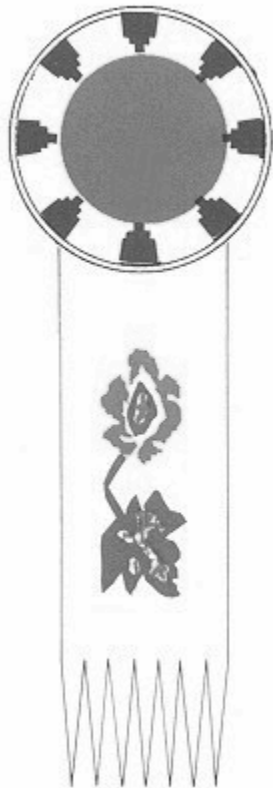


Native Women's Association of Canada



FIRST
NATIONS/METIS
HUMAN RIGHTS LAW:

THE HISTORY OF
NWAC'S POSITION &
OPTIONS FOR
FUTURE ACTION

~ March 18 - 22, 1988 ~

Special Assembly

An NWAC Special Assembly

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1. Introduction

Over the past several years, the NWAC has developed and refined its position on self-determination, the constitutional process (which ended in March, 1987), and the closely related matter of the Canadian Charter of Rights and Freedoms (hereafter Canadian Charter). It may be helpful, for those of you who are new, to provide (or for the others, to refresh your memories) a brief review of the history of the NWAC position on these matters which are so important to the future of our Nations.

2. Background of NWAC's Position

From 1982 - 1985, the focus of NWAC activity in the context of self-government was on the issue of sexual equality. The NWAC was successful in 1983, (in conjunction with other Aboriginal organizations) in securing an amendment to the Canadian Constitution to guarantee that the existing Aboriginal and Treaty Rights in section 35¹ of the Canadian constitution, would be applied equally to male and female Aboriginal persons. From 1983 to 1987, there was a great deal of discussion around whether or not this amendment ensured equality between Aboriginal men and women with respect to all rights and freedoms they enjoy or only those existing Aboriginal and Treaty rights in section 35. The question which concerned the NWAC was whether or not under self-government agreements, male and female persons would be treated equally and enjoy rights to reside in the community, educate their children, vote, etc. This issue was debated on and off from 1984 - 1987 at constitutional meetings, Aboriginal summits and within the NWAC.

Eventually, in 1985, all national Aboriginal organizations agreed to a draft amendment which would guarantee all rights and freedoms (including those in the Canadian Charter) equally to male and female Aboriginal people. This amendment would be to section 25 of the Charter and read:

Notwithstanding anything in this Charter, all rights and freedoms of the Aboriginal peoples of Canada are guaranteed equally to male and female Aboriginal persons

¹ Section 35, as you recall, reads: *The existing Aboriginal and treaty rights of the Aboriginal people of Canada are hereby recognized and affirmed.*

This amendment was never adopted during the constitutional discussions, but it did focus attention to two basic issues:

1. Whether Aboriginal governments would be required to treat women equally under self-government agreements; and
2. What the status of the Canadian Charter of Rights and Freedoms was in relation to existing and future Aboriginal governments.

The first issue was of concern because of the tragic experience of women under the Indian Act and the extent of discrimination and unfair treatment experienced by women in Aboriginal communities. After the 1985 amendments to the Indian Act, there was still no assurance that women would be treated fairly in communities and, indeed, some Bands took a stronger discriminatory stand and denied women the privilege of returning to their communities after they were reinstated to Indian Status. Those who could return have experienced problems with housing, education, and receiving community money (e.g. per capita payments). Problems we are all only too familiar with.

From the history of NWAC's activities, it is clear that women have been mistreated mainly in the following three areas:

- a) citizenship - including entitlement, as well as rights to full enjoyment of citizenship benefits such as community residence, housing, resource sharing, and education for children;
- b) employment - including sexual harassment and discrimination, as well as wrongful dismissal;
- c) property - including unfair matrimonial property rules. Within each area of concern, women are most frequently victimized.

These problems are related to one underlying factor – the Indian Act. NWAC has been concerned about these problems, but also ensuring respect for children and the elderly in all communities.

The second issue (the status of the Canadian Charter) is closely related to the first but more focussed on what should be done to improve the human rights situation (especially of women but of all our people) in communities. During the constitutional discussions, many people proposed that the Canadian Charter held the solution to human rights violations in Aboriginal communities. It was argued (mostly by provincial governments) that Aboriginal women who feel mistreated by their communities should seek redress by relying upon the Canadian Charter's provisions. The Canadian Charter, as you know, is a catalogue of individual human rights guarantees for Canadian society. It guarantees the right to vote, to associate, to equality, etc. However, NWAC and other Aboriginal organizations began to analyze whether the provisions of the Canadian Charter were consonant with Aboriginal rights and Aboriginal perspective. For example,

the Assembly of First Nations, in their Memorandum Concerning the Rights of the First Nations of Canada and the Canadian Constitution, of 1982, stated:

"As Indian people we cannot afford to have individual rights override collective rights. Our societies have never been structured in that way, unlike yours, and this is where the clash comes If you isolate the individual rights from the collective rights, then you are heading down another path that is even more discriminatory The Charter of Rights is in conflict with our philosophy and culture and organization of collective rights".

The Metis National Council questioned the application of the Canadian Charter and proposed that it would not apply to Metis communities and instead that a Metis Rights Commission or a Metis Peoples Court would be set up to ensure that "every individual member of each Collective is equally entitled to the Rights and Benefits which are guaranteed to that Collective, without discrimination on the basis of religion, sex, age, marital status, or mental or physical disability". Their wording resembles the actual wording of section 15 of the Canadian Charter.

NWAC also questioned whether the Canadian Charter should be invoked by women to challenge Aboriginal laws (including Band Council by-laws). The NWAC approach to the Canadian Charter developed out of a resolution on self-determination which had been adopted at the 12th Annual Assembly and unanimously agreed to. This resolution sets out the basis of the organization's approach to matters such as human rights. It reads as follows:

WHEREAS the NWAC has yet to adopt our own position on "self-determination";
and

WHEREAS it is believed that, as women on Many nations, we must assume our responsibility in providing proper direction to our spokespersons in our pursuit of recognition of the right to exercise the powers and authorities of our governments;
and

WHEREAS it is important for NWAC, as a first step, to adopt basic principles that reflect our beliefs, values and systems of government upon which our position could be developed:

BE IT THEREFORE RESOLVED THAT the following Declaration of Principles is adopted by this 12th Assembly;

"We, the women of Many Nations, are citizens of sovereign governments that have never consented to relinquishing our inherent rights. We hereby declare:

1. That mother earth be respected and honoured as our sacred connection with our ancestors;

2. That we still control our lands and we assert our Aboriginal right to regain control of our land that has been stolen, taken without our full knowledge, or in an otherwise unfair way;
3. That our Nations be governed by our customary law first and foremost and not by the laws of a foreign government;
4. That we respect the tradition of the extended family and care for our children by regaining control over our education, health and other community needs;
5. That we are committed to a co-operative economic base where citizens are not exploited for the financial gain of individuals but where community-based projects are initiated and traditional occupations such as hunting, trapping, and fishing are encouraged and respected.
(August 14, 1986 - Whitehorse, Yukon)

This resolution, like all Assembly resolutions, is basically the 'law' or guiding principles of NWAC. Point 3 is the most important part of the resolution in terms of the Canadian Charter. It stipulates that our Nations must follow our customary laws first and foremost and not the laws of a "foreign government". Customary law, or often called "traditional" law, are those genuine principles and beliefs of a particular Nation which have enduring importance for Aboriginal society and form the basis of community organization. The history of NWAC's position on the Canadian Charter can only be understood in relation to this important resolution and the emphasis on customary law.

NWAC considered this resolution, and the nature of the Canadian Charter and the nature of Aboriginal Rights in eventually coming to a position on the development of an Aboriginal Charter.

a) The Nature of Aboriginal Rights

What is the nature of Aboriginal rights and how do they differ from human rights in the Charter? Aboriginal rights - reflective of our customary ways and our difference from Canadian society - are fundamentally collective in nature. They depend on the existence of a distinct group, or to use the language of international Law, a "People". They are the rights of distinct Peoples to land, to a unique form of government, to practice traditional occupations and to ensure the survival of a distinct way of life. Whether or not "Aboriginal rights" in section 35 of the Constitution includes self-government is dubious under Canadian law. The focus of the Constitutional discussions was to settle on a way of specifying self-government in section 35. These discussions, of course, failed to do so when the process came to an end in March, 1987. Nevertheless, all Nations have asserted their right to self-government or self-determination regardless of whether the Canadian Constitution recognizes it. A case has also been made for recognition of this right for Aboriginal Peoples under international law which should not be under-estimated.

By entrenching Aboriginal rights in section 35 of the Constitution, another way of governing (if not complete self-government under Canadian law) was recognized. A way of governing based on our history, the needs of our people, and to ensure our survival within the dominant political and legal system of Canada. This must allow for us to recognize and develop our law concerning, among other things, education, culture, land, child welfare, legal system, economy, and human rights of citizens. These "collective" or natural community rights were very different than the rights in the Canadian Charter which is why they were placed in Part II of the Constitution entitled "Rights of Aboriginal Peoples of Canada" and not Part I "The Canadian Charter of Rights and Freedoms".

b) The Nature of Canadian Charter Rights

What is the nature of rights in the Canadian Charter? Unlike Aboriginal rights, the human rights guarantees in the Canadian Charter are extended to individuals and not groups (although there is a provision on group language rights). Canadian Charter guarantees are basically for an individual to protect him/herself from government abuse. The history and spirit of rights in the Charter is very much individualistic and not for the purpose of protecting a certain community identity like Aboriginal rights. In fact, the whole history of 'rights' in the European context developed out of concern for property (individual ownership) rights. A history which is dramatically different from our collective and communal based cultures where Mother Earth cannot be owned by an individual. The Charter reflects a European - and now Canadian - perspective on rights. Its provision, although vague and general, will be interpreted in light of the Canadian perspective on rights. Furthermore, the content of the rights in Canadian Charter are different than those which would likely be identified by Aboriginal communities.

When section 35 of the Canadian Constitution was initially drafted, everyone realized that these collective rights may not exist easily alongside certain Canadian Charter provisions. Individuals, both Aboriginal but more threateningly non-Aboriginal, could conceivably challenge Aboriginal laws and programs and erode Aboriginal rights. For example, Section 15 of the charter guarantees citizens of Canada equality regardless of race or ethnic origin. A non-Aboriginal person may attempt to use this provision to challenge Aboriginal special rights to land or resources or taxation preferences. In this latter case, such an action is now before lower courts. If successful, these challenges could erode Aboriginal rights (which in Canadian law are already on unsteady ground) and lead to greater assimilation by the dominant legal and political system. Some of you may be familiar with the Twinn action which may provide an indication of the extent to which collective rights of Aboriginal communities will be undermined by individual rights of the Canadian Charter for all of the wrong reasons (the federal government is relying upon the Charter and arguing the rights of individual take precedence over customary Aboriginal law).

The drafters of Section 35 recognized this problem and sought to shield Aboriginal rights from erosion by the Canadian Charter through a special provision on interpretation in section 25 the Constitution, Part I. It reads:

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...

c) **Balancing Individual and Collective Rights**

Has Section 25 in fact shielded Aboriginal rights? The answer is, at this point, a qualified no. Although there have been few cases which have reached a superior court, (again, the Twin case will have to decide these very questions), in a 1986 decision of the Federal Court of Canada, there was a strong statement made that irrespective of section 25, individual rights (Canadian Charter rights) will have to be weighed and balanced against collective rights (Aboriginal rights) and because of the paramount importance of individual rights in Canadian society, they (individual rights) will take precedence. Mr. Justice McGuigan stated:

In sum, in the absence of the legal provisions to the contrary, the interest of individual persons will be deemed to have over collective rights. In the absence of law to the contrary, this must be as true of Indian Canadians as of others. (Boyer v. Canada, 1986 65 N.R. 305).

Therefore, section 35 rights will be limited by the Charter in spite of section 25. The court is saying that the dominant views of Canadian society must be considered and, in some cases outweigh, the Aboriginal rights of which are community-based.

This is a significant practical problem because the Canadian Charter is a product of European culture and law. **It is no more our law or reflective of our values, than the Indian Act**. Canadians view the Canadian Charter as the ultimate expression of their legal and political rights, but do we?

Moreover, Canadian courts, as we are so aware with the Marshall inquiry and the litany of other cases, seemingly always choose their law and their values over Aboriginal customary law. Even when Aboriginal rights are recognized by courts, such as land rights, it is in relation to Canadian common law. If Canadian Charter provisions override Aboriginal customary law (even if expressed through so-called "contemporary" structures) then the power of our traditional law to maintain and promote social harmony is lost: Canadian judges and not the wisdom of our spiritual teachers will be the guiding force in the community. First Nations and Metis women responded to this challenge and began formulating a position which would prevent the Canadian Charter from undermining Aboriginal rights and law.

d) NWAC's Response

NWAC rose to this challenge with the Canadian Charter as early as 1982. The National president raised it at Constitutional Working Group Meetings within the Assembly of First Nations and elsewhere. Just prior to the final First Minister's Conference on Aboriginal Rights, the NWAC Board of Directors held a workshop on the Constitution at which the NWAC position on the Canadian Charter was discussed during one complete day (February 28, 1987). At this workshop, the NWAC position on self-determination (see page 4 herein) from the 12th Annual Assembly was re-affirmed. Following the discussion and consideration of a background and position paper presented to the Board by the NCAR (National Committee of the Board on Aboriginal Rights), a position on the Canadian Charter was developed. It reflected the NWAC resolution on self-determination and the Board's concern about the issue in terms of the constitutional negotiation process. The Board resolved to reject the Canadian Charter to explore the development of an Aboriginal Charter or Charters which would be based on Aboriginal values and customs. The Board also resolved that constitutional funds were to be directed towards developing an Aboriginal Charter for distribution to Aboriginal governments so that if and when self-government was negotiated, it could form part of the basic laws and principles of the agreement. This position was sent-out in a letter to the National Aboriginal organizations prior to the 1987 First Minister's Conference (FMC).

As you know, the 1987 FWC was a failure in that no draft amendment on self-government could be agreed upon by the provincial or federal governments despite a united Aboriginal position. It is noteworthy that the application of the Canadian Charter to Aboriginal institutions was raised in the Federal government draft which proposed that the Charter would apply to the extent that it was appropriate to all Aboriginal self-governing institutions:² An arguably stronger extension of the Canadian Charter values into Aboriginal communities.

The Board resolution on the Canadian Charter was reviewed by the Executive Committee at their meeting of May 11-13, 1987, and it was decided to commission a comprehensive background study by the Canadian Human Rights Research and Education Centre which could provide the groundwork for an eventual NWAC draft Aboriginal Charter modelled on our "First Nation Citizenship Code". The background work focussed on three main areas which were felt to be essential:

- a) a review of Aboriginal rights and their collective nature with respect to the potential threat of the Canadian Charter;

² *The federal draft include the following provision.*

35.04 (1) The Canadian Charter of Rights and Freedoms applies, to the extent that its application is appropriate in the circumstances, to all legislative or governmental bodies or institutions exercising the right to self-government in respect of all matters within their authority.

- b) a thorough review of all international (U.N. and regional) human rights instruments to ascertain what guidance, if any, can be gained by borrowing from international standards; and
- c) a review of dispute resolution mechanisms (both Aboriginal and non-Aboriginal) from which a model can be drawn to settle human rights disputes in communities.

The project report was delivered to NWAC in October, 1987 and is available to those PTMAs which would be interested in reading it (approximately 150 pages).

We are now at the point where a decision on the future direction of this NWAC Aboriginal Charter project should be made.