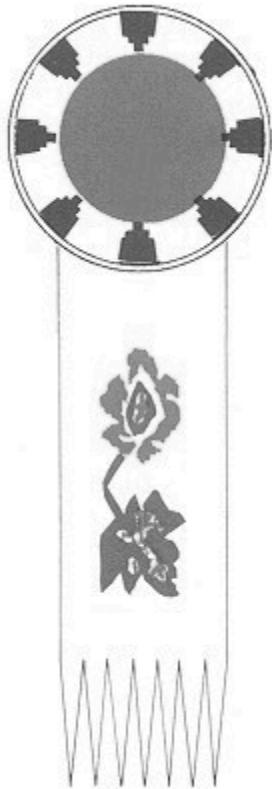


# Native Women's Association of Canada



## PROPOSED AMENDMENTS TO THE CRIMINAL CODE UNDER BILL C-49

## THE PERSPECTIVE OF ABORIGINAL WOMEN

~ May 1992 ~

Presentation before the Legislative  
Committee on Bill C-49

*An NWAC Presentation*

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# **PROPOSED AMENDMENTS TO THE CRIMINAL CODE UNDER BILL C-49 - THE PERSPECTIVE OF ABORIGINAL WOMEN**

While the experience of Aboriginal women may be similar to other Canadian women, there are several aspects which distinguish the experience of Aboriginal women who have been sexually assaulted from those of other Canadian women. It is the purpose of this presentation to inform the Committee of these differences and how Bill C-49 is relevant for Aboriginal women.

In general, the Native Women's Association of Canada supports Bill C-49 as it attempts to address many inadequacies in the law of sexual assault. Most of these inadequacies have resulted from reliance on the common law to define "consent" and to determine what is "relevant" in a sexual assault case. Other problems have arisen as judicial discretion, which ideally is to be exercised impartially, has in reality been influenced by bias and reliance upon unacknowledged stereotypes of complainants.

## **1. Violence Against Aboriginal Women**

Current studies indicate that while one in ten Canadian women will be beaten or sexually assaulted in her lifetime, the statistics are much higher for Aboriginal women. It has been estimated that eight in ten Aboriginal women will be beaten or sexually assaulted in their lifetime. While fear of assault may be a real part of the lives of most Canadian women, being assaulted is too often just a daily reality for Aboriginal women.

Aboriginal women have been subject to male violence at all times in history. While Aboriginal women were given a great deal of respect and honour in pre-European contact times, there has always been the presence of use of force against women. Prior to European contact, these acts were aberrations which were generally recognized as such and were dealt with as deviant and unacceptable. The violence was seen as a threat to the health and security of the entire community. In rectifying the wrong done, victims and their families were compensated - usually by the offender; and in many cases this compensation formed the basis of his punishment. Efforts were made to heal both the victim and the offender. If offenders were not rehabilitated, they could be banished from their communities.

After European arrival, the position of Aboriginal women was changed dramatically. The strengths of Aboriginal women were denied, or degraded and the culture which held women in high regard was destroyed. Eventually, women's participation in their communities was effectively eliminated with the passage of the Indian Act, and the imposition of Band Council governments in which only men could vote and be elected.

As time passed, most Europeans grew to despise the Aboriginal peoples. Women, being perceived as the weakest members of Aboriginal communities were treated worst. The perception that the first inhabitants of this land were "savages" gave support to the notion that we were less than human and that, as women, we were there for the taking.

Unfortunately, this image of women continues today in the minds of many people. The brutal killing of Helen Betty Osborne in Manitoba in the 1970's gives just one example of how these stereotypes have caused great harm to Aboriginal women. Unfortunately, the sexual assault and vicious killing of Helen Betty Osborne was not the only violence suffered. It took 15 years before one of the four men responsible for her death was charged and convicted for her murder. The effect that this has on the Aboriginal community as a whole, and on Aboriginal women particularly, is devastating.

It is important to remember that while many of the women living in Aboriginal communities are victims of violence perpetrated at the hands of Aboriginal men, Aboriginal women are subject to the abuse of the larger non-Aboriginal male population. While Helen Betty Osborne is the most well-known woman who was sexually assaulted by white men, there are many others who do not receive the same kind of notoriety.

## **2. Un-Reported Assaults**

Aboriginal women have only begun to speak publicly about the levels of violence that must be endured in our daily lives at the hands of our fathers, brothers, uncles, husbands, neighbours, acquaintances and strangers. This new voice is growing stronger, but there are still many individual women who are unable to speak or act out against the violence they endure. To our knowledge, no studies have been done to assess the level of violence against Aboriginal women compared to the number of crimes they report to the police. However, it is our understanding that far fewer Aboriginal women will report the occurrence of a sexual assault, or other assault, to the police than will non-Aboriginal women.

This Bill attempts to encourage the reporting of assaults by extending protections of a woman's privacy so that past sexual conduct will be generally recognized as irrelevant to a court proceeding. It is encouraging that this Bill attempts to actively alter the present condition of under-reporting crimes of sexual assault and eliminates the use of irrelevant evidence at trial. This is the first step to codifying an intention to accord women who have been assaulted the respect they seek and deserve from the justice system. While this is necessary, it will not likely have a great effect upon Aboriginal women who face particular obstacles to reporting this offence. These obstacles generally arise from a mistrust of the justice system.

Aboriginal women, who have been sexually assaulted by Aboriginal men, will often choose not to notify the police following the assault as they do not trust the non-Aboriginal police force and the Canadian justice system as a whole. They have been alienated from the Canadian system of justice and do not feel that there is any benefit for them to bring non-Aboriginal people to their aid. Generally, it has been perceived that non-Aboriginal people would merely create further problems for Aboriginal women rather than providing solutions to their problems. This is clearly shown in the following passage:

*The historical experience of Native people makes them reluctant to reveal sexual abuse problems to outsiders. Fear of bringing in alien, outside white others creates pressures to keep the family secret. The R.C.M.P., social workers, (who are seen as “baby stealers”), and the legal justice system can all be seen as oppressors rather than helpers.<sup>1</sup>*

The experience of Kitty Nowdluk in the Northwest Territories gives one recent example of the insensitive treatment Aboriginal women face by the justice system. In June 1990, Ms. Nowdluk, an Inuk woman from Iqaluit, was beaten and raped by an Aboriginal man. Shortly after the assault, Ms. Nowdluk flew to B.C. to be with her fiancé. When she was served with a subpoena to appear in Iqaluit to testify against her attacker, her fiancé contacted the R.C.M.P. for more information. He was told that nothing would happen to her if she did not go. Although defence counsel had informed the Crown that his client would plead guilty, Ms. Nowdluk was arrested so that she could appear to testify, if necessary, at the preliminary inquiry. She was locked up in five different jail cells in six Canadian cities over the period of a week and was finally taken to court in the same van as her attacker. All this was done to her, only to finally be told that her attacker had pleaded guilty and she was not required to testify.

Ms. Nowdluk believed this would not have happened to her if she had been a white woman. Other Aboriginal women either experience similar treatment or fear that similar treatment will be extended to them. As a result, Aboriginal women fear the system, whose purpose is to protect, not further assault, victims.

When Aboriginal women are assaulted by non-Aboriginal men, they often choose not to report the incident to the police because they fear they will not be believed, and because of the different power balance that often exists between non-Aboriginal men and Aboriginal women. It is felt that the police, or judges (who are usually men) would more likely relate to, or understand, a male accused, and that they would be less likely to believe the woman.

If society has an interest in encouraging the reporting of offenses, as indicated in s. 276(3)(b), this Bill should take into account that more is required to encourage Aboriginal women to file complaints with the police. There is a great need for an active policy to encourage Aboriginal women to come forward. This would require assurances that they can expect fair and unbiased treatment by those within the criminal justice system. One step to achieving this could be the inclusion of a provision in the Preamble, as suggested by the National Action Committee on the Status of Women, which reads:

*Whereas the Parliament of Canada recognizes that vulnerability to sexual assault and diminished access to justice are directly related to social inequalities, such as those experienced by Aboriginal women, black women and other women of colour, elderly women, immigrant women, lesbians, refugee women, sex trade workers, women without full citizenship, disabled women and children.*

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<sup>1</sup> T. Martins et al. *The Spirit Weeps: Characteristics and Dynamics of Incest and Child Sexual Abuse with a Native Perspective* (Edmonton: Nechi Institute, 1988) at 115.

While this may be of some assistance, this would not likely be enough to address Aboriginal women's concerns, as it does not challenge racist and sexist attitudes generally. It does not require all players in the criminal justice system to act in unbiased ways. Much more work must be done to educate people working within the justice system about these problems. Unfortunately, we do not see this Bill as being able to fully address these concerns.

### **3. Reliance Upon Stereotypes**

Another policy reason behind Bill C-49 is the attempt to recognize and eliminate the reliance upon negative stereotypes which affect a woman who has been sexually assaulted.

Aboriginal women are doubly damned by stereotypes. As women, we are often subject to the presumption that we lie about being assaulted, that we are emotionally unstable, that we are spiteful and seek revenge, or that we provoked the attack. As Aboriginal women, we are also subject to the presumption that, if we had been drinking, we are drunks and would not have been assaulted if we were sober. There is also still a perception that Aboriginal women are available to provide sexual gratification to any man who demands it of them. People still cannot rid themselves of the notion that there are “good girls” and “bad girls”. People who think this way perceive that Aboriginal women, by their very nature, are “bad girls”.

In recent years, Inuit women have been subject to other judicial proclamations that incest is normal in Inuit societies, that a girl is ready for sex when she begins to menstruate, and that it is acceptable to have sexual relations with young girls. These are stereotypes not identified by Justice L'Heureux-Dubé in her dissenting decision in R. v. Seaboyer and Gayme, but must also be recognized and corrected.

Another stereotype that is detrimental to women is that which defines a rapist as a violent stranger with a criminal record and/or a mental imbalance who uses excessive violence to obtain sexual gratification. It is time this stereotype is also done away with. Any man who is insensitive to a woman's needs, desires and fears can be a rapist.

All these biases should be acknowledged and made clear in s. 276(3).

### **4. Defence of Mistaken Belief in Consent**

The Native Women's Association of Canada supports the proposed s. 273.2 which would hold a man to a higher standard of care than current case law has established. It is only common sense that men should determine whether true consent is present. Women have too long paid the price for men's refusal to ascertain whether their partner is a willing participant.

## 5. Conclusion

Despite the many positive aspects of this Bill, there is a very real question of how this Bill, if law, will affect Aboriginal women who are assaulted. Studies have indicated that a large number of Aboriginal men accused of criminal offenses are advised to plead guilty. Other Aboriginal accused people believe that if they have committed an offence they must plead guilty, or be forced to commit the more fundamental offence of lying. This Bill does not deal with the process involved where an accused pleads guilty. It only relates to the process leading up to a finding of guilt. This being the case, this Bill will not affect many Aboriginal complainants.

This is not to say that this Bill would have no effect upon Aboriginal women. It will benefit those Aboriginal women whose attackers are non-Aboriginal men or those whose attackers are aware of their rights within the Canadian criminal justice system, or those who have competent counsel to advise them of these rights.

If passed into law, this Bill will be of great benefit to Canadian women. It is, however, an open question how this Bill, in reality, will affect Aboriginal women. Given the current constitutional negotiations and the recognition of an inherent right to Aboriginal self-government, we are very uncertain of the future for Aboriginal women in Canada. We do not know if the Criminal Code will continue to apply in Aboriginal communities, or if new justice systems and courts will be established.

Many Aboriginal people believe that it is impossible to work with or within the Canadian justice system as it is a foreign system composed of rules which do not easily mesh with the Aboriginal perspective of "justice". Many believe that the only alternative for Aboriginal people is to return to our traditional ways and traditional systems of justice. If traditional systems are adopted to resolve criminal matters, this Bill will have no effect whatsoever on many Aboriginal women. Whether we return to traditional systems must be determined by Aboriginal peoples, including women. In making our decision, we will have to consider carefully the benefits and costs of doing so. If this Bill becomes law, as we hope it will, we will have one more factor to weigh into the equation.

While this Bill may not address many of the particular concerns of Aboriginal women, the Native Women's Association of Canada supports the current bill for its clarity of purpose and structure. In the past, we have seen too often that the good intent of legislators has been ignored or perverted by defence counsel, crown attorneys and judges. We hope that this Bill can maintain its clarity so that judicial interpretation does not in any way weaken the aim of this Bill.