52 The evolution and implications of this particular provision are discussed in F. McGinn, "The *Canadian Charter of Rights and Freedoms*: Its Impact on Law Enforcement" (1982) 31 *University of New Brunswick Law Journal* 177 at 185–95.

53 Section 10 states:

> "Everyone has the right on arrest or detention
> (a) to be informed promptly of the reason therefore;
> (b) to retain and instruct counsel without delay and to be informed of that right; and
> (c) to have the validity of the detention determined by way of *habeus corpus* and to be released if the detention is not lawful."

The application of section 10 to suspects not yet arrested or charged is discussed in E. Ratushny, "Emerging Issues in Relation to the Legal Rights of a Suspect Under the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review* 177. See also J. Ziskrout, "Section 10 of the Canadian Charter of Rights and Freedoms" (1982) *University of British Columbia Law Review* (Charter edition) 173.

54 Mandel, *supra* note 47 at 130.

55 Chief Emery Stagg, Dauphin River Band, *Presentation No. 495 to the Public Inquiry into the Administration of Justice and Aboriginal People*—Transcript of a Community Hearing (Pineimuta Place, 8 February 1989) 4575 at 4583.

56 *Ibid.* (emphasis added).

57 I am acutely aware of the dangers of generalisation in this area, and do not suggest that this is a universally applicable statement of one of the core elements of traditional Aboriginal dispute resolution processes. There is a relatively limited body of research literature dealing with traditional justice processes. See M. Coyle, "Traditional Indian Justice in Ontario: A Role For the Present" (1986) 24 *Osgoode Hall Law Journal* 605; also Chief Rod Bushie, Assembly of Manitoba Chiefs, *Presentation No. 790 to the Public Inquiry into the Administration of Justice and Aboriginal People*—Transcript of a Community Hearing (Winnipeg, 22 November 1989) at 7741–51.

58 D. Russell, Canadian Human Rights Commission, "Paper for Presentation to the Canadian Bar Association Conference on Native Self-Government"—paper presented at *Bridging the Constitutional Gap* Conference, Canadian Bar Association (Winnipeg, 5–6 April 1991) at 13.

59 P.W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 69; see also, B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 30–31. On the relationship between sections 25 and 35, see W.F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: Native Law Centre, University of Saskatchewan, 1987) at 120–21.

60 Native Women's Association of Canada, *Native Women and the Charter: A Discussion Paper* (Ottawa: Native Women's Association of Canada, 1992) at 9; see also the discussion, *infra* at text corresponding to notes 92–103.

61 Wildsmith, *supra* note 59 at 31; also B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8 *Queen's Law Journal* 232 at 237–38; and D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 *Canadian Bar Review* 314 at 326.

62 Wildsmith, *supra* note 59 at 2.

63 Pentney, *supra* note 59 at iii, 155–59.

64 P.A. Monture & M.E. Turpel, eds. *Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice* (Paper prepared for the Law Reform Commission of Canada, 1991), cited in *LRCC Report* at 20–21.

65 R.H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience" [1988] 2 Canadian Native Law Reporter 1 at 43.

66 See K. Brock, "The Politics of Aboriginal Self-Government: A Canadian Paradox" (1991) 34 *Canadian Public Administration* 272.

67 Continuing Committee on the Constitution, Working Group III, *Rolling Draft* (1 June 1992) (hereinafter "*Rolling Draft*") at 12.

68 Emphasis added.

69 D. Stuart, "Will Section 1 Now Save Any Charter Violation? The *Chaulk* Effectiveness Test is Improper" (1991) 2 Criminal Reports (4th Series) 107.

70 [1986] 1 Supreme Court Reports 103.

71 The Court's interpretation of s.1 has generated a large body of literature. See for example, L.E. Weinreb, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 *Supreme Court Law Review* 469; E.P. Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconceives the Oakes Test" (1990) 24 *La Revue Juridique Thémis* 1; and P.W. Hogg & R. Penner, "The Contribution of Chief Justice Dickson to an Interpretive Framework and Value System for Section 1 of *The Charter of Rights*" (1991) 20 *Manitoba Law Journal* 428.

72 P.W. Hogg, "Section 1 Revisited" (1991) 1 *National Journal of Constitutional Law* 1.

73 See discussion *infra* at text corresponding to notes 111–22.

74 Russell, *supra* note 58 at 14.

75 *Ibid.* at 14–15.

76 Section 33 currently states:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
> (2) An Act or a provision of an Act in respect of which a declarartion made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

77 This is clearly an extremely simplistic depiction of Aboriginal and traditional methods of government, and indeed, may be inaccurate in many cases. As Moss has observed, "[p]erhaps a lesson to be drawn from past and contemporary Indigenous cultures is the interdependence of collective and individual rights": W. Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 *Queen's Law Journal* 279 at 300. Despite the inadequacies of the individual/collective paradigm, it is necessary to address this dichotomy, particularly in the context of "law and order" and justice administration, even if only to take issue with such an "either-or" projection of

society. See M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in R.F. Devlin, ed. *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) 505 at 510.

78 *LRCC Report* at 21.

79 See, for example, A.C. Hutchinson and A. Petter, "Going Into Override" in A.C. Hutchinson, ed. *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Agincourt: Carswell, 1987); J.D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 *Alberta Law Review* 347; P.H. Russell, "Standing Up For Notwithstanding" (1991) 29 *Alberta Law Review* 293; and T. Macklem, "Engaging the Override" (1991) 1 *National Journal of Constitutional Law* 274. Slattery has suggested that a limitation on the availability of the override clause is "built-in" to the Charter: B. Slattery, "Canadian Charter of Rights and Freedoms—Override Clause Under Section 33—Whether Subject to Judicial Review Under Section 1" (1983) 61 *The Canadian Bar Review* 391.

80 Joint Technical Working Group, *Proposed Joint Aboriginal Draft Amendments* (Ottawa, 9 May 1992).

81 Native Women's Association of Canada, *Statement on the "Canada Package"* (Ottawa: Native Women's Association of Canada, 1992) at 14.

82 Hemmingson, *supra* note 65 at 44.

83 S. Newman, "Challenging the Liberal Individualist Tradition in America: 'Community' as a Critical Ideal in Recent Political Theory" in A.C. Hutchinson and L.J.M. Green, eds. *Law and the Community. The End of Individualism?* (Toronto: Carswell, 1989) 253 at 257.

84 B. Schwartz, "A Separate Aboriginal Justice System?" (1990) 19 *Manitoba Law Journal* 77.

85 *Ibid.* at 85.

86 *Ibid.* at 79.

87 *Ibid.* at 79–80.

88 *Ibid.* at 80.

89 *Ibid.* at 78.

90 David Matas, Manitoba Association for Rights and Liberties, *Presentation No. 230 to the Public Inquiry into the Administration of Justice and Aboriginal People*—Transcript of a Community Hearing (Winnipeg, 15 November 1988) at 2001.

91 *Ibid.* at 2004; but see *ibid.* at 2020–21, regarding a possible conflict between this approach and section 25 of the Charter. See the discussion *supra* at text corresponding to notes 64–67 *supra*.

92 NWAC, *supra* note 81 at 14.

93 The Indigenous Women's Collective of Manitoba has supported the position of the Native Women's Association of Canada on the continued application of the *Charter of Rights and Freedoms* to Aboriginal governments: R. Teichroeb, "Limits sought on powers of chiefs. Past abuses raise fears of 'dictatorship' if self-government granted too quickly", *Winnipeg Free Press* (6 April 1992) at B13.

94 The extent to which the application of the Charter is inconsistent with the establishment of autonomous Aboriginal justice systems is addressed *infra* at text corresponding to notes 110–28.

95 J. Courchene, Executive Director, Indigenous Women's Collective of Manitoba, *Presentation No. 789 to the Public Inquiry into the Administration of Justice and Aboriginal People*—

Transcript of a Community Hearing (Winnipeg, 22 November 1989) 7712 at 7714; also see Indigenous Women's Collective, *Aboriginal Women's Perspective of the Justice System in Manitoba* (Winnipeg: Research Paper prepared for the Aboriginal Justice Inquiry of Manitoba, June 1990).

96 S. Delaronde, Indigenous Women's Collective of Manitoba, *supra* note 95 at 7731.

97 J. Bjornson, Charter of Rights Coalition Manitoba, *Presentation No. 463 to the Public Inquiry into the Administration of Justice and Aboriginal People*—Transcript of a Community Hearing (Winnipeg, 26 January 1989) 4177 at 4181.

98 436 United States Reports 49 (1978).

99 The essence of Martinez's claim was that a membership ordinance which stated in part that "children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo", discriminated against her on the basis of sex, and therefore violated Title 1 of the *Indian Civil Rights Act* which states that "No Indian tribe in exercising powers of self-government shall ... deny to any person within its jurisdiction the equal protection of its laws..."

100 C. Christofferson, "Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act" (1991) 101 *The Yale Law Journal* 169 at 179.

101 NWAC, *supra* note 60 at 9–10.

102 First Nations Circle on the Constitution, *To the Source. Commissioners' Report* (Ottawa: Assembly of First Nations, 1992) at 78.

103 J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 *Supreme Court Law Review* 287 (footnotes omitted).

104 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (xxi) of 16 December 1966. Entered into force on 23 March 1976, in accordance with article 49.

105 M. Cohen and A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265 at 268. See also, W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1983) 8 *Queen's Law Journal* 211; J. Humphrey, "The *Canadian Charter of Rights and Freedoms* and International Law" (1985) 50 *Saskatchewan Law Review* 13; and on the pratical implications of the relationship, see W.A. Schabas, *International Human Rights Law and the Canadian Charter. A Manual for the Practitioner* (Toronto: Carswell, 1991).

106 See H.N.A. Noor Muhammad, "Due Process of Law for Persons Accused of Crime" in L. Henkin, ed. *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 138.

107 For a critique of the argument that international recognition of the collective rights of "peoples" would necessarily involve an erosion of traditional individual human rights, see G. Triggs, "The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?" in J. Crawford, ed. *The Right of Peoples* (Oxford: Clarendon Press, 1988) 141.

108 Established in 1981 by the United Nations Sub-Commission on Prevention of Discrimination and Protections of Minorities, the Working Group on Indigenous Populations has been primarily concerned since 1985 with the drafting of a Universal Declaration on the Rights of Indigenous Peoples. The WGIP is widely considered to be "one of the most accessible entities in the United Nations": G. Nettheim, "Indigenous Rights, Human Rights and Australia" (1987) 61 *Australian Law Journal* 291 at 298. Several indigenous non-government organisations with UN

consultative status, including the Inuit Circumpolar Conference (ICC), the World Council of Indigenous Peoples (WCIP), the Indian Council of South America (CISA) and the National Aboriginal and Islander Legal Services Secretariat (NAILSS), participate regularly in the activities of the WGIP. The WGIP has also encouraged other organisations without formal consultative status to make oral and written contributions. As Pritchard has observed, "indigenous peoples and their organisations have been extraordinarily successful in claiming the forum provided by the Working Group as their own": S. Pritchard, "UN Working Group on Indigenous Populations" (1992) 54 *Aboriginal Law Bulletin* 13. For example, some 380 persons took part in the Working Group's 6th session in 1988. Participants included representatives from over 70 indigenous organisations and observers from 33 countries: See H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 84.

109 Continuing Committee on the Constitution, Working Group III, *Overview and Commentary on Aboriginal Drafts*. Document 840–638/009 (Saint John, 5–7 May, 1992) at 8 (emphasis added). See also Native Women's Association of Canada, *Native Women and Self-Government: A Discussion Paper* (Ottawa: Native Women's Association of Canada, 1992) at 10–12.

110 NWAC, *supra* note 60.

111 Turpel, *supra* note 77.

112 M. Boldt and J.A. Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" (1984) 7 *Ethnic and Racial Studies* 478.

113 *Supra* note 77 at 503. Turpel defines "cultural authority" as "the authority which one culture is seen to possess to create law and legal language to resolve disputes involving other cultures and the manner in which it explains (or fails to explain) and sustains its authority over different peoples": *ibid.*

114 *Ibid.* at 510.

115 *Ibid.* at 510–11.

116 See *ibid.* at 525.

117 *Ibid.* at 516–517 (footnotes omitted).

118 *Supra* note 112 at 478.

119 Boldt and Long have argued that a doctrine of "human dignity" could provide an alternative to the rights-based approach illustrated by the Charter of Rights and Freedoms and international human rights instruments, that would "grow out of Indian culture, politics and goals" and be more consistent within the collective emphasis of many Aboriginal cultures: see *ibid* at 486–88.

120 From a significantly different perspective, Green has also questioned the value of Charter protections for Aboriginal people and of seeking further constitutional recognition of Aboriginal rights: L.C. Green, "Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review* 339.

121 M. Boldt and J.A. Long, "Native Indian Self-Government: Instrument of Autonomy or Assimilation?" in J.A. Long, M. Boldt and L. Little Bear, eds. *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 38 at 56.

122 *Ibid.* at 50–56.

123 See discussion *supra* at note 77.

124 Russell, *supra* note 58 at 15.

125 See also Turpel, *supra* note 77 at 510.

126 Russell, *supra* note 58 at 15.

127 See First Nations Circle on the Constitution, *supra* note 102 at 78. The Aboriginal Justice Inquiry of Manitoba recommended that "First Nation governments draft a charter of rights and freedoms which reflects Aboriginal customs and values": *AJI Report Vol. 1* at 336. The Native Women's Association of Canada has taken the position that: "If First Nations wish to establish Aboriginal Charters, we would not object as long as the Aboriginal Charters do not replace the Canadian Charter of Rights and Freedoms which we feel must apply to Aboriginal governments under self-government" — NWAC, *supra* note 109 at 13. The proposal for creating Aboriginal Charters has been criticised by the head of the Canadian Human Rights Commission: see J. McKay, "Don't scrap Charter, Yalden tells natives", *Winnipeg Free Press* (23 April 1992) at B21.

128 See, for example, Native Women's Association of Canada, *A First Nations Human Citizenship Code* (Ottawa: Native Women's Association of Canada, 1986); discussed in Turpel, *supra* note 77 at 526.

129 B.A. Keon-Cohen, "Native Justice in Australia, Canada, and the U.S.A.: A Comparative Analysis" (1982) 5(2&3) *Canadian Legal Aid Bulletin* 187 at 189.

130 (1992) 175 Commonwealth Law Reports 1; (1992) 66 Australian Law Journal Reports 408.

131 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws. Report No. 31* (Canberra: Australian Government Publishing Service, 1986). The Law Reform Commission's recommendations on autonomous justice mechanisms are discussed in L. McNamara, *Aboriginal Human Rights, the Criminal Justice System and the Search for Solutions: A Case for Self-Determination* (Darwin: North Australia Research Unit, The Australian National University, 1993).

132 E. Johnston, *Royal Commission into Aboriginal Deaths in Custody—National Report* (Canberra: Australian Government Publishing Service, 1991), Volume 5, Chapter 37.

133 For a more detailed critique of this feature of the Royal Commission's recommendations, see McNamara, *supra* note 4 at 4–6. Commissioner Johnston did, however, applaud several specific inititaives which were designed to increase the level of community participation in dispute resolution processes. See, for example, the discussion of the Julalikari Council Policing Project (Tennant Creek) and other community-based initiatives in *RCIADIC National Report* Volume 4 at 85–108. In should also be noted that a recent report which recommended self-government for Aboriginal and Torres Strait Islander communities in Queensland, also recommended that the Queensland Government should support the transformation of existing Aboriginal courts to allow them to operate in a manner more consistent with customary law, and that the court structure should be available to communities which seek to develop and expand community justice schemes. See Queensland, Legislation Review Committee, *Inquiry into the Legislation Relating to the Management of Aboriginal and Torres Strait Islander Communities in Queensland—Final Report* (Brisbane: November 1991).