GENDERING DECOLONISATION, DECOLONISING GENDER

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In 1982, the *Canadian Constitution* was amended to protect the collective rights of Indigenous peoples in Canada.[1] Section 35 of the *Constitution Act 1982* recognises and affirms Aboriginal and treaty rights, while s 25 shields these rights from potential abrogation by the *Canadian Charter of Rights and Freedoms*.[2] Aboriginal rights refer to the *sui generis* collective rights of Indigenous peoples that continue to exist outside of treaty relationships, while treaty rights refer to the Indigenous nation's rights and obligations as established in a specific treaty. There is little doubt that s 35 recognises that Indigenous peoples have a constitutional right to self-determination, whether viewed as an Aboriginal right or a treaty right. While the nature and breadth of this right continues to be debated among academics, in the courts and in negotiations with the state, for Indigenous peoples there is little to debate.

Self-determination is an inherent right that was given to each nation by Creator. While it is recognised and affirmed in the *Canadian Constitution*, it is *sui generis*, meaning that it originates outside of Canadian and British legal and constitutional traditions, and is instead vested in Indigenous legal and political traditions, which can be said to comprise Indigenous constitutional orders.[3] For many Indigenous peoples, rights (such as the right to self-determination) originating from these traditions provide a legal foundation to engage in decolonisation and to negotiate for delegated administrative and decision-making responsibilities. For others, the legal and political traditions and their constitutional orders themselves remain alive and well, and provide not only the right to some semblance of limited self-government subject to the Canadian state, but the right of sovereignty or to establish co-autonomous governments within the territory shared by the Canadian state. However the struggle is framed and pursued, Indigenous peoples in Canada are engaging in their own political decolonisation.

This struggle is anything but new. As is the case for Indigenous peoples all over the world, Indigenous peoples in Canada have been struggling to maintain their traditions and fight for their right to self-determination since the time of their 'great discovery' by Europeans. This struggle has taken a multiplicity of forms, and it is evident in the treaties that were negotiated to protect Indigenous legal and political traditions and to forge what was to have been a mutually beneficial nation-to-nation relationship with the colonial state. Today people are engaging in processes of decolonisation and struggling to reclaim their rights and responsibilities protected by the treaties. Across both time and space it is essentially an issue of contested sovereignty, whereby Indigenous people have struggled to maintain or reclaim Indigenous sovereignty in the face of colonisation and to find the means by which to reconcile the claims of the state with their right of self-determination.

While it is important to address the immediate questions of constitutionality, feasibility, reconciliation and implementation in relation to matters of decolonisation and self-determination, these issues are not the concern of this article. Rather, this article addresses the equally pressing questions about the gender implications of self-determination and the move to reconcile contested sovereignties and their competing constitutional orders. If issues of gender are to be anything but an afterthought, gender considerations must be addressed before these other matters are dealt with.

The need to address considerations of gender is absolute. Though women have not fared well under the colonial

structures of oppression and domination associated with the *Indian Act*,[4] many scholars have raised questions as to whether the situation would improve with Indigenous self-government or the implementation of an Indigenous constitutional order within Canada.[5] Others have questioned the compatibility of Indigenous sovereignty and women's rights.[6] In refuting this latter claim, some scholars have cited 'feminism' as an Indigenous tradition, explaining the way in which women exist at the centre of, and are honoured in, Indigenous traditions.[7] Whatever the case may be, these matters need to be addressed at length.

Summarising the need for such deliberations, Joyce Green states:

> Colonialism is closely tied to racism and sexism. These twin phenomena exist in the context of colonial society, directed at Indigenous people, but they have also been internalized by some Indigenous political cultures in ways that are oppressive to Indigenous women. Liberation is framed by some as a decolonization discourse, which draws on traditional culture and political mechanisms. It is conceptualized as totally Indigenous in character, while also honouring women in their gendered and acculturated contexts. But Indigenous liberation theory, like so many other movements and theories, has not been attentive to the gendered way in which colonial oppression and racism function for men and women, or to the inherent and adopted sexisms that some communities manifest.[8]

This paper is my initial step towards engaging in such deliberations, as an attempt to move beyond the gender discussions of Teressa Nahanee,[9] Mary Ellen Turpel-Lafond and Patricia Monture that seem to have halted in the 1990s. Though not intended as a literature review, this paper is an attempt to bring such deliberations into the present, so as to address both current policy initiatives that seek to remedy gender inequalities and treaty constitutionalism, which is said to perpetuate gender inequalities insofar as it promotes what Green deems to be a masculine decolonisation discourse. Framed as a first step towards a gendered analysis of issues of sovereignty, treaty constitutionalism and decolonisation, this article advances the argument that gender must be decolonised and decolonisation must be gendered if the concerns raised by Green are to be addressed and Indigenous self-determination realised. In developing the argument, this paper highlights key issues in the existing deliberations pertaining to the oft-cited disconnect between gender and Indigenous sovereignty, and the current Canadian Government's attempts to address this disconnect and existing gender inequalities. The twin ideas of gendering decolonisation and decolonising gender are then analysed in terms of their potential to connect Indigenous sovereignty with gender considerations and to attend to issues of gender inequality.

I Existing Deliberations

With few exceptions, the literature examining the intersection between Indigenous sovereignty, nationalism and feminism (Indigenous or mainstream/whitestream) claims that there is an incompatibility.[10] Where disagreement in the literature arises is whether Indigenous nationalism and sovereignty – especially when framed as what Green terms a 'decolonisation discourse' – are compatible with women's rights or, more specifically, whether they can positively affect the rights of women.[11] It is important to understand this disagreement over the supposed incompatibility between Indigenous nationalism, sovereignty and gender, for it highlights issues of cultural difference and considerations of intersectionality that are critical to understanding this article and its field of study. It is also important to understand that such disagreements are not simply academic – they continue to define and divide the Indigenous women's movement and Indigenous politics in Canada.

Disagreeing with the manner in which the intersection among sovereignty, nationalism and women's rights has been framed, both Turpel-Lafond and Monture argue that what is perceived as inherent incompatibility can be resolved by stepping beyond the equality discourse of mainstream feminist theory and understanding cultural difference.[12] The crux of the argument is that, while gender equality (and the corresponding equality rights discourse) is a colonial or Western-Eurocentric construct typically at odds with discourses of Indigenous nationalism and sovereignty, Indigenous traditions are, by and large, women-centred, as women are the centre of all life. While the contemporary condition is rife with violence, inequality, and mistreatment, this state of internalised colonialism can be overcome by reclaiming tradition.[13] As Turpel-Lafond suggests:

> we need to rebuild our own houses which have been ravaged by patriarchy, and which have been weakened through paternalism. This is one important task that lays ahead for us

> – one which we have begun. However, our house also must be rebuilt with First Nations men. It cannot be done alone.[14]

For Turpel-Lafond and Monture, it is not simply a matter of Indigenous women faring better under Indigenous traditions or that the rights of Indigenous women would be positively affected by a return to Indigenous traditions and, thus, a strengthening of Indigenous sovereignty and nationhood. As Monture argues, the issue is not solely one of gender – gender cannot be separated from considerations of race or Indigeneity, and Indigenous women face discrimination, oppression and colonisation *as Indigenous women*.[15] Beyond considerations of intersectionality, Turpel-Lafond contends that the *Canadian Charter of Rights and Freedoms* and the supposedly neutral human rights discourse that informs it in fact elide cultural differences and thus conceal the Western-Eurocentric roots of the women's movement – that, in effect, such culturally hegemonic practices are tantamount to the continued imposition of colonisation and repression upon Indigenous peoples.[16]

Responding to such assertions, Jo-Anne Fiske argues that it is not a matter of true incompatibility between Indigenous sovereignty and feminism (Indigenous or mainsteam/whitestream), but rather it is the mere assertion of incompatibility (as a matter of cultural relativity) that has resulted in the claims of Monture and Turpel-Lafond. She suggests that the contesting of subjugation has been reconstructed by a number of scholars and Aboriginal organisations (such as the Assembly of First Nations) such that:

> any appeal to an outside authority diminishes the autonomy of the community/nation, imperiling the struggle for self-determination and diminishing the traditional culture and decision-making processes. The narrative continues: Human rights, being a Western concept cannot be unilaterally imposed upon Indigenous peoples; to do so violates principles of cultural integrity, abrogates inherent rights of self-determination and weakens the collective in favour of the individual.[17]

For Fiske, the reality is not this fear-mongering reconstruction, but rather the fact that the dominant iterations of Indigenous sovereignty and nationhood present in discourses of decolonisation expose 'a masculinist discourse derived from, and inextricably linked by emulation and hostility to a colonial European discourse'.[18] Notions of Indigenous sovereignty and nationhood therefore share the same intolerance of women's rights as the Western-Eurocentric tradition.

Similarly, Joanne Barker suggests that the typical hostility within the framework of Indigenous decolonisation towards gender critiques is

> not merely a legacy of colonialism but that it is exactly the discourse that constructs gender and sovereignty as conceptual or political opposites that is at the heart of the problem. The argument that a choice has to be made securing women's rights or Indian sovereignty has rationalized Indian women's disenfranchisement and disempowerment within communities. The idea that by affirming Indian women's rights to equality, Indian sovereignty is irrevocably undermined affirms a sexism in Indian social formations that is not merely a residue of the colonial past but an agent of social relationships today.[19]

While neither Monture nor Turpel-Lafond would disagree with the assertion that sexism exists in 'Indian country' today, they would vehemently disagree with the assertion that decolonisation is a 'masculinist discourse' or that 'sovereignty has rationalised disenfranchisement'. The reason: decolonisation is a national movement, and as such legal and political strategies have often reflected a choice to silence differences to secure recognition in legal arenas.[20] Such strategic mobilisation or strategic essentialism does not mean that these differences cease to exist within communities or that they should be silenced indefinitely. Rather, while both Monture and Turpel-Lafond would likely agree that strategic choices have not always been the best choices (for reasons of strategy, representation of 'claim' or choice of venue), most of these choices have reflected the collective nature of these rights, while many of the disenfranchised have sought recognition and protection through individual rights. Further, as Monture has continuously asserted, because of the collective nature of Aboriginal and treaty rights and matters such as self-governance, sovereignty and decolonisation, Indigenous women have a responsibility to work within their nations and political movements as agents of change in order to address the colonial legacy and the violence and sexism that exist in communities.[21]

II Gendering Colonialism

Stepping beyond these debates over the supposed incompatibility between women's rights, Indigenous

sovereignty and nationalism, and moving past issues of gender in Indigenous politics more generally, there can be little doubt that Indigenous women have been disproportionately affected by colonialism. Recognising that Indigenous men and people of other genders have suffered, and continue to suffer, the effects and legacies of colonialism (such as the loss of traditional roles and responsibilities, the destruction of Indigenous political systems and the damage to Indigenous educational processes and infrastructure), my suggestion of disproportionality should be construed as a statement of difference rather than as an adjudication of the experience of men.

In addition to the disproportionate effect of colonialism on Indigenous women, there is also no doubt that the sexist policies and attitudes of both state and church have infiltrated Indigenous communities, such that sexism (in all of its physical, policy and doctrinal manifestations) and patriarchy have taken root in Indian country.[22]According to Verna St Denis:

> Some would argue that colonialism affected Aboriginal peoples in varying degree and scope, and therefore in some places Aboriginal cultural traditions and practices have remained more or less intact. I argue that the overwhelming majority of Aboriginal people have gone through some degree of socialization into Christianity as well as incorporation into the patriarchic capitalist political economy and education system, and are therefore subject to western ideologies of gender identities and relationships.[23]

While the breadth and depth of this internalisation of colonialism is somewhat debatable, I would agree with St Denis, but would also note that this colonisation is not complete by any means, and as a result individuals and communities simultaneously manifest competing cultural identities and understandings of gender.

To understand colonialism within the Canadian context one must understand the *Indian Act*. Despite the protections afforded to Indigenous political, legal and social traditions in the treaties that Indigenous nations negotiated with representatives of the Crown, colonial authorities have continuously acted as though they had the (God-given) right to acquire all Indigenous territories and to do as they pleased with Indigenous nations and their lands. Thus, despite promises to the contrary, the treaties and the protection that they were supposed to provide were ignored by colonial governments and never implemented. Instead, by the mid-1800s, colonial governments were developing legislation and directly involving themselves in the affairs of Indigenous nations. This early legislative development of policies of interference and colonisation culminated in the introduction of the *Indian Act* in 1867. In short, the *Indian Act* was created by the Federal Government to pursue the policy goals of protection, civilisation and assimilation.[24]

In pursuing these goals, the Federal Government set forth on a mission of political and cultural genocide. By 'genocide' (used here in a non-legal sense) I am referring to the state policies and practices that were designed to eliminate Indigenous cultures, languages, legal and political systems, spiritual beliefs, economic systems and Indigenous sovereignty.[25] The idea was that the 'Indigenous' was to be eliminated by the state and replaced with the 'civilised'. This process of eliminating the 'Indigenous' and creating the 'civilised' was set forth in the *Indian Act*, which governed (and still governs) nearly every aspect of a community's and a person's life, from birth (registration/status) to death (wills and estates) and everything in between. While reserves and the system of status, which centres on the legal definition as to who is an Indian, were initially set up to 'protect' Indigenous peoples and provide a venue for their 'civilisation', federal policy stipulated that once the 'Indigenous' had been eliminated and 'civilisation' established then individuals and/or collectives were to be legally assimilated into Canadian society; the reserves and Indian status were to be eliminated. Such a policy was openly advocated as a final solution in the 1884 *Indian Advancement Act*[26] and in the 1969 federal government policy document known as the 'White Paper'.[27] Though never successful in its attempts to fully realise its policy goals, the Federal Government was nonetheless successful in institutionalising and facilitating the internalisation of colonialism, or what the state defined as 'civilisation'.

The *Indian Act* and its patriarchal provisions regarding such matters as status, political rights and property rights have, in part, resulted in the internalisation of colonialism by Indigenous people, engendering an inharmonious plurality of cultural identities and understandings of gender. While women within Indigenous traditions are said to have been the source of spiritual and political power in a non-hierarchical sense, and were active participants in their nations' economic, political, social, spiritual and even foreign affairs (both military and diplomatic), they lost this status and their ability to participate in the state-sanctioned polity with the imposition

of the *Indian Act*. The *Indian Act* has 'maligned and devalued' women (and other genders) while male privilege has been 'normalized and legitimized'.[28] In the past, the Act did so by excluding women from participating in band governance, as women could neither vote nor seek election for office until 1951.[29] Through a variety of policies and provisions, Indian women were also historically denied property rights, as reserve property was originally allocated to male heads of households. Similarly, Indian women have also had their matrimonial property rights denied. Women on reserves still do not have legal rights to matrimonial property because this is a matter of provincial jurisdiction that has no application on federal lands, such as Indian reserves.[30] Indian women have also been denied equal membership rights, such that, until 1985 when the *Indian Act* was amended through Bill C-31, Indian women could lose their status through marriage to non-status men. Post-1985, status is still not necessarily transferred to the children of status Indian women.[31]

The situation for women has improved tremendously since 1951 through various amendments to the *Indian Act* that recognised women's rights.[32] Yet while the *Indian Act* has come to provide Indian women with greater equality rights, in some ways not much has changed. This is because the gender-based inequality runs far deeper than the *Indian Act* in Indian country. Barker has argued that this gender inequality was not created by the *Indian Act* but resulted from the introduction and forced perpetuation of an 'entire social structure defined by colonialism, capitalism, Christianity, heteronormativity, and racism', which, despite the cultural disconnect, has become deeply imbedded in Indigenous communities.[33] Put more plainly, colonialism was and continues to be a gendered enterprise.[34] Yet it is not simply a matter of Indigenous societies and cultures being re-gendered in a manner consistent with Western-Eurocentric norms. Instead, colonialism is a gendered enterprise defined by racialised sexual violence perpetuated by the church and state as a means of securing control over a nation and its land – and it is increasingly being perpetuated from within as a result of neo-colonialism, institutionalised sexism and the internalisation of sexual violence.[35]

This widespread, yet incomplete, internalisation of sexism, heteronormativity and masculine ideas of Indigenous nationhood, sovereignty and politics is evident even when the cloak of the *Indian Act* is removed. In the 1970s, the decades-old battle over Indian women's status – or the lack thereof – was renewed as alliances with non-Aboriginal feminists were developed. In addition, judicial and political opportunities for addressing the institutionalised gender inequality perpetuated in the *Indian Act* emerged as a result of the 1960 *Canadian Bill of Rights*[36] and the subsequent development of a rights discourse and gender consciousness in Canadian politics. However, judicial and political avenues proved incapable of addressing gender inequality under the *Indian Act*, as can be seen in the Supreme Court's 1973 5:4 decision in *Lavell*.[37] The Supreme Court held that the status provisions of the *Indian Act* were not in violation of Indian women's right to 'equality before the law', such that even though the *Indian Act*'s status provisions treated men and women differently this was not considered a violation of sexual equality under the terms of the *Canadian Bill of Rights*.[38] While such developments were shocking enough, the position taken by the majority of *Indian Act* Chiefs and their political organisations was even more shocking: they stood opposed to changing the status provisions of the *Indian Act* and to reinstating status for those who had lost theirs through marriage (or other less used means of disenfranchisement).

The vehement resistance of leaders from *Indian Act* band councils and political organisations such as the National Indian Brotherhood/Assembly of First Nations continued long into the 1980s when the issue of the gendering of status was finally 'resolved' in the constitutional arena in 1985. Section 35 of the *Canadian Constitution* was amended so as to affirm that Aboriginal and treaty rights apply to men and women equally. Subsequently the Canadian Parliament, through Bill C-31, provided for the re-instatement of those who had lost status previously and created new criteria for status.[39] The fairly widespread opposition to the supposed de-gendering of status and provisions for reinstatement did not cease in the constitutional arena with either the amendment to s 35 of the *Constitution* or to the *Indian Act*. Instead, several communities (including Sawridge, Ermineskin and Tsuu T'ina) challenged the constitutionality of Bill C-31 on the grounds that it violated their treaty rights.[40] Failing in their legal challenges, these communities and others opted to create their own membership codes under the terms of Bill C-31. These codes, such as that developed by Sawridge, have explicitly perpetuated gender inequality in the granting of membership to those individuals whose status had been reinstated by the Federal Government under the terms of Bill C-31.[41]

Such codes and the two-tiered system of status they created – status with band membership and status without it – continue

to be challenged for their persistent gendered discrimination. Bill C-31 itself, and specifically s 6 of the *Indian Act* as amended by the Bill, also faces ongoing legal contestation on the grounds that it has failed to eliminate gendered discrimination in its criteria for determining status.[42] While status can no longer be 'lost' through marriage, Indigenous women's children are still disproportionately affected by the termination of status than the children of Indigenous men. This is because, when individuals were reinstated as status Indians under the terms of the amended *Indian Act*, those people who had lost their status were registered under s 6(1)(c) and their children were registered under s 6(2), whereas all those who had never lost their status or those who had gained status by marrying status men prior to 1985 were registered under s 6(1)(a). Thus, post-C-31 status is now transmitted to a status Indian's offspring by doing 'section 6 math', whereby a child born of s 6(1) parents is registered under s 6(1), a single s 6(1) parent creates a s 6(2) registered child, two s 6(2) parents create a child who can be registered under s 6(2), and the offspring born to a single s 6(2) parent is terminally non-status.[43] What this means is that the children of re-instated parents, mainly women, have terminal status that cannot be passed on if they have children with a non-status person, while their relatives of equal blood quantum or lineage who descend from those (mainly males) who never lost their status are able to pass status on regardless as to the status of their partner. These provisions have successfully been challenged using the equality rights provisions under s 15 of the *Canadian Charter of Rights and Freedoms* by Sharon McIvor, a former president of the Native Women's Association of Canada, in a recent decision of the Superior Court of British Columbia.[44] The decision is to be appealed to the Supreme Court.[45]

III Recent Canadian Remedies for Gendered Inequality

In Canada, neither the Federal Government nor (the majority of) Indigenous governments in the modern age have had the best track record when it comes to matters of gender. This is demonstrated by inequalities in status (both pre- and post-Bill C-31), rates of electoral participation and electoral success in *Indian Act* governments (post-1951 as prior to this women could not participate), the prevalence of domestic and sexual violence, and the complete absence of matrimonial property rights, which has maintained the masculine domination of land tenure inherent in federal Indian policy.[46] The Federal Government has attempted to rectify this situation by repealing s 67 of the of the *Canadian Human Rights Act*,[47] which shielded the *Indian Act* (and thus band councils) from its purview, and by introducing the *Family Homes on Reserve and Matrimonial Interests or Rights Act* (Bill C-8, formerly C-47), which addresses the existing on-reserve matrimonial property policy vacuum. Though each is representative of gender-mainstreaming and at least seeks to incorporate gender analysis in shaping public policy, both fail miserably; neither piece of legislation addresses the reality of reserve life or the seemingly inescapable disconnect between women's rights and Indigenous self-determination.

The move to repeal s 67 of the *Canadian Human Rights Act* was met with general discontent in Indian country when it was introduced as Bill C-44 in 2006. The Bill subsequently died on the order paper in July 2007 with the end of the first session of the 39th Parliament; however, it was reintroduced as Bill C-21 in November of the same year. The Bill passed its third reading in May 2008 and came into effect with Royal Assent on 18 June 2008. On paper, Indigenous women have a lot to gain, as repealing s 67 of the *Canadian Human Rights Act* provides women with another avenue to pursue remedies to inequality and discrimination perpetuated under the *Indian Act* by either federal or band governments. More specifically, the repeal of s 67 enables claims to be filed against: *Indian Act* band councils by Indigenous peoples; *Indian Act* band councils by non-Indigenous peoples; the federal Crown (on matters related to the *Indian Act*) by Indigenous people (individuals); the federal Crown by *Indian Act* band councils; and the federal Crown by non-Indigenous individuals.[48]

The Native Women's Association of Canada ('NWAC') recognises the dire need for the protection of women's rights and states that

> [m]embership provisions under Bill C-31, off reserve rights, health, housing and education policies as well as the continuing lack of a matrimonial real property law regime that applies on reserve are the issues that the federal crown will most likely see complaints filed about.[49]

Still, NWAC did not favour repeal at this time. Despite the Canadian Human Rights Commission's assertions to the contrary, it is possible that 'the repeal of section 67 will have a significant destabilizing effect on First Nations communities. Some have compared it to the impact of … Bill C-31, while other critics said that it would result in dismantling the *Indian Act*.'[50]

In my opinion the impact will be far greater than that of Bill C-31, and it could very well result in the dismantling of the *Indian Act*. Most First Nations will be hard pressed by the need to develop a grievance process let alone respond to the outcomes of such grievances. For instance, how would a band council that is already unable to meet the housing needs of its members deal with grievances regarding discrimination and disadvantage of off-reserve members wanting housing (on or off reserve), or grievances from those members who endure housing that does not meet their accessibility needs? These concerns are similar to those raised by, and later confirmed following the passage of, Bill C-31.

Beyond the problems resulting from the lack of infrastructure and resources within communities, there is a concern that the repeal of s 67 under Bill C-21 represents the imposition of a Western-Eurocentric understanding of rights and, thus, the further colonisation of Indigenous cultures. It is true that the final text of the Bill includes a 'due regard to legal traditions and customary laws' provision, with particular attention having to be paid to the balancing of individual and collective rights.[51] However, clashing rights traditions and the power of the Canadian Human Rights Commission to interpret and validate Indigenous laws 'as consistent with the principle of gender equality' raise real questions about the Commission's ability to deny its colonial authority. Further, though the Commission has called for a 'First Nations human rights redress mechanism' that respects Indigenous self-government and Aboriginal and treaty rights as recognised in s 35 of the *Canadian Constitution*, it also argues that there is 'no fundamental conflict between the rights protected under section 35 and the provisions of the [*Canadian Human Rights Act*].'[52] Yet, according to my own research findings and those of other scholars such as James Youngblood Henderson, Patrick Macklem and even Peter Russell, there *is* a fundamental conflict that is grounded in the denial of Indigenous sovereignty and the perpetuation of legal myths, such as Crown sovereignty.[53] Finally, and most significantly, the repeal of s 67 opens the door for anyone in Canada, Indigenous or not, to address the discrimination they have experienced under the terms of the *Indian Act* because of their exclusion from all potential benefits (such as healthcare and land) accruing to Indigenous people under the Act. Though the Bill has a s 35 non-derogation provision, and while this seems a moot point to some, it nonetheless still contains the potential for rebalancing 'collective and individual rights'. By guaranteeing the individual equality of all 'Canadians', the repeal of s 67 may make it possible for non-Indigenous Canadians to impugn the validity of the *Indian Act* for its apparent discrimination against them. If the *Indian Act*, for all its faults, were rendered invalid, this would further erode the sovereignty of Indigenous nations.

Meanwhile the second issue that dominates the Federal Government's legislative agenda with respect to Indigenous peoples is matrimonial property. Summarising the issue at hand, NWAC states:

> In 1986, the Supreme Court of Canada ruled that provincial and territorial laws regarding matrimonial real property do not apply to reserve land. This gap in the law has had serious consequences, because when a marriage or relationship ends, there is no law that Aboriginal couples who live on reserve can use to help them solve this dispute.
>
> This gap also means that women who are experiencing violence, or who have become widowed, may lose their homes on the reserve. As a result, the law harms Aboriginal women and children much more than it does Aboriginal men.[54]

Christopher Alcantara suggests that this legislative vacuum unequally disadvantages women because of the male-oriented and -dominated nature of many Indian reserves:

> This is important since men have historically been the prime and sole owners of property and, hence benefit from the court's inability to divide or award an interest in matrimonial property.[55]

While both NWAC and the Assembly of First Nations ('AFN') have consulted with their constituencies and accordingly lobbied the Federal Government to fill this gap in the law, neither body is supportive of the Federal Government's attempt to resolve this issue through Bill C-8, the *Family Homes on Reserve and Matrimonial Interests or Rights Act*. As to the proposed Act's provisions, a Government explanation states:

> All First Nations (with the exception of those First Nations that have matrimonial real property laws under the First Nations Land Management Act or a self-government agreement that includes management of reserve lands) will be subject to the proposed Act's provisional federal rules unless and until such time as they enact their own laws.

> The proposed Act is subject to the [*Canadian Charter of Rights and Freedoms*]. To the extent that provisions of the proposed Act are deemed to fall within the scope of the Canadian Human Rights Act, the legislation will be subject to that Act.
>
> The proposed Act will: a) strike a balance between individual and collective rights; b) respect the inalienability of reserve lands; c) be enforceable in a practical manner; and d) result in greater certainty for spouses or common-law partners on reserves concerning the family home and other matrimonial interests or rights.[56]

Like Bill C-21, Bill C-8 does not deal with systemic issues that result in the inability of communities (and individuals) to effectively address the legislation's demands or the reality of reserve life. Neither Bill deals with 'systemic problems'[57] of poverty, housing shortages, institutionalised sexism and the internalisation of violence. The blanket prescriptions offered by Bill C-8, modelled on provincial matrimonial property rights regimes, do not respond adequately to the distinctiveness of the reality of reserve life. Due to tremendous housing shortages on reserves and with much of the existing housing stock being in poor quality (such that it would likely be deemed uninhabitable in other locales), alternative housing is simply not available. This means that someone will still have to leave the community, despite legislation giving them the right to remain. While the legislation attempts to recognise the interests of women (including non-Aboriginal and non-status women), and provides interim occupation rights and formulas (50/50) for dividing property, the legislation does not respond to the fact that in many cases women (and children) will still have nowhere to go within the community. More importantly, dividing matrimonial property 50/50 fails to consider that most people living on reserve do not have access to funds that would permit them to buy out another's interests, and are in many cases unable to obtain a mortgage due to limited availability or band control over mortgage access.

Bill C-8 will not offer an adequate means of protecting and actualising those rights and interests that it supposedly provides and thus does not remedy gender inequality. In fact, rather than strengthening gender equality within Aboriginal communities, Bill C-8 is likely to negatively affect Indigenous nations. Though the legislation would permit First Nations to develop their own codes, it does not provide First Nations with much capacity to enact codes enabling the governance of matrimonial property by traditional law.[58] This is extremely problematic, for it fails to respect both the sovereignty of First Nations and the demands of Indigenous people with respect to the use of Indigenous law, which were commonly articulated as desirable in the respective consultation processes of NWAC and AFN.[59]

While further infringing the sovereignty of Indigenous nations and their right to self-determination, Bill C-8 also raises a grave concern about the effect that it would have on Aboriginal and treaty rights, given that the proposed Act and any First Nations codes implemented under it would be subject to the *Charter of Rights and Freedoms* and to the *Canadian Human Rights Act*. While noting that subjecting Aboriginal and treaty rights (guaranteed in s 35 of the *Constitution* as constitutional rights) to the *Canadian Human Rights Act* is, in and of itself, unconstitutional as constitutional protections cannot generally be overridden by legislation, nonetheless the legislation and the Canadian Human Rights Commission are set to effect the practice of such rights (for example, self-government) failing constitutional challenge. If the constitutional validity of the legislation was contested, this would create a potential opportunity for the courts to read Aboriginal and treaty rights as subject to the *Charter* despite the protection afforded these rights by s 25 (the non-abrogation and derogation clause) of the *Canadian Constitution*. This would be in keeping with two recent trends in constitutional interpretation by the Canadian Supreme Court: first, the Court has tended to favour limiting the effects of ss 25 and 35 of the *Charter* by balancing Aboriginal rights with the collective good of Canadians; and second, the Court has failed to read s 25 as a 'shield' protecting native rights and freedoms.[60] While one might question the logic of the suggestion that this legislation may be co-opted to limit Aboriginal and treaty rights using the *Charter*, there is no denying that under the *Canadian Human Rights Act* non-Aboriginal people would be able to grieve the 'discrimination' imposed upon them by the *Indian Act* (ie, in being excluded from the specific benefits given to Indigenous people under the Act) and could potentially gain access to rights on reserve.

In rejecting the Federal Government's current efforts to alleviate gender inequality within Indigenous communities as inconsistent with Indigenous sovereignty and self-determination, have I myself fallen prey to the masculinist discourse of Indigenous sovereignty? Am I guilty of subscribing to a sexist, gendered theory of Indigenous liberation?[61] Some may think that is the case, that I have, on

the analysis of scholars like Green, Alcantara and St Denis, simply 'defended gender inequality on reserves by arguing that correcting this inequality would have a detrimental effect on [Indigenous peoples'] quest for Aboriginal self-government and self-determination.'[62] However, while I agree with these scholars to the extent that the issues are viewed in black and white terms (or in this case red and white) and framed as a matter of 'either you are with us or against us', I do not think the terms of this debate are nearly so cut and dry. For me, it is really a matter of 'every reform can be its own problem.'[63] In the case of the two pieces of legislation discussed, the potential for problems is gigantic, as neither is capable of adequately addressing gender inequality and both have the potential to further erode the sovereignty of Indigenous nations, to infringe upon Aboriginal and treaty rights, to dismantle the *Indian Act* and to institutionalise 'equality' in a way that would provide all Canadians with equal rights on reserves. So while I favour recognising and institutionalising gender equality, I am equally committed to defending the rights and sovereignty of Indigenous nations. Therefore, the question that I am left with is: need there be a permanent disconnect between women's rights and Indigenous sovereignty?

IV The Disconnect Between Women's Rights and Indigenous Sovereignty

As Lina Sunseri suggests, the disconnect is not inherent but rather the result of the masculinist ideas that now dominate Indigenous political organisations and *Indian Act* governments.[64] In short, as scholars such as Green, Smith, LaRocque and others have argued, these organisations and band council governments have been colonised.[65] Colonisation has caused the disjuncture between gender rights and Indigenous sovereignty. As such, any attempt to bridge the divide must address colonisation. In acknowledging this need I think that the answer lies within the realm of Indigenous constitutional orders. Leaving aside for one moment certain facts about the colonisation of Indigenous people in Canada – namely, that Indigenous people did not cede or relinquish their sovereignty or their right to govern themselves, and that many sought treaties to protect their constitutional orders – consideration must be given to the fact that Indigenous constitutional orders are not based on the subjugation and domination of women or other genders. This has been confirmed in my own community-based research on traditional Blackfoot governance and Mi'kmaw constitutional visions.[66]

One has to understand that the position of women in Indigenous society was, by and large, quite unlike that of European women at the time of contact. Indigenous conceptions of gender have generally been misunderstood by outsiders, who (re)constructed Indigenous women as 'squaws' and subordinate beasts of burden. As Alice B Kehoe points out, these false images prevailed during the early colonial period and continue to dominate, as Europeans were incapable of seeing Indian societies and Indian women for what they truly were. Shackled by their own intellectual and cultural traditions, the colonists evaluated Indigenous women's status and role in accordance with Victorian norms:

> a leisured wife and mother was in a very real sense an ornament to her husband, a conspicuous symbol of his power exercised through wealth. Working women were … assigned to a lower social status [as a woman was to be a] frail and weak … passive, passionless lady. … Women in other societies who were physically strong, independent, perhaps lusty were perceived as innately inferior to the Victorian lady, and the societies with such 'degraded' women predominantly were characterized as primitive and less evolved.[67]

Unlike the way in which European women were regarded by their own society, Indigenous women were considered within Indigenous society as persons; they were not the property of men, nor the drudges of society. As my own research in the case of the Blackfoot Confederacy has found, women were integral members of society in the pre-colonial period.[68] Though most women remained in camp and were responsible for camp life, the persistence of this gendered division of labour cannot be equated with inequality, subordination or oppression. Rather, these roles were respected and are recounted with great reverence in the oral tradition. Further, women were the owners of matrimonial property, the intermediaries between men and 'power' (in a non-Western sense), and the ones who brought the sacred ceremonies and the political order to the nations. Women were not confined by an absolute gender division, as many *ninawaki* or *sakwo'mapiakikiwan* (manly hearted women) pursued more masculine roles as warriors, hunters and leaders.

According to Smith, Indigenous political traditions call for the inclusion of all and are predicated on ideas of inter-relatedness and responsibility rather than the legitimisation of power and violence.[69] This is reflected in the Blackfoot

constitutional order and traditional political system, which was designed in opposition to a conception of power as coercion, hierarchy and authority. It is a framework (*okahn*) for creating and maintaining peace and good order, designed with the explicit purpose of ensuring people live together in the best way possible. The political system is in many respects part of an undifferentiated whole, with no absolute division between institutions and society. Still the Blackfoot have a complex political system comprised of three independent structures of governance – clans, bundles and societies – which together constitute *okahn* (the Blackfoot system). These institutions appear as part of the undifferentiated whole because governance is by and large consensual and 'power' is collective or horizontal.[70]

Within the Blackfoot traditional political system, women were and are involved in decision-making, and are active participants in the political process. Though several key societies involve either men or women, many of the structures and their resulting councils involve both men and women. These societies often have different roles for women, who are said not to have as much time to waste as men and thus carry the knowledge and the teachings that ground decisions, leaving the men with the time-consuming responsibility of applying the teachings and creating a consensus. While in pre-contact times women may not have been participants in all of the councils resulting from the three social structures (bundles, clans and societies), they were consistently consulted, as good decisions are said to have begun and ended with women. As such, 'their wisdom guided the decision-making process, and their approval provided legitimacy to the decision.'[71] Women were also active participants in the consultation and consensus-building processes that were utilised in decision-making in council or within any of the three structures of governance dependent on creating consensus within the clan, nation or confederacy (ie, the form or unit of governance).

Indigenous constitutional orders and, thus, Indigenous political systems and legal orders, such as that of the Blackfoot Confederacy, are not based on the subjugation, domination or oppression of women. Instead they were created in an attempt to formulate a way for people to live together in the best way possible in a specific territory and with all of the beings in that territory. The Blackfoot *nina* and *naha* (grandmothers and grandfathers) created a political system that vehemently disavowed the institutionalisation of power and instead established a seemingly non-differentiated political system which enabled the participation of all and institutionalised accountability and responsibility. In doing so, the *nina* and *naha* fashioned a political order which in many respects is gender positive, not gender neutral.

Turning back to the gendered and colonial realities of today, I have to admit that the mere existence of such traditions does not solve anything. Given the normalisation of state and individualised violence, sexism, heteronormativity, racism and the institutionalisation of neo-colonialism, how could it? There is an extreme disconnect that appears almost impossible to overcome because of the successes had by the colonisers – today so many Indigenous people lack even an elementary understanding of Indigenous political traditions, and few understand how Indigenous constitutional orders were operationalised as governance. Further limiting the possibility of reinstating gender-positive Indigenous constitutional orders is the fact that colonialism is entrenched and constantly defended by the state; neither the state nor neo-colonial rulers show any desire to relinquish their power and authority or to create anything but a neo-colonial visioning of self-government.[72] But is it impossible to reconnect Indigenous self-determination with gender equality? Or is it simply a matter of an uphill battle, with lots of work left to be done?

V Decolonising Gender and Gendering Decolonisation

According to Henderson, 'attempting to validate [Indigenous] world view[s] and knowledge in its own right, without interference of Eurocentrism, requires a transformation of consciousness.'[73] The change in consciousness involved in transforming the colonised into 'post-colonial' thinkers requires a process of destabilisation and decolonisation. It will require Indigenous people to understand Indigenous knowledge, philosophies, conceptualisations of gender, and constitutional orders on their own terms and within their own context. Expanding on these ideas, Henderson argues that:

> to acquire freedom in the decolonized and dealienated order requires the colonized to break their silence and struggle to take possession of their humanity and dignity. To speak initially, they have to share Eurocentric thought and discourse with their oppressor; however to exist with dignity and integrity, they must renounce Eurocentric models and live with the ambiguity of thinking against themselves. They

> must learn to create models to help them take their bearings in unexplored territory. Educated Aboriginal thinkers have to understand and reconsider Eurocentric discourse in order to reinvent an Aboriginal discourse based on heritage and language, and to develop a post-colonial synthesis of knowledge and law to protect them from old and new dominators and oppressors.
>
> The crisis of our times has created post-colonial thinkers and societies that struggle to free themselves from the Eurocentric colonial context. While we still have to use the techniques of colonial thought, we must also have the courage to rise above them and to follow traditional devices.[74]

The process of decolonising, and in turn creating 'post-colonial' thinkers and societies, must be grounded in Indigenous thought, traditions and language, but at the same time the decolonisation project must also be protected from would-be dominators and oppressors. Decolonisation must, therefore, be a gendered project. It must be a project that is grounded in Indigenous understandings of gender – understandings that may speak of multiple genders, understandings that, while reifying strict categorisations of gender roles and responsibilities, do so within a context of respect and gender neutrality or positivity. These understandings may have to be rediscovered or they may simply need to be dusted off. Whatever the case, they must be grounded in language and tradition, and they will have to be understood from within. They must be disentangled from the penetrating forces of colonialism; for colonialism has deep roots, beginning with first contact as traders and missionaries, in their refusal to accept Indigenous women as their equal in negotiations or in everyday life, began the process of transforming Indigenous understandings of gender.

This will be an onerous task, but as Henderson reminds, it is one that is absolutely necessary. Decolonisation must also be a project protected from all constructions of the past and any ideas of today that are used to dominate and oppress women. Ensuring such protection may take great leadership, and will depend on leaders that 'construct models to help them take their bearings',[75] for there will be pressure to recreate gender as it is within Western-Eurocentric thought and as it has now become imbedded in colonial institutions and Indigenous societies. Of assistance in these decolonisation processes will be Indigenous languages and histories, as they speak of an entirely different understanding of the world. They will serve as a guide to enable leaders to take their bearings, and can be used to begin the process of destabilising, disentangling and decolonising gender.[76]

While Henderson's work speaks to the need to decolonise gender as part of the 'post-colonial ghost-dance',[77] it is in fact necessary to both gender decolonisation and decolonise gender. The works of scholars such as Smith, Turpel-Lafond, Green, Monture, and Voyageur highlight the need for gendering decolonisation and decolonising gender, and to some extent they have begun the process of constructing those models necessary to gain bearings and journey forward.[78] A tremendous amount of work is still needed to effectively decolonise gender in a manner that both holds true to Henderson's vision and Indigenous language and heritage. In doing this work scholars must not simply focus on women, for predominant constructions of masculinity also have to be decolonised. It is necessary to both decolonise gender and gender decolonisation as these two projects are, or at the very least should be, a unified project of decolonisation culminating in Henderson's post-colonial ghost-dance.[79]

As it stands, it is absolutely necessary to reframe decolonisation as a gendered project. That is to say, we must challenge the masculinist ideas that now dominate many Indigenous organisations (such as band councils) and the corresponding discourses of sovereignty and nationalism; and we must reframe them with gender as a central consideration. Gender cannot and should not be separated from considerations of sovereignty and nationhood – to do so is to perpetuate colonisation, which is contrary to the very purpose behind sovereignty and nationhood themselves.

Is it possible? Given the gains that have been made by non-Indigenous Canadian women in (re)gendering Canadian society and in transforming understandings of rights, equality, sovereignty and nationhood, when the only history and tradition they have is one of domination and oppression, then anything is possible! To begin the process of gendering decolonisation, Barker suggests that real reform

> must involve and result in a radical, affirmative repositioning of the legal and social status of women with respect to men. They must be willing to give up the assumptions, privileges and benefits that they have inherited from a system based in sexism; take responsibility in their interpersonal relations for histories of discrimination and violence against women and children; and, work to (re)empower women and their children within their communities and families.[80]

If Barker's wisdom is headed, then gendering decolonisation is indeed possible.

VI Facing the Future

As I have argued countless times elsewhere,[81] for me, decolonisation is intimately tied to treaty constitutionalism. Briefly, treaty constitutionalism (or treaty federalism) refers to a growing body of literature that is dedicated to understanding the historical foundations of and contemporary claims to sovereignty by both Indigenous and settler nations. This body of research has established that Indigenous peoples had and continue to have their own constitutional orders and that, as a result, there exist competing constitutional orders (Indigenous and Canadian) and contested sovereignties.[82] Both Indigenous and Canadian orders assert claims of jurisdiction over the same territory and both claim that their right to do so is vested in and established by history, law, international agreements (such as treaties) and the Canadian constitutional order. Beyond this, treaty constitutionalism contends that by and large these contested sovereignties have been reconciled through treaties which protected the sovereignty, and the legal and political traditions, of the Indigenous and colonial signatory nations.

That women, and indeed all genders, fared so much better under Indigenous constitutional orders than they have under colonial structures suggests a link between decolonisation and treaty constitutionalism. Beyond this obvious consideration of gender, the correlation between decolonisation and treaty constitutionalism exists because it is within these constitutional orders that Indigenous rights and responsibilities are vested. As has been recognised by the courts, Aboriginal and treaty rights are *sui generis* such that these rights were not created by the *Canadian Constitution* (or through the preceding development of the British Constitution), but were instead created outside of this order.[83] As Henderson, Benson and Gindlay have argued:

> The spirit and the intent of section 35(1) [of the *Canadian Constitution*], then, should be interpreted as 'recognizing and affirming' Aboriginal legal orders, laws and jurisdictions unfolded through Aboriginal and treaty rights …[84]

Aboriginal and treaty rights, therefore, are the manifestation of Indigenous constitutional orders in the post-colonial legal context; or, put another way, such rights are the means by which these constitutional orders were recognised and affirmed in the *Canadian Constitution*. Historic treaties themselves recognised and affirmed Indigenous constitutional orders, delegated certain powers and responsibilities to the Crown and provided colonial orders with the ability to govern their own people within the shared territories; and these treaties continue to have the same effects today. In situations where no such treaty has been negotiated, the prerogatives of both 'sovereigns' remain intact as neither constitutional order has ever been subsumed within, limited by or incorporated into the other. Thus, regardless of whether a treaty exists or not, Indigenous rights and responsibilities are vested in and limited by Indigenous constitutional orders.

Whether or not one agrees with treaty constitutionalism, views it as a discourse that further institutionalises racism and sexism, or sees alternative opportunities for achieving decolonisation, the one truth remains – Aboriginal and treaty rights are vested in and result from these Indigenous constitutional orders. Take, for example, the Mi'kmaw right to fish salmon. Though protected by treaty, an individual's rights and responsibilities within the fishery were established in the Mi'kmaw constitutional order, and are merely recognised and affirmed in s 35 of the *Canadian Constitution*. Thus, because of the nature of Aboriginal and treaty rights, it is impossible to truly detach oneself from a discourse of decolonisation embedded in some semblance of treaty constitutionalism.

While it may be true, as Green argues, that discourses of decolonisation which 'draw on Indigenous traditions and political orders have not been attentive to gender',[85] this does not have to be so. The disconnect between gender and Indigenous sovereignty is not inherent. To remedy this disconnect, decolonisation needs to be gendered and gender decolonised. Surprisingly, it is possible to achieve this without deviating from treaty constitutionalism. Even more surprising is that, while the Federal Government has been unable to remedy this disconnect with its proposed matrimonial property legislation (Bill C-21), it is nevertheless possible to do so in a manner that respects treaty constitutionalism, but only insofar as decolonisation is gendered and gender decolonised.

This is because Indigenous constitutional orders have their own rules governing matrimonial property and the resolution of property disputes following death or separation. These are widely thought to have protected the

rights of women and children, something reflected in the fact that many participants in the consultations held by NWAC and AFN spoke about the need to return to such teachings and legal orders.[86] Though my knowledge is quite limited, such sentiments appear well justified on the basis of my own research. From my understandings based upon the teachings of Elders and conversations with leading Haudenosaunee and Blackfoot scholars, the Haudenosaunee constitutional order (the Great Law) can be interpreted to recognise both the property rights of women and the rights of those raising the children; and the Blackfoot constitutional order is quite definitive in that property (lodges and belongings including most bundles) is almost exclusively 'owned' by the women.[87] Such legal orderings confirm that there is not necessarily a disconnect between sovereignty and gender, in congruence with the arguments of Monture and Turpel-Lafond.

However, the existence of these traditions or understandings of Indigenous law will not necessarily render the disconnect between Indigenous sovereignty and gender obsolete. If *Sawridge Band v Canada*[88] (a case in which a Cree community attempted to exclude women from its membership and justified doing so on the basis of Cree laws and traditions) is any indicator, they most likely will not.[89] Those who benefit from the masculinist discourse of sovereignty, and from the sexism and racism that ground neo-colonialism, are not likely to give up that easily. Thus, as Indigenous constitutional orders are dusted off and sovereignty restored to some extent or another, considerations of gender will need to be front and centre. In so doing, both leaders and communities will need to decolonise their understanding of gender and in turn be held accountable for their decolonising of gender and gendering of decolonisation. Internal processes of decolonising gender and gendering decolonisation need to be established, and national or even international (read: pan-Aboriginal) benchmarks have to be created. A situation like the one that arose in Sawridge has to be avoided, but avoided without disregard to treaty constitutionalism.

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1 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

2 These sections read as follows:

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

35. (1) The existing aboriginal and treaty rights of aboriginal peoples are hereby recognized and affirmed.
    (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis 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 so be 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.

Constitution Act 1982, being Schedule B to the *Canada Act 1982* (UK) c 11, ss 35, 25.

3 Indigenous constitutional orders are the mainly unwritten constitutional traditions in Indigenous North America with each nation typically having its own unwritten constitutional order. Like the British Constitution, Indigenous constitutions consist of a myriad of written and unwritten documents and traditions (which in the case of some nations consist of orations of constitutional documents while in others the constitution is outlined by bundles, ceremony, song and story). As with other constitutional orders, Indigenous orders establish and maintain political systems, provide citizens with rights, responsibilities, legal systems and traditions, and outline the interrelationship of society, politics and religion.

4 *Indian Act*, RS 1985, c I-5.

5 See, eg, Teressa Nahanee, 'Taking the Measure of Self-Government: For Native Women, It's a Bad Deal' (1992) 10(5) *Compass: A Jesuit Journal* 17.

6 See Teressa Nahanee, 'Dancing with a Gorilla: Aboriginal Women, Justice and the Charter' in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (1993) 359.

7 Patricia Monture-Angus, *Thunder In My Soul: A Mohawk Woman Speaks* (1995).

8 Joyce Green, 'Taking Account of Indigenous Feminism' in Joyce Green (ed), *Making Space for Indigenous Feminism* (2007) 20, 22–3.

9 Nahanee, 'Taking the Measure of Self-Government', above n 5.

10 See generally Nahanee, 'Taking the Measure of Self-Government', above n 5; Nahanee, 'Dancing with a Gorilla', above n 6; Green, 'Taking Account of Indigenous Feminism', above n 8.

11 Nahanee, 'Taking the Measure of Self-Government', above n 5; Nahanee, 'Dancing with a Gorilla', above n 6; Mary Ellen Turpel-Lafond, 'Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women' (1993) 6(1) *Canadian Journal of Women and the Law* 174; Monture-Angus, *Thunder In My Soul* , above n 7, 131–47.

12 Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences' (1989–90) 6 *Canadian Human Rights Year Book* 3, 40–4; Monture-Angus, *Thunder In My Soul* , above n 7, 131–47.

13 Monture-Angus, *Thunder In My Soul*, above n 7, 179.

14 Turpel-Lafond, 'Patriarchy and Paternalism', above n 11, 190.

15 Monture-Angus, *Thunder In My Soul*, above n 7, 136, 139–40.

16 Turpel, 'Aboriginal Peoples and the Canadian Charter', above n 12, 42.

17 Jo-Anne Fiske, 'The Womb is to the Nation as the Heart is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement' (1996) 51(Autumn) *Studies in Political Economy* 65, 69.

18 Ibid 79.

19 Joanne Barker, 'Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism' (2006) 7(1) *Meridians: Feminism, Race, Transnationalism* 127, 149.

20 Patricia Monture, 'The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?' in Kerry Wilkins (ed), *Advancing Aboriginal Claims: Visions, Strategies, Directions* (2004) 39, 53.

21 See the final chapter in Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations Independence* (1999); Letter from Patricia Monture to Kiera Ladner, 28 May 2008.

22 Andrea Smith, 'Not an Indian Tradition: The Sexual Colonization of Native Peoples' (2003) 18(2) *Hypatia* 70; Joyce Green, 'Introduction: Indigenous Feminism: From Symposium to Book' in Joyce Green (ed), *Making Space for Indigenous Feminism* (2007) 14.

23 Verna St Denis, 'Feminism is for Everybody: Aboriginal Women, Feminism and Diversity' in Joyce Green (ed), *Making Space for Indigenous Feminism* (2007) 33, 41.

24 See John L Tobias, 'Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy' in James Rodger Miller (ed), *Sweet Promises: A Reader on Indian-White Relations in Canada* (1991) 127.

25 Kiera L Ladner, 'Rethinking the Past, Present and Future of Aboriginal Governance' in Janine Brodie and Linda Trimble (eds), *Reinventing Canada* (2003).

26 *Indian Advancement Act*, SC 1884 (47 Vice), c 28. See Tobias, above n 24, 134.

27 For a brief outline of the White Paper see, eg, Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) vol 1, ch 9, 'The Paradox of Indian Act Reform'.

28 Barker, above n 19, 133.

29 See Cora Voyageur, *Firekeepers of the Twenty-First Century: First Nations Women Chiefs* (2008).

30 Christopher Alcantara, 'Indian Women and the Division of Matrimonial Real Property on Canadian Indian Reserves' (2006) 18(2) *Canadian Journal of Women and the Law* 513.

31 *Indian Act*, SC 1876, s 12(1b); *Indian Act*, RS 1985, c I-5, ss 6(1), 6(2). See also Joyce Green, 'Canaries in the Mines of Citizenship: Indian Women in Canada' (2001) 34(4) *Canadian Journal of Political Science* 715, 729–37; Caroline Dick, 'The Politics of Intragroup Difference: First Nations' Women and the Sawridge Dispute' (2006) 39(1) *Canadian Journal of Political Science* 97. Though nothing has changed at the time of writing, changes are now being addressed as we await the granting of an appeal of the decision in *McIvor v Canada (Registrar of Indian and Northern Affairs)* [2009] BCCA 153 by the Supreme Court of Canada.

32 Voyageur, above n 29, 3–15.

33 Barker, above n 19, 132.

34 Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (2005).

35 Smith, 'Not an Indian Tradition', above n 22.

36 *Canadian Bill of Rights*, SC 1960, c 44.

37 *Attorney General (Canada) v Lavell* [1974] SCR 1349.

38 See ibid.

39 Section 12(1b) was repealed and replaced with s 6. See *Indian Act*, SC 1876, s 12(1b); *Indian Act*, RS 1985, c I-5, s 6.

40 Joan Holmes, *Bill C-31: Equality or Disparity? The Effects of the New Indian Act on Native Women* (1987) 19.

41 Dick, above n 31, 101–2.

42 See, eg, *McIvor v Canada (Registrar of Indian and Northern Affairs)* [2009] BCCA 153.

43 See *Indian Act*, RS 1985, c I-5, s 6.

44 *McIvor v Canada (Registrar of Indian and Northern Affairs)* [2009] BCCA 153.

45 See, eg, Bill Curry, 'Indian Status Case Going to Supreme Court', *The Globe and Mail* (online), 5 June 2009 < http://www.

theglobeandmail.com/news/politics/indian-status-case-going-to-top-court/article1168979> at 18 June 2009.

46 See generally Smith, *Conquest*, above n 34; Voyageur, above n 29; Joyce Green (ed), *Making Space for Indigenous Feminism* (2007).

47 *Canadian Human Rights Act*, RS 1985, c H-6. Section 67 of the Act was repealed by Bill C-21.

48 Letter from Patricia Monture to Kiera Ladner, 28 May 2008, above n 21.

49 NWAC, 'Repeal of S 67 Requires Consultations and Resources' (Press Release, 16 November 2007) 1.

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51 Ibid 4.

52 Ibid 10.

53 Peter H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (2005); Kiera L Ladner, 'Up the Creek: Fishing for a New Constitutional Order' (2005) 38(4) *Canadian Journal of Political Science* 923; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2001); James (Sakej) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (2007).

54 NWAC, '"Consultative Partnership" a Sham' (Press Release, 4 March 2008).

55 Alcantara, above n 30, 530–1.

56 Indian and Northern Affairs Canada, *Family Homes on Reserves and Matrimonial Interests or Rights Act: Overview* <http://www.ainc-inac.gc.ca/br/mrp/ip/ipn0-eng.asp> at 10 August 2009.

57 NWAC, '"Consultative Partnership" a Sham', above n 54.

58 NWAC, *Matrimonial Real Property: An Issue Paper* (2007) 9 <http://www.nwac-hq.org/en/documents/nwac-mrp.pdf> at 10 August 2009.

59 See ibid; Assembly of First Nations, *Technical Update: Matrimonial Real Property* (2008) <http://www.afn.ca/misc/mrp-update.pdf> at 10 August 2009.

60 See *R v Marshall* [1999] 3 SCR 456; *Mitchell v Minister of National Revenue* [2001] 1 SCR 911; *R v Kapp*, 2008 SCC 41 (judgment of McLachlin CJ and Abella J at [63]–[65], *contra* the judgment of Bastarache J). See also Kiera L Ladner and Michael McCrossan, 'The Road Not Taken: Aboriginal Rights After the Re-Imagining of the Canadian Constitutional Order' in James B Kelly and Christopher P Manfredi (eds), *Contested Constitutionalism: Reflections on the* Canadian Charter of Rights and Freedoms (2008) 263; Michael Murphy, 'Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?' (2001) 34 *Canadian Journal of Political Science* 109.

61 See above n 8.

62 Alcantara, above n 30, 529.

63 S L Sutherland, 'Responsible Government and Ministerial Responsibility: Every Reform is Its Own Problem' (1991) 24(1) *Canadian Journal of Political Science* 91.

64 Lina Sunseri, 'Moving Beyond the Feminism versus the Nationalism Dichotomy: An Anti-Colonial Feminist Perspective on Aboriginal Liberation Struggles' (2000) 20(2) *Canadian Woman Studies* 143.

65 See Green, 'Taking Account of Indigenous Feminism', above n 8; Smith, 'Not an Indian Tradition', above n 22; Emma LaRocque, 'Métis and Feminist: Ethical Reflections on Feminism, Human Rights and Decolonization' in Joyce Green (ed), *Making Space for Indigenous Feminism* (2007) 53.

66 See Ladner, 'Up the Creek' above n 53; Kiera L Ladner, *When Buffalo Speaks: Cree-ating an AlterNative Understanding of Traditional Blackfoot Governance* (D Phil Thesis, Carleton University, 2001); Ladner and McCrossan, above n 60 .

67 Alice B Kehoe, 'The Shackles of Tradition' in Patricia Albers and Beatrice Medicine (eds), *The Hidden Half: Studies of Plains Indian Women* (1983) 53, 56.

68 Ladner, *When Buffalo Speaks*, above n 66.

69 Andrea Smith, 'Dismantling the Master's Tools with the Master's House: Native Feminist Liberation Theologies' (2006) 22(2) *Journal of Feminist Studies in Religion* 85, 94.

70 For a discussion of *okahn*, and a more comprehensive discussion of the Blackfoot political system and its philosophical underpinnings, see Ladner, *When Buffalo Speaks*, above n 66.

71 Ladner, *When Buffalo Speaks*, above n 66, 138.

72 Kiera L Ladner and Michael Orsini, 'The Persistence of Paradigm Paralysis: The First Nations Governance Act as the Continuation of Colonial Policy' in *Canada: State of the Federation, 2003: Reconfiguring Aboriginal–State Relations* (2005) 185.

73 James (Sakej) Youngblood Henderson, *The Mikmaw Concordat* (1997) 24.

74 James (Sakej) Youngblood Henderson, 'Ayukpachi: Empowering Aboriginal Thought' in Marie Battiste (ed), *Reclaiming Indigenous Voice and Vision* (2000) 248, 254.

75 Ibid.

76 Such would be the case among Nehiyaw (Plains Cree), for instance. Nehiyaw histories speak about respecting diversity and inclusion; and Nehiyaw language is not gendered – it is next to impossible to speak of gender without speaking in terms of one's roles or responsibilities, and this in turn allows for multiple genders. See Robert Innes, 'Cowessess Band Members and the Importance of Family Ties' (Paper presented at the 'What's

Next for Native American and Indigenous Studies?' Meeting, Oklahoma, 3–5 May 2007).

77 Henderson, 'Ayukpachi', above n 74; James (Sakej) Youngblood Henderson, 'Poscolonial Ghost-Dancing: Diagnosing European Colonialism' in Marie Battiste (ed) *Reclaiming Indigenous Voice and Vision* (2000) 57.

78 Patricia Monture-Angus, *Journeying Forward*, above n 21; Voyageur, above n 29; Green, 'Canaries in the Mines of Citizenship', above n 31; Smith, *Conquest*, above n 34; Turpel, 'Aboriginal Peoples and the Canadian Charter', above n 12.

79 Henderson, 'Ayukpachi', above n 74; Henderson, 'Poscolonial Ghost-Dancing', above n 77.

80 Barker, above n 19, 154.

81 See, eg, Ladner, 'Up the Creek', above n 53.

82 James (Sakej) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (2007); Ladner, 'Up the Creek', above n 53.

83 See *R v Sparrow* [1990] 1 SCR 1075; *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73.

84 James (Sakej) Youngblood Henderson, Marjorie L Benson and Isobel M Findlay, *Aboriginal Tenure in the Constitution of Canada* (2000) 432–4.

85 See above n 8.

86 NWAC, *Matrimonial Real Property*, above n 58; Assembly of First Nations, above n 59.

87 Paul Williams, 'The Chain' (LLM Thesis, University of Toronto, 1982). Kiera L Ladner, 'Governing Within an Ecological Context: Creating an Alternative Understanding of Blackfoot Governance' (2003) 70 *Studies in Political Economy* 125; Patricia Albers and Beatrice Medicine (eds), *The Hidden Half: Studies of Plains Indian Women* (1983)

88 There has been a series of legal actions associated with this dispute. For a summary of the litigation history to 2006, see *Sawridge v Canada*, 2006 FCA 228, [6]–[16]. See also Dick, above n 31.

89 See Dick, above n 31.