Aboriginal Women and the Constitutional Debates

Continuing Discrimination

By The Native Women's Association of Canada

Les femmes autochtones ont été sujettes à discrimination depuis la mise en vigueur de la Loi Européenne sur les Communautés des Premières Nations. Cette discrimination persistera si les femmes autochtones sont maintenues à l'écart des négotiations constitutionnelles. L'article qui suit soulève ces questions et souligne aussi la position des femmes quant à l'application de la Charte dans un gouvernement autochtone.

Aboriginal women have been discriminated against on the basis of sex by governments of Canada for over 100 years. Aboriginal women's struggle to end the sexual discrimination began after the enactment of the *Canadian Bill of Rights*,[1] and continues despite the advent of section 15 of the *Canadian Charter of Rights and Freedoms*.[2] With amendments to the *Indian Act*, Aboriginal women were among the first women to benefit legislatively from the *Charter*. Despite this, Aboriginal women still have not achieved sexual equality. The struggle continues, and has expanded today to involve a recognition of Aboriginal women's rights to represent ourselves in the ongoing constitutional discussions.

History of Sexual Discrimination[3]

From the introduction of the *Indian Act* into federal law in 1869,[4] Aboriginal women who married non-Indians were stripped of their legal rights, and their Indian status, banished from their communities, and barred from their families. While the *Indian Act* intruded on all aspects of Aboriginal life in Canada, Aboriginal women were most harshly restricted by the law. Not only did the *Indian Act* concern itself with whom an Indian woman married, it also allowed other Aboriginal community members to protest the paternity of any Aboriginal child suspected of having a white, or other non-Aboriginal father. This is still practised today in our communities. Such a child could be removed from the Indian registry and would not be allowed to be an Indian. This was in contrast to the treatment of men, as all offspring of Aboriginal men—legitimate or illegitimate—gained Indian status and a right to band membership.

The *Indian Act* also imposed a patriarchal system and patriarchal laws which favoured men, giving them the right to confer status and band membership, and at one time allowed only men the right to vote in band elections. By 1971, this patriarchal system was so ingrained within our communities, that "patriarchy" was seen as a "traditional trait." Even the memory of our matriarchal forms of government, and our matrilineal forms of descent were forgotten or unacknowledged.

The ongoing legal and political struggle by Aboriginal women is not only against an insensitive federal government, it is also against the Aboriginal male establishment created under the *Indian Act*. Some legal writers[5] argue that it was the federal government alone, and not Aboriginal governments, which discriminated against women. In fact, the Aboriginal male governments and organizations were part of the wall of resistance encountered by Aboriginal women in their struggle to end discrimination and they continue to ignore women's concerns and their rights.

Sexual discrimination against Aboriginal women did not end in 1985 with the passage of Bill C-31.[6] While this Bill repealed the discriminatory 'marry-out' provision in the *Indian Act*, residual discrimination remains for those whose grandmothers and great-grandmothers lost their status by marrying non-Indians. Since Bill C-31, more than 70,000 women, men, girls and boys have been added to the federal Indian registry[7] and band lists.[8] But of these, only a few have been welcomed back into their communities.

Aboriginal women want to live within their communities, but the women are excluded because there is no land, and no housing. Aboriginal women have been shut out from their communities because the band governments do not wish to bear the costs of programs and services to which the women are entitled as Aboriginals.

Aboriginal women live in the slums. Aboriginal children prostitute themselves in Canadian cities. Our Aboriginal women, young people and children are killing themselves with drug and alcohol abuse on Indian lands and in Canadian cities.

The Constitutional Debates

This tragic situation will not change without our involvement in negotiating and defining self-government and without our participation in the Constitutional discussions. So far, Aboriginal men and male organizations have not represented our interests, and they are not taking the initiative to ensure that we are given a place at the table to do what they cannot.

Aboriginal women want to take their rightful place at the constitutional table. 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 successfully argued that she had suffered discrimination because she was separated from her Maliseet culture, Maliseet language, and from her people.[9] 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.

It is our right as women to have a voice in deciding upon the definition of Aboriginal government powers. Governments cannot simply choose to recognize the patriarchal forms of government which now exist in our communities. The band councils and the Chiefs who preside over our lives are not our traditional forms of government. National, regional and band groups are not nations, and do not reflect a nationhood perspective.

The Chiefs have taken it upon themselves to decide that they will be the final rectifiers of the Aboriginal package of rights. Negotiating a right to self-government does not mean recognizing and blessing the patriarchy created in our communities by a foreign government. To Aboriginal women, this would mean chaos in our communities. We do not want this; we want the equality to which we are entitled as women.

Some Aboriginal women have said no to self-government. Some of our women do not want more power, money and control in the hands of men in our communities. It is asking a great deal to expect us, as women, to have confidence in the men in power in our communities. We do not want the creation of Aboriginal governments with white powers and white philosophies in our communities. We do not want the western hierarchal power structure which has been forced upon us. We do not want the Chieftain overlords which have been created by the *Indian Act*. Aboriginal women must be part of the constitutional negotiation process at all stages so that we can participate in the definition of the structures and powers of our governments, and end the discrimination.

One of the major problems that currently exists is that the majority of First Nations citizens living off reserve are women. Many of these women have been reinstated under changes to the *Indian Act*, but have not been welcomed back into their communities. It is these women who are particularly excluded from the process as it currently exists. Indeed, it is often the Chiefs and councillors who supposedly represent them within the national Aboriginal organizations who are refusing to allow these women to return to their communities. This means that these women cannot get directly involved in any discussions on the reserves and do not even have a right to vote in elections on the reserves. They therefore have no direct or even indirect input in discussions whether on a national or local basis. Often, their only chance to be heard is through their provincial or national Aboriginal women's associations. But, the federal government has not funded or considered the women's associations as being at the same level as other Aboriginal (male) associations. As a result, the women's associations are being kept at the fringes of the process. This could lead to a situation in which reinstated women and others living off reserve are almost completely excluded from the process which will have a profound impact on their lives and their rights.

There are also many important issues affecting Native women living on reserve. We are living in chaos in our communities. We have a disproportionately high rate of child sexual abuse and incest. We have wife battering, gang rapes, suicides, and substance abuse as elements of our daily lives. The development of programs, services, and policies for handling domestic violence has been placed in the hands of men, and this has not resulted in a reduction in this kind of violence. Another issue specific to women on reserves is the need for family law and matrimonial property laws to be strengthened to provide substantive equality rights to women living on reserves.

Moon Dreams, Banakonda Kennedy-Kish

Aboriginal Women and the Charter

Our Aboriginal 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:

As Indian people we cannot afford to have individual rights override collective rights... The Canadian Charter is in conflict with our philosophy and culture.

The opinion is widely held that the *Charter* is in conflict with our Aboriginal notions of sovereignty, and further that

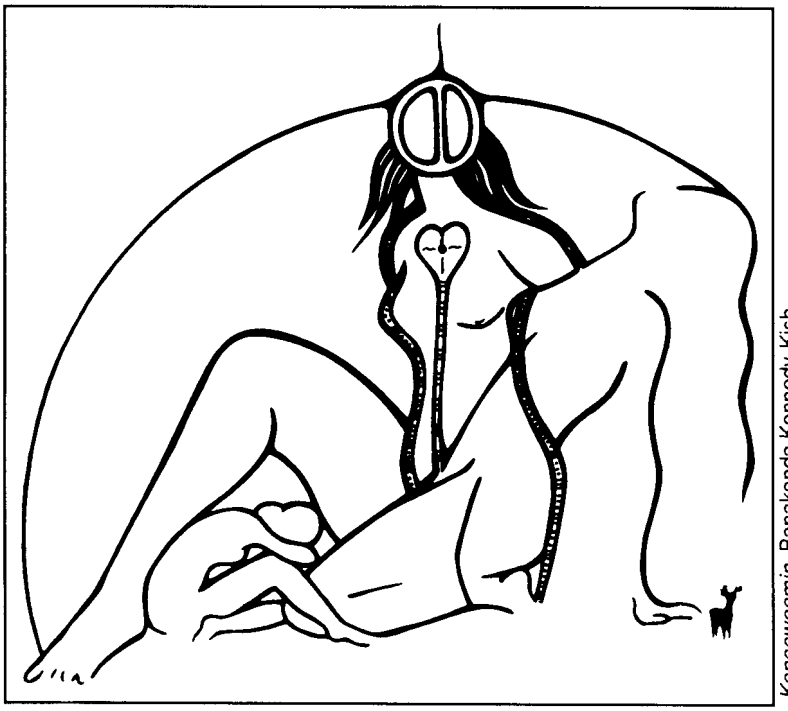
the rights of Aboriginal citizens within their communities must be determined at the community level.

The *Charter* is an individual rights based document recognizing and guaranteeing fundamental human rights to Canadians. Fundamental rights and freedoms are also outlined 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 legal, political and constitutional rights which attach to human beings because they are human beings. The Native Women's Association of Canada supports individual rights. Aboriginal women are human beings whose rights cannot be denied or removed at the whim of any government. These views are in conflict with many Aboriginal leaders and legal theoreticians who advocate Canada's recognition of sovereignty, self-government and collective rights. It is the unwavering view of the male Aboriginal leadership that the 'collective' comes first, and that it will decide the rights of individuals.

As Aboriginal 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.

This is why the application of the *Charter* should not be left to Governments. The federal government has mistreated us as women for over 100 years. If there is a legacy we will leave for women in the future, it is to ensure women's enjoyment of all the rights granted to us by the United Nations. We want our First 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.

If the *Charter* does apply to Aboriginal governments, there is great concern that they will be given section 33 rights which grant a government the power to intentionally violate the rights protected by sections 2, 7 and 15 of the *Charter*. The override powers in section 33 should not be allowed to federal and provincial governments, let alone to Aboriginal governments.



Keneeweemin, Banakonda Kennedy-Kish

As elsewhere in Canada, the law of privacy generally protects homelife from close scrutiny by the State. Often that means women and children are subject to physical, psychological and sexual abuse within the home, including wife battering, incest and other crimes which usually go undetected and unpunished by the State. By their nature, these crimes are violations of a victim's section 7 rights to life, liberty and security of the person. We do not want to sanction the loss of these rights by allowing governments to pass laws which do not respect these rights.

While there are many groups who would like to see their *Charter* rights strengthened in this current round of Constitutional debates, as Aboriginal women, we are the only ones who actually risk the total loss of our *Charter* rights. This is not acceptable.

Conclusion

After 400 years of colonization, Aboriginal communities, Aboriginal families, and Aboriginal structures are devastated, and change of the systems must occur. But, there will not be self-government in our communities without the support of Aboriginal women. Our male Aboriginal leaders must realize that they cannot negotiate self-government without us, any more than they can leave out the elders, the young people and the people living in urban centres.

As women, we are the keepers of the culture. We want to raise healthy children. We want community decision making. We want consent powers. We want all people in the communities to decide upon their form of government. We want those Aboriginal women who are still banished from their communities to have a vote, some land, and a house in their homeland, in the community in which they were born. There are those among the Chiefs who would deny us a voice, who would deny us a place and those who wish we would simply go away until they have settled this political business. We are not going to go away. Our male leaders must make a place for us at the bargaining table.

The fact that the existing power structure and process does not seem concerned with ensuring our full and constant participation leads many of us, living both on and off reserve, to believe that we will not be heard and our rights will not be protected in the negotiations for self-government. As Native women, we must be fully involved in negotiations on self-government. Our voices must be heard.

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[1] S.C. 1960, c.44, reprinted in R.S.C. 1970, App. II.

[2] Part I of *Constitution Act 1982*, as enacted by *Canada Act* (UK) 1982, c. 11, Schedule B.

[3] Much of this portion of the paper is taken from an article by Teressa Nahanee, entitled "Indian Women, Sexual Equality and

the Charter" to be published by McGill-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.

[4] *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.

[5] 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.

[6] R.S., c. 1-6 as am. c. 10 (2nd Supp.); 1974-75-76, c. 48; 1978-79, c.11; 1980-81-82, cc.47, 110; 1985, c.27.6.2.

[7] This is 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.*

[8] 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.

[9] (1982) 1 C.N.L.R. 1 (United Nations committee on Human Rights).

1917 — RCMP infiltrates suffragist movement.

Dawna Gallagher

The Native Women's Association of Canada was created in 1974 to enhance, promote, and foster the social, economic, cultural and political well-being of Aboriginal women. NWAC is the national representative of thirteen provincial and territorial organizations. It has always been NWAC's objective to provide a national voice for Aboriginal women, and to address issues of importance to Aboriginal women.