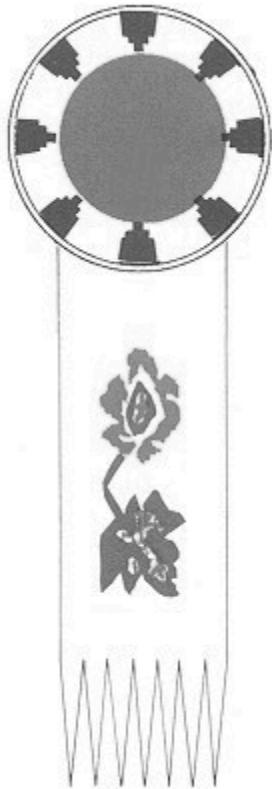


# Native Women's Association of Canada



## NATIVE WOMEN & THE CHARTER

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# NATIVE WOMEN AND THE CHARTER

For an explanation of the different sections of the Canadian Charter of Rights and Freedom, please read the discussion paper called "The Canadian Charter of Rights and Freedoms, A Plain Language Version".

## 1. The Historical Importance of the Charter of Native Women

The Canadian Charter of Rights and Freedoms, which is usually called "the Charter" has had very important effects on the lives of native women.

Before the Charter existed, Indian women were discriminated against under the Indian Act. As most people know, the Indian Act used to provide that Indian women who married non-Indian men lost their Indian status. Indian men who married non-Indian women did not lose their status, rather the non-Indian women gained Indian status.

Indian women fought this discrimination in several court cases. The best known of these cases was the Lavell case in which Mrs. Lavell claimed that the Indian Act discriminated against her on the basis of sex and that this sex discrimination was not legal. When Mrs. Lavell went to court, many of the Indian Associations such as the National Indian Brotherhood (now called the Assembly of First Nations) and the provincial Chiefs' associations went to court to support the government and argue against Mrs. Lavell.

Mrs. Lavell lost her case. In, 1974, the Supreme Court of Canada decided that, although the Indian Act did discriminate against Indian women, this discrimination was legal because Parliament (the federal government) had the power to make laws defining who is an Indian and there was nothing to stop it from discriminating against women in its definition.

This situation changed when the Charter was passed. The Charter limits the power of the federal and provincial governments. The Charter was passed, and most of it came into force in 1982. However, section 15 of the Charter, which guarantees equality, did not come into force until April 17, 1985. The reason for the three-year delay in bringing section 15 into force, was that the federal and provincial governments knew that there were laws in force which were discriminatory, and they wanted to have enough time to change these laws so that they would not be declared illegal by the courts. One of the most famous of these discriminatory laws was, of course, the Indian Act.

The Indian Act was changed in 1985. The law which changed the Indian Act was called Bill C-31. As a result of Bill C-31, the definition of who could be an Indian was changed and the women who had lost their status under the old Indian Act were given back their legal status as Indians and Band Members. Their children were also recognized as Indians.

Since the Charter came into force, the federal and provincial governments no longer have the power to discriminate against women. The reason the old Indian Act was changed was because the federal government knew that section 15 of the Charter would start to apply on April 17, 1985 and they knew that if they didn't change the parts of the Indian Act which discriminated against women, the courts would decide that those sections of the Indian Act were illegal because they violated section 15 of the Charter.

This is why we say that the Charter has been very important for native women. Without it, it might have taken many more years to get the old Indian Act changed.

## **2. The Charter Reflects Some International Standards**

There are a number of basic human rights which most nations in the world have agreed should be protected. Many nations have signed international agreements promising to protect these rights within their own countries. Canada is one nation which has signed many of these agreements.

Nations which do not respect these basic rights are often criticized by other nations. Generally, the kinds of rights which are protected under the Canadian Charter of Rights and Freedoms are basic human rights which are also recognized in international law. There are also some kinds of rights which many nations have agreed should be protected but which are not included in the Canadian Charter. For more information on the kinds of rights which are not protected by the Charter, and the proposals which are being suggested to add some of these rights to the Canadian Charter, please read the discussion paper called "Native Women and the Canada Package".

Individuals and groups who feel that their rights under international law are being violated by the governments in the countries where they live can, under certain circumstances, have their complaints heard by an international organization. For example, in 1977, Sandra Lovelace, a Maliseet Indian who had married a non-native and lost her status under the old Indian Act, took her complaint to the international Human Rights Committee.

The Human Rights Committee made its decision in 1981. For technical reasons they did not decide the issue of sex discrimination in the old Indian Act. But they did decide that since Sandra Lovelace was not allowed to reside on her reserve, she was being denied her right, as a member of a minority, to enjoy her culture, her religion and the use of her language in community with others of her group. This is a right which appears in the International Covenant on Civil and Political Rights.

Although an international organization like the Human Rights Committee cannot force a nation to change its laws, its findings are public and can be useful because sometimes they embarrass the government of a nation to the point where it does take action to correct the situation.

### 3. Balancing Individual and Collective Rights under the Charter

The Charter is often described as a document which guarantees certain rights of individuals, but which does not protect the rights of groups of people who live together as a society. The rights of a group of people are often called "collective rights", the rights of individuals are called "individual rights".

Some aboriginal people have said that the Charter reflects the values of non-native society in guaranteeing the rights of individuals, rather than traditional aboriginal values which emphasize the importance of the group or collective right. This is not entirely true. In fact, the Charter attempts to balance individual rights with collective rights.

In theory, every person is entitled to the rights guaranteed by the Charter. But there may be some cases in which there might be an important reason, based on a social or collective concern, for allowing certain kinds of discrimination or other forms of limits on the rights of individuals. The Charter sets out two different ways in which individual rights can be balanced with collective rights. The first is set out at section 1 of the Charter which states:

***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.***

This section basically means that in some cases, the individual rights guaranteed in the Charter may be limited if it can be shown that the values and principles of society will justify those limits.

There have been many court cases in which section 1 has been discussed. For example, one case involved a law passed by the government of Quebec which forbid television advertising aimed at children. The toy companies, which wanted to be able to advertise their toys during children's television shows, claimed that this law violated their right to freedom of expression guaranteed by sub-section 2(b) of the Charter.

In this case, the Supreme Court of Canada decided that, although it was true that the law limited the right of the toy companies to freedom of expression, this limit was justified under section 1 of the Charter because the law was aimed at preventing the companies from taking advantage of children who are particularly vulnerable to manipulation. The Court decided that this law was valid even though it limited the companies' rights.

So, in fact, in many cases which are about the rights guaranteed in the Charter, the courts will use section 1 of the Charter to balance individual rights against collective social concerns.

There is another way in which governments can limit or do away with rights which individuals have under the Charter. This is through the use of section 33 of the Charter. The opening paragraph of section 33 states:

***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.***

Section 33 of the Charter allows the federal and provincial governments to pass laws which violate some of the rights guaranteed in the Charter under certain circumstances. In order to do this, the government must clearly state in the law that it is being passed "notwithstanding", or "in spite of", the Charter.

Other paragraphs in section 33 set out the rules for using this power. The declaration that the law, or the part of it, which was passed "notwithstanding" the Charter is only effective for five years.

After the five year period, if the "notwithstanding" declaration is not passed again, it no longer has any effect. In this way, any deliberate violation of the rights guaranteed in the Charter is only good for five years at a time and must be reviewed at least every five years by Parliament or the provincial legislature which passed it to see whether it should be continued. This forces public review of any deliberate Charter violation.

For example, in December 1988, the Quebec government used section 33 of the Charter to pass legislation which violated section 2 of the Charter (freedom of expression) by requiring that all signs posted in public must be in French only. This was done because the government felt that the promotion of the French language in Quebec, which is a collective right, was more important than an individual's right to freedom of expression. This law is only in place until December 1993 at which time there will have to be another debate in the legislature to decide whether or not it should be continued.

There are, however, some rights which the federal and provincial governments cannot violate, even with the "notwithstanding" clause. One of these is the right to equality between men and women. This right is guaranteed by section 15 of the Charter which reads as follows:

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.

This is the section of the Charter which guarantees every individual's right to equality, without discrimination. You will notice that sex discrimination is not the only kind of discrimination which is illegal. It is also important to realise that other forms of discrimination may be illegal even if they are not specifically mentioned in section 15.

However, the right to equality between men and women has extra protection in the Charter. The wording of section 28 of the Charter makes it clear that the federal and provincial governments cannot use section 33 to pass laws which discriminate on the basis of sex, nor can the courts use section 1 to justify any sex discrimination.

**Section 28 of the Charter reads as follows:**

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

So the right to equal treatment for men and women cannot be limited or violated under the Charter.

Thus we see that the Charter does allow governments to balance individual rights and collective rights, but it is important to remember that generally men and women have to be treated equally.

But the situation for aboriginal people may be different. There is a special section in the Charter which refers to the rights of aboriginal people. This is section 25 which states:

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

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and*
- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.*

First it should be understood that section 25 does not, itself, recognize and affirm the aboriginal, treaty and other rights of aboriginal people. That recognition and affirmation is in section 35 of the Constitution Act, 1982 which is not part of the Charter.

There have not yet been any cases decided by the Supreme Court of Canada on what this section really means. There are several different ways to interpret it.

One thing section 25 of the Charter does is tell the courts how the rights and freedoms set out in the other sections of the Charter are to be interpreted. In other words, section 25 states that the other rights and freedoms in the Charter are not to be interpreted in a way which denies or interferes with the rights of aboriginal peoples. This is a form of additional protection for aboriginal and treaty rights.

It seems clear that, at least, section 25 protects aboriginal, treaty and other rights from attack by non-aboriginal people who might wish to have some of the same rights as aboriginal people have. In other words, a non-aboriginal person could not complain of discrimination on the basis of race because the non-aboriginal person does not have the same hunting rights which aboriginal people have.

It is not clear, however, whether section 25 does more than protect the rights of aboriginal peoples from this kind of attack by non-aboriginal people. One question is whether section 25 could also be used by aboriginal governments to protect themselves from complaints made by individual aboriginal persons who feel they are being discriminated against by their aboriginal governments.

This possibility worries many aboriginal women who fear that their own aboriginal governments may try to use section 25 of the Charter to allow them to discriminate against women by saying that the right to make rules, whether discriminatory or not, is part of their aboriginal right to govern their communities.

For example, an aboriginal government might try to use section 25 to say that rules for membership in a band can discriminate against women because the right to define band membership is part of their aboriginal rights. We do not know how the courts will interpret section 25 or how they would deal with this type of argument. The question is whether section 28 (which gives equal protection to men and women) is stronger than section 25, and would prevent aboriginal governments from discriminating against women. We might hope that it is, but we will only know for sure when cases are taken to court.

#### **4. How Aboriginal Women are Presently Using the Charter**

What follows is a short description of two of the kinds of cases which aboriginal women are presently taking to the courts under the Charter.

The first case was taken under the Indian Act and the Charter. It is not about an aboriginal right to self-government. It concerns a woman who is married to a non-Indian and who was re-instated as an Indian and a band member under Bill C-31. She has been living with her husband on the reserve for many years (even before she was re-instated). She claims that even though she is legally an Indian and a band member under the amended Indian Act, the band council has refused to recognize her rights. She says the band council will not let her vote in elections, hold property, or in any way participate in band affairs. In 1989, the band council sent her a letter which said that she had to send her husband away because, in the band council's opinion, he had no right to live with her on the reserve.

This case was taken against both the band council and the federal government. She is suing the band council because, she says, they are denying her all her rights as an Indian and band member. She is suing the federal government because, she says, even though they knew that the band council was defying the Indian Act, they did nothing to stop what she claims are the illegal activities of the band council and did nothing to correct the situation. She claims that the federal government tolerated and, in effect, approved the illegal actions of the band council by continuing to finance and assist the band council even though, she says, it was clear that the band council was breaking the law.

The second case is a case against the federal government and concerns the continuing discrimination under the Indian Act against the children and grandchildren of re-instated women. In this case, the Charter will probably be used to argue that the Indian Act continues to discriminate by treating the descendants of Indian women who married non-Indian men differently from the descendants of Indian men married to non-Indian women.

There may be other kinds of cases in which aboriginal people find the Charter useful in helping them fight discrimination or the violation of other rights either by band councils or by the federal or provincial governments.

For more information on how the Charter may apply in a system of aboriginal self-government, please read the discussion paper called "Native Women and Self-Government".