



**Canadian Human
Rights Commission**

**Commission canadienne
des droits de la personne**

***BALANCING INDIVIDUAL
AND COLLECTIVE RIGHTS:***

**IMPLEMENTATION OF SECTION
1.2 OF *THE CANADIAN HUMAN
RIGHTS ACT***

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***L'ÉQUILIBRE ENTRE LES DROITS INDIVIDUELS
ET LES DROITS COLLECTIFS***

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INTRODUCTION

In 1977, the *Canadian Human Rights Act (CHRA)* was passed, together with the exemption that was described at the time as an “interim” measure. That measure, section 67, effectively exempted the *Indian Act* from scrutiny under the *CHRA*. Section 67 was the only “sheltering” clause of the Act, and said, “Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.” This “interim” status was important since the *Indian Act* was perceived as being discriminatory, particularly in terms of gender. It was expected that the sexual discrimination present in the *Indian Act* (and other forms of explicit, indirect, or latent discrimination) would lead to portions of it being found contrary to the principle objectives of the *CHRA*. Subsequent interpretation saw the *CHRA* as “quasi-constitutional” in nature and, therefore, holding sway over the *Indian Act* and other “ordinary” legislation. This could have led to arguments for the suspension of those *Indian Act* provisions that were seen to discriminate on the grounds of race or gender. Thirty-one years later, Bill C-21 was passed in 2008, finally repealing the “interim” section 67.

The question of how best to implement Bill C-21, and more specifically how to implement section 1.2, is the subject of this report. Section 1.2 calls for the following:

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.¹

This report explores, in particular, the concept of balancing individual and collective rights with First Nations legal traditions and customary laws. It addresses, but focuses less on, questions of gender equality. The report examines how First Nations communities and organizations are to implement the legislation, and suggests areas where the Commission, the Tribunal, First Nations, the federal government, and Parliament might assist in this goal. The complex issues surrounding the immediate application of Bill C-21 to government departments, agencies, and other non-First Nation entities whose activities are now covered by the *CHRA* are beyond our mandate.

Our study is also aimed at achieving a practical implementation of Bill C-21, in particular section 1.2, and acknowledging potential shortcomings, inadequacies, and areas of potential follow-up research.

In practical terms, section 1.2 has two major implications. First, the Government of Canada and any other federally regulated body, other than a First Nation government (as defined in exercising powers formerly exempted under the *CHRA*), is immediately subject to the *CHRA*, and must therefore defend their actions, as would any other organization subject to

¹ See Appendix 1 for the full text of Bill C-21 that amends the *CHRA*.

the *CHRA* since 1977. Second, and of most relevance to this report, First Nations governments are provided a three-year grace period (s.3), ending on June 18, 2011, before Bill C-21 applies to those actions formerly sheltered under section 67. During this grace period, Bill C-21 (s.4) also calls upon the federal government to undertake a study to identify the extent of the preparation, capacity, and fiscal and human resources required for First Nations communities and organizations to comply with the amended *CHRA*. This study is to be reported to both Houses of Parliament before the expiration of the three-year transition period. In effect, Bill C-21 acknowledges the need to clarify how section 1.2 is to be interpreted and applied in a process of consultation and joint study between the federal government and First Nations.

The report is presented in four main sections plus four appendices. Part one looks at the legal and legislative background of the new Bill, as well as relevant case law from both Canada and elsewhere, all of which sheds light on how to interpret and apply the new requirements. Part two examines academic literature from the areas of sociology, anthropology, history, and political science for further illumination. Part three explores the *Indian Act* itself, how it has been implemented, and how Bill C-21 will change its regime. Part four provides some conclusions and suggests ways for the Canadian Human Rights Commission to move forward.

The appendices provide the text of the bill itself (Appendix 1), a legal interpretation of key words and phrases (Appendix 2), a quick reference of key questions and conclusions (Appendix 3), and some samples of cases that might arise because of the new legislation (Appendix 4).

PART I: IMPLEMENTING SECTION 1.2: A LEGAL OVERVIEW AND ASSESSMENT

INTRODUCTION

For a short piece of legislation, Bill C-21 poses a variety of significant challenges to the Canadian Human Rights Commission (CHRC) and the Canadian Human Rights Tribunal (CHRT), and to all potential complainants and respondents, particularly First Nations governing authorities covered by the legislation. This is in part because of the wide and ultimately unresolved range of expectations, concerns, and interpretive approaches at play in the debates over how the individual rights advanced by the *Canadian Human Rights Act* (CHRA) can and should be balanced with broader, collective rights and interests specific to First Nations legal traditions and customary laws. In addition, there is little guidance in policy or case law about how to balance such potentially competing rights and interests.

This part of the study, guided by the principles of legislative interpretation, sets out the legal frameworks available for interpreting s.1.2. This section is intended to explore the principles, concepts, notions, and ideas about individual and collective rights as determined in Canadian jurisprudence regarding “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.” Applicable foreign jurisprudence is also reviewed.

The Canadian human rights landscape is crafted by both legislative and constitutional principles. Section 1.2 (now part of the *Canadian Human Rights Act*) is not a constitutional provision, but it is informed by the *Charter of Rights and Freedoms*,² which provides a set of guiding principles for the interpretation of legislation. However, through the incorporation of the “legal traditions and customary laws” of “First Nations,” s.1.2 also potentially incorporates the constitutional principles (found in s.35 of the *Constitution Act, 1982*) that protect Aboriginal and treaty rights.³ The *Charter*, Aboriginal and treaty rights, and human rights frameworks will be explored to establish the frameworks within which consideration of s.1.2 might take place. These provisions, and those of related legislation, form part of the legislative context. By adopting “the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter,”⁴ we can ascertain how the current legislation fits within the broader legislative landscape.

The principles of constitutional interpretation differ from normal legislative interpretation. Constitutional terms are difficult to amend. As such, the interpretation of the Constitution

² *Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982.*

³ Aboriginal peoples are defined in Section 35(2), which states “In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit, and Metis peoples of Canada.”

⁴ *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 (S.C.C.) (Q.L.) at para. 52.

is not as strict as normal legislative interpretation. The Canadian Constitution, like constitutions in many countries, is treated as a “living tree” in order to facilitate changing times and circumstances.⁵ Thus, while the constitutional interpretive frameworks are essential for understanding the landscape in which s.1.2 exists, more pointed analysis is necessary to understand the precise meaning of s.1.2.

The interpretive landscape for s.1.2 will be filled out by examining the legislative history and intention of Parliament,⁶ and the scheme of the Act, which can be characterized by identifying its broad objects and methods. The most direct route to identifying the meaning of a piece of legislation is to look at the grammatical and ordinary meaning of the Act. This stage involves trying to provide a plain language understanding to the words used within a statute, unless there is some reason on the face of the Act to choose a technical or specialized meaning over following the normal rules of grammar and dictionary definitions.

This part of the report begins with the background of s.1.2 in order to discern the legislative intent behind it. The second section examines three frameworks—the *Charter of Rights and Freedoms*, Aboriginal and treaty rights, and human rights law—that inform the interpretation of s.1.2. The third section then examines jurisprudence relevant to legal traditions and customary laws. The fourth section analyses both broad and narrow interpretations of the wording of s.1.2. This section should be read with reference to Appendix 2 of this report, which discusses the wording in detail.

1. SCOPE AND INTENT OF SECTION 1.2

1.2. THE EXEMPTION AND CALLS FOR REPEAL

Bill C-21 has a unique origin. In 1977, the *Canadian Human Rights Act (CHRA)* was passed, together with what was described at the time as an “interim” measure—the exemption (in s.67) of the *Indian Act* from scrutiny under the *CHRA*. This was important because, in a most general sense, the *Indian Act* was perceived in 1977 as being discriminatory, particularly regarding gender. Decisions rooted in the *Indian Act* were seen as unlikely to survive a challenge under the new *CHRA*. Indeed, Sandra Lovelace’s challenge to the *Indian Act*’s denial of entitlement to formerly “out-marrying” women helped illustrate how the *Indian Act* was discriminatory. Lovelace’s challenge resulted in a decision by the United Nations Human Rights Committee⁷ that declared s.12(1)(b) of the *Indian Act* contrary to the *International Covenant on Civil and Political Rights*.

⁵ Ruth Sullivan, *Statutory Interpretation* 2nd ed. (Toronto: Irwin Law, 2007): 100–101.

⁶ *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 (S.C.C.) (Q.L.) at para. 33 where the Court writes: “To understand the scope of (a statutory provision), it is useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute.”

⁷ *Lovelace v. Canada*, [1983] Can. Human Rights Yearbook 305 (U.N.H.R.C.) confirming the admissibility of the complaint, by discarding the failure to exhaust domestic remedies argument made by Canada, on the basis of the Supreme Court’s 1973 decision on the same point in the *Lavell* case (*Attorney General of Canada v. Lavell; Isaac v. Bedard*, [1974] S.C.R. 1349); and by the U.N.H.R.C. in 1981 on the merits of the complaint.

In defence of exempting s.67, note was made in the legislative debates about ongoing discussions with the National Indian Brotherhood (NIB) (now the Assembly of First Nations) and Native women's groups about updating the *Indian Act's* entitlement provisions. The NIB strongly supported the exemption, though only as an "interim" measure.

In 1985, Bill C-31 was enacted to eliminate all forms of sexual discrimination in the *Indian Act*. However, Bill C-31 itself has been successfully challenged on the grounds of discrimination based on sex and family status.⁸ From the *CHRA's* passage in 1977, thirty-one years passed before the passage of Bill C-21 in 2008, and the "interim" measure was successfully replaced.

1.2. THE LEGISLATIVE DEBATES ON BILLS C-44 and C-21

The legislative context for the implementation of s.1.2 may provide clues about legislative intent, but since the clause itself was not extensively debated, these clues may be of limited utility.

The Government Position

As introduced, both Bills C-44 and its successor C-21⁹ were sparse, and therefore attracted considerable criticism. A five-year impact review and reporting requirement was limited to either a House or Joint Committee, and there was a six-month transition clause suspending complaints against "*an aboriginal authority that was made in the exercise of powers or the performance of duties and functions conferred or imposed by or under the Indian Act.*"¹⁰

The government did not include an "interpretive" clause in either Bill C-44 or Bill C-21. However, the two previous legislative efforts (Bill C-7 and S-45) had included interpretive clauses. These earlier legislative proposals are worth examining before looking at the background of Bill C-44.

Bill C-7: In 2002, the government included a repeal provision as part of a much broader *First Nations Governance Act* (Bill C-7), in which a single interpretation provision for the *CHRA* was included:

In relation to a complaint made under this Act against an Aboriginal governmental organization, the needs and aspirations of the Aboriginal community affected by the

⁸ *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, CanLII B.C.C.A. (2009) 153. The Government of Canada announced on June 1, 2009, that it would not be appealing this decision and instead would bring forward amendments to the *Indian Act* to implement the Court's directions, <http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2009/nr000000339-eng.asp>. Ms. McIvor and her son were unsuccessful in obtaining leave to appeal from the Supreme Court of Canada.

⁹ Bill C-44 was introduced in one session of Parliament but then died on the Order Paper. It was revived the next session as Bill C-21.

¹⁰ This language was in the First Reading version of Bill C-44, and was incorporated in the adopted version of Bill C-21.

complaint, to the extent consistent with principles of gender equality, shall be taken into account in interpreting and applying the provisions of this Act.¹¹

Due to the focus of C-7 on governance, elections, and financial accountability, there was little discussion about its proposed repeal of the s.67 exemption. Both the Native Women's Association of Canada and the National Aboriginal Women's Association supported extending the CHRA fully into all aspects of the *Indian Act* regime. There was no mention of the proposed repeal provision by other First Nations witnesses, and next to no discussion within the Parliamentary Committee. The Bill died on the Order Paper in 2003.

Bill S-45: A private Senate Bill, S-45, was introduced in November of 2005 to propose the simple repeal of s.67, without any review or transition periods, but with the identical interpretive clause as set out in C-7. This Bill also died on the Order Paper.

Bill C-44

The Minister of Indian and Northern Affairs introduced the new government's first attempt to repeal s.67 in 2006. Appearing on March 22, 2007, before the House of Commons Standing Committee on Bill C-44, the Minister anticipated questions about the absence of an interpretive clause and provided a detailed rationale for excluding one:

I share the view that the Canadian Human Rights Act should be applied in a manner that is sensitive to particular circumstances of aboriginal communities, but the truth is that three factors preclude the need for an interpretive clause in the legislation. The first is that laws already exist that provide for a balancing of individual and collective rights. I refer to the constitutional protection already in place for the recognition of collective aboriginal and treaty rights in section 35 of the Constitution Act, which remains as the paramount authority in our legal system.

Given these protections, members of the Canadian Human Rights Tribunal... are required by the act to be sensitive to human [rights] issues as they pertain to aboriginal and treaty rights. They can also be expected to interpret the existing defences in the act, bearing in mind these concerns. With these protections in place to help guide the application of the ...Act and the commission, there's no need to add an interpretive clause to Bill C-44. In effect, the Constitution Act provides that overall interpretive umbrella itself.

The second factor has to do with the critical role of the Canadian Human Rights Commission itself. The Commission is charged with the administration of the ...Act, which means that it not only processes complaints but also engages in educational activities....

The Act already grants the commission the power to establish guidelines or regulations on how the Act should be applied to a particular class or group of

¹¹ s. 16.1, *First Nations Governance Act*, (Bill C-7) 2002.

complaints. ... I have full confidence that, given its mandate, its track record, and in dialogue with First Nations, the Canadian Human Rights Commission is best placed to offer advice on how the Act should be applied...

Thirdly, we know from experience with the interpretive clause, which was originally proposed in ...Bill C-7, that it is extremely difficult to capture in a single clause fail-proof language that would address all the competing considerations for handling a ...complaint in a First Nations context. Additionally, an interpretive clause ...would have to be interpreted by the commission and the ...Tribunal ...in specific cases, and would obtain clarity really only after the litigation of many complaints and conflicts, undoubtedly, with the Charter.¹²

While this intriguing rationale touches upon a great many things, it points above all to one justification: the government felt that between s.35 and *Charter* law, and given the capacity of the Commission to issue guidelines and regulations for interpreting breaches of the *Canadian Human Rights Act*, there was no need for a specific interpretive clause. Indeed, there was concern expressed about the dangers of over-specificity or over-generality in the introduction of such a clause.

This position was maintained throughout the discussion of Bill C-44, and, though the Minister of Indian Affairs did not specifically deal with the issue, the same position was held throughout the debate over Bill C-21.

Main Witnesses on Bill C-44

The positions of the main witnesses before the Committee on Bill C-44 (since there were no witnesses called for C-21 other than in the Senate) are summarized below:

The Assembly of First Nations (AFN)

The AFN proposed two main amendments to C-44 that are relevant to our inquiry—a non-derogation clause and an interpretive clause:

- A non-derogation clause, based largely on s.25 of the *Charter*:

The repeal of Section 67 of the Canadian Human Rights Act shall not be construed in a manner which abrogates or derogates from any Aboriginal or treaty rights, including customary laws and traditions that pertain to the First Nation peoples of Canada such as:

- a) *any rights or freedoms that have been recognized by the Royal Proclamation of 1763; and*

¹² Hon. Jim Prentice, Minister of Indian and Northern Affairs, before the Standing Committee of Aboriginal Affairs and Northern Development on Bill C-44, *Hansard*: March 22, 2007: 1105.

- b) *any rights or freedoms that now exist by way of land claims agreements or may be so acquired.*
- An interpretive clause:
 - a) *The Interpretation and application of the Canadian Human Rights Act shall take into account: the entitlement of a First Nation government to provide programs and services whether exclusively or on a preferential basis to its members;*
 - b) *The entitlement of a First Nation government to give preference to its members in training and hiring of employees and contractors; and*
 - c) *The entitlement of a First Nation government to give preference to its members in the allocation of land, resources or other economic benefits to its members; and*
 - d) *The entitlement of a First Nation government to give preferential or elusive treatment to its members in matters relating to the exercise of cultural, spiritual or other traditional practices or activities; and*
 - e) *The entitlement of a First Nation government to consider and apply indigenous legal traditions and customary laws in a manner in keeping with principles of equality and justice.*¹³

The Native Women's Association of Canada (NWAC)

NWAC did not propose specific interpretive language in its appearance before the committee studying C-44. They did call, however, for an interpretive clause “to enable the CHRC to adequately balance collective and individual rights, whereby the CHRC could rely on an exemption that would explicitly allow discrimination where a preference or advantage is granted to aboriginal peoples and is not discriminatory in any other respect.” NWAC insisted that any interpretive clause must be developed in consultation between the government, First Nations organizations, and NWAC.¹⁴

The Canadian Human Rights Commission (CHRC)

The Chief Commissioner of the CHRC appeared on April 19, 2007, and argued that an

¹³ Assembly of First Nations, First Nations Perspective on Bill C-44 (Repeal of Section 67 of *Canadian Human Rights Act*): a submission to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, available at <http://www.afn.ca/misc/C-44.pdf>.

¹⁴ Ellen Gabriel, Quebec Native Women's Association, Evidence, Standing Committee on Aboriginal Affairs and Northern Development on Bill C-44, *Hansard*, March 17, 2007: 1115.

interpretive provision was:

... imperative to give application to the inherent right of self-government and is fundamental to developing an appropriate system for First Nations human rights redress. An interpretive provision would help to ensure that individual claims are considered in light of legitimate collective rights and interests.¹⁵

The Adoption of Section 1.2

Bill C-44 died on the Order Paper but without any clause-by-clause discussion of amendments. It was brought back to Committee as Bill C-21 after the start of the new session of Parliament. Following procedure, no witnesses were called other than government officials to assist in responding to questions about the intent of the government's draft.

The central reference now contained in s.1.2 to "legal traditions and customary laws" emerged in an opposition motion of December 2007 during clause-by-clause consideration. To explain the intent of the language, the mover of the motion commented:

It could be as simple, for example, as always giving our elders preferential treatment, so that they are dealt with first...¹⁶

Aside from support from one other MP, this was the sole example given as to the potential impact of the interpretive language proposed before the Committee adopted the clause. The Committee spent far more time negotiating and debating the transition and review clauses.

However, we can see that the crafting of s.1.2 owed much to the witness presentations. NWAC reinforced the need for an interpretive clause. The AFN's contribution was to introduce the concept of "legal traditions and customary laws," both in its draft non-derogation clause and in its proposed interpretive provision. The CHRC may well have inspired s.1.2's reference to a "balancing" of collective and individual rights and interests. Between these witnesses, s.1.2 was born.

2. FRAMEWORKS FOR CONSIDERATION OF THE LEGISLATIVE AND LEGAL CONTEXT

In considering the broader legislative and legal landscape surrounding s.1.2, it is important to consider human rights law as well as constitutional law. The three subsections below help illustrate key areas essential to interpreting s.1.2.

¹⁵ Jennifer Lynch, Chief Commissioner of the Canadian Human Rights Commission, Evidence, Standing Committee on Aboriginal Affairs and Northern Development on Bill C-44, *Hansard*, April 19, 2007: 1110.

¹⁶ Nancy Karetak-Lindell, M.P. Standing Committee on Aboriginal Peoples and Northern Development, (39th Parliament, 2nd Session), *Hansard*, January 30, 2008: 1605.

A. CONSTITUTIONAL LAW: THE *CHARTER OF RIGHTS AND FREEDOMS*

When assessing a *Charter* case, the Court must ask if a specific right guaranteed under the *Charter* has been infringed. If there has been an infringement of a *Charter* right, then the Court needs to determine if the infringement is justified under s.1. In *Oakes*, the Supreme Court called for a “stringent standard of justification,” with the standard of proof for limitation being “proof by a preponderance of probability.”¹⁷

For a limitation to be allowed, the objective of the infringing legislation must be significant and the means chosen must be reasonable. Passing this level of scrutiny requires that the infringing measure meet three tests:

1. *“First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.”*¹⁸
2. *“Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question.”*¹⁹
3. *Third, “there must be a proportionality between the deleterious effects of the measures limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.”*²⁰

Section 1 of the *Charter* provides the only provision for a “balancing mechanism.” However, s.1 “balancing” potentially removes the shield from protected rights where legislative intrusion can meet a test of justification.²¹ While this is a somewhat limited form of “balancing,” it might be useful for gender equality analysis. Adapting this approach to the principle of gender equality mentioned in s.1.2, any collective interest that exists in conflict with gender equality might have to undergo a structured justification analysis. However, “balancing” in contexts that do not involve gender equality might strive to find a middle ground that ensures that individual interests are respected while trying not to impair the ability of the collectivity to express its own rights or interests.

Section 25 of the *Charter* is also brought into view in the interpretation of s.1.2. It reads as follows:

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 and freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal

¹⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103 (Q.L.) at para. 67.

¹⁸ *Ibid.* at para. 70.

¹⁹ *Ibid.*

²⁰ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (Q.L.) at para. 95.

²¹ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 94, per L’Heureux-Dubé J. (dissenting): “The *Charter* makes no provision for directly **balancing** constitutional rights against one another. It is aimed rather at governmental and legislative intrusion against the protected rights.”

Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.”²²

The relevance of s.25 of the *Charter* is largely based, not on the specific language of s.1.2 (which is quite different from s.25) but on the characterization of the goal of an interpretive clause by many witnesses before the House of Commons, and in some previous legislative proposals of a similar nature. However, s.25 has received little judicial treatment. At the Supreme Court, s.25 has only been given careful analysis in a few minority opinions.²³

The most extensive treatment of s.25 was provided by Justice Bastarache in *R. v. Kapp*,²⁴ in which he made several key determinations:

- First, s.25 is an interpretive provision and does not create new rights.²⁵
- Second, s.25 acts as a shield designed to address the tension between individual *Charter* rights and collective Aboriginal and treaty rights.²⁶
- Third, the s.25 shield is not absolute:

“... it is restricted by s. 28 of the Charter which provides for gender equality [n]otwithstanding anything in this Charter’. Second, it is restricted to its object, placing Charter rights and freedoms in juxtaposition to aboriginal rights and freedoms.”²⁷

The final *Charter* section that might provide insight into how s.1.2 will ultimately be treated is s.28, which is the gender equality provision.²⁸ Typically serving as an interpretive declaration of overriding importance, this section may be highly influential in

²² *Canadian Charter of Rights and Freedoms*, s.25.

²³ See, L’Heureux-Dubé J. in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 (Q.L.) at para. 52: “Section 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from “other rights or freedoms that pertain to the aboriginal peoples of Canada.” This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the “other rights or freedoms” included in s. 25.”

²⁴ [2008] S.C.J. No. 42 (S.C.C.).

²⁵ *Ibid.* at para. 79: “Most authors believe that s. 25 is an interpretative provision and does not create new rights.” And at para. 93 “It was made abundantly clear that s. 25 creates no new rights. It was meant as a shield against the intrusion of the *Charter* upon native rights or freedoms.”

²⁶ *Ibid.* at para. 82.

²⁷ *Ibid.* at para. 97 where Bastarache also states: “This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives.” Also at para. 101: “In this case, what is significant about the scope of s. 25 protection is the meaning of the words “other rights or freedoms.” These words are “all-embracive,” as mentioned by Lysyk, at p. 472; this indicates that the protection was meant to be very broad. But the rights and freedoms are only those that “pertain to the aboriginal peoples of Canada,” those that are particular to them. In French, the Act speaks of “*droits ou libertés ancestraux, issus de traités ou autres des peuples autochtones du Canada.*”

²⁸ *Canadian Charter of Rights and Freedoms*, s. 28 reads: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”

providing a guide for how the “principle” of gender equality should be treated.

The *Charter* principles reviewed above are one source for interpreting s.1.2. These provisions provide a foundation of Constitutional level principles similar to some of the aspects of s.1.2. Specifically, s.1 of the *Charter* reveals an example of balancing that can be used as a guide. Similarly, the guarantee of gender equality in s.28 of the *Charter* may provide a comparable example for the “principle of gender equality.” Finally, s.25 of the *Charter* has the potential to operate as a shield against any application of s.1.2 that interferes with Aboriginal and treaty rights. The case law is lacking on this latter point.

B. CONSTITUTIONAL LAW: ABORIGINAL AND TREATY RIGHTS AND SECTION 35

The Supreme Court’s framework for s.35 is relevant to the possible steps in analysis, and related evidentiary tests, to determining the historic and contemporary existence of a legal tradition or customary law. Section 35 declares:

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

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) 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 Supreme Court has provided a line of decisions beginning with *Sparrow*²⁹ and in particular marked by *Van der Peet*³⁰ and *Delgamuukw*³¹ (regarding Aboriginal title) to clarify how best to move forward.

The Aboriginal and Treaty Rights Framework: A Summary

Stage 1: Is There an Existing Right?

The Aboriginal claimant holds the burden of proving that there is an existing Aboriginal or treaty right. Proving an Aboriginal right involves three steps:

- **Step 1:** Determine the precise characterization of the right, which in order to qualify,

²⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

³⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

³¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

must centre on an Aboriginal practice, custom, or tradition.

- **Step 2:** Determine whether the practice, custom, or tradition upon which the right is based is integral to the distinctive culture of a First Nation or Aboriginal group. The main concern is the centrality of the practice, custom, or tradition to a pre-colonial Aboriginal culture.
- **Step 3:** Determine if the practice, custom, or tradition finds its source in the pre-contact period (for Indian and Inuit rights³²) at the time of sovereignty (for title³³) or at the time of “effective Crown control” (for Métis rights³⁴). This temporal requirement is underpinned by a principle of continuity, which requires a demonstration that the practice, custom, or tradition, whether in original or modified form, has continued to be exercised to the present day.

Stage 2: Is There an Infringement?

The Aboriginal claimant must demonstrate a *prima facie* infringement of that right by Crown authorized action or legislation. Factors in determining infringement are as follows:

- Whether the right is acknowledged;
- The reasonableness of the nature of the interference;
- Imposition of undue hardship;
- Denial of a preferred means to exercise the right.³⁵

Stage 3: Has the Right Been Extinguished?

If the Aboriginal or treaty right has been shown to have been infringed, then the defendant may choose to argue that the right had been extinguished prior to 1982 and is not protected under s.35. This argument requires proof of Aboriginal consent (e.g., via treaty) or that clear and plain language was used by the Crown consciously to extinguish the specific right so that it was no longer “existing” on April 17, 1982, when s.35 came into force.

Stage 4: Is There a Justification?

Fourth, if the right has not been extinguished by the Crown, then the defendant may seek to prove justification of any infringement, as the Supreme Court of Canada in *Sparrow* effectively imported the *Oakes* analysis of s.1 into s.35 even though the latter is outside the *Charter*.

³² *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

³³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

³⁴ *R. v. Powley*, [2003] 2 S.C.R. 207.

³⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

- Step 1: That it is the least possible infringement and is required to fulfill a compelling and substantial legislative objective consistent with the purpose of s.35 (recognition of prior occupation and reconciliation with Crown sovereignty).
- Step 2: That the honour of the Crown and its duty to consult and accommodate the Aboriginal interest involved was upheld in keeping with its fiduciary relationship with Aboriginal peoples.³⁶

Section 35 analysis may apply to s.1.2, as it calls for due regard to be given to “First Nations legal traditions and customary laws.” Incorporating the s.35 Aboriginal and treaty rights analysis would also draw a comparison between s.1.2 and s.35(4), which protects Aboriginal and treaty rights equality for women and men.³⁷ The possible incorporation of the principles from both *Charter* law and Aboriginal and treaty rights contributes to the uniqueness of s.1.2.

Additionally, while interpreting the Constitutional protection of Aboriginal and treaty rights in s.35, the Supreme Court also held in *Sparrow* that it was important to adopt a purposive approach,³⁸ which resolves doubtful expression in favour of the Indians.³⁹ This interpretive principle applies to both treaties and statutes relating to Indians. If this interpretive rule is given full effect in the proper reading of s.1.2, then it may influence the process of balancing called for.

C. HUMAN RIGHTS LAW

This section sets out in summary form the general framework of analysis within human rights law. Additionally, methods of balancing will be covered along with the scope of the *CHRA* in considering s.1.2.

The Supreme Court has established several rules to assist in reviewing a tribunal’s interpretation of its enabling legislation.

- The particular knowledge held by a tribunal is expected to influence and form part of the analysis of its enabling legislation.⁴⁰
- If a tribunal’s interpretation of its enabling legislation is not irrational or unreasonable, “courts should not lightly interfere with its interpretation and

³⁶ See, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 S.C.C. 73; and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 S.C.C. 74.

³⁷ Section 35(4) reads: “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.”

³⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 56.

³⁹ *Ibid* at para. 57 where the court cites *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36: “... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”

⁴⁰ *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650 at para. 98.

application of its enabling legislation.”⁴¹

- Tribunals can, and should, review external statutes to assist in interpreting the tribunal’s enabling legislation.⁴²

The application of these instructions to s.1.2 is not clear. Due to the uniqueness of s.1.2, various constitutional frameworks are potentially at play in the interpretation and application of its provisions. As a result, the emphasis upon legal expertise, rather than any specialized knowledge held by a tribunal, could encourage the courts to play an active role through its judicial review function in interpreting s.1.2.

These stages of legislative interpretation provide a guide for how to approach s.1.2; however, they are not the only principles to consider. The *Canadian Human Rights Act* is meant to be interpreted in a manner which seeks “out the purpose of the legislation and if more than one reasonable interpretation consistent with that purpose is available, that which is more in conformity with the *Charter* should prevail.”⁴³ Here again, it is unclear how the potential conflict will be resolved between this and the principle of interpretation set out in the Aboriginal and treaty rights framework, which calls for doubtful expressions to be resolved in favour of the First Nations litigants.

Human rights law also reveals some guidance on the proper application of balancing among divergent factors. Balancing involves two sets of competing interests. In the context of s.1.2, these interests can be contrasted in two ways. Under one interpretation, individual rights as anchored in the *CHRA* must be balanced with the collective rights of a First Nation as a whole. Here the individual First Nation’s legal traditions and customary laws would be given due regard only for the purpose of understanding the collective right or interest.

Alternatively, the individual right or interest of the complainant can be balanced with the collective rights or interests expressed by the First Nation’s government. In this case, the legal traditions and customary laws would receive due regard for the dual purpose of understanding both the collective and individual interests. Due regard would be given to how the First Nation may have already undertaken a balancing between individual and collective rights and interests.

While true “balancing” of rights is a rare find in case law, several examples are worth examining for how balancing tests have been applied elsewhere. When such analysis is undertaken, it rests upon established principles. For example, when attempting to balance the right to be free from discrimination based on sexual orientation with another person’s right to freedom of religion, the Human Rights Tribunal of Ontario relied upon constitutional values and the provisions of its enabling legislation. The Tribunal found that the right to be free from discrimination based on sexual orientation effectively trumped the

⁴¹ *Ibid.* at para. 104.

⁴² *Ibid.* at para. 114.

⁴³ *Canada (Attorney-General) v. Mossop*, [1993] S.C.J. No. 20 (Q.L.) per. Lamer C.J., Sopinka and Iacobucci JJ. at para. 36. Lamer C.J., at para. 37, also clarified that “absent a Charter challenge, the Charter cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have.”

right to freedom of religion.⁴⁴ The Tribunal, then, was not performing the balancing itself but was *applying* the balancing that it inferred had already taken place in its enabling legislation. In contrast, s.1.2 calls for balancing but fails to articulate the framework in which that balancing is to occur.

Section 1.2 does not suggest that either individual or collective rights would trump the other. However, an influential balancing test can be found in the context of *Charter* rights where the Supreme Court of Canada has found that freedom of religion had internal limits. To this end, s.1 of the *Charter* has been used as a balancing mechanism.⁴⁵ That balancing mechanism is summarized as follows:

*The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question.*⁴⁶

The balancing in s.1 of the *Charter*, then, affords a protection of the individual's right against the State's attempt to infringe that right by placing the onus on the latter if it seeks to uphold its legislation despite its violation of a *Charter* protected right. The *Charter* methods have to be respected since the *Charter* itself is binding in providing an overriding interpretive set of principles for the *CHRA*.

There has been no official federal documentation about what types of program or service decisions made either by the federal government or by Bands might have constituted *prima facie* discriminatory actions within the scope of the *CHRA*. Certainly there would appear to be several remaining areas of statutory discrimination within the *Indian Act*, but it is far from clear that the *CHRA* would apply to challenges to these holdovers. While normally these are matters for direct court challenge under the *Charter*, the *CHRA* certainly enables the Tribunal to halt the application of discriminatory legislation by federal officials.⁴⁷

Complaints regarding program and service eligibility restrictions are, however, a matter that falls within the normal scope of the *CHRA*'s mandate. The following might potentially be exposed:

- Health program eligibility restrictions (limited to registered Indians, members of Inuit

⁴⁴ *Heinz v. Christian Horizons*, 2008 H.R.T.O. 22 (Human Rts. Tribunal of Ont.).

⁴⁵ *V.M. v. British Columbia (The Director of Child, Family and Community Services)* 2008 B.C.S.C. 449 (CanLII) at para. 88 where the Court cites the S.C.C. in *B.(R.)* at p. 384–85: “In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(a).”

⁴⁶ *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256, at para. 43.

⁴⁷ On the powers of statutory tribunals, see *Drunken v. Canada (Employment and Immigration Commission)* [1989] 2 F.C. 24 (F.C.A.), in which the Court held the Tribunal's powers to include ordering the federal government to cease applying a discriminatory provision. The Tribunal has applied this power in subsequent cases involving federal employment insurance legislation; see *McAllister-Windsor v. Canada*, (2001) 40 C.H.R.R. D/48 (C.H.R.T.).

land claims organizations, and, from 1988 to their registration in 2002, the Innu of Labrador).

- Indian and Northern Affairs Canada (INAC) post-secondary education assistance programs, with eligibility restrictions identical to those of Health Canada.
- Until the early 2000s, access to some reserve-based programs and services (such as social welfare and education) that, until that time, were restricted to status Indians resident on reserve.

Not only is this list fairly short, but also it involves programs that either pre-existed the *CHRA* or succeeded the passage in 1985 of Bill C-31.

As part of the *CHRA*, s.1.2 is firmly rooted in human rights law. However, it also draws in elements that fall within the purview of Aboriginal rights. This characteristic serves as a bridge between these sources of law. It is not clear from which side of the bridge the interpretive principles for s.1.2 will be drawn. The nature of complaints and the context of the alleged discrimination will likely influence this.

3. EVIDENTIARY CONSIDERATION OF FIRST NATIONS LEGAL TRADITIONS AND CUSTOMARY LAWS

In this section, we will look at what legal consideration has been given to identifying legal traditions and customary laws. While it is evident that customary laws have a long history in colonial courts, this history does not reveal much about how these laws were to be received, identified, or interpreted.⁴⁸ The primary framework in considering whether a First Nation's legal traditions or customary laws must be given "due regard" comes from both Canadian and foreign case law involving Aboriginal and treaty rights, especially that of the Supreme Court of Canada's suite of decisions from *Sparrow* through to *Sappier and Gray*.⁴⁹

The Supreme Court of Canada's approach to Aboriginal rights issues is set out above. For the purposes of this section, it is essential to note that Aboriginal and treaty rights jurisprudence has found that Aboriginal oral evidence is admissible in courts of law. The Supreme Court has determined that traditional legal rules of evidence should be modified to accommodate oral histories. The Court has focused on ensuring that oral evidence is useful in proving relevant issues, that the evidence is reasonably reliable, and that it is more useful than potentially prejudicial.⁵⁰ The Court has also made it clear that Aboriginal perspectives

⁴⁸ See generally, Mark D. Walters (1999), "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982," *McGill Law Journal* 44, 711–752; Mark D. Walters (1995), "Mohegan Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," *Osgoode Hall Law Journal* 33, 785; Peter W. Hutchins with Carol Hilling and David Schulze (1995), "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine," *U.B.C. Law Review* 29, 251; and Lucy Bell (2006), "Kwakwaka'wakw Laws and Perspectives Regarding Property," *Indigenous Law Journal* 5: 119–159.

⁴⁹ *R. v. Sappier; R. v. Gray* [2006] 2 S.C.R. 686.

⁵⁰ *Mitchell v. Canada (M.N.R.)*, [2001] 1 S.C.R. 911 at para. 30.

about treaties with the Crown, their societies, and their laws are vital, as well as written records that may exist.⁵¹

While it is important to be receptive to Aboriginal evidence, outside experts can also be taken into account. When assessing the qualification of experts, local experience is important. This experience can be in the form of mainstream academic qualifications or “local community advisers, ministers of religion, and government officials.”⁵² Of particular relevance is an assessment of witnesses to ensure that the person giving evidence:

- *has special knowledge or experience of the customary laws of the community in relation to that matter; or*
- *would be likely to have such knowledge or experience if such laws existed.*⁵³

South African jurisprudence sets out several rules for determining the content of customary law, which is given constitutional protection under the post-apartheid Constitution:

1. It is necessary to determine the customary law in the context of community tradition.⁵⁴
2. The right of the community to develop their customary law in order to meet the challenges of contemporary society should be respected.⁵⁵
3. It should be remembered that customary law regulates people’s lives. This consideration stresses the importance of the balancing tests. Considerations to be taken into account by the Courts include:

*... the nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law.*⁵⁶

The Australian courts, in reference to Native title, have pointed out that there needs to be

⁵¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

⁵² The Law Reform Commission, Report 31, *The Recognition of Aboriginal Customary Laws*, Vol. 1 Australian Govt. Publishing Service, Canberra, 1986 at 470.

⁵³ *Ibid.* at 478.

⁵⁴ *Shilubana and others v. Nwamitwa* [2008] Z.A.C.C. 9 at para. 44: “Customary law is a body of rules and norms that has developed over the centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, ...courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.”

⁵⁵ *Ibid.* at para. 45: “As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.” Also see, The Law Reform Commission, Report 31, *The Recognition of Aboriginal Customary Laws*, Vol. 1 Australian Govt. Publishing Service, Canberra, 1986 at 91.

⁵⁶ *Ibid.* at para. 47.

continuity between those traditional laws that existed at the time of sovereignty and those that are currently asserted. If such laws are abandoned, then so too is a connection to Native title.⁵⁷

While the pre-contact connection might be said to be essential in determining what customary law was, it may not be as essential in determining what customary law currently is.⁵⁸ While pre-contact roots are the most reliable measure of customary law origins, it is not critical. However, prior knowledge of the customary law is necessary “for proving customary law, continuity is not required if the custom was known to have existed at some earlier point” because “no amount of discontinuity can destroy a custom once it is established.”⁵⁹ Several key factors mentioned above help give a fuller indication of how customary law can be received. South African jurisprudence emphasizes that customary laws are meant to respond to the needs of the local community. As local needs change so too will customary law. This recognition provides a path around the problem of continuity with pre-contact customs.⁶⁰

4. .

This chapter has provided the foundation for the approach in which s.1.2 should be interpreted. This primary exploration reviewed the legislative history, guiding frameworks of interpretation, and examples of jurisprudence regarding legal traditions and customary laws. As well, Appendix 2 should be referred to for an analysis of the specific phrases used in s.1.2. The possible incorporation of both *Charter* principles and Aboriginal rights principles reveals the unique nature of s.1.2. Further, the legislative history reveals no clear direction for the interpretation of s.1.2. The lack of clarity means that the CHRT and the courts will have to impute a legislative intent upon Parliament where no clear intent exists. The discussion in this part reveals two possible interpretive models, outlined below.

⁵⁷ *Mabo v. Queensland*, [1992] 5 C.N.L.R. 1 (High Ct of Aust.) (Q.L.) at note 127 per Brennan J.: “when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of Native title has disappeared. A Native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.”

⁵⁸ Mark Walters (1998–1999), “‘According to the old customs of our nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826–1847,” *Ottawa Law Review* 30(1) (Q.L.) at para. 17 expresses the link between a community’s way of life and the laws that governed that community as follows: “To summarize, it is clear that the general characteristics of the pre-contact Ojibway system of law and government were inextricably bound up with the general characteristics of pre-contact Ojibway society itself. The normative foundations of the system of usages and customs that regulated Ojibway life derived from, first, the unique manner in which Ojibway peoples harvested natural resources within their territories—i.e., the economic basis of Ojibway society—and, second, the spiritual relationship that existed between Ojibway peoples and the natural world around them—i.e., the spiritual/religious basis of Ojibway society.”

⁵⁹ Albert Peeling and Paul L.A.H. Chartrand (2004), “Sovereignty, Liberty, and the Legal Order of the ‘Freemen’ (Otipahemsu’uk): Towards a Constitutional Theory of Métis Self-Government,” *Saskatchewan Law Review* 67, 339 (Q.L.) at para. 9.

⁶⁰ *Ibid.* at para. 9 where they note: “Continuity is not required if there is otherwise strong proof of a custom, and discontinuity can be explained by evidence that practice of the custom was impossible.”

POTENTIAL IMPLICATIONS OF THE CLAUSE'S PHRASING

The frameworks discussed above reveal two methods for understanding and applying s.1.2. The broad approach relies on existing human rights and *Charter* law foundations, and the narrow approach relies on the Constitutional law foundations of s.35's recognition and affirmation of Aboriginal and treaty rights.

A Broad Interpretation

The non-exclusive listing of what is included within First Nations governments suggests that other entities and their actions might fall within the ambit of the clause. This, along with the phrasing of the clause, reinforces a possible broad interpretation such that any First Nation government facing a complaint, whether or not it has to do with a service formerly exempted under s.67, can invoke the requirement to give "due regard." This approach includes any Aboriginal governing body that falls within federal jurisdiction but that may not be operating under the Indian Act (e.g., Westbank First Nation, the governments operating under the Cree-Naskapi (of Quebec) Act, etc.) to whom the CHRA has always fully applied unless modified specifically by legislation (as with Westbank).

Similarly, a broad interpretation would suggest that the intention of the clause was to give due regard to both "First Nations legal traditions and customary laws" *and* to "the balancing of individual rights and interests against collective rights and interests" (i.e., requiring a balancing of collective interests separate from any particular customary law).

This broad interpretation takes individual rights as paramount and narrowly construes exemptions. To the extent that it is an individual interest, and due to it being specifically mentioned in s.1.2, the principle of gender equality would certainly be given primary consideration over collective interests. Such an approach is consistent with s.1.2 being an interpretive provision rather than a new source of rights.

The broad view might interpret s.1.2 as a standalone justification similar to the limited jurisprudence on s.25 of the *Charter*. Here, s.1.2 would operate as a defence against a charge of discrimination without necessary reference to other justificatory provisions of the *CHRA*.

Finally, a broad interpretation might suggest, given the more specific language of s.3, that the clause is to take effect immediately for First Nation governments in relation to complaints under the Act, except for those acts or omissions "made in the exercise of powers or the performance of duties and functions conferred or imposed by or under that Act." Under such an interpretation, s.1.2 would have to give "due regard" immediately in the case of a complaint against a First Nation government (as broadly defined) concerning all matters that were not formerly exempt under s.67.

A Narrow Interpretation

Alternatively, the principle of interpreting exemptions to human rights statutes narrowly would favour the more rigorous tests of s.35 Aboriginal and treaty rights law over the flexibility of human rights and *Charter* law.

Under the narrow interpretation, “First Nation” refers to governments or entities formerly covered under the s.67 exemption (i.e., only those specifically falling under the *Indian Act*). It also suggests that “due regard” is to be given only in the context of formerly exempt activities and not generally to any act of such governments.

A narrow view also suggests that instead of giving “due regard” to both traditions and customs, as well as to the balancing of individual as against collective rights and interests, the intent was only to give due regard to the balancing of collective and individual rights and interests that occurs within a First Nation’s legal traditions and customary laws.

This narrow interpretation of s.1.2 might also engage a test similar to that found in s.35 case law. Where a contested right is found to exist, the existing mechanisms found in s.35 could serve as a guide to determine the validity and characterization of the legal tradition or customary law.

This narrower view would also suggest that “due regard” does not have to be given in any case until the expiry of the three-year transition period.

CONCLUSION

There is nothing specific in case law or in various legal frameworks that dictates which of the two basic approaches is correct—Human rights and *Charter* law, or Aboriginal and treaty rights law—or whether some elements of both are intended.

A broader interpretive approach of Bill C-21 might not be what legislators felt was the intention, if only because s.1.2 was not proposed by the government and was added on opposition motions specifically to modify the repeal of s.67, which only had an effect on those operating under the *Indian Act*. Yet earlier draft interpretation clauses, including that of Bill C-7 and the version proposed by the *CHRA* Review Panel, would have applied to all actions by all Aboriginal governmental organizations.

Given the legacy of debate, it might be considered strange for the *CHRA* to afford only some, and not all First Nation governments, the ability to raise legal traditions, customary laws, and collective interests in response to an alleged discriminatory act, especially where most of those excluded (e.g., Nisga’a Lisims) are exercising self-government specifically protected as treaty rights under s.35.

The foregoing analysis illustrates that the legal literature is only one part of the equation in answering the key questions in this study. Case law and jurisprudence do not provide a complete picture and we need to refer to the expertise of other disciplines, as discussed in the next part.

PART II: HISTORICAL AND SOCIAL SCIENCE ASSESSMENT

INTRODUCTION

This part of the study looks to the historical and social science literature for guidance on how notions of individual and collective rights are framed and how they relate to First Nations legal traditions and customary laws. We also look at some practical solutions, from Canada, Australia, and elsewhere, and how these fit within the broader conceptual frameworks examining the relationship between human rights law and First Nations legal traditions and customary laws.

The main challenge is to address the several themes or topics on which guidance from the historical and social science literature may be useful:

- The scope and meaning of legal traditions and customary laws;
- The balancing of collective and individual rights within legal traditions or customary laws;
- Who to turn to in arbitrating contested legal traditions and customary laws.
- The crucial issue of membership determination and related restrictions in the provision of goods and services by First Nations governments; and
- The emergent issue of self-government and alternative justice systems.

The examination of these topics frames this part of our analysis, as does the reality that customary law refers to the basic rules and procedures governing the everyday life of persons in a community.⁶¹ Customary law is also often represented as a higher form of imperative: something more than mere practice or “what people are used to” and closer to what people hold as moral and obligatory.⁶²

Yet in examining these matters, we must address, first, some boundary issues, if only to map out how the guiding topics we suggest become foremost in a proper analysis of the subject. This merits discussion of the challenge in establishing reliable boundaries for what

⁶¹ For major anthropological treatments of the topic, see Bronislaw Malinowski (1932), *Crime and Custom in Savage Society*, London: Routledge and Kegan Paul; and Max Gluckman (1997), “Concepts in the Comparative Study of Tribal Law,” in Laura Nader (Ed.), *Law in Culture and Society*, Berkeley: University of California Press: 349–373. For a sociological treatment, see Stanley Diamond (1971), “The Rule of Law Versus the Order of Custom,” *Social Research* 38(1): 42–72. For customary law and judicial recognition in Canada, see Bradford W. Morse (1980), “Indian and Inuit Family Law and the Canadian Legal System,” *American Indian Law Review* 8: 199–257. For an Aboriginal perspective on First Nations history, see the excellent book *For an Amerindian Autohistory* by Georges E. Sioui (Montreal and Kingston: McGill-Queen’s University Press, 1992).

⁶² A. L. Goodhart cited in Kenneth Maddock (1984), “Aboriginal Customary Law,” in Peter Hanks and B. Keon-Cohen (Eds.), *Aborigines and the Law*, North Sydney: Allen and Unwin: 217.

we have been asked to assess, including matters that generally might fall beyond a consideration of what could be argued before the Canadian Human Rights Commission or the Tribunal.

BOUNDARIES

As with the legal literature, the social sciences—anthropology, sociology, political science, history—have given considerable attention to the “outer boundaries” of Aboriginal customary law; namely, those practices that appear notoriously in breach of either non-Aboriginal cultural norms or of formal statute law. A Canadian example concerns a reluctant spirit dancer, Thomas, who “was denied food, forced to walk naked in a creek and carried by a group of men who bit him and dug their fingers into his stomach.”⁶³

Thomas filed suit, and the trial court judge ruled in his favour, noting that even if the spirit dance ceremony was a valid tradition, “those aspects of it which were contrary to English common law, such as the use of force, assault, battery, and wrongful imprisonment, did not survive the introduction of law in British Columbia.”⁶⁴ The court found that even if the Coast Salish Spirit Dance ceremony was protected under s.35(1) of the *Constitution Act, 1982* as an Aboriginal right, the forced seizure involved was a breach of constitutionally protected and statute-based human rights law, if not that of the *Criminal Code*.

The Australian literature has been even more preoccupied with what many might regard as unusual encroachments on individual rights, notably the reprisal practice of “spearing” and the practice of under-age marriage.⁶⁵ International human rights literature has also been concerned with cultural practices at or over the edge of broad transnational norms of acceptance, whether customary law or not, particularly where such practices inflict harm on women.⁶⁶

These cases are not cited to suggest that Aboriginal legal traditions or customary laws are always, necessarily, or even routinely adverse to the perceived universal norms of human

⁶³ Cited in Patrick Macklem (2001), *Indigenous Difference and the Constitution of Canada*, Toronto: University of Toronto Press: 49.

⁶⁴ *Thomas v. Norris CanLII 354*, [1992] B.C.S.C.

⁶⁵ See Megan Davis and H. McGlade (2004), “International Human rights law and the recognition of Aboriginal customary law,” Background Paper #10, Law Reform Commission of Western Australia.

⁶⁶ On violations of gender equality—involving genital mutilation, rape, etc.—see Sally E. Merry “Human Rights and Transnational Culture: Regulating Gender Violence through Global Law” (2006) 44 *Osgoode Hall Law Journal*. On discrimination against Indian women in Canada, see Mary Ellen Turpel (1989), “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences,” *The Canadian Human Rights Yearbook 3*; and Teresa Nahanee (1993), “Dancing with a Gorilla: Aboriginal Women, Justice and the Charter,” Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Criminal Justice System*, Ottawa: Supply and Services Canada. In the Australian Aboriginal context, in which customary law traditions are more clearly assessed, see Catherine Wohlan (2005), “Aboriginal Women’s interests in customary law recognition,” Background Paper #13, Law Reform Commission of Western Australia.

rights or non-Aboriginal statute law. In most cases, such traditions and laws undoubtedly incorporate and indeed protect and advance individual rights, as well as those of the collectivity involved.⁶⁷ The cited cases do signify, however, that the social sciences, as with the legal sources, often focus on the question of boundaries more than they deal with the detailed, day-to-day substance of what Aboriginal legal traditions and customary laws actually entail. This lack of attention to the “everyday” is commonplace in the social science literature. The absence of a systematic and comparative analysis of First Nations legal traditions and customary laws poses a problem: the important might be disregarded in favour of the notorious.

Aside from these boundary issues, not all aspects of Aboriginal tradition or law are of concern in this study. The *Canadian Human Rights Act* deals with discrimination against individuals in a limited set of federally regulated circumstances—the provision of goods and services, accommodation, and employment. It does not have the same broad scope as the *Canadian Charter of Rights and Freedoms*. Similarly, the *CHRA* is not concerned with directly protecting or implementing Aboriginal and treaty rights—the topic of s.35, in Part II of the *Constitution Act, 1982*.

Many First Nations traditions and laws will not impact how the *CHRA*, given its narrower scope, is implemented in relation to First Nations governments. Nevertheless, s.1.2 of the *CHRA* (see Appendix 1 for a full version of the amendments) brings into play a requirement for what has to date been a matter reserved for exclusively constitutional treatment, the interpretation of Aboriginal customs and traditions. As noted in Part I, there are some pre-1982 interpretations of these matters by the courts, drawing mostly upon English common law principles. However, the main reference to Aboriginal customary law and legal traditions is now to be found in s.35 of the *Constitution Act, 1982*, as well as in s.25 of the *Canadian Charter of Rights and Freedoms*. Both these provisions, recognized and affirmed as “the supreme law of the land,” uphold Aboriginal rights, which presumably include legal traditions and customary laws.

No constitutional provision is absolute or without balancing considerations against other, similarly protected rights.⁶⁸ As indicated in Part I, balancing may be justified in accordance with different principles advanced by three distinct legal frameworks. However, these frameworks have themselves drawn upon historical and the social science literature for instruction. The tools provided by the social and historical sciences should therefore be consulted. In addition, it is important to identify if and when “legal traditions and

⁶⁷ This is the general assumption, and finding, of comparative legal scholars. See for example Christoph Eberhard (2001), “Towards an Intercultural Legal Theory: The Dialogical Challenge,” *Social and Legal Studies* 10(2): 171. For the view that so-called “universal” norms such as those in the *Charter of Rights* displace already extant individual rights protection norms in Indigenous cultures, see Menno Boldt and J. Anthony Long (1984), “Tribal Philosophies and the *Canadian Charter of Rights and Freedoms*,” *Ethnic and Racial Studies* 74(4): 478–493.

⁶⁸ The Supreme Court of Canada has emphasized this point repeatedly, such as in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 and, in relation to the *Charter*, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

customary laws” are fixed or evolving.

The overlay of non-First Nations laws, policies, and institutions has resulted in a challenged authenticity for First Nations legal traditions and customary laws. Claims of “authenticity” for collective rights or interests therefore need to be assessed. First Nations practices may not always be held as a valid basis for discrimination against individual rights or interests. Procedures or techniques to distinguish between what is “traditional” and what is derivative of introduced forms need to be considered.

The social science and historical literature does offer guidance in considering the nature and meaning of legal traditions and customary laws, what might “balance” individual and collective rights and interests, and where to turn in assessing the authenticity of First Nations legal traditions and customary laws.

1. THE SCOPE AND MEANING OF LEGAL TRADITIONS AND CUSTOMARY LAWS

There is no question that First Nations communities within Canada have legal traditions and customary laws that are part of their broader cultural milieu. Regardless of the context—contemporary, pre-contact, or historic early contact—all First Nations cultures attempt to control behaviour through various forms of encouragement and sanction. Murder and violent crimes are and remain governed by forms of social practice, ranging from reprisal murder to banishment. Family law is present everywhere, dealing with marriage, divorce, adoption, and childcare. Similarly, matrimonial property, inheritance, and ownership are topics that are managed through legal norms within all cultures, from nomadic society to hierarchical chiefdom-ship to quasi-state systems. Rules of kinship, belonging, residence, land ownership, family law, or other cultural practices, are all uniformly present.⁶⁹

In this context, what are the appropriate frameworks for identifying when legal traditions and customary laws are involved in decision making by First Nations organizations? Before we can turn to a discussion of how individual and collective rights might be accommodated or balanced with or against each other, we need to identify what, or at least how, we can know what are legal traditions and customary laws that must, under C-21, be given “due regard.”

⁶⁹ Philip Drucker (1939), “Rank, Wealth and Kinship in Northwest Coast Society,” *American Anthropologist*, New Series 41(1): 55–65.

1.1. WHAT ARE CUSTOMARY LAWS/LEGAL TRADITIONS?

Contact and post-contact First Nations cultures portray an enormous diversity of languages, traditions, practices, and spiritual beliefs. Dickason, along with Trigger and Washburn, are perhaps the works most worthy of canvassing, though as with many historical studies, less is disclosed about how specific traditions and customs illustrate common principles or underlying patterns.⁷⁰ Historians are focussed on the descriptive particular, as in Bruce Trigger's hugely influential study of the Huron.⁷¹

Within this wider frame of reference is the reality that there is no broadly accepted definition—whether for lawyers, historians, or social scientists—of what constitutes customary laws or legal traditions for Aboriginal people. Because there are, according to the Royal Commission on Aboriginal Peoples (RCAP), upwards of eighty or so such broadly construed Aboriginal societies, flexibility in approach is required.⁷² Broadly framed approaches are further confounded by the oral transmission of customary law traditions, the often closely guarded rituals associated with some of their expression, and the stories, songs, and ceremonies that give vitality to legal traditions.⁷³

It seems clear that most First Nations cultures—at least those with some sense of continuity with pre-*Indian Act* formations—have customary laws or legal traditions addressing a wide range of activities, including family matters, descent of property, criminal conduct, status relationships, obligations within a clan or tribal system, as well as religious or spiritual matters. It may be that some cultures were without particular elements of these traditions historically, but none was lawless.

In relation to modernity, McDonnell notes that the Cree in Quebec were without any tradition of banishment, yet began to explore the practice in the late 1940s.⁷⁴ Does that mean that banishment—if it serves a valid social goal and is not inimical to the fundamental human rights of the individual involved—cannot be employed in contemporary Cree legal tradition? The answer is unclear under Canadian law but not necessarily under Cree law. In some cases, the response involved may accord with legal tradition or customary law. In yet other cases, there may be no culturally motivated defence for the action taken other than exigent necessity.

⁷⁰ Olive Dickason (1992), *Canada's First Nations: A History of Founding Peoples from Earliest Times*, Toronto: McClelland & Stewart. See also, Bruce G. Trigger and Wilcomb E. Washburn (Eds.) (1996), *The Cambridge History of the Native Peoples of the Americas, Volume I: North America—Parts 1 and 2*. Cambridge: Cambridge University Press.

⁷¹ Bruce Trigger (1970), *The Huron: Farmers of the North*, New York: Holt, Rinehart, and Winston. See also Bruce Trigger (1987), *The Children of Aataentsic: A History of the Huron People to 1660*, Carleton Library Series: 195, Montreal & Kingston: McGill-Queens University Press.

⁷² Royal Commission on Aboriginal Peoples (1996), *Restructuring the Relationship*, Report of the Royal Commission on Aboriginal Peoples, Volume 2, Part I: 182. The Commission notes that this population of nations stands in contrast to the thousand or so local Aboriginal communities, which include some 620 *Indian Act* Bands (involving over 2,300 reserves), hundreds of Métis communities, and some 50–60 Inuit ones.

⁷³ A general and accessible discussion is found in John Borrows (2005), "Indigenous Legal Traditions," a presentation to the Roundtable on Indigenous Legal Traditions, Ottawa February 16, 2005, Institute on Governance: cited at www.iog.ca/publications/2005_tanaga6summary.pdf.

⁷⁴ Roger McDonnell (1992), "Contextualizing the Investigation of Customary Law in Contemporary Communities," *Canadian Journal of Criminology* 34(3–4).

Customary laws and legal traditions are transmitted within cultures and across generations by predominately oral means, including stories, songs, ceremonies, and recitation, and also through formal and informal education. In “performance” as opposed to “writing” cultures, law can be perceived “to exist apart from, and indeed above, human individuals.”⁷⁵ This involves the constant adaptation of received custom against emerging social requirements. However, is there something fundamentally inimical to the idea of innovation in how an orally transmitted lesson is recorded into a code of written behaviour? This remains a contested matter that the social sciences provide some, though limited, guidance in answering.

Anthropologists in particular have been diligent in recording the specific comparative customs and traditions of various North American Indian cultures in relation to kinship.⁷⁶ Yet there is great variation in assessment even within a single language group or amongst closely linked communities. Adoption provides a ready example.

The Canadian courts have recognized the legality of Indian custom adoption for over 40 years; however, customary adoption was only acknowledged as a basis for entitlements to registration and Band membership in the *Indian Act* in 1985. To date it is one of the only such customary practices to have federal statutory recognition. Adoption holds legal consequences both within communities (e.g., family relationships, community membership,⁷⁷ inheritance, and so on.) and in external relations with Canadian common and statute law (entitlement to registration, estates, and so on). Yet few attempts have been made to codify or even give a broadly comparative description for how customary adoption is achieved, precisely because its practice is so variable.

Despite previously including customary adoption as legitimating inheritance rights, the federal government’s initial response to the formal acknowledgement of custom adoption as a factor in registration entitlement within the *Indian Act* in 1985 is revealing. The government attempted to insist on evidence of local sanction by requiring that Band Councils endorse a custom adoption through a formal resolution. After opposition, including by clan-based organizations and families with limited or no membership in *Indian Act* Bands, this requirement was relaxed. Recognition of custom adoption is now consistent with the simpler and socially flexible attestation requirements in B.C. and N.W.T. legislation.⁷⁸

The case of adoption, with a legacy of court acceptance, highlights that even when a custom has been formally acknowledged, there has been little attempt to systematize a framework

⁷⁵ Bernard J. Hibbets (1992), “‘Coming to our Senses’: Communication and Legal Expression in Performance Culture,” *Emery Law Journal* 4, 873 at 956, quoted in Alex Frame (2002), *Grey & Jwikau: A Journey into Custom—Kerei Raua to Jwikau: Te Haerenga me Nga Tkanga*, Wellington: Victoria University Press.

⁷⁶ A formative study of this area is Philip Drucker (1939), “Rank, Wealth and Kinship in Northwest Coast Society,” *American Anthropologist*, New Series 41(1): 55–65.

⁷⁷ For example, all modern land claims agreements or modern treaties accord full beneficiary entitlements to persons adopted by custom, and some elaborate specific institutions as playing a role (e.g., the Nisga’a Treaty specifies that adoption must be within one of the recognized clans).

⁷⁸ See the case of *Tuplin v. The Registrar*, [1998] P.E.I. Supreme Court.

for the determination of when a procedure truly falls within a claimed tradition. It is an internal matter of culture; that is the dominant stance.

Where there are doubts that an act is truly customary in nature, there have been questions posed about the scope of communal acceptance of the practice.⁷⁹ Nevertheless, the primary consideration has been one of culture, and cultural integrity in accordance within its own frame of reference.

There have been few attempts to prepare any kind of typology of legal traditions. This is in part due to the simple fact that each Aboriginal or First Nations community is distinct and cannot be compared to others in its application of a customary tradition in such matters as kinship, adoption, or property entitlements. This is a conundrum for the normal practice of human rights agencies to compare and contrast the treatment of individuals.

One of the few efforts to organize cross-cultural jurisprudence in relation to customary law defences, whether in the criminal or civil context, is Renteln,⁸⁰ who proposed the following three-part test regarding the veracity of any cultural claim:

- Whether the person claiming a cultural defence is a *bona fide* member of the community concerned;
- Whether the tradition is in fact practiced; and
- Whether the individual claiming the defence was motivated by the cultural practice or motivated by inauthentic goals, such as greed, revenge, or social benefit.

Historians and other social scientists, other than anthropologists, have not answered these questions with any clarity. There are few available typologies or categorizations of Indigenous legal traditions or customary laws, and those that exist are highly contested.

1.2. CULTURE AT THE CORE

Menno Boldt describes Indian cultures as a

set of premises about the purpose, value, and meaning of life. For Indians, these premises are derived from unwritten covenants the Creator communicated to their ancestors. The covenants comprehend a number of fundamental philosophies and principles that gave

⁷⁹ The courts have deliberated such matters as whether a Caucasian parent can adopt under Indian custom (finding that they can, but requiring some demonstrated connection/acceptance by the relevant community); *Re Wah-shee*, [1975], 57 D.L.R. (3rd) 743. For a summary review of variable custom practices, see Cindy Baldassi (2006), “The Legal Status of Aboriginal Customary Adoption across Canada: Comparisons, Contrasts and Convergences,” *University of British Columbia Law Review* 39: 71–76.

⁸⁰ Alison Renteln (2004), *The Culture Defence*, New York: Oxford University Press.

*coherence and unity to Indian values, beliefs, social systems, customs and traditions. These fundamental philosophies and principles emphasized an organic, holistic concept of the world: spiritual and harmonious relationships to the land and all life forms; communalism; personal duties and responsibilities to the band/tribe; social and economic justice, equality and sharing; universal and consensual participation in decision making; personal autonomy; human dignity; and so on.*⁸¹

Customary law is by definition culture-specific, context-specific, and time-specific. It is the evolving expression of cultural norms and social interactions that actively interpret what is regarded as tradition or custom into active, day-to-day accepted rules of behaviour. This suggests at least two important things. First, legal traditions and customary laws must be grounded in some established normative framework; they cannot be a recent or entirely political (i.e., power-based) invention of convenience. Second, legal traditions and customary laws evolve and adapt to changing circumstances. The invocation of “custom” by a Cree First Nation Council announcing the mandatory hiring of a Cree person as a teacher in an English/Cree educational system may well merit consideration. It may always have been customary for Cree children to receive educational training from Cree educators, whether their mothers, uncles, grandmothers, or otherwise. It may also be that the current, emergent cultural and social reality is that without some restriction on who teaches them, Cree children will grow up without any Cree language, heritage, or cultural support. As with Quebec language laws (the importance of which led the province to invoke the “opt-out” provision in the *Charter*), this may well be seen as a valid derogation of normal equal-employment rights norms.

At the same time, if we take the case too far, we arrive back at the first principle: the requirement for a normatively defensible cause. It might stretch the point too far for a First Nation to insist that the teacher being hired be a member of the local Band, as opposed to being a Cree from some other community. Such a demand invites the question of whether the goal of the restriction was to preserve Cree culture or to advance the local/political goals of the hirer.

From the vantage of social science literature, there emerges a general picture about what Bill C-21 describes as “First Nations legal traditions and customary laws,” accompanied by suggestions about how the veracity of any particular legal tradition or customary law might be discovered. But the clarity of this picture dissolves if forced into a snapshot. Legal traditions and customary laws are best accepted as evolving instruments of culture, and are only frozen in time to accord with statutory requirements of non-Aboriginal legal regimes.

Australian sources on customary law are generally more integrated between anthropology, law, and political science than those in Canada since several major Commissions have, since the mid-1980s, pondered how formal recognition of Aboriginal customary law might best be achieved or advanced. One of the most comprehensive, and the most recent, is that of the Law Reform Commission of Western Australia (LRCWA), whose terms of reference were quite broad and not, as in some other Commissions, primarily concerned with criminal

⁸¹ Menno Boldt (1993), *Surviving as Indians: The Challenge of Self-Government*, Toronto: University of Toronto Press: 182–183.

law. As John Toohey’s paper for the LRCWA⁸² points out, it is unwise to attempt a definition of customary laws. Instead, “it is enough to see law in Aboriginal society as a body of rules, accepted by the society and enforced by recognisable constraints.”⁸³ The general approach has not been to attempt a typological or categorical description of customary law, but rather to identify situations in which claimed customs should be taken into account. Toohey also notes that several aspects commonly expressed about Aboriginal customary law remain problematic. These include:

- The claimed immutability of customary law, which raises issues about interpretation and validity when change to custom has taken place;
- The boundary between cultural practices and customary law, in which some practices or traditions are seen as morally a part of the everyday life, but not compulsory or sanctioned in any defined way; and
- The role of violence within customary law—a particular challenge for the criminal law—and accommodations to customary law that reinforce traditional protection of women and children.

These three aspects are not analytically or operationally discreet. They are observations and give rise only to suggested approaches.

It is also worth noting the latent tensions between academic disciplines and their methodologies, and the absence of any firm rules to decide whether a particular practice is normatively binding as legal tradition or as customary law. As suggested from the previous discussion, two broadly divergent approaches have emerged:

1. Aboriginal customary laws or legal traditions are characterised as adaptive and need not hold any direct connection to “distinctive customs or practices that are integral to a particular culture” at a particular time before intensive acculturation pressures mounted (e.g., at “pre-contact,” “sovereignty,” or “effective control” dates).⁸⁴
2. Aboriginal customs or traditions must have a demonstrable continuity from some established “time immemorial” date, and bear an integral relation to a distinctive Aboriginal culture connected to practice that is not influenced or induced by Europeans.

⁸² John Toohey (2005), “Aboriginal Customary Laws Reference—an Overview,” Background Paper #5, Law Reform Commission of Western Australia.

⁸³ Toohey, *ibid*: 177–178.

⁸⁴ The pre-contact date issue flows from the 1996 *Van der Peet* decision of the Supreme Court of Canada 2 [1996] S.C.R. at 507; the date of sovereignty discussion flows from *Delgamuukw* [1997] 3 S.C.R. 1010 and the notion of a post-contact and post-sovereignty assertion date comes from *Powley*, [2003] 2 S.C.R. 207.

2 BALANCING OF INDIVIDUAL AND COLLECTIVE INTERESTS WITHIN LEGAL TRADITIONS AND CUSTOMARY LAWS

Where and how then are First Nations legal traditions and customary laws amenable to accommodating individual rights? This challenge appears to embrace two types of balance: one within the framework of the traditions or laws involved, and another involving a reconciliation of First Nations traditions with non-Aboriginal or broader state or international human rights norms.

There are several notable features in the literature:

- A strong ethic of egalitarianism pervades Indigenous worldviews and underlying values of personal freedom and decision-making;⁸⁵
- The vesting of economic and property rights in lands within communal institutions, whether at the family or wider Band level or in transecting institutions such as clans and houses;⁸⁶
- The lack of formal norms that pose or oppose “individual vs. collective” rights or interests. Instead there is a more frequent discourse about individual duty or responsibility and the obligations of leaders to support individuals;⁸⁷ and
- The considerable variation across First Nations cultures—between cultures that are more settled as opposed more semi-nomadic—in how entitlements to economic and social/political values are distributed and disputes are dealt with.⁸⁸

A dominant concern has been how to achieve balance or accommodation between liberal, individual rights law and at the same time protect collective interests of national minorities, particularly Aboriginal peoples. In this regard, Kymlicka notes that:

Some critics argue that the conception of human personhood and human needs

⁸⁵ Egalitarianism is a common feature of hunter-gatherer and semi-nomadic societies, but is also embraced in more hierarchic societies. See for example Stephen Sharp “Asymmetric Equals: Women and Men among the Chipewyan” in Laura Klein and Lillian Ackerman (Eds.) (1995), *Women and Power in Native North America*, Norman: University of Oklahoma Press: 46–74.

⁸⁶ For an extensive comparative analysis of Aboriginal property regimes from an economic vantage, see Martin J. Bailey (1992), “Approximate Optimality of Aboriginal Property Rights,” *Journal of Law and Economics* 30 (April): 183–198. For a critique of communalism as a viable future strategy, including several analyses identifying contemporary communalism with imposed property regimes via the reservation system, see Thomas Flanagan, Terry Anderson, and Bruce Benson (Eds.) (2006), *Self-Determination: the Other Path for Native Americans*, Paulo Alto, CA: Stanford University Press.

⁸⁷ For an excellent analysis that frames this pre-colonial framework in the context of emergent self-determination debates, see Val Napoleon (2005), “Aboriginal Self Determination: Individual Self and Collective Selves,” *Atlantis* 9(2): 1–21.

⁸⁸ *Ibid*, footnote 25.

*underlying the doctrine of human rights is culturally biased. More specifically, it is 'Eurocentric', and exhibits a European commitment to individualism, whereas non-Western cultures have a more collectivist or communitarian conception of human identity.*⁸⁹

This characterization, which Kymlicka sees as fundamental, is accompanied by a, more modest challenge to liberal doctrines of individual rights:

Some critics say that the idea of universal human rights is acceptable in principle, but that the current list of human rights is radically incomplete. In particular, it fails to protect minority cultures from various forms of injustice, and so needs to be supplemented with an additional set of what are sometimes called 'collective rights'...

*To avoid this sort of injustice, national minorities need guaranteed rights to such things as self-government, group-based political representation, veto rights over issues that directly affect their cultural survival, and so on.*⁹⁰

Kymlicka's remarks aside, it is important to recall that many First Nations legal traditions and customary laws contain or express an "individual rights" ethic. For example, some deal with the rights or interests of individuals in such matters as adoption, including in some traditions the right of the child to a controlling say in the matter. Burial rights, succession, and distribution of property are all intimately concerned with the interests and rights of individuals.⁹¹

Most, if not all, customary laws would seem to incorporate a balancing between the roles, rights, and relationships of the individual within the broader collective, with ancestors and descendents, and with the natural or non-human world. In most cases, it would be unusual to characterize customary laws as expressing a purely "collective rights/interests" point of view.⁹²

It is perhaps this reality—the important role played within First Nations traditions of individual rights promotion—that underscores the position of Aboriginal critics of the *Charter* or the *CHRA* as being an imposition, and potentially acting to suppress the unique individual rights/responsibility ethic found within First Nations cultures.⁹³

Nevertheless, the primary critical stance of Aboriginal scholars has not been with the intrusion of individual rights against Aboriginal collective rights or interests. As Williams

⁸⁹ Will Kymlicka (2001), *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford: Oxford University Press: 69.

⁹⁰ *Ibid.*, 70; 77.

⁹¹ For a comprehensive assessment within one west-coast tradition, see Jo-Anne Fiske and Betty Patrick (2000) *Cis Dideen Kat, When the Plumes Rise: The Way of the Lake Babine Nation*, Vancouver: UBC Press.

⁹² For a discussion of how oppositional conceptions of individual and collective rights can seriously undermine how minority or ethno-national law operates, see Douglas Sanders (1991), "Collective Rights," *Human Rights Quarterly* 13: 368–386.

⁹³ Menno Boldt (1993), *Surviving as Indians: The Challenge of Self-Government*, Toronto: University of Toronto Press: 178. See also Ovide Mercredi and Mary Ellen Turpel (1993), *In the Rapids*, Toronto: Viking Penguin.

notes in her study of the New Brunswick Human Rights Commission's experience with Aboriginal complainants, the primary concern appears to be with the failure of the broader legal regime to embrace and protect Aboriginal collective rights at all, particularly against the power of the state.⁹⁴

Australian legal and anthropological literature, prompted by several major commissions, has found extensive consideration regarding the relationship between individual and collective rights: the Australian Human Rights and Equal Opportunity Commission (2001–2006), the Australian Law Reform Commission, the Northern Territory Law Reform Commission, and the Western Australia Law Reform Commission. The need to avoid entrenching a perception of oppositional relationships between collective and individual rights is a common theme in this body of work:

The claim that collective rights jeopardise traditional individual rights misunderstands the interdependent relationship between group and individual rights. The apparent tension between (them) is partially resolved once it is recognized that certain individual rights cannot be exercised in isolation from the community. This is particularly the case in indigenous communities...⁹⁵

On this same topic, the CHRA Review Panel explored the need for a “balancing clause” to accompany the repeal of s.67 in the CHRA. Its advice was to achieve a “balancing of the values of the Aboriginal people and the need to preserve Aboriginal culture” so that adjudicators would “actually hear evidence and representations on the issue of whether the interest of the individual and the community are properly balanced.”⁹⁶ Of importance, the Panel’s goal was that such a balancing clause be sufficient to “defeat a claim by an individual, who is unconnected with the community.”

This goal is similar to one commonly expressed regarding s.25 of the Charter. That is, the objective is to avoid the abrogation or derogation of the broadly collective rights protected in s.35 and those noted in s.25 while defeating claims made against such rights by non-Aboriginal people based on equal rights provisions in the Charter. The CHRA Review Panel’s approach identifies an objective that may well be identical to that expressed by s.1.2 in the newly amended CHRA.

What about balancing individual and collective rights within the community itself, however? There are several directions to consider in answering the matter. One approach would invoke the anthropological-sociological perspective: (a) is the person involved truly a member, and (b) was the rule truly sanctioned. A proper balancing between statutory human rights law and First Nations legal traditions and customary laws might witness the

⁹⁴ Shannon Adair Williams (1999), “Human Rights in Theory and Practice: A Sociological Study of Aboriginal Peoples and the New Brunswick Human Rights Commission, 1967–1997,” Master of Arts Thesis in Sociology, University of New Brunswick: 125–131.

⁹⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee of Inquiry into Aboriginal Customary Law in the Northern Territory*, (2003) quoting a 1995 statement by the Sex Discrimination Commissioner: cited at www.humanrights.gov.au/social_justice/familyviolence/family_violence2006.html.

⁹⁶ Minister of Justice and Attorney General of Canada, *Canadian Human Rights Act Review Panel* (La Forest Report), (2000): 32.

defeat of the claim by a member of that community. A second approach, involving the same social science literature, might ask whether the community concerned was sufficiently authentic to assert legal traditions or customary laws contrary to the claimant's asserted *CHRA* rights. This approach defers attention from the *bona fides* of the individual until after resolving the initial inquiry about the authenticity of the community itself. This leaves open the question of whether or not any legal traditions or customary laws are available to be sanctioned, at least until the secondary stage of consideration is overcome.

Certainly these are matters for legal consideration, but they raise as well issues for which the social science literature provides some guidance. A recent study for the National Centre on First Nations Governance examines the fear that expanded application of First Nations law will permit the violation of human rights within communities:

Internal oppression and power imbalances are another reality that all Indigenous people—like anyone else—have to consciously guard against. Sexism is a reality. Homophobia is a reality. Ageism (despite the rhetoric) is a reality. Many of our communities are not safe places for children and other vulnerable individuals. ... Since power dynamics are always part of social relationships, we need to ask what powers are preserved despite oppressive cultural, legal or social norms. When an oppressive cultural practice is identified, we need to figure out what the goal of the practice is, and then decide on how to meet that goal without oppression.⁹⁷

Here then is an important direction. When dealing with internal (rather than externally focused or sponsored) disputes, it is crucial to consider the role of legal tradition and customary law to identify the underlying normative framework, or goals, involved. As Val Napoleon advises, it then becomes the task to “figure out how to meet that goal without oppression.”

Nevertheless, as McDonnell cautions:

...there is probably something to recommend any native person's view on their customs under certain circumstances; but there is no view now existing that would be suitable for everyone all of the time. But it is clear too that no one on the outside can adjudicate the matter—there exist no external criteria for judging authenticity or pertinence in these matters one way or another. There also are no grounds for excluding anything a contemporary native may feel to be important—including, for instance, “individual rights.” How then can one choose between diverse or even contradictory priorities held by different sectors of the same community without alienating some of the population? It would seem impossible. Consequently, a shift in emphasis is required—away from choice and towards devising community consultation processes that are more obviously geared to creatively articulating the diverse concerns of present day native communities, thereby giving voice and shape to

⁹⁷ Val Napoleon (2007), “Thinking about Indigenous Legal Orders,” Research Paper for the National Centre for First Nations Governance: 18–19.

*contemporary customs that are a product of a dialogue between people with a distinct heritage and yet are capable of also being a realistic response to the concerns of today.*⁹⁸

McDonnell points as well to the challenge of balancing individual rights with First Nations legal traditions and customary laws. As he notes, “customary constraints and regulations among Git’ksan and Wet’suwet’en were pervasively age, gender and, above all, rank specific.”⁹⁹ Contemporary human rights legislation generally prohibits distinctions on precisely these grounds, yet there would seem to be an obvious need to provide some respect for traditional distinctions, such as in the allocation of scarce resources, as against individual equality rights. This might be particularly applicable regarding the often environmentally stressed realities facing many Aboriginal communities.¹⁰⁰

In conclusion, a balancing of individual and collective rights requires an understanding that “collective rights” or interests may not always be a faithful analogue for what First Nations legal traditions and customary law actually accomplish. Such traditions and laws are frequently a balancing of individual and collective rights within a cultural community and, sometimes, along and across the boundaries of that community and others. Individual rights, in this framework, are not opposed to but are given expression within a broader cultural framework of the particular collective identities, practices, and values of that culture. In addition, it is apparent that these identities, practices, and values are constantly evolving. It was no doubt in recognition of this reality that the Royal Commission on Aboriginal Peoples recommended that the *Charter* be given flexible interpretation taking into account “distinctive philosophies, traditions and cultural practices of Aboriginal peoples.”¹⁰¹

3. CONTESTED TRADITIONS: WHO TO TURN TO?

Who are the proper arbiters of First Nations legal traditions or customary laws? The socio-historical literature is no less vocal about this than the legal literature and litigation record. What is known is that an absence of an appropriate arbiter for what is accepted tradition or custom can severely undermine any effort at reconciliation.

As a general rule, we should be wary about the claims of elite members of a group to speak authoritatively about any group’s ‘traditions’ ... debates over human rights are often debates over who within the community should have the authority to influence or

⁹⁸ Roger McDonnell (1992), “Contextualizing the Investigation of Customary Law in Contemporary Communities,” *Canadian Journal of Criminology* 34 (3–4): 313.

⁹⁹ *Ibid*, p. 310.

¹⁰⁰ For an instructive anthropological study of how ritual and hierarchy operate within isolated, non-literate societies and provide for decision-making forms in controlling access to resources during seasonal scarcity, see Jonathan Hill (1984), “Social Equality and Ritual Hierarchy: The Arawakan Wakuenai of Venezuela,” *American Ethnologist* 11(3): 528–544.

¹⁰¹ Royal Commission on Aboriginal Peoples (1996), *Restructuring the Relationship*, Volume 2, Part One: 234.

*determine the interpretation of the community's traditions and culture. When individual members of the group demand their 'human rights', they often do so in order to be able to participate in the community's process of interpreting its traditions.*¹⁰²

The question of to whom third parties can turn to in order to receive guidance about what is a valid First Nations legal tradition or customary law is enormously important. Securing the opinions or perspectives of knowledgeable experts from within the affected community and culture may be the only reliable technique for determining whether and how individual rights or interests have been or may be accommodated. Complications may arise, however, if experts are uncertain or unwilling to answer to an outside agency.

The discussion in the social sciences about tradition and culture provides some direction on this issue, but not a great deal of certainty. The validity of a particular customary law expression may in fact not turn on it being rooted in practices that are from "time immemorial." It might rely instead upon the attestation of an acknowledged speaker of the truth about current practices, norms, laws, and traditions.

3.1. DETERMINATION OF CONTEMPORARY VALIDITY OF CUSTOM AND LAW

Napoleon and McDonnell suggest that the discovery process involved in determining genuine tradition and law is essentially an internal one, even if mediated by outside agencies.¹⁰³ Such an internal process is not amenable to outside determination.

Several examples suggest how contested traditions have been approached by third parties in order to determine contemporary—as opposed to pre-established—custom and legal practice. One concerned the case of an elder contesting the decision of an election committee confirming a female candidate's eligibility to run, asserting that it was inconsistent with tradition, which precluded female Chiefs.¹⁰⁴ In that case, the court examined the internal procedures of the election committee and, finding no procedural breach, ruled that the committee itself was validly expressing evolving custom.

A second case from Australia involved a Native Title Tribunal hearing concerning a small family group's rights to Aboriginal usage of a territory of mining importance. The claim was contested by the regional affiliate of a Commonwealth-recognized Aboriginal organization. The presiding judge relied upon a "notorious" elder to resolve the issue and he affirmed the applicant's identity as Aboriginal even though the organization questioned their entitlement.¹⁰⁵ In this case, the Tribunal avoided the use of third-party experts or tests of

¹⁰² Will Kymlicka (2001), *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford: Oxford University Press: 83.

¹⁰³ Val Napoleon (2007), "Thinking about Indigenous Legal Orders," Research Paper for the National Centre for First Nations Governance: 18–19; Roger McDonnell (1992), "Contextualizing the Investigation of Customary Law in Contemporary Communities," *Canadian Journal of Criminology* 34(3–4).

¹⁰⁴ *Harpe v. Massie and the Ta'an Kwach'an Council*, [2006] Yukon Supreme Court 1 (CanLII).

¹⁰⁵ The High Court of Australia found that communal acceptance of an individual's membership was to be determined "by the elders or other persons enjoying traditional authority among those people." High Court of

authenticity and relied instead on an arbiter from within the community, but one unaligned with state-sponsored institutions.

In short, this approach involves asking, “What is accepted as normative now, within the relevant community concerned”? The answer is to request the opinion of leaders or elders within the community uninvolved with political life.

3.2. ASSESSING AUTHENTICITY AND CONNECTION TO PRE-ESTABLISHED TRADITION

Another approach to determining authenticity utilizes tests similar to those adopted by the Courts in relation to claimed Aboriginal and Treaty rights. Contemporary expressions of legal traditions and customary laws must be fundamentally grounded in the distinctive customs, traditions, or culture of the community and must have continuity with practices that connect the current customs to a time when the culture was not distorted by outside influence.¹⁰⁶ This approach engages a deliberative role for outside agencies in assessing the weight of evidence that a claimed custom or tradition is in fact valid, not so much in relation to its objectives, though this may weigh on the matter, but rather from the evidence of connection of the claimed current practice to a valid pre-cursor.

A notorious example of this approach to determining authenticity occurred in the mid-1990s in Australia over a proposed bridge development that one Aboriginal women’s group claimed would breach sacred secret traditions, an assertion vigorously challenged by another Aboriginal women’s group. A Royal Commission and a judicial inquiry ensued and, as Tonkinson notes in his review of the issues, the only sure victim was the credibility of anthropology as a worthy interlocutor between Aboriginal and non-Aboriginal worldviews and concepts of law and morality.¹⁰⁷ In this instance, the government and the courts first deferred to those they perceived as “ready-made” arbiters, only to find them contested by equally assertive candidates for the position. This is not a case that should be regarded as exceptional since the degree to which fragmentation of traditional forms of decision-making also erodes the certainty with which outsiders might identify the proper arbiters of tradition or law in a First Nation community.

Another matter of claimed “tradition” conflicting with human rights norms is discussed by Wholan, who cites the complaint by an Aboriginal woman that there are “*now three types of violence in Aboriginal society—alcoholic violence, traditional violence, and bullshit traditional violence.*”¹⁰⁸ By extension, this allegation points to the potential for customary practice in a community—whether law-like or not—to be fundamentally adverse to broader

Australia, *Mabo v. Queensland* (No. 2) (1992) 175 C.L.R. 1 at p. 70.

¹⁰⁶ This approach is most clearly advanced in relation to the tests for “existing aboriginal and treaty rights” as set out by the Supreme Court in the “Van der Peet trilogy” of decisions in 1996. For an analysis, see Mark D. Walters (1999), “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982,” *McGill Law Journal* 44: 711–752.

¹⁰⁷ Robert Tonkinson (1997), “Anthropology and Aboriginal Tradition: The Hindmarsh Island Bridge Affair and the Politics of Interpretation,” *Oceania* 68(1).

¹⁰⁸ Catherine Wholan (2005), “Aboriginal Women’s Interests in Customary Law Recognition,” Background Paper #13, Law Reform Commission of Western Australia: 525.

norms of human rights law. This matter may not be amenable to community-based reconciliation via accepted community authorities.

McDonnell raises another challenge and area of potential contestation within an Aboriginal or First Nations community—the decision to codify customary law and tradition. Regardless of the motive for such efforts—whether to oust non-traditional influences or to regularize power relations in the community that may have the effect of ousting external Canadian law—s.1.2 offers any complainant, as with any respondent, the opportunity to reinforce their own expressions of what is valid in cultural traditions and customary laws. Whether such codifications should be regarded as valid adaptations of pre-established traditions has been contested, but unless clear violations of equally pre-established individual interests or rights are involved, such an initiative should not be rejected outright merely for having been subject to codification.¹⁰⁹

4. MEMBERSHIP

Cases involving exclusion from access to programs, services, and entitlements based on First Nations membership transcend the two main approaches suggested for determining the authenticity or validity, of claimed tradition or customary law. This is particularly the case in relation to the influence of the *Indian Act* regime. Discussed at greater length in Part III of this paper, the topic merits some mention here. Precisely because of the *Indian Act*'s intrusions—widely regarded as interfering with pre-existing customary law and tradition—any assertion by an *Indian Act*-based authority about its entitlement to control the content and meaning of customary law may well be exposed to question. Certainly membership rules and residence entitlements are likely to be tested in this fashion. So too are asserted customary laws or traditions regarding descent of property, adoption, and local governance, including voting rules under the provision in the *Indian Act* referring to “the custom of the band.”¹¹⁰

In cases where inclusion of a claimant within a First Nation's membership is in question, the response must not distort or alter actual legal tradition or customary law while attempting a balance of collective and individual rights. As suggested by Napoleon, pursuing an “internal dialogue” and reconciliation approach might involve a “goals-based” assessment. This can be done by consulting relevant community interests to determine what is regarded as a valid legal tradition or customary law and how best to give it modern expression without suppressing interests or rights based on non-traditional practices.¹¹¹

¹⁰⁹ For a U.S.-based discussion of codification issues and cultural authenticity, see Matthew L. M. Fletcher (2007), “‘A Perfect Copy’: Indian Culture and Tribal Law,” *Yellow Medicine Review* 2, Michigan State Legal Studies Research Paper No. 05-02, Available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1004311.

¹¹⁰ The *Indian Act* has since its inception recognized that Bands select their leadership in accordance with their customs or traditional practices, subject only to being displaced by government order, whether by the Governor in Council (up to 1951) or by the Minister (from 1951 to date). For a discussion, see Robert Groves (2007), “The Curious Instance of the Irregular Band: Canada's Missing Recognition Policy,” *Saskatchewan Law Review* 70(1): 153–182.

¹¹¹ Val Napoleon (2007), “Thinking about Indigenous Legal Orders,” Research Paper for the National Centre for First Nations Governance: 18–19.

Alternatively, authenticity issues in relation to such boundary constructs as membership might be managed in the same way as alleged s.35 rights are determined (most often arising in conflicts between state-based collective jurisdiction and Aboriginal collective interests in lands and resources). This second approach involves a different and more difficult balance—one requiring an elaboration of evidentiary and “balance of probability” tests. Justifications would be required, whether for a custom-based intrusion into the realm of individual rights protection or, conversely, for the intrusion of individual rights into the realm of constitutionally protected Aboriginal rights. The problem with this approach, of course, is that it inevitably involves an external determination of what many authorities, and many First Nations leaders, regard as an internal matter.

First Nations have a long and rich history of law-making and law-applying in relation to membership/kinship and “belonging,” but this has most often been in an oral context in which the determination of what is lawful or moral or good rests in the agents of cultural transmission of knowledge—elders, faith keepers, medicine people, and so on. In some cases, traditional elders are the obvious choice as arbiters, though care is needed to ensure that the determination of which elders are engaged in the process of discovering tradition reflects the relevant custom or tradition (i.e., expertise) and avoids any presumption of bias.¹¹²

5. SELF-GOVERNMENT AND ALTERNATIVE JUSTICE SYSTEMS

The incorporation of Aboriginal customary law within the interpretive mandate of the *Canadian Human Rights Act* necessarily raises the question of self-government with respect to the implementation, interpretation, and enforcement of such laws. While self-government rights have, since *Pamajewon*,¹¹³ been held to be topic-specific, *Delgamuukw* held that self-government in relation to matters not covered by federal or provincial law and touching on the preservation of Aboriginal social, cultural, spiritual, or political identity is worthy of deference.¹¹⁴

There is little guidance from the social science or historical literature about how such deference might best be achieved, particularly with respect to how a specific right of self-government might interact with the interpretation of Bill C-21’s “due regard” provision. In the majority of cases involving *Indian Act* Band Councils or their delegated institutions, the issue of the inherent right of self-government may not arise. However, in some cases, traditional councils or non-statutory bodies might claim authority regarding particular legal traditions or customary practices. Where non-First Nations people are involved as

¹¹² Further to the “Hindmarsh” affair cited above, see James Weinter (1997), “‘Bad Aboriginal’ Anthropology: A Reply to Ron Brunton,” *Anthropology Today* 13(4): 5.

¹¹³ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 rejected the argument that self-government, as a right protected under s.35, could exist in the abstract or as a broad jurisdiction. The Court ruled that any such right needed to be established in accordance with the fact-specific tests set out in *R. v. Van der Peet*, as discussed at Part I above.

¹¹⁴ *Delgamuukw v British Columbia* [1993] 3 S.C.R. 1010.

complainants, the question of self-government might not be at issue. Where, however, a complainant is connected to the community but may not enjoy equal entitlements due to the *Indian Act*, Band membership rules, or discrimination, the issue of s.35 rights, and self-government, might be raised, whether by the First Nation government concerned or by a traditional council or body asserting the existence of a tradition or custom.

Few First Nations authorities have to date asserted self-government rights as a basis for the validity of a particular legal tradition or customary law against a competing individual right or interest, whether codified or simply made subject to a specific interpretation procedure (for example, an elders' appeal committee). However, it is likely that such assertions will emerge, particularly as a result of s.1.2. Of course, there are also newly recognized First Nations authorities under modern treaties that have an unquestioned right of self-government—for example, the Nisga'a Lisims Government and the Tlicho Government—and each of these may exercise jurisdictions in relation to the protection and development of cultural practices that might prevail against a statutory protection of non-discrimination.¹¹⁵

Also worthy of consideration, and further study, are the suggestions of the Supreme Court to examine alternative dispute resolution in reconciling state laws and jurisdictions with Aboriginal rights and to conduct consultations to ensure minimal impairment of rights.¹¹⁶ In addition, there is the potential adaptation of Aboriginal innovations in the criminal sentencing process that might be considered for use in the balancing of conflicting individual and collective rights or interests. Building on traditional approaches to the restoration of social harmony, sentencing and peacemaking circles have emerged as a feature of First Nations community participation in the formal sentencing process.¹¹⁷ Similar courts have emerged for sentencing purposes in Australia (referred to as Koori Courts, Murri Courts, and Nunga Courts).¹¹⁸ There may be some concern with the potential for traditional and customary law procedures and authorities being “co-opted” to serve external goals (i.e., the implementation of the *CHRA*). Nevertheless, this is an area worthy of specialized study, particularly for more remote and traditional communities.

In closing this discussion concerning the appropriate arbiters of custom or tradition, it is important to add the potential for contemporary institutional sources of First Nations legal traditions and customary laws. In some cultures, there has been a rebirth and adaptation of specialized institutions for law giving (legislating or rule making) and the arbitration of

¹¹⁵ For example, the *Nisga'a Final Agreement Act*, S.B.C., [1999], c.2, provides in s.41 of Chapter 11 that Lisims Government laws to preserve, promote, and develop Nisga'a culture (and language) prevail to the extent of any inconsistency or conflict with provincial or federal laws.

¹¹⁶ The Supreme Court referenced the New Zealand government's approach as an example of an alternative dispute measure in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3. S.C.R. 511.

¹¹⁷ For an in-depth analysis of peacemaking circles in the Canadian context, see Barry Stuart (1999), “Peacemaking Circles: Principles for Introduction and Design of Peacemaking Circles,” L.L.M. Thesis, Osgoode Hall Law School, York University.

¹¹⁸ See *Report of the Law Reform Commission of Western Australia* (2006), Part V: Aboriginal Customary Law and the Criminal Justice System, available at www.lrc.justice.wa.gov.au/2publications/reports/ACL/DP/Part_05D.pdf.

disputes (including the establishment or re-creation of judicial institutions).¹¹⁹ Because no truly customary practice remains static or stagnant, there is no “boiler-plate” solution to this challenge.

The following suggestions emerge from the literature:

- To the greatest degree, the determination of a customary law and its application should be respected as a community-based dialogue.¹²⁰
- Contested traditions are bound to bring with them some degree of “opposing experts,” even amongst elders and traditional people. The potential for introducing an adversarial relationship to the determination of authenticity, and related balancing, may be significant.
- Culturally relevant procedures for securing consensus (e.g., talking circles) about the nature and significance of a particular tradition or law might be utilized.¹²¹
- Anthropologists, historians, or other social scientists with direct familiarity with the culture concerned may be needed for their expertise. At the same time, such expertise requires balancing from within the community itself to avoid characterizing a particular culture’s expression of custom or tradition in overly artificial, abstract, or formalistic terms.¹²²

CONCLUSION

In the social sciences, legal traditions and customary laws are treated as fairly elastic concepts. Traditions and customary practices evolve and adapt, sometimes quite rapidly, in response to changing social, environmental, and political circumstances. While the term “legal tradition” seems to require some level of historic connection to a specific First Nation’s traditions, such connections are not the core of “customary law,” whether viewed from a legal or social science perspective. To be sure, customary laws must be, by definition, “customary” to the community concerned. But that does not mean that a practice that is customary and lawful (i.e., obligatory and sanctioned) needs to be rooted in ancient times or pre-contact traditions.

¹¹⁹ James Zion (1988), “Searching for Indian Common Law,” in Bradford Morse and Gordon Woodman (Eds.), *Indigenous Law and the State*, Dordrech, Netherlands: Foris Publications.

¹²⁰ See Val Napoleon (2007), “Thinking about Indigenous Legal Orders,” Research Paper for the National Centre for First Nations Governance: 18–19; and Roger McDonnell (1992), “Contextualizing the Investigation of Customary Law in Contemporary Communities,” *Canadian Journal of Criminology* 34(3–4).

¹²¹ On the litigation concerning the relationship of s.35 rights and the *Indian Act*, see *Sawridge Band v. Canada* [(2009) F.C.A. 123 (CANLII)].

¹²² See, Peter R. Grant “The Tenth Anniversary of *Delgamuukw v. the Queen*: Two Legacies” (n.d.) at www.grantnativelaw.com/pdf/Delgamuukw_Ten.pdf.

Unwritten legal traditions and customary laws are of decreasing significance in many Aboriginal communities due to the emergence of formal structures of local governance—Band Councils, formal resolutions, and by-laws. Nevertheless, legal traditions and customary laws, as acknowledged formally in Bill C-21, likely exist in many community settings, whether within the context of First Nations operating as Bands under the *Indian Act* or otherwise (such as under modern self-government agreements or treaties).¹²³ What is of concern in Bill C-21 is determining how such traditions and laws operate so that individual rights are properly protected under the *Canadian Human Rights Act*.

Of significance are the modifying terms “legal” and “customary” in describing what “traditions” and “laws” are to be given “due regard.” These terms introduce a set of boundary questions and analytical issues for interpreting the intent of Bill C-21, some of which are contested. For some analysts the use of the term “law” in relation to cultural practices or traditions may disguise or even distort their reality. For others, the idea of casting contemporary cultural practices as law is to distort fundamentally the social structures within which such practices find expression. Yet others see it as essential that Aboriginal legal traditions and customary laws be strictly defined in order to avoid individual rights being subordinated unnecessarily.¹²⁴

In this part, we have explored the question of balancing, as prompted by Bill C-21 in the context of the social science and historical literature. Three topics have been assessed, with the following main conclusions:

1. The Scope and Meaning of Legal Traditions and Customary Law

- Legal traditions generally require a rootedness within a particular First Nation’s history, as opposed to being “invented tradition”;
- Customary law, in contrast, may be the product of contemporary pressures and community needs, amounting essentially to what is regarded within the community as lawful and obligatory, even if there may be no formal enforcement mechanism in place; and
- There are few external measures or objective tests to determine the validity of a

¹²³ For example, the First Nation communities that form the Nisga’a Nation and the Tlicho Nation are no longer Bands under the *Indian Act*. The two dozen communities that form the Federation of Newfoundland Indians (currently being considered for establishment as a Band) and several others across the country have never been *Indian Act* bands, but nevertheless are likely to have legal traditions and customary laws in respect of a range of matters. See Robert Groves (2007), “The Curious Instance of the Irregular Band: Canada’s Missing Recognition Policy,” *Saskatchewan Law Review* 70(1): 153–182.

¹²⁴ David Howes (2005), “Introduction: Culture in the Dominions of Law,” *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 20(1). Howes provides a useful overview of the emergent judicialization of culture, and assesses the movement in Canadian courts toward the use of “distinctiveness” and the associated need to connect contemporary practices to pre-contact origins in order to be both distinctively Aboriginal and protected under law.

legal tradition or customary law; it is essentially an internal matter for the community.

2. Balancing of Collective Rights and Interests in Tradition and Custom Context

- First Nations legal traditions and customary laws typically express a balance between individual rights and interests and broader social norms of behaviour that reflect collective interests and rights. Legal traditions and customary laws are usually an important vehicle for the protection of individual rights and interests within the community;
- Power dynamics within communities exist and may on occasion be masked as tradition or custom; and
- A key to balancing individual and collective interests regarding traditions and customs is to determine the underlying goal of the tradition or custom, and then determine how that goal can be served with minimal interference with individual equality.

3. Who to Turn To: Arbiters of Authenticity

- Traditions and customs may be hotly contested, particularly by complainants with clear and strong connections to the community concerned;
- External experts, anthropologists, for example, may be able to facilitate an understanding of particular traditions or customs, but may not be able to provide guidance as to contemporary relevance, meaning, or significance;
- Traditional First Nations expertise may be crucial to determining not only what laws and customs are at stake, and what goals they serve, but also in determining how individual interests are protected, or should be protected; and
- The essentially internal or First Nations specific nature of legal traditions and customary laws is such that community-based dialogue and consultation is central to discovering an appropriate balance of apparently contending rights and interests.

PART III: IMPACTS OF THE INDIAN ACT REGIME

INTRODUCTION

This part of the study explores the *Indian Act* regime in light of Bill C-21's "due regard" provisions. We canvass a range of literature on the *Indian Act's* impact on First Nations, as well as government perceptions of collective and individual rights, how they are currently balanced, and how they might be balanced in future. Some of the sources are academic, although surprisingly little attention has been paid to this set of issues in the social sciences.¹²⁵ In contrast, non-academic assessments that give greater attention to how concepts of "collectivity" and "individual rights" have evolved, including advocacy and policy-based work, have been undertaken by First Nations organizations, government agencies, and Royal Commissions.

Accordingly, in this part we provide a general context for understanding the documented and potential impacts of the *Indian Act* and its accompanying policies and programs on the social institutions and interactions most relevant to the application of the *Canadian Human Rights Act* to First Nations. When dealing with such impacts, we need to have an appreciation of the interaction of a fairly rigid set of national policies and laws reinforcing, suppressing, or altering the highly elastic, localized, and constantly re-forming expressions of First Nations cultures over the past 150 years and more.

1. THE *INDIAN ACT* REGIME

The phrase "*Indian Act* regime" describes not only the *Indian Act* itself, but also the many policies, rules, guidelines, and programs associated with the *Indian Act*. Of importance, the *Indian Act* provides the Governor in Council and the Minister of Indian Affairs with much discretion. This has emerged over the years in a variety of forms, including formal regulations subject to Parliamentary oversight, Ministerial orders, departmental policies, and a myriad of guidelines and related program and service access criteria, some of which may have government sanction (for example, Treasury Board decisions). For others, however, program and service guidelines may be little more than administrative documents produced without any senior level oversight and without public exposure.

A great deal of what has passed for federal Indian policy has no direct statutory source. For example, treaty annuities are usually paid only to persons with registered status; yet there is nothing in either the Treaties or the *Indian Act* that compels this limitation. Similarly, policies of relocation and the forced attendance of children at residential schools were without any particular sanction from Parliament other than the *Indian Act's* broad provisions for "social objectives" and "education."

¹²⁵ As discussed in section 2 below, the dominant academic focus in relation to the *Indian Act* has been on its historic and continuing discrimination against Indian women and social institutions tied to matrilineal descent.

In fact, most programs and services are non-statutory in nature and may, or may not, involve eligibility criteria linked to the *Act*, such as registered status or membership in a Band. They may also be regarded locally as “law” in the sense of being mandatory. As such, they are all part of the *Indian Act* regime.

Understanding the *Indian Act*’s legacy and influence as a statutory regime is critical to appreciating the context in which the *CHRA* will now operate.

1.1. THE *INDIAN ACT*

The *Indian Act* is one of Canada’s oldest pieces of legislation. Its origins lie in policies and practices dating to the 17th and 18th centuries—in trade and military relations, imperial proclamations—and 19th century colonial and post-Confederation statutes. The *Indian Act* has witnessed several consolidations in 1876, 1886, 1906, 1921, 1927, and 1951. Of importance, in few of these consolidations—and in none of the minor amendments—was there any attempt to accommodate pre-existing First Nations legal traditions and customary laws.

The final report of the Royal Commission on Aboriginal Peoples observed that:

The Indian Act of 1876 created an Indian legislative framework that has endured to the present day in essentially the terms in which it was originally drafted. Control over Indian political structures, land holding patterns, and resource and economic development gave Parliament everything it appeared to need to complete the unfinished policies inherited from its colonial predecessors. Indian policy was now clear and was expressed in the alternative by the minister of the interior, David Laird, when the draft act was introduced in Parliament: “[t]he Indians must either be treated as minors or as white men.” There was to be no middle ground.¹²⁶

Two generations after Laird’s comment, the same purpose was apparent in the words of the Deputy Superintendent of Indian Affairs appearing before Parliament to explain the policy goal of what was to become the *Indian Act* of 1921:

Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department—that is the whole object of this Bill.¹²⁷

As with the original legislation of 1876, and in contrast to pre-Confederation and early federal statutes, the objective was clearly intended to replace legal traditions and customary laws with pre-formed settler ideas about citizenship, governance, and socio-

¹²⁶ Report of the Royal Commission on Aboriginal Peoples (1996), Vol. 1, *Looking Forward, Looking Back*, Part Two: False Assumptions, Failed Relationship, Section 9, “The Indian Act.”

¹²⁷ Quoted from evidence of D. C. Scott, Deputy Superintendent of Indian Affairs, to the Special Committee of the House of Commons examining *Indian Act* amendments tabled in 1921: see John Leslie and Ron McGuire (Eds.) (1979) *The Historical Development of the Indian Act*, 2nd ed., Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Department of Indian Affairs and Northern Development: 114.

economic progress.

The application of the *Indian Act* regime has had profound impacts on local First Nations legal traditions and customary laws. Generally, the *Indian Act* itself, as a statutory instrument, has suppressed both Band and wider tribal-level institutions and expressions of customary law and legal tradition. As Ken Coates' recent summary of the *Indian Act's* impact on local governance and culture notes:

*Dependency, cultural loss, dispiritedness, and a profound sense of disengagement from the national political system are all logical outgrowths from a system that provided little room for individualism, collective action or a positive Indigenous agenda.*¹²⁸

As noted by Coates,

*to be a status Indian in Canada is to be immersed in a "total institution," which envelopes those caught under its authority and which renders them largely without power to determine their destiny. As noted in the considerable research and assessment conducted by the Royal Commission on Aboriginal Peoples, it has been this all-inclusive power—the reality of being under the effective daily control of a distant political authority—that has stripped away First Nations autonomy, undercut their confidence and restricted their ability to compete effectively with other Canadians. Total institutions remove dignity, self-respect and a sense of independence; they are, in return, the foundation of dependency, demoralization and cultural loss. Attempts to understand the full impact of the Indian Act must move beyond the details of specific clauses, amendments or regulations and must reflect more broadly on how this critical and long-standing piece of government legislation has sent a clear message to status Indians across the country that they are and were lesser citizens within Canada and therefore lacking in the most basic rights, freedoms and opportunities available to other Canadians. The Indian Act is both a symbol of cultural and political domination but, in a very real and pervasive sense, the cause of much Aboriginal suffering, discouragement and cultural loss.*¹²⁹

The specific impacts for any particular community, tradition, or custom are more difficult to assess. Any claim to be enforcing a tradition or custom will likely be contested by at least some within a community, often due to the felt corruption of "proper tradition" by the *Indian Act*.

¹²⁸ Ken Coates (2008), "The *Indian Act* and the Future of Aboriginal Governance in Canada," research paper for the National Centre for First Nations Governance: 4–5. Available at www.fngovernance.org/research/coates.pdf.

¹²⁹ *Ibid.*, p. 29.

1.2. THE STATUTORY ASSAULT ON IDENTITY

From its inception, the *Indian Act* intruded into an area that had been left to more traditionally organized First Nation communities — who would be recognized as a member. This topic of “identity,” which is central to any community, is also key to understanding the corrosive powers of the *Indian Act*.

The “Imperial” era, from the early 1600s to the late 1700s, was characterized by treaties of peace, friendship, and trade, and marked by the complete autonomy of First Nations over their internal affairs. Indian identity was rarely if ever questioned, as it was seen as a matter of internal self-government. Yet even as early as the beginning of the 1800s, a “protection” era began to emerge, particularly in Atlantic Canada and what is now southern Quebec and southern Ontario. The accelerated pressures of non-Indian settlement led to a demand for the “settlement” of Indian people and the first “reserves,” with or without treaties of cession.¹³⁰ Colonial legislation to control access to reserve lands eventually followed. This early legislation tended to avoid any definition of who was an Indian. The first such exclusionary clauses, found in 1869 legislation, were aimed principally at non-Indian spouses of Indian women out of a concern that they might act to break-up reserve holdings. From shortly after Confederation, the *Indian Act* explicitly moved away from earlier statutory descriptions of First Nations or Band communities as consisting of a person “of Indian blood, reputed to belong to the particular Body or Tribe of Indians.”¹³¹ The policy of protection had given way to a new focus on “civilization” and witnessed a rapid expansion of categories of exclusion to embrace a new category of “enfranchised” Indians: those meeting social tests of “civilization.”

This dominant motive of imposition saw Indian policies falling under one statute and the emergence of measures that stripped First Nations communities of almost any say in matters of internal membership, as well as the assumption of direct bureaucratic and Ministerial control over much of the day-to-day business of the communities. This period saw the goal of assimilation as dominant, and strongly reinforced, by force if necessary. This period also saw the greatest demand, for new agricultural, ranching, mining, and forestry lands by incoming settlers, and an associated reduction, mostly facilitated by federal officials, of reserve lands to less than 40 percent of historic levels.

A number of measures were also introduced to limit Indian membership and legal status entitlements, including a reinforcement of the patrilineal rule (in which, to be an Indian, one must have a father born of Indian status) and new “social capacity” tests (previously referred to as tests of “civilization”). At the height of this period, in 1951, the *Indian Act* also saw the introduction of the first “minimum descent” rule for exclusion from Indian legal status. This new test targeted the male lineage, since out-marriage in the female line was already an automatic ground for exclusion. This rule (the so-called “double mother clause”) held that a male person born into a Band was presumed to be not an Indian if his

¹³⁰ For example, see the article by Bonita Lawrence (2002), “Rewriting Histories of the Land: Colonization and Indigenous Resistance in Eastern Canada,” in Sherene Razack (Ed.), *Race, Space and the Law: Unmapping a White Settler Society*, Toronto: Between the Lines: 21–46: “As late as 1923, despite attempts to clarify boundaries... the federal government realized that almost half of the City of Toronto, as well as the towns of Whitby, Oshawa, Port Hope, Cobourg, and Trenton were on land that had not yet been ceded” (41).

¹³¹ “An Act for the better protection of the Lands and Property of the Indians in Lower Canada,” Canada, Parliament (1850).

mother and his father's mother were not born into Indian Band membership or status, regardless of their actual ancestry. Being presumed to have less than 50 percent Indian descent, at the age of 21 the person was no longer considered an Indian in law and required to leave the reserve. This approach to identity, involving the presumption that group membership be based on biological and generational connections (or blood lines), is still strongly evident in today's *Indian Act*.¹³²

In summary, the shift away from First Nations control over membership in the Imperial era to eventual state control in the modern era witnessed a wide range of efforts to grapple with "the Indian question." The first consolidated *Indian Act* of 1876 was amended 20 times in the first 25 years of Confederation before a more comprehensive policy on First Nations identities emerged. This was amended another 21 times by 1951, when the core policy on identity determination of today's *Indian Act* was largely set. Over time, the legislation moved from early efforts to achieve protection of Indian lands through a variety of measures to compel "civilization" and achieve "enfranchisement" to the final effort of the 1951 Act to promote assimilation into the general population.

Current and former distinctions as to membership and registered status under the *Indian Act* account for many discrimination cases brought by Aboriginal people under the *Charter* and the *Canadian Human Rights Act* today.

1.3. BILL C-31'S INTERIM RESPONSE

Ironically, just as section 67's exemption of the *Indian Act* was adopted as an "interim measure" in 1977 for the *CHRA*, so too was Bill C-31 described when passed in 1985. The dominant pressure to reform the *Indian Act*, leading to Bill C-31, was the fact that section 15 of the *Canadian Charter of Rights and Freedoms* was coming into force on April 17th of 1985. The *Charter* was widely expected to result in many of the discriminatory provisions of the 1951 *Indian Act* being found unconstitutional. In addition, section 12(1)(b) of the 1951 Act (the "marriage-out" rule), after being upheld by the Supreme Court of Canada, in the *Lavell* case,¹³³ had been successfully contested at the Human Rights Committee of the United Nations pursuant to the Optional Protocol of the *International Covenant on Civil and Political Rights*.¹³⁴

Bill C-31 was enacted on June 28, 1985, and made retroactive to April 17. As a result:

- The longstanding "patrilineal" and "social-test" rules for enfranchisement and assimilation, and the bar against registration of "half-breed scrip" recipients, were repealed;

¹³² The British Columbia Court of Appeal upheld the current "second-generation" cut-off rule within Bill C-31 as a valid legislative objective. See *McIvor v. Canada* (Registrar of Indian and Northern Affairs), [2009] B.C.C.A. 153. The Supreme Court denied the Plaintiff's application for leave to appeal.

¹³³ The Supreme Court upheld the *Indian Act*'s discriminatory regime in relation to the *Canadian Bill of Rights* in *Lavell v. A.G. (Canada)*, [1973] 34 D.L.R. (3rd) 145 S.C.C.

¹³⁴ On this important case, see Anne F. Bayefsky (1982), "The Human Rights Committee and the Case of Sandra Lovelace," *The Canadian Yearbook of International Law* 20: 244–265.

- For the first time since Confederation, Bands were legislatively affirmed as having the capacity to assume their own membership rules; the only limitation was that they respect “acquired rights” of persons with membership entitlements and that they comply with the *Charter of Rights and Freedoms*;
- Almost all persons who had held status or membership rights at one time and lost them were reinstated to status automatically, and after a two-year period to Band membership subject to Band rules; those who had been subjected to sex-based discrimination acquired immediate entitlement to Band membership;
- The system of voluntary and involuntary enfranchisement was abolished; and
- Entitlement to registration as a “status Indian” (and membership if a Band does not have its own rules) came under a new “second generation cut-off” rule that applies the 1951 Act’s “double mother clause” in a gender-neutral way.¹³⁵

Bill C-31 established a transitional period of two years during which Bands could adopt membership codes that might broaden or narrow entitlement to membership for certain classes of re-instatees and first-time registrants. After 1987, all persons already entitled to status under Bill C-31 would hold “acquired rights” to membership, rights that all subsequent Band membership rules would be bound to respect equally. Consequently, Bill C-31 had to divorce the concepts of registration or status entitlements from membership entitlement in a Band. Band control over membership could extend to non-status persons, and similarly could exclude status ones.

It was publically asserted by the Minister of the day, and has been much commented on since, that Bill C-31 involved balancing individual rights, particularly those of women and their children, with the collective rights of Bands to control membership. Minister Crombie stated that the balancing effort was also in aid of recognizing First Nations cultures and traditions:

*What greater intrusion can there be than the arrogance of assuming the right to tell another people of another culture and tradition who is and who is not a member of their community and who can and cannot live on their lands?*¹³⁶

¹³⁵ For assessments of Bill C-31’s amendments, see Gerard Hartley “The Search for Consensus: A Legislative History of Bill C-31, 1969–1985,” in Jerry P. White, et al., (Eds.) (2006), *Aboriginal Policy Research: Moving Forward, Making A Difference*, Volume V, Toronto: Thompson Educational Publishing; and Bradford W. Morse and Robert K. Groves (1987), “Forgotten Peoples: A Comparative Analysis of Métis and Non-Status Indians in Canada,” *Law and Anthropology 2*. For assessments of the historic and the current legislation’s impacts on key aspects of collective and individual identities and rights and interests in respect of both human rights and Aboriginal rights contexts, see Wendy Cornet, “Indian Status, Band Membership, First Nations Citizenship, Kinship, Gender and Race: Reconsidering the Role of Federal Law,” also in White et al.; and John Giokas and Robert Groves “Collective and Individual Recognition in Canada: The *Indian Act* Regime,” in Paul L. A. H. Chartrand (Ed.) (2002), *Who are Canada’s Aboriginal Peoples?* Saskatoon: Purich Publishing.

¹³⁶ Indian and Northern Affairs Canada, *Communiqué*, June 1985, as cited in National Centre for First Nations Governance (2006) *Reclaiming our Identity: Band Membership, Citizenship and the Inherent Right*. For commentary on Minister Crombie’s statement about his intended balancing, see

The achievement of balancing was, in general, characterized by the government as a compromise between opposing positions—those of First Nations communities and their predominately male leadership, and those of Indian women and non-status Indians seeking Band membership and registration entitlements. There was certainly a lack of consensus on how the *Indian Act* should be amended and different positions advanced.

The Speaker of the Native Women’s Association of Canada (NWAC) rejected the compromise and its legal distinction between status and membership entitlements, and expressed concern that the *Indian Act* was being used as a basis for self-government, instead of pursuing the necessary constitutional reform.¹³⁷ As well, several Indian associations and First Nations leaders rejected the proposed legislation for its “imposition of new members” and the consequent failure to respect an absolute right of Bands to control their own membership. Somewhat less opposed were the Assembly of First Nations and the Native Council of Canada (NCC).¹³⁸

This balancing effort, distinct from that now facing the Canadian Human Rights Commission and Tribunal, was between *Charter* compliance and equal treatment, on the one hand, with what can only be described as legislated patriarchy, imposed on First Nations communities from without with no regard for pre-existing legal traditions and customary laws. However, as Hon. David Crombie notes above, a third factor was in the mix as well: First Nations cultures and traditions.

2. CUSTOMARY EXEMPTIONS

In assessing the impact of the *Indian Act* on how the “due regard” provisions of Bill C-21 are to be applied, it is important to consider what federal legislation considers and accepts as “custom.”

From its first passage in 1868, the *Indian Act* attempted to move First Nations communities away from their own social and political forms towards “mainstream” conceptions of municipal governance. Nevertheless, the *Act* has always contained some degree of recognition of customary practices in certain areas, notably in relation to leadership selection and some aspects of membership.

www.fngovernance.org/toolkit/Institutions/Transparency_and_Fairness/CitizenshipCodes/ReclaimingOurIdentity_Paper.pdf.

¹³⁷ Gerard Hartley “The Search for Consensus: A Legislative History of Bill C-31, 1969–1985,” in Jerry P. White, et al., (Eds.) (2006), *Aboriginal Policy Research: Moving Forward, Making A Difference*, Volume V, Toronto: Thompson Educational Publishing: 23.

¹³⁸ *Ibid*, 24–25. Hartley does not cite the role played by the Native Council in his treatment. However, the NCC worked closely with Indian Rights for Indian Women and NWAC in having some 35 amendments made to the Bill at Committee (personal records of co-authors, Bradford Morse and Robert Groves, then advisors to the NCC on Bill C-31).

2.1. LEADERSHIP SELECTION

The *Indian Act* recognizes “customary” Chiefs and Band Councils, as set out in s.2 of the Act. The legislation was adapted and amended over time, however, to bring the system of “hereditary chiefs” to an end. This was originally attempted through “opt-out” provisions for the “advancement” of Bands by adopting election systems for choosing Chiefs and Councils, as well as for the entry of Band members into the mainstream through “enfranchisement.” These voluntary attempts at reform were almost completely unsuccessful.¹³⁹ Relatively few Bands adopted elective systems, and very few individuals volunteered for enfranchisement. Only two Bands in the history of the *Indian Act* chose to enfranchise as a group.¹⁴⁰

Up to 1951, however, the federal Cabinet could order any Band out of “custom” and into the elected system. For example, in 1924 the traditional Confederacy Council of the Six Nations of the Grand River (Canada’s largest reserve population) was ordered under the election system with the aid of the RCMP, a decision that has had ramifications ever since.¹⁴¹ In 1951, the Minister was given full discretionary powers to force an end to “custom” Chiefs and Councils. In the early 1950s, hundreds of Bands were summarily ordered under the *Indian Act* election system. For many, a main reason for adherence to custom was not a desire to follow hereditary selection procedures¹⁴² but rather that the majority of members—particularly in British Columbia, parts of Ontario and Quebec, and much of the North—lived on Crown land and not on reserve and would otherwise be disenfranchised. Over the ensuing decades, many Bands managed to convince successive Ministers to reverse the impulsive orders of the early 1950s and permit them to restore their own systems of democratic legitimacy.¹⁴³

What remains important, however, is that the *Indian Act* originally and still recognizes Chiefs and Councils chosen “according to the custom of the band.” The degree to which such customs might be disputed, including in actions under the *Canadian Human Rights Act* is

¹³⁹ Enfranchisement provisions pre-dated Confederation in *An Act to encourage the gradual Civilisation of the Indian Tribes in this Province, and to amend the Laws respecting Indians*,” S.C. [1857], c.6 of Upper Canada. It became a main feature of the *Indian Act* from 1869 through to 1985. For a discussion of the experience, see John Tobias “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy” in J. R. Miller (Ed.) (1991), *Sweet Promises: A Reader on Indian–White Relations in Canada*, Toronto: University of Toronto Press.

¹⁴⁰ One was the Michel Band in Alberta, some of whose members unsuccessfully contested the enfranchisement (in 1956) before the Indian Specific Claims Commission in 1997. See Indian Specific Claims Commission *Friends of the Michel Band Claim* (1998). The second Band was a small family group on an unnamed reserve cited in Indian Affairs Branch, Department of Citizenship and Immigration, *A Review of Activities, 1948–1958*: 35–36.

¹⁴¹ For a popular account of the 1924 events and a broader discussion of the impacts, see Brian Maracle (1996), *Back on the Rez: Finding the Way Home*, Toronto: Penguin Books: 20–25. For a more academic review of the extensive litigation surrounding the political status and leadership system of Six Nations, see Donald Bourgeois (1986), “The Six Nations: A Neglected Aspect of Canadian Legal History,” *Canadian Journal of Native Studies* IV(2): 253–270.

¹⁴² While there are many hundreds of Bands whose Chiefs and Councils are selected under what the *Indian Act* recognizes as custom, only about a dozen nationwide actually involve hereditary selection. Most involve formal elections, and some involve appointments or approvals by elders’ councils. See as well Stewart Clatworthy (2003), *A Review of First Nations Membership Codes*, prepared for INAC by Four Directions Project Consultants.

¹⁴³ Robert Groves (2007), “The Curious Instance of the Irregular Band: Canada’s Missing Recognition Policy,” *Saskatchewan Law Review* 70(1): 153–182: 167.

unclear, but a spate of cases in federal and territorial courts makes it likely.¹⁴⁴

2.2. MEMBERSHIP CONTROL

The second major area of accepted autonomy for Bands, and thus for the operation of their legal traditions and customary laws, concerns membership. It is important to understand that all Bands were seen as autonomous in how they decided their initial membership upon being initially established as Bands, subject only to federal rules of exclusion that began to operate in 1869. Despite those exclusionary rules—aimed particularly at Indian women who married non-Indians—a range of conditional acceptance rules were developed over time. For example, illegitimate children and individuals who were deemed, by foreign residence, to have forfeited membership, were legislatively stripped of legal status as Indians, subject, however, to Band decision. In both cases, the *Indian Act* (variously from 1876–1951) recognized that the Band’s consent was important in relation to inclusion of the individuals concerned.¹⁴⁵ Neither of these provisions survived the 1985 amendments in Bill C-31. As discussed below, Bill C-31 replaced these previous powers with a general membership authority for Bands choosing to “opt-in” to the new provisions of the legislation.

Bill C-31 restored—though not in an explicitly “customary” context—the power of a Band to opt out of the *Indian Act*’s membership entitlement provisions and adopt its own membership laws. Bands were able to restrict several categories of persons who would otherwise receive an acquired right to membership if and only if they passed their membership codes before June 28, 1987. Thus while Bands are able to add anyone as a member, there are (still somewhat uncertain) restrictions on who can be denied membership (likely subject to due process and *Charter* limitations). The basic elements of this new authority and its limitations are as follows:

Acquired rights:

- Persons who had membership before 1985 and who lost membership due to sexually discriminatory provisions—in sections 6(1)(a), (b), and (c)—have “acquired rights” under section 10(4) of the Act;
- Persons born of two Indian parents, both of whom are entitled to be members of that Band, after 1985 but before a Band adopts membership rules also have “acquired rights”; and
- A Band’s membership rules cannot deprive persons in these two categories of membership, solely by reason of a pre-existing situation (e.g., by reason of former

¹⁴⁴ The most recent Federal Court case concerning the *Charter* and custom election systems is *Clifton v. Benton*, [2005] F.C.T.D. 1030 (CanLII), in which the *Charter* reasoning in *Corbiere* was held against the relative exclusion from voting of non-resident members. See also *Harpe v. Massie and the Ta’an Kwach’an Council*, [2006] YKSC 1, in which the appointment of a female chief was contested unsuccessfully as in breach of custom.

¹⁴⁵ *Indian Act*, 1876, section 3.

loss of membership before 1985).¹⁴⁶

Conditional rights:

- Former members who lost membership due to any of the enfranchisement provisions of earlier *Indian Acts* (whether voluntary or involuntary);
- Persons born after 1985 of two parents with entitlements under s.6(1) with the parents having membership entitlements in different Bands; and
- A person born before or after 1985 only one of whose parents is entitled to membership under s.6(1).¹⁴⁷

A Band’s membership rules can deprive the persons in these three latter cases if those rules were passed before June 28, 1987. After that date, all those with conditional rights receive full membership entitlements; subject, however, to new Band membership rules that respect such acquired rights.

The *Indian Act* was also amended to provide that Band members not otherwise entitled to be registered be nevertheless “deemed” Indians for some, but not all, purposes of the *Indian Act*, including participation in Indian moneys distribution, electoral and civil rights, and protection of their interest in reserve lands from taxation or restraint.

Given the new importance to the *Canadian Human Rights Act* of giving due regard to First Nations legal traditions and customary laws, it is relevant to analyse the emergent membership rules adopted by Bands since 1985, as studied in a 1992 report conducted for the Assembly of First Nations (AFN):¹⁴⁸

Lineal Descent Rule (no minimum descent cut-off)

- 94 Bands with rules that require that one parent be a member of the Band.

Two-Member Parent Rule

- 64 Bands with rules requiring both parents to be members of the Band.

¹⁴⁶ See *Indian Act*, R.S.C., 1985, sections 6, 10 and 11.

¹⁴⁷ The latent discriminatory effects of Bill C-31 with respect to its “second-generation” cut-off of entitlement, and regarding how “cousins” and “siblings” are differentially entitled as a result of how in-marriage of non-Indians was treated before 1985 has been litigated in *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, [2009] B.C.C.A. 153. At trial, the B.C. Supreme Court concluded that all “second generation” cut-off and related cousins and sibling distinctions are in breach of the *Charter*. On April 6, 2009, the Appeal Court overturned the ruling and found that a much narrower set of persons have experienced non-justified discrimination. This included only those treated differently than persons born before 1985 and entitled to s.6(1)(c) status because of the “upgrading” of re-instatement entitlements for their comparator group, persons re-instated as a result of former loss of status and membership due to the “double mother clause”—s.12(1)(a)(iv) in the 1951 Act. The Appeal Court found Parliament’s adoption of the second-generation cut-off of entitlements to be demonstrably justified under s.1 of the *Charter*. The decision has not been appealed by Canada but has been by McIvor.

¹⁴⁸ Stewart Clatworthy and Anthony Smith (1992), *Population Implications of the 1985 Amendments to the Indian Act: Final Report*, Prepared for the Assembly of First Nations: iii. Clatworthy updated the 1992 analysis in 2003, and his updated findings are reflected in Stewart Clatworthy (2003), *A Review of First Nations Membership Codes*, Prepared for INAC by Four Directions Project Consultants.

Minimum Descent Rule (*Indian Act equivalent*)

- 58 Bands; identical to all Bands without their own rules (435 Bands altogether).

Blood Quantum Rules

- 26 Bands with a variety of rules ranging from a minimum descent from ancestors with acknowledged or assumed “full” Indian ancestry (usually 50 percent or 25 percent) to more complicated rules involving at least one parent with Band membership rights and the other parent meeting a minimum “blood quantum” (up to 100 percent).

The AFN study did not report the detailed nature of the “blood quantum” rules used by 30 of the Bands concerned.¹⁴⁹

In addition, the membership rules of many Bands have been styled as “codifications” of legal traditions or customary laws, though the Act does not formally refer to them as such. Whether or not such traditions are protected under the Constitution remains largely unknown. At the same time, there is some degree of accommodation for the expression of local custom and tradition through the Act’s acknowledgement of the Chief and Council’s powers, under s.81 of the Act, in relation to the following:

- Allotment of reserve lands among members [s.81(1)(i)];
- Residence [s.81(1)(p.1)]; and
- Rights of spouses and children to reside with members on reserve [s.81(1)(p.2)].

In such cases, a First Nation government may adopt a new law or seek to codify an established legal tradition or customary law.

2.3. ADOPTION

The *Indian Act* historically recognized that children adopted in accordance with Indian custom acquired whatever rights natural birth children would have in relation to the descent of property. However, it was not until 1985 (with Bill C-31) that entitlement to membership and/or registration was also recognized. Although the courts have recognized the legal effect of Indian and Inuit custom adoptions since the early 1960s, the government

¹⁴⁹ A pure “blood quantum” rule takes into account descent from any Indian ancestor (regardless of their registration or membership in recognized groups) as far back as acceptable records permit (and thus, like any descent quantum rule, must establish some date before which all ancestors are presumed to be “full blood”). It is clear that some Band rules using a “blood quantum” do not follow this approach, but instead are membership-descent quantum rules (using either single or double-parent rules). An example is the Tsuu T’ina membership rules, which grant all members on the Band list on April 16, 1985 “full-blood” status, and disentitle anyone who marries a non-member, who has two children less than one-half “Tsuu T’ina blood quantum,” as well as those with less than one-half “blood” (in this case, membership descent quantum). The rules also follow a more literal “blood quantum” by permitting spouses of members to apply for membership if they have more than one-half “Indian blood quantum” (a term otherwise undefined in the Membership Code). The Tsuu T’ina Code, as of 1994, was summarized in the intervener factum (Non-status Indian Association of Alberta) in *Twinn et al. v. The Queen*, Federal Court Trial Division, T-66-86, and available in the on-line case law archive of the Native Law Centre of Canada.

has taken the stance that Bill C-31's recognition of custom adoption was, in connection to registration entitlements, a newly granted one, and not a clarification of pre-existing law. This stance suggests that unless legal traditions and customary laws are explicitly accorded statutory recognition, they are subordinate to federal statutes or provincial laws of general application to Indians through s.88 of the *Indian Act*.¹⁵⁰

In summary, the *Indian Act* today only expressly recognizes three forms of customary law or legal traditions:

- Chiefs and/or Councils chosen in accordance with the custom of the band;
- Control over membership, where the Band membership involved has voted to (re)assume control; and
- Children adopted in accordance with Indian custom.

3. THE PROGRAM AND SERVICE CONTEXT

3.1. ON RESERVE PROGRAMS

The *Canadian Human Rights Act* is concerned with equal treatment in employment, housing, and the provision of federal goods and services or those, as with Band or Tribal Council programs, delivered under federal jurisdiction.¹⁵¹ It is therefore appropriate to look beyond the *Indian Act's* provisions to how programs and services are actually delivered by First Nations governments.

Most federally funded programs for First Nations people are tied closely to reserve-based governance and delivery. Indian and Northern Affairs Canada (INAC) is involved in funding or delivering a wide range of programs that would, for non-First Nations communities, be typically funded or delivered by provinces and municipalities: social assistance, primary and secondary schooling, child welfare, and a range of local infrastructure support programs for power, water, sewer, roads, and so on. Up to the 1970s, such programs were managed directly by INAC but are now almost entirely controlled by Band governments or Tribal Councils and funded by INAC. Similarly, up to 2001 many of the social programs were restricted to reserve-resident Band members or status Indians; now access is largely based on residence, regardless of status or membership. Accordingly,

¹⁵⁰ In this the government has been supported by the Supreme Court of P.E.I. in *Tuplin v. Indian & Northern Affairs Canada*, [2001] PESCTD 89 (CanLII). On the judicial recognition of the effect of custom adoption, see Cindy L Baldassi (2006), "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences," *University of British Columbia Law Review* 39: 63.

¹⁵¹ In respect of the delivery of programs and services funded by INAC, Tribal Councils should not be confused with either the anthropological term "tribal" or with councils formed for treaty or land claims assertions, negotiations, or settlements. The 80 or so Tribal Councils that INAC regularly funds came about because of a 1980s effort to achieve "economies of scale" and to have organizations linking adjacent or culturally connected Bands take over functions of the agency and district offices INAC was then wrapping up. They deliver technical services, engineering contracting, and some centralized program administration, such as post-secondary education for their member First Nations. Accordingly, these Tribal Councils are "twice-delegated" in nature, requiring a mandate from their constituent Bands in order to deliver the service involved, and as well needing the approval and funding of INAC.

issues over perceived discrimination in accessing services on reserve may now extend not only to status and/or member residents, but also to any resident, regardless of nationality or entitlement under the *Indian Act*.

3.2. TRANS-RESERVE PROGRAMS

Only a few programs and services transcend the reserve boundary, but they are of considerable monetary value. Included are Health Canada's non-insured health program (currently budgeted at some \$1.3 billion out of the \$2.13 billion federal budget for First Nations and Inuit health programs). The largest general INAC program is post-secondary education (at \$325 million).¹⁵²

Uniquely, neither of these programs have needs tests associated with eligibility.¹⁵³ However, other than for local medical transportation, most health benefits are delivered by third-party specialists based on federally determined eligibility, and are thus unlikely to attract *CHRA* scrutiny for purposes of s.1.2. In the case of post-secondary education, however, Band Councils and Tribal Councils are the main administrators and, given the capped budgets in place, decisions can be expected to attract controversy. Certainly the preference given in some First Nations to Reserve residents or Band members (as opposed to status or registered Indians not members of the Band) is likely to be contested, and discrimination based on family status has already been alleged before the Tribunal.¹⁵⁴

In addition, Band and Tribal Councils may be centrally involved in other programs and services, such as labour market training programs, control over food fishing licences off the reserve, and so on. In the latter case, one might expect that legal traditions and customary laws would play a significant role. Yet the delivery of these programs may become highly contentious where, as has occurred, the First Nation involved excludes non-resident members from voting in elections and also prevents their access to food fishing under a permit system controlled by the Band.¹⁵⁵

Of importance to the program context, various First Nations leaders have asserted that education and health programs engage collective rights under several of the post-Confederation "numbered" Treaties. Accordingly, it is possible for a First Nations respondent to assert that those programs and services directly controlled by a First Nations government are subject to legal traditions and customary laws, rather than being bound

¹⁵² NIHB figures are drawn from the Estimates, Part II, for 2007–2008. INAC's post-secondary assistance program costs are not reported in the Estimates apart from the total education expenditure authority of \$1.424 billion for 2007–2008. However, it is generally accepted that the PSEAP program costs approximately \$325 million.

¹⁵³ In the U.S., Australia, New Zealand, and elsewhere, similar programs are delivered, but all are means tested, and all are available to the entire Aboriginal population who meet the respective country's constitutional definitions (in the U.S., this requires membership in a federally recognized Tribe, a matter entirely determined by the Tribes themselves). In Australia and New Zealand, in contrast, entitlement is based, broadly, on self-identification, descent, and community acceptance.

¹⁵⁴ *McAdam v. Big River First Nation*, 2009 CHRT 2 (CanLII). The Tribunal declined to substantiate the claimant's position of discriminatory treatment.

¹⁵⁵ An unreported 1997 case between the Essipit Band (now referred to as the Pessamit Band) and several members (Quebec Provincial Court).

only by individual equality norms.¹⁵⁶

4. RECOGNITION AND BALANCING OF INDIVIDUAL AND COLLECTIVE RIGHTS AND INTERESTS: ASSESSING THE IMPACT

4.1. FOUR CASES OF IMPACT: THE POTLATCH, PROPERTY, KINSHIP, AND CONNECTION

By way of exploring how the *Indian Act* regime has influenced or conflicted with legal traditions and customary laws, let's look at four areas that involve the traditional distribution of, or access to, goods and/or services within a community.

The *Indian Act* regime had a significant impact on a major tradition in west coast and interior cultures in British Columbia by outlawing the potlatch (or balhats, as it is also known amongst the interior Carrier people).¹⁵⁷ The potlatch is a broad category of ceremonies that relates to an equally broad range of social, economic, and political functions. From 1884 to 1951 the potlatch was outlawed (though still practiced underground), with the objective of replacing "improvident ways" with largely patrilineal land holding and descent of property rules, as well as an elected Chief and Council system.

The re-emergence and reformation of the governance, land holding, and inheritance traditions of west-coast First Nations, typically associated with potlatch ceremonies, may well become a controversial topic. In such disputes, the *Indian Act* has clearly distorted common practice and forced a departure from legal traditions and customary laws. It remains to determine whether the contemporary expression of customary laws is communally supported and that general principles of balance with individual interests have been met. However, the *Indian Act*, like the fur trade and other broadly influential outside forces, cannot necessarily be considered entirely alien in influencing contemporary land holding patterns. Indeed, this would seem no less the case than the impact on traditional laws and customs in relation to land and land use by modern notions of Aboriginal land rights and claims.¹⁵⁸

In the case of kinship, the impact of the *Indian Act* regime is obvious insofar as membership in Bands was, until 1985, entirely dictated by a patrilineal rule of descent.

¹⁵⁶ See page 3, Peter Alan Barkwell (1981), "The Medicine Chest Clause in Treaty No. 6." *Canadian Native Law Reporter*: 1–23, and John L. Taylor (1986), *Two Views on the Meaning of Treaties Six and Seven: An Examination of the Significance of Treaties Six and Seven in the Light of Archival Records and Indian Testimony*, Ottawa: Indian Claims Commission.

¹⁵⁷ See Jo-Anne Fiske and Betty Patrick (2000), *Cis Dideen Kat, When the Plumes Rise: The Way of the Lake Babine Nation* Vancouver: UBC Press. See also Tina Loo (1992), "Dan Cramner's Potlatch: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1994–1951," *Canadian Historical Review* 73(2): 125–166. On the Tsimshian potlatch, see Christopher Roth (2002), "Goods, Names and Selves: Rethinking the Tsimshian Potlatch," *American Ethnologist* 29 (1): 13–150.

¹⁵⁸ For a discussion of the distortions faced by customary law and tradition by modern land claims and the notions of "aboriginal title," see Paul Nadasdy (2002), "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations," *American Anthropologist* 104(1): 247–261.

Less obvious is how the *Indian Act* affects kinship norms and other institutions, such as inheritance, under customary law. For example, the traditions of families, or clans, might indicate that a niece or nephew who cared for a deceased person is considered the closest kin. The *Indian Act* regime, however, excludes anyone more remote than spouse, children, or siblings, and if there is no such person, any real property (i.e., a Certificate of Possession) reverts to the Band.

Another example involves what is often referred to within a community context as “relationships,” and entails the kind of case that will arise if status hierarchies or connections within a community find reflection in the distribution of scarce resources, such as employment. As discussed in Part II, status hierarchies are a common feature of many traditional First Nations communities, and may conflict with norms associated with equal treatment in employment. Decisions about employment could well involve the assertion that it is customary, or that it is traditional, to give priority to those with the strongest connections to the community and that “community” might be locally defined in kinship terms that do not follow conventional residence-based, familial, or Band membership connections.

Determining connection to the community could involve *Indian Act*-based measures, leading to the treatment of re-instated or first-time registered individuals as being relatively “distant” from the community in contrast to those who had always been members. Such a practice would clearly have strong associations with the *Indian Act*’s historic and continuing entitlement provisions and might well not seem to be giving “due regard.” However, it may be the case that the First Nation had a widely regarded and adhered-to custom of preference in employment in community works that has, over the past quarter century, become commonly associated with “Bill C-31 status” distinctions.

Certainly most persons who have experienced distinction based on their former status or membership might strongly contest the validity of any such “tradition.” In such cases, giving due regard to a common tradition or custom might be very difficult without having some internal, community specific arbitration mechanism available.

4.2. FIRST NATION vs. BAND

It is a truism that First Nations people hold to distinctly “communal” perceptions. It is also widely held that this sense of collective values is sometimes placed in opposition to “individual rights” or, more broadly, “individualism.” As noted in Part II, this sense of opposition is not something one generally finds featured within legal traditions or customary laws. It appears more a response to the intrusion of outside influences and claims to control broader First Nation or local community life.¹⁵⁹

Any discussion of individual and collective rights must address concepts of the collectivity around which and through which individuals associate and identify themselves. The *Indian*

¹⁵⁹ For a Canadian-specific discussion on this point, see Will Kymlicka (2001), *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford: Oxford University Press: 83. A more cross-cultural discussion of the issue is David Howes (2005), “Introduction: Culture in the Dominions of Law,” *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 20(1), ft. 62.

Act's intrusion into the matter cannot be assigned sole responsibility for disputed collective identities, but it is the dominant source of the much-contested legitimacies of First Nations and Tribal Councils. While many First Nations societies traditionally operated through small family-based bands, these formations were highly flexible, constantly forming and reforming as a result of economic, ecological, and seasonal, as well as spiritual influences and political leadership factors. The location of such communities onto fixed reserves with gradually decreasing boundaries and increasing populations has no doubt played a significant role in transforming how individual and collective rights and interests are perceived and balanced.

Certainly there are many who regard an *Indian Act* Band, and especially the reserve community as a "First Nation" proper, and the locus of even sovereign authority.¹⁶⁰ Many others regard this as a result of the *Indian Act*, and entirely un-traditional. Pursuing the vision of governance elaborated by the Royal Commission on Aboriginal Peoples, these voices seek to build broader nation-level (e.g., Mi'kmaq-wide, Mohawk-wide, or Wet'swet'en-wide) institutions that not only strengthen rights, interests, and capacities, but also advance individual rights, capacities, and opportunities.¹⁶¹

Similarly, the *Indian Act* has a strong association with reserves. Almost all First Nations hold reserve lands. The first legislative efforts by Upper and Lower Canada, and by the post-1867 Parliament, were directly concerned with protecting such lands from non-Indian trespass and illicit alienation. Accordingly, the powers of Band Councils today are largely restricted to reserve-based activities. The concept of "collective" may have been framed in relation to residence on the reserve. Thus, non-reserve residents may often feel that they are treated as not being a part of the "collectivity" in some matters and that any interests they have are cast as illegitimate and "individual." Nevertheless, in the context of any particular opposition between individual and collective rights, it is important to appreciate the potential for contested conventions regarding the level at which the collective interest or right operates:

Customary laws were implicit guidelines developed from examples or tacit models of conduct, rooted in spiritual force, similar to instinct in the animal world and as natural as gravity to modern science. These guidelines were captured in oral traditions and rituals, and the shared hardships and joys of living... Mi'kmaq customary law produced a matrix of processes which provided guidelines in broad outline, not precise detail. But its standards were neither universal, objective nor

¹⁶⁰ This axiom is assumed, without being firmly insisted on, by the 1982 founding Charter of the Assembly of First Nations.

¹⁶¹ This stance was clearly advanced by the Royal Commission on Aboriginal Peoples, which concluded that only in rare cases would Bands now constituted under the *Indian Act* also be found to be "First Nations" with constitutional standing and capable of exercising aboriginal and treaty rights: *Royal Commission on Aboriginal Peoples* (1996) Vol. 2, *Restructuring the Relationship*, Part I, Chapter 3, Minister of Supply and Services Canada. For the Commission's summary of various First Nations views on the matter, see pp. 157–161.

*enforced by man-made institutions. Initiating the customary process was a family responsibility, remedy was a clan function.*¹⁶²

Legal traditions or customary laws may invoke an intermediate level of authority between the wider community and the individual, most often the extended family, and in more structured societies, a clan. Contemporary expressions of these intermediate bodies may be present under different structures, but still carry out what are traditional functions. Some way to recognize and engage these intermediate institutions may be crucial to finding and realizing a contemporary balancing within a First Nation's cultural traditions.

4.3. GOVERNANCE AND CONCENTRATION OF POWER: IMPACTS ON COLLECTIVE AND INDIVIDUAL RIGHTS

Another dynamic in perceptions of collective and individual rights and interests involves the distribution of governance in a community. Governance has always been a feature of legal traditions and customary law in some fashion, whether determined by family, clan, band, tribe, or state-like institutions. However, the concentration of extensive powers within a single authority is relatively unknown in most (though not all) First Nations cultures. This concentration of power over scarce resources (particularly the delivery of programs and services) has undoubtedly affected concepts of the individual, the collective, and their proper interrelationship.¹⁶³

From the 1950s through to the 1970s, the instruments of federal spending power became more elaborate and far-reaching. Reserve communities were introduced to systematic social welfare schemes, local primary and secondary education systems, and related truancy laws to compel attendance. The increasing incorporation of provincial child and family services onto the reserve, as residential schools were closed, resulted in the much-admonished "sixties scoop," when large numbers of Aboriginal children were sent to live with non-Aboriginal middle-class families.¹⁶⁴ The result was a virtual "cradle-to-grave" regime, superintended by local Indian Agents and backed by an increasingly bureaucratic system of district, agency, and regional administration. The *Indian Act's* provisions for extensive Ministerial and Cabinet authority to approve, override, or vary Band decisions eroded the transmission of legal traditions and customary law.

However, by the mid-1970s, after the failure of the Trudeau government to gain support for a complete abandonment of the *Indian Act* system and with the official withdrawal of the White Paper of 1969, discussions began on the potential for Indian self-government. There was, by the early 1970s, no emergent model or accepted middle ground. The government decided to decentralize as much of its directly managed programs and services as possible. This move, led by the withdrawal of all resident Indian Agents by the mid-1970s, followed

¹⁶² William B. Henderson (1985), "Native Customs and the Law," Research Paper prepared for the Research Branch, Corporate Policy, Indian and Northern Affairs Canada.

¹⁶³ For a discussion, see Craig Proulx (2001), "Current Directions in Aboriginal Law/Justice in Canada," *Canadian Journal of Native Studies* 20(2): 371–409.

¹⁶⁴ Patrick Johnston (1983), *Native Children and the Child Welfare System*, Ottawa: Canadian Council on Social Development.

by the closure of almost all district offices, has expanded over the past quarter century. Much of the administrative control over programs and services has now been transferred to Chiefs and Councils, and to the newly formed Tribal Councils.

Thomas Flanagan's commentary on this interposition of the Chief and Council system for the formerly centralized and federally controlled "total institution" is worth quoting:

*When the demand for aboriginal self-government became irresistible, Canada responded, not by replacing the Indian Act with more appropriate legislation, but by abolishing the position of Indian agent and delegating departmental powers to local governments on Indian reserves. As a result, band governments now possess the same comprehensive control over their people's property, jobs, and housing that Indian agents used to exercise. In too many cases, local factionalism replaces distant administration as an oppressive force in people's lives.*¹⁶⁵

The concentration of authority and power is anathema to many traditionalists and a source of concern about how individual rights and interests are and can be respected within First Nations traditions.¹⁶⁶ Some communities have taken steps to introduce a countervailing power in decision-making (through Justice, Housing, Economic Development and other Commissions with arms-length authority from that of Band Councils).¹⁶⁷ Yet in smaller communities, most discretionary authority regarding income, social welfare, housing, and public sector employment is centralized in the Band office.¹⁶⁸ In this circumstance, the pursuit of individual interests and rights can invite considerable risk, not because of any necessary cultural disapproval of individual interests or equality norms, but because of the simple scarcity of goods and services in a community.¹⁶⁹

In summary, the characterization of a claim to equality in treatment may appear within some First Nations communities as a challenge to authority, and might expose the complainant to retribution or, at the very least, social isolation. This is a reality to which the CHRC and the Tribunal must be attuned.

¹⁶⁵ Thomas Flanagan, "Bring Democracy to Indian Reserves," *Globe and Mail*, 20 December 2006. For a similar view on the concentration of powers, but one that disputes some of Professor Flanagan's core presumptions, see Gordon Gibson (2009), *A New Look at Canadian Indian Policy: Respect the Collective—Promote the Individual*, Vancouver: Fraser Institute: 171–173. Available online at: http://www.fraserinstitute.org/commerce.web/product_files/NewLookCanadianIndianPolicy.pdf.

¹⁶⁶ Val Napoleon (2007), "Thinking about Indigenous Legal Orders," Research Paper for the National Centre for First Nations Governance: 18–19; also see Taiaiake Alfred (2008), *Peace, Power, Righteousness: An Indigenous Manifesto*, 2nd Ed., London: Oxford University Press.

¹⁶⁷ See, for example, the discussion of the re-emergence of clan-based decision-making in Anishinabe communities: Patricia D. McGuire (2008), "Restorative Dispute Resolution in Anishinabe Communities—Restoring Conceptions of Relationships Based on Dodem," Research Paper for the National Centre for First Nations Governance.

¹⁶⁸ This is a rarely documented reality. For several years, CBC Radio's "Dead Dog Café Comedy Hour" (1997–2001) featured weekly send-ups of Band office politics, and it is in this genre that the issue is perhaps most frequently analysed.

¹⁶⁹ For a discussion on small First Nations and the difficulties faced in combating the concentration of power, see Calvin Helin (2006), *Dances with Dependency: Indigenous Success Through Self Reliance*, Vancouver: Orca Spirit Publishing.

CONCLUSION

The *Indian Act*'s influence on contemporary social, economic, political, and legal frameworks—those familiar to Canadian jurisprudence and those influenced by local customary practice in First Nations communities—is as undeniable as it is highly complex and mostly undocumented.

The review of the social science and historical literature discloses the following conclusions:

- There is a continuing remnant of the historic discriminatory treatment of women married to non-members, and related distinctions in status and membership entitlements as between cousins and, in some cases, siblings;
- A non-traditional concept has crept into the dialogue concerning “collective” inclusion and exclusion boundaries, most often associated with status entitlement distinctions, and with reserve residence;
- The contested nature of Band Councils (and in some cases Tribal Councils) as “creatures of the *Indian Act*” remains potent, particularly in relation to claims that First Nations governments are acting in accordance with legal traditions or customary law;
- There is a suspicion common in some communities that “Bill C-31” Indians and long-time non-residents are importing alien and threatening conceptions of “equality” and “individualism,” particularly when they cite *Charter* or Human Rights legislation; and
- The potential isolation and even retribution of complainants is a real concern given the degree of concentration of power and discretion over services vested in First Nations governments.

CONCLUSION: FRAMEWORKS FOR THE ACHIEVEMENT OF BALANCE

This part of the study consolidates the results of our review of the legal and social science literature, and the *Indian Act*'s impacts. It sums up the main conclusions about individual and collective rights, balancing, and First Nations legal traditions and customary laws. As well, it introduces the 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
2. The “Stand-Alone” Justification: The Aboriginal and Treaty Rights Framework

1. CONCLUSIONS FROM THE LITERATURE REVIEWS AND INDIAN ACT ASSESSMENT

There are several conclusions that can be drawn regarding the challenge presented by Bill C-21 in achieving a balancing of individual and collective rights and interests. Our study has examined the question from a number of vantages:

- The background context of the original exemption of the *Indian Act* from the application of the *Canadian Human Rights Act*;
- An analysis of the relevant provisions of Bill C-21—notably s.1.2—against the legal literature and case law;
- A review of the historical and social science literature; and
- An assessment of the impact of the *Indian Act* regime on concepts and ideas about both individual and collective rights and interests.

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.”

1.1 SCOPE AND TIMING OF s.1.2's IMPACT

As discussed in Part I, there is a set of key questions facing the implementation of Bill C-21, in particular concerning the obligation to give “due regard” to First Nations legal traditions and customary laws:

- What is the meaning of “First Nation government”?

- What activities trigger the obligation to give “due regard”?
- When and for which First Nation government activities does the repeal of s.67 take effect?

This set of questions is almost entirely a matter for legal guidance; drawing upon the legislative context of Bill C-21, the case law and the legislative precedents for the term “First Nation.”

Of key importance is the fairly narrow purpose of Bill C-21, which was to end the 1977 exemption of activities covered by the *Indian Act*. However, equally important is the wording of s.1.2’s “due regard” requirement, which clearly goes beyond the restriction in s.3 of Bill C-21 (dealing with the 3-year suspension of complaints against First Nation governments in relation to the *Indian Act*).

1.2 THE MEANING OF “LEGAL TRADITIONS AND CUSTOMARY LAWS”

This essential topic engages legal, social science, and historical literature. It is also the most unlikely arena for definitive conclusions, if only because so few cases exist where a positive incorporation of Aboriginal customary legal systems into state-based law has occurred. The legal literature suggests a variety of meanings and related tests for what legal traditions or customary laws entail.

The historical and social science literature—particularly that of anthropology—offers a richer context-based or localized understanding of traditions and customary practices, including law-like behaviour, but this level of analysis does not lend itself to broader understanding. The internal comprehension of cultural practices and laws is generally not applicable to broader, trans-cultural findings. Nevertheless, there are certain constants in understanding both “legal traditions” and “customary laws” within the social science and historical literature.

1.3 BALANCING INDIVIDUAL AND COLLECTIVE RIGHTS AND INTERESTS

The challenge provided by Bill C-21 regarding the concept of “balancing” is two-fold. Section 1.2 asserts that the balancing required is of individual rights and interests “against” collective rights and interests, an approach that seems to assume conflict where in fact no opposition may exist. The reference to “balancing” in s.1.2 is not a “stand-alone” requirement, but is instead subordinate to the need to give “due regard” to “First Nations legal traditions and customary laws.” This implies that giving “due regard” means taking into account any balancing that occurs *within* First Nations legal traditions or customary laws.

As discussed in Parts I and II, the first challenge—that of assuming an opposition between collective and individual rights—is familiar to human rights or *Charter* law: indeed, it is the norm. However, an oppositional presumption is not common within First Nations legal traditions or customary laws. While a conflict-based relationship of rights and interests

might exist for non-members or persons whose interests are not communally based, this would not necessarily occur where the individual was part of the community. Where a community member or a person closely connected to the community is concerned, a legal tradition or customary law should accommodate if not advance individual rights and interests. Where such an accommodation is not evident, the tradition or law concerned might merit serious question.

In addition, balancing rights and interests can only occur to the “extent that they are consistent with the principle of gender equality.” Therefore, this latter principle places a specific limitation upon how these rights and interests are susceptible to being balanced if there is a potential conflict with the overriding goal of “gender equality.”

The second challenge deals with an interpretation of Bill C-21 that sees any requirement to “give due regard” only where there is an accepted First Nation legal tradition or customary law that also balances individual against collective rights or interests. If such a balancing is absent, or such traditions or laws are not invoked as relevant, then the *CHRA* would be applied as it would against any non-First Nation respondent.

It is clear that further exploration is required to inform a robust understanding of several important matters implicated by the challenge of balancing individual and collective rights and interests in the context of First Nations legal traditions and customary laws:

- Consultative approaches for the determination of legal traditions or customary laws, as opposed to externally invasive efforts to “validate” sometimes contested traditions or laws, need to be developed; and
- The assessment of particular customs and traditions—those most likely to be invoked in connection with the *CHRA*—needs much further work, if only to glean a better understanding of how individual rights/interests are accommodated within such traditions, or indeed may be suppressed in favour of communal interests and goals.

2. INTERPRETIVE FRAMEWORKS

The two main conceptual frameworks most likely to be applied in considering First Nations legal traditions and customary laws are:

- 1 The “Supplemental” Approach: Adapting Human Rights and *Charter* Law to First Nations legal traditions and Customary Laws
- 2 The “Stand-Alone” Justification: The Aboriginal and Treaty Rights Framework

In the vast majority of cases likely to come before the Canadian Human Rights Commission and Tribunal, the Human Rights/*Charter* perspective will hold sway. Rarely—likely, only when a legal tradition or customary law is contested by a complainant—will the Aboriginal Rights framework come into play.

2.1 THE “SUPPLEMENTAL” APPROACH: ADAPTING HUMAN RIGHTS AND *CHARTER* LAW TO FIRST NATIONS LEGAL TRADITIONS AND CUSTOMARY LAWS

General Nature of the Approach

In Part I of this study we considered three broad legal frameworks: Human Rights law, *Charter* law, and Aboriginal and Treaty Rights law. The essential steps and principles involved in Human Rights and *Charter* law are so similar in application that—with one exception—they should be treated together. The exception concerns a matter on which there is very little judicial guidance—the interpretation of *Charter* rights in respect to the “aboriginal and treaty rights and other rights and freedoms” set out at s.25 of the *Charter*. Where this issue emerges, it is likely that the “stand-alone” framework applicable in Aboriginal and Treaty Rights law will be brought into play.

The “supplemental” approach stresses the existing Human Rights/*Charter* law procedures and, in general, would involve what the Supreme Court of Canada found in *Zurich Insurance*:

*The underlying philosophy of human rights legislation is that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics. Exceptions to this legislation should be narrowly construed.*¹⁷⁰

This position is consistent with the fact that s.1.2 in Bill C-21 does not confer new rights, but rather is an interpretive guide for how the rights set out in the *CHRA* are to be implemented and applied. There is a four-stage process in using this approach:

1. Jurisdiction and Scope
2. Determination/Characterization of Rights and Interests
3. Giving Due Regard: The Consideration of Legal Traditions and Customary Laws as Justifications
4. Balancing

Stage 1: Jurisdiction and Scope

The first consideration in this approach is to determine whether a claimant’s case falls within s.1.2 and therefore involves both “due regard” and “balancing.”

Scope of “First Nation government”

Generally, the “supplemental” approach to interpreting s.1.2 would follow established principles. For example, in dealing with the definition of “First Nation government,” the context of the *CHRA* would suggest that only those bodies under federal jurisdiction apply. While it is possible that Inuit, Métis, or off-reserve Aboriginal institutions that deliver

¹⁷⁰ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

federal programs might engage in discriminatory practices, this approach would assume that unless these entities are directly legislated for, any complaints against them would fall under provincial or territorial human rights laws, as they have in the past.

Programs and Services under the *Indian Act*

While complaints dealing with services and programs pursuant to the *Indian Act* would clearly fall within the scope of the provision, it is likely, given the nature of the clause, that two other types of programs and services would be included, even in this narrower and “supplemental” approach:

1. Programs and services delivered by Band Councils, Tribal Councils, or other governing authorities that have already been subject to *CHRA* scrutiny. If this class of cases is included, there is no reason why the s.1.2 “due regard” requirement should not come into effect immediately with respect to them.
2. Programs, services, and related decisions made by other First Nation authorities not covered by the *Indian Act* (e.g., Nisga’a, Westbank, Cree-Naskapi). As with the first class, the 36-month suspension of s.1 of the *CHRA*, as amended, would not logically apply.

Stage 2: Determination/Characterization of Rights and Interests

The next step would be to characterize accurately the issues and interests at stake. Normally, this would be a matter for CHRC investigators and conciliation experts—a stage that might be usefully facilitated by specialists having a familiarity with First Nations community and cultural contexts.

The Individual’s Interests and Relationship with the First Nation

One of the main goals of the implementation clause, as noted by the *Canadian Human Rights Act* Review Panel, is to “defeat claims by individuals unconnected with the community.” The characterization of the individual’s interests and rights in the community therefore becomes critical.

There are at least seven discreet classes of potential claimants subject to *CHRA* application:

1. Non-Aboriginal persons with no connection to the community;
2. Aboriginal persons with no formal connection to the community (but to whom, for example, the existing “Aboriginal Employment Preference Program” of the CHRC now applies);
3. Aboriginal or Non-Aboriginal persons who live in the community (residents) and therefore have demonstrated connections, but who are not intermarried or otherwise related to community members;
4. Non-Aboriginal persons intermarried with Band members;
5. Aboriginal persons living in the community with direct family ties (including via marriage), but who are not members of that Band;

6. First Nation members of the Band not resident on the reserve; and
7. First Nation members of the Band resident on the reserve.

The characterization of collective interests—particularly if framed as devolving from First Nation legal traditions or customary laws—will almost certainly have to ensure that the tradition or law is described properly and of relevance to the complaint, and that it is not a contested or widely disregarded tradition or custom. It may be that even at this early stage the involvement of a person widely regarded in the community as knowledgeable in this regard—even if not a member—might be engaged to advise on an appropriate characterization.

Mediation/Conciliation

In approaching alternative dispute resolution (ADR), it is important to consider alternatives in relation to Aboriginal or First Nation contexts:

Within the context of Canadian Aboriginal communities, Indigenous methods for resolving disputes have also been revived and applied. Within these communities, there are three distinct modes of alternative resolution processes. One approach involves Western-based paradigms such as negotiation, conciliation, arbitration and mediation. A second approach applies Indigenous paradigms to resolve disputes according to the culture and custom of the Indigenous parties involved. Due to the diversity and distinctiveness of Aboriginal peoples across the continent, these methods of dispute resolution are multifaceted; they reflect the Indigenous teachings from which they come and subsequently differ across Aboriginal nations. A third approach focuses on combining the two paradigms, so that aspects of Western-based paradigms are synthesized with traditional Indigenous paradigms.¹⁷¹

Effective ADR techniques require knowledgeable mediation/conciliation specialists with a familiarity with First Nations communities and cultural contexts. There is currently no established specialized body of accredited First Nation mediators/conciliators. However, the development of such a body might usefully be encouraged, perhaps trained at a First Nations institute.

The goal at this stage—as in the normal process of characterizing the individual and collective interests involved in a complaint—is to assist the parties to reach a joint solution of the issue. Such a reconciliation approach is quite consistent with First Nations cultures and traditions. The challenge is to determine, regardless of the apparent conflicts between a First Nation government decision and the complainant’s *prima facie* rights, whether there is an underlying and community-endorsed goal that can be reconciled with the individual’s

¹⁷¹ Victor Winona (2007), “Alternative Dispute Resolution (ADR) Contexts: A Critical Review,” prepared for the Canadian Human Rights Commission: 37.

right to equal treatment.

Investigation: The Challenge of Contested Traditions/Interests

Without specialized assistance, the investigatory procedures common to most complaints lodged under Human Rights legislation may be inadequate to provide the Commission with appropriate advice about whether a case should proceed to a Tribunal. Clearly, a balanced and accurate report on the status of a particular “legal tradition or customary law” might require a more intensive community-level investigation than has been experienced by the Commission to date. Circumventing this challenge may involve a different kind of investigation; perhaps a “peacemaking circle” at the community level involving highly regarded “validators” to ensure impartiality.

Of particular importance where a complainant contests the nature or relevance of a collective interest or tradition will be the ability to probe, sensitively but effectively, the degree to which the tradition actually does accommodate (or deny) the individual’s right or interest, and whether it is a genuine and widely regarded expression of community interest or customary law.

Stage 3: Giving Due Regard: The Consideration of Legal Traditions and Customary Laws as Justifications

Normal Justifications

Assuming a *prima facie* case of discrimination under the *CHRA* has been made by the complainant, this approach would then move to an assessment of justification. If s.1.2 is considered as a supplement to the existing justification test, an assessment would first be made under s.15(1)(g) of the *CHRC*, utilizing the normal principles and considerations of “undue hardship,” and so on. If the base justification test is not satisfied, then the assessment turns to s.1.2.

Giving Due Regard to First Nations legal traditions and Customary Laws

If legal traditions or customary laws are alleged, and not contested by the complainant, they would be given “due regard” in the objective and subjective justification tests and would have to meet the test of “reasonableness.” Considerable discretion would otherwise normally be granted in deciding whether there was a justification consistent with legal traditions, customary laws, and fairness in the balancing of the individual’s rights and interests (normally understood via *CHRA*’s protections) and those of the First Nation community.

A full and fair appreciation of legal traditions and customary laws could be quite complex. The process of determining the specific accommodation of individual rights might not be set out clearly in the practices involved, but rather applied within the community in the

broader normative framework. As noted in the anthropological literature, such accommodations are nested within a culture and its day-to-day practices, and not readily perceived from an outside perspective. The Commission and Tribunal may nevertheless have to conduct such an “external” review to determine whether the application of the customary rule or law was conducted in a way that would not offend.

Several considerations arise from the review of the legal and social science literatures:

1. In the case of a legal tradition, there would need to be some clear evidence that the tradition was genuinely sourced in the First Nation’s cultural practices, rather than being adopted because of non-traditional (e.g., *Indian Act*) influences, and that it is still widely accepted.
2. In the case of customary laws, the courts have provided rather more guidance, including criteria such as:
 - a. Practices generally acceptable to members of the Band;
 - b. Practices upon which there is a ‘broad consensus’; and
 - c. Practices firmly established, generalized, and followed by the majority of the community.
3. To these criteria might be added that invoking a legal tradition or customary practice and its enforcement be consistent with the custom or tradition involved (which may involve intermediate bodies such as extended families or clans).

Dealing with Contested Traditions and Laws

Where asserted legal traditions and/or customary laws are contested, or where uncertainty exists as to their true character in relation to the nature of the complaint, then a more difficult determination is required. Whether aided by third parties or not—this exercise would involve arbitrating whether a legal tradition or customary law remains operative under the particular circumstances. This exercise can lead to the kind of approach called for in the “stand-alone” framework, involving a more detailed, lengthy, and costly determination of the existence of traditions and customs in the context of s.35 or Aboriginal and Treaty rights law.

If collective interests or rights are alleged by the respondent (and not in the context of legal traditions or customary laws) then a reconciliation might still be required, but subject to the over-arching preference for the prohibition against discrimination where a clear conflict exists, as well as in recognition of the overriding principle of gender equality. In this case, due regard would have to be given to the collective interests or rights involved, certainly in relation to the use of such criteria as preferential treatment of Band members, establishing service priorities for certain sub-groups in the community, and so on.

A more difficult issue will be how best to frame the impacts of the *Indian Act* regime itself. Such impacts might be portrayed as valid contributors to necessary adaptations of First Nations laws and traditions in the course of balancing collective and individual rights.

Alternatively, the impact of the *Indian Act* regime might be cited as the source of illicit discrimination.

Above all, discretion will be needed to determine a fair balancing of rights and interests, whether framed by reference to legal traditions or to differing collective and individual rights and interests. Under the “supplemental” approach, the model is to follow standard approaches to “reasonableness” and evidence regarding claimed traditions or laws.

Stage 4: Balancing

As noted in our discussion in Part I, there is a lack of clarity about whether s.1.2 involves giving due regard only to the “balancing” that occurs *within* the framework of First Nations legal traditions and customary laws, or also to balancing such traditions and laws (styled as “collective rights and interests”) *against* individual rights and interests. This is something of a Hobson’s choice.

Internal Balancing

A good deal of the legal and social science literature treats the expression of legal traditions and certainly customary laws as an entirely internal cultural dynamic, and one that is difficult to assess from outside. Assuming broad regard is given by a community to the norms invoked and the expected outcomes are widely respected, the roles and relationships between the individual and wider interests in the community will be determined largely on an internal, cultural, basis.

Some of the literature suggests that priority should be given to the harmonization of interests and rights within legal traditions and customary laws, involving, for example, a “discovery” process with the engagement/participation of well-regarded elders and others with an intimate knowledge of traditions. In a criminal law context, healing circles do more than merely determine appropriate sanctions and compensation. They also act to restore harmony and re-build fractured relationships. A similar process of discovery might prove useful where it is clear that a legal tradition or custom is widely regarded, but where the degree to which it has accommodated the complainant’s interests remains subject to challenge.

Giving due regard to the internal balancing process also suggests the importance of integrating or re-integrating the individual into the broader distribution of roles and responsibilities within the community, guided by legal traditions and customary laws. By definition, such traditions and laws embrace all members of the community, while involving different assignments of roles, responsibilities, and duties. Where a person is simply excluded, it may be difficult to claim that individual rights and interests have been accommodated in accordance with legal traditions and customary laws. However, there may also be cases where individual rights and roles are accommodated, but are lacking in validation.

Balancing Traditions/Laws “Against” Individual Rights and Interests

The task of balancing is no less problematic where the dispute involves legal traditions and customary laws expressing “collective” rights or interests that are perceived as being opposed to individual rights or interests. This understanding of how Bill C-21 might be interpreted poses a danger of artificially creating a perception of division within the community, and frequently at the expense of the individual’s sense of belonging. Certainly where legal traditions and customary laws appear to be operating with broad community support, the preference might be to avoid casting interests and rights in opposition, but instead to support community-based solutions that avoid any overlay of arbitrary power relations.

However, where a claimant has not been a part of a customary process by virtue of a claimed rule or custom that excludes the individual entirely, as opposed to treating the person differently, there is no alternative to balancing collective against individual rights and interests. It might well be that s.1.2 should be seen, as the *CHRA* Review Panel recommended, as sufficient to defeat discriminatory claims by persons with no connection to the community. However, there are many gradations of connection between individuals and communities, some that may have a strong degree of value and legacy within legal traditions (many of which invoke ranking systems of clan, status, and gender, as well as age), and others that may not (e.g., persons reinstated under Bill C-31 being systematically treated differently).

The balancing of collective and individual rights—which is only one potential meaning of Bill C-21’s “due regard” provision—would tend to involve the CHRC and Tribunal in what might be a more familiar process of arbitrating differences and, in the end, making determinations on the basis of subjective and objective tests of justification. However, stepping outside of the cultural context of First Nations legal traditions and customary laws entails risk, as noted in both the legal and social science literatures. Most important is the risk of disrupting the nested accommodations and reciprocal relationships that exist and evolve within First Nation cultures and communities.

2.2 THE “STAND-ALONE” JUSTIFICATION: THE ABORIGINAL AND TREATY RIGHTS FRAMEWORK

General Nature of the Approach

The second approach to Bill C-21 and s.1.2’s interpretative provision is to regard it as the basis for First Nation governments to assert autonomous justification for what would otherwise be treated as discriminatory treatment. As suggested in some of the testimony before Parliament during debate of Bill C-44 in 2007, this approach might involve viewing s.1.2 as the equivalent to the “shield” provided by s.25 of the *Charter* in relation to

individual rights claims made against the Aboriginal or Treaty rights protected in s.35 of the *Constitution Act, 1982*.

There is a perception—still tentative and possibly inaccurate—that the s.25 “shield” for Aboriginal and Treaty rights within the *Canadian Charter of Rights and Freedoms* is primarily intended to protect against non-Aboriginal interests that might wish to limit Aboriginal and Treaty rights, or other rights and freedoms encompassed by s.25, on the grounds included within s.15, or on the basis of the fundamental freedoms protected by s.2. The matter becomes less clear and more contentious when the right being alleged under s.35 involves the *CHRA* or *Charter* equality rights of a person with clear community connections with the First Nation concerned. In this case, a different order of understanding emerges. Complex considerations about historical and systemic discrimination against “minorities within minorities” emerge.¹⁷²

The nature of this approach is to see the “due regard” function less as an “exceptional” interpretive duty that merely supplements the existing justifications, but rather as a stand-alone recognition of Aboriginal legal traditions and customary laws as a basis for a defence against a charge of discrimination.

There are two broad comments necessary in relation to this approach. First, it is clear that Bill C-21 had the primary goal of repealing the s.67 exemption. It was not meant to introduce new rights. Nevertheless, in some circumstances valid legal traditions and customary laws might well be protected under s.35, and sheltered from abrogation or derogation by the *Charter*. In this case, it might appear strange for the *CHRA*’s human rights provisions to be able to infringe on rights that might be shielded from *Charter* override.

A stand-alone justification approach engages what we reviewed in Part I as the “s.35” model of assessment. This framework has evolved in the jurisprudence to place an onerous burden on any Aboriginal assertion of an s.35 right. Despite the likely desire of First Nations people and leaders to advance local customs and traditions or collective interests in the mould of s.35, there are considerable risks in doing so in the context of a *CHRA* case involving alleged discrimination, particularly when the complainant has clear and compelling connections to the community. The sheer costs involved would likely be prohibitive in most contexts of an individual’s complaint about discrimination in service, accommodation, or employment. The risks of loss to the community could be quite high.

There is a five-stage process in using this “stand-alone” approach:

- 1 Jurisdiction and Scope
- 2 Determination/Characterization of Rights and Interests

¹⁷² Perhaps the best example of how these complexities have been considered is in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2. S.C.R. 203.

- 3 Is the Aboriginal Right Infringed by the Individual's Equality Demand under the *CHRA*?
- 4 Justification
- 5 Balancing

Stage 1: Jurisdiction and Scope

As with the “supplemental” approach, the first consideration is whether a claimant’s case falls under s.1.2 and therefore involves “due regard” and “balancing.” However, the “stand-alone” approach assumes that s.1.2 is an attempt to implement Aboriginal rights as expressed through legal traditions and customary laws. As such, it might be that the term “First Nation government” would be given an accordingly expansive interpretation. The Supreme Court has held (in *Delgamuukw*) that only Parliament may enact laws directly touching on the “core of Indianness.” The Court also defined s.35 rights (whether for Indian, Inuit, or Métis groups) as falling under Parliament’s exclusive mandate under s.91(24) regarding “Indians, and Lands reserved for the Indians.” Therefore, unlike the “supplemental” approach considered above, the scope of complaints that could trigger a “due regard” requirement could include any Aboriginal governing authority. This potential for a broad and inclusive scope for the “due regard” provision merits further consideration, if only because it would involve the expansion of the normally understood “federal jurisdiction” limitation of the *CHRA*. It may also involve potentially overlapping applications of federal, provincial, and territorial human rights commissions.

Considerations concerning the scope and timing of s.1.2’s coming into force remain the same as under the “supplemental” approach.

Stage 2: Determination/Characterization of Rights and Interests

At this stage in the assessment, the general considerations common to Aboriginal rights litigation become relevant. The normal practice where an alleged Aboriginal right is posed, as a defence against a claimed statutory right, is the three-step procedure to establish whether there is an existing right:

Step 1, according to the procedures laid down by the Supreme Court, would begin with determining the characterization of the claimed right, which in the case of a legal tradition or customary law would involve an attempt to specify exactly what practice, custom, or tradition is at issue.

Step 2 involves the determination of whether the claimed practice, custom, or tradition is integral to the “distinctive culture” of the Aboriginal group: Is the practice “central” to the group’s pre-colonial culture? This requirement has proved exceedingly complex and expensive to demonstrate, usually involving expert testimony from anthropological and historical experts, as well as considerable oral testimony.

Step 3 begins when the existence of the right has been established and involves the First Nation respondent having to demonstrate both that the custom or tradition is sourced in the pre-contact, pre-sovereignty, or (for Métis) pre-effective-control period. Aboriginal rights specifically asserted for practices or customs that were largely introduced after these dates have not been protected under s.35.

In addition, the respondent would have to establish that continuity in the exercise of the custom or tradition, however modified in contemporary times, is still exercised. In the context of land and resource rights, this test has become highly complex and specific, with a general requirement to establish continuous use in a specific area. In the *CHRA* context, where services, employment, and accommodation are at the centre of dispute, this test might prove difficult, if not impossible, to adapt. (Except for cases, such as accommodation or access to land, where an individual's request is denied, for example due to family status or lineage where the property concerned falls under a particular clan's control and management).

Stage 3: Is the Aboriginal Right Infringed by the Individual's Equality Demand under the CHRA?

The Relevance of the Claimant's Relationship to the First Nation

The familiar range of Aboriginal rights litigation typically involves conflict between an individual or entity unrelated to the Aboriginal community pursuing activities under federal or provincial law that is opposed by the Aboriginal community as a breach of s.35 rights. In the *CHRA* context, the characterization of the claimed intrusion into customary law or legal traditions would occur at the stage of determining whether an infringement of an established right had in fact occurred. The Aboriginal Rights framework, in contrast to the "supplemental" approach, would have to grapple with entirely new legal terrain since there have been few contests between Aboriginal rights claimants and members of the community, or indeed those who might not have direct membership (as in a Band) but who have clearly established connections to the community.

The courts have generally given considerable deference to how Aboriginal groups have framed their collective identity. Other than in Treaty rights cases, this has generally not involved the use of the *Indian Act's* membership and registration criteria. The *Powley* decision, for example, involved a case entirely outside of *Indian Act* experience, but where considerable overlap in family and descent connections were apparent.¹⁷³ In the face of this, and for practical reasons of enforcement, the court developed its three-part identification test for determining an individual's entitlement to Métis rights:

1. Self-identification;

¹⁷³ *R. v. Powley*, [2003] 2. S.C.R. 207, S.C.C. 43.

2. Aboriginal descent; and
3. Acceptance by the Métis community.

This objective test may well be of importance to the potential interpretation of how s.1.2 might apply in some First Nation contexts as well, particularly in determining the connection of non-status First Nation people to a broader collective entitlement—established by the facts of communal association rather than by formal “acceptance” by a Band Council or under the *Indian Act*.

Onus of Proof on Infringement

The Aboriginal law framework places the onus on the claimant to establish that a *prima facie* infringement has in fact occurred. While this onus has not been a great hurdle with respect to Crown actions (which have typically ignored Aboriginal rights entirely in statute law and regulatory practice), it might prove particularly difficult to establish in the context of service and program delivery involving individuals connected to the community.

The courts have adopted a number of factors in determining whether an infringement merits a full justification assessment, including:

1. Acknowledgement of the right by the other party (which in the case of the *CHRA* would likely be satisfied by the “due regard” clause);
2. The general reasonableness of the nature of the interference;
3. Whether undue hardship was involved in the infringement; and
4. Whether the claimed individual right entitlement denies the First Nation its preferred means of exercising the custom or tradition affected.

It is apparent in the context of the *CHRA* that these factors are familiar to a standard Human Rights framework. They also help reinforce the principle that no rights or interests are absolute, and that based on the facts and circumstances, the interference of one right or interest with another may well be found to be reasonable, without truly offending principles of justice.

Stage 4: Justification

The Aboriginal Rights framework involves a procedure of reversing the onus of proof by requiring a justification for a *prima facie* infringement. This normally involves the Crown having to prove justification. If transposed onto the *CHRA*’s context—where individuals are typically contesting a Band’s decision—this would involve the following two steps:

Step 1 requires the complainant to demonstrate that the right or interest being claimed was further to a valid legislative objective not inconsistent with the purpose of s.35 (reconciliation of Aboriginal sovereign pre-existence with Crown sovereignty). This step might well be limited in *CHRA* cases to the claimant having to establish factually that

there was discrimination in the action or omission of the respondent.

Step 2 is to demonstrate that any duty to consult and accommodate was met. Such a test would not feasibly apply to individuals. However, it could be mirrored to some degree where an individual was told clearly that access to a service or program was to be administered in accordance with a particular customary law or tradition, and the First Nation refused to permit the complainant to participate in the communal process of determining how that law or tradition would operate.

Stage 5: Balancing

The Aboriginal Rights framework for implementation is rooted in a generally adversarial “win or lose” context of opposing state laws and Aboriginal collective rights assertions. The courts have not engaged in an explicit balancing of interests or rights between the Crown and Aboriginal peoples, other than occasionally to offer rationalizations for when infringements are inevitable and to set out guidelines for consultation or accommodation, including compensation. Individuals seeking equal treatment through the *CHRA* would not normally be expected, or have the resources, to accommodate or compensate their Band in exchange for exercising a statutory right.

To what degree this stage in the Aboriginal Rights framework departs from the “supplemental” model remains unclear.

3. CLARIFYING WHAT IS BEYOND THE SCOPE OF s.1.2

It is important to clarify a variety of potential claims of discrimination that will likely not be considered within the mandate of the *CHRA*. It is possible that the long-standing exemption of some forms of complaint in relation to the application of the *Indian Act* has resulted in an unwillingness by individuals to utilize the *CHRA* even in relation to matters beyond the s.67 exemption. With the media attention surrounding the passage of Bill C-21, in contrast, individuals may feel that the CHRC and Tribunal can arbitrate a broader range of issues than is in fact the case.

Examples of perceived or actual discrimination as alleged against a First Nation government that would appear to be beyond the *CHRA*'s mandate generally falls into two categories:

1. Challenges to federal statutes, regulations or First Nation laws passed pursuant to the enabling provisions of the *Indian Act*, including:

By-Laws

- Band membership rules [s.10];

- Allotment of reserve lands among members [s. 81(1)(i)];
- Rights of residence on reserve [s.81(1)(p.1)];
- Rights of spouses and children to reside with members on reserve [s. 81 (1)(p.2)];
and
- Control of intoxicants [s.85.1].

Statutes and Regulations

- The registration and membership entitlement provisions of the Indian Act [sections 6–11].

The discriminatory implementation of such laws, by-laws, or regulations is not sheltered in any way from application of the *CHRA*. What is important, however, is that the Tribunal would not be able to remedy a directly discriminatory law by having it overturned. A court action citing *Charter* breaches would likely be required, as occurred in the case of the *Indian Act* election rules prohibiting non-resident voting in the *Corbiere* decision.

The Tribunal, though mandated by statute, is not a court and does not have the capacity to strike down other federal statutory instruments, although it can certainly render them inoperable. This must be made clear in order to avoid the unnecessary expenditure of time and resources by the Commission, Tribunal, complainants, and respondents. Perhaps most importantly, such clarity will avoid a spate of rejected complaints early on in the process that will dissuade individuals from pursuing justice through the *CHRA* in the case of legitimate complaints that do fall within the authority of the Commission and Tribunal.

2. The second major group of challenges are those dealing with federally determined programs and services administered by First Nations governments, but whose discriminatory features are determined by federal policy, as opposed to the First Nation government itself. This class of cases might include such issues as:
 - Education placement reimbursement rates on and off-reserve;
 - Post-secondary education entitlements (limited to registered Indians and Inuit);
 - Non-insured health benefits program; and
 - Social income support rates.

This class of potential discrimination challenges would certainly fall within the *CHRA*'s jurisdiction, but would not engage s.1.2 of the *CHRA*. For this class, the issue is not whether the *CHRA* has jurisdiction, but rather the identity of the appropriate respondent.

SUMMARY

Overall, the Human Rights Framework evaluated in Part I appears most concordant with the “black-letter” law interpretation of Bill C-21 and its provision for the interpretation of the *CHRA* giving “due regard” to First Nations legal traditions and customary laws.

However, as the review of the historical and social science literature shows, it may prove difficult for s.1.2 to be implemented in the absence of tests common to the Aboriginal Rights Framework, particularly where the veracity of an alleged legal tradition or customary law is contested.

An enduring theme is the advisability of seeking intra-communal reconciliation as a part of protecting human rights in a First Nations context. This might best be sought through the engagement of traditional knowledge keepers, and in the development of a consultative dialogue within the concerned communities to discover, or re-discover the balances between individual and collective rights and interests that are inherent in First Nations legal traditions and customary laws.

The *Canadian Human Rights Act* Review Panel’s exhortation to explore First Nation codes or Charters of human rights should definitely be advanced in order to lay more of the groundwork to proceed in implementing Bill C-21.

APPENDIX 1: BILL C-21, CHAPTER 30

CHAPTER 30

An Act to amend the Canadian Human Rights Act

[Assented to 18th June, 2008]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

CANADIAN HUMAN RIGHTS ACT

1. Section 67 of the *Canadian Human Rights Act* is repealed.

1.1 For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

1.2 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.

R.S., c. H-6

Aboriginal rights

Regard to legal traditions and customary laws

CHAPITRE 30

Loi modifiant la Loi canadienne sur les droits de la personne

[Sanctionnée le 18 juin 2008]

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

LOI CANADIENNE SUR LES DROITS DE LA PERSONNE

1. L'article 67 de la *Loi canadienne sur les droits de la personne* est abrogé.

1.1 Il est entendu que l'abrogation de l'article 67 de la *Loi canadienne sur les droits de la personne* ne porte pas atteinte à la protection des droits existants—ancestraux ou issus de traités—des peuples autochtones du Canada découlant de leur reconnaissance et de leur confirmation au titre de l'article 35 de la *Loi constitutionnelle* de 1982.

1.2 Dans le cas d'une plainte déposée au titre de la *Loi canadienne sur les droits de la personne* à l'encontre du gouvernement d'une première nation, y compris un conseil de bande, un conseil tribal ou une autorité gouvernementale qui offre ou administre des programmes et des services sous le régime de la *Loi sur les Indiens*, la présente loi doit être interprétée et appliquée de manière à tenir compte des traditions juridiques et des règles de droit coutumier des Premières Nations et, en particulier, de l'équilibre entre les droits et intérêts individuels et les droits et intérêts collectifs, dans la mesure où ces traditions et

L.R., ch. H-6

Droits des autochtones

Prise en compte des traditions juridiques et des règles de droit coutumier

règles sont compatibles avec le principe de l'égalité entre les sexes.

REVIEW AND REPORT

Comprehensive review

2. (1) Within five years after the day on which this Act receives royal assent, a comprehensive review of the effects of the repeal of section 67 of the *Canadian Human Rights Act* shall be jointly undertaken by the Government of Canada and any organizations identified by the Minister of Indian Affairs and Northern Development as being, in the aggregate, representative of the interests of First Nations peoples throughout Canada.

Report

(2) A report on the review referred to in subsection (1) shall be submitted to both Houses of Parliament within one year after the day on which the review is undertaken under that subsection.

EXAMEN ET RAPPORT

Examen approfondi

2. (1) Dans les cinq ans qui suivent la date de sanction de la présente loi, un examen approfondi des effets de l'abrogation de l'article 67 de la *Loi canadienne sur les droits de la personne* est entrepris conjointement par le gouvernement du Canada et les organismes que le ministre des Affaires indiennes et du Nord canadien désigne comme représentant, collectivement, les intérêts des peuples des Premières Nations de l'ensemble du Canada.

Rapport

(2) Un rapport sur l'examen visé au paragraphe (1) est présenté aux deux chambres du Parlement dans l'année qui suit le début de cet examen.

TRANSITIONAL PROVISIONS

DISPOSITIONS TRANSITOIRES

Grace period

3. Despite section 1, an act or omission by any First Nation government, including a band council, tribal council or governing authority operating or administering programs or services under the *Indian Act*, that was made in the exercise of powers or the performance of duties and functions conferred or imposed by or under that Act shall not constitute the basis for a complaint under Part III of the *Canadian Human Rights Act* if it occurs within 36 months after the day on which this Act receives royal assent.

3. Malgré l'article 1, les actes ou omissions du gouvernement d'une première nation—y compris un conseil de bande, un conseil tribal ou une autorité gouvernementale qui offre ou administre des programmes ou des services sous le régime de la *Loi sur les Indiens*—qui sont accomplis dans l'exercice des attributions prévues par cette loi ou sous son régime ne peuvent servir de fondement à une plainte déposée au titre de la partie III de la *Loi canadienne sur les droits de la personne* s'ils sont accomplis dans les trente-six mois suivant la date de sanction de la présente loi.

Délai de grâce

Study to be undertaken

4. The Government of Canada, together with the appropriate organizations representing the First Nations peoples of Canada, shall, within the period referred to in section 3, undertake a study to identify the extent of the preparation, capacity and fiscal and human resources that will be required in order for First Nations communities and organizations to comply with the *Canadian Human Rights Act*. The Government of Canada shall report to both Houses of Parliament on the findings of that study before the expiration of the period referred to in section 3.

4. Le gouvernement du Canada, de concert avec les organismes compétents représentant les peuples des Premières Nations du Canada, entreprend au cours de la période visée à l'article 3 une étude visant à définir l'ampleur des préparatifs, des capacités et des ressources fiscales et humaines nécessaires pour que les collectivités et les organismes des Premières Nations se conforment à la *Loi canadienne sur les droits de la personne*. Le gouvernement du Canada présente un rapport des conclusions de l'étude aux deux chambres du Parlement avant la fin de cette période.

Étude à entreprendre

APPENDIX 2: STATUTORY REVIEW: DISASSEMBLING SECTION 1.2

The legislative record relating to the wording of s.1.2 is sparse. Some of the language of the clause is clearly sourced in previous discussion and analysis. For example, the reference to *balancing of individual and collective interests* seems to stem largely from the recommendation of the *CHRA* Review Panel, which suggested an interpretive clause “to balance the interests of Aboriginal individuals seeking equality without discrimination with important Aboriginal community interests.” The Panel proposed a clause that seemed to be intended to supplement the existing *CHRA*’s provisions for *bona fide* justification, to defeat claims of persons unconnected to First Nations communities and to support preferential services and employment, but without justifying sexual discrimination.

There is also some limited guidance in legislation and case law for other terms and phrases in s.1.2. However, overall it can be said that the phrasing of the clause—like its intent—is unique. Some terms — like “First Nation” — have no clear or established universal meaning in law. Other terms appear in various legislative and case law contexts, but none of them occurs in a setting familiar to the application of the *Canadian Human Rights Act*.

In this appendix we seek to disassemble or “un-pack” s.1.2 in order to assess the meaning of the terms used and the potential implications for the clause’s application in relation to potential complaints under the *CHRA*. This process is essential to understanding the ordinary meaning of the Act, which is a major consideration when interpreting any legislation.

A. ANALYSING KEY TERMS AND PHRASES IN SECTION 1.2

1. “In relation to a complaint made under the *Canadian Human Rights Act*”

Section 1.2 does not stand on its own. It is only activated when a complaint is made under the *CHRA*. This context supports the interpretation of s.1.2 within the *Charter* and the Human Rights frameworks discussed in Part 1 of this report.

2. “against a *First Nation* government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*”

2.1 “First Nation... including”

This clause is of critical importance in determining the scope of s.1.2. Section 1.2 deals with

complaints against “a First Nation government.” The boundaries of the term “First Nation government” are not defined in C-21. However, the term is described within this provision as including “a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*.” Section 1.2 speaks of “including” these three governing bodies but is not necessarily limited to these forms of First Nation government, as the word “including” is regularly interpreted as implying the possibility for other options not specified as coming within the intent of the clause.¹⁷⁴ Other options are limited by the items explicitly enumerated such that they would have to bear a clear element of similarity to the three types of “First Nation government” listed. Therefore, the full extent of the term “First Nation government” is not clear.

The use of the term “First Nation” rather than “Aboriginal,” or “Indian,” which are constitutionally recognized and extensively litigated terms, might suggest that First Nation is meant to be either more restrictive or equal to “Aboriginal.” In the broader legislative landscape, “First Nation” has carried several differing meanings. For example, “First Nation” is used to describe particular communities that have entered into a self-governance agreement. Other legislation identifies First Nation with reference to specific Indian communities.¹⁷⁵ In other cases, First Nation has been equated with specific bands,¹⁷⁶ or used synonymously with *Indian Act* bands.¹⁷⁷ Elsewhere, First Nation has been used to identify particular Indian communities along with other Inuit and Métis communities.¹⁷⁸

An assumption that concordance with relevant (*Indian Act* related) legislation is important and suggests that “First Nation” refers to Band and Band-based entities. This assumption is, however, of limited value since bands and tribal councils are both specifically referenced in s.1.2 (and therefore do not define the outer boundaries of the term “First Nation”). Furthermore, “tribal councils” are usually bodies consisting of a number of *Indian Act* bands who have grouped together to better provide common technical and other services to all of their communities through this regional body and for political representation. Tribal councils generally have no direct law-making or governance function and have no status under the *Indian Act*. Moreover, there are some groups or political associations of Aboriginal (usually First Nation or Indian based) groupings that refer to themselves as Tribal Councils, often based on pre-*Indian Act* political formations.

Accordingly, and given the variety of legislative usages of “First Nations” to date, it would not be appropriate to import definitions of this term from other statutes or contexts. On the

¹⁷⁴ See, Ruth Sullivan, *Statutory Interpretation* 2nd ed. (Toronto: Irwin Law, 2007) at p. 70: “the verb ‘includes’ is used to extend the defined term to the things singled out for special mention ... that they are subject to the same rules as the things within the ordinary scope of the terms.”

¹⁷⁵ *Canada National Parks Act*, S.C. 2000, c. 32, s.38.

¹⁷⁶ *First Nations Land Management Act*, S.C. 1999, c. 24, s.2; *Manitoba Claim Settlements Implementation Act*, S.C. 2000, c. 33, s.2.

¹⁷⁷ *First Nations Oil and Gas Moneys Management Act*, S.C. 2005, c. 48, s.2; *Specific Claims Tribunal Act*, S.C. 2008, c. 22, s.2.

¹⁷⁸ *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, s.2.

other hand, “First Nation” could be equivalent to “Aboriginal” but with a different focus. Unlike the Constitutional “aboriginal peoples,” as defined in subsection 35(2) of the *Constitution Act, 1982*, which is meant to protect the cultural rights of broad political or racial groups (“Indian, Inuit and Métis peoples”), “First Nation” might have been chosen to emphasize the importance of the political identity of particular communities. This interpretation could draw support from the types of political bodies that are clearly included in s.1.2. The reference to “a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*” may be indicative of a focus on particular governing authorities rather than broader ethnic or cultural communities. Legislation employing a similar and contextually relevant use of the term can be found in the *British Columbia Treaty Commission Act*, which states:

*“first nation” means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, that has been mandated by its constituents to enter into treaty negotiations on their behalf with Her Majesty in right of Canada and Her Majesty in right of British Columbia.*¹⁷⁹

Furthermore, the context in which s.1.2 was enacted relates to the repeal of the s.67 *Indian Act* exemption. Inuit, Métis, and First Nations unrecognized under the *Indian Act* were not previously automatically excluded by the former s.67 from the *CHRA*’s scope. As a result, it is reasonable to infer that the language used here is intended solely to encompass governmental entities connected to existing *Indian Act* “Bands” and those First Nations formerly regulated to some degree by that *Act*.

2.2 “programs and services”

In general, a program can be defined as “a plan or system under which action may be taken toward a goal.”¹⁸⁰ Depending on the reach of the “programs and services” clause, a proper application of that clause can only be made on a case-by-case basis by examining the locus of the constituting authority behind the program or service in question.

The limited descriptive properties of s.1.2 leave open the possibilities that “operating or administering programs and services under the *Indian Act*” may only qualify “governing authorities” or, it may apply to band and tribal councils or, it may apply to all “First Nation governments.”

¹⁷⁹ *British Columbia Treaty Commission Act*, S.C. 1995, c. 45, s.2.

¹⁸⁰ *Irvine (Re)*, [2002] B.C.E.S.T.D. No. 425 (B.C. Employment Standards Trib.) (Q.L.).

3. “this Act shall be interpreted and applied in a manner that gives *due regard* to First Nations *legal traditions and customary laws*”

3.1 “due regard”

Section 1.2 operates as an interpretive clause. When a complaint is made under the *CHRA* against a First Nation “this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws.” This interpretive function requires guidance on how to identify what a First Nation’s “legal tradition” or “customary law” is and what is meant by “due regard.”

The plain language of s.1.2 suggests that once a complaint is made under a ground of discrimination found in the *CHRA*, “due regard” must be given to both legal traditions and customary laws of the First Nation. “Due regard” is context specific and does not impose a rigid legal test of consideration. Owing to the larger purpose of the Act, it is likely that “due regard” would entail ensuring that First Nations legal traditions and customary laws must be given considerable weight in assessing a complaint, rather than just constituting a minor factor in the analysis.

In a legal context, “due regard” is not a term of concrete definition. It reflects a need for discretion. If “due regard” is owed to particular circumstances but not given, then “the decision is patently unreasonable, and can not be allowed to stand.”¹⁸¹ From this we can assume that having “due regard” imparts a notion of reasonableness. Knowing what level of regard is “due” depends on the circumstances of the case and the purpose of the guiding legislation.

3.2 “First Nations”

Here the term is used in the plural, rather than in the singular as it is framed earlier concerning “First Nation government.” Some meaning could be attached to this difference.

Further, the phrase in the plural is not circumscribed by the added word “government” such that it should not have the same meaning as “First Nation government” that is then described in part through the three forms of governance that are listed.

It is likely that its use in the plural form suggests that the traditions and laws being referenced are not restricted to the specific community that may be identified in a complaint. Instead, it could be argued that the ordinary meaning of the language used relates to the broader original nations such as the Mi’kmaq, Kwakiulth, Nuu-chah-nulth, Ojibway, and so on. The impact of such an interpretation would mean that evidence of these

¹⁸¹ *Biro v. Canada* (Minister of Citizenship and Immigration), 2006 FC 712. (CanLII) at para. 16.

traditions and laws does not solely have to be proved by witnesses in relation to the respondent community.

3.3 “legal traditions and customary laws”

The phrase “legal traditions and customary laws” with a conjunction between the two concepts could be directed at the same or very similar types of community legal practices. The two terms might have been used so as not to exclude what might be an artificial distinction. For example, South African legislation defines customary law in very general terms that also captures the “traditional” aspect of such laws:

*customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.*¹⁸²

Similarly, in Australia the *Native Title Act* refers to “traditional laws acknowledged, and the traditional customs observed.”¹⁸³ The Australian jurisprudence has determined that this phrasing refers to a “body of norms or normative system.”¹⁸⁴ The use of “legal traditions and customary laws” in s.1.2 could conceivably be used to capture a broad normative system of rules.

On the other hand, the two terms could be set out precisely to indicate that distinct interests need to be given “due regard.” This interpretation suggests that a “legal tradition” could be distinguished from a “customary law” in the sense that legal traditions are linked to more fundamental historic traditions of particular cultural communities, and might include methods of dispute resolution, whereas customary laws could be understood to be more fluid to allow for more recent development and evolution.¹⁸⁵

If the terms are treated as distinct, then “legal traditions” can be identified in a similar manner as “traditions” have been identified in s.35 jurisprudence. For example, the Supreme Court of Canada had the following to say about “traditional laws”:

*‘Traditional laws’ and ‘traditional customs’ are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples.*¹⁸⁶

Jurisprudence of the Federal Court has imparted several characteristics to customary law,

¹⁸² *Recognition of Customary Marriages Act*, Act 120 of 1998, s.1 as cited in *Gumede v. President of the Republic of South Africa and Others*, [2008] Z.A.C.C. 23 at para. 22.

¹⁸³ *Native Title Act*, No. 110, 1993, s.223, (1)(a) (Australia).

¹⁸⁴ *Members of the Yorta Yorta Aboriginal Community v. Victoria*, [2002] H.C.A. 58 at para. 39.

¹⁸⁵ For a review of the 19th and 20th century litigation in which Canadian courts regularly gave legal effect to First Nation and Inuit customary laws see, Bradford W. Morse (1980), “Indian and Inuit Family Law and the Canadian Legal System,” *American Indian Law Review* 8: 199–257.

¹⁸⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 40.

which might indicate that it is distinct from traditionally based Aboriginal laws.

The constituent elements of custom may therefore be summarized as follows:

- (1) *'Practices' for the choices of a council;*
- (2) *Practices must be 'generally acceptable to members of the band'; and*
- (3) *Practices upon which there is a 'broad consensus'*¹⁸⁷

In the context of customary band council selection sanctioned by the *Indian Act* and of far more recent vintage than pre-contact traditional leadership selection, the Federal Court provided guidance on how custom comes into being:

*For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a 'broad consensus' as to its applicability.*¹⁸⁸

This use of custom and customary law also suggests more of an orientation toward identifying specific rules or individual laws that might apply in a given case from a larger body of law in force in the community or First Nation.

The consequences of interpreting customary law according to “a broad community consensus” should be fully evaluated to determine if such an interpretation of customary law was likely intended. For example, it may have been intended that s.1.2 would capture laws, which would otherwise be outside of the purview of the *CHRA* (because they are not “programs and services”), because these customary laws gave root to a discriminatory ground.

The interplay between phrases is illustrated by the impact of the earlier discussion on “First Nation.” One consequence of accepting “First Nation” as meaning the particular political identity of Aboriginal governing bodies is that it supports an understanding of “customary laws” focused on broad community consensus and adaptation over time, rather than a pre-contact version of that First Nation community and its laws in that much earlier era.

4. “particularly the *balancing* of individual rights and interests against collective rights and interests”

The due regard that is to be given to “First Nations legal traditions and customary laws” must somehow be considered in light of the required exercise at balancing the individual

¹⁸⁷ *Francis v. Mohawk Council of Kanesatake (T.D.)*, [2003] 4 F.C. 1133 at para. 23.

¹⁸⁸ *Ibid.*, at para. 36.

rights and interests with collective rights and interests. The word “particularly” seems to indicate that the balancing of these rights and interests is a significant part of the “due regard” process that is to be given to these “legal traditions and customary laws.” As such, s.1.2 would provide an avenue for examining if the legal traditions and customary laws to which a First Nation adheres already accommodate the complainant’s individual interest within collective interests. This may mean that it is relevant to inquire whether the legal tradition or customary law in question already achieves the requisite balance between the individual right and the collective right as well as their respective interests.

Another interpretation of this clause would equate “individual rights and interests” with those protected grounds of discrimination identified in the *CHRA* and “collective rights and interests” with the “legal traditions and customary laws” of the First Nation. Under this approach, a balance would be sought between the individual rights of the complainant and the rights and interests that the First Nation government might have in promoting the collective interests of the community. This interpretation is somewhat problematic because such a characterization may fail to capture the complexity of the “collective right.” A legal tradition or customary law may already incorporate a balance between the interests of individual members of a First Nation and the collective interests of the First Nation as a whole in which each member is included. A further variation could see the “collective rights” as encompassing not only the “legal traditions and customary laws,” but also the rights contained within s.35 that are pertinent to this First Nation.

The phrasing of the clause (s.1.2) is twofold, i.e., there are both “rights and interests” of individuals and the “rights and interests” of a collectivity that are held as important. This suggests that the intent of s.1.2 was that the balancing exercise would not be limited solely to *legal* rights. Parliament has instead directed that a balance must also encompass the respective *interests* of the parties. This may suggest that broader issues like the financial capacities of the parties, their respective goals and cultural values, the desire to restore harmony, the impact upon others, the political aspirations of the community, concerns for the environment, and other factors should also be considered where relevant.

Balancing normally involves two sets of competing concerns. These concerns can be represented by a collective, such as the state, and the individual; between individuals; or between collectives such as the state and a First Nation. The balancing process also generally involves two distinct stages. First, the rights or interests pertinent to the dispute need to be identified and interpreted. Second, after these elements have been correctly deduced, a balance can be sought between the identified interests.¹⁸⁹

¹⁸⁹ See, *B.C. Teachers’ Federation v. School District No. 39 (Vancouver)* 2003 B.C.C.A. 100 (CanLII) at para. 163: “In any event, the balancing of interests which permeates his reasons is more properly triggered at the second stage of the s.7 analysis, once it has been determined that a s.7 interest has been engaged. If the focus at the first stage becomes the balancing of interests, there is a potential for the analysis to become results-oriented based on the decision-maker’s view of where the balance lies. In that event, the first stage of the analysis is in danger of being given short shrift.”

4.1 “Balancing”

Balancing does not have to involve an “either/or” decision. On the other hand, the use of the word “against” is suggestive of a competitive balancing process where the individual right (or interest) is pitted against the collective right (or interest). Regardless of how balancing is interpreted in s.1.2, an attempt at balancing interests can set out to ensure that “the satisfaction of one interest does not create disproportionate hardship affecting the other interest.”¹⁹⁰ Instead, as explained in the following quotation, “weighing the balance” can be a method of reconciling competing interests:

*In such cases, arbitrators engage in a balancing of the two competing interests. To the extent that both interests possess legitimacy, an effort is made at a reconciliation. If a reconciliation is impossible, and one must give way to the other, sometimes the employee's interest prevails and sometimes not. It all depends on the nature of the competing interests, the circumstances in which the two interests have been engaged, and an admittedly subjective attempt to weigh the balance.*¹⁹¹

Just as in the case of one provision which trumps another, a “weighing” must be based on the articulation of clear principles or values.

5. “to the extent that they are consistent with the principle of gender equality”

This clause appears to operate as a limitation upon how “due regard” is given to legal traditions and customs. Under this view, “due regard” is only owed to the extent that legal traditions and customary laws are consistent with the principle of gender equality. However, the frame of reference is not entirely clear. For example, the principle of gender equality could be determined according to the complaint raised under the *CHRA*, or gender equality could be taken into account based on the notions of equality relied upon by the First Nation. This latter understanding would bring Aboriginal and treaty rights law into consideration.

The presence of the reference to gender equality may be intended to signify that gender equality is of primary concern in any balancing exercise or when giving due regard. One possible interpretation could mean that “First Nations legal traditions and customary laws” are only to be given due regard “to the extent that they are consistent with the principle of gender equality.” Another interpretation would view the principle of gender equality as a

¹⁹⁰ *VIA Rail Canada Inc. v. National Transportation Agency* (C.A.) [2000] F.C.J. No. 1685 (Fed. Ct. of Canada—Ct of App.) at para. 39.

¹⁹¹ *Fraser Valley Milk Producers Co-operative Assn. (Dairyland Foods) and I.A.M., District Lodge 250* (1989), 9 L.A.C. (4th) 376 at para. 208.

guiding principle for how the balancing between individual and collective rights and interests should be conducted.

This brings into consideration the constitutional frameworks discussed above. To what extent are gender equality provisions in the *Charter* (s.28) and in s.35(4) of the *Constitution Act, 1982* likely to assist in framing the relationship between collective rights and individual rights, particularly in the case of gender or multiple-ground based complaints? One must note that the reference in Bill C-21 is to the “*principle* of gender equality” whereas the Constitutional clauses herein are both expressed as absolute guarantees of access to individual (s.28) or to collective (s.35(4)) rights. A search for consistency would reveal that the Constitutional provisions above are likely to be consistent with the “principle” stated in 1.2.

APPENDIX 3: QUICK REFERENCE: KEY QUESTIONS AND CONCLUSIONS

KEY QUESTION	STUDY CONCLUSIONS
<i>What does “First Nation government” mean?</i>	<ul style="list-style-type: none"> • Clearly includes <i>Indian Act</i> Bands and other governing bodies operating under direct or delegated authority of the <i>Indian Act</i>. • Most likely includes other Indian (First Nation) entities operating entirely or mostly outside of the <i>Indian Act</i> (e.g., Nisga’a Lisims Government, Sechelt First Nation, Cree-Naskapi Bands, etc.). • May include traditional First Nation bodies exercising governmental authorities, independently of the <i>Indian Act</i>, but this will likely require evidence of a right to self-government established under Aboriginal and treaty rights law. • Would not seem to include Inuit or Métis organizations or governments.
<i>What is the scope of activities that might trigger s.1.2?</i>	<ul style="list-style-type: none"> • Any program or service activity of a First Nation government and its employment relationships, regardless of whether or not it was formerly sheltered from <i>CHRA</i> examination by the s.67 exemption.
<i>When does s.1.2 come into force?</i>	<ul style="list-style-type: none"> • Only Bands or delegated authorities under the <i>Indian Act</i> would be included in the 3-year suspension of s.1 and s.1.2’s application. • Only decisions or actions taken by <i>Indian Act</i> Bands or authorities as authorized by specific provisions of the <i>Indian Act</i> would be included in the 3-year transition period. • Claimants and First Nation government respondents would, involving decisions beyond the narrow frame of the former s.67 exemption, be able to call upon the “due regard” requirement effective immediately (i.e., as of June 18, 2008).
<i>What are “First Nations legal traditions”?</i>	<ul style="list-style-type: none"> • A First Nations legal tradition—a term that holds a very limited understanding within either the law or the social sciences—is a practice potentially grounded in pre-contact and almost certainly pre-<i>Indian Act</i> practices, is still endorsed as an obligatory practice within the community, and includes a system of dispute resolution.
<i>What are “First Nations customary laws”?</i>	<ul style="list-style-type: none"> • The legal and social science literature appears at one in regarding First Nation customary laws as having to meet at least two if not all of the following three-part test: <ol style="list-style-type: none"> 1. That the contemporary community abides by or largely follows the custom concerned, without requiring unanimity; 2. That the community censors or otherwise penalizes

	<p>individuals who depart from the practice involved; and</p> <p>3. No strict linkage with historic/pre-contact activities is required, but there must be some degree of purposive connection to a long-standing or contemporary but socially accepted problem or challenge.</p> <ul style="list-style-type: none"> • There is a general discomfort in the social sciences with the term “law” when applied to customary practices, if only because the term “law” often, if not always, imports ideas about a “state-like” system of compulsion usually absent in non-state First Nation communities. • Importantly, there is a general consensus that the determination of what is customary and law-like is necessarily an internal or culturally determined matter, and cannot be determined by objective (external) tests or measures other than on the basis of what members of the community concerned affirm as their customs, and what is law-like for their purposes.
<p><i>What does “balancing” involve—what are the key tests or measures of an appropriate balance from the Human Rights and Charter law perspectives?</i></p>	<ul style="list-style-type: none"> • Human Rights and <i>Charter</i> law hold individual rights as more in need of protection than collective rights or interests—normally cast in the mould of state or legislative power. There are two clear tests for balance: <ol style="list-style-type: none"> 1. The onus is on those advancing reasonable and demonstrably justifiable limits on rights of equality; 2. A proportionality of limits on individual rights is required in relation to a valid legislative (or traditional or customary legal) objective (i.e., there is minimal impairment). • In a narrow interpretation of Bill C-21, however, the only consideration would be if a First Nations legal tradition or customary law provides its own balancing of individual and collective rights and interests. Absent such a balancing, there would be no need to give “due regard.” • However, determining what if any balancing does exist within First Nations legal traditions or customary laws requires an “internal” perspective that will not readily be available to the Commission or the Tribunal, or the courts, without community-based sources of reference and authority.
<p><i>How does “balancing” occur within the Aboriginal Rights Perspective?</i></p>	<ul style="list-style-type: none"> • From an Aboriginal and Treaty rights perspective, the onus on the collective or First Nations right or interest would be amplified. It would include a requirement to establish the existence of such a right as connected to pre-contact practices and traditions, showing continuity, and continuing relevance. • Where an Aboriginal and Treaty rights basis for a collective right or interest is established, the individual rights’ interest would be placed in the unusual position of having to prove that minimal impairment of the collective interest or right has occurred in asserting the legislative entitlement to equality.

APPENDIX 4: CASE STUDIES

These case studies set out in schematic form a limited but characteristic range of cases of alleged discrimination under the *CHRA*. Three broad types of cases involving a number of scenarios are explored in order to determine the applicability of the conceptual frameworks (see part I and the conclusion of this report) developed from our study in addressing the key issues of implementing s.1.2:

The Balancing of Collective and Individual Rights within a Legal Tradition or Customary Law

- Cases where a legal tradition or customary law is asserted as representing collective rights and interests of the community, as against individual rights and interests as expressed in the non-discrimination provisions of the *CHRA*. In this case, the determination of a solution may turn on procedures or rules of balancing rooted in the First Nations laws or customs.

Contested Legal Traditions/Customary Laws: Determining Authenticity

- Cases where a respondent alleges a collective right as a trigger for a consideration of balancing, but this allegation is contested by the applicant as being rooted in non-traditional or non-First Nations laws (e.g., the *Indian Act*, etc.).

Balancing of Collective and Individual Rights in the Absence of Asserted Legal Traditions or Customary Laws

- These cases involve the assertion of a general collective interest or right of the community to discriminate as a supplemental justification to the remedies available in sections 15 or 16 of the Act.

Each type of case, and related scenarios, are then examined in connection with how their fact situations align with the conceptual frameworks developed for considering how a balancing might be achieved.

These case studies apply the conceptual model or framework for isolating and dealing with the key questions posed by a variety of potential scenarios for the application of s.1.2.

The scenarios are not exhaustive of potential cases. The cases we do address are all meant to fall within the authority of the Commission and Tribunal in relation to the balancing requirements of s.1.2 of the *CHRA*.

The Balancing of Collective and Individual Rights within a Legal Tradition or Customary Law

Scenario 1

A woman, reinstated under C-31, has returned to the community to live with her parents after her marriage ended and applies to her First Nation Band Council for housing. There are delays in allocating housing for her and the woman believes that other people have been given priority. She contacts the Band officials, who explain that there is only sufficient funding to build a certain number of houses each year, and her application is not a priority. The Band states that it has a policy, based on a custom or tradition, of allocating housing first to Band members who have resided the longest on the reserve. The complainant argues that she has been discriminated against because of her former loss of status and residence.

Scenario 2

A Cree member of an Ojibwa First Nation who has married into the community applies for and receives a job as Education Director. The offer of employment is then rescinded, and a less qualified Ojibway woman is hired. While the job posting was silent on the matter, the complainant was told that her inability to speak Saulteaux had been overlooked and was a requirement of the job. She lodges a complaint under the *CHRA* arguing discrimination based on national and ethnic origin. In response, the Band argues both that the CHRC's Aboriginal Employment Preferences policy (s.16) justifies a preference for an Ojibway Band member, and that it is traditional for teachers in the community to be fluent in Saulteaux.

Discussion

These two scenarios would not appear to involve any issue about whether the respondent Band Councils were able to allege a justification in seeking to have its customary practice given due regard under s.1.2. Housing allocations, due to their connection to possession of reserve lands, fall clearly within what s.67 had formerly exempted from the *CHRA*. In connection with employment, the case is less clear, and the Commission would have to decide whether the s.1.2 defence is available only in relation to formerly excluded activities, or to all complaints against First Nation governments. An argument as to the application of the 3-year delay to this latter scenario can be anticipated.

As Band members, the complainants might dispute the fairness of the Band custom, or simply feel it is unfair. Assuming the existence of the practice or custom is not disputed, these cases would proceed to an investigation about the consistency of the policy application

and its connection to a clearly established custom of allocating scarce housing or employment opportunities on the basis claimed.

How would the Tribunal in this instance provide “due regard” to the customary allocation practice, and in particular determine whether and to what degree the complainant’s interests and rights were accommodated within that practice? Beyond a normal “undue hardship” case (involving potential hardship on other applicants), what approach would appear most appropriate in this case?

Clearly, these scenarios are likely to be common, and the acute shortages of both housing and employment on many reserves will undoubtedly lead to many cases where discrimination on the grounds involved is alleged. This may also derive from misunderstandings about how policies are related to community expressions of traditional law or custom in the allocation of scarce resources like housing or when the cultural education of children is concerned. Mediation could be expected to arrive at an understanding and eliminate the perception of discrimination, result in reconciliation, or document a more serious situation where the policy was adopted in response to the individual and not in connection with a more long-standing custom of determining need or ensuring the continuity of the First Nation culture.

Should these types of cases proceed to Tribunal, it would seem that the due regard and balancing principles set out in the Supplemental Approach (see the Conclusion of this report) would be most appropriate. In essence, the core justification for distinguishing between members seeking housing or for employment preferences for Saulteaux speakers would seem to fall generally within the bounds of the *CHRA*’s s.15 “bona fide” justification, bolstered by the added considerations derived from the unique circumstances faced in the two communities.

The application of a “pre-existing” test in relation to an alleged legal tradition (as opposed to a more recent custom) needs to be considered in connection with the housing case. The provision of housing allocations is a relatively new activity (in the past two-generations), though it may be related to an older tradition/custom of allocating community lands. These two goals or activities may need to be kept distinct to gain a fuller appreciation for contemporary policies that claim to reflect long-established customs or traditions.

In the case of employment in the culturally significant task of education, legal tradition claims may be less obviously at risk.

Certainly if it appeared from the facts that the claimant was “singled out” for denial or faced unique needs for housing that merited consideration within a more flexible needs-based policy, the Tribunal might find that giving due regard failed to convince it that the discrimination concerned could be reasonably justified. A Tribunal might find that community tradition for land allocation followed a less rigid application of needs-tests, and

encourage a revisiting of the housing policy in light of what customary practice actually attempts to achieve.

Contested Legal Traditions/Customary Laws: Determining Authenticity

Scenario 3

A woman runs for Chief of her community, and is selected by the elders, in accordance with the custom system. The decision is contested by another women member, who argues that legal traditions and customary law in the community did not allow a woman to hold the position of Chief.

Scenario 4

A man dies intestate (without a will) and has no immediate family, but his niece had been living with him for several years, taking care of him. Under the *Indian Act* rules, the house and land allocation revert to the Band, if no immediate family member is available to inherit, which decides to allocate it to the next person on a housing list (in accordance with its customary practice). The niece complains that she has been discriminated against on the grounds of family status, and that the First Nations legal traditions and customary laws clearly entitled her to receive the house and land allocation.

Discussion

Both these cases involve an interesting twist on the normal idea of an individual complainant advancing “individual rights” as against the “collective rights” recognized by the customs and traditions of the community.

These scenarios illustrate where the conventional definition of a valid complaint evolves to take into account allegations about what is truly accepted custom, and what is not, with the individual complainant invoking customary laws against an adverse decision by the First Nation government.

The core consideration in these cases concerns both investigatory and Tribunal “due regard” and “balancing” considerations. In the custom election case, the opportunity is apparent for reconciliation by facilitation or mediation to assist in “re-discovering” the meaning of customary laws or practices—that they evolve over time in accordance with a consensus, in this case with the support of elders.

In the case of the estate transfer, leaving property to the youngest person, and a caregiver, may well have been the traditional custom of the community, with adaptations for cases

where no children were involved through the informal adoption or taking in of a niece or nephew to assist.¹⁹² This form of custom was generally ignored when the *Indian Act* provisions regarding descent of property were introduced, along with the rule that where no immediate family is involved, the property reverts to the Band. In this case, the investigation and Tribunal might have to hear testimony about the widespread nature of the Band's claimed custom as opposed to the niece's claim of a contrary customary law. It might be that assistance of elders and other respected members of the community might be enlisted to broker a resolution without it having to go to a Tribunal, and of course, this would be the preference. However, as in the case of the custom election context, what would be essential is the engagement of respected third parties.

Should mediation fail, of course, a Tribunal would likely have to solicit third-party evidence in order to arrive at a balanced sense of which, if either, claimed tradition or law must be given due regard.

Balancing of Collective and Individual Rights in the Absence of Asserted Legal Traditions or Customary Laws

Scenario 5

A young man whose mother left the First Nation community when he was young is denied the opportunity to vote in a custom Band election. He is enrolled as a Member and has many connections in the community, but resides off reserve. He alleges that being denied the right to vote discriminates against him based on his family status.

Scenario 6

A First Nation establishes election rules under custom that specify that any candidate who seeks to run for office must submit to a drug test. The First Nation adopts a policy that any elected leader must be a positive role model for the community, and in view of problems associated with drug use in the community, this step is in the collective interest of promoting a healthy community. Several individuals challenge the requirement as contravening their human rights, based on disability, or perceived disability.

¹⁹² *Ultimogeniture* refers to the practice of property descent through the youngest member of the family—often considered to be any person who, younger than other relations, provides caregiving to the person leaving the personal property or interest in land.

Discussion

Of importance here is that custom election systems are not backstopped by Band by-laws or endorsed by the Minister of Indian Affairs. They are, in this respect, truly expressions of customary practice.

Although both these cases involve “custom” elections, it is important to note that many such systems are codified and have been adopted for a number of purposes, including varying the term of office for Chief and Council, permitting (or precluding) off reserve voting, lowering the age of eligible voters and so forth. Only a small minority of contemporary s.2 (custom) election or selection systems do not involve voting in accordance with a written procedure. Therefore, the challenge is not merely to deal with the complex and evidence-rich issues surrounding legal traditions or customs, but also to give due regard to, and balance, collective interests as expressed in a formally adopted code as against an individual right or interest.

In these cases, the approach most likely to give effect to a reasonable interpretation of s.1.2 might be simply to engage in the traditional balancing techniques familiar to the standard justification tests. Scenario 5 involves a blanket and stereotypical exclusion of an individual in a situation analogous to that faced in the *Corbiere* case before the Supreme Court. As recently noted in the Federal Court in the *Laurent* decision, the *Corbiere* test also likely applies to custom election systems.¹⁹³

Upon investigation the Tribunal might well find that an exclusion of this type is not in aid of or serving any particular collective right or interest, but rather is present to avoid accountability to an important segment of the population that might not vote in predictable ways familiar to the reserve component of the Band.

In Scenario 6, as well, a conventional balancing of interests might be called for, even up to the point of determining that in light of the serious and unique health and safety concerns the community faces, the collective interests outweigh the suspension of individual equality rights. If so, it might seem apparent that new justification criteria and tests are required to supplement the existing s.15 “bona fides” justification set out in the *CHRA*.

¹⁹³ *Laurent v. Gauthier and the Fort McKay First Nation*, [2009] FC 196 (CanLII). Although the Federal Court did not find it necessary to deal with the challenge to the custom election code under s.15 as the code was invalid for failing to obtain sufficient community support when adopted.