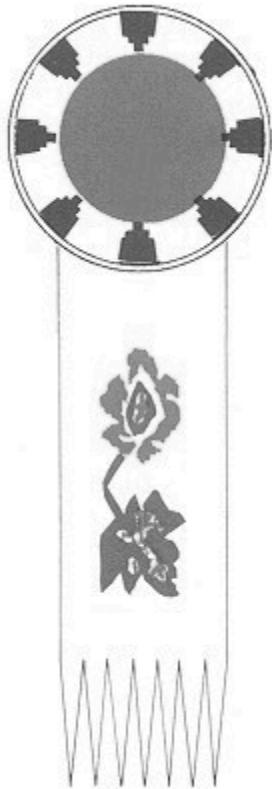


# Native Women's Association of Canada



## NATIVE WOMEN & SELF GOVERNMENT

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*An NWAC Discussion Paper*

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# **Native Women & Self-Government**

In this document we discuss some of the issues facing Native women in the discussions about self-government which are now taking place. These discussions are about changing the Constitution of Canada so that an Aboriginal right to self-government will be included specifically in it.

## **1. The Canadian Constitution**

The Constitution of a nation is the supreme law of that nation. It sets out the basic rules and principles which everyone in the nation, including the government, must follow and respect. The Canadian Constitution was originally created in 1867. It has been changed several times since then in order to take into account new and different ideas as they occur, or to deal with new problems that arise as Canadian society changes over time.

The Canadian Constitution contains rules which the federal and provincial governments must respect. It limits the powers of the governments in two ways. The first kinds of limits are called "jurisdictional" limits. That is, there are a number of subjects about which the federal government can make laws, and there are other subjects about which the provincial governments can make laws.

The federal government cannot make laws about subjects which are under provincial jurisdiction and the provincial governments cannot make laws about subjects which are under federal jurisdiction. Therefore, each government is limited in the kinds of laws which it can pass. For example, a provincial government does not have the power to make laws about "Indians and lands reserved for the Indians" because only the federal government has the "jurisdiction" to do this.

The second kind of limit is contained in the Canadian Charter of Rights and Freedoms. The Charter is part of the Constitution and it provides certain rules which the federal and provincial governments must respect. For more information on the Charter, please read the two discussion papers called "The Canadian Charter of Rights and Freedoms -A Plain Language Version" and "Native Women and the Charter".

It is often said that the federal government and each of the provincial governments are "sovereign" when they act within their respective areas of jurisdiction. This idea of "sovereignty" means that each level of government passes its laws about the subjects over which it has jurisdiction without these laws being subject to the approval of another level of government. However, "sovereignty" does not mean that a government is free to do anything it wants. As mentioned above, both the federal and the provincial governments, although "sovereign", have limits placed on their powers by the Constitution.

## 2. Difference Between Delegated Powers & Self-Government

When thinking about Aboriginal self-government, it is important to understand the difference between self-government and delegated powers. Up until now, the form of government in most Indian communities has been the one set up under the *Indian Act*. Under the *Indian Act*, some powers are "delegated" or "given to" the band councils. The Minister of Indian Affairs acts as a general superintendent. For example, any laws made by a band council under the *Indian Act* must be sent to the Minister and the Minister can decide not to allow them.

Because band councils act under delegated authority in the *Indian Act*, the Canadian Charter of Rights and Freedoms presently applies to them. This is because the Charter applies to the federal and provincial governments and to certain other entities which act under powers which are delegated to them by these governments.

Under a system of self-government, this might no longer be the case. Instead of there being provision for only the federal and provincial governments, there would be provision for Aboriginal governments as well. Each of these three kinds of government would have its own jurisdiction, that is, a list of subjects about which it could make laws. Each of these three kinds of governments would be "sovereign" within its areas of jurisdiction, that is, no other level of government would be able to control them, although there might be other kinds of limits on their powers, such as those set out in the Canadian Charter of Rights and Freedoms, if it applies to them.

Subsection 32(1) of the Charter says that the Charter applies to the federal and provincial governments. It presently reads as follows:

### **32(1) This Charter applies**

- (a) to the Parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and**
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.**

Unless the Constitution is changed so that it specifically says that the Charter will also apply to Aboriginal governments, the Charter will not apply to Aboriginal governments when self-government amendments are made to the Constitution. This is why NWAC proposes that subsection 32(1) be changed by adding an additional paragraph to it. This paragraph could read:

- (c) to First Nation (or Aboriginal) governments in respect of all matters within the authority of each First Nation (or Aboriginal) government.**

### 3. Federal Government Proposal for Self-Government

The federal government is proposing to amend the Constitution of Canada to "entrench", that is, to include an Aboriginal right to self-government. The way in which they intend to do this makes it sound as though this is a new right.

Some Aboriginal people object to this method of including self-government in the Constitution. They say that the right to self-government is an "inherent" right, that is, (1) right which has always existed as part of their Aboriginal rights which are now recognized by section 35 of the *Constitution Act, 1982*. They say that there is no need to add a "new" right to self-government to the Constitution, rather there is only a need to clarify the right to self-government which already exists.

The federal government proposal also states that including the right to self-government in the Constitution will do away with the need for much of the federal government's involvement which is required under the present *Indian Act*.

The federal government proposal is to make this amendment in the near future but to suspend its operation for a period of up to ten years to allow enough time for federal and provincial governments and Aboriginal people to negotiate the precise content of the right.

When we speak of defining the content of the right, it means defining the jurisdiction, that is, the subject matters, over which the Aboriginal governments will have control, the territory in which their laws will apply, and the people (Aboriginal and/or non-Aboriginal people) to whom the laws will apply.

It is not clear what areas of jurisdiction Aboriginal governments will have. The federal government's proposal simply says that this is to be decided by negotiation, but that the areas of jurisdiction could be very wide. It mentions some possibilities as being: land and resource use, language and culture, education, policing and administration of justice, health, social development, economic development and community infrastructure. The federal government's proposal also says that many federal and provincial laws would continue to apply.

Some Aboriginal groups, such as the Assembly of First Nations, do not want provincial laws to apply to First Nations under self-government. They have suggested that areas of jurisdiction for First Nations under self-government should be left as wide as possible and might include such subjects as: citizenship (membership), residency, health, education, social services, justice, wildlife, natural resources, economic development, environment, policing and taxation.

It is also not clear whether there will be enough financial and other support for self-government. If Aboriginal governments are really going to be able to govern without interference, they will require much more in the way of land, resources and financing than they have now. The idea of self-government is not that Aboriginal governments will just administer more Indian Affairs' programs, but rather that they will be self-supporting. Negotiation of financing and a proper resource base will likely be a long process.

The federal government proposes that, if at the end of the ten year period, there has been no agreement on the content of the right, then it will come into force anyway and the courts will end up defining it gradually as cases or disputes arise. If there is an agreement before the end of the ten year period, the right could come into force as soon as agreement has been reached.

There are two important types of questions which should be thought about in discussing the move toward self-government. The first type of question is about the process which will be used to negotiate self-government. The second type of question is about the content of the right to self-government including whether or not there should be safeguards built into the new system to protect the rights of individual Aboriginal persons.

#### **4. The Process of Negotiation**

Aboriginal people must define what a nation is, and this definition must include all peoples of each nation. This definition must also rely on historic concepts of nationhood. National, regional and band groups are not nations, and do not reflect the nationhood perspective.

Different First Nations may have different ideas about what they need and want from self-government. This raises the question of how the jurisdiction of Aboriginal governments will be negotiated. It is our position that they must be negotiated on a nation-to-nation basis.

Perhaps as important, is the question of who will have a voice in the process. Aboriginal women must be part of the negotiation process at all stages so that we can participate in the definition of the structures and powers of our governments.

There is a need to define First Nations so that all First Nations peoples are included in the process. This must include all Aboriginal women. 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 political or other 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 into 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, as we know, the women's associations are being kept at the fringes of the process. They are not being funded or considered at the same level as other Aboriginal associations by the federal government.

This could lead to a situation in which re-instated 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. But there are also many important issues affecting Native women living on reserve. As just one example, family law and matrimonial property laws ought to be strengthened to provide substantive equality rights to women living on reserves.

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

Native women must consider and decide what action they wish to take to make sure that they are fully involved and have a strong voice in negotiations on self-government.

## **5. Should Protection for Individual Rights be Built into Self-Government?**

Aboriginal rights are often referred to as "collective rights". Usually this means that Aboriginal people as groups or nations claim certain rights as opposed to other groups or nations which also may claim certain rights. An Aboriginal group or First Nation may claim certain rights to resources, or legal jurisdiction in its territory. Non-Aboriginal Canadians, who form another group, may also claim certain rights to the resources and legal jurisdiction in the same territory. Where should the line be drawn between the competing claims of these two groups?

The "drawing of the lines" in terms of rights and jurisdictions between the collective rights of the different groups is a part of the negotiation of Aboriginal self-government. Once the rights of the different groups or collectivities has been decided, and the "lines" or "external boundaries" are drawn, the question becomes one of deciding what happens "inside the lines". What are the rights of the individuals who make up the group? What is the best way to protect the rights of individuals within the collectivity?

For example, if the right to self-government is included in the Constitution of Canada, eventually there might be no reason to have the *Indian Act*. Indeed, that is what is implied in the federal government's proposal. While there are many very good reasons for getting rid of the *Indian Act*, it should be remembered that the protection for women was established in the 1985 amendments to the *Indian Act* (Bill C-31), and is now part of the *Indian Act*. If the *Indian Act* will no longer exist, and First Nations have complete control over their membership, how will Native women's rights be protected? Will anyone even consider the problem if Native women are kept at the fringes of the negotiation process?

In addition, as mentioned above, because most band councils presently act under powers delegated to them in the *Indian Act*, the Charter presently applies to them. Under self-government, this would not necessarily be true. If the *Indian Act* is eventually replaced by self-government, should individual rights, including the rights of Native women be guaranteed either by continuing the application of the Canadian Charter of Rights and Freedoms or by some other means?

The federal government has proposed that the Aboriginal right to self-government be subject to the Charter. The federal proposal means that Aboriginal governments would have to respect the rights of individuals in the same way as the federal and provincial governments are required to respect these rights.

NWAC has insisted that the Charter must apply in a system of self-government because, to date, the Charter has proven to be the only real protection for the rights of Native women. In any event, the Charter simply sets out the same minimum standards of protection as those recognized in international law as applicable to all self-governing nations.

## **6. Self-Government and International Law**

Any attempt to either impose the Canadian Charter of Rights and Freedoms, or some other form of limit on Aboriginal governments under self-government, will, as we have already seen, meet with some resistance from other Aboriginal organizations. They argue that, under the principles of international law, Aboriginal people have the right to self-determination. Thus, it is said, First Nations in Canada have the right to determine, for themselves how they will be governed, and the rules which will apply within their societies, and no rules should be imposed on them from the outside.

However, international law also provides for the protection of basic human rights, and, in particular, the rights of women to equal status and equal participation in all aspects of society with men. There are a number of international agreements which recognize and protect the importance of the family as the basic social unit and which call for special protection of women and their children in all aspects of marriage, family and social life.

There are also more specific international agreements dealing with the elimination of all forms of discrimination against women and ensuring that women have full human, civil and political rights.

If Aboriginal people claim rights under international law, then they must realize that they also have duties and responsibilities under international law. There can be no rights without responsibilities.

Native women who wish to ensure that their right to equal treatment is guaranteed under any system of self-government, must point this out and to insist that Aboriginal leaders recognize that the principles of international law speak not only of self-determination, but also of the respect for all human rights and, particularly the rights of women to be full and equal participants in all aspects of society.

Native women are also entitled to insist that the Government of Canada live up to its international obligations to protect basic human rights including sexual equality, whatever the political status or jurisdiction of Aboriginal governments.

## **7. What Choices Do We Have?**

### **a) An "Aboriginal Charter"**

Some Aboriginal associations say that the Canadian Charter of Rights and Freedoms should not apply to Aboriginal governments under self-government, but rather that an "Aboriginal Charter" should be created. NWAC does not agree with this approach for the following reasons.

At present, we do not know what would be included in an "Aboriginal Charter". Nor do we know whether there would be one Aboriginal charter which would apply to all First Nations or whether each First Nation would create its own Aboriginal charter. If there is one Aboriginal charter applying to all, what method will be used to ensure that it is acceptable to all concerned? If there are different Aboriginal charters for each group or First Nation, this would require negotiating and keeping track of a number of different Aboriginal charters.

Nor do we know what kind of legal force such Aboriginal charters would have. Would they become part of the Constitution or would they simply be statements of principle which would perhaps have moral or political force, but would not necessarily have much legal force. If an Aboriginal charter is given some legal force, who would enforce it - the Canadian court system or an Aboriginal court system?

If First Nations wish to establish Aboriginal charters, we would not object as long as the Aboriginal charters do not replace the Canadian Charter of Rights and Freedoms which we feel must apply to Aboriginal governments under self-government. Any Aboriginal charter could exist to provide for additional rights which would be included as "other rights" under section 26 of the Canadian Charter. Section 26 reads as follows:

**26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exists in Canada.**

## b) The Canadian Charter of Rights and Freedoms

If, as most Aboriginal women's groups have insisted, and the federal government has proposed, the Canadian Charter does apply to self-government, Aboriginal people will have the same rights guaranteed to them as do all other people in Canada. This might have an impact on some traditions, but section 25 of the Charter could take care of some of these possible problems by shielding some traditions from the impact of the Charter.

But, even if the Charter does apply under a system of self-government, it is not clear just how much protection there will be for Native women if the *Indian Act* no longer exists and each band has complete control over its membership. Because of section 25 and, especially, section 33 of the Charter (the power to make laws "notwithstanding" or in spite of the Charter), a band or First Nation might still be able to discriminate against Native women, both on the subject of membership and on other issues.

This is why NWAC and many provincial Native women's groups are insisting that Aboriginal governments not be given this power under section 33 of the Charter. (For more information on sections 25 and 33 of the Charter, please read the discussion paper entitled "Native Women and the Charter").

Aboriginal women are entitled to insist that this whole issue be clarified before any amendments to the Canadian Constitution concerning self-government are made. NWAC suggests that section 25 of the Charter be changed to add an additional paragraph which would read:

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

This would take care of part of the possible problems. However further steps will have to be taken to ensure that, under a system of self-government, women who regained their status under Bill C-31 and other Aboriginal people who were not able to be reinstated under Bill C-31, will not be excluded from their nations.

## 8. Conclusion

As can be seen, there are a lot of questions, and not many answers, when it comes to the idea of self-government.

Much of the discussion until now has been more concerned with form and process and declarations of general principles than with the content of self-government and the very real concerns that many Aboriginal persons, especially Aboriginal women, have when it comes to guarantees of their rights.

Vague promises and general statements are not much comfort for Aboriginal women who are being allowed only a very minor place in the discussions. If anything this proves that they are right to be worried. It is important to ask the questions, and to insist on clear answers so that we all know where the discussions on self-government will lead us.