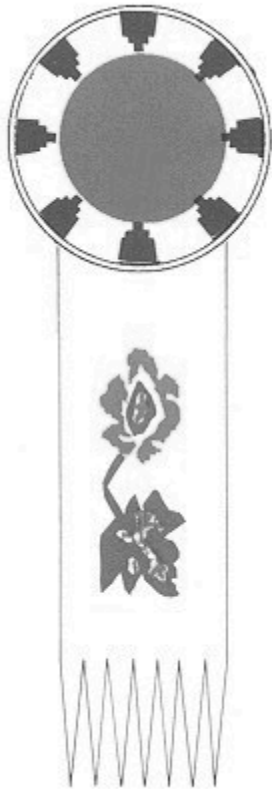


# Native Women's Association of Canada



## AN ABORIGINAL CHARTER OF RIGHTS & FREEDOMS

~ 1992 ~

Addressing Aspects of  
Human Dignity

*An NWAC Discussion Paper*

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# **AN ABORIGINAL CHARTER OF RIGHTS AND FREEDOMS A DISCUSSION PAPER**

## **1. The Purpose of an Aboriginal Charter of Rights and Freedoms**

An Aboriginal Charter is, at its most basic, intended to be a written statement of fundamental values or of the rights and freedoms of aboriginal persons living in Canada, rights and freedoms which ought to be respected and protected by any form of aboriginal government.

In theory, a written statement of fundamental human rights and freedoms is not the only way that human rights might be recognized and promoted within aboriginal communities. Further possibilities identified by others include the absence of a Written law, but the creation of ad-hoc councils to work out problems as they arise; broad statements of principles, standards or customs lacking in detail and enforceability.

But the premises behind the necessity of an Aboriginal Charter of Rights and Freedoms for aboriginal communities within Canada are these:

- Every individual or member of a minority group, as a human being, is in need of protection from the political majority or those wielding political control or power. The political majority in the context of aboriginal self-government is no exception.
- Rights require enforceability, not mere rhetorical endorsement.
- Most of the rights and freedoms in the Canadian Charter of Rights and Freedoms have their source in international human rights law binding upon Canada. The community of nations within the United Nations considers these principles to be of general application and significance. They are not considered to be standards endemic to either anglo-saxon or French societies.

## **2. The Relationship of an Aboriginal Charter with Self-Government**

The substance of an Aboriginal Charter is inevitably related to the scope and content of aboriginal self-government. Consequently, an Aboriginal Charter cannot be definitively drafted in isolation from the definition of self-government, wherever and however that occurs.

Another preliminary clarification ought to be made in an exploration of the possible terms of an Aboriginal Charter. To the extent that aboriginal self-government permits federal and provincial laws to continue to apply to aboriginal persons, aboriginal persons will continue to be able to invoke the Canadian Charter of Rights and Freedoms with respect to the application of those laws. On this assumption the Aboriginal Charter will be restricted in its application to aboriginal governments and it will be unnecessary to repeat Canadian Charter rights in an Aboriginal Charter in order for aboriginal persons to invoke them against federal, provincial or territorial governments.

### **3. Where to Start**

There are a number of potential starting points for the development of an Aboriginal Charter. They include: the Canadian Charter; international human rights law, particularly Canadian international obligations; a blank slate.

The first option of beginning with the Canadian Charter has the following factors in its favour. Starting with the Canadian Charter need not mean that its content must be copied. Where it is relevant to aboriginal communities it may, however, be useful to repeat the same language. In particular, the jurisprudence developed under the Canadian Charter can be a helpful source of information to both rights claimants and rights enforcers. Furthermore, the Canadian Charter may be an appropriate starting point without being the finishing point. The potential to incorporate additional rights not embodied in the Canadian Charter clearly remains.

The second option of incorporating international legal norms directly and not in the form in which they have already been adopted in the Canadian Charter will prove difficult both for individuals and governments seeking to guide their action, and for enforcement authorities wishing to interpret the Aboriginal Charter. This is because there is relatively little international jurisprudence on the meaning of international human rights law, particularly those international conventions which bind Canada. Furthermore, the Supreme Court of Canada has explicitly allowed the introduction of international human rights law as an interpretative tool in construing the Canadian Charter so that the relevance of international law is not denied by making use of rights in the Canadian Charter.

The third option of beginning a new would be more time-consuming and perhaps less likely to lead to consensus.

This discussion paper will approach the task of drafting an Aboriginal Charter from the point of view of option 1, namely by beginning with the form and content of the rights in the Canadian Charter.

## 4. The Format of the Canadian Charter of Rights and Freedoms

To begin with the Canadian Charter of Rights and Freedoms means following a basic format. That format is as follows:

*Preamble*

*General Limitation Clause*

*Rights and Freedoms*

*Sections: Fundamental Freedoms*

*Democratic Rights*

*Mobility Rights*

*Legal Rights*

*Equality Rights*

*Official Languages of Canada*

*Minority Language Educational Rights*

*Enforcement Provision*

*Aboriginal Rights*

*Miscellaneous/Interpretation Clauses:*

*Effect on other rights outside the Charter*

*Multiculturalism*

*Equality of the sexes*

*Denominational schools*

*Application to the territories*

*Effect on legislative power*

*Application of the Charter*

*Override Clause*

*Title*

Nearly all of these elements are relevant or lend themselves to an Aboriginal Charter. Others raise more directly questions of inclusion, such as whether an override provision should be incorporated into an Aboriginal Charter at all. The overall form, namely: a preamble, a limitation clause, the definition of rights and freedoms, an enforcement mechanism, interpretation clauses, and an application provision, would generally seem conducive to the development of an Aboriginal Charter.

The substance of those component parts of an Aboriginal Charter then remains to be defined. In other words, each of the specific rights and freedoms in the Canadian Charter, raise issues of adaptability and relevance to aboriginal self-governing communities.

The detailed development of an Aboriginal Charter therefore requires a step-by-step consideration of each of the components of the Canadian Charter and an answer to the following questions:

- In general, is such a clause or right appropriate for an Aboriginal Charter or should it be omitted?

- If such a clause or right is appropriate, should it be modified or adapted for an Aboriginal Charter and if so, what modification is required?
- Are there rights and freedoms which are not included in the Canadian Charter which ought to be added to an Aboriginal Charter?

## **5. General Issues of Significance for an Aboriginal Charter**

There are three general issues of significance to an Aboriginal Charter of Rights and Freedoms: a general limitation clause applicable to all rights and freedoms, the issue of enforceability, and an override provision which would allow aboriginal governments to opt out.

### **a) A General Limitation Clause**

In the Canadian Charter there is a general limitation clause which applies to all the rights and freedoms. It is called s. 1 and it says:

*“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”*

The courts have interpreted and applied the Canadian Charter by using a two-step approach. First the courts have the responsibility of defining the various rights and freedoms, and then they have the task of determining what limitations governments can reasonably impose on those rights and freedoms. It is possible for the courts to find that a person's right has been violated, but then to find that the limitation imposed by the law is “a reasonable limit demonstrably justified in a free and democratic society”. At the end of such a case, the individual loses and the government wins. Clearly, therefore, the scope of the general limitation clause is extremely important to the value or usefulness of a charter of rights.

In legal terms the general limitation clause has been interpreted to require the courts to consider: (a) the importance of the objective of the law, and (b) the proportionality of the means used in the law to attain that objective. Overall these issues are inevitable components for any inquiry into the reasonableness of a law whether in the context of an aboriginal or non-aboriginal community. But the factors to be considered in determining relative importance and adequate proportionality as identified by an existing Canadian court might not be those important to an aboriginal society.

Drafting an Aboriginal Charter will therefore require that consideration be given to the following problem. How should a limitation clause be drafted which will encourage the enforcement agency - whatever that might be - to take into account the correct factors to be used in limiting rights? How can one try to ensure that the enforcement agency is sensitive to the appropriate community values in determining when rights should be limited?

One possibility is to expand the Canadian Charter's general limitation clause to explicitly identify factors to be taken into account in determining reasonableness in an aboriginal society. For example, one might state the priority to be given to the "survival of a distinct way of life" or the revitalization of aboriginal customs.

Another possibility would be to expand the words "free and democratic society" to articulate the desired features of an aboriginal society.

Or one could simply insert the word "aboriginal" in the phrase "free and democratic [aboriginal] society" and leave it to an enforcement body to define case by case the needs and parameters of an aboriginal society.

On any of these scenarios it must be stressed that the factors identified here will be used to limit individual rights and freedoms and they should be articulated in a way which will not serve to negate or undermine the purpose of the Aboriginal Charter itself.

## **b) An Enforcement Mechanism**

The second general issue of significance is that of enforceability. The Canadian Charter deals with the issue of enforcement in section 24. In part it says:

*24(1). Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

In an Aboriginal Charter the question will arise should a remedy for breaches of the Aboriginal Charter be sought from a "court of competent jurisdiction" - the same courts which interpret the Canadian Charter? Or should alternative enforcement mechanisms be developed?

An aboriginal justice system might be developed and it might involve new methods of enforcement.

International law contains the basic principles governing the relationship between rights and remedies. They are as follows:

### ***Universal Declaration of Human Rights***

*Article 8:*

*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*

## ***International Covenant on Civil and Political Rights***

*Article 2(3):*

*Each State Party to the present Covenant undertakes:*

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted.*

A 1988 NWAC paper identified the following values to be embodied in desirable enforcement machinery:

- 1. Consensus: decisions made after open discussion and agreement.*
- 2. Positiveness: not "do not" do something but how things should be done.*
- 3. Restoration: the purposes of applying the law is not to punish but to restore respect and peace in the community in times of conflict.*
- 4. Healing: decision makers will be sensitive to needs of the victim for healing after being mistreated or wronged.*
- 5. Fairness: procedures must be consistent; decision-makers must be concerned about all problems.*

NWAC also identified 7 options for enforcement mechanisms. They were:

- 1. Elders Council/or Mixed Elders Council*
- 2. Aboriginal Court (Community based, Tribal Council based, Nation based)*
- 3. Ombudsperson/Commissioner*
- 4. Mediator*
- 5. Arbitrator*
- 6. Open community meetings on problem*
- 7. Education about law/principles in community*

Overall, the issue of enforcement of an Aboriginal Charter requires answers to at least the following questions:

If there was a separate system of aboriginal justice in existence, should the words of the Canadian Charter, "court of competent jurisdiction" be replaced with some general language such as "competent authority", or should an Aboriginal Charter identify more precisely what kind of authority will be competent to enforce Aboriginal Charter claims? What kind of authority should that be?



If there was a separate system of aboriginal justice in existence, what would be its relationship to the Canadian justice system in the context of the enforcement of Aboriginal Charter rights? Would it be insulated from Canadian “courts of competent jurisdiction”, or would appeals lie to some of these courts - such as the Supreme Court of Canada - or to any of these courts?

### c) **An Override Provision or Notwithstanding Clause**

The Canadian Charter contains an override provision. It says in part:

*s. 33(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 the Charter.*

This provision permits the federal government and the provincial legislatures to opt out of most of the rights and freedoms in the Canadian Charter. That ability is unlimited. All that is required is a simple majority of the members of the relevant legislature. The only proviso intended to make its use more difficult is the requirement that the opting out declaration must be renewed by the respective legislature at the end of five years or it ceases to be valid.

In drafting an Aboriginal Charter, the question will arise should an override provision be included?

The Native Women's Association has been wary of the inclusion of such an override provision. That concern can be supported on the basis of the following considerations.

An override provision means the retention of the doctrine known as parliamentary supremacy or sovereignty. This doctrine provides inadequate protection for human rights because it places reliance for the security of human rights on the people, or on the possibility of civil disobedience, or on the conviction of the average person that he or she has a moral obligation to act in a manner which respects human rights. But adequate protection of human rights requires judicial (or similar enforcement agency) protection. The judiciary offers individuals and minorities protection from majorities unsympathetic to the promotion of human rights. Judicial protection can raise a significant impediment to the implementation of (at least transitory) majority prejudices.

Objections are often made to an expanded judicial role in human rights protection. For example, it is argued: the courts in coming to decisions take explicit account of only a limited range of facts and values; the judiciary are insufficient in terms of background and experience for this function, since they are unrepresentative of the population. But these deficiencies of the judicial system are not insurmountable. They can be altered by reform of judicial selection, practices and procedures. (For example, the practice of allowing intervention by informed and interested third parties, and the reception of economic and sociological evidence of the impact of judicial decisions.)

When section 33 - the override clause - was added to the Canadian Charter of Rights and Freedoms in the November 1981 accord federal and provincial governments insisted that the section would rarely, if ever, be used. It was obvious, the public was told, that its use would always be met by significant, unfavourable, political consequences.

The last 9 years has proved otherwise. The section has been used in a pre-emptive fashion that is before a possibly unfavourable court decision in Saskatchewan to avoid the application of the Charter's freedom of association provision in the context of the right to strike. It has been used on a number of occasions in Quebec, both by the P.Q. government to avoid all sections of the Charter to which the override could apply, and by the subsequent Liberal government with respect to legislation concerning pension plans, agricultural grants, the Education Act and the sign language law. None of these uses met significant impediments within the respective provinces/legislative authorities. Assurances by any government, including an aboriginal government, that an override provision will rarely be used should be met with scepticism.

Furthermore, s.33 was placed in the Canadian Charter in the November 1981 accord between the Premiers (except the Quebec premier) and the Prime Minister. In substance it contradicts the wishes of the public; the witnesses before the Hays-Joyal Committee in 1980 indicated a clear desire to end parliamentary sovereignty or supremacy and institute a supremacy of Charter regime.

There is a fundamental inconsistency in the Canadian Charter. Section 52 of the Constitution Act 1982 calls the Charter "the supreme law of the land", but it can be dominated by legislatures or Parliament when they choose to opt out. Judicial decisions have called the Canadian Charter the "fundamental law of the land", but it can be avoided by legislation passed by ordinary majorities of legislatures or Parliament. In effect therefore Canada retains the doctrine of supremacy of Parliament.

The fact that an override provision is found in the Canadian Charter is therefore not a good reason for duplicating it in an Aboriginal Charter. It will be used by governments. It is inconsistent with the widespread support among Canadians as a whole for the Charter of Rights and Freedoms and its supremacy. And it is inherently contradictory with the thrust of protection of rights and freedoms by a fundamental Charter.

On the other hand, it is well to remember that confidence in a fundamental Aboriginal Charter will be closely related to the confidence aboriginal persons will have in the enforcement body, whatever form that might take. Care must be taken, therefore, to consider and address the adequacy of the enforcement body at the same time as instituting an Aboriginal Charter without an override clause.

## 6. Specific Provisions of An Aboriginal Charter: What Rights and Freedoms?

The Canadian Charter contains the following specific clauses, and rights and freedoms:

### *The Preamble*

- s. 1: *The General Limitation Clause*
- s. 2: *Fundamental Freedoms*
- ss. 3,4,5: *Democratic Rights*
- s. 6: *Mobility Rights*
- ss.7-14: *Legal Rights*
- s. 15: *Equality Rights*
- ss.16-22: *Official Languages of Canada*
- s. 23: *Minority Language Educational Rights*
- s. 24: *Enforcement*
- s.25: *Protection of Aboriginal rights and freedoms*
- s. 26: *Other rights not in the Charter*
- s. 27: *Multiculturalism*
- s. 28: *Equality of the sexes*
- s. 29: *Denominational schools*
- s. 30: *Application to territories*
- s. 31: *Legislative powers*
- s. 32: *Application of Charter*
- s. 33: *The Override*
- s. 34: *Title of the Document*

The sections containing specific rights and freedoms raise (at least) the following questions of inclusion and/or modification for an Aboriginal Charter (see Appendix for Canadian Charter sections):

### **a) A Preamble**

Should the preamble be rewritten to incorporate a statement of common values among all Aboriginal people?

Such values could include, for instance, those outlined in the 1988 NWAC paper, namely: "Acknowledgement of the Creator; Importance of Mother Earth; Relationship to the land; Extended Family." Furthermore, one could add, for example: The Equality of Women and Men.

## **b) Fundamental Freedoms**

Do these fundamental freedoms apply to aboriginal communities?

- ❑ freedom of conscience and religion
- ❑ freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication
- ❑ freedom of peaceful assembly
- ❑ freedom of association

## **c) Democratic Rights**

In the Canadian Charter these sections give the citizen the right to vote and to be qualified for membership in the government. They also ensure that governments do not have the right to remain in power for more than 5 years without an election, except in very limited circumstances such as war. And they ensure that the government must sit periodically.

The issue of the right to participate in the selection of governments and the right to membership in governmental bodies, arises for aboriginal self-governing communities. While the selection process of aboriginal governments might be different than the process for non-aboriginal governments, the principle of the right to participate in that selection process or to qualify for membership in the government remains.

Should a section therefore be included which would grant to every aboriginal citizen the right to participate in the selection of the government and the right to qualify for membership in the government of their respective self-governing communities? Should requirements for participation or membership in the government be further spelled out?

Democratic rights also raise the question of the frequency of the selection process of an aboriginal government, and the reasons which might justify any delay in selecting an aboriginal government. These are both issues' affecting individuals within aboriginal self-governing communities which could well be applied to aboriginal governments.

The issue of the frequency of the meetings of aboriginal governments could also be addressed in an Aboriginal Charter.

## **d) Mobility Rights**

The idea of mobility rights in an Aboriginal Charter raises the issue of the degree to which aboriginal territories would be open. Who would have the right to enter, remain in or leave these territories? Who would have the right to take up residency? Who would have the right to gain a livelihood on these territories? Would these rights be subject to any limitations, and if so, what would these be? The Canadian Charter section on mobility rights contains certain limitations placed on such rights in the context of the territory of a province, but these limitations are unlikely to be adequate in the context of aboriginal territory.

## e) Legal Rights

The question arises of the application of such rights to an aboriginal justice system, should one be instituted. In theory concepts such as detention, imprisonment, a fair and public hearing by an independent and impartial tribunal, cruel and unusual treatment or punishment could continue to apply to a separate system of aboriginal justice. However, the nature or texture of these rights might be different in an aboriginal justice system. Nevertheless, this need not deny the applicability or relevance of the values embodied in the legal rights sections. The flexibility in the definition of these rights for an aboriginal justice system could be provided by (a) a new general limitation clause (a change in the language of s.1) and (b) a new, more sensitive enforcement mechanism (a changed s.24).

## f) Equality Rights

The equality rights provision in the Canadian Charter states, among other things, that there must be equality without discrimination based on race, national or ethnic origin. The reference to discrimination based on race, national or ethnic origin may raise concerns that non-aboriginal individuals unconnected with the community might attempt to claim equality rights from aboriginal self-governing communities. On the other hand, one might not want to preclude all discrimination claims based on racial or ethnic diversity within aboriginal communities. Important claims may arise, for example, in the context of non- aboriginal husbands or adopted other-race children. If it were considered desirable to permit the latter claims, but to avoid the former result, a number of courses would be possible. These include the following:

*(a) a clause might be added to an equality rights provision which tried to ensure that equality rights would not be misused to diminish the vitality or security of aboriginal communities. Or*

*(b) reliance could be placed on an affirmative action provision in the equality rights section. The argument would then have to be developed that a given law servicing only aboriginal persons was an affirmative action program and therefore permitted. But affirmative action programs are defined in terms of the group being "disadvantaged". It may not be desirable to require, not only now, but for the entire lifetime of the constitutional Aboriginal Charter, that aboriginal persons be "disadvantaged".*

Alternatively, the equality rights provision could be much more limited in scope. The whole clause could be restricted to aboriginal persons, by replacing the words in the Canadian Charter equality rights provision which make it applicable to "every individual" with the words "every aboriginal individual".

### **g) Official Languages**

These sections of the Canadian Charter make English and French the official languages of Canada (and of New Brunswick). They also provide that proceedings of Parliament, parliamentary records, court proceedings, communications with public institutions be possible or available in both languages.

They raise the question of whether self-governing aboriginal communities wish to designate aboriginal languages as official languages, and if so, whether they wish to make commitments, for example, to provide services in those languages, to provide translation for those languages in any governmental assembly and/or judicial proceeding, or to print and publish the proceedings of aboriginal governments in those languages.

### **h) Minority Language Educational Rights**

The issue of minority language educational rights in the context of self-governing aboriginal communities might well be broader than education in either English or French. There may be a desire to place in an Aboriginal Charter the obligation of aboriginal governments to provide education in an aboriginal language. The question would then be, under what circumstances would such an obligation on the part of an aboriginal government be imposed? Under the same conditions that the provincial government would be obliged to provide educational facilities in English or French? According to the Canadian Charter these conditions involve the following considerations: first language of the parents, primary school instruction in Canada of the parents, primary or secondary instruction of other children in the family, where the numbers desiring such educational facilities warrant the provision of such services out of public funds.

### **i) Section 25: Aboriginal Rights and Freedoms**

The issue raised here concerns the consistency or purpose of this section in an Aboriginal Charter addressed to aboriginal governments. Is the inclusion in this context of s.25 redundant?

### **j) Other Rights**

This section might be included unaltered. Note again, as mentioned at the outset of this discussion paper, to the extent that aboriginal self-government permits federal and provincial laws to continue to apply to aboriginal persons/aboriginal persons will presumably want to continue to be able to invoke the Canadian Charter of Rights and Freedoms with respect to the application of those laws.

## **k) Multiculturalism**

This section is an interpretative provision. It is intended to ensure that the interpretation of any Charter right or freedom, or the general limitation clause, is done in a manner consistent with multiculturalism. This idea could be incorporated in an Aboriginal Charter and modified to refer to cultural diversity within aboriginal communities. Note that the actual degree of cultural diversity within the aboriginal community which intends to adopt an Aboriginal Charter will be related to the definition of self-government and the identification of self-governing communities.

## **l) Section 28: Equality of the Sexes**

This section of the Canadian Charter is an interpretative provision. It is intended to ensure that the interpretation of any Charter right or freedom, or the general limitation clause, is done in a manner consistent with the equality of men and women. It uses the language “notwithstanding anything in this Charter” in an effort to ensure that sex equality is primary in any hierarchy of values or judicial attempt to balance rights.

In my view it does not, however, protect sex equality from the override provision. The override clause applies to s.15 (the equality rights section) and therefore to sexual discrimination.

Section 28 applies to “the rights and freedoms referred to in the Charter” and if the override is used to opt out of the equality rights section there is no equality right upon which s.28 could operate.

## **m) Denominational Schools**

This provision is intended to protect denominational schools from the application of Charter rights and freedoms, such as equality rights.

If education within aboriginal communities were not to be provided by any denominational schools, this provision would be unnecessary in Aboriginal Charter. Alternatively, even if such schools were to be present, and aboriginal governments were responsible for education, aboriginal governments may not wish to support anything other than public schools out of public funds. In either of these cases s.29 could be omitted from an Aboriginal Charter.

## **n) The Application of the Aboriginal Charter: To Whom is it Directed?**

The Canadian Charter applies to governments, federal, provincial and territorial. The section would have to be re-written to apply the Aboriginal Charter to aboriginal governments.

This application section has been interpreted by the courts to mean that the Canadian Charter does not in general apply to the behaviour of private individuals. The behaviour of private individuals is, however, closely related to a number of Charter rights, in particular, equality rights. Such behaviour includes issues of special concern to native women such as: discrimination in employment - including sexual harassment in employment, violence against women, and discrimination in the provision of housing.

In general, Canadian law deals with discriminatory behaviour of individuals or private institutions through anti-discrimination legislation or human rights codes. Aboriginal self-governments could develop separate anti-discrimination law.

Alternatively, an Aboriginal Charter could deal with private discriminatory behaviour in legislative jurisdictions assumed under self-government. In order to do this the Aboriginal Charter might:

*a) combine the rights and freedoms discussed so far (i.e. those suggested by the Canadian Charter) with other rights usually found in anti-discrimination legislation (see discussion below re: additional rights). Rights found in anti-discrimination legislation and those usually found in bills of rights are both located, for example, in the Quebec Charter of Rights and Freedoms, or*

*b) expand the application section to say that the application of the Aboriginal Charter includes private behaviour.*

## **7. Additional Rights and Freedoms to be considered which are not in the Canadian Charter of Rights and Freedoms**

There are a number of kinds of rights which the Canadian Charter does not include and which might be of particular interest for an Aboriginal Charter:

- a) anti-discrimination rights
- b) rights relating to violence against women
- c) rights of the child
- d) environmental rights
- e) social and economic rights
- f) rights of indigenous peoples

### **a) Anti-Discrimination Rights**

#### **i. Content**

Anti-discrimination rights apply the right of equality to particular contexts. These contexts, as they have been developed by various Canadian anti-discrimination statutes are as follows:



- a) provision of goods, services, facilities and accommodation
- b) making of contracts
- c) employment
- d) professional/business/trade associations
- e) notices
- f) hate messages
- g) payequity
- h) sexual and other harassment

When aboriginal self-government results in the assumption of jurisdiction in a particular area, the question will arise of the prohibition of private acts of discrimination within that area of jurisdiction. For example, if a self-governing community were to assume jurisdiction over some or all facets of property and civil rights (s.92(13) of the Constitution Act 1867), protection from (most) discrimination in employment may require adoption by the aboriginal government of anti-discrimination law.

The question must then be answered, how can such discriminatory behaviour of private individuals be covered? There are a number of possibilities:

- a) expand the application section of the Aboriginal Charter to include private behaviour (as discussed above), or
- b) add sections to the Aboriginal Charter explicitly covering such activity (combining the bill of rights elements of the Charter with elements of Canadian anti-discrimination codes), or
- c) adopt aboriginal anti-discrimination law.

In answering this question, the issue will arise of, the advantages and disadvantages of constitutionalizing anti-discrimination rules; is entrenchment of prohibitions of discrimination in particular contexts and on particular grounds too inflexible to accommodate evolving societal perceptions in this area?

## **ii. Enforcement**

The further question arises of the enforcement mechanism to be associated with anti-discrimination rights. Canadian anti-discrimination codes generally create commissions to investigate and attempt to settle complaints; they also establish quasi-judicial tribunals to hear cases in the first instance.

If private discriminatory behaviour were covered by the Aboriginal Charter, some consideration should be given to the effect such inclusion will have on the design of Aboriginal Charter enforcement mechanisms.

If, on the other hand, it is preferred to develop aboriginal anti-discrimination law, consideration should be given to the shortcomings of much of the enforcement machinery of current Canadian anti-discrimination codes.

## **b) Rights Relating to Violence Against Women**

Some protection for women from acts of violence may be part of the legal right already in section 7 of the Canadian Charter, namely, the right “to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. Some protection might also be part of the concept already in the Canadian Charter's equality section, namely, the right of “equal benefit of the law”. But the likelihood of securing remedies based on these rights is speculative at best.

Currently, Canada has taken a lead role in international efforts specifically to develop international human rights law which directly addresses violence against women. (Work is now underway, for example, to write a Draft United Nations Declaration on violence Against Women). The articulation of an Aboriginal Charter could incorporate that thinking now at the forefront of international human rights developments.

For example, the Aboriginal Charter might include the following provision:

*Every woman has the right to be free from violence in every context of private and public life.*

*The right of every woman to be free from violence, based on the inherent dignity of the individual, is taken to include:*

- a. the right to be free from discrimination against women, and*
- b. the right to sexual self-determination and the security of her person.*

(These suggestions have been taken from the Preliminary Draft for the preparation of an Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. This is a 1991 document from the Organization of American States, an organization to which Canada now belongs.)

Provisions covering violence suffered in private life would impose duties on aboriginal governments to put in place adequate mechanisms to protect women from this form of violence. This kind of obligation of government can be justified. There are a number of international legal sources which have used human rights law to impose obligations on governments to protect individuals from violations of their human rights by individuals.

## **c) Rights of the Child**

The international community has now addressed specifically the needs of children in the form of a treaty called the convention on the Rights of the Child. It was ratified by Canada in December of 1991. The Canadian Charter of Rights and Freedoms does not take direct account of the provisions of this treaty because the Canadian Charter was drafted at a much earlier date. Certain sections of this Convention may be of special interest to aboriginal women, such as, those which address the issue of violence against children. The Convention states, for example:

## **Article 19**

- 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
- 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

An Aboriginal Charter could include a similar provision.

Considerations mentioned in the above discussion on violence against women would also apply here: some protection might be afforded by clauses like sections 7 and 15 of the Canadian Charter; provisions like those concerning violence against children would impose duties on aboriginal governments to protect individuals from violations of their human rights by individuals.

The Convention on the Rights of the Child addresses the human rights of the child in the following contexts:

- ❑ discrimination in specific situations
- ❑ legal or administrative actions concerning children
- ❑ right to life, survival and development
- ❑ right to be registered, to a name, to acquire a nationality
- ❑ right to preserve his or her identity
- ❑ right to certain relationships with his or her parents
- ❑ protection from illicit transfer or non-return of children
- ❑ right to freedom of expression and information
- ❑ freedom of thought, conscience and religion
- ❑ right to freedom of association and peaceful assembly
- ❑ right to privacy, non-interference in family, home or correspondence
- ❑ right to access to information
- ❑ rights to benefits of child-care
- ❑ protection from violence and abuse
- ❑ protection by the state of children deprived of parents
- ❑ rights of mentally or physically disabled children to a full and decent life
- ❑ right to certain standards of health
- ❑ rights to benefits of social security
- ❑ right to adequate standard of living
- ❑ right to education

- ❑ right to enjoy/use own culture, religion and language
- ❑ protection from economic exploitation
- ❑ protection from the illicit use of drugs
- ❑ protection from sexual exploitation and abuse
- ❑ freedom from torture, cruel, inhuman or degrading treatment or punishment
- ❑ legal rights upon lawful deprivation of liberty; appropriate treatment upon infringements of the penal law
- ❑ entitlement to state measures to promote recovery and social reintegration of child victims of neglect, exploitation or abuse

#### **d) Environmental Rights**

The federal Beaudoin-Dobbie report contains the following recommendation for a social covenant to be included in the constitution:

*“s. 36.1 (1) Parliament, the legislatures and the territorial councils, together with the government of Canada and the provincial and territorial governments, are jointly committed to*

*...*

*(e) protecting and preserving the integrity of the environment in an economically sustainable manner.”*

Aboriginal governments will be faced with the question of whether this covenant should apply to them. As it is drafted here this social covenant is essentially unenforceable. The only enforcement mechanism envisaged by the report is the establishment of an agency to report to governments on the degree to which the stated goals have been met. An Aboriginal Charter could adopt both enhanced substantive commitments and accept greater enforcement machinery.

Examples of more expansive substantive commitments are:

- 1. All human beings have the fundamental right to an environment adequate for their health and well-being.*
- 2. [States] shall conserve and use the environment and natural resources for the benefit of present and future generations. (taken from the World Commission on Environment and Development, Experts Group on Environmental Law, 1987)*

*or,*

- ❑ *a public right to a healthy environment*
- ❑ *a duty upon government to conserve and protect public resources (taken from Ontario Environmental Bill of Rights Task Force)*

## e) Social and Economic Rights

The Canadian Charter does not in general contain social and economic rights. There are efforts underway by various equality - seeking groups to expand - by way of judicial interpretation - the present Canadian Charter concepts of “security of the person” and “equal benefit of the law” to include social and economic dimensions. But for the most part social and economic rights have been omitted from the Canadian Charter.

International law is concerned with various forms of such rights, such as:

- ❑ right to an adequate standard of:
  - living
  - food
  - clothing
  - housing
  - fair remuneration
- ❑ rights of the elderly, the disabled, the family, children to social protection/assistance
- ❑ right to social security
- ❑ right to a high standard of physical and mental health/medical assistance
- ❑ right to an education [e.g. an aboriginal education]
- ❑ right to work
- ❑ right to favourable work conditions
- ❑ right to take part in determination and improvement of working conditions
- ❑ right to choose and engage in an occupation
- ❑ right to vocational guidance and training
- ❑ right to information and consultation and participation of workers and their representatives
- ❑ right to collective bargaining
- ❑ right to property

The social and economic rights identified in the social covenant of the federal Beaudoin-Dobbie report are:

- (a) providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered, and accessible;*
- (b) providing adequate social services and benefits to ensure that all Canadians have reasonable access to housing, food and other basic necessities;*
- (c) providing high quality primary and secondary education to all persons resident in Canada and ensuring reasonable access to post- secondary education;*
- (d) protecting the rights of workers to organize and bargain collectively; and*
- [(e) above -see environmental rights]”*

The federal report suggests that these provisions constitute commitments of the federal, provincial and territorial governments. Aboriginal governments may be asked to consider whether this covenant should apply to them.

An Aboriginal Charter, however, could adopt both greater or different substantive commitments and accept stronger enforcement machinery.

The questions therefore arise: are these social covenant rights substantively adequate? are there other social and economic rights found in international law which should be included? is it sufficient for the substantive rights chosen to be unenforceable commitments of government, or should stronger enforcement machinery be instituted? When considering such questions it should be noted that the current trend in international law is to expand or strengthen the enforceability of social and economic rights. This is occurring, for example, in the context of The European social Charter and the International Covenant on Economic, social and Cultural Rights.

## **f) Rights of Indigenous Peoples**

There is a current effort within United Nations bodies to draft a Universal Declaration on the Rights of Indigenous Peoples. Those rights are to apply in the context of threats posed by non-indigenous populations or states. The Draft Declaration lists various collective, as well as individual, rights.

It might be argued that rights of an aboriginal people as a whole are therefore unsuited to an Aboriginal Charter since such a Charter is aimed at the aboriginal government of those same people. Or people's rights are unsuited to a Charter directed at the people's government itself.

On the other hand, it might be suggested that a separate part of the Aboriginal Charter should affirm the rights of aboriginal peoples as against or in relation to the federal, territorial and provincial governments in Canada. This would require eliciting from the federal, provincial and territorial governments recognition of some of the collective rights of indigenous peoples as they relate to inter-governmental relations.

Examples of such rights may be drawn from the current draft of a Universal Declaration on the Rights of Indigenous Peoples, which includes:

- ❑ right to self-determination
- ❑ right to enjoyment of all human rights and fundamental freedoms
- ❑ right to protection against genocide
- ❑ cultural rights
- ❑ right to maintain religious traditions
- ❑ language/communication rights
- ❑ right to financial and technical assistance
- ❑ land rights
- ❑ non-deprivation of the means of subsistence
- ❑ right to social and economic determination
- ❑ right to equal participation in all aspects of state life
- ❑ right to full political and administrative participation
- ❑ right to autonomy in internal and local affairs
- ❑ treaty claims
- ❑ right to access to and prompt conflict resolution

## 8. Conclusion

An Aboriginal Charter of Rights and Freedoms would be an effort to address many aspects of human dignity, not only those which result from specific concerns for sexual equality. It would be difficult to isolate those rights and freedoms which are of concern to women, and perhaps only include those, since women -as human beings -cannot be compartmentalized. Injustices which affect their children, affect them. What harms the ability of individuals to freely express themselves, harms them.

At the same time, redress of the suffering of aboriginal women in particular can be sought by the inclusion in an Aboriginal Charter of specific kinds of rights, such as:

- 1. sex equality notwithstanding anything else in the Charter*
- 2. non-discrimination rights*
- 3. protection from violence*
- 4. equality in the provision of basic human needs, such as housing and food,*
- 5. adequate levels of social assistance or security for the family.*

The question should therefore be asked, last but not least, what are the basic rights which aboriginal women would identify as most in need of attention in the context of their own lives in particular? Looking over any total package of fundamental rights in an Aboriginal Charter, have these rights been adequately addressed?

**APPENDIX 1**

**CANADIAN CHARTER  
OF RIGHTS  
AND  
FREEDOMS**



# CONSTITUTION ACT, 1981

## PART I

## SCHEDULE B

### CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

#### *Guarantee of Rights and Freedoms*

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

#### *Fundamental Freedoms*

Fundamental freedoms

2. Everyone has the following fundamental freedoms:  
(a) freedom of conscience and religion;  
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;  
(c) freedom of peaceful assembly; and  
(d) freedom of association.

#### *Democratic Rights*

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies 5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

### *Mobility Rights*

Mobility of citizens 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right  
(a) to move to and take up residence in any province; and  
(b) to pursue the gaining of a livelihood in any province.

Limitation (3) The rights specified in subsection (2) are subject to  
(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and  
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

### *Legal Rights*

- |   |   |
|---|---|
| Life, liberty and security of person      | 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.   |
| Search or seizure                         | 8. Everyone has the right to be secure against unreasonable search or seizure.  |
| Detention or imprisonment                 | 9. Everyone has the right not to be arbitrarily detained or imprisoned.   |
| Arrest or detention                       | 10. Everyone has the right on arrest or detention<br>(a) to be informed promptly of the reasons therefor;<br>(b) to retain and instruct counsel without delay and to be informed of that right; and<br>(c) to have the validity of the detention determined by way of <i>habeas corpus</i> and to be released if the detention is not lawful.   |
| Proceedings in criminal and penal matters | 11. Any person charged with an offence has the right<br>(a) to be informed without unreasonable delay of the specific offence;<br>(b) to be tried within a reasonable time;<br>(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;<br>(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;<br>(e) not to be denied reasonable bail without just cause;<br>(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;<br>(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;<br>(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished |

for the offence, not to be tried or punished for it again; and  
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

### *Equality Rights*

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

### *Official Languages of Canada*

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick	(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
Advancement of status and use	(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.
Proceedings of Parliament	17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
Proceedings of New Brunswick legislature	(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.
Parliamentary statutes and records	18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
New Brunswick statutes and records	(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.
Proceedings in courts established by Parliament	19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.
Proceedings in New Brunswick courts	(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.
Communications by public with federal institutions	20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

### *Minority Language Educational Rights*

Language of instruction

23. (1) Citizens of Canada  
(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or  
(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

### *Enforcement*

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

### *General*

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Other rights and freedoms not affected by Charter	26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
Multicultural heritage	27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
Rights guaranteed equally to both sexes	28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
Rights respecting certain schools preserved	29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.
Application to territories and territorial authorities	30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.
Legislative powers not extended	31. Nothing in this Charter extends the legislative powers of any body or authority.

*Application of Charter*

Application of Charter	32. (1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
Exception	(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.
Exception where express declaration	33. (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.

Operation of exception (2) An Act or a provision of an Act in respect of which a declaration 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.

Five year limitation (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.

Re-enactment (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

#### *Citation*

Citation 34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

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## **PART VII**

### **GENERAL**

Primacy of Constitution of Canada 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada (2) The Constitution of Canada includes  
(a) the *Canada Act*, including this Act;  
(b) the Acts and orders referred to in Schedule I; and  
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to Constitution of Canada (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.