



# Raven's Garden : A Discussion about Aboriginal Sexual Orientation and Transgender Issues

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*"Hmmm. Hmmm. I just wonder what will happen." Raven is musing from the top of the world. Raven has been watching the recent Supreme Court of Canada decisions regarding same-sex benefits, marriage, and pornography. "Will they remember the garden?" Raven asks. "Can they rediscover the garden?"<sup>1</sup>*

## Introduction

How might Aboriginal nations constructively address sexual orientation and transgender issues in the next millennium?<sup>2</sup> In the Aboriginal political landscape, there is an absence of voices advocating that sexual orientation and transgenderism are significant Aboriginal issues. Instead, they remain subsumed by continuing political and legal battles over Aboriginal rights and title, formal equality rights as set out in the *Canadian Charter of Rights and Freedoms*,<sup>3</sup> and human rights legislation. Furthermore, in many Aboriginal communities, conservative and Christianized revisionist "culture" mitigate against acceptance of transgenderism and variety in

<sup>1</sup> "The *Trickster* is a central figure in the myth worlds of many hunting and gathering societies. A divine figure, but deeply flawed and very human, the *Trickster* is found in myth cycles from the Americas, Africa, Australia, and Siberia. ... The *Trickster* symbolizes the frailty and human qualities of the gods and their closeness to humans. These stand in pointed contrast to the omnipotent, all-knowing but distant deities that are central to the pantheons of state religions and their powerful ecclesiastical hierarchies." R. Lee & R. Daly, "Foragers and others" in R. Lee & R. Daly, eds., *The Cambridge Encyclopedia of Hunters and Gatherers* (Cambridge : Cambridge University Press, 1999) 1 at 4-5 [footnotes omitted].

<sup>2</sup> The term "sexual orientation issues" is used here to describe those that affect gay men and lesbians. The terms "gay men" and "lesbian" will be used to apply to same-sex relationships and sexual preference. The literature uses the terms "berdache", "two-spirited", "man-woman", and "woman-man" to describe an array of roles including gay, lesbian, alternative genders, gender variance, transvestites, transsexuals, transgendered, drag queens, and butches. Many Aboriginal people find the commonly used term "berdache" offensive because it derives from a Persian and Arabic term that means "male prostitute". As well, the more recent commonly used term, "two-spirited", offends some Aboriginal nations who relate this term to (1) someone who is neither alive nor dead, (2) ghosts, or (3) witches. The term "transgender" is used to describe the range of alternative genders – transsexuals, transvestites, and other gender role variances – deriving from gender identity, role, or status. This term does not necessarily include or imply same-sex or heterosexual preferences. For more detailed information, see S. Lang, *Men as Women, Women as Men : Changing Gender in North American Cultures* (Austin : University of Texas Press, 1998) at xv-xvi [hereinafter Lang].

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

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sexual orientation. Consequently, the discourse is limited, and many gay, lesbian, and transgendered Aboriginal persons are adversely affected, living in silence and isolation, or endangered by violence.

It is the thesis of this paper that the legal principles within pre-contact Aboriginal legal orders affecting individual and collective rights can be articulated and extended to apply to current-day sexual orientation and transgender issues in Aboriginal communities. With specific reference to the Gitksan nation of northwestern British Columbia, it explores four themes that will affect how Aboriginal nations<sup>4</sup> might proactively begin the new millennium.

First, the colonizing breakdown of Aboriginal societies' internal social, political, and economic systems has resulted in Aboriginal communities being less open and compassionate generally, and specifically less tolerant of sexual orientation and transgender issues, than in pre-contact times. Second, colonialism has caused a fundamental shift in Aboriginal social constructs of the individual and the collective. Third, for some Aboriginal nations, ideas and practices about marriage, transgenderism, and sexual orientation were more a part of the socio-political organization and economic structure than they were concerned with interpersonal relationships.<sup>5</sup> Fourth, if Aboriginal nations are to rebuild their strength and capacity, current and future self-government arrangements must preclude discrimination on the basis of sexual orientation and transgenderism.

Since there is no case law that critically discusses current sexual orientation or transgender issues and discrimination in Aboriginal<sup>6</sup> societies,

<sup>4</sup> There are profound differences between western and Aboriginal constructs of nationhood, so care must be taken not to simply assume a western definition. Different histories and cultures have produced different ways for large groups of people to define themselves and relate to others, non-human life forms, space, and the land. A critical cosmological difference is that Aboriginal nations make no fundamental separation between the history of humans and the history of the world, and fuse human power with the power of the land. Another critical divergence between Aboriginal and non-Aboriginal constructs of nationhood lies in the structures of the hierarchies in social and political regimes (e.g., centralized vs. decentralized). In order to emphasize the different social constructs, some authors deliberately use the term "peoples" when referring to Aboriginal groups rather than nations. For more information, see N.J. Sterritt *et al.*, *Tribal Boundaries in the Nass Watershed* (Vancouver : University of British Columbia Press, 1998).

<sup>5</sup> According to an Anishnawbe author, Midnight Sun, "there is a tendency to conflate the 'universal' or 'essentialist' and the 'social constructionist' approaches [to sexual orientation] and to use contemporary western concepts of sex, gender, and sexuality as standards for comparing all other cultures." Midnight Sun, "Sex/Gender Systems in Native North America", in W. Roscoe *et al.*, eds., *Living the Spirit : A Gay American Indian Anthology* (New York: Martin's Press, 1988) 32 at 33 [hereinafter Midnight Sun]. It is a premise of this paper that sexuality and gender essentially are culturally determined social constructs in the broadest sense inclusive of biological, hormonal, environmental, and psychological influences. See W. Williams, *The Spirit and the Flesh : Sexual Diversity in American Indian Culture* (Boston : Beacon Press, 1986) at 272 [hereinafter Williams]. However, this is not intended to suggest that same-sex sexual preference is simply an externally determined part of human identity or a matter of an inherent personal quality or a personal choice. The reality is much more complex and beyond the scope of this paper.

<sup>6</sup> Some people prefer the term "Indigenous Peoples" because it means coming from the land, it conforms to current international usage, and it is a clear rejection of colonizer labels. Others prefer to use the terms "First Nations", "Aboriginal", or "Indian", the latter is mainly used by American Indians). In this paper, I mainly use the term "Aboriginal"

I will draw some analogies from the experiences of Aboriginal women – in particular, their struggles with sexual discrimination in band membership policies and in the justice system.

## Background

*Raven watches more mundane events. Val meets Charlie. He is a great, big gay Ojibwa with bleached blond hair and a magnificent sense of humour. She learns from him about language, history, and all manner of things. It dawns on Val that her elderly uncle, Ray, is like Charlie – that he is gay.*

There are 500 diverse Aboriginal nations in North America.<sup>7</sup> The Aboriginal peoples of Canada, which include First Nations, Inuit, and Métis, represent about 2.7 percent of the total population. In Canada, there are more than 60 distinct Aboriginal nations, 11 major linguistic groups, and numbers of linguistic dialects within each of these groupings. Fifty-eight percent of the Aboriginal population live in the almost 600 Aboriginal reserve communities; the remaining 42 percent live mostly in urban centres. Aboriginal people residing in southern Canada are more likely to reside off-reserve.<sup>8</sup>

While Aboriginal cultural patterns (belief, social, economic, political, and legal systems) differ substantially from European patterns, there is also considerable variety among Aboriginal nations.<sup>9</sup> There is no one Aboriginal nation, no one Aboriginal community, and no one Aboriginal approach to sexual orientation and transgender issues. These historic differences remain important as Aboriginal nations seek to assert Aboriginal rights and to develop effective cultural approaches to dealing with current social problems in a modern context.

For Aboriginal nations, colonization has included the experience of being extensively studied, measured, judged, and interpreted by western anthropologists and other social scientists.

One positive result of this intensive scrutiny is written records of post-contact oral accounts by learned Aboriginal persons about their own cosmologies, societies, and practices.<sup>10</sup> Many of these materials now form a useful resource for Aboriginal nations in the work of healing destructive

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because it is easily recognized and the most commonly used in Canada. My preference is, when possible, to use people's own names for themselves (e.g., Gitxsan, Cree, etc.).

<sup>7</sup> H. Feit, "Introduction: North America", in Lee & Daly, *supra* note 1 at 23.

<sup>8</sup> Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back 1* (Ottawa : Canada Communications Group, 1996) at 12, 15-17.

<sup>9</sup> *Ibid.* at 46.

<sup>10</sup> For example, see M. Anderson & M. Halpin, eds., *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver : University of British Columbia Press, 2000). This is an invaluable publication of several notebooks documenting a complete series of Gitxsan feasts in 1945. Also, the extensive works of Franz Boas, Marius Barbeau, Wilson Duff, and Violet Garfield from the early 1900s to the 1960s provide volumes of anthropological and ethnographic materials about Aboriginal peoples, especially about the people of the northwest coast.

ruptures in cultural transmission and overcoming the colonial legacy of dysfunction in Aboriginal communities.

But there are also negative aspects to this scrutiny, especially in regard to sexual orientation. According to historian Sabine Lang, while the quantity of reports about sexual orientation is considerable, the quality is variable at best because in the eyes of European observers, transgender and sexual orientation issues were tainted with the stigma of sexual perversion. For one thing, the earliest chroniclers were missionaries, conquistadors, traders, or other people with Christian ideals of morality. Not surprisingly, examinations of their reports reveal that these chroniclers were entirely products of their own times and worlds, as we all are, with the biases, expectations, and values of their day.<sup>11</sup> Hence, the questions they asked and the conclusions they drew from the answers came from different cultural perspectives than those of their subjects. Without an effective and critical cultural translation process, there was, and is, a continuing danger of misinterpretations, misunderstandings, and blunted or superficial conclusions.<sup>12</sup> For example, Lang writes,

[c]oming to a village with the concept of two genders, the observer sees two genders. ... At the same time, the possibility of an ambivalent gender status (different from the gender statuses of “men” and “women”) calls into question the assumption that same-sex relationships with women-men or men-women correspond to homosexual relationships as defined in Western culture.<sup>13</sup>

In other cases, researchers – even professional academics – simply refused to consider the study of sexual orientation or transgender issues as a legitimate academic pursuit and excluded any such references from their writings. Finally, some of the early ethnographic reports indicate that Aboriginal peoples often told the researchers what they thought the researchers wanted to hear, and sometimes this included denying the existence of same-sex relationships, gender-role changes, or other sexual orientation issues.<sup>14</sup>

Another example of the importance of assessing information critically is provided by Jean-Guy A. Goulet, who argues that anthropologists erred in two ways when they identified berdaches among the Dene Tha, a northern Athapaskan people. They read into the ethnographic record more than there was, and they failed to consider indigenous constructions of personhood and

<sup>11</sup> Lang, *supra* note 2 at 17.

<sup>12</sup> H. Slim & P. Thompson *et al.*, *Listening for a Change: Oral Testimony and Community Development* (Gabriola Island, B.C.: New Society, 1995) at 151 [hereinafter Slim & Thompson].

<sup>13</sup> Lang, *supra* note 2 at 24. See also S. Kessler & W. McKenna, *Gender: An Ethnomethodological Approach* (N.Y.: Wiley, 1977) at 33.

<sup>14</sup> Lang, *supra* note 2 at 19. For example, in 1975, the executive board of the American Anthropological Association voted “not to endorse anthropological research on homosexuality across national borders.” This was later revoked.

gender.<sup>15</sup> In the Dene Thas' experience of the world and of themselves, sexual identity is not an unchanging attribute of an individual, but rather is part of a complex continuum with the spirit world through cross-sex reincarnation.<sup>16</sup> In his article, Goulet critically reviews the original evidence from which anthropological reports have drawn overstated and erroneous conclusions regarding northern berdaches. Failure to follow how Aboriginal people construct and combine their sexual and gender identities through their social and linguistic practices allowed earlier anthropologists to identify berdaches where there were none.

For Aboriginal nations that rely on the early anthropological research, there is a danger of further historic revisionism as people try to interpret the past in ways that support currently held political, legal, or religious positions. The struggle of Aboriginal people includes the complex issues of identity and social dysfunction created by the alienation of land and resources, political powerlessness, and loss of humanity as evidenced by the extreme levels of violence in many Aboriginal communities. "The 'tape recorders' and 'ball-point pens' of oral testimony collectors risk being the first part of a process of cultural 'rot', although, as the Dene case-study shows, it may also be the last resort of a beleaguered or threatened culture."<sup>17</sup> Caution is required to prevent further cultural distortions caused by decontextualizing Aboriginal cultural practices, applying these practices inappropriately to social problems and current day issues, and perpetuating destructive power imbalances.

## Raven's Garden

*Raven begins to laugh. What is shocking to Val is not that her uncle is gay, but that she was so stupid that she never realized it before. "Christ," she thinks, "sometimes Ray was Rose, sometimes with lipstick, sometimes not. Other times, Ray was a big, tough trapper. And I never thought about it?"*

The primary sources of information about sexual orientation and transgender issues for Aboriginal cultures in North America date back to the time of the Spanish exploration, with the earliest known western source originating in 1555.<sup>18</sup> There was no golden age – hardship, wars, violence, sexism, prejudices, repression, and homophobia existed for many Aboriginal nations as in the rest of the world. However, the overall picture that emerges from these early sources is of extraordinary diversity, flexibility, and tolerance among most Aboriginal nations across North America.

According to Walter Williams, we can draw some general conclusions from the extensive variation in sexuality and gender across Aboriginal

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<sup>15</sup> J-G. A. Goulet, "The 'Berdache'/'Two Spirit': A Comparison of Anthropological and Native Constructions of Gendered Identities Among the Northern Athapaskans" *Journal of the Royal Anthropological Institute* 2:4 (1996) 683 at 683.

<sup>16</sup> *Ibid.* at 693, 698.

<sup>17</sup> Slim & Thompson, *supra* note 12 at 151.

<sup>18</sup> Lang, *supra* note 2 at 17.

cultures: (1) Sexual freedom beyond reproduction and opposite-sex marriage was accepted, and one did not have to be a special healer or shaman to be accepted as gay; and (2) since sexuality was seen as a gift from the spirit world, restriction of sexual behaviour or choices was not an accepted societal function, and many societies accepted same-sex marriages.<sup>19</sup>

Sabine Lang's *Men as Women, Women as Men* is a recent and comprehensive study of sexual orientation and transgender issues among 148 Aboriginal nations across North America.<sup>20</sup> According to her, gender can be characterized as the cultural meaning given to an individual's physical sex and can be divided into three components: gender identity, gender role, and gender status. For many Aboriginal societies, a gender role change resulted in a change to masculine or feminine status and identity, or a change to an ambivalent state. The changes to gender roles did not necessarily correlate with same-sex preferences or behaviours, and same-sex sexuality did not necessarily preclude heterosexual marriage. Rather, across many Aboriginal societies there existed a broad spectrum of possibilities involving gender identity, gender role, and gender status, as well as a broad range and combination of accepted sexual behaviours. For example, there is extensive documentation of cross-dressing, mixed gender roles, and specialized occupations for gay men and lesbians.<sup>21</sup>

Lang's work is supported by Francisco Valdes, who argues that while Aboriginal people recognized a sex based on external genital anatomy at birth, this sex assignment did not fix a gender at birth.<sup>22</sup> Gender was transitory, induced from personality as part of a person's maturation. This allowed each individual a high degree of autonomy and flexibility over gender and sexual diversities.

Moreover, according to Patricia Cain, the binary gender classification system is much too constrained to fit any reality, including that of non-Aboriginal people.<sup>23</sup> Cain argues that some people are intersexed in that they combine both male and female biological traits. Other people begin their lives with one biological sex, but with a gender identity from the opposite sex. Cain suggests that there is a continuum of gender and that "[a] person's gender identity may be any place on the scale at any given time."<sup>24</sup> For example,

[a]ccording to current scientific knowledge, there are at least five, and perhaps more, sexes. These include male, female, and three types

<sup>19</sup> Williams, *supra* note 5 at 88-89.

<sup>20</sup> Lang, *supra* note 2. Some of Lang's sources are researchers whose work has been refuted by Goulet.

<sup>21</sup> Lang, *supra* note 2; Williams, *supra* note 5; Roscoe, *supra* note 5.

<sup>22</sup> F. Valdes, "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society" (1995) 83:1 Cal. L. Rev. 1 at 212 [hereinafter Valdes].

<sup>23</sup> P. Cain, "Stories from the Gender Garden: Transsexuals and Anti-discrimination Law" (1998) 75:4 Den. U. L. Rev. 1321 at 1333.

*Ibid.* at 1335.

of intersexed persons ... as many as four percent of all births may produce some variety of these intersexed persons. Although most such newborns are assigned a sex that is either male or female and are medically treated to help their bodies conform to the assigned sex, their natural biological sex is mixed.<sup>25</sup>

The combined works of Lang and Williams constitute a compendium of information recorded since European contact about Aboriginal sexual orientation and transgender practices. While it is necessary to bear in mind the limitations of the compilations caused by biases, cultural blindness, prejudices, informant behaviours and expectations, and perhaps even wishful thinking by some of the recorders, still, the overall portrayal of Aboriginal societies is nonetheless one of great diversity and possibility.

### Economics in Raven's Garden

*Val realizes Ray hasn't been Rose for some years now. He hasn't been trapping either. His hair is long and grey. For years, his partying was mad, intense, and sometimes violent. For a very long time – years – he never left the reserve. His sister and niece bought his supplies whenever they went to town.*

As with other cultural patterns, economic systems varied greatly between Aboriginal nations. According to *Midnight Sun*, “[s]ocial, and specifically sexual, life is embedded in the economic organization of society – an organization that gives rise to a variety of cultural forms. The cultural construction of gender and sexuality must be seen in terms of the sexual division of labour, subsistence patterns, social relations, and male-female relations.”<sup>26</sup> This is a useful approach for examining the importance and influence of various economic structures in Aboriginal societies.

According to Lang, there is documentation of same-sex marriage (monogamous and polygynous) among almost 50 Aboriginal nations.<sup>27</sup> In other Aboriginal societies, adult gay men or lesbians either continued to live with their families or lived alone. The living arrangements for same-sex couples or gay men and lesbian women appeared to depend on the extent to which they could obtain economic autonomy and generate wealth.<sup>28</sup> Access to and control of land, resources, and food supplies within the economic framework determined the extent to which any individual member could be relatively autonomous in the society.<sup>29</sup> For example, whether or not a woman could hunt would determine whether or not she could be economically

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<sup>25</sup> *Ibid.* at 1355-56 [footnotes omitted]. See A. Fausto-Sterling, “The Five Sexes : Why Male and Female Are Not Enough” *Science* (1993) at 20-24.

<sup>26</sup> Williams, *supra* note 5 at 33-34.

<sup>27</sup> Lang, *supra* note 2 at 214, 254.

<sup>28</sup> *Ibid.* at 212-13.

<sup>29</sup> *Ibid.* at 188.

independent, and therefore would determine whether she could take a same-sex partner.<sup>30</sup>

Similarly, in societies where gay men could become productive and accepted at the occupations usually fulfilled by women, there was a greater likelihood of accepted same-sex marriage. According to Williams, within a marriage in a gender-divided economy, there are only the roles of husband and wife, and while the sex of the person may change, the role generally does not. Williams' Navajo informant said: "If they marry men [and not a *nadle* – a Navajo gay man], it is just like two men working together." However, because the *nadle* also do women's work, these same-sex marriages are economically viable and successful.<sup>31</sup>

### Social Structure in Raven's Garden

*In her little epiphany, Val remembers Ray telling her how much he loved school, but how when he was 14, the priest told him not to come back to school. Ray said he just cried and cried. This was never talked about.*

Besides economics, the other major factor in Aboriginal societies that appears to determine whether same-sex marriages are sanctioned is the extent and complexity of the group's social structure. Lang found that "the Northwest Coast had a complicated system, unique to North America, of inheritance of privileges, names, and 'coats-of-arms' that was bound up with opposite sex marriage. ... Where such a complex system of rights and privileges was lacking, however, it was precisely respected men who took women-men as wives in polygynous marriages."<sup>32</sup> In other words, highly structured societies with complex social, political, and economic structures were more likely to rely on arranged opposite-sex marriages as necessary corporate, economic contracts. In contrast, less formally structured societies were more likely to accept same-sex marriages.

The Gitksan in northwest British Columbia have a complex, matrilineal, kinship-based social and political structure. The primary political unit of Gitksan society is the "House", a formal socio-political grouping identified with the longhouses in which people lived until the latter half of the 19<sup>th</sup> century. The approximately 60 Gitksan Houses in turn form the four Gitksan clans – larger groups with more distantly connected lineages.

The Gitksan arranged marriages principally on the basis of economic and corporate strategies rather than of romantic love. By showing preference for marriages between Houses that owned choice territories, families sought to

<sup>30</sup> *Ibid.* at 268-85. Lang also provides examples of Aboriginal women who did achieve economic independence and thereby acquire same-sex partners, but were targeted by extreme male violence and sexual assault. Whether this homophobic behaviour was pre-contact or was a product of westernization and Christianization is unclear. However, there were also Aboriginal "manly women" or "men-women" who were highly successful and accepted.

<sup>31</sup> Williams, *supra* note 5 at 111.

<sup>32</sup> Lang, *supra* note 2, at 201-202.

consolidate control of whole watersheds.<sup>33</sup> Reproduction was also a very important factor, because a House could keep up its membership numbers only through its women. And according to Richard Overstall, the combination of marriage outside the clan and matrilineal succession fragmented male power blocks by creating two sets of lineages with reciprocal responsibilities for each individual – the father's side and the mother's side.<sup>34</sup> For example, in a case of conflict, death, or injury, this dualistic kinship arrangement ensured input from two interested parties with specified roles and responsibilities to resolve the conflict or agree on compensation.

In the complex Gitksan order, there does not appear to have been any allowance made for same-sex marriages, especially since preference of any sort was not a deciding factor. Presumably, same-sex relationships or other cross-gender arrangements would have existed outside the formal economic, social, and political orders within Gitksan society. In reality however, survival outside the Gitksan accepted order would have been unlikely, because it was extraordinarily difficult for anyone to survive without their kinship relationships and approved access to territories and resources – the pre-contact punishment of banishment, for example, was in effect a death sentence.<sup>35</sup>

Nor do the Gitksan oral histories allude to same-sex relationships or other alternate genders, unlike the creation myths and cosmology of many Aboriginal nations (e.g., Navajo, Mohave, etc.).<sup>36</sup> Gitksan cosmology does include cross-sex reincarnation, which connects people back through time and into the future, but for the Gitksan – as for the Dene Tha – cross-sex reincarnation beliefs did not translate into support for same-sex marriage. (Although cross-sex reincarnation beliefs are linked to permitting cross-gender behaviour among the Dene Tha.)<sup>37</sup>

However, Paula Gunn Allen reasons that there must have been gay men and lesbians in the past, including among the Gitksan, because there are Aboriginal gay men and lesbians today.<sup>38</sup> As it is, powerlessness and western influences, especially since the 1960s, have made Aboriginal communities less tolerant of diversity, reflective of the homophobia that is the Canadian norm. Most Aboriginal gay men, lesbian, and transgendered people leave the reserves and move to large, urban centres to find anonymity, acceptance, and

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<sup>33</sup> R. Daly, "Witsuwit'en and Gitksan of the Western Cordillera", in Lee & Daly, *supra* note 1 at 73.

<sup>34</sup> R. Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-based Legal Order" [unpublished paper presented at Property Rights in Colonial Imagination and Experience, a colloquium of the Faculty of Law, University of Victoria, February 2001] at 8-9 [hereinafter Overstall].

<sup>35</sup> To be properly understood, this practice must be very carefully contextualized within Gitksan spiritual and reincarnation conceptions of life and death. Arguably, justice systems in any society reflect that society's beliefs about life and death.

<sup>36</sup> Williams, *supra* note 5 at 17-30, and interview with Gitksan language and culture teacher K. Ludwig (31 January 2001).

<sup>37</sup> Goulet, *supra* 15 note at 693. Also, interview with K. Ludwig, *ibid.*

<sup>38</sup> Lang, *supra* note 2 at 324. See also P. Allen, "Lesbians in American Indian Culture"

safety.<sup>39</sup> The Gitksan and other Aboriginal nations must reconcile current-day sexual orientation and transgender issues with indigenous laws in order to protect and include gay men, lesbians, and transgendered people in current and future governance policies and practices.

### Current Issues

*Ray is sometimes lonely. He is sick of drinking too much. Raven watches, and wonders whether the garden can grow through all the little sad, grey stories. Can the garden be restored? Can beautiful flowers take root in the narrowness and lack of imagination?*

Some Aboriginal societies historically were sexist and homophobic, and many still are. They face the same challenges as do all the groups that now comprise Canadian mainstream society – to evolve and to struggle to erase these attitudes. However, there is an underlying assumption in mainstream society that Aboriginal societies are hopelessly paralyzed in a kind of time warp – that without the civilizing restraints of Canadian law, they would immediately revert to oppressive sexist, homophobic, and who knows what other practices. The racist, colonial subtext is that Aboriginal people can only overcome paralyzing social dysfunction by adopting the western liberal framework.

Indigenous governance and legal systems including the Gitksan's have been largely in stasis. American author Russell Barsh writes that "to the extent that tribal government has been structurally western, or American, [...] it has deterred the evolution of genuine indigenous institutional adaptations to contemporary realities."<sup>40</sup> In Canada, the *Indian Act*-imposed band council structure conflicts with indigenous governance systems because it is this structure that receives government recognition, legitimacy, and resources. Also, as a colonial tool, the band council system is inherently corruptible and open to abuses of power because it is disconnected from indigenous authority, accountability, and scope. (The band structure is village-based, not nation based; village boundaries arbitrarily sever nation-based kinship connections and legal orders.) The Gitksan's system has remained intact, but its function insofar as House management and protection of their territories has been seriously undermined.

The B.C. Treaty Commission's negotiation process, which is currently underway in the province, requires the inclusion of the *Charter* in all negotiated Aboriginal treaty agreements.<sup>41</sup> The *Nisga'a Final Agreement*

<sup>39</sup> Interviews with G. Dechamps, former community development worker with Two-Spirited People of First Nations, Toronto (January & March 2001).

<sup>40</sup> R. T. Barsh, "Aboriginal Self-Government in the United States: A Qualitative Political Analysis" Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services, 1993) at 7.

<sup>41</sup> Province of B.C., Ministry of Aboriginal Affairs, *Glossary of Treaty-Related Terms*, online: <http://www.aaf.gov.bc.ca/pubs/glossary.htm> (accessed 09-03-01) at 6.

states that the *Charter* will apply to the Nisga'a government.<sup>42</sup> According to Doug Sanders, the application of the *Charter* to the Nisga'a government required an extension of s. 32(1) of the *Constitution Act, 1982*.<sup>43</sup> However, in 1995, the federal government acknowledged in a policy statement<sup>44</sup> that the *Charter* itself would have a qualified application because of its interpretive provision, s. 25, which reads in part : "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 ... ." But exactly how this policy might apply to issues of gender, sexual orientation, and transgenderism remains untested and therefore unknown. Meanwhile, there is persistent Aboriginal resistance to applying the *Charter* to Aboriginal self-government.<sup>45</sup>

As to provincial rights laws, they will apply on treaty lands either by their own force, by federal settlement legislation, or by referential incorporation of s. 88 of the *Indian Act*, unless the matter singles out Indians or touches on the core of jurisdiction of "Indianness" as protected by interjurisdictional immunity under s. 91(24) of the *Constitution Act, 1867*.<sup>46</sup> Section 88 of the *Indian Act* makes clear that provincial "laws of general application" apply to "Indians" because they operate as a federal adoption of provincial laws, making the provincial laws applicable as part of federal law.<sup>47</sup> According to Peter Hogg, "[t]his technique is valid, despite the fact that it comes close to a delegation of federal legislative power to the provinces."<sup>48</sup> Section 88 provides as follows :

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.<sup>49</sup>

<sup>42</sup> *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2 at 18 [hereinafter *Nisga'a Treaty*].

<sup>43</sup> D. Sanders, "We Intend to Live Here Forever": A Primer on the *Nisga'a Treaty*" (1999) 33:1 U.B.C. L. Rev. 103 at 127; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*]. Section 32(1) of the *Charter* reads, "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

<sup>44</sup> Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* (Ottawa : Ministry of Supply and Services, 1995) in D. Sanders, *supra* note 43.

<sup>45</sup> E. Jordon, "Residual Sex Discrimination in the *Indian Act*: Constitutional Remedies" (1995) 11 J.L. & Soc. Pol'y, 213 at 227.

<sup>46</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II. No. 5.

<sup>47</sup> P. Hogg, *Constitutional Law of Canada : 1997 Student Edition* (Carswell : Toronto, 1997) at 566-67.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Indian Act*, R.S.C. 1985, c. 1-5.

Basically, s. 88 of the *Indian Act* means that the provincial human rights legislation only applies on reserve and treaty settlement lands as long as the field is not occupied by either treaty or other federal legislation, and as long as the human rights legislation does not touch on the federally protected core of Indianness.

Recently, litigation regarding formal equality rights, same-sex marriage, separation, benefits, pornography, and transgenderism has increased the profile of these issues not only nationally, but also locally within Aboriginal communities.<sup>50</sup> For example, Leona Daniels, an Aboriginal woman, has alleged that she was discriminated against on the basis of her sexual orientation by the Ktunaxa Kinbasket Tribal Council, of southeastern British Columbia. Daniels filed a complaint with the B.C. Human Rights Commission which, having completed its preliminary investigation, has determined that there is a reasonable basis to refer the complaint to a tribunal for a hearing.<sup>51</sup>

### Aboriginal Women's Experience as Analogue

*Raven is wondering when people will remember all the other ways of being, before they began to think that there was just Man and Woman. The time before people were determined by their genitalia. When there was a garden of humanity with many, many different and beautiful blossoms.*

In many communities across Canada, violence and sexual assault are the reality that oppresses Aboriginal women and children. Theresa Nahanee considers that this victimization has reached “epidemic proportions”, and that it takes place at the hands of their husbands, lovers, fathers, grandfathers, and other men in their communities. According to her, Aboriginal men – with the collaboration of the courts – have used inappropriate “cultural defences” in cases of sexual violation of children, essentially condoning deviant, abusive behaviour as traditional.<sup>52</sup> This

<sup>50</sup> For example, *Re : K.* (1995), 23 O.R. (3d) 679 [adoption]; *Ward v. Canada (A. G.)* [1993] 2 S.C.R. 689 [social group status]; *R. v. Paterson*, [1998] B.C.J. No. 126 (C.A.) [jury bias]; *Chamberlain v. Surrey School District No. 36*, [2000] B.C.J. No. 1875 (B.C.C.A.) at 519 [(school resources)]; *Trinity Western University v. British Columbia College of Teachers*, [1998] B.C.J. No. 3029 (C.A.) [homophobic employment restrictions]; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 [same-sex pornography]; *Vancouver Rape Relief Society v. British Columbia (Human Rights Commission)*, [2000] B.C.J. No. 1143 (B.C.S.C.) [transsexual discrimination]; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [human rights protection for sexual orientation]; *Egan v. Canada*, [1995] 2 S.C.R. 513 [same-sex pension benefits]; *M. v. H.*, [1999] 2 S.C.R. 3 [opposite-sex spouse definition found unconstitutional].

<sup>51</sup> P. Barnsley, “Woman fired, files human rights complaint” *Windspeaker* 20:4 [Edmonton] (August 2002) at 2.

<sup>52</sup> T. Nahanee, “Dancing With A Guerrilla: Aboriginal Women, Justice and the Charter”, in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Supply and Services Canada, 1993) 359 at 360-61, 371. Nahanee recognizes that “men are not so well off either in the Aboriginal world. They have the high unemployment rate; they suffer the same poverty; they suffer higher suicide rates; and often find

sanctioning by the courts has caused many Aboriginal women to reject Aboriginal self-government and justice initiatives as being instruments that consolidate and validate men's abusive and oppressive power.

Donna Coker argues that, within the Navajo nation, current material, psychological, and spiritual conditions are the continuing legacy of colonialism and are related to the domestic violence experienced by Navajo women.<sup>53</sup> While Coker does not claim that domestic violence is entirely caused by colonization, she does contend that Navajo women's diminished social and economic status, combined with powerlessness and the subordination of Navajo culture and political life, creates social conditions that foster domestic violence. According to her, the U.S. government has been complicit in the marginalization of Navajo women by privileging Navajo men through legislation (tribal leadership, resources, and land management and education policies) and by devaluing clan and kin relationships.

In contrast, Coker also critically examines the Navajo Peacemaker Court and its treatment of battered women. She compares the Peacemaker Court to conventional means of intervening in domestic violence – including civil protection orders, criminal prosecution, and offender treatment programs (e.g., diversion, probation, and other remedies) – and concludes that the Peacemaking approach offers three potential benefits for battered women:

the ability to address both systemic and personal aspects of battering and thus disrupt the familial and social supports for battering; the ability to foster social and personal change through the use of traditional Navajo creation narratives based on gender-egalitarian understandings of male-female relations; and the ability to foster "safe connection" that does not treat as pathology women's multiple loyalties, including their commitment to relationships with men who have been abusive.<sup>54</sup>

There is a need for a legitimate return to the Aboriginal ways, which include power sharing between men and women, and equally valued roles, rights, and responsibilities.<sup>55</sup> For example, under Navajo common law, violence toward, or mistreatment of, women is illegal.<sup>56</sup> Under Lakota law, a man who battered his wife was considered irrational and would lose leadership, hunting, and other privileges.<sup>57</sup> Historically, Gitksan women were arguably in a much stronger position of equality than they are post contact, because their individual rights were collectively protected and enforced. And in some Aboriginal nations, women owned all private and

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themselves in conflict with the law. What the law has done to women, which it has not done to men, is to exclude women from the community."

<sup>53</sup> D. Coker, "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47:1 U.C.L.A. L. Rev. 1 at 16.

<sup>54</sup> *Ibid* [footnote omitted].

<sup>55</sup> Nahanee, *supra* note 52.

<sup>56</sup> G. Valencia-Weber & C. Zuni, "Domestic Violence and Tribal Protection of Indigenous Women in the United States" (1995) 69:69 St. John's L. Rev. 69 at 69.

public real property, controlled all family and community governance, selected and deposed political leaders, and went to war.<sup>58</sup>

Nahanee and the Native Women's Association of Canada (NWAC) argue that, to protect women and children, the *Charter*<sup>59</sup> must apply to Indian Bands and all Aboriginal justice initiatives.<sup>60</sup> Nahanee also thinks that there is a need to accommodate individual rights within the collective, including the rights of women and children.<sup>61</sup> In her opinion, without the overriding protection provided by the *Charter*, the violent oppression resulting from patriarchy and colonialism will continue. Furthermore, the oppression "will not be eradicated without clear federal initiatives aimed at restoring the cultural, social, economic and political position of Aboriginal women within their societies."<sup>62</sup>

Aside from membership, the basic issues for Aboriginal women include safety and protection from violence, social benefits and housing,<sup>63</sup> and political participation in governance decision-making and planning.<sup>64</sup> The overarching political issues of Aboriginal title and rights, access to resources, and self-government remain unresolved for all Aboriginal people, including Aboriginal women.

<sup>58</sup> G. Stacey-Moore, Speaker, Native Women's Association of Canada, from a speech on Native Women's Political Rights given on numerous occasions, archived at N.W.A.C., referenced in Nahanee, *supra* note 52 at 364.

<sup>59</sup> There are two schools of thought regarding whether the *Charter* applies to Indian Bands established pursuant to the *Indian Act*. On the one hand, Kent McNeil argues the Indian Band structure is only a current-day expression of the unextinguished, constitutionally protected Aboriginal right of self-government. Given this, McNeil concludes that, as a matter of constitutional law and with the exception of the s. 28 gender equality provision, the *Charter* does not apply to Indian Bands. See K. McNeil, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*" (1996) 34:1 Osgoode Hall L.J. 62. On the other hand, the case law appears to support the *Charter's* applicability to Indian Bands as legislative creatures. For a recent example, see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 24 S.C.J.. In *Corbiere*, the S.C.C. held that the residential voting restrictions as set out in the *Indian Act* violated s. 15(1) of the *Charter* and were not justifiable under s. 1. However, the Court restricted the ruling to apply only to the Batchewana Band, because other Aboriginal groups might be able to establish an opposing Aboriginal right as protected by s. 35 of the *Constitution Act, 1982*. Note that the S.C.C. does not make an explicit reference to the *Charter* applying to Indian Bands. Rather, the *Charter's* applicability to Indian Bands appears to be presumed by the Court. Also for an extensive analysis of this issue, see, P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto : University of Toronto Press, 2001) at 194-233.

<sup>60</sup> Nahanee, *supra* note 52 at 367.

<sup>61</sup> *Ibid.* at 371.

<sup>62</sup> *Ibid.* at 364.

<sup>63</sup> See J. Silman, ed., *Enough is Enough : Aboriginal Women Speak Out* (Toronto : Women's Press, 1987) for a general discussion of the personal experiences of Aboriginal women regarding violence, equality, membership, benefits, social concerns, public and political action, and divisions within families and communities.

<sup>64</sup> *Native Women's Association of Canada v. Canada*, [1995] 1 C.N.L.R. 47 (S.C.C.). The S.C.C. held that the federal government's decision not to fund N.W.A.C. to participate in the 1992 constitutional review process did not violate the *Charter* and did not come within s. 35(4) of the *Constitution Act, 1982*. The effect of this case was to limit Aboriginal women from participating as an independent party in the national political and legal debates.

## Individual and Collective Rights

*Raven is bored with the tortured machinations of the Supreme Court of Canada and with the mundane. What is going on? Out of the terrible confusion of colonization, an ice age of human inertia seems to have occurred. Hmmm. What to do? What to do? When will the wonderful profusion of flowers bloom again? Can the garden grow here at this time and in this place – from beneath the dark, heavy stone of colonization?*

Although widely accepted as universal, modern conceptions of rights are ethnocentric, arising from the concepts of private property and liberal democracy in which the primary rights-based relationship is between the individual and a centralized state.<sup>65</sup> The liberal rights-based relationship demands that the laws and institutions of society be justifiable to those who constitute the state.

Most discussions about Aboriginal rights pit collective rights against individual rights and rationalize collective or group rights on the basis of social and historic disadvantage.<sup>66</sup> In these discussions, collective rights are framed in diametric opposition to both the individual's rights in the collectivity and the individual rights of mainstream society members.<sup>67</sup> This line of thinking usually results in a rejection, or at best limited rationalization, of collective rights. In his book, *The Rights Revolution*,<sup>68</sup> Michael Ignatieff explains how a misunderstanding of the origin of rights can result in perverse conceptions of Aboriginal rights. He argues that the current "rights revolution" has reduced politics to an exchange of "recrimination between victims and their supposed oppressors" in which there is no understanding that Aboriginal rights are not about penance, but about history and unresolved valid, legal claims of title and rights.<sup>69</sup>

<sup>65</sup> R.C. Palmer, "The Origins of Property in England" (1985) 3 L. & Hist. Rev. 1.

<sup>66</sup> W. Kymlicka, "Individual and Community Rights" in J. Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994) 17. Kymlicka first argues that group rights involve the right of the group against its own members, a restriction of individual freedom in the name of group solidarity. He also argues that the special rights of the group derive from its unfair treatment by mainstream society.

<sup>67</sup> The reality in western law is that group rights are recognized in the form of corporations and governments, but these are classified by legislation and case-law as pseudo-individuals. Accordingly, these entities are afforded some legal rights under the *Charter* as protected individual rights. For an example of western group rights applied in legislation and *Charter* case law, see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.; *Irwin Toy Ltd. v. Quebec (A. G.)*, [1989] 1 S.C.R. 927.

<sup>68</sup> M. Ignatieff, *The Rights Revolution* (Toronto: Anansi Press, 2000) at 115. Regarding group rights, some people ask, "[h]ow long must the Canadian majority continue to pay for the abuses done to aboriginal peoples in times past? How long must it do penance for racism, sexism, and other forms of injustice?" Penance or guilt without practical, useful social change is not useful to Aboriginal people. Racism is not simply a grudge that Aboriginal people are unwilling to release. Rights are not earned and do not arise out of past injustice; rights for Aboriginal people exist because of Aboriginal nations' pre-contact ownership and occupation of the North American continent. This position was affirmed in the S.C.C.'s *Delgamuukw* decision, *infra* note 76.

<sup>69</sup> *Ibid.* On page 1 of his book, Ignatieff, briefly describes the "rights revolution" as "the amazing way in which rights talk has transformed how we think about ourselves as

Within the Canadian state, Aboriginal societies assert historic collective rights against the state.<sup>70</sup> However, this does not mean that Aboriginal people do not also have individual rights within their own nation, along with the collective rights held by the nation. Historically and currently, the conception of individual rights for Aboriginal people requires understanding the individual's relationships within an Aboriginal society that is organized very differently than a centralized nation state. This is the key point of contention for Aboriginal nations and is usually mistakenly characterized as a simplified conflict between collective and individual rights.

Hence, it is difficult and of limited value to attempt to discuss rights in Aboriginal societies in a vacuum, outside of human relationships and social organization. And hence, the standard western approaches to defining rights – liberalism, social/expansive democracy, and communitarianism – fail to capture or accurately reflect most Aboriginal societies' rights conceptions.<sup>71</sup> Matthew Chapman writes that

in indigenous societies individual and collective rights have traditionally coexisted. The rights of an individual within the indigenous community are not in opposition to the rights of the collective, or asserted against the collective; rather, individual rights are accorded *because* of an individual's place within the collective.<sup>72</sup>

Chapman argues that to impose a legal system that only recognizes individual rights is to undermine the survival of distinct cultures and peoples who operate collectively. According to Chapman, the liberal recognition of the collective is based only on the value of the collective to the individual, and the thinking about collective rights must go much further to encompass a recognition of territorial rights and self-determination.

*Sometimes Ray reminisces about a long-ago, crazy Russian friend named Leon who is now in the south. Val shows Ray a map and they trace the roadways to where Leon lives. Might as well be the moon. Neither Ray nor Leon will travel the hostile in-between.*

In Gitksan society, there is no such thing as an accident. For Gitksan people, individuals are reincarnated throughout time, sometimes (though more rarely) as nonhumans. This creates a spiritual continuum that forms part of everyday life and in which past actions connect with present and future actions. Human beings are part of an ongoing cycle of interactive relationships with each other, the land, and nonhuman life forms. All events,

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citizens, as men and women, and as parents. The rights revolution took off in the 1960s in all industrialized countries, and it is still running its course."

<sup>70</sup> In my opinion, the rights framework is seriously problematic for Aboriginal peoples because it has become the way that Aboriginal people relate to one another internally and to the rest of the world externally. This means that the rights framework fundamentally has come to shape Aboriginal peoples' identity individually and collectively.

<sup>71</sup> For an explanation of these theories, see T. Janoski, *Citizenship and Civil Society* (U.K.: Cambridge University Press, 1998) at 19.

<sup>72</sup> M. Chapman, "Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection" (1997) 26 *Anglo-A. L. Rev.* 357 at 377.

including crime, are a responsibility because they arise out of lived, rather than theoretical, relationships. When misfortune or conflict occurs, people are responsible for determining the cause of the breach and for correcting it. In accordance with Gitxsan law, settlements of disputes are reached and witnessed in the feast hall with payments and demonstrations of power. The breaking of a law, seen as fundamental disrespect, requires some form of compensatory payment. Compensation and public admission made at a feast symbolically redress wrongdoing. Historically, payments were made with land, songs, material wealth, or in extreme cases, a life. The results were negotiated settlements in which wrongs had been put to right.

The Gitxsan social and political organization is highly decentralized. There is no one authority over the Houses; rather, each has an internal authority system and reciprocal relationships with other Houses. Within the kinship network, each Gitxsan person has particular duties as a House member to his or her family and House, to closely aligned Houses, and to the family and House of his or her father's side. These responsibilities include generating wealth so that the House may fulfill its responsibilities to the House's land and to the feast.<sup>73</sup>

Within Gitxsan society, individual rights are expressed and acted on as collective rights. In this sense, rights are interests that are enforceable within the Gitxsan kinship system, according to the relationship within which the right arises. These enforceable rights include sustenance, livelihood, personal safety, access to territory and resources, opportunity to compete for ranked names or increase the value and prestige of one's own name, compensation in cases of injury or death, and the opportunity to generate wealth.

The relational aspect to rights formation is demonstrated by Gitxsan approaches to the place of children, who belong first to the family and House, second to the closely related Houses, and finally to the clan. This means that in order of priority, any one of these kinship groups can intervene to raise a child whenever necessary (*e.g.*, a parent's inability due to accident, poor health, or other demands). In pre-contact times, there were no external or central entities responsible for child welfare, social services, justice, law enforcement or other social controls. Instead, the well-being of the House and its members was the collective responsibility of the House assisted by closely related Houses and combined with the shared responsibilities of all the various fathers' sides of the House members (the House is matrilineal, so all the fathers are in their mothers' Houses).

Gitxsan property rights are similar to Gitxsan individual rights in that both are internal and collectively enforceable through kinship relationships. Over a lifetime, each person has a right to specified access and use of both the father's and mother's territories, but the territories are communally held

<sup>73</sup> Overstall, *supra* note 34 at 6. "The feast is central in recreating the people's primary relationship with the world. All representations of an event or entity call the power of that event back into action. These representations include events where the group acquired territory such as the *adaaw* for a history." Library Network, on 29 Nov 2017 at 21:25:38, subject to the Cambridge Core terms of use, available at <https://www.cambridge.org/core/terms>. <https://doi.org/10.1017/S0829320100007286>

by the House in the name of the head chief.<sup>74</sup> This might be compared to western individual rights, which originated when individual tenants could bring writs to the king, thus bypassing the intermediate lords in the feudal hierarchy. Male property owners consolidated power by securing the right to vote, which expanded in scope and suffrage into today's individual rights regimes.<sup>75</sup>

I contend that the individual rights of the Gitxsan are contained within and made possible through the kinship nature of their definition and enforcement, and consequently their internal collective rights are not simply divisible into, or reducible to, individual rights.

*Val thinks about Ray some more, and she realizes that he is always busy. People bring him moose meat that he dries in exchange for keeping some of it. People also bring him fruit and vegetables to can, and he gets to keep some of that, too. He goes berry picking. She recalls that Ray tanned hides and did beautiful beadwork. Val has a quilt that Ray made a few years ago.*

However, colonialism has recently created another level of rights in and around the Gitxsan nation – that of the Canadian state with its human rights legislation and the *Charter*. Basically, for the Gitxsan, this means there are now entities external to the Gitxsan that have an interest in the individual rights of the Gitxsan person. It also means that each Gitxsan person now has a direct relationship with the Canadian state, at least for the positive and negative rights and freedoms provided for and enforced by western law.

This external Canadian rights regime resists recognizing internal collective Gitxsan rights and responsibilities (e.g., collective responsibility for an offending House member). Litigation over the past decade has caused some official legal recognition of collective land title and resource-use rights, but achieving recognition of other collective rights (e.g., intellectual and cultural property, self-government, and child welfare) continues to be a struggle for Aboriginal peoples.<sup>76</sup>

Finally, the external state bureaucracies' surrounding and taking responsibility for Gitxsan people has led to a corresponding decrease in the House's responsibility for its members. For example, historically, a House was responsible for the health, wealth, and general social welfare of its members. Now, to meet personal or family needs or resolve a dispute, a Gitxsan member may take the momentarily easier, but socially destructive route of turning to external agencies rather than to his or her House. These

<sup>74</sup> A Gitxsan person usually had access to the father's House territories until adulthood, at which time he or she would move to the mother's territory. The Gitxsan land tenure system was flexible enough to allow various use and access arrangements.

<sup>75</sup> Palmer, *supra* note 65.

<sup>76</sup> See for example, the seminal cases of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.), online : QL.; *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.), online : QL. Also see J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 for an important discussion about the *sui generis* incorporation of Aboriginal law into Canadian law.

agencies include lawyers, social workers, police, teachers, health professionals, and counsellors.<sup>77</sup>

### Future Self-Government Considerations

*Raven flies to a remote north coast Aboriginal village where a community meeting is being held. A small group of four gay men is participating and having fun too. On the other side of the room is a group of older men in work clothes with crossed arms and gruff expressions. Behind their backs, the old guys call the gay men "GI Joes". They don't exactly sneer when they say this. "Ho hum," said Raven. "It's a start, but there's not much happening yet. Where is the colour and imagination?"*

These are the particular rights challenges before Aboriginal nations: (1) how to recognize and protect the individual rights of each Aboriginal person according to Aboriginal or indigenous law; (2) how to protect the Aboriginal individual's rights according to western law in a way that also protects the political, social, legal, and cultural integrity of the Aboriginal nation; and (3) how to secure and protect collective Aboriginal rights and title against the claims of individual rights of mainstream citizens.

For Aboriginal nations, looking to the past for tools to apply to the future means looking through the distortions caused by colonialism. There are no "intact" (as in pre-contact) Aboriginal nations or communities in Canada. They all bear the scars of history, born on the hearts, minds, and bodies of all Aboriginal people.

Coming to terms with the consequences and changes wrought by recent history will be a two-step process. First, Aboriginal nations will have to identify and articulate changes to their indigenous legal systems, communities and governance structures, relationships to land, social roles and responsibilities, citizenship and membership, and intergenerational cultural transmission. Second, each nation will have to figure out how to transcend its damaged internal state and move on to a productive and healthy future. Meanwhile, the discourse on rights must shift from the unproductive polarization between individual *Charter* rights and collective Aboriginal rights. Fundamentally, it is not the "content" of the *Charter* rights that is at issue, but how those rights are given expression, protected, and enforced. Finding ways to recognize and protect rights within Aboriginal nations and legal orders is about nation building and social change for Aboriginal communities.<sup>78</sup>

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<sup>77</sup> The term "external" is used here to mean external to the Gitksan House, and so applies to the post-contact institution of the *Indian Act* band.

<sup>78</sup> J. Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nations Politics" in D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: the Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 169. This article provides an excellent discussion about the rights debate and self-government. Also see Macklem, *supra* note 59.

Celestine Nyamu's work with human rights in developing countries is instructive for Aboriginal nations.<sup>79</sup> According to her, destructive cultural practices such as female genital surgery supply much of the rationale for the conventional approaches to human rights and development, which treat culture as an obstacle to women's full participation in society. Nyamu calls for an understanding of how formal legal institutions, culture, and customary practices interact. She argues that "[p]roponents of gender equality must appropriate positive openings presented by cultural and religious traditions, instead of dismissing culture as a negative influence."<sup>80</sup>

Nyamu's suggested approach to dealing with gender-biased social arrangements has potential to be directly applied to Aboriginal self-government issues. Basically, instead of simply arguing for reform of cultural practices on the basis of inconsistency with human rights standards and ideals of equality, Aboriginal peoples must undertake a deeper analysis and dialogue. Nyamu suggests that they ask themselves a series of questions: "Do the cultural norms reflect actual social practice? Are they representative of the community, or are they simply a generalization of the narrow interests of a few? Whose power is preserved through the use of cultural norms? Is the label of culture being deployed to stifle a desirable and necessary political debate?"<sup>81</sup> Arguably, this was exactly the situation in *Sawridge v. Canada*, in which an Aboriginal rights argument was used to defend discrimination against Aboriginal women who had been reinstated by the 1985 *Indian Act* amendment.<sup>82</sup>

Nyamu argues that "Human rights advocates need to understand the process of cultural legitimization and change within a political context."<sup>83</sup> One important element of this is understanding that assertions of culture rarely reflect the entire social reality of the cultural group. That is, "[c]ustoms, laws, rituals, symbols, and rigid procedures serve as a cultural framework that attempts to capture and represent social life. Social life is, however, difficult to define due to continuous cultural and social change."<sup>84</sup> Yet it is these assertions that are the basis for debate, when instead they should be read only as competing efforts to preserve certain power relations. According to Nyamu, "[d]ominant articulations of custom result in rigid and ossified conceptions of culture; and by not challenging these articulations,

<sup>79</sup> C. I. Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41:2 *Harv. Int'l L.J.* 381.

<sup>80</sup> *Ibid.* at 381-82.

<sup>81</sup> *Ibid.* at 404.

<sup>82</sup> *Sawridge v. Canada*, [1995] 4 C.N.L.R. 121 (FCTD), online: QL. In this case, the Sawridge Band argued that on the basis of inherent self-government, it had a constitutionally protected Aboriginal right to discriminate against Aboriginal women through its membership code. Muldoon J. concluded that 150 years of federal legislation of Indian membership effectively extinguished any inherent Aboriginal right to control band/tribal membership. *Sawridge* could potentially have a very limiting effect on future self-government litigation for Aboriginal groups, and it also shows the danger of relying on *Indian Act* models as the basis for claiming an Aboriginal right.

<sup>83</sup> Nyamu, *supra* note 79 at 405.

<sup>84</sup> *Ibid.*

proponents of gender equality implicitly endorse them.”<sup>85</sup> In the case of Aboriginal nations, this is often men’s power, but it sometimes also includes class and family power. This type of discussion avoids the unproductive polarization between the rigid, and often desperate, defence of cultural practices and recognition of the need to adapt cultural practices to meet today’s realities.

In applying Nyamu’s approach to Aboriginal nations, we must first place the pre-contact principles of the cultural practices in the context of the social, economic, and political conditions of that time. Then this historic perception must parallel an understanding of current cultural practices in light of today’s contexts including the position of most Aboriginal communities and people in the underclass of Canadian society.

Nyamu suggests taking a three-stage “critical pragmatic approach” to plural normative orders to surmount the tension between gender equality and cultural identity: (1) Challenge any constitutional framework and other social processes and mechanisms that protect customary and religious laws from questioning, so that room is created for diverse voices and changes to community norms. (2) Generate empirical evidence of varied and alternative local cultural practices (*e.g.*, Aboriginal sexual orientation, transgenderism, and alternative approaches to identity and gender equality) to counteract negative, ossified cultural rhetoric.<sup>86</sup> This type of evidence could be used in developing new case law within Aboriginal practice as well as in developing self-government programs.<sup>87</sup> (3) Identify the concepts of fairness and justice within the culture, and then figure out how to apply these principles to issues of sexual orientation, transgenderism, and gender equality.<sup>88</sup> In other words, what are the underlying principles or values of the oppressive cultural practice, and how might these be interpreted so as not to oppress women, gay men, lesbians, and transgendered people?

Application of Nyamu’s critical pragmatism to Aboriginal nations would be a positive approach to addressing sexual orientation and transgender issues, and a way of rebuilding healthy, diverse nations. For the Gitksan, a non-polarizing discussion would involve examining the cultural practice of marriage in both a historical and a contemporary context. Historically, they would look at marriage as a product of the cultural goals of maintaining corporate political alliances, adjacent land holdings, and House membership, as well as preventing male power blocks. Contemporarily, they would look at the emphasis on romantic love, centralized band council structures that compete for legitimacy with Houses, alienated House territories and consequent poverty, the introduction of the wage economy and monetary

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<sup>85</sup> *Ibid.* at 406.

<sup>86</sup> *Ibid.* at 410-13.

<sup>87</sup> This is very important for cases where rights arguments are made to restrict the participation and rights of some Aboriginal people as was done in *Corbiere*, *supra* note 59 [non-resident voting rights] and *Sawridge* *supra* note 82 [membership].

<sup>88</sup> Nyamu *supra* note 79 at 415.

currency, and the rupture of intergenerational cultural transmission processes.

The Gitxsan system is flexible enough by design to respond to present-day demands, providing that future self-government developments do not continue to undermine the integrity and authority of the kinship system (as is the case with the band councils and other post-contact institutions). The more attacked and minimized any cultural system is, the more reactionary it is likely to become and the less tolerant of diversity.<sup>89</sup> The Gitxsan system and laws could be employed to act on and protect the rights of gay men, lesbians, and transgendered Gitxsan people. In this case, both the father's side and the mother's side would have to fulfill their roles and responsibilities to their gay men, lesbians, and transgendered House members.

Where the collective memory of Aboriginal law is "foggy", as Nahaneé argues is often the case, the Aboriginal nation can choose either to restore the principles of its cultural practices and legal orders or to abandon former practices in favour of adopting the liberal regime.<sup>90</sup> Ideally, Aboriginal nations can protect the individual rights of their members in a way that protects their cultural integrity, as well as recognizes the integrity of the external state regime. Ultimately, Aboriginal families, kinship groups, communities, and nations must identify who their vulnerable, oppressed members are, and decide whether to continue the oppression. Choosing to end discrimination and protect the rights of women, transgendered persons, gay men, lesbians, and children is the courageous political act of a strong nation.

## Conclusion

*Val phones Ray long distance. "Are you happy, Ray?" she asks him. Ray is quiet a moment. "Yes," he says, "do you want me to sing to you?" and he sets the phone down. Val hears him get up from his chair and walk heavily across the living room to get his drum. Then she hears the drum, and he is singing the ancient songs, and her heart wants to burst with love, pride, and sadness. As she hangs up the phone, Val thinks she hears a raven outside.*

The thesis of this paper is that the legal principles contained within pre-contact Aboriginal legal orders regarding individual and collective rights can be identified and expanded to enable Aboriginal nations to proactively and positively deal with sexual orientation and transgenderism. It has shown that Aboriginal laws can protect individual rights within Aboriginal nations, and that the conflict between collective rights and individual rights is essentially a false dichotomy. Where there are oppressive Aboriginal cultural practices,

<sup>89</sup> M. Ignatieff, *Blood and Belonging* (Toronto: Penguin, 1994). Ignatieff analyzes six international conflicts — Germany, Ukraine, Quebec, Kurdistan, Northern Ireland, and Croatia and Serbia.

<sup>90</sup> Nahaneé, *supra* note 52 at 374.

a critical pragmatist approach could be employed to encourage equality, diversity, and political debate, and protect transgenderism and all sexual orientations.

The work of applying and following through with the critical pragmatic approach is very likely to be extraordinarily difficult on many levels – personal, political, and legal. This type of work is necessary, however, to promote clarity of thinking, reconcile contradictions, and avoid the intellectual dead end of political rhetoric. As long as Aboriginal nations do not undertake to end discrimination against gay men, lesbians, and transgendered people, they implicitly accept homophobia and the continued loss of citizens who must seek safety and acceptance far away from home.

### **Résumé**

La thèse de cet article est que les principes des ordres juridiques autochtones, prévalant avant le contact avec les Européens, concernant les droits individuels et collectifs peuvent être articulés de manière à s'appliquer aux questions contemporaines d'orientation sexuelle et de transgenre dans les communautés autochtones. Selon le cadre d'analyse proposé (1) les sociétés autochtones avant contact acceptaient en général une diversité d'orientations sexuelles ainsi que les phénomènes de transgenre; (2) l'intolérance envers la diversité sexuelle est une conséquence du colonialisme; (3) des contestations récentes et l'action politique ont initié un débat sur ces enjeux dans les sociétés autochtones; et (4) les Autochtones peuvent s'appuyer sur des ordres juridiques avant contact et une approche pragmatique et critique pour construire des nations autonomes non oppressives. Le conflit entre droits collectifs et individuels est au fond une fausse dichotomie, selon l'auteur. Le défi posé est d'imaginer comment des systèmes juridiques autochtones et occidental peuvent coexister tout en maintenant l'intégrité de chaque culture et en protégeant les droits de gays, de lesbiennes et de transgenre autochtones.

### **Abstract**

It is the thesis of this paper that the legal principles within pre-contact Aboriginal legal orders affecting individual and collective rights can be articulated and extended to apply to current-day sexual orientation and transgender issues in Aboriginal communities. The conceptual framework for the paper is that (1) pre-contact Aboriginal societies generally accepted sexual orientation and transgenderism diversity, (2) a consequence of colonialism has been widespread intolerance of sexual diversity, (3) recent litigation and political action have raised the profile of sexual orientation and transgender issues within Aboriginal societies, and (4) Aboriginal people can draw on pre-contact legal orders and employ a critical pragmatic approach to build non-oppressive self-governing nations. The paper argues further that the conflict between collective and individual rights is essentially a false dichotomy. The challenge is to figure out how Aboriginal legal systems can coexist with the western legal system in a way that maintains the integrity of each culture and that protects the rights of Aboriginal gay men, lesbians, and the transgendered.

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