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Section 15: How Indigenous Use of the Charter Tool is About Returning to Respect Not Creating Equity

Rebecca Major

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Résumé de l'article

Une certaine conception de la notion de liberté dans son rapport avec le rôle de l'État, surtout lorsque ce dernier est perçu comme l'oppresseur ou le colonisateur a gagné la faveur d'une partie de la population canadienne. Bien que les communautés autochtones du Canada ne jugent pas forcément la structure de gouvernance actuelle représentative de leurs traditions, elles reconnaissent la nécessité d'y avoir recours pour faire valoir leurs contestations. Les groupes autochtones s'appuient sur l'article 15 pour remédier aux inégalités qui découlent du passé colonial, en vue de rétablir l'équilibre d'une manière compatible avec leurs idéaux précoloniaux. Avant le rapatriement de la Constitution, ces tentatives de s'attaquer aux inégalités par la voie judiciaire l'ont bien souvent emporté dans une mesure restreinte, de sorte que les femmes autochtones se sont tournées vers les Nations Unies pour obtenir réponse aux problèmes d'équité entre les genres que pose la Loi sur les Indiens. Depuis le rapatriement, l'article 15 a servi de fondement aux contestations des peuples autochtones à l'encontre de politiques et de lois qui désavantagent injustement certains groupes par rapport à d'autres. Ces démarches s'inscrivent ainsi dans la poursuite d'un traitement équitable de la part du gouvernement. Nous souhaitons explorer, dans cet exposé, la façon dont les communautés autochtones recourent à l'article 15 comme outil pour contester les inégalités de traitement et pour défendre un droit à l'égalité qui concorde avec leurs valeurs traditionnelles précoloniales.

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Section 15: How Indigenous Use of the *Charter* Tool is About Returning to Respect Not Creating Equity

Rebecca Major[*]

Some Canadians view the concept of freedom in relation to government involvement differently, particularly when government presence is seen as oppressive or colonizing. While Indigenous communities in Canada may not always view the current governance structure as reflective of their own traditions, they recognize the necessity of using it to navigate challenges. Indigenous groups utilize section 15 to address inequalities that stem from historical colonialism, seeking to restore balance in a manner consistent with pre-colonial ideals. Prior to the repatriation of the constitution, attempts to address equity issues through the legal system were often met with limited success, prompting Indigenous women in Canada to take their gender equity concerns to the United Nations with respect to the Indian Act. Following the repatriation, section 15 has provided a platform for Indigenous peoples to address policies and laws that unfairly disadvantage certain groups in comparison to others, thereby promoting fair treatment from the government. This discussion aims to explore how Indigenous communities utilize Section 15 as a tool to address issues of unequal treatment and advocate for equity that aligns with traditional pre-colonial values.

Une certaine conception de la notion de liberté dans son rapport avec le rôle de l'État, surtout lorsque ce dernier est perçu comme l'oppresseur ou le colonisateur a gagné la faveur d'une partie de la population canadienne. Bien que les communautés autochtones du Canada ne jugent pas forcément la structure de gouvernance actuelle représentative de leurs traditions, elles reconnaissent la nécessité d'y avoir recours pour faire valoir leurs contestations. Les groupes autochtones s'appuient sur l'article 15 pour remédier aux inégalités qui découlent du passé colonial, en vue de rétablir l'équilibre d'une manière compatible avec leurs idéaux précoloniaux. Avant le rapatriement de la Constitution, ces tentatives de s'attaquer aux inégalités par la voie judiciaire l'ont bien souvent emporté dans une mesure restreinte, de sorte que les femmes autochtones se sont tournées vers les Nations Unies pour obtenir réponse aux problèmes d'équité entre les genres que pose la

[*] Rebecca Major is an Indigenous Associate Professor in Indigenous Governance at Yukon University and adjunct in the department of Political Science at the University of Windsor. Her research and teaching focus on Canadian Indigenous public policy, Indigenous governance and politics, Indigenous land and governance claims, policy learning; working in Indigenous feminism, intersectionality, and knowledge systems. Rebecca also has hands-on experience in Indigenous governance. Prior to joining the University of Windsor, Rebecca worked in Métis administration as policy advisor in Environment (including harvesting negotiations with provincial government), and in Inter-governmental Affairs. She later served as a Métis local president in Saskatoon as well as Area Representative for the Métis Nation-Saskatchewan; Western Region 2A. Today, aside from teaching and research, where much of Rebecca's time is spent in service in the community, and for the university by working in expanding equity and Indigenization spaces.

Loi sur les Indiens. *Depuis le rapatriement, l'article 15 a servi de fondement aux contestations des peuples autochtones à l'encontre de politiques et de lois qui désavantagent injustement certains groupes par rapport à d'autres. Ces démarches s'inscrivent ainsi dans la poursuite d'un traitement équitable de la part du gouvernement. Nous souhaitons explorer, dans cet exposé, la façon dont les communautés autochtones recourent à l'article 15 comme outil pour contester les inégalités de traitement et pour défendre un droit à l'égalité qui concorde avec leurs valeurs traditionnelles précoloniales.*

I. INTRODUCTION

Indigenous Peoples' engagement with the Canadian state in the courts is a political act, as it is interacting with a governance structure that was imported with colonization. When exploring the resurgence literature, particularly around identity, the focus of Canadian colonial government in relation to identity was quite clearly to displace Indigenous governance and social structure, and replace it with a governance structure grounded in the political philosophy of social contract theory – a post-modern imperialism.[1] In the first phase of colonization, the "Doctrine of Discovery" established a global political environment where European nations used this international legal concept to legitimize claims to foreign lands. Once well established in the new lands, colonial states developed. These colonial states asserted their own laws and institutions, and reinforced their power through the courts.[2] Canada exists under a constitutional monarchy as a modern democratic state with a legal system that functions as part of the governance structure. In interpreting the legal position of Indigenous Peoples' sovereignty and position within the colonial state, the Canadian courts turned to American case law in the Marshall trilogies, which established who has entitlement to access 'Indian lands' and legitimizing colonial state sovereignty.[3]

In the second phase of colonization (displacement and assimilation), Canada established legal relationships with Indigenous Peoples through treaties and then the *Royal Proclamation of 1763*.[4] The relationship was further entrenched in the *Constitution* in the *British North America Act, 1867* under section 91(24).[5] The political philosophy of 'Social Contract Theory' acted as a foundation for the political governance of Canada.[6] The political thought that emerges from the social contract philosophy informs the nature of the Canadian state moving forward, including understandings of justice through the lens of

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1 Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism" (2005) 40:4 Government & Opposition 597 at 597.

2 Yann Allard-Tremblay, "The Two Row Wampum: Decolonizing and Indigenizing Democratic Autonomy" (2022) 54:2 Polity 225 at 242.

3 Initially, the Indigenous-Crown relationship existed between First Nations (Indians) and the legislation and associated policies existed as such. Eventually the Crown engaged in colonial and administrative control of Inuit and Métis. In the modern context Indigenous refers to all three Crown-recognized distinctions within 'Indigenous' as a legal identity. Importantly, Métis are a state-recognized Indigenous collective that are a post-contact, rights-bearing population. See Ryan Beaton, "Positivism and Pluralism in Canadian Aboriginal Law: Reading *Caron v Alberta* and the Marshall Trilogy" (2022) Social Science Research Network, Working Paper at 17, DOI: <10.2139/ssrn.4311423>.

4 Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 36.

5 *British North America Act,* 1867, 30-31 Vict, c 3 (UK).

6 Janet Ajzenstat, *The Canadian Founding John Locke and Parliament* (Montreal: McGill-Queen's University Press, 2007) at 4–5.

positivism. Social contract theory served the colonial displacement of Indigenous Peoples well, as "social contract theory has developed in a dialectical relationship to the political practice of excluding Indigenous peoples from the international realm."[7] The utilitarian benefit that this political philosophy provided was a validation of the premise behind colonization (occupation of another's lands).[8]

In the modern era of colonization, where Indigenous Peoples and the community structures exist under Canadian sovereignty at the international level, the Canadian State patriated the *Constitution* and developed the *Charter of Rights and Freedoms* in 1982. "Prior to 1982, aboriginal rights were founded only on the common law and they could be extinguished by treaty, conquest and legislation as they were 'dependent upon the good will of the Sovereign.'"[9] Today, Indigenous Peoples and communities address the social disruption created by colonization through constitutional tools, such as section 15 *Charter* challenges. However, what is unique is how Indigenous Peoples use the tool itself; it is not used to create equality with non-Indigenous Canadians, rather it is used to import equality principles into Indigenous policy and to deconstruct colonial institutions. The following discussion explores how resurgence and regeneration occur through Indigenous Peoples' use of section 15. The discussion is positioned to illustrate that the efforts of Indigenous Peoples' use of section 15 are to undo colonial harm rather than to become equal with other Canadians – return to original distinctness and sovereignty.

II. CONTEXT

Colonization imported legal conceptions of land and land ownership, which disrupted the legal position of Indigenous Nations as original inhabitants. Christian religion and social values assisted in physically usurping the diverse Indigenous institutions and worldviews in practice through forced relationships between Indigenous peoples and newcomers in North America. Christianity, specifically the Catholic Church, established the international law of "Doctrine of Discovery", which created a European entitlement to the conquest of new territory and its Peoples, particularly in non-Christian territories.[10] In the process, colonization entrenched the colonial power's institutions and social organization through decrees and legislation. The British asserted dominance in North America through *the Royal Proclamation of 1763,* then in Canada through the *British North America Act, 1867* (now known as the *Constitutional Act, 1867*), and through subsequent legislation, such as the *Indian Act*.[11] An administrative relationship between Indigenous Peoples and the Crown developed that constrained Indigenous Peoples and communities within Western institutions of governance. European Western expansionism is 400 years of colonial history and entrenched ideas of institutions and 'civilization,' which created a normative history

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7 Robert Lee Nichols, "Realizing the Social Contract: The Case of Colonialism and Indigenous Peoples" (2005) 4 Contemp Pol Theory 42 at 44, DOI: <10.1057/palgrave.cpt.9300153>.

8 *Ibid* at 48.

9 *R v Van der Peet,* [1996] 2 SCR 507 [*Van der Peet*] at para 125.

10 Baron Pineda, "Indigenous Pan-americanism: Contesting Settler Colonialism and the Doctrine of Discovery at the UN Permanent Forum on Indigenous Issues" (2017) 69:4 Am Q 823 at 823.

11 UK, *Proclamation*, 7 October 1763, reprinted in RSC 1985, App II, No 1 [*Proclamation*]; *British North America Act,* 1867, 30-31 Vict, c 3 (UK) [*BNA Act*]. The name of the British North America Act, 1867 relates to the new relationship established by the Crown where Canada and its institutions are delegations of the Crown and have a specific relationship with Indigenous Peoples. The BNA Act is known as the *Constitution Act*, 1867 since the patriation of the Constitution; however the BNA Act is often referenced when discussing historic relationships.

for the newcomers.[12] Prior to colonization, Indigenous Nations had well-established social and political structures that Christian Law disrupted and used to assert administrative control.[13] Out of economic interests, it was sometimes beneficial for colonial powers to have treaty agreements and economic partnerships with Indigenous Nations.[14]

An example of administrative control that came from the colonial government in Canada following the *BNA Act* was the *Indian Act, 1876* that registered First Nations registered with the federal government as legal Indians and left them with few legal options for a redress of grievances or legal infringements.[15] Rights were further limited and narrowed in the *Indian Act* in 1927 when the government made hiring lawyers to address grievances illegal until the 1951 *Indian Act* amendment when section 141 was repealed.[16] In the years leading up to the 1982 patriation of the *Constitution*, Indigenous rights-based cases came before the courts, but there was a significant increase in these matters coming before the courts following 1982.[17] As part of the new legislation came instruments to address constitutional matters, particularly legal matters that do not align with constitutional principles, such as gender inequality. Equality rights in Section 15(1) of the *Canadian Charter of Rights and Freedoms* provide equality to all in Canada. Still, just as important, Section 15(2) provides room for those considered disadvantaged by articulating legal protection for creating government programs that combat discrimination.[18]

With Indigenous Peoples regarded as historically disadvantaged since colonization, section 15(1) challenges by non-Indigenous Peoples targeting Indigenous rights tend to fail because Indigenous Peoples qualify for accommodations under section 15(2). Furthermore, Indigenous and non-Indigenous peoples cannot be used as comparator groups to assess equality because of the constitutionality of Indigenous identity recognized in Section 91(24) of the *British North America Act, 1867* and Section 35 of the *Constitution Act, 1982*.[19] The Supreme Court of Canada explains in *Hodge v. Canada (Minister of Human Resources Development)* that a comparator group is where "the claimant shares the characteristics relevant to qualification for the benefit or burden in question, except for the personal characteristic that is said to

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12 Charles Vevier, "American Continentalism: An Idea of Expansion, 1845-1910" (1960) 65:2 Am Historical Rev 323 at 331.

13 At this time, North American's Indigenous populations were the First Nations and Inuit.

14 Canada, Crown-Indigenous Relations and Northern Affairs, "INAC, Treaties and Agreements" (last modified 11 April 2023), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231> [perma.cc/5JTW-AQUX].

15 *Indian Act, 1876,* SC 1876, c 18, s 6 [*Indian Act 1876*].

16 *The Indian Act*, SC 1951, c 29. First Nations were controlled administratively through the *Indian Act*, Métis were controlled administratively at the provincial level in the Prairies and the Inuit also endured administrative control through various federal policies such as Arctic relocation programs.

17 Rebecca Major & Cynthia Stirbys, "Using the Master's Institutional instruments to Dismantle the Master's Goal of Indigenous-Rights Certainty" in Kate Puddister & Emmett MacFarlane, eds, *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* (Vancouver: University of British Columbia Press, 2022) 367 at 379. With the patriation of the *Constitution* came legal recognition of three distinct Indigenous groups in Canada: First Nations (Indians), Inuit and Métis in Section 35(1). Additionally, Inuit and Métis are also recognized as being included in Section 91(24) of the *Constitution Act*, 1867 through legal decisions (*R v. Eskimo, 1939* and Daniels *v* Canada (Indian Affairs and Northern Development), 2016 SCC 12)

18 *Canadian Charter of Rights and Freedoms,* s 15, Part 1 of the *Constitution Act*, *1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

19 *British North America Act,* 1867, 30-31 Vict, c 3 (UK); *Constitution Act*, *1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act]*.

be the ground of wrongful discrimination."[20] While the comparator concept is no longer used in the courts since *Withler v. Canada (Attorney General)*, the foundation of this concept remains significant as an articulation of why Indigenous and non-Indigenous peoples have different starting points.[21] The history and difference in constitutional positionality explain why Indigenous Peoples use Section 15 differently than others in Canada and why there is no desire to be 'equal' to non-Indigenous peoples under colonial administration.

III. FREEDOM THROUGH GOVERNMENT VS FROM GOVERNMENT

With the importation of a western political form of governance informed by social contract theory, (where the governance exists because the collective agrees to submit to a particular power structure for governance), legal conceptions of thinking followed.[22] Western philosophical thought contrasts significantly from the varied and diverse perspectives of Indigenous Peoples because Indigenous governance structures (along with most Indigenous aspects of life in Canada) are grounded in relationships.[23] Understanding the relational component to governance comes from the relational component to identity, recognized by Jeff Corntassel as an adapted peoplehood approach to Indigenous identity.[24] Freedom to understand Indigenous identity is part of the elements of freedom from colonial governance for Indigenous Peoples. In the resurgence literature there are pathways to break from colonialism and western structures of engagement, named spaces where this takes place (sites of resurgence), as well as ways to reconstitute thinking that repositions Indigenous political philosophy from varied perspectives.[25]

In approaching governance, and its laws and justice from a western perspective, it is best to look at how the underlying structure of philosophies inform how some see governance and justice, as these structures currently govern Indigenous-state relationships in Canada. Original political philosophers in social contract theory are Hobbes, Locke, and Rousseau.[26] The 20th century saw development in the area by John Rawls. In considering the role of freedom in John Rawls' work, "Justice as Fairness", freedom derives from social institutions according to Western political thought and the associated ideas of a just society.[27] This perspective is grounded in a belief that enforces normative patriarchy and supports the individual in a collective democracy. Normative patriarchy, by definition, is the social setting where the

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20 *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65.

21 *Withler v Canada (Attorney General)*, 2011 SCC 12.

22 John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) at 13–14, cited in Allard-Tremblay, *supra* note **Error! Bookmark not defined.** at 227.

23 Alfred & Corntassel, *supra* note 1 at 597; Allard-Tremblay, *supra* note **Error! Bookmark not defined.** at 236.

24 Jeff J Corntassel, "Who Is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity" (2003) 9:1 Nationalism & Ethnic Politics 75.

25 Allard-Tremblay, *supra* note **Error! Bookmark not defined.** at 245; Alfred & Corntassel, *supra* note 1 at 600.

26 Christopher W Morris, ed, *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* (Lanham, MD: Rowman & Littlefield, 1999) at IX.

27 John Rawls, *A Theory of Justice: Revised Edition* (Cambridge Mass: Belknap Press of Harvard University Press, 1999) at Chapter 1.

standard of social protocols centres on the male-identifying segment of the population.[28] Colonialization and Western expansion were inherently patriarchal and informed by the Judaeo-Christian lens that supported global colonization through papal bulls and the affiliated "Doctrine of Discovery".[29] Rawls stated that freedom is already established in a just society, as "justice denies the loss of freedom and that loss of freedom is only warranted when it is to avoid a greater injustice."[30] It is the collection of individuals that establish individual freedoms through social institutions. In Canada, protections exist under the *Charter* and the *Constitution Act, 1982*.[31] The *Charter* and *Constitution* exist and hold validity because a collective of people agreed, although perhaps not articulated directly,[32] and endorse it as the rules to live by and be governed by in a way that respects the collection of individuals.

Further to this discussion, Rawls dissects positions of equality within his concept of justice and a just society. He explains that equality is an aspect to justice that is situated with social ideals, attaching his work directly to social contract theory.[33] Discussed later in this paper are the exceptions to the right to equality set out in section 15(2) of the *Charter*, which align with Rawls' reasoning on why inequalities can work. Rawls states, "inequality is allowed only if there is reason to believe that the practice with the inequality, or resulting in it, will work for the advantage of every party engaging in it."[34] Applying this concept of equality to section 15 illustrates how accounting for barriers people experience in life creates the reason for subsection (2) in this section of the *Charter*.

Examining the state as an institution through Immanuel Kant's understanding, the state and its constitution are held up by the people acknowledging the state as an idea.[35] Upholding the state and its laws to recognize rights as individuals exist within the collective is a way for an individual to excise freedom through the state.[36] Freedom, as framed by Kant, is a reality realized through practical principles.[37] Understanding freedom in terms of the state involves the consent of society broadly to preserve personal rights as part of the Commonwealth.[38] This concept highlights the connection realized through the *Charter* and the *Constitution*. The institutions that produced the Constitution are used and supported by the broader Canadian society to give it all meaning. This normative understanding derives from a patriarchal society comprising Western philosophical knowledge and morals.

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28 Jessica L Liddell et al, "She's the center of my life, the one that keeps my heart open": Roles and expectations of Native American women" (2021) 36:3 Affilia 357 at 359-360, 371.

29 "The Bull Romanus Pontifex (Nicholas V)" (8 January 1455), online (pdf): *Christian Aboriginal Infrastructure Developments* <www.caid.ca/Bull_Romanus_Pontifex_1455.pdf ≥ [perma.cc/QT9L-8WWC]

30 *Rawls*, *supra* note 27 at 4.

31 *Charter, supra* note 18, s 15.

32 PH Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed (University of Toronto Press, 2004) at 10. Note on page 6 of Russell, there is no evidence that Indigenous Peoples or people in Quebec agreed to this constitutional arrangement.

33 John Rawls, "Justice as Fairness" (1958) 67:2 *The Philosophical Rev* 164 at 165.

34 *Ibid* at 167.

35 Immanuel Kant, *The Metaphysics of* Morals, translated and edited by Mary Gregor (Cambridge: University Press, 1996) at 90-91.

36 *Charter, supra* note 18, s 15.

37 Kant, *supra* note 35 at 14.

38 *Ibid* at 91.

Reflecting on the presupposition of achieving freedom through the state, ask yourself how implementing colonial institutions in democratic traditions inherited from Western normative values created freedom for Indigenous Peoples in Canada. The discourse that differentiates Western political thought from that of the many Indigenous Nations is vital to discuss as well as the difference between freedom through government institutions and freedom from government institutions in the Western democratic sense. Notably, Indigenous societies vary in organization and relational spaces;[39] however, there is a broader contrast to Western colonial thought and social organizing. While Indigenous Peoples use colonial systems to address colonial injustices, it is about Indigenization and resurgence in decolonization rather than a desire for equality with non-Indigenous populations.[40] Glen Coulthard's work explains that empowerment should move away from state recognition and "fashioned toward our on-the-ground struggles of freedom."[41] First Nations' opposition to the White Paper in 1969 by the Trudeau government is an example of Indigenous resistance to concepts of equality with non-Indigenous Canadians. The connection between Coulthard's perspective and First Nations' reaction the White Paper is found in Alfred and Corntassel's work, where they note that the White Paper's erasure of First Nations' distinct constitutional identity was another version of colonially constructing identity and associated rights.[42]

The legislative and administrative relationship established through treaties, the *Royal Proclamation*, and assertions of the legitimacy of government claims and constitutions, established Indigenous-Crown relations. The new governance structure imported to North America more broadly dispossessed the Original People and any post-contact Indigenous collectives, such as the Métis. In the United States, Indigenous case law began in the 19th century, with *Johnson v. M'Intosh* (1823), a case concerning who could negotiate Indigenous title to land in order to secure access to the land. *Johnson v. M'Intosh* was the first of three cases that became known as the Marshall trilogy.[43]

The Canadian courts have cited the narrative in these Marshall cases in decisions concerning Indigenous title to land and Indigenous sovereignty. In *Van der Peet,* the Supreme Court cited *M'Intosh* and *Worcester v. Georgia* (1832) and are discussed because they consider claims to land, and land rights based on prior occupation.[44] *Cherokee Nation v. Georgia* (1831), a Marshall trilogy case, related to tribal sovereignty, but the *Van der Peet* decision outlines that this case must be considered in the context of the prior-occupancy highlighted in the other two Marshall cases.[45] References to the Marshall trilogy of cases can be found in other case law, which is not the focus of this paper. However, it should be noted that the

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39 The different cultures across Turtle Island existed with different governance structures and social protocols. Knowledge is grounded in relationships to land and is relational in nature. See Emily Grafton & Jerome Melancon, "The dynamics of decolonization and Indigenization in an era of academic 'reconciliation', in S Cote-Meek & T Moeke-Pickering, eds, *Decolonizing and Indigenizing Education in Canada* (Toronto: Canadian Scholars, 2020) 153 at 138.

40 Alfred & Corntassel, *supra* note 1 at 599.

41 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 48.

42 Alfred & Corntassel, *supra* note 1 at 598-599.

43 Beaton, *supra* note 3 at 1v

44 *Van der Peet*, *supra* note 9 at para 36.

45 *Ibid* at paras 35-37.

Marshall cases that inform Canadian case law provide insight into how Indigenous sovereignty in North America became "domestic dependent nations" within colonial states.[46]

Through the normative patriarchy that came with Christian colonization, the male dominance of the Western colonizing nations became the social and organizational standard. Therefore, the implemented colonial policies that managed Indigenous populations from a state perspective created Christian notions of gender and gender roles, marginalizing women.[47] The official policies that targeted gender in Canada, began in the 1850s; however, after Confederation in 1867, consolidated first in the 1868 and 1869 national policies, the government dictated the terms for First Nations women to retain their legal and cultural identity.[48] In these legislative acts, a women's legal identity was tied to their husband's identity. Through legislation, in 1868 woman could gain an Indian (First Nations) identity by marrying an Indian-identified person, and in 1869, women would lose their identity as an 'Indian' by marrying a non-Indian-identified person – known colloquially as 'marrying-out'.[49] The government organized this control of gender through policy at the national level later through the *Indian Act* of 1876, which remains the legislative policy under which Indian status is organized and legally understood.[50] In the second half of the 20th century, First Nations women started addressing gender discrimination through legal means, explored in the following discussion.

Before the adoption of the *Constitution Act, 1982* and its *Charter*, Mary Two-Axe Earley advocated equal rights for Indigenous women, later called "Indian rights for Indian women*."*[51] Two-Axe Earley successfully gained attention for gender issues in *the Indian Act* when women's equality was under examination in Canada through the Royal Commission on the Status of Women in 1968, which led to the 1970 recommendation to amend the *Indian Act*.[52] The equality sought at the time was not to be equal with non-Indigenous Canadians, but to have equality to that of Indian men in access to legal Indian identity. The marginalization of Indigenous women through colonial policies made Indigenous legal arguments for equality emerge in the 20th century. Significantly, the policies the First Nations women were fighting were instruments used by the state to control people rather than enhance freedoms. This point is essential because settler people were using institutional instruments, such as the Royal Commission, to address what seemed to be unsettled freedoms in post-world War Canadian society, using the government to get more freedoms and protections through them. For First Nations women, it was to undo the oppression exerted on them by the government that took their freedoms.

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46 *Cherokee Nation v Georgia*, 30 US 5 Pet 1 1 (1831) at 30.

47 Liddell et al, *supra* note 28 at 360.

48 *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, SC 1868, c 42; *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act,* 31st Victoria, Chapter 42, SC 1869, s 6.

49 *Ibid*. Note that the term Indian used as a legal distinction, refers to a First Nations person, one of the three groupings of Indigenous Peoples recognized in Section 25 of the *Constitution Act* 1982.

50 *Indian Act 1876*, *supra* note 15, s 6.

51 "Mary Two-Axe Earley: Public Service (1996)" (last visited January 2023), online: *Indspire Laureate* <www.indspire.ca/laureate/mary-two-axe-earley/> [perma.cc/7VCH-FV3U].

52 Florence Bird et al, "Royal Commission on the Status of Women in Canada" (28 September 1970) recommendation 106 at 410, online (pdf): *Women and Gender Equality Canada and the Government of Canada* <www.women-gender-equality.canada.ca/en/commemorations-celebrations/royal-commission-status-women-canada.html > [perma.cc/8PGE-3MG7].

By returning to traditionally-informed governance practices, Indigenous Peoples can also seek freedom through governance, but that does not mean through the Canadian state. In nation-building approaches to governance, breaking dependency is pivotal to returning to community-based governance grounded in a cultural match.[53] Legislation enacted to govern Indigenous Peoples made them dependent on the Canadian state that acts on behalf of the Crown. The act of breaking away from Canadian state dependency is an acknowledgment of two things. First, Indigenous Peoples want to break from colonial governance; the Canadian state acting as a constraint to rights rather than a provider of rights for Indigenous Peoples. The imposed *Indian Act* governance was a disruption to community-based governance, for example.[54] In modern comprehensive claims, First Nations communities negotiated discontinuation of *Indian Act* band governance, such as in the *Nisga'a Final Agreement Act*.[55] Second, breaking away demonstrates that Indigenous Peoples can get security through governance when it is their own and not imposed from the outside. Where colonial states created laws and administration through their self-recognized right to discovery, Indigenous Peoples found ways for redress; in the 18th and 19th centuries, Indigenous groups engaged in diplomacy through formal channels such as petitions.[56] In the 20th century, there was diplomatic engagement and utilization of the legal system as a means of seeking justice. The efforts of Indigenous Peoples and communities to address the impacts of colonization through decolonizing approaches demonstrate their commitment to rectify historical injustices while striving for cultural revitalization.

The government created a dependency on the state through several colonial administrative policies and legislation. They created a fiduciary responsibility where the federal government is legally responsible for Indigenous Peoples (later recognized in *Guerin*)[57] and regulating First Nations Peoples through the *Indian Act*. The government made it impossible for communities to be sustainable through the policies, thereby creating dependency. In the 19th century, many First Nations Peoples were moved onto reserves and endured laws restricting mobility and forcing *Indian Act* band governance.[58] To coerce those resistant to settle on reserves, the government went so far as to subjugate peoples through starvation.[59] Reserves were nothing more than town sites, and to be able to leave the reserve, one had to ask for a pass from the resident non-Indigenous federal bureaucrat known as the "Indian agent".[60] While hunting was a protected practice under treaties, permission was required to leave the reserve to exercise the right. As part of the settlement, those on reserves were promised provisions for farming (cows and ploughs). Still, the government

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53 Stephen Cornell & Joseph P Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in Mariam Jorgensen, ed, *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007) 3 at 24-25.

54 *Indian Act 1876*, *supra* note 15, s 74.

55 *Nisga'a Final Agreement Act*, SC 2000, c 7.

56 Rebecca Major, *Shifting Institutional Control: Changing Indigenous Policy Goals Through Métis and First Nations Identity Assertions* (PhD Dissertation, University of Saskatchewan, 2020) at 222.

57 *Guerin v The Queen*, [1984] 2 SCR 335 at 336, 13 DLR (4th) 321 [*Guerin*].

58 *Indian Act 1876*, *supra* note 15, s 6.

59 John L Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" in JR Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1999) 212 at 219-21.

60 F Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935" (1988) 13:1 Prairie Forum 25 at 26; JR Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2001) at 258.

provided the worst land possible for reserves — keeping the better land for settlers — and failed the communities in providing farming implements, which created the specific claims in the modern day.[61] The constraints to mobility and governance ensured complete government control and a cycle of dependency.[62] If the elected leaders did not act in a way the government approved, the Indian agent assigned to a community could remove the leadership and install someone who would carry government policies forward.[63] The answers lie in the community when looking at ways to break the dependency created.

IV. NATIONHOOD AND NATION-TO-NATION

Pre-colonial governance structures sometimes require adaptation because of the necessity to engage with colonial institutions. Additionally, pre-contact Indigenous governance reflected the community's needs at the time. Because of the impacts of colonization and community adaptation and growth, some values may not be desired in modern governance. Returning to the Indigenous governance discussion, Brenda Gunn cautions:

> In revitalizing Indigenous legal traditions, we must be careful to not romanticize Indigenous traditional legal systems by overstating traditional ideas of equality, as well as to be cautious when presented with fundamentalists' views of Indigenous laws that purport to identify pure or true traditions.[64]

This statement is significant because Indigenous governance (community-led) may require modernization in a way that holds space for everyone in society today that did not in the past. As with practicing Indigenous rights with modern tools, the same can be true in other ways of Indigenous living and governance. Indigenous culture is not frozen in time; it adapts through cultural engagement with others, and so must Indigenous governance.

'Breaking the Chains of Dependency' means restoring pre-colonial traditions, practices and sovereignty from the dependency created by the government, whether it is at the federal, provincial or municipal level.[65] However, returning to community governance is only part of breaking the dependency created. Governance needs to be community driven with a cultural match.[66] This match to the community makes Nation-building not about equity or equality; instead, it is an approach to bringing community identity into modern spaces. Present-day Indigenous governance must be responsive to community needs while maintaining cultural integrity so people feel connected to their governance. As detailed by Cornell

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61 Hélène Pellerin, "Indigenous Peoples in Canadian Migration Narratives: A Story of Marginalization" (2019) 8:1 Aboriginal Policy Studies 3 at 7.

62 Cornell & Kalt, *supra* note 53 at 6-17.

63 Miller, *supra* note 60 at 260.

64 Brenda Gunn, "Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law," in John Borrows et al, eds, *Braiding Legal Orders* (Waterloo: Centre for International Governance Innovation, 2019) 135 at 143-144.

65 Manley Begay et al, "Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?" in Jorgensen, supra note 53, 34 at 34-35

66 *Ibid* at 47.

and Kalt, the 'Standard Approach' to governance exemplifies how colonial governments weaponized governance as a constraint, not an avenue from which Indigenous Peoples derived their freedoms.[67] Thinking of nation-building is a way of imagining governance outside of Canadian state control.

Connecting how laws operate in Canada, we can see how bringing new rights and laws to benefit Indigenous Peoples are constrained. Larry Chartrand observes that the *Constitution* impedes equality of nationhood when considering laws must align with the *Constitution* above all.[68] Even Indigenous rights are interpreted through a constitutional lens. Pre-confederate policies and laws affecting Indigenous Peoples, such as treaties, rights, and the *Royal Proclamation of 1763*, are entrenched and explicitly protected in the *Charter* through section 25.[69] Further, the application of rights and recognition of Indigenous Peoples exists under section 35 of the 1982 *Constitution Act* – purposely, outside the *Charter*, where the notwithstanding clause is inapplicable.[70] These sections of the *Constitution Act, 1982* (ss. 25 and 35) illustrate the distinctiveness and special constitutional standing of Indigenous Peoples, distinct from other Canadians, recognizing rights based on historic occupancy.

In an example of how legislation cannot unjustifiably conflict with *Charte*r rights, the Saskatchewan government had to change laws after taking Tristan Durocher to court. Tristan Durocher walked to Regina from Northern Saskatchewan for a fast to draw attention to Indigenous suicide in the province. The provincial government took Durocher to court for erecting a teepee in Wascana Park, where the Saskatchewan Legislature sits. The result from the court was an imposed 6-month deadline (para 16) for the provincial government to align Wascana Park laws with the *Constitution* under Section 52(1).[71] This example points to similar arguments by Chartrand as he notes there is an impediment around the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) legislation;[72] the constitutional constraint limits it. The colonial power dominating legislation and recognizing Indigenous rights reflects the power imbalance through modern-day relations. Indigenous identity and rights recognition are based on the colonial power. Yann Allard-Tremblay proposes reconsidering governance from an approach that creates space for political pluralism.[73] Moving engagement to nation-to-nation is the start of rebalancing power relations. It is only a start until true nation-to-nation powers exist without one governance system controlling another.

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67 *Supra* note 53 at 7-17.

68 Larry Chartrand, "Mapping the Meaning of Reconciliation in Canada: Implications for Métis-Canada Memoranda of Understanding on Reconciliation Negotiations" in Borrows et al, supra note 64, 83 at 87.

69 *Charter, supra* note 18, s 25.

70 *Ibid*, s 35; Eric Hanson, "Constitution Act, 1982 Section 35" (last visited 9 May 2023), online: *Indigenous Foundations* <www.indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/> [perma.cc/MT7R-7HYU].

71 Michael Bramadat-Willcock, "'Unaddressed problem' of Indigenous suicide comes into election focus at Saskatchewan leaders debate", *Windspeaker* (16 October 2020), online: <www.windspeaker.com/news/windspeaker-news/unaddressed-problem-indigenous-suicide-comes-election-focus-saskatchewan> [perma.cc/AQU2-LMZW]; *Saskatchewan V Durocher* 2020 SKQB 224.

72 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007).

73 Allard-Tremblay, *supra* note **Error! Bookmark not defined.** at 248.

V. WHY THIS ISN'T ABOUT EQUALITY IN THE WESTERN SENSE

Indigenous social disruption happened through enforced colonial policy, with entrenched Western concepts of gender in legislation. These policies created the setting for Indigenous engagement with the state over equality. Following the work and legal actions of Mary Two-Axe Earley, Jeanette Corbière-Lavell, and Yvonne Bedard, the Government of Canada brought legislation forward through Bill C-31.[74] The legislation centred on equality under the *Indian Act*. These First Nations women lost status from the *Indian Act* by marrying out. Corbière and Lavell took their voices to the United Nations when the Canadian judicial system failed to provide change.[75] The Corbière-Lavell and Bedard cases created international attention. This public attention created pressure to start looking at legislative changes at a time when women's issues were in the public eye. However, nothing developed until after the patriation and introduction of Section 15.[76] The patriation of the C*onstitution* and implementation of the *Charter* created an avenue for equity and equality challenges to oppressive legislation in Indigenous cases.

Section 15 *Charter* challenge cases started a new area in case law, with the challenges defining its use and creating an avenue of distinction for Indigenous rights through challenges brought forward. The first Section 15 case, *Andrews v Law Society of British Columbia*, begins the conceptual framework for understanding using the section moving forward.[77] In *Andrews*, the intent behind the law creating equality involved acknowledging that distinctive treatment is sometimes required to create equality.[78] Discussed earlier, this approach aligns with the concepts of equality by Rawls and how inequalities can be to the benefit of the greater group. In other words, preferential treatment sometimes creates equality, and not everybody is treated the same. This articulation is an essential acknowledgement for understanding equality and freedom because not everyone is born into equal opportunity circumstances. For example, not everyone is born into multigenerational wealth; some may have access to private schools, paid post-secondary education, and the opportunity to study rather than work to put food on the table. Indigenous Peoples endure disadvantages created through policies, and as a result, accommodations for this history exist presently in legislation, such as Indigenous hiring practices under Human Rights laws.[79]

The acknowledgment of requiring clear definitions and understandings of equity and equality is important because the government's understanding affects service delivery. An example of how a government can push political knowledge of equality happened in Ontario more recently. Following Doug Ford's election in June 2018, he and his party rolled out an autism plan. The proposed change to the

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74 *An Act to Amend the Indian Act*, RSC 1985, c 32 (1st Supp).

75 *Attorney General of Canada v Lavell*, [1974] SCR 1349, 38 DLR (3d) 481 [*Lavell*].

76 Gerard Hartley, "The Search for Consensus: A Legislative History of Bill C-31, 1969-1985*"* (2007) 5 Aboriginal Policy Research Consortium International (APRCi) 5 at 13.

77 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

78 Ian Peach, "Section 15 of the 'Canadian Charter of Rights and Freedoms' and the Future of Federal Regulation of Indian Status" (2012) 45:1 UBC L Rev 103 at 109; *Andrews*, *supra* note 77.

79 "Indigenous Peoples in Ontario and the Ontario Human Rights Code (brochure)," (2015) at 2, online (pdf): *Ontario's Human Rights Code* <www.ohrc.on.ca/en/indigenous-peoples-ontario-and-ontario-human-rights-code-brochure> [perma.cc/23MZ-ETP7]. Following the *Employment Equity Act, 1993* and the Aboriginal Employment Preferences Policy according to the Canadian Human Rights Commission, Indigenous-centred service centres in Ontario give preference to hiring Indigenous Peoples unless that preference or employment would constitute a discriminatory practice under the *Human Rights Act*, for example. See also *Employment Equity Act,* 1993, SO 1993, c 35; *Aboriginal Employment Policy*, Ontario Human Rights Commission (March 25, 2003).

program was hugely problematic because autism is a spectrum disorder, according to the Centre for Disease Control. The needs vary, sometimes significantly, from one person who needs support to another.[80] The proposed change was a redistribution of services and support so that everyone received the same support. The Ford government pivoted from the proposed changes before implementing them, likely because of public pressure and scrutiny. The provincial government released a statement that they will reassess the autism program in a way that accounts for a "needs-based" approach funding model, making this approach the centre of any model moving forward.[81] While the debate on how to interpret equality seemed little more than semantics at the time, when left to government interpretation, the idea and implementation can directly impact the quality of life. Ford providing the same financial assistance for every family might be equal. Still, it is not equitable when different families have different needs based on the spectrum of autism. This approach to equity and equality is why the courts interpret Section 15 in a way that accounts for uneven starting places and is pivotal to its use. It is also why Indigenous cases approach Section 15 in a particular way – coming from a different legislative history than other Canadians.

For Indigenous Peoples using the *Charter* for rights recognition and enforcement, advocacy is a return to the pre-colonial status in many ways. The *Charter* provides a tool with section 15; it is a tool for taking space back that was removed through other legislation and policies, such as the *Indian Act*. According to Jeremy Patzer and Kiera Ladner:

> The opening of the constitution presented a unique window of opportunity for Indigenous peoples to achieve rights recognition … But, unlike others from civil society who were seeking rights recognition within the *Charter of Rights and Freedoms*, Indigenous peoples were pursuing rights recognition outside of the *Charter* — even seeking to shield and protect their distinct, collective rights from the *Charter* and from the liberal nationalism that it embodied.[82]

It is not about equality with other Canadian citizens, as demonstrated by the cases brought forward by Indigenous Peoples or communities.

Indigenous use of section 15 addresses rights impacted by use of colonial administration and policies. In Indigenous-specific use of section 15, Ian Peach reviewed cases and broke them into themes: equality of off-reserve residents, individuals seeking status or equality with status, and groups seeking equal treatment with *Indian Act* bands.[83] Explored further below, the cases are examples of Indigenous Peoples achieving justice following the loss or impairment of their rights through targeted legislation. Section 25 enforces the meaning for Indigenous Peoples behind Section 15. The section 25 non-derogation clause was added to the *Charter* so that none of its sections, including section 15, could be used against

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80 "Autism Spectrum Disorder" (14 December 2022), online: *Centres for Disease Control and Prevention* <www.cdc.gov/ncbddd/autism/index.html> [perma.cc/CM7L-HN64].

81 Kevin Nielson, "Ford government backs off changes to autism funding plan," *Global News* (29 July 2019), online: <www.globalnews.ca/news/5697552/ford-government-ontario-autism-program-funding-changes/> [perma.cc/NP27-W6JZ].

82 Jeremy Patzer & Kiera Ladner, "Charting Unknown Waters: Indigenous Rights and the Charter at Forty" (2022) 26:2 Rev Const Stud 15 at 18.

83 *Supra* note 78 at 110.

Indigenous Peoples.[84] In addition, according to Roy Romanow, section 35 falls outside the *Charter* for similar reasons, so the Notwithstanding Clause could never be used against that section.[85] Section 15 does not interact with Indigenous rights in isolation; sections 25 and 35 inform all state interactions with Indigenous peoples and the recognition of rights essentially.[86]

Astutely pointed to by Patzer and Ladner, interpretations within the law are potentially problematic; explanations that shift the use of rights can happen by using the law to interpret rights. According to Patzer and Ladner:

> It is becoming more apparent that contemporary threats to Indigenous rights may not manifest simply as equality arguments *against* the existence of those rights. Instead, they can find their entry into Canadian law via interpretive weaknesses embedded into the *Charter* protections *sought by* Indigenous rights holders.[87]

Audre Lorde said, "[t]he master's tools will never dismantle the master's house."[88] While Indigenous Peoples can assert and protect rights, there are drawbacks and potential pitfalls when using the master's tools to dismantle the master's house. The cases are not about meeting the idea of Canadian idealism in equality for Indigenous Peoples; instead, Indigenous Peoples are left with colonial tools to take back power and space usurped through colonial acts and legislation.

What if the master provided the tools unexpectedly? As part of the inclusion of Indigenous Peoples in the *Constitution Act, 1982,* section 37 established constitutional conference discussions as a mechanism to define the rights promised.[89] However, the government lost control by not setting the terms in the constitutional rounds through section 37.[90] While the Canadian judicial system is a colonial institution, Indigenous Peoples and communities use the courts to assert rights and recognition, with a notable increase since the patriation of the *Constitution*.[91] Billy Diamond from the Grand Council of the Crees spoke about learning the non-Indigenous systems to use the system to their advantage, explaining it was his dad's words telling him: "Use the white man's law to get our rights recognized."[92] As constitutional Peoples, Indigenous Peoples and their engagement with the law come from a different space than most others because rights and protections are enshrined, and they have the extra use of section 15 to expand access to rights.

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84 Patzer & Ladner, *supra* note 82 at 19. *Charter, supra* note 18, s 25.

85 Roy Romanow, POLS 801, Course (Faculty of Political Studies, University of Saskatchewan, Winter 2007).

86 *Charter, supra* note 18, ss 15, 25.

87 Patzer & Ladner, *supra* note 82 at 20.

88 Audre Lorde, "The Master's Tools Will Never Dismantle the Master's Hhouse" in Audre Lorde, ed, Sister Outsider: Essays and Speeches (Berekley: Crossing Press, 2007) 110.

89 *Constitution Act*, *supra* note 19, s 37.

90 Major & Stirbys, *supra* note 17 at 370; *Constitution Act*, *supra* note 19, s 37.

91 Major & Stirbys, *supra* note 7 at 237; *Guerin*, *supra* note 57, *R v Sparrow*, [1990] 1 SCR 1075; *Van der Peet*, *supra* note 9; *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511; *Manitoba Metis Federation Inc v Canada (Attorney General),* [2013] 1 SCR 623, *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257, Daniels v Canada (Indian Affairs and Northern Development) 2016 SCC 12; *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4. These are some of the more notable cases since 1982.

92 "Billy Diamond, "In his own words" (last visited 15 February 2023), online: *Cree Nation of Waskaganish* <www.waskaganish.ca/billy-diamond/> [perma.cc/3GXN-CF2W].

VI. SECTION 15 USE

As discussed, colonial institutions created a constrained Indian registration and governance structure imposed through the *Indian Act*. A notable case where Indigenous Peoples successfully used the *Charter* to address discrimination issues about equality was the *Corbière* case.[93] The legal challenge surrounded access to voting on-reserve for those living off-reserve, where "provisions of the Indian Act that limited, to reserve residents, the right to vote for Chief and Council of an Indian band."[94] This case was an opportunity to use the legal instrument to grieve legislation used to control Indigenous governance, using section 15 to access freedoms. Still, the case was about loosening constraints where the state limited freedoms (restricted voting off-reserve) and was not where Indigenous Peoples wanted equality outside Indigenous policy jurisdiction.[95] The Supreme Court of Canada found in the *Corbière* case that Section 77(1) of the *Indian Act* was discriminatory because "[i]t denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic."[96] The justices in the case explained substantive inequality because the living off-reserve is not always by choice, and the comparator group for examining equity was those that live on reserve and not other Canadians.

Another case about equality under the *Indian Act* and band elections involves running for chief. In *Francis v. Mohawk Council of Kanesatake*, the case was a question of the applicability of residency in the context of band election codes rather than the *Indian Act* itself.[97] It was the *Clifton v. Hartley Bay Indian Band* case that settled the question. The distinction of residency was deemed discriminatory.[98] The determination was such that regardless of custom or *Indian Act* election, both technically fall under the *Indian Act* and therefore fall under the *Charte*r's jurisdiction.[99] All three above cases concern community members wanting access to community governance as previous legislation disenfranchised their participation, and the challenges were restoring their access to their communities. Residency clauses also affected people wishing to run in band elections. In *Esquega v Canada (Attorney General),* the challenge was to an *Indian Act* provision that prevented off-reserve band members from running in band council elections. In this case, the courts deemed residency not a reasonable limit on equality.[100] Another band council election challenge happened in *Kahkewistahaw First Nation v. Taypotat*.[101] In this case, the challenge was to an education clause added to the election code. The courts examined the case through a section 15 lens, weighed whether residency impacted the matter at hand, and determined the evidence was insufficient to meet the claim against the education clause made in the case presented.[102]

Among the various ways Indigenous Peoples can use section 15 of the *Charter*, one avenue discussed above involved challenges to gender equality by First Nations Peoples that resulted in changes to the *Indian Act*. Other court challenges from people's community disenfranchisement resulted from those

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93 *Corbière v Canada (Minister of Indian and Northern Affairs),* [1999] 2SCR 203, 173 DLR (4th) 1 [*Corbière*].
94 Peach, *supra* note 78 at 111.
95 *Corbière*, *supra* note 93.
96 *Ibid at* para 18.
97 *Francis v Mohawk* Council of Kanesatake, 2003 FCT 115, [2003] 4 FC 1133.
98 Peach, *supra* note 78 at 112-113; *Clifton v Hartley Bay Indian Band*, 2005 FC 1030 at para 8 [*Clifton*].
99 *Clifton, supra* note 98 at para 8.
100 Peach, *supra* note 78 at 113. *Esquega v Canada (Attorney General),* 2007 FC 878.
101 *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.
102 *Ibid.*

changes to the *Act*. In *Scrimbitt v. Sakimay Indian Band Council*, the challenge came because of inequality between band members due to Bill C-31's implementation.[103] Band membership codes and the separation of band lists from the Indian Registrar happened through Bill C-31, legislation resulting from Two-Axe Earley, Corbière-Lavell and Bedard. As such, other complications arose with the development around band membership. This case is an intersection between band election codes and the problems created by gender inequity.

In *Grismer v Squamish First Nation*, band membership inequity centred around adoption rules in the community.[104] The claimants requested band membership based on adopting a child with a blood connection to the band. However, the judge deemed that the band's membership code that violated section 15, was protected under section 1 of the *Charter*.[105] What is interesting about this case is that while the judge found there was inequity in the election code, section 1 of the *Charter* justified the inequities in the band code.[106] This consideration of section 1 allows for justifiable, reasonable limits. With an Indigenous community being a group historically disadvantaged, targeted through cultural assimilation, cultural protections would fall within reasonable limits. The most significant changes following the *Charter*'s implementation came through the gender equity cases brought by women, culminating in the Bill C-31, C-3, and S-3 changes.[107]

In some cases, section 15 challenges contest Indigenous use of group-differentiated rights. In British Columbia, through consultations with Indigenous communities, the Department of Fisheries and Oceans developed an "Aboriginal Fisheries Strategy" [AFS], which involved a communal fishing license for the Indigenous communities. In the *Kapp* case, a group of non-Indigenous commercial fishers challenged the system based on racial discrimination.[108] The AFS provided special fishing accommodations where the Indigenous communities had exclusive access to fish for set periods. Indigenous Peoples have access to rights and accommodations based on historic inequities as observed in Human Rights law and through treaties and Indigenous-specific legislation. As articulated in *Andrews*, distinctive treatment is sometimes required to create equity and equality.[109] The section 15 challenge in *Kapp* was dismissed because a breach was not established.[110] The courts determined that section 25 of the *Charter* does not preclude Indigenous protections under section 15; Indigenous rights are shielded from *Charter* review.[111] This case raises issues of addressing Indigenous Peoples disadvantaged by colonization and how their historic marginalization

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103 *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FC 513, [2000] 1 CNLR 205.

104 *Grismer v Squamish First Nation*, 2006 FC 1088 [*Grismer*].

105 *Ibid* at para 83; *Charter, supra* note 18, s 1.

106 *Grismer, supra* note 104 at para 83; *Charter, supra* note 18, s 1.

107 These three amendments to the *Indian Act* were changes to increase gender equity in Indian status transmission, and providing means for those excluded prior to the changes, eligibility for registration under the *Indian Act*. These changes are reflective of court decision as discussed above. Additionally Bill C-3 changes were the result of *McIvor v Canada (Registrar, Indian and Northern Affairs*), [2009] 2 CNLR 236, and Bill S-3 were the result of two cases: *Descheneaux v Canada,* [2015] QCCS 3555 and *Gehl v Attorney-General of Canada,* [2015] ONSC 3481.

108 *R v Kapp*, 2008 SCC 41; "Examples of Charter-related cases" (last modified 05 April 2023), online: *Government of Canada* <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/cases.html> [perma.cc/3YBU-3CES].

109 *Andrews*, *supra* note 77.

110 S*upra* note 108 at para 66.

111 *Ibid* at para 99; "Section 25 – Aboriginal and treaty rights" (last modified 01 September 2021), online: *Government of Canada* <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art25.html> [perma.cc/ZZ7G-2YWS].

creates the necessity for unique or distinct rights for particular groups beyond what is entrenched in sections 25 and 35 of the *Constitution*.

Another case where a challenge came based on distinctions seen as discriminatory was the *Cunningham* case.[112] In *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, access to Métis rights was at issue. According to the Supreme Court of Canada: "The exclusion of status Indians from membership in the new Métis land base serves and advances this object and hence is protected by s. 15(2)."[113] In this case, the plaintiffs were Métis people from the Peavine Métis settlement in Alberta who voluntarily applied for Indian Status under the *Indian Act*. The *Métis Settlement Act* explicitly states in section 75 that one must remove oneself from the Indian registry to be a settlement member, and one's membership in a settlement terminates if one voluntarily registers under the *Indian Act*.[114] The challenge was the governance of the settlement. As with the *Kapp* decision, the identity-based distinctions were not unconstitutional in this case, and the challenge was dismissed. Historic cultural attacks created the necessity for identity-based protections, including within Indigenous identities.

The question before the courts in the *Dickson v Vuntut Gwitchin First Nation*[115] matter began with whether an Indigenous government's election code infringed section 15 of the *Charter*, and turned into whether section 25 of the *Charter* shields section 15 violations entirely.[116] Through the Supreme Court, Dickson appealed on the questions of the constitutional validity of residency requirements in Indigenous self-government elections, and the Vuntut Gwitchin First Nations (VGFN) cross appealed on the questions of the applicability of the *Charter*; both appeals were dismissed. On the *Charter* applicability issue, the Court found that the VGFN, and potentially other Indigenous governance structures, are "government" under section 32(1), thereby making the *Charter* applicable to the VGFN. In relation to sections 15 and 25, the residency clause was found to infringe section 15, but the infringement was found to be an allowable infringement because it protects "Indigenous Difference" as an "other" right under section 25.[117] Moving forward, *Charter* rights apply in Indigenous governance, but section 25 can serve to override these rights by justifying infringements if the infringements protect cultural continuity and difference.[118] Clarity around section 15's use in Indigenous communities developed from a majority decision in this case, with separate judgments dissenting on both questions brought forward.[119] The use of section 15 in this case was not about equality with non-Indigenous Canadians, but the case contributed to understanding in-group access and use of the charter, and how the charter interacts with Indigenous governance.

When there is a question of equality, it falls to equality between Indigenous groups under Indigenous-led challenges. An identity case of equality exists in the *Ochapowace Indian Band v. Saskatchewan (Department of Community Resources)*.[120] In this case, the value of the chief's role as a "person of sufficient interest" for adoption cases for non-registered Indigenous children's cases was questioned. In

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112 *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37.
113 *Ibid* at para 20.
114 *Métis Settlements Act,* RSA 2000, c M-14, ss 75(1), 90 (1).
115 2024 SCC 10 [*Dickson*].
116 Amy Swiffen, "Section 25 and Indigenous Legalities Exploring Plurinational Federalism in Canada" (2023) 101:2 Can Bar Rev 365 at 372.
117 *Dickson*, *supra* note 115 at paras 72–73,78, 91–92, 401.
118 *Dickson*, *supra* note 115 at paras 5, 109, 143, 150.
119 *Dickson*, *supra* note 115 at para 314.
120 *Re SP*, 2007 SKQB 87, (*sub nom Ochapowace Indian Band v Saskatchewan (Department of Community Resources*)).

this situation, the appellant challenged legislation outside the *Indian Act* but still grounded in identity.[121] Other cases involving section 15 challenges by Indigenous peoples, although not consistently successful, follow similar trajectories – the cases are not about equality with non-Indigenous Canadians. Section 15 challenges engaged by Indigenous Peoples have distinctions that make using that section of the *Charter* unique for Indigenous Peoples. Although a failed case, the *R. v. Sharma* (2022) *Charter* challenge under section 15 addressed the historic colonial position. The argument was that excluding conditional sentences in some criminal situations disproportionately impacts Indigenous Peoples.[122] This legal argument provides an area of examination that is a continuation of addressing past injustices by raising *Gladue* principles.[123] In an effort to acknowledge and address historic injustices raised in the case, the federal government moved forward with Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, despite the court decision – an action within the scope of legislative jurisdiction through section 15(2).[124]

VII. CONCLUSION

Rights through government mean different things to different people in Canada. Thinking about how government provides freedoms through rights guaranteed and supported by the government, it is a restrictive structure for some. Through international law, colonization entrenched normative patriarchy, which created the system for Indigenous Peoples to engage. Since the *Royal Proclamation* of 1763, the Crown established an administrative relationship with Indigenous Peoples, using legislation and policy as instruments of control by structurally imposing governance systems.[125] For Indigenous Peoples in Canada, receiving freedom from the government means being released from limiting and, at times, punitive laws. Returning to community-based traditional governance is a vehicle to address injustices as a collective and is a way to receive rights and freedoms protected from colonial interference. As constitutionally recognized groups under section 35, the colonial government acknowledges Indigenous communities as entities to engage legally through courts and negotiations. The collective identity provides the recognizable group with a means for accessing group-based rights associated with constitutional recognition.

As the judicial system works to police the constitutionality of actions, laws, and legislation, John Borrows proposes ways to contemplate bringing Indigenous justice into Canadian society.[126] Borrows calls for the implementation of Indigenous legal traditions in Canadian law structures.

The positionality of this discourse is about creating equality with a government and not under a government. Noticeably, even before the adoption of the *Constitution Act, 1982*, most Indigenous cases before the courts focused on accessing or defending Indigenous-specific rights, such as the *Calder* case asserting "Aboriginal" title to land.[127] Following the constitution's patriation and the *Charter*'s

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121 *Ochapowace Indian Band v Saskatchewan (Minister of Justice)*, 2007 SKCA 88.
122 *R v Sharma*, 2022 SCC 39.
123 *Ibid*.
124 Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 40th Parl, 2022, RS, c C-46 (as passed by the House of Commons 15 June 2022).
125 *Proclamation*, *supra* note 11.
126 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 227.
127 *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

implementation, deconstructing colonial policies became easier once instruments through law became accessible. The government did start making changes before the patriation, but there was not a lot of movement and no official legal policy changes until Bill C-31 in 1985. Gender-based challenges affect other areas of Indigenous rights because, for some, entitlement to the Indian registration system is how some demonstrate authorization to exercise inherent Indigenous rights.

Fundamentally, Indigenous challenges under section 15 are different because these challenges are about undoing inequality produced by colonization, whereas non-Indigenous challenges are about maintaining and equality under colonial law. This distinction makes Indigenous approaches to section 15-based judicial challenges different than non-Indigenous challenges. For example, the protection of uniqueness as Indigenous Peoples is maintained in the face of equality, with the cases of *Grismer* and *Cunningham* pointing to this fact. When challenged by non-Indigenous collectives in *Kapp*, again, the history of injustices and the historic acknowledgements create the space for specific exclusions under section 15 for Indigenous Peoples when approaching 'race-based' rights (as described by the plaintiffs in the complaint). As constitutional peoples, non-Indigenous peoples do not make a comparator group in section 15 challenges because non-Indigenous Peoples do not have the same standing or protections. Some may see Indigenous rights and citizens in the old term of 'citizens plus,' but Indigenous Peoples are not using the government to enjoy rights. Instead, Indigenous Peoples use government instruments to relinquish controls and exercise inherent rights.