nations. In our view, it is insufficient to create the legislative space for First Nations to enact their own MRP laws; the PFR must also make space for indigenous laws to avoid perpetuating the colonial nature of the *Indian Act*.

Bill S-4 represents an important step forward to address systemic problems with MRP interests on reserves.[44] However, the implications of Bill S-4 over inherent Aboriginal rights of self-government and over First Nations citizens and reserve lands ought to result in in-depth consultation before the Bill proceeds further in the legislative process.[45] Federal decisions concerning reserve lands engage the Crown's fiduciary duty, again requiring national consultation with First Nations and representative organizations.

VI. Bill C-21, the repeal of s. 67 of the *Canadian Human Rights Act*

The final legislative initiative we discuss involves recent amendments to the *Canadian Human Rights Act*[46] ("CHRA"), enacted in 1977 to provide a comprehensive body of law to deal with discrimination in Canada at the federal level.[47]

However, section 67 (then section 63(2)) exempted the federal government, band councils, tribal councils and other governing authorities operating or administering programs under the *Indian Act* from complaints of discrimination relating to actions arising from or pursuant to the *Indian*

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[44] Bill S-4 passed third reading in the Senate on July 6, 2010 and was given first reading in the House of Commons on September 22, 2010. As of the date of writing (October 15, 2010), second reading in the House had not yet occurred.

[45] On this and other concerns, see the speeches in the Senate respecting Bill S-4, July 6, 2010 at http://www.parl.gc.ca/40/3/parlbus/chambus/senate/DEB-E/046db_2010-07-06-e.htm?Language=E&Parl=40&Ses=3

[46] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[47] Russ, *supra*, p. 55. See also Canada, House of Commons debates, February 11, 1977 at 2976

Act.[48] Section 67 of the CHRA was necessary, as the Minister of Justice at the time, the Honourable Ron Basford, frankly conceded:

> Certain provisions of the *Indian Act,* and actions carried out pursuant to it, quite possibly would not pass human rights scrutiny and might be struck down if complaints regarding them were considered by the new Human Rights Commission.[49]

In protecting the *Indian Act* from human rights scrutiny, section 67 also shielded the actions of Aboriginal governments from human rights scrutiny, even when dealing with its own members. The rights of Aboriginal individuals had no guaranteed or consistent protection if they experienced discrimination or harassment from their own Aboriginal governments in a variety of areas including:

- registration or non-registration of someone as a First Nation member;
- use of reserve lands;
- occupation of reserve lands;
- wills and estates;
- education;
- housing;
- ministerial decisions with regard to incompetent individuals and guardianship; and
- the enactment of by-laws.

While there is evidence that this measure was meant to be temporary, there was no explicit provision to that effect within the CHRA. Perhaps as a result of the less-than-temporary nature of section 67, the courts developed in a hodge-podge fashion certain exceptions to the exemption, in an obvious attempt to get around section 67.[50]

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[48] That said, section 67 was <u>not</u> a complete exemption of the CHRA for Indian band councils. For example, an administrative decision allocating First Nation rental housing, which does not require an individual land allotment under the *Indian Act,* would not have been exempt from the CHRA. Other non-exempt matters include the denial or termination of employment, the denial of access to programs or services not administered under the *Indian Act* and sexual harassment in the workplace.

[49] Canadian Human Rights Commission, *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act*, (October, 2005) at 5.

[50] Russ, *supra*, at 57-58. See, for example, *Re Desjarlais*, (1990) 12 C.H.R.R. D/466 (F.C.A.), *Canada (Human rights Comm.) v. Gordon Band Council* (2000), 39 C.H.R.R. D/60 (F.C.A.), *Bressette v. Kettle Stony Point First*

It took Parliament thirty years to repeal section 67 in 2007 by way of Bill C-21, which came into effect on June 18, 2008.[51] Bill C-21 includes transitional provisions providing band councils and tribal councils with 36 months to come into compliance with the human rights legislation. The federal government, on the other hand, was given no such grace period; it had to be entirely CHRA compliant upon the repeal of section 67 becoming law in June 2008.[52]

While the protection of individual rights is clearly at the forefront of the repeal of section 67 and of the CHRA generally, legislative consideration of collective rights, or at least interests, is also apparent. Bill C-21 provides that the repeal of section 67 will not affect existing Aboriginal or Treaty rights, as protected by section 35 of the *Constitution Act, 1982.* The Bill also includes an interpretive clause respecting complaints made under the CHRA:

> In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

This interpretive clause operates in addition to existing provisions of the CHRA, which make certain exceptions to the basic rules.[53]

Nation Band Council, [2003] C.H.R.D. No. 38 (Q.L.), and *Canada (Human Rights Comm.) v. Canada (Department of Indian Affairs and Northern Development)*, [2001] 1 F.C. 174 (F.C.A.)

[51] *An Act to amend the Canadian Human Rights Act*, S.C. 2008, ch. 30. Briefly, Bill C-44 was originally introduced in the House of Commons in December 2006. It was referred to the Standing Committee on Aboriginal Affairs and Northern Development on February 21, 2007 and underwent weeks of committee study prior to the prorogation of Parliament. Bill C-44 died on the Order Paper when a new session of Parliament was convened. It was the fourth time that Parliament had considered but did not enact repeal legislation. On November 13, 2007 Bill C-21, identical to Bill C-44, was introduced and deemed to be referred to the Standing Committee on Aboriginal Affairs and Northern Development. *See* Canadian Human Rights Commission, *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act*, (October, 2005) at 2-3. Bill C-21 became

[52] We understand from direct communication from Commission staff that a number of complaints respecting the registration provisions of the *Indian Act* have been filed with the Commission since the repeal of section 67, similar to the *Charter* challenge in the *McIvor* case.

[53] For example, it is not considered a discriminatory practice to carry out a special program designed to prevent, reduce or eliminate disadvantages suffered by a group of individuals because of a prohibited ground of discrimination by improving opportunities respecting goods, services, facilities, accommodation or employment for that group.

But what are "First Nation legal traditions and customary laws"? Indigenous legal traditions have long existed and enjoyed recognition within Canada's legally pluralistic constitutional framework.[54] Indigenous legal traditions continue to exist in Canadian law unless they were incompatible with the Crown's assertion of sovereignty, they were surrendered voluntarily via the treaty process, or the government extinguished them.[55]

The AFN has advanced a "collective rights" approach to the application of this interpretive clause and indigenous legal traditions. In its publication, *The Canadian Human Rights Act: Information for First Nations Citizens, Governments and Organizations*, the AFN advocates as follows:

> When the repeal comes into effect for First Nations governments in 2011, the interpretive clause could be seen as expressing the intent of Parliament that the application of the *CHRA* to First Nations governments is to be interpreted in light of Aboriginal and treaty rights.
>
> The amended *CHRA* recognizes First Nations collective rights in providing direction that these must be balanced with individual rights. The reference to First Nations legal traditions and customary laws provides an opening to raise issues of inherent jurisdiction over matters such as "membership" or "citizenship" and invokes the notion of inherent powers and pre-existing sovereignty. It represents a directive to inform the understanding of human rights under the *CHRA* with the legal traditions and customary laws of First Nations to ensure that they have a greater say in the human rights norms applied to their communities. The interpretive provision is not a defence itself but as an interpretive provision it may apply in interpreting *CHRA* concepts such as "discriminatory practice" or defences like *bona fide* justification.[56]

The Canadian Human Rights Commission has been more equivocal in its response to the interpretative provision. In its report *Balancing Individual and Collective Rights: Implementation of Section 1.2 of the Canadian Human Rights Act*, the Commission states:

> Two main conceptual frameworks most likely to be applied in considering First Nations legal traditions and customary laws. These frameworks are:
>
> > 1. The "Supplemental" Approach: Adapting Human Rights and Charter Law to First Nations legal traditions and Customary Laws

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[54] Borrows, John. *Indigenous Legal Traditions in Canada*, Unpublished paper for IBA/CBA Forum on Indigenous Legal Traditions. Ottawa, March 2005.
[55] *R. v. Mitchell*, [2001] S.C.R. 911, at 927
[56] Assembly of First Nations, *The Canadian Human Rights Act: Information for First Nations Citizens, Governments and Organizations*, January, 2010 at 8.

2. The "Stand-Alone" Justification: The Aboriginal and Treaty Rights Framework

> It is important to caution against arriving at any definitive conclusions. The origin and nature of the "balancing" provision in Bill C-21 is unique and has few if any precedents in Canadian legislation. It is the first time a quasi-constitutional human rights statute has been required to give "due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality."[57]

At the core of the interpretative provision will again be the issue of reconciling the collective indigenous traditions of First Nations with the individual rights of their members and those whom they govern. What will be interesting to see is whether the Canada Human Rights Tribunal (and the courts) will apply Bastarache J.'s view of section 25 of the *Charter* to Bill C-21's interpretative provision, or will undertake a more pragmatic approach to how indigenous legal traditions are to be recognized and given legitimacy in the context of human rights complaints. Certainly, it may be difficult to ignore the constitutional imperative of gender equality inherent to section 35(4) of the *Constitution Act, 1982*. As well, the principle of "*bona fide* justification" may be applied (and modified) to the interpretative provision, to incorporate indigenous legal traditions into human rights law.[58]

VII. Conclusion

Clearly, there is no automatic trump of individual over collective rights when it comes to Aboriginal people. The nascent jurisprudence for section 25 of the *Charter* suggests as much, as does the more established jurisprudence respecting section 35(1). However, the law is not the only place we can obtain guidance in reconciling individual and collective rights. Conflict models like the ones mentioned in this paper provide a framework within which to view conflicting rights and concepts like Fraser's "participatory parity" provide other ways in which to reconcile conflicting rights and to measure that success.

The examples discussed in this paper are legislative attempts to strike a balance between individual human rights and collective Aboriginal rights:

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[57] Canadian Human Rights Commission, *Balancing Individual and Collective Rights: Implementation of Section 1.2 of the Canadian Human Rights Act*, 2010 at p. 63.
[58] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3.

(a) sex discrimination may be almost but not quite remedied in the registration provisions of the *Indian Act*;

(b) marital real property disputes on Indian reserves may finally become justiciable in a manner that does rough justice (at least) to the needs of women and their children living on reserves; and

(c) basic human rights will now be enforceable in circumstances involving the *Indian Act.*

In all three examples, there remain delicate issues whether Parliament will or has achieved the correct balance between the public policy goals of protecting the human rights of individuals and the collective rights of Aboriginal peoples. No doubt future litigation will reveal whether the legislators struck the right balance.

The risk in all of this, from an Aboriginal law perspective, is that Aboriginal collective rights, inherent to the indigenous legal traditions of Canada's First Nations, may be eroded by the better known and more widely accepted liberal legal tradition of human rights.[59] Our hope is that the law will take up the challenge identified by Bastarache J. in *Kapp*,[60] to engage in the necessary work of reconciling individual human rights with collective Aboriginal rights, with respect to each of the legal traditions from which those rights arise.

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[59] Chartrand, *supra*, pp. 20-21
[60] *Kapp, supra*, at para. 100.