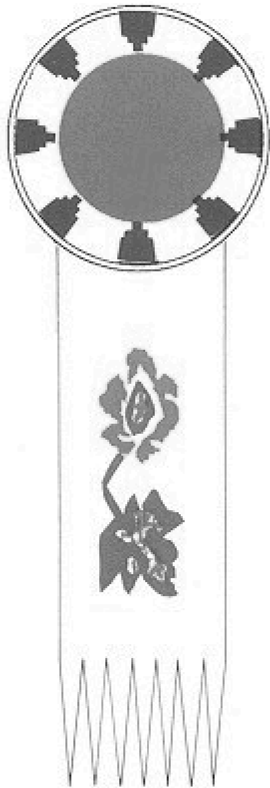
Native Women's Association of Canada



ABORIGINAL WOMEN, SELF GOVERNMENT & THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

~ 1991 ~

In the context of the 1991 "Canada Package" on Constitutional Reform

An NWAC Analysis

Table of Contents

1. Inherent Right to Self Government....3

2. Existing Right to Self Government in Section 35....3

3. The Canada Package and Self Government....4

4. Other Problems with the "Canada Package"....5

5. Section 33 and Aboriginal Self Government: Women's Rights....7

6. The "Distinct Society" Clause and Aboriginal Self Government....8

7. Aboriginal Constitutional Process....12

8. History of Sexual Discriminations....14

9. Aboriginal Women and the Charter....17

10. Recommendations....19

ABORIGINAL WOMEN, SELF GOVERNMENT AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS IN THE CONTEXT OF THE 1991 “CANADA PACKAGE” ON CONSTITUTIONAL REFORM

1. Inherent Right to Self Government

The Native Women's Association of Canada supports recognition by the Government of Canada of the inherent right to self-government. By "inherent right" we mean that Aboriginal peoples Canada have enjoyed this right since time immemorial, and still possess it today. As acknowledged in the "Canada Clause", the right to self-government predates Confederation and the Constitution Acts of Canada. The inherent right to self-government has never been explicitly taken away from Aboriginal peoples and continues to exist today. Canadian courts have decided that an existing aboriginal and treaty right cannot be extinguished except by explicit reference in law. This has never been done with respect to the inherent right to self-government. This position is compatible with the creation of First Nations governments through federal legislation, namely the Indian Act, It may be said that the Indian Act, regulates First Nations governments, but it does not extinguish the inherent right of Aboriginal peoples to govern themselves.

2. Existing Right to Self Government in Section 35

The Native Women's Association of Canada takes the position that the inherent right to self-government is an "existing" treaty and aboriginal right within the context of section 35 of the Constitution Act, 1982.

Section 35 reads:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The Native Women's Association of Canada is asking the Government of Canada to recognize and affirm the inherent right to self-government. In other words, we are not asking for the creation of a new right. We are asking Canada to recognize and affirm the absolute right to self-government.

3. The Canada Package and Self Government

The Native Women's Association of Canada agrees with the Assembly of First Nations that the characterization of Aboriginal self-government in the "Canada Package" is not acceptable to the peoples of the First Nations. The "Canada Package" undermines self-government in a number of ways. The "Canada package" circumscribes the rights, responsibilities and jurisdiction of Aboriginal governments to such a great extent that such governments would exercise minimal powers. The only powers which would be left to Aboriginal Governments are powers which now exist in the Indian Act. The current Indian Act powers emanate from 1850 British local government legislation. This means these governments can legislate only in such areas as bee keeping, garbage disposal (even that is controversial), dog catching, etc. They are meaningless powers.

This is not self-government. This approach to the recognition of Aboriginal self-government is opposed by the Native Women's Association of Canada. We wish to now examine the manner in which the "Canada Package" circumscribes Aboriginal self-government.

First, the "Canada Package" does not propose an Aboriginal self-government amendment, but there is a draft of the "distinct society" clause for Quebec. Second, the "Canada package" does not specify at which place an Aboriginal self-government clause would appear, but makes it clear that the "distinct society" clause will be s. 25.1(1). Third, it is not clear if the Aboriginal self-government clause is within or outside the Charter of Rights and Freedoms, but it is clear that the clause is subject to the Charter. Fourth, the "Canada package" proposes to subordinate Aboriginal Belt government to the Canadian Charter of Rights and Freedoms. This is inconsistent with the treatment of the other two levels of government, namely, the Federal and Provincial governments. Those two levels of government can use section 33 of the Charter to OPT out of the application of the Charter.

Section 33 reads:

> (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 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.
>
> (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).

Fifth, the subjection of the Aboriginal self-government clause to the Charter is inconsistent with section 25 if self-government is an existing aboriginal or treaty right under section 35.

Section 25 reads:

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

This section is an "interpretive clause" which shields existing treaty and aboriginal rights from the application of the Charter.

4. Other Problems with the "Canada Package"

There are other problems with placing the right to self-government inside the Charter. The Native Women's Association of Canada takes the position that the placement of the right to self-government in the Charter derogates from an existing treaty and aboriginal right, namely, the inherent right to self-government found in section 35. Further, if the right to self-government is placed inside the Charter, the right will be subject to section 1.

Section 1 reads:

> 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 placement of the right to self-government within the Charter would mean that the right is not an absolute right, but will be subject to such "limits prescribed by law" as long as those limits can be justified "in a free and democratic society". The other alternative is the place the right to self-government outside the Charter. Even if this occurs, the Government of Canada intends, in the "Canada Package", to subject Aboriginal self-government to the Charter of Rights and Freedoms.

The Government of Canada may choose to recognize and affirm that the right to self-government is an inherent right within the context of section 3S. If that were the case, the Government of Canada could place this recognition in section 35, for example, a s. 35(5). This would be acceptable to the Native Women's Association of Canada. This would ensure the absolute right to self-government, and ensure that such right was not subject to section 1. While the Canadian Charter of Rights and Freedoms would not apply, the right to self-government could be subject to section 35(4). In the event that the right to self-government is recognized and affirmed in a new section 35(5), the Native Women's Association of Canada requests the following change to section 35 (4):

> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) and (5) are guaranteed equally to male and female persons.

In other words, Aboriginal self-government would be recognized in such a way as to guarantee the sexual equality rights of Aboriginal women.

The way in which the "Canada package" now reads does not lead to the conclusion that Aboriginal self-government will be contained in section 35(5). It suggests that the right to self-government will be outside the Charter and outside section 35. If the right to self-government is outside the Charter and outside section 35, the Native Women's Association of Canada insists that the following amendment be made to section 25.

> 25. (2) Notwithstanding anything in this Charter, all rights and freedoms of the Aboriginal peoples of Canada are guaranteed equally to male and female Aboriginal persons.

This proposal was developed in 1984-85 by the Quebec Native Women's Association and was adopted as the national position of the Native women's Association of Canada. For purposes of this paper, the word "Native" in the 1984-65 position has been changed to "Aboriginal" to make the provision consistent with the wording of the Constitution Act, 1982. The word "Aboriginal" is used in that constitutional document instead of the word "Native”.

To adopt the wording of the Quebec Native Women's Association from 1987, what we are seeking now is a coexistence both within our communities and in Canadian society. The Quebec Native women in 1987 said that:

> the development of aboriginal government and the exercise of self-government powers should take place on the basis of equality between aboriginal persons.

The Quebec Native women said that:

> [t]he balance between collective and individual rights of aboriginal peoples and persons should be reflected in both Parts I and II of the Constitution Act, 1982 to cover both existing aboriginal governments and future self-government arrangement.

It was the position of the Quebec Native Women's Association and that of the Native Women's Association of Canada that section 25(2) be added to protect the sexual equality rights of Aboriginal women.

5. Section 33 and Aboriginal Self Government: Women's Rights

The Native Women's Association of Canada is taking the position that all of our human, civil and political rights guaranteed under Canadian and International law must be protected equally between male and female Aboriginal persons and between Aboriginal and non-Aboriginal persons. If the recognition and affirmation of the inherent right to Aboriginal self-government falls outside the Charter and outside section 35, we need to ensure the protection of Charter rights under sections 2, 7-15 to all Aboriginal persons. We are particularly concerned because the Government of Canada offered Native governments the use of section 33 in 1987. The operative part of section 33 which causes concern is the following:

> (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.

The Assembly of First Nations and other national Native organizations may take the position that section 33 should apply equally to Aboriginal governments as to the federal and provincial governments. In other words, sections 2, 7-15 could be suspended by laws passed by Aboriginal governments. This would be of concern to Aboriginal women, and indeed, would be opposed by Aboriginal women. At a time when the Prime Minister and this country takes the position that no funding aid should be provided to nations who suspend human rights to its citizens, why would this Government endorse the violation of the human, civil and political rights of Aboriginal peoples living under Aboriginal governments? We will now list the rights which could be suspended by Aboriginal governments under section 33.

If the Government agrees that the Charter does apply to Aboriginal governments, and if the Government agrees that Aboriginal governments may use section 33, the following rights of Aboriginal citizens could be suspended:

> Section 2 rights: An Aboriginal government could deny its citizens 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; and freedom of association.

With these powers, an Aboriginal government could decide the religion of the entire community, e.g. everyone must worship in the North American Native Church, take peyote, worship every Monday morning. Political dissent could be quashed with a by-law by denying freedom of thought, belief, opinion and expression. How many band

offices have been occupied over the past 10-20 years by political dissenters demanding financial audits, or demanding an elective or traditional system of government. All of this could be stopped with a by-law which calls for an end to peaceful assemblies or an end to freedom of association. That is what section 33 could mean within Aboriginal communities governed by Aboriginal governments.

With section 33, Aboriginal governments could pass laws forbidding their citizens to vote in federal and provincial elections. It would not be a matter of individual choice, but collective fiat. The Charter mobility rights could be denied to Aboriginal citizens by Aboriginal governments. People could be forbidden to move out of the territory, or forbidden to move into the territory. Right now, only two per cent of bill C-31 reinstatees have moved back to their reserves because of lack of land and housing. Section 33 could be used to ensure that no more reinstatees or urban peoples move back to their homelands and reserves.

The powers of suspension under section 33 should not even be allowed to federal and provincial governments, let alone to Aboriginal governments. The suspension of section 7 rights could deny Aboriginal citizens their 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". We do not have to describe what an awesome power that would be in the hands of Aboriginal patriarchs. As elsewhere in Canada, the law of privacy protects the homelife from close scrutiny by the State.

Often that means women and children are subject to physical and sexual abuse within the home, including spouse battering, incest and other crimes which go undetected and unpunished by the State. The suspension of section 8 rights which protect citizens against "unreasonable search and seizure" could mean the violation of these rights by tribal police. Even today in some communities, homes of private citizens are searched for liquor on dry reserves, or for incriminating evidence which is not legal under the Charter. Do we want Aboriginal governments which have the power to "arbitrarily detain and imprison" Aboriginal citizens by the suspension of section 9 of the Charter? Do we want Aboriginal governments which can subject their citizens to cruel and unusual treatment or punishment? Some women and some Aboriginal peoples may say that this already occurs, but do we want this condoned by giving section 33 powers to Aboriginal governments? This list is by no means exhaustive. In the concluding section of this paper, the Native Women's Association of Canada will propose constitutional amendments designed to guarantee individual human, civil and political rights to Aboriginal peoples within the context of Aboriginal self-government.

6. The "Distinct Society" Clause and Aboriginal Self Government

The second manner in which Aboriginal self-government is circumscribed in the "Canada Package" is through the "distinct society clause". The Government of Canada has proposed the entrenchment of a new clause to recognize Quebec's distinctiveness and Canada's linguistic duality. The new clause would be included immediately

following the Aboriginal clause, section 25, as an interpretive clause of the Canadian Charter of Rights and Freedoms. This would mean that the Charter should be interpreted by the courts in a manner consistent with this following proposed section 25.1:

> (1) This Charter shall be interpreted in a manner consistent with
>
> (a) the preservation and promotion of Quebec as a distinct society within Canada; and
>
> (b) the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.
>
> (2) For the purposes of subsection (1), “distinct society”, in relation to Quebec, includes
>
> (a) a French-speaking majority;
>
> (b) a unique culture; and
>
> (c) a civil law tradition.

In a very terse statement the Assembly of First Nations takes the position that “the recognition of Quebec as a distinct society can be very detrimental to First Nations within Quebec.”[1] It has been said that this proposal to place 6. 25.1(1) in the Charter is better than Meech Lake, a constitutional proposal which was killed in 1990 because it was not ratified by Manitoba and Newfoundland. In the Meech Lake Accord the "distinct society" clause was to be entrenched as part of the Constitution Act. 1867. In the 1991 "Canada Package", the "distinct society" clause is part of the Charter contained in the Constitution Act. 1982. To grasp the impact of the 1991 "distinct society" clause upon Aboriginal governments in Quebec, it is important to understand three things. First, what is the purpose of the "distinct society" clause? Second, why is the "distinct society" clause to be made part of the Charter of Rights and Freedoms? Third, why is the “distinct society" clause placed immediately after section 25? In the absence of explanatory notes in the "Canada Package", we can only guess at the answers which are proposed below.

First, what is the purpose of the "distinct society" clause? The purpose of the "distinct society" clause is to recognize that Quebec is "distinct" because of its French-speaking majority, its unique culture, and its civil law tradition. It further recognizes the rights of French-speaking Canadians outside Quebec to preserve their existence. The "distinct society" clause is aimed at more than mere preservation. It also aims to promote the distinctiveness of French-speakers, and secondarily it recognizes that there are English-

[1] *Leroy Littlebear, “Sharing Canada’s Future – An Analysis from a First Nations Perspective” (Ottawa: Assembly of First Nations, 1991), Part II, 1. (unpublished)*

speakers inside Quebec. These English-speakers inside Quebec are entitled to "preservation", but not promotion. “Promotion” is reserved to French-speakers in Quebec. In this context, there is no room for Aboriginal governments in Quebec to preserve and promote their distinctiveness. The "distinct society" clause recognizes only two groups: French-speakers and English-speakers inside and outside Quebec. In this sense, Aboriginal self-government is diminished or limited.

Second, why is the “distinct society” clause to be made part of the Charter of Rights and Freedoms? The "distinct society" clause is to be included in the Charter both to strengthen the power of Quebec to operate outside the Charter and limit Quebec's use of section 33. In other words, section 33 stigmatizes Quebec. When Quebec and other governments use section 33 to set aside the application of the Charter, they appear to be disregarding individual rights and freedoms deliberately. From a public relations perspective, it is not desirable to be seen to be using section 33 to override individual rights and freedoms. By including the "distinct society" clause within the Charter there will be less need to use section 33. As well, the placement of the "distinct society" clause within the Charter will lead to different interpretations by the courts of actions taken by the Quebec government towards its English-speaking minority. A number of key cases on French language rights have been lost in the Supreme Court of Canada, e.g. Bill 101 because French in Quebec is a majority language. The French language is not entitled to minority language status and rights inside Quebec. Having the "distinct society" clause in the Charter will necessarily lead to different conclusions by courts. Why? In any Charter challenge, the plaintiff must prove that he or she has a Charter right. The plaintiff must prove that the State (federal or provincial government law or actor) has infringed that Charter right. If there is a Charter right, and if that right was infringed then the Court must weigh the rights of the individual against the right of the State to infringe that right. This analysis takes place under section 1. In the case of a plaintiff from Quebec, the justification for the infringement of the right must be weighed against the new "distinct society" clause. For example, the denial of a right to an English-speaker in Quebec under the "distinct society" clause may mean that the denial is justified in a free and democratic society. Another Bill 101 case is likely to succeed in the Supreme Court of Canada because of the "distinct society" clause.

Third, why is the "distinct society" clause to be placed immediately after section 25? It is no accident that the Quebec "distinct society" clause is proposed to immediately follow the aboriginal shield. While section 25 and the new section 25.1(1) are not to be read against each other, their close proximity means they are to be read closely together. The Sparrow decision of the Supreme Court of Canada has shown that section 35 -- the section dealing with existing treaty and aboriginal rights -- has teeth. The Sparrow decision has shown that provinces cannot use their legislation, regulations and jurisdiction to override existing treaty and aboriginal rights. This case dealt with the aboriginal right of British Columbia Indians to fish for food. Fishing and navigable waters are areas of federal jurisdiction, but the regulation of fishing is under provincial jurisdiction. It was held that the federal Fisheries Act and provincial regulations could "regulate" the First Nations right to fish. This activity in itself, however, could not extinguish the Indian right. In other words, the mere regulation of a right did not

extinguish that right. Extinguishments can only come about as a result of explicit language within federal law, and it may be that such extinguishments must have taken place prior to the enactment of the Constitution Act, 1982. How does this affect the province of Quebec?

We can only guess that the impact of placing the "distinct society" clause immediately following section 25 may be to both limit the use of section 25 by Aboriginal peoples and to strengthen the jurisdictional powers of Quebec over its Aboriginal population. For example, the "distinct society" clause could have been made part of the Charter in any number of sections. Why include it next to the aboriginal section? Was it an accident? It must be remembered that section 25, the new section 25.1(1), and sections 26, 27 and 28 are all interpretive sections of the Charter. How are interpretive sections used? As indicated before, a plaintiff from Quebec must prove he or she has a Charter right and that the State infringed that right. The court then does an analysis under section 1 to see if this infringement is justified in a free and democratic society. To make this determination the Court considers the interpretive sections, e.g. 25, 25.1(1), 26, 27 and 28. Under normal circumstances, sections 25, 26, 27 and 28 are weighed equally. Each must be considered in its own right. How is section 25 to be weighed with respect to section 25.1(1) if they come into conflict? It would seem that one interpretation is that the internal weighing must take place first. In other words, section 25 is to be weighed internally against section 25.1(1), and where the infringement involves the French-speaking majority, the (undefined) unique culture of Quebec and the civil law tradition, it is likely that s. 25.1(1) will carry more weight. This then will limit the application and value of section 25 which will only come into play when there is an Aboriginal plaintiff. It would seem then that it could be said that Aboriginal peoples will be the population most adversely affected by the "distinct society" clause. The weighing of section 25.1(1) against women's rights under section 28 will be more equal under a section 1 analysis then section 25.1(1) against section 25. In the alternative, both section 25 and section 25.1(1) will be weighed equally under a section 1 analysis. What is likely to carry more weight then is the question of interpretive versus substantive rights contained in the clause. Section 25 is interpretive; section 25.1(1) appears to be more substantive i.e. unique culture. This could lead to an override of aboriginal and treaty rights in Quebec under the amended Constitution.

Why would it be important for Quebec to have the power to override existing aboriginal and treaty rights? There are two important reasons, although they provide no excuse for allowing governments to unilaterally overpower and infringe upon the rights of domestic dependent Aboriginal nations. First, Quebec wants the right to secede from Canada. Second, Quebec wants to take the First Nations and Inuit lands out of Canada if it secedes from this nation. To accomplish either of these objectives, Quebec needs the right to override existing aboriginal and treaty rights. The objective then in having the Quebec "distinct society" clause adjacent to the aboriginal shield clause is to destroy the aboriginal shield. The objective of the Government of Canada, in its pursuit of a deal with Quebec, is to derogate and abrogate existing aboriginal and treaty rights. In other words, Canada is willing to sacrifice the self-government rights of Aboriginal First Nations and Aboriginal peoples of Quebec to give French-speakers of Quebec the right

to secede from Canada with territorial integrity. Canada and Quebec are not alone in seeking to ensure the territorial integrity of an independent Quebec. The Supreme Court of Canada has been of recent assistance to Quebec in the Bear Island case. In that case the Aboriginal plaintiffs claimed they did not adhere to the treaty, yet they had been receiving and accepted treaty payments. The court held that although they or their ancestors did not sign the treaty, the fact that they accepted treaty payments was enough to give up their aboriginal title to the area. There appear to be some adverse implications for the James Bay Cree, the Naskapi and the Inuit of northern Quebec in the Bear Island decision. The James Bay Cree, for example, accepted $225 million and various categories of land in exchange for a land claims settlement in northern Quebec. The debate over who owns northern Quebec is a live debate, and one which is not legally settled. Nevertheless, it has been conjectured by a number of legal scholars inside and outside Quebec that the province cannot leave Confederation with First Nations and Inuit lands. Nor can Quebec proceed with the Great Whale hydroelectric project in northern Quebec without the cooperation of the federal Government and the Aboriginal peoples involved. There are advantages in having the "distinct society" clause adjacent to section 25. It accomplishes most of Quebec's objectives. First, it is within the Charter and decreases the need for Quebec to exercise its rights under section 33. Second, on cultural, legal and linguistic matters, the rights of French-speakers inside Quebec are likely to limit the rights of Aboriginal peoples and governments inside Quebec. Third, the destruction of the aboriginal shield in section 25 may pave the way for Quebec to infringe upon existing aboriginal and treaty rights inside Quebec whether or not that province leaves Confederation.

7. Aboriginal Constitutional Process

The Native Women's Association of Canada reminds the Parliamentary Committee, the Government of Canada, and Canadians that women are 52 per cent of the Aboriginal population. We are organized into 13 provincial and territorial organizations. There is a separate organization for Inuit women, and a newly formed organization for Metis women. The Native Women's Association of Canada asks the Committee to recommend that Aboriginal women be represented in their own right in all future constitutional meetings on Aboriginal and treaty rights. Under sections 15, 28 and 35(4), Aboriginal women are entitled to substantive equality rights. Those sections read as follows:

> Equality rights
> 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.
>
> General
> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights of the Aboriginal Peoples of Canada
35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

In this current round of constitutional discussions with Canadians and aboriginal peoples, funds have been provided to four recognized aboriginal organizations: the Assembly of First Nations, the Metis National Council, the Inuit Tapirisat of Canada and the Native Council of Canada. As of November 1, 1991, those four groups shared an estimated $6 million to prepare for constitutional discussions. The Native Women's Association of Canada was offered $130,000 from the Government of Canada. These funds were channelled through the Assembly of First Nations and the Native Council of Canada. We do not interpret this as equitable treatment. This is not "equal benefit of the law", and nor can it be interpreted as "equal protection of the law".

This discriminatory treatment of Aboriginal women in the constitutional fora has persisted since at least 1979. Before that date, all Aboriginal peoples were discriminated against and robbed of a voice in affairs of state affecting their very lives. We are appealing to you as Parliamentarians to take what will be a small step for you, and a giant step for us. We want our place at the constitutional table as women.

Let us remind you of the discrimination practised against Aboriginal women by governments of Canada in the past. In our view, our legal struggle as Aboriginal women began after the enactment of the Canadian Bill of Rights,[2] and before the advent of section 15 of the Canadian Charter of Rights and Freedoms.[3] We acknowledge that as Aboriginal women we were among the first women to benefit legislatively from the Charter in the Constitution.[4] When our men were fighting for collective rights, we, as women, were struggling for sexual equality within the collective. These concurrent struggles have checkered the constitutional processes since 1979. When our Chiefs went to London, England to lobby the House of Lords on patriation, we were marching 100 miles from Oka, Quebec to Ottawa for sexual equality rights. We have always been there. We have never wavered from our objectives. We want to be part of this process. We bring a feminist perspective to the Constitutional debate. We want your recommendation to be there.

---

[2] *S.C. 1960, c.44, reprinted in R.S.C. 1970, App. II.*
[3] *Part I of Constitution Act, 1982, as enacted by Canada Act (U.K.) 1982, C. 11, Schedule B.*
[4] *Constitution Act, 1982 as enacted by Canada Act (U.K.) 1982, c. 11, Schedule B.*

8. History of Sexual Discriminations[5]

For 100 years, First Nations women who married non-Indians were banished from their communities, barred from their families and stripped of their legal rights as Indians. This disqualification was first introduced into federal law in 1869[6] and evidences the intrusiveness of the law in First Nations life in Canada. Moreso than most Canadians, the life of an Indian in Canada is shrouded in law - the Indian Act[7] governs an Indian's life from birth to death. In fact, the law follows the Indian into the grave by establishing the parameters of wills and estates on reserve lands. What First Nations women said in the 1970s was that they did not want the government in their bedrooms. The Indian Act concerned itself with whom an Indian woman married.[8] The Indian Act also allowed other First Nations community members to protest the paternity of any First Nations child suspected of having a white, or other non-First Nations father. Such a child could be removed from the Indian registry and would not be allowed to be an Indian. In the minds of most First Nations women of the 1970s concerned with sexual equality, the interest of government in the sexual partnering of First Nations women went too far. And, it discriminated based on sex. First Nations men who produced illegitimate children with non-First Nations women passed on Indian status and a right to band membership to any of their offspring.

The legal struggle by First Nations women was brought almost to a standstill by the loss in the Lavell[9] case in the Supreme Court of Canada. One reason why Jeannette Lavell lost her case is because there was no constitutional guarantee of sexual equality for women in Canada. Undaunted by this loss, First Nations women later won a semi-victory in the Lovelace[10] case at the United Nations Committee on Human Rights. These First Nations women of the 1970s never wavered in their battle for sexual equality. The aboriginal women of the 1990s whom we represent, also, will never give up the struggle for sexual equality. What we are saying here today is this struggle includes the right to represent ourselves in constitutional discussions. We want to remind you that our women of the 1970s took their struggle to the international arena[11], to national meetings every year from 1971 to 1985, to feminist meetings[12], to Parliament[13] and finally to the streets and highways[14].

---

[5] *Much of this portion of the paper is taken from an article by Teressa Nahanee, entitled "Indian Woman, Sexual Equality and the Charter" to be published by Mc-Gill-Queen's University Press in a record of the Canadian Women and the State Conference" held at the University of Ottawa Law School, November 1990. Paper with the Author.*

[6] *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs and to Extend the Provisions of Act Thirty-First Victoria Chapter 42, S.C. 1869, c. 6.*

[7] *Indian Act, R.S.C. 1985; R.S.C. 1970, C. I - 6, as am. 1956, c. 40, s. 2; R.S.C. 1952, C. 149*

[8] *s. 12(1)(b) – Indian women who married white men lost their Indian status, Band Membership and Indian rights.*

[9] *Attorney-General of Canada v. Lavell (1973), [1974] S.C.R. 1349.*

[10] *[1982] 1 C.N.L.R. 1.*

[11] *Mary Two Axe Early of Kahnawake succeeded in obtaining a resolution from the International Women's Year convention in Mexico City in 1976. See Chatelaine Magazine, August 1976, article by Teressa Nahanee.*

[12] *The Report of the Royal Commission on the Status of Women, Chairperson, Florence Bird (Ottawa: The Commission, 1970) recommended the repeal of section 12(1) (b) of the Indian Act.*

[13] *Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings and Evidence, 1st Session, 30th Parliament, 25 May 1976, 53:7; Canada, House of Commons, First Report of the Sub-Committee on Indian Women and the Indian Act, in Standing Committee on Indian Affairs and Northern Development,*

The legal and political struggle by First Nations women was not only against an insensitive federal government. It was also against the First Nations male establishment created under the Indian Act. The Indian Act has imposed upon us a patriarchal system and patriarchal laws which favour men. Only men could give Indian status and band membership. At one time, only men could vote in band elections. By 1971, this patriarchal system was so ingrained without our communities, that "patriarchy" was seen as a "traditional trait". In other words, even the memory of our matriarchal forms of government, and our matrilocal forms of descent were forgotten or unacknowledged. Some legal writers[15] argue that it was the federal government alone, and not First Nations' governments, which discriminated against women. In fact, the First Nations male governments and organizations were part of the wall of resistance encountered by First Nations women in their struggle to return to their communities.

First Nations women have historically been legally politically and socially subordinated by the federal government and by First Nations governments. That subordination continues today. You may have thought, as parliamentarians, that sexual discrimination against First Nations women ended in 1985 with the passage of Bill C-31[16].

The political struggle for sexual equality for First Nations women was both a male / female struggle, as well as one which pitted collectivist self-government rights against female individual rights to equality. It was the political struggle, aligned with the advent of the Charter of Rights and Freedoms, which resulted in the passage of Bill C-31. This Bill amended the Indian Act to repeal sexually discriminatory provisions. As a result of passage, more than 70,000 men, women, boys, girls, old and young people have been added to the federal Indian registry[17] and band lists[18].

Of the 70,000 registrants, 13,000 or 19 per cent were women who originally lost their status under section 12(1)(b) of the Indian Act. An additional 40,00 are the children and grand-children of section 12(1)(b) women. Between December 1985 and June 1990, the status Indian population grew from 360,000 to 487,000, an increase of 33 per cent. The on-reserve population grew by 12 per cent, with only 22 per cent of that figure representing Bill C-31 registrants. At the same time, the off-reserve population grew by 84 per cent, with 70 per cent of those persons being Bill C-31 registrants. It is estimated

---

Minutes of Proceedings and Evidence, 20 September 1982, 58; resolution by women Parliamentarians, Canada, House of Commons, Debates, 17 July 1980, p. 2999. Document: Appendix B, p. 3072.

[14] *Indian Women's March from July 14 to July 19, 1979, from Oka Quebec to Ottawa documented in J. Silman, Enough is Enough: Aboriginal Women Speak Out (Toronto: The Women's Press, 1987).*

[15] *Menno Boldt and J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Boldt and Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985), 170. The authors note: "…the Canadian government was found guilty of denying "Indian Rights" to Indian women who married non-Indians." They also note "the Charter was exploited to create a public perception that Indian leaders are insensitive to human rights." Ibid.*

[16] *R.S., c. I - 6 as am. C. 10 (2nd Supp.); 1974-75-76, c. 48; 1978-79, c. 11; 1980-81-82, cc. 47, 110; 1985, c. 27.*

[17] *This a record or registry held by the Department of Indian Affairs and Northern Development which contains the names of all "registered Indians" in Canada. The provisions for entitlement are contained in the Indian Act.*

[18] *Each Indian "Band" (defined in the Indian Act) maintains a registry of its members, and this list is also kept, by Band, by the federal Department of Indian Affairs and Northern Development. The list is important for determining who may benefit from Indian rights, programs and services.*

that 90 per cent of Bill C-31 registrants live off reserve. Over a period of five years since the passage of Bill C-31, only 2 per cent of the registrants were successful in moving back to the reserves! Almost 50 per cent of Bill C-31 registrants said they would rather live on reserve, yet only 12 per cent saw any chance of ever moving back!

Within 20 years half of the status Indian population will live in urban centres off reserves even though many prefer to remain within their communities. Our women want to live within their communities. It does not matter which male-dominated organizations appears before you to say they represent us. We are here. We are the women. We are entitled, and we do, represent ourselves. We are not living in our communities because there is no land. We are not living in our communities because there is no housing. We have been shut out from our communities because they do not wish to bear the coats of programs and services to which we are entitled as Indians. We are telling you that this situation will not change without our involvement in self-government and in the constitutional discussions. Our men could take the initiative and give us a place at the table. Have they done that? No they have not.

We are asking for your recommendation to have Aboriginal women assume their rightful place at the constitutional table. But, of course, we must look at your society -- at Canadian society. How does Canada treat women? How many women sit on this Committee? How many women are in the House of Commons? How many women are in the Senate? How many women Premiers are there in Canada today? How many women sit on the Supreme Court of Canada? Has there ever been a female Prime Minister in this nation? It is not an encouraging picture. But we are a "distinct and insular" minority belonging to another culture from which we have been separated. Our case is no different from that of Sandra Lovelace who claimed continuing discrimination because she was separated from her Maliseet culture, Maliseet language, and from her people. We want to reiterate that the majority of women we represent also suffer under this continuing discrimination. When our women are relegated to living in cities instead of among their own peoples, that is discrimination. It is a denial of fundamental rights guaranteed to us in international instruments signed by Canada. When this Government passed Bill C-31 it did not give us substantive equality. It erased the offensive sections of the Indian Act, but it did not restore us to our former position. It did not give us access to our communities. It did not give us access to land and housing. It did not give us access to programs and services to which we are entitled as Aboriginal peoples. It did not give us access to our culture and languages. We demand justice. We demand substantive equality. Give us our seat at the table and we will continue to fight for ourselves because no one else is doing it.

9. Aboriginal Women and the Charter

Our First Nations leadership does not favour the application of the Canadian Charter of Rights and Freedoms to self-government. That position has not changed since 1982, when the Assembly of First Nations stated the following to the Standing Committee on Aboriginal Affairs:

[a]s Indian people we cannot afford to have individual rights override collective rights... if you isolate the individual rights from the collective rights, then you are heading down another path that is ever more discriminatory... The Canadian Charter is in conflict with our philosophy and culture.

The opinion is widely held that the Charter is in conflict with our nations of sovereignty, and further that the rights of First Nations citizens within their communities must be determined at the community level.

The Charter is an individual-rights based document recognizing and guaranteeing fundamental human rights to Canadians. This notion of fundamental rights and freedoms emanates probably from time immemorial. It is captured in the Charter of the United Nations and the Universal Declaration on Human Rights. These international instruments of law celebrate the individual nature of fundamental rights and freedoms. These are the rights which attach to individuals. They are the legal, political and constitutional rights which attach to human beings because they are human beings. Aboriginal women support individual rights. These rights are so fundamental that, once removed, you no longer have a human being. We are human beings and we have rights which cannot be denied or removed at the whim of any government. That is how fundamental these individual Charter rights are. These views are in conflict with many First Nations and legal theoreticians who advocate for recognition by Canada of sovereignty, self-government and collective rights. It is their unwavering view that the 'collective' comes first, and that it will decide the rights of individuals.

As women, we can look at nations around the world which have placed collective and cultural rights ahead of women's sexual equality rights. Some nations have found sexual equality interferes with tradition, custom and history. Sexual equality rights have been guaranteed to women around the world. But, like Canada's Charter, the United Nations has allowed nations to "opt out" of these international instruments. We are speaking of international human rights instruments stating that women are entitled to sexual equality with respect to their human, civil and political rights.

Women have a right not to be tortured. Women have a right not to be dominated by men and Government to their detriment. But there are many, many nations around the world which have refused to implement United Nations guarantees of sexual equality. This country... called Canada... cannot exempt itself from this example. One of our own Aboriginal women, Sandra Lovelace, a Maliseet from New Brunswick, took our nation to the United Nations Committee on Human Rights. She won her case because this nation cannot deny us, as women, access to our people, to our communities, to our languages

and to our cultures. Yet, as we have said, Canada is still doing it to us today. Yes, we are denied the right to live within our communities. We do not need to tell you that if you are an Indian and live off the reserve, the Government denies you your programs, services and benefits. We are the beggars in our own land. We are the ones, as women, doing without houses. Many of our women are denied their rights and we are helpless in our struggle. We have organizations without funds. When we have gained knowledge which we want to share with our women in the communities, we have no way to communicate. This is why the application of the Charter should not be left to Governments. The federal government has mistreated us as women for 100 years. If there is a legacy we will leave for women in the future, it is their right to enjoy all of the rights granted to us by the United Nations. We want our nations to act within the spirit and intent of the United Nations, and not do as so many nations have done before them… opt out of sexual equality rights.

The Charter of Rights and Freedoms applies to Indian Act governments. We speak of Band Councils and Chiefs who make the laws on Indian reserve lands today. When a Band Council acts, it acts under the authority of federal law, namely, the Indian Act. When the Band Council passes a Band Council Resolution, that is a federal law and is recognized as a regulation under the Statutory Instruments Act. There is a mixed regime respecting Band council Resolutions, and some are subject to closer scrutiny than others. This does not detract from their stature as federal statutory instruments, as laws and regulations are referred to. The subjection of Band Chiefs, Councils and Band Council Resolutions to the scrutiny of the Charter is new since 1982. Prior to passage of the Charter, even the federal Indian Act could discriminate against First Nations women based on sex as it did under section 12(1)(b). After 1982, the Charter applied to us as women and this resulted in amendments to the Indian Act in 1985.

We have Charter case across the land being taken by men and women against our Indian Act governments. The Charter protection must extend to aboriginal women because there is a long history of discrimination against aboriginal women in Canada. The protection of the Charter will enable aboriginal women to challenge discrimination resulting both from the enforcement of Band by-laws enacted under delegated authority and from federal legislation.

There are at least two areas where there is residual discrimination left in the Indian-Act: first, under section 6 pertaining to registrations under section 6(2) where the grandmother was a section 12(1)(b) Indian; and second, in the exercise of band by-law powers by Band Councils respecting residence on reserves.

We recognize that there is a clash between collective rights of sovereign First Nations governments and individual rights of women. Stripped of equality by patriarchal laws which created "male privilege" as the norm on reserve lands, First Nations women have had a tremendous struggle to regain their social position. We want the Canadian Charter of Rights and Freedoms to apply to Aboriginal governments.

10. Recommendations

1. That the Canadian Charter of Rights and Freedoms apply to all Aboriginal governments once the right to self-government is recognized and affirmed as part of the Canadian constitution until such time as there is developed and constitutionally entrenched an Aboriginal Code of Human Rights.

2. That if the Canadian Charter of Rights and Freedoms applies to all Aboriginal governments, the Government of Canada not extend section 33 rights to Aboriginal governments until such time as section 33 is modified, in consultation with Aboriginal women, in such a way as to limit such section 33 powers, *e.g.* Aboriginal governments should not be given the right to suspend human rights such as the right to life and liberty.

3. That the proposed s. 25.1(1), the "distinct society" clause be amended to ensure that it will not override aboriginal and treaty rights in the province of Quebec to a greater extend than is possible for other provinces and territories.

4. That recommendations be made by the Parliamentary Committee to ensure that Aboriginal women are given their own seat at the constitutional table.

5. That recommendations by made by the Parliamentary Committee to ensure that Aboriginal women participate as equals in the definition of Aboriginal governments, their forms, structures and powers.

6. That there be recognition of the inherent right to self-government, including recognition that the subjection of Aboriginal governments to the Charter of Rights and Freedoms does not take away its inherent sovereignty. In other words, just as the application of this Charter to the federal and provincial governments does not alter or diminish their jurisdictional powers under ss. 91 and 92 of the constitution Act. 1867, so also will Aboriginal governments not be diminished.

7. That recommendations be made by the Parliamentary Committee to ensure equal representation of male and female Aboriginal persons in the Senate regardless of discrimination against women in Canadian society.

8. That the Canada clause be amended in part to read as follows: "recognition that the aboriginal people were historically self governing, continue to enjoy self governing powers within the Canadian state, and recognition of aboriginal and treaty rights within Canada, and recognition that such rights are to be enjoyed equally by male and female aboriginal peoples." Further, that there be recognition of the responsibility of governments to preserve and promote Aboriginal languages and cultures, as well as the distinct identity of aboriginal peoples.

9. That the Constitution of Canada be amended to ensure representation of aboriginal peoples, based on sexual equality, in the Parliament and Legislatures of Canada. See the Marchand-Blondin proposal for Parliamentary Reform.

10. That aboriginal people be consulted on appointment to the Supreme Court of Canada, and be invited to make representations to the Senate Committee established to consider qualifications of S.C.C. candidates.

11. That the amending formula for the constitution include the permanent granting of a seat to aboriginal peoples at all First Ministers conferences called for the purpose of discussing constitutional reform recognizing that all amendments affect aboriginal peoples.

12. That recommendations be made to ensure aboriginal representation on the Board of Directors of the Bank of Canada.

13. That responsibility for training of aboriginal peoples remain the responsibility of the federal government under section 91 of the Constitution Act, 1867, and that agreements may be made to transfer funds to provinces and territories for training of aboriginal peoples.

14. That aboriginal peoples be consulted by the federal and provincial governments on immigration agreements to ensure that there is limited immigration until such time as the aboriginal labour force is employed, and aboriginal peoples share equitably in the wealth of this nation.

15. That constitutional arrangements be made between the federal and aboriginal governments for culture and language.

16. That in the area of broadcasting, the federal government work with provinces and territories to ensure broadcasting in aboriginal languages in all part of Canada.

17. That the federal government not transfer peace, order and good government powers to provincial and territorial governments because as was evidenced at Oka, provincial governments should not be allowed to suppress the constitutional and human rights of aboriginal peoples without restraint.

18. That the federal government not transfer to provincial jurisdiction, or recognize the exclusive provincial jurisdiction in the following areas: tourism, forestry, mining, recreation, housing, and municipal/urban affaire without first consulting with and seeking the concurrence of aboriginal peoples whose rights could be adversely affected under section 35.

19. For the same reason as 18, that wildlife protection and conservation not be transferred as exclusive jurisdiction to provinces without consulting with and seeking the concurrence pf aboriginal peoples.