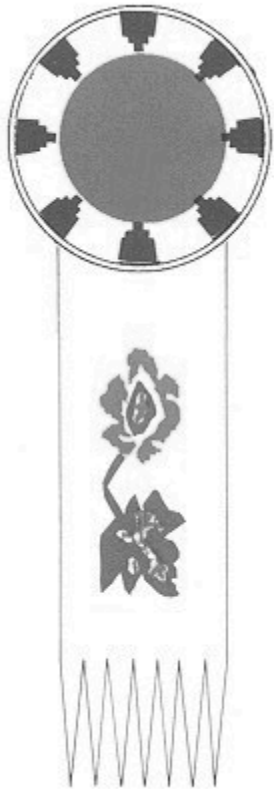


Native Women's Association of Canada



“NATIVE WOMEN & THE CANADA PACKAGE”

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An NWAC Discussion Paper

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NATIVE WOMEN AND THE CANADA PACKAGE

1. Introduction

In this discussion paper we will outline a few of the proposed amendments to the Canadian Constitution which are contained in the Canada Package. These proposals relate to issues such as property rights, transfers of powers to the provinces, and inclusion of a clause recognizing Quebec's distinctness. We will also discuss the proposed 'Social Charter' which does not appear in the Canada package, but has been proposed by the Government of Ontario and is supported by the federal NDP.

The proposals in the "Canada Package" have been put out by the federal government. The government is currently sending a committee around the Country in order to find out what people in the various provinces think of these suggestions. Once the House of Commons has voted on these proposals the federal government will then consult officially with the provincial governments. Since these are simply proposals they may be modified or changed after the consultation process.

The Constitution of Canada is made up of a number of documents. These include the Constitution Act, 1867 (which used to be called the British North America Act), the Constitution Act, 1982 (which includes the Charter and the Rights of the Aboriginal Peoples of Canada). The federal government's proposals will affect these two documents.

2. Amendments Proposed to the Constitution Act, 1982

a) The Charter -- Property Rights

The present Canadian Charter of Rights and Freedoms does not contain any specific protection of property rights. The government has proposed that this protection be included in the Charter. Unfortunately the manner in which the government intends to protect this right is unclear. We do not know if it plans to protect the right to property itself or the right not to be deprived of property except by due process of law. We do not know where in the Charter they would insert this protection. It seems likely that the section would be added to section 7, but at this point no one knows. Nor do we know to whom this protection would be accorded: will only individuals, that is natural people, be given this right, or will the right be granted to corporations as well?

Property rights are already protected under the Canadian Bill of Rights but the Bill of Rights is not a constitutional document. Other countries have constitutional protection for property rights. For instance the American Bill of Rights contains protection of the right to property and the right not to be deprived of it without due process of law (in the Fifth and Fourteenth Amendments). The United States Courts have interpreted this to mean that a person has the right to be free from unauthorized actions of government officials which substantially impair his or her property interests.

What this basically means is that the courts will have to perform a balancing test (as they do for many other Charter protections). The courts will have to decide what constitutes an unfair or unreasonable infringement of property rights. For instance, do protections given by law to residential tenants infringe the landlords' property rights?

The AFN and other aboriginal people are concerned that this protection for property rights might make the enforcement of environmental protection laws harder for governments. They also fear that this protection might obstruct the progress of land claims negotiations by protecting non-native individuals and perhaps corporations who have or claim rights such as ownership of land, timber leases, mining rights or other types of rights in the land claim areas. Aboriginal property rights are already protected in section 35 of the Constitution Act, 1982 so the addition of a new protection for property rights will not make them better off. For example, this protection for other property rights might give logging companies constitutional protection for their interests which could be used against aboriginal people who are trying to stop logging on their traditional lands.

Although property rights do not appear specifically in the Canadian Charter, the Supreme Court has recently stated that certain economic rights associated with property rights may be included under Charter protection. The Court has said that the Charter might protect certain economic rights fundamental to human life or survival such as the right to adequate food, clothing and shelter, the right to social security and the right to traditional property. However the Court stated clearly that under the present Charter of Rights, a corporation's economic rights have no protection. So, for instance, at present a logging company could not claim Charter protection for its right to log trees.

b) The Charter -- Distinct Society Clause for Quebec

Although the Constitution Act, 1982, including the Charter, applies in Quebec that Province did not sign the agreement, which brought it into force. Since 1982 various efforts have been made to bring Quebec into this arrangement as a willing party. It should be noted that Quebec has always been treated as distinct among the provinces. This policy dates back to the Quebec Act, 1774 when Great Britain granted the then colony of Quebec the right to preserve its language and its system of law although these were different from what was in force in the rest of the colonies.

Quebec wants constitutional recognition of its distinct society. The Government of Canada has proposed to recognize Quebec's distinctiveness in a section of the Charter, which would follow section 25 (which protects aboriginal rights). The proposed section 25.1 is an interpretive clause.

25. 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 now exist by way of land claims agreements or may be so acquired.***

25.1 (1) *This Charter shall be interpreted in a manner consistent with:*

- a) ***the preservation and promotion of Quebec as a distinct society within Canada; and***
- b) ***the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English speaking Canadians, primarily located outside Quebec but also present in Quebec.***

(2) *For the purposes of subsection (1), "distinct society", in relation to Quebec, includes:*

- a) ***a French-speaking majority***
- b) ***a unique culture; and***
- c) ***a civil law tradition.***

The Courts would be required to interpret the Charter in a manner consistent with the existence of a distinct society in Quebec. For instance, if the Provincial law requiring all commercial signs to be in French was challenged under this new version of the Charter, the Courts would have to interpret the right to free speech contained in section 2, in a manner that is compatible with the existence and preservation of Quebec as a distinct society. However, the fact that the right is being interpreted consistently with the existence of a distinct society in Quebec does not mean that Quebec is exempt from compliance with the Charter. Under section 1, the Courts are already required to balance the interests of society as a whole against the individual violation of rights in question. The proposed section 25.1 adds an element to this balancing. If a Quebec law is being examined by the Court it is required to balance the interests of Quebec in protecting and preserving its distinct society as against the protection of the right in question.

It should also be noted that the new section 25.1 is only applicable in a Charter case. This means that it will have no effect whatsoever on claims for aboriginal or treaty rights under section 35. Section 35 is not part of the Charter, and the distinct society clause only affects Charter interpretation. In any event the protections given by section 25.1 are no stronger than those under section 25, so aboriginal people's distinctiveness is protected to the same extent as Quebec's distinct society.

c) The Charter -- Modification of the Override Power

Under section 33 of the Charter the federal government or a provincial legislature can make a law valid in spite of the fact that it violates section 2 or sections 7 to 15 of the Charter. In the present Charter of Rights the government needs only a vote of a simple majority of the House of Commons or the legislature in order to invoke this clause -- that is, 50% plus 1 of those voting. The federal package proposes to change this requirement of a majority of 60% of the legislature or House of Commons. This should make it more difficult for governments to intentionally violate Charter rights.

d) Rights of the Aboriginal Peoples of Canada -- Right to Self-Government

This proposal is dealt with in the paper entitled "Native Women and Self-Government".

3. Amendments Proposed to the Constitution Act, 1867

a) Canada Clause

The government proposes to add a clause to the Constitution, which would set out the essential characteristics of Canada. The proposed characteristics include the equality of men and women, recognition that the aboriginal peoples were historically self-governing, a commitment to the well-being of all Canadians and recognition of "the balance that is especially Canadian between personal and collective freedom and personal and collective responsibilities".

Aboriginal people object to the wording which refers to aboriginal peoples as "historically" self-governing thus making it appear as though the right to self-government no longer exists. Aboriginal people maintain that the right to self-government is a continuing, inherent right.

This type of clause is essentially a statement of principle, and is of limited use in the Courts. At most it can be used as an interpretive aid.

b) Senate

Many of the western and maritime provinces have called for Senate reform. At present the Senate is made up of unelected members, most of whom received their appointment through patronage. The provinces in favour of Senate reform have called for a "triple-E Senate"; that means "elected, effective and equal". In essence this proposal is for an elected Senate which would have some real powers, and which would be made up of the same number of Senators from each province.

The federal government proposals endorse an "elected" Senate. They also give a little more power to the Senate to make it more "effective". However, there is a great deal of

opposition to the idea of an “equal” Senate. The provinces of Ontario and Quebec do not believe that they should have the right to the same number of Senators as, say, Prince Edward Island. The federal proposal suggests that there be more representation in the Senate from the smaller provinces and regions. However, the proposal does not call for a truly equal Senate.

The government has also proposed that there be guaranteed representation for aboriginal people in the Senate. At present we do not know how many seats would be reserved for aboriginal people, nor how they would be elected. On this point we would say that at least half the seats for aboriginal people should be guaranteed for aboriginal women.

c) The Supreme Court of Canada

The Supreme Court of Canada is a very important institution for the aboriginal people of Canada. Judgments given by the Court in cases such as Calder, Sioui and Sparrow have advanced the process for recognition of aboriginal rights. Therefore, the make-up of that Court is very important for aboriginal people.

In the “Canada Package” the federal government has proposed to alter the way in which Supreme Court judges are appointed. No one has asked for this amendment so it seems a little strange that the government wants to change a process which up to this point has worked well.

At present the judges of the Supreme Court are appointed by the Cabinet. In practice there is consultation with organizations such as the Canadian Bar Association before making the appointments. In the “Canada Package” the federal government proposes to make the appointment process more formal by requiring the Cabinet to choose a Supreme Court judge from a list of five judges submitted by the province or provinces. This gives the provinces much more say in appointments to the Supreme Court.

To restrict the possible candidates for appointment as Supreme Court judges to those on a short list drawn up by the provinces concerned, is to seriously undermine the delicate balance of a number of interests which should be represented on this court. The Supreme Court is one institution which should be left out of the endless federal-provincial tug of war.

We think, on the contrary, that the consultative process should be broadened, not narrowed, and should include a number of national interest groups, including aboriginal people and women.

d) Distribution of Powers Between the Federal and Provincial Governments

Our comments on this section are made on the assumption that there will also be a third level of government recognized in the Constitution, that is, aboriginal self-government.

The various proposals in the “Canada Package” do not acknowledge this except in the one isolated section which deals with the proposal for aboriginal self-government. The result is that it is difficult to see how the various pieces fit together.

In 1867, when the first Canadian Constitution was passed, all the powers then in existence were divided up between the federal and provincial governments. However, the people who drafted this document knew that it would have to last for a long time and that there would be new areas which would come up in the future which would not fit into the original list of powers. Therefore, they added in a clause which stated that all new matters would be under the control of the federal government. Under that clause, things like aeronautics and nuclear power have been put under the authority of the federal government. This clause is called the “residual power” clause. The federal government has proposed to give up this “residual power” to the provincial governments. Under the new proposals the provinces would have jurisdiction would have jurisdiction over all new matters arising in the future. However, a new matter which is an emergency or of national concern would still be under the authority of the federal government. This emphasis on provincial rather than federal power could work to the detriment of aboriginal people.

The “Canada Package” also contains proposals which would result in the handing over of some federal powers to the provinces. In the “Canada Package” there is not much proposed for immediate transfer to the provinces. However, some of these transfers will affect the aboriginal people of Canada.

For instance, everything relating to manpower training courses will be recognized as an area of purely provincial jurisdiction. This could certainly affect aboriginal people who have sometimes been able to benefit from special federal programs designed for aboriginal people. Does the proposal mean that there will no longer be a possibility for these special federal programs and that aboriginal people will have to address themselves to provincial governments for training programs, or does it mean that responsibility for manpower training will be part of the responsibilities of aboriginal governments?

The proposals will also make any future transfers of jurisdiction between the federal and provincial governments constitutionally valid.

Although the federal government has insisted that the federal power over Indians and Indian lands will not be transferred to the provinces, there are other areas of jurisdiction which have very serious impacts on aboriginal people. One of these is the area of environmental protection.

It is clear that when a province decides to build a major development project, it is in a conflict of interest if it alone controls the impact assessment process. One of the few protections for aboriginal people has been that the federal government also has a role to play in assessing impacts of development, particularly where aboriginal interests are concerned. Aboriginal people have had to fight hard and long to ensure that the federal

government will carry out its responsibilities in this area. If the federal and provincial governments can simply get together and decide between themselves to work out a deal which will allow the provinces to have complete control in this area, the results could be disastrous for aboriginal people.

This cannot be allowed. Who will control this deal-making? What assurance do we have that governments will not use this new ability to sidestep the constitutional amending process, and work out deals between themselves to the detriment of the people they are supposed to protect?

These transfers of powers will not necessarily be made to all provinces. The situation could differ between provinces depending on the interests of each province. If there are a number of transfers of powers to various provincial governments before the right to self-government is properly clarified, the whole process of clarifying the jurisdictions of aboriginal governments could be made far more difficult and complicated as each provincial government would have to be dealt with on a separate basis.

4. The "Social Charter"

At present the Charter protects what are called "civil and political" rights. These individual rights are recognized and protected in international law by the International Covenant on Civil and Political Rights. Canada is a party to that agreement.

Canada is also a party to another agreement, the International Covenant on Economic, Social and Cultural Rights. This agreement guarantees rights to an adequate standard of living, the right to adequate food, clothing and housing, the right to health and the right to education. However, these rights are not specifically represented in the Charter. As we have already noted the courts might find some protection for these rights in section 7 of the Charter, however, this protection would probably be limited. This is because the obligations for protecting "civil and political rights" are very different from the obligations for protecting "social and economic rights". The government has to adopt a much more active role in order to protect "economic and social" rights.

Some people feel that the governments should do more to guarantee economic and social rights, and should play any role in ensuring that all Canadians are equal and are guaranteed social and economic support to secure that equality. The Ontario government for instance has proposed the addition of a "Social Charter" to the Constitution. This "Social Charter" would guarantee such rights as the right to medicare, unemployment insurance and welfare. It would also prevent the federal government from cutting back on its payments to the provinces for services such as welfare, health and education during harsh economic times such as the present.

While many people are talking about the role of a "Social Charter" and how it could be enforced, it is not part of the federal government's proposals in the "Canada Package".