THE NATIVE WOMEN'S ASSOCIATION OF CANADA'S STRUGGLE TO SECURE GENDER EQUALITY RIGHTS WITHIN THE CANADIAN CONSTITUTION

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This thesis examines the evolution of the Native Women's Association of Canada as they embraced the challenge to secure aboriginal rights for all First Nation women in Canada's Constitution. Between 1978 and 1995, the Native Women's Association vigorously pursued what they believed was their right to participate in Constitutional negotiations as equal partners. They did not acknowledge present day First Nation political organizations as being true First Nation governing bodies.

Thousands of Canadian First Nation women have been denied their rights as aboriginal persons due to the Indian Act and a consequence of that legislation has meant that First Nation women have been marginalized in Canadian society. Present day First Nation political governing bodies are a product of that legislation and many political leaders sought to legitimize denial of aboriginal rights to First Nation women citing that true self government meant the right to determine membership. The Native Women's Association of Canada chose to challenge that premise using the very political tools which denied their right to now reassert them.

This thesis explores that struggle by examining the approach and position taken by both the national political organizations and the Native Women's Association of Canada concluding that true self government does mean determination of membership but that the women's rights to equality was of primary importance.

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In 1992, the Native Women's Association of Canada [NWAC] challenged the Canadian government and First Nation national political organizations, alleging that both had been instrumental in denying their right to equality as women and as aboriginal people. The Native Women's Association of Canada believed that they were the voice of First Nation women. They wanted a legitimate and equal voice in the political negotiations that would ultimately lead to changes in Canada's highest law, the Constitution. They wanted equal representation at the constitutional negotiating table and, when their request was denied by both the Canadian state and their own First Nation organizations, they used the Canadian *Charter of Rights and Freedoms* to try and secure their right to equality. They asserted that equality between men and women was inherent to 'traditional' First Nation societies, but had been lost after the imposition of alien political structures by successive Imperial and Canadian governments. The Canadian Charter, which affords rights to all Canadian citizens on an equal basis, was the tool that the Native Women's Association of Canada grasped in their attempt to secure equality for themselves within their own First Nations.

Ironically, First Nation women were forced to use some of the very political structures which had been used to deny their equality to try and reassert it. This thesis examines the struggle of the Native Women's Association of Canada to secure a seat at the table of constitutional negotiations during the period of 1978 to 1995 and comments on the outcome, its impact on First Nations, and on constitutional discussions in general.

INTRODUCTION

Women in First Nations were forced to endure many generations of oppression institutionalized initially by the British monarchy, later adopted by Canadian governments, and eventually absorbed by First Nation political institutions themselves. The loss of autonomy, equality and eventually rights as First Nation persons was a gradual process sanctioned through legislation. That legislation, highly discriminatory in nature, distorted First Nation internal relations and societal structures, successfully altering the role of First Nation Women within their communities. The Indian Act of 1876 was by far the most damaging legislation passed by the state. Its goal was the assimilation of First Nation people into one basic Canadian community. The Act reinforced First Nation special status, but also divided First Nations from other Canadian citizens and among themselves. That division was along lines of race and gender. They were never dealt with as Nations with an inseparable dimension of power and identity.

Due to the Indian Act thousands of women lost their right to be identified as First Nation people. The Indian Act specified that if a First Nation woman married a non First Nation man, the Canadian government would no longer recognize her as being a member of that nation. In essence, she was stripped of her identity, barred from her community and no longer able to pass on her status as an Indian to her children. The same was not true for First Nation men. The Act attacked all First nationhood through the female line and

Nation women.

> The Indian Act's tracing of Indian descent and identity through the father was the unthinking application of European patrilineal assumptions by a patriarchal society; but it accorded ill with those Indian societies, such as the Iroquoian, in which identity and authority flowed through the female side of the family. All these attempts at cultural remodeling also illustrate how the first step on the path of protection seemed always to lead to the depths of coercion.[1]

The Indian Act was amended twenty-six times between 1876 and 1951. The provisions that discriminated against First Nation Women were continually carried forward and strengthened.

The Act also successfully eliminated all traditional governing bodies of First Nations when governing by elective band members became mandatory. Women were not allowed a voice in band elections: only men could vote on important economic and political decisions. In 1951 the Act was further amended and section 12[1][b] was strengthened as the government gave themselves total control in deciding First Nation citizenship. Only those Indians with status were recognized by the government as "Indian". The government decided that women would be enfranchised upon marriage, despite what she or her band wanted. Bands and women therein lost all right to decide upon citizenship.

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[1] J.R. Miller, Skyscrapers Hide the Heavens: A History of Indian White Relations in Canada rev. ed. (Toronto: University of Toronto Press, 1989), p. 145.

Women became a severely marginalized group of people.[2]

Much of First Nation women's experience is similar to Canadian women in general because the institutions involved were generated from the same patriarchal source. For generations, Canadian women expressed discontent about the inequalities inherent within their society. Although they comprised more than 50% of the population they continued to be underrepresented in Parliament and provincial legislatures, in fact in all major governing bodies. Issues of major importance to them were not adequately addressed on political, business or research agendas.[3] In spite of that reality, women have successfully promoted greater awareness of their plight, aggressively voicing their opposition to the uneven distribution of political power. They forced governments to investigate systematically ingrained gender inequality.

Between 1960 and 1996 the Canadian women's movement built strong institutions, providing a solid foundation which will enable future generations of women to continue the battle to gain equality within Canadian society. As that process occurred differing aspects of the women's movement emerged. Discrimination and inequality varied in relation to the political culture within which individual women existed. Therefore the

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[2] Cora J. Voyageur, "Contemporary Indian Women", in David Alan Long and Olive Patricia Dickason, Visions of the Heart: Canadian Aboriginal Issues, (Toronto: Harcourt Brace Canada, 1996), p. 93.

[3] Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights of Women: One Step Forward or Two Steps Back? (Canadian Advisory Council on the Status of Women, September, 1989), p. 12.

status within their cultural and political community. It was during this time period that some First Nation women began to question their place in society.

In 1967 a question was put to the Standing Committee on Indian Affairs and Northern Development (SCIAND) by Mary Two Axe Early, an elder Mohawk woman from Kahnawake, Quebec. She asked why her marriage to a non-aboriginal man should deprive her of legal status as an Indian, band membership, the right to live in her community and her right to transmit legal status and band membership to her children. Women such as Yvonne Bedard and Sandra Lavell, repeated similar questions initiating challenges to this policy. In 1974 the Supreme Court of Canada ruled that Parliament had the right to discriminate against First Nations women on the basis of their sex. They concluded that the Canadian Bill of Rights did not supersede the Indian Act. This ruling had the effect of reinforcing government's authority to decide who could be an "Indian".[5] A sobering and shocking result of that judicial process was the discovery by First Nation women who supported the challenge of the Canadian government, that they did not have the support of many contemporary leaders of First Nations, most of whom were men.

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[4] Vijay Agnew, Resisting Discrimination, Women from Asia, Africa, and the Caribbean and the Women's Movement in Canada (Toronto: University of Toronto Press, 1996), pp. 1-21.

[5] Native Women's Association of Canada, Parallel Process on the Constitution 1992, Position Paper, October 1992.

Native Women's Association of Canada

In part, as a result of that discovery, the Native Women's Association of Canada [NWAC] was established in 1974 to represent First Nation and Metis women. It began to provide a voice for thousands of First Nation women excluded from meaningful political dialogue and decision making. Many women dispossessed by the Indian Act were included in Native Women's Association of Canada's membership. They believed the Indian Act caused gender inequality, which was not characteristic of "traditional" First Nation cultures. They also believed that male domination had deeply permeated the values of contemporary First Nation leaders, an effect of the importation of European cultural values and laws. Gender discrimination had become an accepted reality, guarded and preserved by Canadian governments and some very powerful First Nation political organizations.

> The European view of women as subordinate to and owned by their menfolk infected the First Nations of Canada. It did so directly through the Indian Act, which tied women's identity and rights as aboriginal people to those of their husbands, through government policies that reinforced women's status as dependents, and through its deliberate disruption of traditional life . . . But sexism is not merely imposed on First Nations from outside; it has entered our soul. To be blunt, a great many First Nation males need to have their consciousness raised. The women see leaders in particular as being sexist and discriminatory.[6]

[6] First Nations Circle on the Constitution, To The Source, (Ottawa: Assembly of First Nations 1992), p. 59.

sought to reclaim and constitutionally secure their rights to equality as First Nation persons and as Canadian citizens.

This thesis examines the evolution of that movement as the Native Women's Association of Canada engaged in a political struggle for equality. In particular it focuses on the reasons behind the Native Women's Association of Canada's decision to challenge the Canadian government in an attempt to secure a place for themselves in constitutional negotiation. Their position was that gender equality was intrinsic to "traditional" First Nation communities. If the inherent right to self government was to be constitutionally recognized, their voice must be a part of those political negotiations. They stated that the Band Councils and Chiefs who currently presided over their lives did not fit the traditional forms of government and recognizing the inherent right to self government did not mean recognizing and blessing the patriarchy created in their communities by a foreign government. They wanted the equality to which they believed they were entitled as women of First Nations.[7] Their greatest fear was that First Nation political organizations, dominated by men, would not act to protect the rights of all First Nation women, thus ensuring the continued legal, political and social subordination of thousands of First Nation women. The Native Women's Association of Canada chose the only source available to them to secure their right to equality, the Canadian Charter of Rights and Freedoms.

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[7] Theresa Nahanee, "Respect, Equality, Participation, Justice", Speech given to LEAF, 12 February, 1992.

During the constitutional reform discussion which eventually led to the Charlottetown Accord, the Canadian government provided 10 million dollars to be shared among the Assembly of First Nations [AFN], the Inuit Tapirisat of Canada [ITC], the Metis National Council [MNC] and the Native Council of Canada [NCC]. This allowed their involvement in how Canada should be restructured. The government recognized those four organizations as the legitimate voice of the diverse First Nations of Canada. The Native Women's Association of Canada was not specifically included in that funding but a portion of those dollars were earmarked for women's issues. The Native Women's Association of Canada objected to their exclusion from direct funding and participation in the discussions believing that the equality of First Nation women was severely compromised. They particularly objected to proposals advanced by the Assembly of First Nations for constitutional amendments that would move First Nation self government outside Charter protection.[8] The Native Women's Association of Canada therefore argued that the Government of Canada, by funding male dominated groups and failing to provide equal funding to them, violated their freedom of expression and right to equality in contravention of the Constitution. The decision was made to challenge the Government of Canada in court.

[8] Native Women's Association of Canada v. Canada [1994] 3 S.C.R. 627, p.628.

Not all First Nations agreed with the Native Women's Association of Canada's position regarding traditional First Nation governing, and strong opposition was directed toward their position. The Native Women's Association of Canada was accused by some First Nation governing bodies, the Assembly of First Nations [AFN] in particular, of placing individual rights above the rights of the collective, thus coming into conflict with First Nation culture and tradition. As stated by Mary Ellen Turpel, the Assembly of First Nation's constitutional advisor:

> The problem with the Charter from an aboriginal perspective is that it is based upon a Western-liberal conception of rights as vested in individuals rather than collectivities. This political perspective is foreign to aboriginal peoples, who operate as collectivities and have no concept of individual rights . . . The tendency in Charter case law and Western Liberal human rights systems is to uphold individual rights at the expense of collective rights . . . AFN's position is that as Indian people we cannot afford to have individual rights override collective rights. Our societies have never been structured that way, unlike yours, and there 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 Canadian Charter of Rights is in conflict with our philosophy and culture.[9]

[9] M.E. Turpel, "Aboriginal and Treaty Rights, Section 15 of the Canadian Charter of Rights and Freedoms Draft only" 1991 March, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

The Native Women's Association of Canada's response was:

> How can Canadians think that we as aboriginal people can come unscathed out of 500 years of oppression and live differently than other oppressed peoples who have found liberation . . . what you see being built today in the constitutional process is the mirror image of your patriarchal system and your male leaders think that is progress . . . they look at our men and see themselves. The Native Women's Association of Canada has adopted a pure gender equality stance, we will not tolerate any deviation from our sexual equality rights and reject any qualification put upon our sexual equality right. We do not want our equality interpreted through the prism of culture, tradition, traditional government or spiritual practices. [10]

Why did the Native Women's Association of Canada choose the Charter and the Canadian judiciary to secure what they believed was their traditional right to be present during constitutional negotiations?

First, they believed that gender discrimination existed within contemporary First Nation cultural and political life. As noted above, they argued that alien political structures had been legislatively imposed upon First Nations and that traditional governing bodies had been dismantled, changing the role of women in First Nation societies. The result was that their status within those communities was shifted into a patriarchal political relationship where women did not have an equal voice. What little power and control remained in First Nation societies was delegated to men who gained political advantage

[10] Sharon McIvor, "Aboriginal Women and Self Government and Our Struggle," speaking notes to Annual Meeting of the B.C. Indian Homemakers, Vancouver, B.C. 20 August 1992.

paternalistic values permeated First Nation governing bodies ensuring that First Nation men held almost all the leadership roles in their communities. In essence, the Native Women's Association of Canada alleged that First Nation culture, tradition and leadership had been transformed by colonialism, and official power was placed in the hands of male leaders.

Second, it is evident that First Nation women's values had changed. They also imported non-traditional ideas, the most notable being liberal democratic ideals of equality. They became an hybrid of traditional and non-traditional beliefs. The major catalyst for the Native Women's Association of Canada's firm conviction to have sexual equality unambiguously and constitutionally protected, guarding all aspects of aboriginal rights and self government, was the effect of the sexually discriminatory status regulation of the Indian Act which marginalized thousands of First Nation Women.[11] So, while structures and patriarchy provide part of the explanation for aboriginal women's action, changing ideas and ideals within their own movement was also a major catalyst. They chose to use the Charter as a shield in their attempt to secure their right of equality as First Nation women. They strongly believed that without Charter protection, women would be unable to resist the discriminatory actions of band councils and future forms of self government.

[11] Lilianne Ernestine Krosenbrink-Gelisssen, Sexual Equality as an Aboriginal Right, (Fort Lauderdale: Nijmegen Studies in Development and Cultural Change, 1991), p. 211.

position that the Charter of Rights and Freedom should not apply to First Nation self governing bodies?

The Assembly of First Nations stated the individual rights could not overrule the collective rights of First Nations. If the Charter was to do so they argued, they would not be truly self governing nations. If individual First Nation members had the right to appeal to external laws, or when actions of bands or tribal governments were to be subject to external judicial review, First Nation governments would lose the power to control their nations.

The Assembly of First Nations also asserted that there was nothing 'traditional' about the Native Women's Association of Canada's position on self government and equality, In fact they argued, the position that was being put forward by NWAC was anti-traditional. They believed that the Native Women's Association of Canada's position had been overly influenced by their non First Nation sisters and by the feminist movement which adhered to a white liberal doctrine.

How then should we evaluate the competing claims?

This thesis will conclude that both the Assembly of First Nations and the Native Women's Association of Canada were correct in their assessments. The Assembly of First Nations was correct in its conclusion that judicial decisions made by a court outside of the jurisdiction of First Nations would seriously affect the autonomy of First Nation communities and that the Native Women's Association of Canada was more concerned about equality than autonomy, based primarily on the fact that the Native Women's Association of Canada was heavily influenced by the European conception of equality.

The Native Women's Association of Canada was also correct in its assertion that present day governing structures in First Nations communities were patriarchal in nature and therefore incapable of restoring First Nation's women to their former status. They were also correct in their apprehension surrounding non-application of Charter provisions to First Nation governments. Without Charter protection, they believed their claims of equality could be easily lost.

Finally in weighing the evidence in support of both positions, this thesis will conclude that the constitutionally guaranteed right to equality for First Nations women was of greater importance than the need to protect the autonomy of First Nations. In examining the importance of autonomy versus equality, in evaluating historical evidence, and assessing the Native Women's Association of Canada's arguments around the importance

secure positive change was clear. In the words of Gail Stacey-Moore, "women have the right not to be dominated by men and governments to their detriment . . . we are beggars in our own land, living without houses, programs, services and benefits of other First Nation people".[12]

The truth is that women and their children were being denied the right to return to their own communities and access to programs which benefited other First Nation people. In many cases, the band and tribal councils which were still dominated by men who continued to ignore the plight of their own people. First Nation women ought not to have been asked to live outside of constitutional protection of their rights, to place their trust in governing bodies which had a history of denying their rights, and which had not yet clearly established what those rights would be. Given the history of the oppression First Nation women had been forced to endure, their apprehension was understandable.

In order to elaborate on these conclusions, this thesis is organized in the following manner:

[12] Gail Stacey Moore, "Aboriginal Women, Self Government, The Canadian Charter of Rights and Freedoms, and the 1991 Canada Package on the Constitution", an address to the Canadian Labour Congress, Skyline Hotel, Ottawa, Ontario, 3 December 1992, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina, December 179.

of women in "traditional" First Nations societies. It also explores the foundation and birth of the Indian Act and discusses how this legislation affected aboriginal women.

Chapter three examines how the Indian Act changed tribal government and discusses how patriarchy and paternalism permeated First Nations, resulting in contemporary constitutional conflict. It also examines the root of aboriginal women's discontent and discusses the steps they took to initiate their pursuit of constitutional change. It also discusses how First Nations were able to secure a seat at the constitutional table and identify the arguments put forward by First Nation women regarding their participation at this level.

Chapter four examines how and why first nation men's and women's interests were pitted against each other in contemporary constitutional negotiation. In particular this chapter focuses upon the Meech Lake Accord and the Charlottetown constitutional agreement which culminated in the Native Women's Association taking legal action that went to the Supreme Court of Canada.

Chapter five examines the actual court challenges launched by the Native Women's Association of Canada.

Chapter six reviews the facts and outlines the main conclusions of the thesis.

Pre-Contact and the Impact of Colonization

It is difficult for researchers to obtain an accurate account of what life was like for First Nation men and women prior to contact. Much of the existing literature was written from a non-First Nation perspective. Since First Nations had an oral tradition their history passed through the generations unwritten. The reality is that no person alive today is old enough to remember 'traditional' roles of the people prior to the reservation era. Even elders were children during this time and memories of their lives were based upon a period during which the government systematically attempted to impose Anglo-European values.[13]

Nonetheless, it is known that First Nations had sound economic, political and social systems prior to contact. Every society develops systems that ensure survival; systems that allow for the material means of existing. These systems allowed for extraction of resources necessary to sustain life. First Nations were mutually dependent upon each other for survival. Therefore their social structure was built upon co-operation and expert knowledge of their environment. They developed proficient techniques that enabled them to extract natural resources and distribute these resources in accordance to need. The economic, political and social structures evolved from that means of survival that depended on ecology and food supply. Participants were mutually dependent upon each

[13] Janet Mancini Billson, "Standing Tradition on Its Head: Role Reversal Among Blood Indian Couples," Great Plains Quarterly 11, No. 1 (1991): pp. 3-21.

that recognized these obligations.

North America was ecologically diverse, therefore differences of custom and tradition existed among First Nations. Social systems evolved in response to collection of food that was dependent upon the ecology and environment of the regions they inhabited. Long distance trade formed a market place that was nevertheless not a market system.[14] Communalism, governed by equal relations within the communities, was the method of production and surplus was used to benefit the whole community.[15] The survival of the nation depended upon those social systems and until contact with European culture they sustained First Nations for thousands of years. Survival was paramount, therefore the relationship between men and women was based on shared responsibility for ensuring that their communities were safe and secure. The individual had to be subordinate to the whole or one could not have survived.

Political institutions, economy, social order and spirituality were also born from the collective consciousness. The whole could only survive if each part fulfilled a role. The individual in this web of social relations had responsibilities toward others. These responsibilities were the outgrowth of the person performing their obligation in the order

[14] Peter Jordan, "Cosmological Implications of Pan Indian Sacred Pipe Ritual," Canadian Journal of Native Studies 7, No 2 (1987): pp. 297-304.
[15] Ron Bourgeault, "The Struggle of Class and Nation: The Canadian Fur Trade 1670s to 1870s," Alternative Routes, 8 (1988), p. 882.

the general good and the individual good were identical.[16]

The diversity of First Nations was exhibited in the variance of roles between and within First Nations. These nations were not a homogenous group. Some First Nations such as the Huron and the Iroquois were matriarchal societies. They traced their ancestry and social organization through the female line. Matriarchy correlates with societies strongly dependent upon agriculture activities and generally women were in charge of those tasks. In those societies, women possessed political and social power, greatly influencing the governing of the communities.[17]

Reciprocity and kinship structured Iroquois societies. Their economy embodied what can be described as reverse capitalism in which goods were not accumulated but provided to others. Status and authority rested with those who were able to give the most away.[18] They ruled by consensus and they believed power rested within a spiritual source.

The basic building blocks of Iroquois politics were lineage and women. Both played a very prominent role. Rights, privileges and obligations were determined by an established constitution. Powers of governing were vested in Council Chiefs and members did not act without the approval and advice of women. Iroquois men had no

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[16] Menno Boldt and Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms," Ethnic and Racial Studies, 7 Number 4, (October, 1984), p. 479.
[17] Karen Anderson, "Commodity Exchange and Subordination: Montagnais-Naskapi and Huron Women, 1600-1650," Signs, Journal of Women in Culture and Society. 11, No. 1(1985): pp. 488-492.

children and marriage was usually a contract between the mothers.[19]

The Huron were horticulturists, corn being their major food staple. Their economy also revolved around fishing, hunting and gathering. The nation organized themselves politically through clans that were governed by women, the head of the clan. Men became members of the clan they married into and the head of the clan was always a woman who was also custodian of the land. All social and economic activities were determined by gender and neither man nor woman occupied a position that allowed total control of the means of production. Therefore neither sex could claim special status.[20] Women dominated agricultural production and were responsible for keeping the food supply stable; their expertise in the agricultural area provided economic security and family stability.[21] As in the Iroquois society, status was determined by generosity and gift exchange. The social structure was egalitarian and the non-accumulation of wealth prevented economic class differentiation.[22]

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[18] Daniel K. Richter, The Ordeal of the Longhouse, The Peoples of the Iroquois League in the Era of European Colonization, (Chapel Hill: University of North Carolina Press, 1992), p. 22.
[19] Cheda, Sherrill, "Indian Women, A Historical Example and a Contemporary View," in Women In Canada, (Toronto: New Press, 1977), pp. 195-206 and Sally Roesch Wagner, "The Iroquois Influence on Women's Rights," Akwe:Kon Journal, (Spring, 1992): pp. 4-14.
[20] Anderson, Op. Cit., pp. 488-492.
[21] Marlene Brant Castellano, "Women in Huron and Ojibwa Societies," Canadian Women Studies, 10, Numbers 2 & 3(Summer/Fall 1989): p. 42.
[22] R. T.Naylor, Canada in the European Age 1453-1919 (Vancouver: New Star Books 1987), p. 37.

The social structure of other First Nations differed. Seasons determined the activity of migratory hunters and gatherers such as the Ojibwa nation and difference of responsibility existed between men and women. Although men received public recognition for achievement in hunting and in warrior expeditions, women were more than passive complements to the life of their men. They were essential partners to the survival. They were needed for their expertise in domestic chores of cooking and sewing and their duties were imperative in the production of fishing nets, fur robes, tanning of hides and harvesting of wild rice.[23]

In other nations such as the Plains' Blood, also a hunting and gathering society, a more distinct division of labor existed. Women gathered berries and hunted small local game and occasionally accompanied men on the buffalo hunts in order to help regulate herd movement and to be there for the initial processing of hides. They were responsible for making tipis, taking them down and moving the camp. Although women generally did not take part in tribal governing, they were a valuable and integral part of the Blood society. Their duties were domestic and centered around caring for children and elderly.[24] Men's role revolved around the ability to provide for the family.

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[23] Castellano, Op. Cit., p.42.
[24] Billson, Op. Cit., p. 6.

Unfortunately, there is little written account of the traditional status and role of First Nation women, and what is available for contemporary analysis is all too often given through the interpretation of ethnographers and anthropologists. As more research is conducted which incorporates the viewpoints of present day First Nations women, their knowledge and opinions all too often facilitate much debate on the topic. Jean Goodwill, was a well respected and accomplished leader, health professional and teacher who passed away in 1997. She stated that, "Indian women remained in the background for traditional social and cultural reasons. Other than the Mohawk women in eastern Canada, women of other tribes did not sit on council nor did they have any say in the affairs of the tribe". Other contemporary First Nation women maintain that "women always had a vote on council and no discrimination against women existed in Indian tradition[25]

The difficulty in attempting to analyze the conception of equality and the exercise of power in traditional societies stems from the definition of those terms using today's standards. Matriarchy and the organic structure of the Plains societies were much different in the 16th and 17th century than they are today. In spite of all the debate, what is clear is that the role of women in traditional First Nation societies changed after contact with European nations.

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[25] Somer Brodribb, "The Traditional Roles of Native Women in Canada and the Impact of Colonization," Canadian Journal of Native Studies, 4, No. 1 (1984): pp. 85-105.

competed for economic and political dominance. World trading routes emerged along with colonial expansion. Contact with First Nations of the Americas was inevitable. This resulting new economic order had many parts: eg. ideas, institutions, cultures. The most important of these however, were politics and markets.[26]

First Nations were inextricably drawn into this new world order. They were instrumental to an European expansion which heavily depended upon trading partners and military allies. This early period of contact revolved around the fur trade. It was this trade that introduced a market economic order to First Nations. They were drawn into a competitive trans-Atlantic trading system that would change their societies forever. No First Nation would remain unaffected.

European explorers sought out new lands for the purpose of establishing trade routes and to accumulate capital and to circulate commodities on a world wide scale. Two polarized worldviews collided, European mercantilism and First Nation communalism.[27] Furs were a luxury product and a profitable commodity therefore European traders were eager to establish a trading relationship with First Nations. European traders recognized that they would need the people's cooperation if the system of exchange was to work. Already

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[26] Stephen Cornell, The Return of the Native: American Indian Political Resurgence (New York: Oxford University Press, 1988), p. 11.

[27] Ron Bourgeault, "Race, Class, Gender: Colonial Domination of Indian Women," Bonds and Barriers, Number 5 (1989), p. 90.

commodities such as, guns, gunpowder, cloth and iron tools.[28]

Indigenous people had the expertise needed for the harvest of furs and European merchants and explorers recognized this fact. Indigenous participation in the mercantile system was crucial since they knew the best places for hunting and were more adapted to the environment.[29] First Nation societies were communal and governed by a political system much different from what was established in European nations. It was therefore necessary to change First Nation societies to ensure that the new mercantilism would succeed.

The supply of European goods quickly changed the lives of indigenous people. They became experts in operating firearms which replaced bows and arrows. Steel tools and weapons replaced bone and flint implements and products such as kettles were introduced into their lives. A rapid shift took place within their culture as their methods of living changed and there was increased attention to the trade of furs.[30]

With the introduction of trade, the individual's most important ties and the objective relation to other band members, changes from a cooperative mode to a competitive mode. Storable, transportable and individually acquired supplies, (e.g., flour, lard, etc.) allowed

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[28] Naylor, Op Cit., p. 37.
[29] Ibid.
[30] Irene Spry, "Innis, The Fur Trade and Modern Economic Problems," in eds. Carol M. Judd and Arthur J. Ray, Old Trails and New Directions: Papers of the Third North American Fur Trade Conference (Toronto: University of Toronto Press 1980): pp. 291-307.

hindered the personal acquisition of furs. The more furs one was able to collect, the more material comforts one could obtain and material gains become theoretically limitless. The family group began to be threaten the limit on furs and a sense of proprietorship develops over certain land areas.[31]

Once the new economy was introduced into First Nation societies, transformation of those societies became inevitable. First Nations willingly participated in the fur trade and in most respects their life became easier through the use of imported commodities. Their autonomy was intact during this period but their economy as well as their social and political relations took on new characteristics. This laid the groundwork for First Nation adaptation of differing spiritual beliefs and the importation of a different political paradigm. A First Nation's way of life had to be reconfigured. Traders and missionaries found it necessary to influence male members of First Nations societies and urged them to bring their women under control.[32] The relative autonomy that women had in some First Nation societies made the newcomers very uncomfortable.

The status and role of women changed dramatically once First Nations became locked into a market economy and were exposed to the western patriarchal notion that men must look after their women. The exchange and introduction of new products was made through men and this fractured the equivalent status and reciprocal relationship that

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[31] Eleanor Leacock, "The Montagnais Hunting Territory and the Fur Trade," American Anthropologist, 56, Number 5, Part 2 (Memoir No 78, 1954): pp. 10-43.

agents elevated their social role and hierarchies began to appear within First Nations.[33] Power became centralized to First Nation men and they were sought out by Europeans to make the important decisions for their families and communities. Men soon gained a political and economic advantage over women.[34]

The fur trade was instrumental to European expansion and until the end of the 18th century the French and British heavily depended on First Nations to act as trading partners, middlemen and military allies. In 1763, the political, economic and military competition between the French and British came to an end and the British became the sole colonial power. That same year, the British acknowledged self-ruling First Nations through the Royal Proclamation.[35]

FIRST NATIONS LOSE TRIBAL SOVEREIGNTY

The Royal Proclamation of 1763 acknowledged First Nation sovereignty and nationhood. The British recognized aboriginal title by declaring that unceded lands could only be surrendered to the Crown in a prescribed manner. This would only be done through negotiated agreements or treaties and at that time, the relationship between First Nations

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[32] Hamilton, Op. Cit., p. 115.
[33] Bourgeault, Op. Cit., p. 102.
[34] Hamilton, Op. Cit., p. 120.
[35] Krosenbrink-Gelissen, Op. Cit., p. 21.

still had control of their culture, population, land and economies. A boundary between Indian land and non-Indian land was in place and a procedure for surrender of land was established. It should be noted that while the Royal Proclamation confirmed Indian tribes were independent nations, it only recognized limited sovereignty. Tribes were not viewed as national equals but as wards under British protection.

> . . . the several Nations or Tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominions and Territories as, not having been ceded to or purchased by us, are reserved to them or any of them, as their hunting grounds (Royal Proclamation, 1763)[37]

First Nation sovereignty was recognized out of prudence and tolerated within a restricted range.[38]

CREATION OF CANADA

Canada is a product of colonization and the founders of the nation were heavily influenced by British, French and American consciousness which explains how and why the political policy that controlled the relationship between First Nations and colonial governments was created. "The history of colonial Canada may be seen as the interaction

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[36] Antoine S. Lussier and Ian A. L. Getty. As Long as the Sun Shines and Water Flows, A Reader in Canadian Native Studies. (Vancouver: University of British Columbia Press, 1983), p. x.
[37] Menno Boldt, Surviving as Indians, The Challenge of Self Government (Toronto: University of Toronto Press, 1993), p. 271.
[38]. Kathy Lenore Brock, The Theory and Practice of Aboriginal Self Government: Canada in a Comparative Context, Ph.D. Dissertation (Toronto: University of Toronto, 1989), pp. 352-373.

into this prefabricated society and if the national dream was to be achieved, a reformation of First Nation identity had to be realized. Assimilation thus becomes the official colonial policy and governments used all internal institutions to reach their goal.

Political circumstances for the colonial government changed in the early 1800s and a time of peace and security invalidated the military usefulness of many First Nations. The relationship between First Nations and colonial powers changed.[40] Settlers immigrated to the area in large numbers and the Crown found it necessary to obtain land. The Royal Proclamation had established the government as middleman in the settlement process and transference of land from First Nations to the incoming white settlers could only come through the intervention of the government. The British found it necessary to adopt a policy of "civilizing" First Nations, believing it would be easier to incorporate them into British North America than to exclude them entirely.[41]

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[39] Reg Whitaker, A Sovereign Idea, Essays on Canada as a Democratic Community (Montreal and Kingston: McGill-Queen's University Press, 1992), p. 6.
[40] Brock. Op. Cit., p. xi.
[41] Rick Ponting and Roger Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada (Toronto: Butterworths, 1980), p. 4.

An Indian department had already been established which supported the "civilization" process. The judgment was made that:

> "under the guidance of government agents and evangelical missionaries, Indians were to be settled in permanent villages and instructed in the English language, Christianity and agricultural methods. The expectation was the creation of self supporting individuals who were indistinguishable from their fellow citizens."[42]

First Nations were encouraged to adopt European values and live a civilized life. Missionaries were expected to transform and make the necessary changes in First Nation behavior and society.[43] They were particularly shocked by, and eager to change, some First Nation societies like the Huron and Montagnais whose women had considerable freedom and autonomy. Missionaries urged men to control their wives and practice monogamy. Within three decades many women had been subdued and rendered docile and obedient.[44] The movement to eliminate traditional, spiritual and cultural values of First Nations became entrenched. In other words, all aspects of First Nation's cultural, spiritual and political life were to be transformed or destroyed.

In 1857 this movement became law when the Act for the Gradual Civilization of the Indian Tribes in the Canadas was passed. Offering monetary, property and

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[42] Brian E. Titley, A Narrow Vision, Duncan Campbell Scott and the Administration of Indian Affairs in Canada (Vancouver: University of British Columbia Press, 1986), p. 3.
[43] Anne-Marie Mawhiney, Towards Aboriginal Self Government: Relations between Status Indians Peoples and the Government of Canada, 1969-1984 (New York: Garland Publishing Inc., 1994), p. 21.
[44] Karen Anderson, Chain Her By One Foot (London: Routledge, 1991), p. 4.

First Nations were enticed to assimilate and sever all ties with tribal roots. The legislation stated those First Nation persons:

> . . . could not be accorded the rights and privileges accorded to European Canadians until the Indian could prove that he could read and write in either French or English, was free of debt, and of good moral character. If he could meet such criteria, the Indian was then eligible to receive an allotment of fifty acres of reserve land, to be placed on one year probation to give further proof of his being civilized.[45]

The Act was drawn on the premise that by removing the legal distinctions between Indians and non-Indians through enfranchisement and by facilitating the acquisition of private property by Indians, it would be possible to absorb them fully into colonial society. This act applied only to adult male Indians. Section 3 of the Act stated that to be enfranchised one had to be male over the age of 21. Women were not to be enfranchised independently, but if an Indian male were enfranchised, his wife and children were automatically enfranchised along with him regardless of their wishes. Ultimately, women lost status as Indians. Only males had the right to possess property and women were perceived as chattels, perpetuating the European notion of the wife and child as property of the male.[46]

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[45] John L Tobias. "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy," The Western Canadian Journal of Anthropology, 6, No 2 (1976), 16.

[46] Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, Volume 4, (Ottawa: Minister of Supply and Services, 1996), p. 26.

Indian Policy. At that time, First Nations still had a voice in how their societies, cultures and politics were to change if they were to change at all. First Nation leaders recognized the intent of the Act and rejected it. One tribal leader noted that the intent of the legislation was to "break them to pieces"[47] and only a handful of First Nation people actually came forward with applications to enfranchise. This meant that the Act For the Gradual Civilization of the Indian Tribes in the Canadas could not be effective.

In 1860, the responsibility for First Nations was transferred from the Imperial government to the Province of Canada. In 1867, the *British North American Act* created a federation in Canada. Section 91[24] made Indians and lands reserved for Indians a federal responsibility serving the interests of the young nation by creating central control and jurisdiction over Indians and their territories. The Federal government now had the legislative power to cede large areas of land to provinces and private enterprises without First Nation consent. All policy relevant to First Nations would now be coordinated along side national military, settlement and economic policies.[48] In no way did First Nations participate in the formulation of the BNA Act.

The Act for the Gradual Civilization of the Indian Tribes in the Canadas was not successful so in 1869, the Crown reverted to more coercive measures when the Act for

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[47]. John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change," in Antoine S. Lussier and Ian A.L. Getty, eds., As Long as The Sun Shines and Water Flows, A Reader in Canadian Native Studies, (Vancouver: University of British Columbia Press, 1983), p. 59.
[48] Boldt, Op. Cit., p. 68.

Indian Affairs (or his agent) was granted extensive decision making powers affecting the lives of First Nation people. This Act also terminated any control First Nation people had over determining citizenship. The state had the power to identify First Nation citizenship thus shifting culturally defined concepts of First Nationhood to legally defined components imposed by the state.[49]

This Act stipulated that in each settlement, a council was to be elected by adult males over the age of twenty-one. Only men were allowed to vote in band elections effectively removing Indian women from band political life. This reflected the reality of how women were treated in Canadian society generally. Also, upon the death of a First Nation male, his goods and land rights were to be passed to his children to the exclusion of his wife as she was regarded as a responsibility of the children. If a First Nation male was to become enfranchised his wife and minor children were automatically enfranchised. Section 6 of this act stated that "any Indian woman marrying any other than an Indian shall cease to be an Indian within the meaning of this Act . . .". The children from the marriage also lost their status and if an Indian women married an Indian from another band she became, along with the children, members of the husband's band.[50] For the first time, Indian women had fewer rights than the Indian men. This legislation was intended to aid in the reduction of Indians and half-breeds on reserves and it establishes the successful assimilation of the people.

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[49]. Mawhiney, Op. Cit., p. 24.
[50] Ponting and Gibbins, Op. Cit., p. 116.

The Indian Act passed in 1876 was a consolidation of elements embodied in two dozen previous Acts. All pre-existing legislation pertaining to First Nations was brought together with the passage of the Indian Act. Deriving authority from Section 91[24] of the British North American Act and coinciding with the extension of the federal government's jurisdiction, the Indian Act was social legislation with a very broad scope. It became a land, municipal, education and societies act with provisions about liquor, agriculture, mining, Indian lands and band membership. It had the force of the Criminal Code and the impact of a constitution for those people and communities that came within its purview.[51] This Act became the foundation upon which all future First Nation policy developed and it successfully instituted the dominant/subordinate nature of the relationship between First Nation people and the Canadian government. The Canadian state established firm control over the cultural, social, economic and political activities of those defined in the Act. Through this Act, First Nations lost control of every aspect of their existence.

The intent of the Indian Act was total enfranchisement and destruction of First Nation culture. The state only recognized those persons as "Indian" if they were defined as such within the jurisdiction of the Indian Act. Rooted in a British and French patriarchy, the Act reflected this perspective. Persons entitled to be registered with the state as "Indians", were male persons who were direct descendants in the male line of a male person or is the wife or widow of a person who is entitled to be registered. In other

registered Indian.[52] Section 12(1)(b) of the 1869 legislation, specified:

> The following persons are not entitled to be registered
> (b) A woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in Section 11.

The status of First Nation women was thus determined through their father or husband. If a woman, recognized under the Indian Act as having status, married a non-Indian man, she lost her status as did her children.

When a woman married a non Indian she was forced to leave her reserve. She was not entitled to property on the reserve and had to dispose of any property held. She was prevented from inheriting property left to her by her parent and could not take part in Band business. Her children were not recognized as Indian and therefore denied access to cultural and social amenities of the Indian communities. She was prevented from returning to live with her family on the reserve nor was she allowed to be buried on the reserve with her family. In reverse, non-Indian women marrying a status Indian male gained status as did their children. The state effectively removed "Indian" outside blood lines and cultural distinction.[53]

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[51] Ibid, p. 8.
[52] Cheda, Op. Cit., pp. 195-206.
[53]. Kathleen Jamieson, Indian Women and the Law in Canada: Citizens Minus, (Ottawa: Minister of Supply and Services Canada, 1978), p. 1.

The Indian Act also eliminated all traditional forms of First Nation governing. Elected band governing was introduced prior to passage of the Indian Act in the Gradual Enfranchisement Act of 1869. The intent was to undermine traditional governing structures but bands were not interested in an elected system of governing. Traditional Indian leadership usually grew out of social systems that were organized around extended kinship groups and duties were defined by custom and culture essential to the survival of the communities. In many First Nation societies, power was not set into formal specialized institutional structures. The tribal community performed all political, social, economic and political functions and made decisions by consensus. In this sense, the people constituted the government in respect of all its functions. There was no permanent political institution nor authority hierarchy. Tribal governing existed for and by the group.[54] The European notion of sovereign authority had its origins in the system of feudalism and the associated belief in the inherent inequality of men. First Nations of North America did not experience feudalism and most believed in the equality of people. In tribal society individual interest was intertwined with tribal interest, the general good and the individual good were taken to be identical.[55]

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[54] Robert Bunn, "First Nations self governing prior to colonization in Manitoba," The Peoples' Decision, Framework Agreement Newsletter, 2, No. 1 (July, 1996), p. 6.

[55] Menno Boldt and J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," Canadian Journal of Political Science, 17, No. 3 (September, 1984), p. 540.

Those forms of governing based upon tradition were replaced by band governing through elective measures which were outlined in the Indian Act. Only men were allowed to vote in band elections thus removing Indian women from band political life. Many First Nation leaders resisted the Act realizing that if they adopted Band systems of governing their vestige of tribal governing and traditional political systems would be destroyed.[56] Indian agents that were appointed by the state had the power of a Justice of the Peace and they enforced all sections of the Act. First Nation resistance to the Act was countered with legislative amendments, each increasing the federal government's control over Indians. A classic example is as follows:

> . . . when First Nation bands elected their traditional leaders, the Act was amended (1884) to give the government the power to depose those considered immoral, incompetent, and to prevent their re-election. When traditional First Nations customs, interfered with progress toward assimilation, legislation was introduced to ban them (1884 the Potlatch and Sun Dance were banned). In 1920, provisions requiring First Nation to seek permits to appear in traditional dress and perform traditional dances were written into the Act . . . if school on the reserves were not well attended . . . provisions were written in permitting the Governor-in-General to issue regulations to commit children to such institutions . . . children who did not attend thus making their parents subject to criminal penalties . . . peoples failed to apply for enfranchisement, provisions were made making it compulsory were written into the Act (1926).[57]

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[56] Tobias, Op. Cit., p. 19.

[57] Andrew Armitage, Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand (Vancouver: University British Columbia Press, 1995), p. 78.

amendments were the result of resistance to the Act, others were the result of societal pressure. Major amendments to the Act took place in 1951 due in part to an interest taken by the Canadian public. Indian men made a significant contribution to the Second World War and the public became concerned with the treatment of Indians as second class citizens when they returned. That was coupled with concern regarding conditions in which First Nation people were forced to live. First Nation men with status did not have the same rights as other Canadians. In fact, First Nation men were not regarded as Canadian citizens at all.[58] This was changed after the 1951 Indian Act amendment and Indian women were then allowed to participate in Band politics.

Menno Boldt, in his book, Surviving as Indians, published in 1993, gives an excellent analysis of how the Act affected First Nation governing structures and ultimately how it affected the leaders within the community. He argues First Nation leaders, who were at one time servants of the people, became managers of the people within a hierarchical political structure where authority was delegated by the Department of Indian Affairs [DIAND]. Although reluctant participants in the process, the goal of the state was somewhat successful. The introduction of provisions for election of the Chief and Councilors modeled on the Canadian electoral requirements, gave rise to a ruling class within the communities that was in turn ruled by Indian Affairs. This created the elite ruling class on most reserves which in turn controlled all political agendas. Although Chiefs and Councilors sought out the vote of the people, their mandate to govern came

[58] Tobias, Op. Cit., p. 24.

to Indian Affairs.

After generations of this kind of rule, traditional patterns of control were virtually extinguished and authority was delegated through a hierarchical, authoritarian and legal system. However, the checks and balances that operate in western democratic societies were not present in Indian communities. Without this traditional control and without the checks and balances, there was an open invitation for arbitrary behavior. This made Indians without political power, who for the most part were women, vulnerable to manipulation under the rule of their own elite and DIAND officials.[59]

The negative implications of the Indian Act have been permanent. They have created a group of women and children displaced within their own culture and within society as a whole. Some consequences of denial of status include loss of the following benefits belonging to status Indians:

- non access to educational benefits
- children of non status Indian women were denied access to cultural education programs offered in reserve schools
- entitlement to tuition and books
- lunch supplements
- access to sports equipment
- post secondary educational benefits
- housing benefits
- the right to live on reserve where they can be close to friends and family
- loans and grants from the Indian Economic Development Fund for the purpose of starting a business
- tax exemption that comes from residing on a reserve

[59] Boldt, Op. Cit., pp. 120-130.

provinces.
- costs of medication
- hunting and fishing rights
- animal grazing and trapping rights
- cash disbursements derived from sale of band assets or monies surplus to band needs.[60]

To date these inequities have not been adequately dealt with or rectified.

The Act of 1876 and the amendments that were to follow attacked every aspect of Indian culture. The Act defined who would be recognized as an Indian in the context of the Canadian law. This had the effect of fragmenting the population into legally and legislatively distinct blocs experiencing different rights, restriction and obligations. Indians were not recognized as full Canadian citizens until they became enfranchised which meant that they had to sever all ties to their community.

Public pressure on the Canadian government resulted in changes to the Indian Act in 1951. This was due in part to First Nation participation in World War Two where upon their return to Canadian soil they were not recognized as citizens and denied basic rights accorded to other citizens. Consequently, a joint Senate-House of Commons Committee was established to review the Indian Act and Indians were encouraged to participate in this process which was unprecedented up to that point. Representatives from bands and associations [North American Indian Brotherhood and associations from three western provinces] submitted briefs and gave testimony to the committee, calling for the abolition

that women who had lost their status through marriage and who were deserted or widowed should be allowed to rejoin their band with their children. The Indian Affairs Branch differed in opinion and this recommendation was ignored.[61]

Flowing from the Committee hearing, amendments to the Indian Act were introduced in 1951 by the Liberal government. The amendments allowed for a reduced degree of government intrusion into cultural affairs but the discretionary powers of the Minister and Governor in Council were amplified. The prohibition on the ceremonial practices was repealed. Indians were then allowed to consume liquor in public places and the 1933 provision that allowed an Indian to be enfranchised without his consent was dropped as was the 1927 ban on political organization.[62]

For the first time, Indian women were allowed to vote in band elections but the enfranchisement section of membership was greatly elaborated and altered. The status provisions in the Act clearly explained who would be recognized as "Indian" for federal government purposes. Greater emphasis was placed upon registration and the right to be registered and this strongly favored the male line of descent. "Marrying out" provisions reflected in Section 12 (1)(b) were strengthened by connecting them to concept of

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[60] J. Rick Ponting, Arduous Journey, Canadian Indians and Decolonization (Toronto: McClelland and Stewart Limited, 1986), p. 125.
[61] J. Rick Ponting, Op. Cit., p. 121.
[62] Ponting and Gibbins. Op. Cit., p. 13.

could have to some extent dual status as an Indian and an ordinary Canadian citizen. She could retain the right to collect annuities and band money if she and her band chose. She continued to be on the Band list and enjoy band benefits and treaty rights. After the 1951 amendments she no longer had the right to retain this privilege.[64] In 1960, Indians became eligible to vote in federal elections and it became acceptable to be an 'Indian' who was also a "Canadian".

The Act of 1876 and the amendments that followed attacked every aspect of First Nation culture fragmenting the people into legislatively distinct blocs experiencing different rights, restriction and obligations. An Indian with "status" had a unique relationship with the Federal government and was acknowledged as having special rights other Indians did not have. The government became responsible for all facets of Indian life and through the administration of Indian policy, the Department of Indian Affairs functioned as a microcosm of the state, providing a complex of services other Canadians received from the Federal Government. Metis and non status Indians were considered members of regular Canadian society and fell under provincial jurisdiction. The ultimate goal was assimilation and it was envisioned that at some point in time, the special status of First Nations would be non-existent.

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[63] After the '51 amendment, Indian women who married out would not only lose status, she could be enfranchised against her will as of the date of her marriage.
[64] Ponting, Op. Cit., p. 123.

Assimilation of First Nations became the goal of the British and later the Canadian government. Loss of sovereignty did not happen in one step but resulted from economic and political restructuring of the nation. However, the strategy of the British and later Canadian state to assimilate Indian culture into Canadian society was not totally successful. The placing of First Nations on reservations ironically affirmed maintenance of their culture uniqueness. Ceremonials that were banned went underground and to this day are still practiced. What the British and Canadian governments did do was create a complex multidimensional relationship with First Nations on many different levels. First Nation people fit into many different categories within the Canadian state. These categories are determined by what rights they have access to and what jurisdiction they belong to.

The Indian Act clearly divided the people and encoded into Canadian law different treatment, different access to state resources and different governmental obligations and responsibilities toward members of First Nation societies. The Act incorporated Western patriarchal laws and values which served to pit members of First Nation societies against each other, sister against sister, men against women and those who married non-Indians against those who married Indians. The effects were far reaching and tragic.

The Effects of the Indian Act on Women and their Attempts to become involved in Constitutional Negotiation

As discussed in the previous chapter, the Indian Act was the tool used to oppress First Nation people by shaping and regulating all aspects of their lives. Mirroring Euro-Canadian social organization, specifically cultural values and English common-law, wives became property of their husbands, perceived as dependent subjects who would from then forward derive their rights from either their husbands or fathers. Through this Act, the oppression of First Nation women was institutionalized, legislatively enforcing discrimination based upon gender. After this Act was passed, First Nation women had fewer fundamental rights than other Canadian women or Indian men.[65]

The state passed Bill C-79 in 1951 amending the Indian Act. The amendment made the state less intrusive into First Nation cultural affairs but went further than any previous attempts to sever the connection to the women marrying out of their reserve communities. The Act's focus was still designed to promote integration of First Nations into the Canadian mainstream society. Prior to the 1951 changes, women who married non status men, in some instances, could continue receiving treaty annuities and reside on their home reserve communities. Some bands continued to recognize these women as part of their communities and what was referred to as "red tickets" were issued as a means to

[65] Sarah Carter, "First Nations Women of Prairie Canada in the Early Reserve Years, the 1870s to the 1920s: A Preliminary Inquiry," Women of the First Nations: Power, Wisdom, and Strength, eds., Christine Miller and Patricia Chuchryk (Winnipeg: University of Manitoba Press, 1996), p. 53.

after the 1951 amendments.[66]

In accordance with section 12 (1) (b), any supplementary rights, band benefits and marginal access to annuities that women were allowed by the Acts of 1869 and 1876 were expropriated on the date of marriage. New status rules made the definition of Indian more restrictive as far as women were concerned and the "Double Mother" clause was introduced. This clause caused a child to lose status at age 21 if his or her mother and grandmother had obtained their own status through marriage. What this meant was that if someone born and raised on a reserve whose mother and grandmother obtained their status through marriage, lost band membership and would have to forfeit the right to live on the reserve[67] All women without status were affected including those who may have been enfranchised involuntarily or who were inadvertently left off the band list or unable to qualify.[68] Section 12(1)(b) sustained the objective of the colonialist policy of assimilation by reducing the numbers of Indian people with claim to status and band affiliation. The Indian Act determined a particular colonial patriarchal arrangement of discrimination directed solely toward women.[69]

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[66] Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, Volume 1, (Ottawa: Ministry of Supply and Services Canada, 1996) p. 300.
[67] Report of the Royal Commission on Aboriginal Peoples, Volume 1, Op. Cit., p. 312.
[68] Jamieson, Op. Cit., p. 60.
[69] Emberley, Op. Cit., p. 88.

The 1960's were the times of change in the world and these changes transformed Canada. The American civil rights movement caused Canadians to question their government's treatment of First Nations. People began to realize that First Nations had been treated differently because of their race. Politicians began to be held responsible for past policy which resulted in harsh treatment of the First Nation people. The Indian Act was called into question. A number of studies funded by the federal government were commissioned and the 1966 The Hawthorn Report exposed the deplorable living conditions of First Nations. Hawthorne reported that First Nation communities were overwhelmed with unemployment and poverty and past government policies were exposed both nationally and internationally. It was evident that federal intervention into the lives of First Nations had resulted in severe negative impacts upon their communities.[70]

In 1960, the Canadian Bill of Rights had been passed during the Diefenbaker era guaranteeing "equality before the law and protection of the law without discrimination". In this Bill, sexual equality rights were guaranteed. It was also during this era that women became more vocal, forming political organizations which exposed the reality within which they lived. Women were generally poorer than men and employed at lower paying, part time jobs. They lacked social and political power, were underrepresented in Canadian Parliament and legislatures, the Senate, city councils and school boards.

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[70] Sally M.Weaver, Making Canadian Indian Policy, the Hidden Agenda 1969-1970 (Toronto: University of Toronto Press, 1981), p. 7.

objectives. As the women's movement gained prominence it shaped an atmosphere within which Indian women also began to question their place in Canadian society and their own cultural paradigm. Although the living conditions for First Nation communities were a national disgrace, conditions for First Nation women were much worse, particularly for those women who lost status due to provisions of enfranchisement within the Indian Act.

In 1967, responding to pressure from established women's groups, the Canadian government established a Royal commission on the Status of women. This process served as a catalyst exposing the extent of gender inequality and how inequality is systematically entrenched in all Canadian institutions.[71] Mary Two-Axe Early, a non-status Mohawk woman from Kahnawake reserve in Quebec, had ten years previously vocalized her discontent of sexual discrimination inherent within the Indian Act. She had married an non Indian person and lost her status but she and her children continued to return to the reserve in the summers and lived in the house willed to her by her parents. This was consistent with Mohawk traditions. Ms. Two-Axe Early was informed by the Band Council that in accordance with the Indian Act, she was no longer entitled to property on reserve. This circumstance prompted her to began to organize a women's group and "Equal Rights for Indian Women" movement was born. She immediately

[71] Chaviva Hosek, "Women and Constitutional Process", in Keith Banting and Richard Simeon, And No One Cheered: Federalism, Democracy & the Constitution Act (Toronto: Methuen publication, 1983), p. 280.

experiences and concerns.[72]

In, 1968 a new Prime Minister was elected, one who promised the establishment of a "Just Society". Pierre Elliot Trudeau's Liberal government, took on the formidable task of reviewing the Act which caused the perpetuation of racial discrimination toward Indians. It was determined that First Nations were to be consulted on revising the Indian Act and meetings were set up in First Nation communities across Canada. The consultation process began in the summer of 1968 and lasted until May 1969.[73] Expectations among First Nations were raised, since they had seldom been asked to participate in policy changes affecting them. Major priorities presented by First Nation groups included recognition of their special rights as original inhabitants and speedy settlement of land claims and historic grievances involving the treaty making process. They also wanted direct involvement in the implementation or policy changes affecting their lives in the future.[74]

When the government White paper was released in June of 1969 entitled Statement of the Government of Canada on 'Indian Policy, 1969, it quickly became apparent that the "consultative" process was an illusion. Very few of the concerns expressed by First Nations groups had been addressed. Instead, the federal government proposed abolition

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[72] Krosenbrink-Gelissen, Op. Cit., p. 75.
[73] Weaver, Op. Cit., p. 60.
[74]. Mawhiney, Op. Cit., p. 42.

Indians. Six points were proposed:

- That the legislative and constitutional bases of discrimination be removed.
- That there be positive recognition by everyone of the unique contribution of Indian culture to Canadian life.
- That services come through the same channels and from the same government agencies for all Canadians.
- That those furthest behind be helped the most.
- That lawful obligations be recognized.
- That control of Indian lands be transferred to the Indian people.

According to White Paper, special status conferred on First Nation people was the reason their communities were in deplorable conditions. "The policy of separation has become a burden. The difference must not be enshrined in legislation".[75]

The response from First Nation leaders was immediate and it took government officials by surprise. First Nations adamantly rejected the policy stating it had not been developed in good faith and they angrily rejected the paper's denial of their special rights. A press release issued by Indian leaders noted that the policy document had "been unilaterally devised by the government without Indian discussion or negotiation, with the result that "we do not feel we took part in any decision making process".[76]

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[75] Pauline Comeau and Aldo Santin, The First Canadians, A Profile of Canada's Native People Today (Toronto: James Lorimer and Company, 1990), p. 7.
[76]. Weaver. Op. Cit., p. 173.

resounding rejection of the federal government's proposal. A policy change of that magnitude, made on behalf of First Nations, would not be allowed to become a reality. They made it very clear to the government that before alteration to Indian policy took effect they wanted land claims settled, treaty disagreements resolved and fair and equitable compensation for past injustices. It was then that First Nations decided to aggressively assert their right to control their own destiny. If equality was the goal, then they wanted to start from a level playing field.

The policy was officially withdrawn in the spring of 1971, but the impact of the document was permanent. Indian policy in the 1970's took on a very different direction. Development of alternative policies became a complex process because First Nations now demanded input into political decisions affecting their lives. The climate for major changes had been set. First Nations advocated strongly for retention of their special collective status. With more aggressiveness, First Nations openly rejected the paternalistic relationship they had experienced with the government since the mid 1850's and demanded that it change.[77] Self government became the ultimate goal.

An extremely important shift in First Nation consciousness took place as a result of the White Paper and this shift altered the relationship between the Canadian government and First Nations who then vigorously pursued a different relationship between themselves and the state. That experience caused them to become powerful guardians of their special

Act was patriarchal and, racist but they also knew it was the Indian Act that reinforced their special position within the state. Guarding that distinctness was paramount. They did not want the Indian Act tampered with in fear that it would eradicate the special citizenship rights that were accorded them by the Act.

First Nation women also strongly believed in self government but it was those women who were separated from their communities, separated from equal status within First Nations because of the Act, that sought out alternatives that would secure reentry and eventual acceptance into their home communities. Those women lost equality within their own nations because of the Indian Act and they wanted it restored and were forced to fight their battles on two fronts, with the Canadian governments and their own First Nation leaders.

In 1970, Indian women became hopeful that changes to the Indian Act would occur making equality between the sexes easier to realize. These changes were due to an Indian man named Drybones, who was convicted of intoxication while on reserve. He challenged the Canadian government stating the conviction was discriminatory and contrary to the Canadian Bill of Rights which guaranteed equality before the law. The challenge went to the Supreme Court which ruled that Indians were subject to harsher penalties and judged that Section 94(b) of the Indian Act be repealed. This gave a women by the name of Jeanette Lavell the strength to take her challenge forward to the

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[77] Mawhiney, Op. Cit., p. 58.

the deletion of her name from the band list stating that this was gender specific discrimination. She contested Section 12(1)(b) of the Indian Act. She was joined in the challenge by Yvonne Bedard, another Indian women who had lost status for marrying, then separating from, a non status male. After her separation she returned to live on her home reserve in a house willed to her by her parents but then was evicted a year later by the Band Council.[78]

The case went before the Supreme Court in February1973. In a five to four decision, the Supreme Court of Canada ruled against the women.[79] The Court took the position that discrimination was legal because the federal government had the power to make laws defining who was an Indian and nothing could stop it from discriminating against women in its definition.[80] The Canadian Bill of Rights was not deemed to overrule the Indian Act. The fact that Indian women were treated differently upon marriage with non-status men was not considered relevant to the case.

Much to their surprise, aboriginal women discovered that some very powerful First Nation political organizations such as the Indian Association of Alberta took a stand against Lavell and Bedard. Although they believed that discrimination of women in the Indian Act was wrong, they were afraid that if Bedard and Lavell won their cases, the

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[78] Ponting, Op. Cit., p. 126.
[79] Jamieson, Op. Cit., p. 84.
[80] Native Women's Association of Canada, Native Women and the Charter: A Discussion Paper (Ottawa: Department of the Secretary of State), 1992.

The Indian Association of Alberta's position was later agreed to by the Indians of Quebec and the Federation of Saskatchewan Indians and the National Indian Brotherhood. Having gone through the experience of the 1969 White Paper, the fear of losing rights caused many leaders to be suspect of change without their consent. They therefore believed that maintaining the status quo was a safer route to take. Sexual inequality was not necessarily favoured, but fear of the unknown was much more threatening. The National Indian Brotherhood did not want the federal government to have the power to change or alter the Indian Act without the consent of the people. Sexual equality between Indian men and women would have to be sacrificed in the interest of preserving Indian rights either through the Indian Act or through other legal channels.[81]

The federal government was also reluctant to make any changes to the Act partly because they were sensitive to First Nation political organizations following the bad publicity of the White Paper and had promised that no changes would be made without First Nation full participation. They were also reluctant because changing the Indian Act would mean enormous financial consequences. Therefore First Nation women were left on their own and their only option was to form a separate political vehicle that could deal with the political problems they confronted. In 1974, the Native Women's Association held its first national assembly and publicly asserted that they represented aboriginal women who based their identity upon self identifying criteria, including non-status and status Indian

[81] Katharine Dunkley, Indian Women and the Indian Act, (Ottawa: Law and Government Division, Research Branch, Library of Parliament, November, 1982) p. 18.

representation.[82]

The Supreme Court ruling of 1973 allowed the Indian Act to remain in force leaving no judicial avenue open for First Nation women who wanted to challenge Section 12(1)(b) of the Indian Act. Therefore in 1975, a Maliseet woman from the Tobique reservation in New Brunswick, was forced to pursue other options in challenging the discriminatory legislation. Ms. Sandra Lovelace lost her status when she married a non Indian man. When she separated from him, she returned with her child to her home reservation where she was then informed by the Band Council that she was not entitled to Indian rights and could not reside on the reservation. The United Nations paid attention to her case and decided it was a legitimate complaint against Canada because of the judicial process that ruled against Lavell and Bedard. The United Nations Human Rights Committee ultimately ruled[83] that Canada was guilty of violation of the Covenant of Civil and Political Rights which guarantees rights of all people to enjoy their culture in their community.[84] Lovelace's exclusion from her reserve violated this right and the UN decision resulted in some international censure of Canada for the Section 12(1)(b) of the Indian Act. This situation proved embarrassing for the Canadian governments who were under extreme pressure by women's groups to amend the Indian Act so the government

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[82] Krosenbrink, Op. Cit., p. 87.
[83] This ruling did not come down until 1981 as cited in Janet Silman, Enough is Enough, Aboriginal Women Speak Out, Toronto: The Women's Press, 1987), p. 14.
[84] Ibid., p. 15.

leadership and respond to the demands of equality for aboriginal women.[85]

The Federal government kept its promise that nothing in the Indian Act would be changed without their participation and consent. In 1975, a Joint Cabinet/National Indian Brotherhood Committee began work on Indian Act revisions. The National Indian Brotherhood [NIB] prevented the Native Women's Association from participating in the meeting and was not prepared to discuss the issue of sex discrimination in the Act. The National Indian Brotherhood believed that individual Indian bands should decide on this matter and sought instead to focus upon self determining powers for Indian bands within the legal framework of the Indian Act.[86] The federal government used the Lavell and Bedard cases as a lever of change, but took the position that legal status could only be altered after an agreement was reached on total revision of the Indian Act. The Act was declared exempt from the Human Rights Act of 1977 in order to prevent aboriginal women from further litigation.[87]

At the same time that the constitutional struggle erupted during the 1970's, the traditional political and economic structures of Canada shifted. The West gained wealth from resource development and wanted more control over resources and the Parti Quebecois, which was committed to Quebecois independence was elected to government in Quebec

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[85] Joyce Green, "Sexual equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act", Native Studies Review 1, No. 2 (1985): p. 84.
[86] Jamieson, Op. Cit., p. 17.

redesigned to accommodate these visions.[88] First Nation political organizations recognized and took advantage of those troubled times making it clear that they wanted to participate and redesign their relationship with the Canadian state in a way which would recognize their right to self government as well as their special rights as aboriginal people.

In early constitutional discussions, organizations representing First Nation groups were the National Indian Brotherhood [NIB] later to regroup and become the Assembly of First Nations [AFN] representing 300,000 Canadian treaty and status Indians. The Inuit Tapirisat of Canada and their constitutional working committee titled the Inuit Committee of National Issues [ICNI] representing 25,000 Inuit, and the Native Council of Canada [NCC] representing half to one million Metis and non-status Indian people.[89] Initially, NIB had two demands:

1. That a new constitution must entrench aboriginal and treaty rights.
2. That Indians must be involved in the process of constitutional reform.

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[87] Lilianne Ernestine Krosenbrink-Gelissen, "The Native Women's Association of Canada" in Native Peoples in Canada: Contemporary Conflicts, 4th, ed., James S. Frideres (Scarborough: Prentice Hall Canada, 1993), p. 348.

[88] Roy Romanow, John Whyte, and Howard Leeson, Canada Notwithstanding, The Making of the Constitution, 1976-1982 (Toronto: Carswell/Methuen, 1984), p. xvi.

[89] Robert Sheppard and Michael Valpy, The National Deal, The Fight for a Canadian Constitution (Toronto: Fleet Books, 1982) p. 166.

travel to England and seek block constitutional reform by the British government.[90]

From 1978 to 1982, the struggle to participate in constitutional reform overwhelmed agendas for all aboriginal people, as Indians, Metis and Inuit pursued a complex and expensive strategy which many Canadian politicians dismissed as naive. "They sought recognition as political actors within the Canadian state and piggybacked the campaign on a legal issue not of their making. In efforts to block patriation First Nations sought to transform their roles within Canadian federalism."[91] Constitutional self consciousness occurred on several fronts and Canadians were less apt to avoid the self examination and self responsibility for their constitutional identity and evolution.[92] Self conscious minorities challenged the constitutional world of federalism and parliamentary government and they expressed their feeling stating that the British were no more equal than the French. Many also set out to challenge the sexual division of labor and women demanded equality and wanted this to be constitutionally guaranteed. First Nations demanded their rights as a collective to also be guaranteed.[93]

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[90] Banting and Simeon, Op. Cit., p. 303.
[91] Banting and Simeon, Op. Cit., p. 301.
[92] Alan C Cairns, Disruptions, Constitutional Struggles, from the Charter to Meech Lake, (Toronto: McClelland & Stewart Inc, 1991), p. 17.
[93] Ibid, p. 18.

Initially First Nations were disqualified from constitutional discussions, so in August 1978, National Indian Brotherhood agreed to take their concerns to the British parliament in an attempt to stall assent to Constitutional amendments which excluded First Nation agreement. Lobbying the British seemed logical for National Indian Brotherhood because of British responsibility via the treaty making process. First Nations felt that because the treaties were signed with the British and because the British Crown would be the final signatories of Constitutional amendments, lobbying in that arena was essential.[94]

In 1979, Indian women had to compete for a place on the constitutional political agenda. While the Chiefs from across Canada were preparing to go to London in an attempt to block patriation of the British North America Act, Indian women were preparing for a March in support of equality rights of Indian women. Some First Nation people did not want the media competition, nor did they want Indian women and sexual discrimination in the Indian Act to cloud the patriation issue. Self government and treaties were the focus of Indian political issues.[95] Participants in this march included Indian women from all over Canada. One of the most notable was Sandra Lovelace, the first Indian women in Canada to bring a sex discrimination case to the United Nations Commission on Human Rights. The relationship between the National Indian Brotherhood and the Native Women's Association of Canada became strained. The National Indian Brotherhood did not support the walk.

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[94] Banting and Simeon, Op. Cit., pp. 301-309

[95] Teresa Ann Nahanee, "Women March Into History", Indian Education Quarterly p. 6

During the actual patriation process, the National Indian Brotherhood came to recognize that women's rights had to be dealt with but they considered equality rights subordinate to aboriginal rights issues. Joe Clark, the newly elected Prime Minister, and his government, were still just getting involved in constitutional issues. His government decided to pursue changes to the Indian Act and the National Indian Brotherhood recognized that there needed to be a reconciliation between themselves and the Women's Association. It was then that the Native Women's Association of Canada [NWAC] established a national office in 1980 and the National Indian Brotherhood offered office space to the Executive.[96]

Members of the Native Women's Association of Canada felt that there were still no guarantees that aboriginal women's views were fully accepted because male leaders accorded very little importance to the viewpoints of Native Women's Association of Canada. They felt that they had to pursue separate actions if there were to be any changes at the band level where men still dominated politics. It was only outside the male dominated Indian political structure that women would be able to seek their own political positions. While National Indian Brotherhood conducted separate lobby activities, Native Council of Canada, Inuit Tapirisat of Canada and Native Women's Association of Canada formed an Aboriginal Rights Coalition agreeing upon a sexual equality guarantee for aboriginal women.[97]

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[96] Krosenbrink-Gelisssen. Op. Cit., p. 101.
[97] Ibid.

Indian women wanted recognition of their rightful place in Canadian history and demanded that being women and descendants of original peoples they must be recognized. They stated they had a right to participate in constitutional discussions so they could identify constitutional inadequacies which affected First Nation women. They demanded to be participants in discussions which would result in constitutional change.[98]

Extensive lobbying efforts by all First Nation organizations continued to pressure the government to respond to their demand of constitutional participation. The Native Council of Canada (NCC) went before the Bertrand Russell Peace Foundation, which is an international tribunal on human rights located in Amsterdam, where they accused the Canadian government of ethnocide. The Bertrand Russell Peace Foundation concurred with them which caused embarrassment to the Canadian government. The Native Council of Canada also established a Constitutional Review Commission which canvassed opinions and views of Metis and non-status Indians across Canada. They received considerable press attention as a result of these endeavors.

Trudeau's government returned to office in February 1980 and endorsed participation of First Nation leaders in constitutional dialogue, specifically on those matters that directly affected them. $1.2 million was committed to First Nation political organizations for development of their constitutional positions. Later, the government established that

referendum on sovereignty-association became the overriding federal preoccupation. When the Parti Quebecois initiative was defeated the Continuing Committee of Ministers on the Constitution (CCMC) drew up a list of 12 items that were deemed to be constitutional priorities. Aboriginal issues were not included in the list.[99]

The First Minister's Conference held in September, 1980 failed and no constitutional arrangement was agreed upon. Therefore, Prime Minister Trudeau made the decision to unilaterally patriate the constitution with its Charter of Rights and Freedoms.[100] In October 1980, six provincial Premiers met in Toronto and agreed to challenge the federal government's unilateral action in court on the grounds that the Federal government's actions were contrary to the constitution of Canada. The challenge went to the Supreme Court. The course of events over the next year were instrumental in securing the aboriginal section [Section 35] in the Constitution. Aboriginal groups took advantage of the antagonism that erupted between the provincial and federal government and moved their issues forward. They launched an extensive and international lobby, part of which included the British Columbia chiefs who initiated a lawsuit asking for the declaration that their consent be required before ratification of constitutional amendments. They also chartered a train they called "The Constitutional Express" which transported several hundred Indians to Ottawa.

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[98] Beverley Bains, "Statement by Native Women's Association of Canada on Native Women's Rights" in Women and the Constitution in Canada, eds., Audrey Doerr and Micheline Carrier (Ottawa: Canadian Advisory Council on the Status of Women, 1981), p. 65.

[99] Douglas Sanders, "Indigenous People in the Constitution of Canada," Unpublished paper, 8 September 1980, p. 5.

In January, 1981, the Kershaw Committee (a British House of Commons Committee) issued a report recommending the Canadian government not unilaterally patriate the constitution. Eventually eight provincial governments were opposed to the action causing considerable controversy. The Indian lobby became only one of many problems facing the Trudeau administration as they attempted to broaden constitutional support.

> . . . they faced more opposition from the provinces and the other federal political parties than they had expected. The Indian opposition was only one of many problems facing the government, but it was particularly troubling because of its combination of moral and legal arguments. The government knew that the Indian cause had significant appeal in Canada and in Britain.[101]

It was in this atmosphere, the federal government introduced an amendment including aboriginal rights, giving positive recognition to treaty rights and aboriginal rights.[102]

In January, 1981, an agreement was reached between the federal political parties and aboriginal organizations. Recognition of aboriginal rights were placed in the constitutional draft, the amendment read:

> 34(1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed
> (2) in this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.[103]

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[100] Baines, Op. Cit., p. 79.
[101] Banting and Simeon, Op. Cit., p. 314.
[102] R.E Gaffney, G.P. Gould and A.J. Semple, Broken Promises, The Aboriginal Constitutional Conferences (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984), p. 11.
[103] Banting and Simeon, Op. Cit., p. 314.

Section 25 which protected the rights of aboriginal peoples from the egalitarian provisions of the Charter of Rights was strengthened and a new subsection 35(2) required that a future first ministers' meeting would involve participation of aboriginal representative and discuss aboriginal issues.[104] The aboriginal leaders of the three leading organizations were euphoric and agreed to pledge their support to the federal government and their constitutional endeavors. The euphoria was short lived for within a few days, Jean Chretien circulated further amendments giving the federal government amending powers to unilaterally change provisions allowed in Section 34. Chretien later withdrew this proposal but the damage was done and trust was gone.

In September 1981, the Supreme Court of Canada declared that although the federal government was within its legal rights to unilaterally patriate the constitution to do so would be in contravention of constitutional convention. The federal government was then forced to approach the provinces and attempt to re-negotiate a package that would satisfy both levels of government. At a First Ministers' meeting in November 1981, the aboriginal rights provisions were deleted. That section was used as a bargaining chip by British Columbia and a deal was reached between the federal and provincial governments whereby this section was discarded.[105] This section made many Premiers nervous and the inclusion of Metis had significant implications to provincial resources for upcoming land

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[104] Ibid, p. 315.
[105] Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989), p. 250.

who had reservations about its implications on provincial jurisdiction.

First Nation leaders united in their outrage. The "Aboriginal Rights Coalition" was formed and was composed of the Native Council of Canada (NCC), Inuit Committee National Issues ICNI), the Native Women's Association of Canada (NWAC), the Dene Nation of the Northwest Territories and the Council of Yukon Indians (CYI). They initiated, with the Assembly of First Nations who later joined their coalition, a series of public protests. The Federal New Democratic Party eventually stated that it would not support any resolutions that did not include native rights. As the events unfolded the aboriginal organizations gained support in many jurisdictions. Women's organizations agreed with aboriginal groups. Howard Pawley's New Democratic Party government in Manitoba announced his support of Section 35.[106] Premier Rene Levesque referred to the deletion of aboriginal rights acknowledgment as "hypocritically, fundamentally racist . . . "[107] Saskatchewan's Premier Blakeney (New Democratic Party) announced that his government would not support sexual equality without Section 35 being placed back into the constitution. Premier Davis, Ontario, announced his support as did Premier Bennett of British Columbia. Premier Lougheed announced he would support the amendment if the word "existing" were added.[108] The Clause was restored with the word "existing" and on April 17, 1982, the Constitution of Canada was patriated with recognition of aboriginal rights.

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[106] The Constitution Act, 1982, That section was renumbered Section 35 from the previous 34.
[107] Banting and Simeon, Op. Cit., p. 321.

Sections specifically pertaining to aboriginal people were:

> **Section 35** recognized and affirmed 'existing' aboriginal and treaty rights, Section 35(1) recognized that 'aboriginal' were Indian, Inuit and Metis
>
> **Section 37** provided for a process whereby proposals for additional rights for aboriginal peoples would be examined by First Ministers and specified that:
>
> a) a first ministers conference was to be convened within one year (subsection 37(1) to discuss the definition of the rights of the aboriginal peoples of Canada to be included in the Constitution of Canada and:
>
> b) representatives of aboriginal peoples (subsection 37(2) and the governments of NWT and Yukon (subsection 37(3) were to be invited to participate in discussing agenda items that directly affected them.

By these latter two sections, the Constitution Act, 1982, made an important distinction between "existing" rights of aboriginal peoples, and additional rights that might be included in the Constitution as a result of discussions held pursuant to section 37.[109] The federal and provincial governments of Canada made a commitment to aboriginal people entrenching their existing rights but it inaugurated a curious constitutional ritual, temporarily entrenching constitutional discussion in order to determine exactly what "existing" meant.[110]

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[108] Ibid.
[109] Indian and Northern Affairs Canada, "A Record of Aboriginal Constitutional Reform". Information Pamphlet, 1992.
[110] Gaffney, et al., Op. Cit., p. 15.

Preparations for the mandated Section 37 Constitutional conferences on Aboriginal issues began in 1982. Meetings were held in Winnipeg, Ottawa, and Montreal to discuss the agenda. Initially participants included the Inuit Committee on National Issues (ICNI) and the Native Council of Canada (NCC) (representative of both non-status Indians and Metis). Because of internal pressures that insisted provinces had no say in the identification and definition of aboriginal and treaty rights, the Assembly of First Nations boycotted participation attending as observers only .[111] In the spring of 1983 the AFN reversed this position and became participants. The Native Women's Association, through its provincial and territorial member associations, was able to participate in those preparatory meetings.

Throughout 1982 and 1983, the Native Women's Association unsuccessfully tried to obtain an official seat at the First Ministers' Conference. They were consistently denied this seat by the Federal Government because it was felt that their organization represented only a portion of the aboriginal population. The Assembly of First Nations and other national aboriginal organizations were thought to represent the aboriginal population in total. Federal funding for constitutional participation was restricted to national aboriginal bodies. The Assembly of First Nations opposed the Native Women's Association of

[111] Bryan Schwartz, First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984 (Kingston: Institute of Intergovernmental Relations, Queen's University, 1986), p. 88.

considered sexual equality a closed matter adequately provided for in various sections of the Constitution Act.

The focus of the Native Women's Association was on securing a sexual equality guarantee in sections of the Constitution Act pertaining to aboriginal peoples.[112] Having been excluded from political participation at the band level, and experiencing the discriminatory provisions of the Indian Act which forced many to leave their communities, aboriginal women felt like second class citizens within and among their own communities. Fundamental to their concern was the balance that had to be struck between the collective rights and the rights of the individual members of First Nations.[113]

They felt that the term "existing" aboriginal rights should not be narrowly defined so as to deny the rights of non-status Indian persons.[114] They were also concerned about the ambiguity surrounding how Section 15(1) of the Charter of Rights and Freedoms would impact upon aboriginal collective rights. This section of the Charter guaranteed equality "before and under the law" and the "equal protection and equal benefit of the Law"

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[112] The Constitution Act, 1982, Section 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 may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
Section 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
[113] Native Women Association of Canada, Proposal for Funding 1991-1992 Fiscal year, March 14, 1991.
[114] Krosenbrink-Gelissen, 1993, Op. Cit., p. 358.

therefore allowing provincial governments time to change discriminatory legislation.

Various sections of the Indian Act which discriminated against Indian women on the basis of sex and marital status were to be reviewed. Section 15 of the Constitution would make parts of the Indian Act contrary to the Charter. The Native Women's Association of Canada members felt that because of the male chauvinist attitudes of band administrators and some members of the Assembly of First Nations, they wanted to be sure that sexual equality rights with respect to aboriginal rights would be protected. They also wanted to participate in future Indian, self governing institutions on an equal basis.[115]

Although the Native Women's Association regarded self government as a political priority, there was a prerequisite. The Native Women's Association of Canada believed that the principle of sexual equality for aboriginal men and women must stand constitutionally above aboriginal self government. Unless this guarantee was included in the Constitution, they believed that there would still be trouble with Band Councils under self government.[116] The Native Women's Association of Canada chose the constitutional arena in an effort to secure these rights for the same reasons that other aboriginal organizations sought out constitutional protection of their rights. Constitutional law stands above all other law.

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[115] Krosenbrink-Gelisssen, Op. Cit., 1991, p. 149.
[116] Krosenbrink-Gelissen, Op. Cit., 1993, p. 358.

> which to seek changes in women's positions within their own communities. Constitutional law is considered fundamental since federal legislation and administrative procedures, as set out in the Indian Act, cannot be resolved before the constitutional rights of women are resolved.[117]

The Native Council of Canada and the Inuit Committee on National Issues supported the Native Women's Association of Canada's struggle to get sexual equality on the aboriginal constitutional agenda. The Inuit perceived sexual equality guarantees with respect to aboriginal rights as self evident. For the Native Council of Canada, sexual equality guarantees were instrumental to legal recognition of a self identifying aboriginal person.[118]

The agenda for the March, 1983 Conference had six items for discussion:

> Charter of Rights of the Aboriginal Peoples (expanded Part II of the Constitution Act) including
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> - Preamble
> - Removal of "existing" and expansion of Section 35 to include recognition of modern treaties, treaties signed outside Canada and before Confederation, and specific mention of "aboriginal title" including the rights of aboriginal peoples of Canada to land and water rights.
> - Statement of the particular rights of aboriginal peoples
> - Statement of principles
> - Equality
> - Enforcement
> - Interpretation

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[117] Ibid, p. 343.
[118] Krosenbrink-Gelisssen, Op. Cit., 1991, p. 151.

Amending formula revisions, including:

- Amendments on aboriginal matters not to be subject to provincial opting out (section 42)
- Consent Clause

Self Government

Repeal of section 42(1)(e) and (f)

Amendments to Part III, including:

- Equalization
- Cost-sharing
- Service delivery
- Financing of Aboriginal governments

Ongoing process, including further meetings of first ministers, and the entrenchment of necessary mechanisms to implement rights.[119]

Day one of the conference was mostly taken up with opening statements by the Prime Minister and national aboriginal organizations. Prime Minister Trudeau rejected outright the notion of full independence and absolute sovereignty for aboriginal governments. He denied assimilation as a federal Indian policy and accepted the concept of aboriginal rights only so far as to state the people were entitled to their own place within Canada. His vision of aboriginal self government equated to a municipal or regional model of government in Canada which was consistent with his views on Quebec.[120]

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[119] Canadian Intergovernmental Conference Secretariat, Federal Provincial Conference on First Ministers on Aboriginal Constitutional Matters, (Unpublished verbatim transcript), Ottawa, Ontario, 15-16 March 1983, p. 222.

[120] Assembly of First Nations. Bulletin, 2, No 1 (April 1983), p. 1.

which to renew their relationship within Canada, all organizations stressed the need for self government to ensure cultural survival. By contrast, the provincial governments were concerned about the entrenchment of the right to self government and wanted a explicit definition of the concept. Alberta stated that they would not agree to any constitutional amendment until all implications were known. They did not want the word "existing" removed until aboriginal rights were defined.[121] British Columbia, Saskatchewan and Newfoundland had similar concerns and were not interested in entrenchment of the right to self government.

The subject of equality was brought to the floor on the second day. The President of NWAC spoke through the seat of NCC, NWAC representatives from Manitoba, Ontario, New Brunswick, Saskatchewan and Quebec spoke through the provincial government's seats. Sandra Lovelace (New Brunswick Native Women's Association) stated that native women had been discriminated against since the enforcement of the Indian Act and that they wanted entrenchment of equality placed within Section 35.[122]

Sol Sanderson, Chief of the Federation of Saskatchewan Indians indicated that their preference would be to deal with the broader question of citizenship policy as they applied to the people. There was no interest in continued discrimination but Federation of Saskatchewan Indian Nations wanted the right to deal with the question fully on the

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[121] Ibid, p.3.
[122] Krosenbrink-Gelissen, Op. Cit., p. 152

Assembly felt that it was intrusive of others to try to determine who Indians were.

> You cannot determine who is and who isn't an Indian. Only us, the Indian nations of the country can do that and that is a God-given right and that is the way it must be. This issue is not the differences between the Indians regarding equality, the issue is very plainly who defines who is and who is not an Indian, who determines citizenship or membership, that is ours.[124]

The Assembly of First Nations believed equality should be dealt with by individual bands once self government became reality. The ongoing problem with this premise was the fact that many First Nation women did not recognize band governments as Indian governments. As Ms. Donna Phillips stated during the course of the 1983 conference:

> Band governments are not true Indian governments and if they were, we wouldn't have to be here. Our traditional governments recognize the role of women within those governments and until everybody in this country, non-Indian and Indians alike recognizes that, then I don't think we are going to have any protection at all.[125]

Many native women and their representative organizations were not prepared to wait for self governing Indian band governments to recognize equality between the sexes, nor did they trust that band governments would live up to this expectation. They believed that inequality existed due to an imposed system of government which was well entrenched in contemporary band governments. They also believed that equality was a part of First

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[123] Canadian Intergovernmental Conference Secretariat. 1983, Op. Cit., 222.
[124] Ibid, p. 234.

should be applied equally to men and women.

The Assembly of First Nations' position on equality put forward at the 1983 aboriginal constitutional conference could have been acceptable under ideal circumstances but in reality many native women completely distrusted band governments. Band councils were male dominated thus leading to the continued legal, political and social subordination of aboriginal women. Patriarchal power structures established and supported by the federal government were the reason why Indian women lost status and were denied membership within their communities.[126] Women did not trust Indian men to rectify this situation adequately and thus wanted a constitutional guarantee.

In response to the discussion surrounding the equality issue, the Assembly of First Nations issued a formal statement. They clarified that they were in agreement with women and acknowledged that they have been treated unfairly by governments imposed by the Indian Act. They also made it very clear that they would control their own citizenship and that it would not be done in a racist or sexist manner.[127] The Assembly of First Nations did not stray from this stand. The Native Women's Association of Canada agreed that band membership should be determined by the band but under no

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[125] Ibid, p. 232.
[126] Alan C Cairns, "The Political Purposes of the Charter," Reconfigurations: Canadian Citizenship and Constitutional Changes ed. Douglas E. Williams, (Toronto: McClelland & Stewart Inc, 1995), p. 211.
[127] Canadian Intergovernmental Conference Secretariat. Federal Provincial Conference of First Ministers on Aboriginal Constitutional Matters, Document Number 800-17/044, Agenda Item: Charter of Rights of First Nations, Sub Item: Equality.

inequality and non-entrenchment of the right to equality.

The Assembly of First Nations was not pleased that so much time was taken up discussing the equality issue. They blamed the federal and provincial governments for embarrassing status Indians and clouding the aboriginal rights issue. On the condition that the federal government promise not to interfere in future Indian band membership, the AFN was willing to accept a sexual equality amendment to section 35.[128]

The 1983 First Minister's Conference ended with the signing of a Constitutional Accord including Section 35(4), which did not completely satisfy Native Women's Association of Canada.

> Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[129]

They felt the wording could be interpreted as being applicable to only aboriginal and treaty rights and not to other rights such the right to self government. They wanted a sexual equality guarantee for all their rights. The Metis National Council supported this stand stating that legal guarantees were needed because "existing aboriginal rights" reaffirmed sex discrimination. They wanted sexual equality to govern development of

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[128] Krosenbrink-Gelisssen, 1991, Op. Cit., p. 155.
[129] Canadian Intergovernmental Conference Secretariat, First Ministers' Conference on Aboriginal Constitutional Matters, Document: 800-17/041, 1983 Constitutional Accord on Aboriginal Rights.

allow for the ongoing process of constitutional talks. This gave all parties concerned, including NWAC, another chance to meet their political goal. It was quite evident that much work was left to be done.

At the 1983 conference the federal and provincial governments had no problem agreeing to amend the constitution to ensure sexual equality in aboriginal matters. Of the four aboriginal groups present, only Assembly of First Nations did not support the amendment. They did not elaborate on their objections so as not to be perceived as defending unjust sexual discrimination. If they had opposed the amendment, the Assembly of First Nations would have risked scuttling the entire constitutional package.[131]

Members of the Native Women's Association of Canada were critical of having to speak through other delegations seats during the negotiations.[132] Equality was discussed on the second day and members of the Native women's Association of Canada spoke as part of the Native Council of Canada. Other aboriginal women's groups from New Brunswick and Quebec, not affiliated with the Association, were present as delegates and spoke through their provincial governments. All aboriginal women present were critical of the fact that they were only given a seat to exclusively discuss sexual equality and they

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[130] Krosenbrink-Gelissen, 1991, Op Cit., p. 156.
[131] Schwartz, Op. Cit., p. 337.
[132] Thirty-five official seats were delegated at the conference, three were reserved for the federal government, territories and provinces had two each and the four aboriginal organizations had two seats each.

Aboriginal women was that they should be allowed to speak on other aboriginal issues such as self government and issues concerning their communities. The Native Women's Association of Canada believed that an amendment to section 35 of the Canadian constitution should be subject to the equality clause. They believed that reinstatement of non-status Indian women was a birthright and should be constitutionally guaranteed.[133]

The federal government, after repatriation of the constitution, established a special committee with Keith Penner as Chairman. It's mandate was to review all legal and related institutional factors affecting the status, development and responsibility of Band Governments on Indian reserves.[134] The Committee also examined the question of self government in relation to the various aboriginal peoples interpretation of their special rights under section 35 of the Constitution and all areas recommended by the sub-committee dealing with Indian women and the Indian Act. The committee was composed of Members of Parliament from the three major political parties plus participants from three national aboriginal organizations, Assembly of First Nations, Native Council of Canada and the Native Women's Association of Canada. Inclusion of aboriginal people was crucial if the committee was to achieve a genuine understanding of issues and concerns from an aboriginal perspective.[135] This report was released in October, 1983 and one of the recommendations was Constitutional entrenchment of the right to Self

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[133] Krosenbrink-Gelissen, 1991, Op. Cit., p. 152.
[134] Paul Tennant, "Aboriginal Rights and the Penner Report on Indian Government," in The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, eds. Boldt, Menno and J. Anthony Long in association with Leroy Little Bear, (Toronto: University of Toronto Press, 1985), p. 326.
[135] Mawhiney, 1994, Op. Cit., p. 62.

Minister's Conference a central focus.

The key elements to the Report were:

> Allow Indian bands to determine the constitutional structure of their own government and form governments
>
> Federal government would formally recognize First Nation governments as long as it satisfied certain criteria, i.e. demonstrate support for the governmental structure by the majority of the people and have an adequate system of accountability by the government and the community, also a system to determine who belonged to the community
>
> Indians would have full legislative and policy making powers on matters affecting Indian people and full control over their territory and resources in boundaries of Indian lands
>
> Parliament should authorize the federal government to enter into a bilateral agreement with Indian governments where the exact scope of their law making authority would be determined
>
> The economic base for Indian government would be expanded and made more secure by granting Indian communities full legal control over their lands to fully share in the revenues from the development of natural resources and by settling their outstanding claims.[136]

On March 5, 1984, three days before the scheduled constitutional conference, The Honorable John Munro, Minister of Indian Affairs put forth the federal response to the Penner Report. The Minister declined to endorse self government as an aboriginal right

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[136] Special Committee on Indian Self Government, Chairman: Mr. Keith Penner, Indian Self Government In Canada: Report of the Special Committee, (Ottawa: Queens Printer for Canada, 1982)

to recommendations to entrench aboriginal self government in the Constitution.[138]

Sexual equality was accepted in principle at the 1983 conference. At preparatory meetings for the 1984 conference, the federal government showed a willingness to adjust section 35(4) to the terminology proposed by the Native Women's Association of Canada. The Assembly of First Nations was reluctant to discuss sexual equality but NWAC continually framed its political claims to sexual equality within the conceptual framework of self government.[139]

The second conference on Aboriginal Affairs was held on March 8 and 9, 1984. The agenda included:

Equality rights

> This issue was still a problem for some aboriginal leaders who did not want any guarantee of equal rights for women to be construed in such a way as to interfere with the right of native communities to define their own membership.

Aboriginal self government

> Aboriginal groups wanted this entrenched in principle in the Constitution so it could not be revoked by future governments. This area included researching of self government and language and culture.

Land and resources

> Aboriginal leaders stated that these were important because without an economic base, aboriginal communities will continue to be impoverished, dependent ghettos.

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[137] Tennant, Op. Cit., p. 330.

[138] David Hawkes, Negotiating Aborignal Self Government: Developments surrounding the 1985 First Minsiters' Conference. (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985), p. 10.

[139] Krosenbrink-Gelissen, 1991, Op. Cit., p. 157.

This would form the basis for separate aboriginal rights in Canada.[140]

Prime Minister Trudeau, who had just announced his retirement, surprised conference participants by announcing that he supported a proposal to entrench the right of aboriginal people "to self governing institutions". He specified that definitions could be worked out at future negotiations.[141] He proposed a draft accord entrenching these rights, a building of social and economic institutions and protection and enhancement of aboriginal cultures and languages.

Also on the first day, the Prime Minister announced the government's intention to introduce legislation to remove discrimination on the basis of sex from the Indian Act. He pointed out that the planned legislation would bring justice to many Indian women who have sought rights equal to those enjoyed by Indian men. The Indian Act would be changed to suit the following:

> In the future, no Indian will lose his or her Indian status or band membership as a result of marriage to a non-Indian and conversely, no non-Indian will gain status or band membership through marriage to an Indian.
>
> Within certain limits specified in the amendment, the children and grandchildren of marriages between Indians and non-Indians will enjoy Indian status and band membership.
>
> Non Indian spouses of registered Indians will have the right to reside on reserve with their Indian partners.

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[140] Schwartz, Op. Cit., p. 148.

[141] Hillary MacKenzie. "PM's Plan On Self Rule for Natives Stalled", Globe and Mail, 9 March 1984, p. 1.

> Those who lost status and band membership as a result of the discriminatory provision of the Act will be reinstated, if they wish, as will their children.[142]

Band membership and sexual equality would be dealt with under new Indian Act regulations.

The Equality issue was discussed on the second day of the conference. Premier Hatfield opened the afternoon session by allowing Sandra Lovelace to speak through his delegation. She expressed discontent toward aboriginal leaders for pushing sexual equality issues to the side. She reiterated that collective rights were important and fully supported Indian self government but she called for the immediate entrenchment of sexual equality in the constitution. Once achieved, she argued, aboriginal men and women could work together for self government.[143]

The federal government proposed constitutional amendments that were made on the initiative of NWAC, ICNI, NCC, MNC. They proposed:

> Section 25(2) Nothing in this section abrogates or derogates from the guarantees of equality with respect to male and female persons under section 28 of this Charter
>
> Section 35(4) Notwithstanding any other provision in this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female

[142] Canadian Intergovernmental Conference Secretariat, Government Announces Plans to Eliminate Discrimination Against Indian Women, Document 1-8355.

[143] Canadian Intergovernmental Conference Secretariat, Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters, (Unpublished verbatim transcript), 8-9 March 1984, pp. 323.

all other rights, and all freedoms.

The Assembly of First Nations had not cooperated in finding a solution to the equality issue and later argued that if an amendment was necessary, it should be included in section 25(2). NWAC held to their position and supported the amendment to section 35(4) with the majority of the provinces agreeing.[145]

This proposed amendment had the words "other rights" which pleased the Native Women's Association of Canada as they were afraid that equality rights in section 25(2) might be endangered because section 25 stipulates that not all charter rights had to apply to the aboriginal peoples. The Assembly was against "other rights" inserted into this section because they believed it threatened the interpretation of section 35(1) as being a full box of aboriginal rights. This may imply that other rights were not considered aboriginal rights and also inequality among aboriginal groups. The Assembly of First Nations thus changed its attitude toward sexual equality realizing that they had to work with NWAC to ensure amendments to Indian Act were agreeable to both organizations.[146]

At this conference no agreement was reached on sexual equality and overall the conference ended with no agreement between the parties at the table. The difficulty lay in the difference of interpretation surrounding the proposed federal constitutional amendment to entrench the right to self government. The national aboriginal

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[144] Krosenbrink-Gelisssen, 1991, Op. Cit., p. 158.
[145] Ibid.
[146] Ibid.

concerned with how those changes would affect them. They were apprehensive about agreeing to amendments that might cost their province money and land. The concept of self government was not rejected but the premiers complained that to entrench the right was premature without details of how much it would cost their treasuries.[147]

Little was accomplished. Premier Bill Bennet, British Columbia, urged "prudence and caution" and stated that more discussion was needed. Nova Scotia's John Buchanan argued that aboriginal demands were unrealistic. James Lee of Prince Edward Island. stated that the Constitution should not be changed on a whim. Premier Grant Devine of Saskatchewan and Alberta's Peter Lougheed asserted that the federal proposal was too vague and it would not be in the interest of aboriginal groups to "act hastily without full, consideration".[148] Zebedee Nungak responded by saying "We've been doing backflips and somersaults to explain ourselves so there can be no doubt about what we want".[149] The President of the Native Women's Association of Canada did speak on several occasions, however her voice was heard through other provincial or aboriginal (NCC) delegations. The conference closed in frustration and Native Women's Association of Canada began to prepare for the upcoming changes to the Indian Act.

Lilianne Ernestine Krosenbrink-Gelissen in her book entitled Sexual Equality as an Aboriginal Right, describes the change in relationship between the Assembly of First

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[147] Gaffney, et. al., Op. Cit., pp. 64-74.
[148] Ibid.

the 1985 constitutional conference. The Assembly of First Nations knew that they had to come to some agreement with the Native Women's Association of Canada regarding sexual equality or this point would continue to dominate the constitutional political agenda and they knew that the Indian Act was about to be amended. They invited the Native Women's Association of Canada to a special meeting in April of 1984 to discuss this issue. A joint resolution was established which affirmed commitment by both political organizations to remove Section 12(1)(b) of the Indian Act, but there was major disagreement regarding reinstatement of Indian women. The Native Women's Association of Canada strongly believed that Band Councils were government controlled and they wanted definition of "Indian" to move from a legal definition to a cultural one. Bill C-47 was passed through the House of Commons but died on the Senate order paper, table when the a federal election was called in September, 1984. Bill C-47 was unacceptable to both the Assembly of First Nations and Native Women's Association of Canada.

The Native Women's Association of Canada and the other national aboriginal organizations met to discuss political positions and strategies for the 1985 First Ministers conference. The Native Women's Association of Canada had agreed to drop the sexual equality issue as a separate agenda item in order to focus upon self government although they did send a letter to the newly elected Prime Minister of Canada, Brian Mulroney,

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[149] Hilary MacKenzie. "PM's Plan On Self Rule for Natives Stalled", Globe and Mail, March 9, 1984.

Association agreed to drop the equality issue for the 1985 conference was because a meeting was held in Edmonton in May of 1984 where the Assembly of First Nations passed a resolution supporting the women's position on equality. They believed that self government should be the dominant issue of discussion. The Native Women's Association of Canada were to speak through the Assembly of First Nation's delegated seats and although the Prime Minister had placed equality on the agenda because he wanted the issue dealt with time restraints did not allow the issue to be raised at the 1985 First Minister's Conference.[151]

In accordance with the equality rights section of the Canadian Charter of Rights and Freedoms, the Indian Act was amended in April, 1985. The Bill was called C-31. The main goals of the bill were to:

(1) abolish sexual discrimination
(2) restore Indian rights to those who lost or never had them
(3) entitlement of Indian bands to control their own membership.

[150] NWAC suggested alternatives that could ensure equality for aboriginal women: Section 25(2) amendment which was proposed by the federal government in the '84 conference i.e. notwithstanding anything in this charter, all rights an freedoms of aboriginal peoples of Canada are guaranteed equally to male and female aboriginal persons: Section 28, notwithstanding anything in this Charter, the rights and freedoms referred to including rights and freedoms referred to section 25, are guaranteed equally to male and female persons (Schwartz, Op. Cit., p. 350).

[151] Krosenbrink-Gelissen, Op. Cit., pp. 166-168. Also, as expressed in Krosenbrink-Gellisen's book, the NWAC believed that the newly elected Conservative government would speed up amendments they were also invited to discuss such amendments.

The Native Women's Association of Canada was pleased that the final wording abolished section 12(1)(b) and sections pertaining to enfranchisement. However their preference was for additional amendments to be guided by the principle that all people of aboriginal ancestry, who for some reason had lost or were never able to exercise their rights to be members of the First Nations, have their rights restored.[152]

The Federal government kept their promise to the Assembly of First Nations that there would be no government interference in the administration of band membership. Bill C-31 was implemented and individual bands had the power to determine membership. This was problematic for First Nation women seeking to regain status and rights. The Assembly of First Nations would not move from the political position that control of citizenship was a strategic component of self government and the Native Women's Association of Canada did not believe that reinstatement of status was a stand against self government. Instead, they believed that contemporary Indian governments operated in accordance with the Indian Act and if all people of Indian ancestry had status and band membership restored, Indian governments could operate in accordance with tradition which would mean true self government.[153] Women remained concerned that membership controlled by bands would be deployed in such a way as to deprive them of a political voice, further entrenching the patriarchy of the Indian Act. Women put forward strong cultural arguments relating to equality in gender relations, from a First Nation

[152] P.J Desjarlais, Swinton & Company, Legal document prepared for NWAC, "Section 15 Charter of Rights and Freedoms: Application to Indian Women", July, 1991. Special Collection of Native Women's'

exclusively around a liberal discourse of equality rights.[154] The same argument would be put forward at future constitutional discussions.

The third and final conference of aboriginal constitutional issues took place March 26 and 27, 1987. The chasm between the positions of national aboriginal groups and some governments had not narrowed over the two years between conferences. British Columbia, Saskatchewan and Alberta were opposed to entrenching rights before definition.[155] By the end of the first day of the conference it was apparent that an agreement could not be reached. Ontario, New Brunswick and Manitoba were the only provinces that supported aboriginal groups and the real deadlock presented itself when the provincial and federal government would only have self government recognized if it were contingent upon future negotiations.

The Native Women's Association of Canada had been successful in getting Section 35(4) placed within the Constitution and that meant discrimination could not be part of any agreement made between the federal (and provincial) government and aboriginal peoples. Because some internal differences existed within the Native Women's Association of Canada at the time of the 1987 conference, sexual equality was not raised. Some members of the Executive did not want to seek a separate seat at the 1987 First Minister's

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Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[153] Krosenbrink-Gelisssen, Op. Cit., 1991, p. 175.

[154] Peter Kulchyski. "Aboriginal Peoples and Hegemony in Canada," Journal of Canadian Studies, (Spring 1995 30, No l), p. 67.

Assembly of First Nations had similar positions and they therefore did not require a separate seat.[156] Other members of the Executive disagreed and because no consensus could be reached, it was decided not to push for discussion of sexual equality at the 1987 conference.[157]

It is also important to note that some members of the Native Women's Association of Canada wanted to resist the application of the Canadian Charter to aboriginal communities because the Charter's "individual rights" focus was perceived as threatening to the collective rights of aboriginal people. The Native Women's Association of Canada's intent was to develop an Aboriginal "Charter" or human rights law which would ensure that individuals would not be mistreated in aboriginal communities while ensuring that collective or communal rights were respected.[158]

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[155] Jeffrey Simpson. "The Aboriginal Talks", Globe and Mail, 26 March 1987.

[156] Just prior to the 1987 First Minister's Conference, the Native Women's Association decided that in light of their Annual Assembly's "Resolution on Self Determination", that the discussion process had to be rejected because it compromised the sovereign status of First Peoples of the country. The Native Women's Association of Canada did not support the process and attended in an observer only capacity. No presentations or statements were made. [taken from Native Women's Association of Canada, July 1991 Constitution Papers, 179, unpublished and in draft only "An Overview of Aboriginal Constitutional Discussions and Treaty Issues". Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[157] Krosenbrink-Gelisssen. Op. Cit., 1991, p. 189.

[158] Native Women's Association of Canada, "An Overview of Aboriginal Constitutional Discussions and Treaty Issues", May, 1987, Unpublished Paper taken from Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina. July 1991, p 179.

The 1987 conference ended with a stinging attack by Jim Sinclair against Grant Devine and Bill Vander Zalm. The five year attempt to define native constitutional rights had come to an end with a stalemate over self government. Prime Minister Mulroney was not able to bridge the gap between native leaders and the Premiers. Native leaders had demanded an enforceable right to self rule and the Premiers would not entrench a right that had not been politically negotiated before hand.[159] The four national aboriginal groups, the Assembly of First Nations, Inuit Committee on National Issues, Native Council of Canada and Metis National Council were united in the position taken that self government was an "inherent" right, freestanding and enforceable. It should have constitutional recognition and not be contingent upon any future negotiations. [160]

By the time the 1987 conference took place, definitions and conditions of self government had not been resolved. Aboriginal people had taken the position that they had an inherent right to self government and they wanted this right entrenched in the Constitution. They believed that nature and process of implementation would be negotiated later. Some provincial premiers agreed, others did not. The dissenting premiers argued that self government should be defined up front and must fit within the constitutional structure of Canada. They agreed with the concept of self government but

[159] Graham Fraser and Rudy Platiel. "Mulroney Blames Premiers After Talks with Natives Fail", Globe and Mail, 28 March 1987.
[160] Graham Fraser. "Main fight already won, Natives say", Globe and Mail. March 26, 1987.

conference ended with no decisions being made.[161]

In the ten years of constitutional negotiations, aboriginal women had managed to secure equality in aboriginal and treaty rights. Although those rights had yet to be defined, section 35(4) meant that women's rights would have to be taken seriously. Women were distrustful of contemporary band council governing and not willing to trust that those governments would restore what had been taken from women by discriminatory legislation. In fact, contemporary First Nations political leaders had demonstrated tremendous resistance to any constitutional guarantee of sexual equality.

First Nations women learned many valuable lessons in the process. They had become more sophisticated in putting forth their position and had gathered powerful allies in their pursuit of their vision of justice. They firmly believed that equality was a part of their culture and tradition and all definition of citizenship should be applied and determined equally. First Nation women demanded that they be included in determining that definition. As constitutional negotiations continued into the next decade the Native Women's Association would use all available resources to ensure what they believed to be their right, to secure a voice in those negotiations.

[161] Frideres. 1993, Op. Cit., p. 415.

Quebec's refusal to sign the 1982 Constitutional Accord, thus not acknowledging patriation nor the Charter of Rights and Freedoms, proved later to be a concern for Canadian politicians. Nationalists in Quebec firmly believed that Canadians and their elected representatives did not respect the cultural and political integrity of the Quebecois. Therefore, during the 1984 Federal election campaign in a bid to secure seats in Quebec, the Progressive Conservative leader Brian Mulroney promised the Bourassa government that he and his party would do whatever they could to accommodate his government's demands. In so doing, Mulroney's intent was to have the Quebec government accent the Canadian Constitution Act,1982, therefore becoming a committed member of the Canadian nation.

The Bourassa government demanded that five basic principles be met before they would agree to amendments made in the 1982 Constitution Act. These demands were originally adopted in June 1985 by the Quebec Liberal Party and expressed in a manifesto entitled *Maitriser l'avent.* They were again reaffirmed and clarified by the Minister of Intergovernmental Relations at a symposium in Mont-Gabriel in May 1986. They demands were as follows:

- recognition of Quebec as a distinct society
- a greater provincial role in immigration
- a provincial role in appointments to the Supreme Court of Canada
- limitations on the federal spending power

At a meeting in August 1986, just prior to the fourth and last aboriginal constitutional conference, Prime Minister Brian Mulroney convinced the provincial premiers to focus upon Quebec's demands and set aside all other constitutional concerns giving Quebec's demands top priority. The Prime Minister and the Premiers believed that First Nations organizations' demands for self government could not be legitimately decided without Quebec at the table.[163]

On April 30, 1987, at a retreat located at Meech Lake, eleven first ministers signed an Accord that accommodated all the demands of the Quebec government. Quebec was to be brought into the constitutional family, shocking First Nations by the speed with which Quebec's demands were met when just four weeks previous the aboriginal constitutional conference failed. First Nations leaders believed that the process was hypocrisy of the worst kind.[164] Although the Meech proposals were the product of negotiations that began in July 1986, the fact remained, that the agreement was completed privately, behind closed doors, attended only by the heads of eleven governments who took it upon themselves to redefine Canada. That action was not acceptable to First Nations, nor did it fit well with many segments of the Canadian public.

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[162] Michael Behiels. The Meech Lake Primer Conflicting Views of the 1987 Accord (Ottawa: University of Ottawa Press, 1989), p. 318.
[163] Ibid., p. 415.
[164] Bruce Carson, (Law and Government Division), The Meech Lake Accord: A Constitutional Conundrum, (Ottawa, Minister of Supply and Services, 1989) p. 24.

Ottawa on June 3, 1987 and it embodied eight elements of constitutional change. First Ministers also approved a companion political accord that committed them to lay the resolution containing the proposed amendments before their respective legislative bodies as soon as possible, but no later than June 1990. The eight areas of proposed constitutional amendment were:

1. Quebec's distinct society: Recognize that French-speaking Canadians constitute a fundamental characteristic of Canada, and that Quebec constitutes a distinct society within Canada.
2. Senate appointments: adopted a procedure for filling Senate vacancies from a list of names submitted by the government of the province in which the senate vacancy occurs.
3. Immigration: It committed the federal government to negotiate an immigration agreement with any province that requested it. It also provided that such an agreement could be constitutionally protected and gave each province concerned veto power over any change to its agreement.
4. Supreme Court of Canada: required the federal government to make Supreme Court appointments from a list of names proposed by the provinces, and that at least three of the nine Supreme Court justices would be from names proposed by Quebec.
5. Spending Power: required the federal government to provide reasonable compensation to any provincial government that chose not to participate in new

provided a corresponding program.

6. Conferences on the Economy and other matters: required the prime minister to convene, once a year, a First Ministers' conference on the Canadian economy and other appropriate matters.
7. Amending Formula: required unanimous consent for changes to national institutions, for the creation of new provinces and for changes to the amending formula.
8. Constitutional conferences: required the prime minister to convene a First Ministers' conference at least once a year. The agenda to include Senate reforms, fisheries and other matters agreed upon.[165]

Many segments of Canadian society felt threatened by the Meech Lake Accord. Canadians had arrived at a place in history where they wanted to be active participants in constitutional negotiation. The Canadian Charter of Rights and Freedoms made them more aware of their rights as a people and Canada had evolved into a nation that needed a constitution that would accommodate the social, ethnic and gender cleavages of contemporary Canadian society.[166] Not only First Nations felt betrayed by the Accord. Women believed that the important equality sections of the Canadian Constitution were threatened, and many others felt that the Accord was "an agenda for the dismemberment of our country or a way to turn Canada into a loose collections of ten independent duchies

[165] Boldt, Op. Cit., p. 290.

in the direction of defense".[167]

First Nation leaders had no quarrel with bringing Quebec into the Canadian constitutional fold. What they opposed in the Meech Lake negotiating process was that in "constitutional terms" First Nations were not counted, again. They believed the Accord undermined all that they had struggled for throughout the previous two decades making them victims of somebody else's language and imprisoned in realities manufactured by that language. First and foremost they were offended by the distinct society clause. The Assembly of First Nations argued that the clause perpetuated the idea of duality in Canada thus strengthening the myth that French and English societies founded Canada. They viewed the Accord as legitimizing the distortion of history which failed to recognize First Nations as self governing and distinct societies.[168]

First Nations had other grave concerns about the Accord, these included:

- The Accord's requirement of a unanimous consent clause which would forever close the door on a 'third order' of Indian governments. This clause reaffirmed their belief that the government ignored the aboriginal claim that they too were people of "distinct societies" with collective rights.

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[166] Idea from James Tully. Strange Multiplicity: Constitutionalism in an Age of Diversity, (Cambridge University Press, 1995), Chapter 1.
[167] Ivan Bernier. "Meech Lake and Constitutional Visions" in Competing Constitutional Visions. The Meech Lake Accord, eds. K. E. Swinton and C. J. Rogerson (Toronto: Carswell, 1988) p. 241.
[168] Frideres. Op. Cit., p. 415.

provinces to prevent aboriginal communities from gaining access to or administering their own social service programs under some form of self government.

- The process pertaining to new amendment formula and future constitutional meetings. It was believed that expansion of the unanimity formula to national institutions and creation of new provinces would make the achievement of aboriginal self government impossible. A provincial veto could block any reform concerning aboriginal representation in the House or Senate.
- The Accord failed to renew section 37(1) of the Constitution Act 1982 which lapsed in April '87. This section had provided a unique and dedicated process of aboriginal conferences coupled with a range of flexible amending formulas for FM to negotiate the constitutional future of aboriginal people.
- Under section 50 of the proposed accord, aboriginal leaders would have to plead annually with First Ministers to get unfinished business on the constitutional agenda meaning that aboriginal issues would have to complete with provincial issues and their issues would be subject to provincial veto.
- Aboriginal leaders considered section 16 of Accord not sufficient protection of their rights Section 35 of the Constitution and Section 91[24] of Constitution Act, 1867, were immunized from the distinct society/linguistic duality clause. They had lobbied hard for a without prejudice clause applicable to the entire Accord. The Native Council of Canada appealed for a companion resolution, which would restore the dedicated aboriginal amendment procedure and assure aboriginal participation in

a decline of interest by First Ministers and their bureaucrats.[169]

First Nations leaders were also angered that they had not been invited to participate in deliberations leading to the signing of the Accord. First Ministers displayed a generous readiness to agree to Quebec's demands, a readiness that was not given to First Nations in constitutional negotiations regarding their rights. The Canadian first ministers did not show the same political will and the Accord did not protect Indians from the potential consequences of decentralization of the federal constitutional mandate to the provinces.[170]

Canadian women were equally concerned with the Meech Lake Accord and quickly voiced their opposition to the Canadian public. They were concerned about how the "Distinct Society" clause would relate to the equality clause that they had fought so hard to secure in Canada's constitution. Women's groups were torn between two primary issues of importance to Canadian women, defense of Charter equality rights and loyalty to Quebec women who strongly supported the Accord. Women refused to make that choice, instead deciding to support entrenchment of distinct society, but demanding that Section 28 of the Charter be protected from the interpretive power of the Distinct Society clause. Tough legal questions about the potential impact of the distinct society clause on

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[169] Tony Hall, "What Are We? Chopped Liver? Aboriginal Affairs in the Constitutional Politics of Canada in the 80's" in The Meech Lake Primer Conflicting Views of the 1987 Accord, ed., Michael Behiels, (Ottawa: University of Ottawa Press, 1989), pp. 415-418.
[170] Boldt. Op. Cit., p. 291.

that women had reasonable cause for concern. Section two, directly or indirectly, could restrict the scope of Charter equality rights inside and outside of Quebec.[172] Ms. Eberts also stated that the process within which the Accord had been developed was flawed:

> undemocratic nature of the existing constitutional amending process involving the first ministers. This process virtually excludes input from Canadian women despite their historical association with the Constitution. The use and abuse of nationalism by the Prime Minister . . . to castigate Canadian women as anti-Quebec while portraying Quebec women's organizations as the only voices that count have added even more distrust about the process[173]

Section 16 of the Accord stipulated that particular provisions respecting aboriginal and multicultural rights would not be affected by Section Two of the Accord.[174] Nonetheless, First Nations groups and women's groups felt that the Accord sufficiently jeopardized the current rights in the Constitution Act and they did not accept nor trust the federal government's assurance that their rights were guaranteed.[175] Some concern focused upon

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[171] Mary Eberts, provided legal counsel to the Ad Hoc Committee of Women on the Constitution and is knowledgeable on all matters pertaining to women and the Canadian constitution.

[172] Section 2 of the Meech Lake Accord reads "2(1) The Constitution of Canada shall be interpreted in a manner consistent with (a) the recognition that the existence of French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English speaking Canadians, concentrated outside Quebec but also present in Quebec, constitute a fundamental characteristic of Canada; and (b) the recognition that Quebec constitutes within Canada a distinct society.

[173] Mary Eberts. "The Constitution, the Charter and Distinct Society Clause: Why are women being ignored?" in The Meech Lake Primer Conflicting Views of the 1987 Accord, eds., Michael Behiels, (Ottawa: University of Ottawa Press, 1989), p. 291.

[174] Section 16 states "Nothing in Section 2 of the Constitution Act, 1867 affects section 25-27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1982.

[175] Krosenbrink, 1991, Op. Cit., p. 192.

sections of the Charter [28 and 15] were not.

Relevant to note here is that Robert Bourassa was anxious to sign the Accord for a couple of primarily reasons. Firstly, the Accord was a good deal for the political and bureaucratic elite of Quebec but more importantly, Bourassa also believed that the Accord would allow Quebec's politicians to legislate in favor of preservation of Quebec's majority francophone society without fear that this legislation could be overruled by the courts. Bourassa signed the Accord because he believed the distinct society clause would take precedence over the Charter[176]

That caused women great concern. They did not want the Distinct Society clause to weaken Section 28 and 15 of the Charter. Their concern was further enhanced by the fact that Section 16 was put in place to ensure that the distinct society clause would not affect multiculturalism and aboriginal rights provisions of the Charter. When women argued that equality rights could also be affected by the Accord and wanted similar reassurances, they were told that they must prove beyond a reasonable doubt that their rights could be overriden.[177] That response from Government officials made women very nervous and in spite of repeated assurances by the "modern Fathers of Confederation" that the proposed Section Two of the Accord would not affect the rights of women, the government was not willing to make the requested changes and they left the onus upon women to prove they

[176] Behiels, Op. Cit., p.5.
[177] Ibid., p.308.

placed as a secondary concern as negotiators ignored the position of women in Canada. Their powerlessness was deeply felt. Professor Beverly Baines said, "the response of the Joint Committee Report to the concerns of women was patronizing, non-hearing and sexist".[179]

The Accord's ultimate demise was eventually effected by Elijah Harper, a lone Indian New Democratic Party member of the Manitoba legislature. Harper took advantage of a procedural rule of the Manitoba legislature that required unanimous consent of all members in the legislature before the Accord could be put to a vote. Harper denied unanimous consent which prevented the Manitoba legislature from voting on the Accord. The unanimous approval by all provinces was not achieved by the June 1990 deadline, and the Accord officially died.

The ultimate hope of First Nations was that they could convince the First Ministers of Canada that their rights as First Nations lay within the recognition of an inherent right to be self governing nations. They wanted the First Minister's conferences on Aboriginal affairs to be the forum from which Canadian First Ministers displayed their political goodwill by recognizing their rights. The political will was not realized, instead Canadian First Ministers chose to recognize Quebec's collective rights and to do so

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[178] Lynn Smith. "The Distinct Society Clause in the Meech Lake Accord: Could it Affect Equality Rights," in Competing Constitutional Visions, The Meech Lake Accord, eds., K.E Swinton and C. J. Rogerson.Carswell (Toronto: Carswell 1988), p.54.
[179] Cairns. Op. Cit., p.128.

Minister's conference was an extreme insult to all First Nations.

They believed that recognizing Quebec's collective rights and excluding those of First Nations' created a hierarchy of collective rights. Quebec's collective rights would acquire constitutional status with all the political and social powers flowing from that recognition, while First Nation communities were relegated to second class citizenship with the threat of gradual integration and assimilation.[180] That potential was unacceptable to First Nations and the Native Women's Association were supportive of the national opposition to the Meech Lake Accord taken by all First Nation political entities. They firmly believed that collective rights of First Nations must be recognized as crucial to the survival of their people.[181]

When Elijah Harper used his legislative right to declare the Meech Lake Accord dead, that action put First Nations' political concerns once again in the Canadian spotlight. During the final hours prior to the demise of Meech, First Nations expressed their discontent at consistently being locked out of constitutional negotiation. The Canadian public once again faced having to confront First Nation discontent. That action helped pave the way for future participation in constitutional negotiations.

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[180] Behiels, Op. Cit., p.xxiii.

[181] Barbara Roberts, Feminist Perspectives, Smooth Sailing or Storm Warning? Canadian and Quebec Women's Groups and the Meech Lake Accord, (Montreal: Concordia University) Canadian Research Institute for the Advancement of Women, 1988.

In September 1990, the Prime Minister of Canada announced that the Federal Government would again seek to define a new relationship between themselves and First Nations. That was due in part to a constitutional crisis which began in 1990 after the defeat of the Meech Lake Accord. Quebec, in reaction to the defeat, passed legislation declaring that a referendum on sovereignty would be held in the Fall of 1992. Fearing that a vote favoring sovereignty could lead to Quebec's separation, new proposals for constitutional amendments were announced.[182] The new proposals would attempt to address the concerns of Quebec, the rest of Canada and First Nations. The government was also cognizant of the disruptions caused by the Oka crisis of the summer of 1990.

In response to the Federal governments' wish to open constitutional discussions, in March 1991, the Assembly of First Nations held a Constitutional Ad Hoc Committee meeting in Ottawa. Most of the members in attendance were representatives of the previous Constitutional Working Committee and members of the Native Women's Association of Canada were asked to participate. Also in attendance were Matthew Coon Come [Quebec Cree], Chief Bill Montour and Roland Crow of Federation of Saskatchewan Indian Nations. The following proposed principles were established:

> Canada's constitutional responsibilities to First Nations were still based upon a nation to nation basis.
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> There should be a fulfillment of treaty obligations especially in land claims.

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[182] Shin Imai, Gary Stein and Katherine Logan, Aboriginal Law Handbook, (Toronto: Carswell Thomson Professional Publishing, 1993), p. 66.

> All constitutional amendments dealing with First Nations must be based upon bilateral arrangements between themselves and the Crown, provinces could not vote or ratify aboriginal rights.
>
> Canada had to recognize First Nation jurisdiction over land.[183]

In June 1991 the Native Women's Association of Canada, at their Executive meeting held in Winnipeg, hired Theresa Nahanee as their constitutional coordinator. The Association was concerned that the national First Nation political organizations, the Assembly of First Nations in particular, did not speak on their behalf. The Assembly represented status Indians living on-reserve. The problems created for women because of Bill C-31 coupled with the fact that the Assembly spoke for the Chiefs who could not address those issues forced the Association to seek a political voice separate from the national First Nation organizations. Shortly after the Executive meeting held in June, members of the Native Women's Association of Canada arranged to meet with the Honorable Joe Clark. Their intent was to inform him that the Native Women's Association of Canada would take their own position on constitutional renewal. A funding proposal was put forward at that time. Mr. Clark informed the Native Women's Association of Canada that the decision had already been taken that constitutional funding would go through the national aboriginal organizations.[184]

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[183] Rose Anne Morris, Executive Director NWAC, Memorandum to NWAC Executive Council Re: AFN Ad Hoc Committee on the Constitution, 21 April 21 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[184] Teressa Nahanee, Report: Constitutional Meeting with Mr. Clark, June 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

The Federal government via the Secretary of State, gave each national aboriginal organization [AFN, ITC, NCC, MNC] $450,000 for constitutional research between April and September, 1991. A portion of this money was to be used for research on women's issues. The Native Women's Association of Canada was not recognized as a representative organization, and therefore had to be reliant upon the national organizations for constitutional research funding dollars.[185] The Native Women's Association of Canada was to receive $65,000 from each of the Assembly of First Nations and Native Council of Canada. The Metis National Council was not committed to provide funding dollars to Native Women's Association of Canada but it was stipulated in their agreement that a portion of their dollars was to be devoted to research of women's issues. The Inuit had their own women's organization called Pauktuutit.[186]

The Government of Canada proposed to establish an "Aboriginal Panel" which would be consulted and provide advice to the Parliamentary committee. The Government of Canada did not want this Panel to represent the national organization but wished instead to appoint women, elders and others to act as a voice for aboriginal people. The Assembly of First Nations and the Native Council of Canada were opposed to this suggestion and the Assembly of First Nations decided to hold a constitutional circle in

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[185] Teressa Nahanee, Memorandum to Board Members of NWAC, 27 June 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[186] Inuit people have a very different experience in dealing with the Federal government. The Inuit Tapirisat of Canada [ITC] is the national organization that represents Inuit from the Northwest Territories, Northern Quebec and Labrador. ITC is composed of seven members, three of whom are women. The

position on participation in the constitutional process. The Native Women's Association of Canada was invited to participate in this meeting.

The decision was reached at the Morley gathering to conduct a parallel process. This independent aboriginal process would serve two purposes:

> to review, consolidate and re-new the constitutional principles, objectives and agenda of First Nations via an extensive grass roots consultative process with First Nation communities and the non-aboriginal public and
>
> to develop and promote First Nations' views of a renewed and reconstituted Canada.

A commission was established consisting of 12-15 members selected to reflect representation by region, elders, women, youth and urban citizens.[187] From July 1991 to December 1991, public hearings would be conducted in representative cross section First Nation communities and selected urban areas. In addition four constituent assemblies would deal with issues specific to aboriginal women, elders, youth and First Nation citizens resident off reserve.

The Honorable Joe Clark was in attendance for part of the Morley gathering and he stated that he wanted the fullest possible participation by aboriginal people in the discussion of

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president of Pauktuutit is a full participating member of the ITC. (Native Women's Association of Canada v. Canada [1994] 3 S.C.R. p. 628.

[187] Assembly of First Nations, "A Discussion Paper on AFN Participation in Constitutional Processes," Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina. July 1991, 10.

be able to deal with the full range of issues that had to be dealt with and no important issue were to be left out. The manner in which Aboriginal people's participation in constitutional renewal changed after the Morley meeting and the government of Canada accepted the Assembly of First Nation's proposed parallel process.[188]

The Assembly of First Nations requested the Native Women's Association of Canada to organize the constituent assembly for aboriginal women. They were to be given the dollars to develop position papers for discussion at the constitutional meetings. The Assembly of First Nations committed $228,000 plus $16,000 for child care to the Native Women's Association of Canada for this process.[189] It would be fully within the Native Women's Association of Canada's discretion to host either one national meeting or a series of regional meetings for discussion of constitutional issues.[190] Members of the Native Women's Association of Canada continued to sit on the Assembly of First Nations technical team throughout the summer in preparation of the aboriginal parallel process.

In September, 1991, Prime Minister Mulroney issued a proposal for constitutional reform. In this round of constitutional negotiation, the public, opposition parties and special interest groups would be given a voice in Canada's constitutional future. Among

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[188] Teressa Nahanee. "Constitutional Report" submitted to NWAC Executive, September 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.
[189] Ibid.
[190] Teressa Nahanee. Memo to Gail Stacey Moore regarding AFN Constitution Circle Meeting of the Technical Team, 24 July 1991, 25, Special Collection of Native Women's' Association of Canada

aboriginal self government within Canada and aboriginal participation in constitutional deliberations.[191]

When another round of constitutional talks was publicly announced, the Native Women's Association of Canada's political position had changed very little since the constitutional conferences of the early 1980's. The repercussions of Bill C-31 made them even more committed to have their own voice at the constitutional table. One of the major concerns of the Native Women's Association of Canada was that 90% of C-31 registrants lived off reserve, had no political representation and were mostly women. Although the Assembly of First Nations had invited them to participate in constitutional dialogue, the women's collective experience forced them to take a constitutional position quite different from that of the Assembly.

The main reason for taking a different position revolved around Bill C-31, which successfully divided status Indians into those with band membership and those without. Before C-31, the two were almost always interconnected, as only approximately 100 status Indians were registered on a General list, that is, they were not band members.[192] The disassociation between status Indians with band membership and those without, had a negative impact As of June 1990, approximately 70,285 people registered under Bill C-

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Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina..

[191] Susan Delacourt. "Canada's future in people's court," Globe and Mail, 25 September 1991, p. 1.

[192] Krosenbrink-Gelissen, 1991, Op. Cit., p. 173.

section 12(1)(b) of the Indian Act; and 40,745 were children and grandchildren of section 12(1)(b). Between December 1985 and June 1990, the status population grew by 33% and on reserve populations grew by 12% with only 22% of that figure representing C-31 registrants.[193] Therefore, only 2% of the registrants were successful in moving back to their reserves. $320,000,000 was set aside to ease re-integration onto the home reserve but very few of the women and children intended to benefit from those dollars actually did so. The main reason was that Bands, fully within their jurisdiction and in accordance with Bill C-31, controlled who would be recognize as members. What Bill C-31 did do was increase the number of status Indians living outside their communities most of whom were women.[194]

In most cases only those who lived on reserves were eligible to vote in band elections and 90% of C-31 registrants lived off reserve. Those women, restored to Indian status via Bill C-31 were not only denied residency on reserve but were denied the franchise and had no political representation in band elections. This became increasingly frustrating for First Nation women. They were confronted with the reality that the Assembly of First Nations consisted of 633 member Chiefs of Indian Bands across Canada, only 60 of which were women, none of whom represented Native Women's Association of

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[193] Mary Eberts, Tory Tory DesLauriers & Binnington, Letter to NWAC dated 19 December 1991 re: Charter Challenges Program. Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina..

[194] Teressa Nahanee, Presentation Paper to the British Columbia Native Women's Society, Kelowna, British Columbia, 16 November 1991, 3, Special Collection of Native Women's' Association of Canada

which would greatly influence the lives of women and they had no say in choosing them. That reality gravely concerned the Native Women's Association of Canada. If self government were to devolve to the male controlled bands, how would they be assured of their participation in selecting leaders in First Nations governing bodies that proposed to be representative of them? They were also worried about the fate of their rights in the male dominated culture. They had no assurances that decisions of law making and enforcement in that male dominated political system would be sensitive to women's interests. It was for those reasons that Native Women's Association of Canada reversed their previous position taken on the Charter in the 1987 constitutional conference and decided that self governing aboriginal communities should be included under Charter provisions along with other levels of government.[195]

Another funding proposal was submitted to the Honorable Joseph Clark on September 18, 1991. In that proposal the Native Women's Association of Canada again reiterated their previous position requesting participation as equal partners in constitutional renewal. They insisted that the Government ensure equality rights by providing constitutional funding to the Native Women's Association of Canada and affiliates, and protested the direct funding that went to the Metis National Council, stating that Metis women were represented within the Native Women's Association of Canada. They demanded their

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Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[195] Eberts, 19 December, 1991, 22, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

equally in your constitutional negotiations with aboriginal groups"[196]

The Native Women's Association of Canada was consistent with other national aboriginal organizations in that they supported recognition by the Government of Canada to an "inherent" right to self government that predated Confederation and the constitution. Where the Native Women's Association of Canada's constitutional position differed from the Assembly of First Nation's was in their belief that constitutional recognition did not mean recognizing a patriarchal form of government created by the Indian Act. As members of the Native Women's Association of Canada stated in the Constitutional conferences:

> "There is an obvious contradiction in attempting to negotiate rights that predate the very existence of the Canadian government if the only base for recognition is a registration system created by that government. It is therefore essential that all aboriginal people, whether or not they possess a government number, realize the potential consequences of endorsing the status quo".[197]

The Native Women's Association of Canada believed that they represented aboriginal women from across Canada and in particular were a voice for the women who had no political representation. They spoke for a distinct minority belonging to the First Nations culture from which they were separated. They believe aboriginal rights should be for all

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[196] NWAC, Proposal for Funding 1991-1992 submitted to Honorable Joseph Clarke, 18 September 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.
[197] NWAC, 1984, 15 as cited in Krosenbrink-Gelissen, 1991, Op. Cit., p. 146.

society for many aboriginal women had not been a pleasant experience. The Native Women's Association of Canada was distrustful of the self governing position taken by the national aboriginal organizations because they knew self government did not necessarily mean an idealistic pre-Columbian utopia where all would live in harmony.[198]

The Native Women's Association of Canada believed that sexual equality in the contemporary First Nation reality was non-existent. Bands, tribal councils and national aboriginal organizations were dominated by men. Many women who regained status under C-31 were not allowed to return to their communities in many instances because of band by-laws on residency. Nor were some allowed a share of social service dollars or receive per capital payment from resource exploitation on aboriginal lands. The Native Women's Association of Canada did not want the existing forms of band governments to determine what form self government would take because ultimately those decisions would affect all aboriginal people. The Native Women's Association of Canada also made it very clear that they were Canadian citizens and as such wanted the protection of all Canadian constitutional laws. They wanted First Nation governments to have the same checks and balances required of other levels of government.

In November, 1991, Gail Stacey Moore, of the Native Women's Association of Canada gave a speech to a gathering of approximately 1,000 - 1,500 First Nation representatives

[198] Theresa Nahanee, "Respect, Equality, Participation, Justice", Speech given 12 February1992, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A.

position on Constitutional renewal known. They reiterated their wish to represent themselves at all constitutional meetings relating to aboriginal and treaty rights and assessed that this right was in accordance with Section 15, 28 and 35(4) of the Constitution. Decisions on defining aboriginal governmental powers should include a female perspective:

> "You cannot simply choose to recognize the patriarchal forms of government which now exist in our communities. Band Councils and Chiefs who preside over our lives are not our traditional forms of government . . . recognizing the inherent right to self government does not mean recognizing and blessing the patriarchy created in our communities by foreign government . . . we want equality to which we are entitled as women . . . we are not leaving our men, our men are at the table, they have been well funded to participate . . . they have all the money, power and control".[199]

During the same address Ms. Stacey Moore gave the Native Women's Association of Canada's official position on the proposed constitutional reformation:

> That the Canadian Charter of Rights and Freedoms apply to all aboriginal governments.
>
> That if the Charter applies to all aboriginal governments, the Government of Canada not extend Section 33 rights to aboriginal governments.

Desmarais, Saskatchewan Indian Federated College, Regina.

[199] Gail Stacey Moore, "Aboriginal Women, Self Government, The Canadian Charter of Rights and Freedoms and the 1991 Canada Package on the Constitution," November 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

women are given their own seat at the constitutional table.

> That recommendations be made to ensure that aboriginal women participate as equals in the definition of Aboriginal governments, their forms, structures and powers.
>
> That there be recognition of the inherent right to self government.[200]

The presentation was not well received by the National Chief and other Chiefs. The Assembly of First Nations firmly rejected the Charter's application to First Nation governments. Their preference was to not have Section 33 (1) apply to aboriginal governments. The Government of Canada proposed there be a 10 year period for negotiating self government agreement which the Assembly of First Nation's rejected. The Native Women's Association of Canada supported this position.

By December, 1991 the Assembly of First Nations had not yet followed through on the agreement with the Native Women's Association of Canada relating to the Women's Constituent Assembly. Instead, the Assembly choose to hire Trisha Monture, Law Professor of the University of Ottawa, Helen Gladue of the Treaty Women of Alberta along with a number of women Chiefs, to form an organizing committee for the women's assembly. The Native Women's Association of Canada suspected that the Assembly of First Nations had reversed their position and on December 6, 1991, Gail Stacey-Moore sent a letter to Chief Ovide Mercredi informing him that if the original arrangement regarding the Women's Constituent Assembly had changed, the Association would not be part of the Assembly's constitutional plan.

As of November 1, 1991, the four national aboriginal organizations [AFN, NCC, MNC, ITC] shared an estimated $6 million to prepare for constitutional discussions. The Native Women's Association of Canada was offered $130,000 of these funds which were channeled through the Assembly of First Nations and Native Council of Canada. Each owed $14,000 to NWAC and in addition, the $228,000 committed by the Assembly of First Nations for the Women's Constituent Assembly was not forthcoming. The Assembly of First Nations originally received twice the dollar amount of other aboriginal organizations because of their working relationship with the Native Women's Association of Canada. Overall, the Native Women's Association of Canada received substantially fewer dollars than other aboriginal national organizations to research constitutional issues.[201] That put a tremendous strain on the relationship between the Native Women's Association of Canada and the Assembly of First Nations.

The major area of difference between the Native Women's Association of Canada and the Assembly of First Nations was the constitutional position taken regarding collective verses individual rights. The Assembly of First Nations was opposed to the Charter of Rights and Freedoms applying to self governing First Nations. Their position was that the individualist rights based Charter was in conflict with the notion of the collective cultural identity of First Nations. The Assembly of First Nations argued that "as Indian

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[200] Ibid.

[201] Teressa Nahanee, Introductory Remarks to the NWAC Board Meeting, 1 November 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

have never been structured that way. If you isolate the individual rights from the collective rights then you are heading down another path that is even more discriminatory . . . the Canadian Charter of Rights is in conflict with our philosophy and culture".[202]

A cause of great concern for the membership of the Native Women's Association of Canada was identifying where their protection would come from if aboriginal women were discriminated against and denied their aboriginal rights by future First Nation self governing bodies. The Association had repeatedly stated that those First Nation governments derived their legitimacy and authority from the Indian Act and Aboriginal rights did not flow from the Indian Act but from the fact an individual was aboriginal. The Native Women's Association of Canada wanted consistent application of rights and not a patchwork quilt of rights for women based upon the whims of politicians, aboriginal or otherwise.

To review this matter in further detail, the Association requested P.J. Desjarlais, Barrister and Solicitor of the Law Firms Swinton & Company, Vancouver, British Columbia, to prepare an opinion on two key legal questions dealing with the impact of Section 15 of the Charter and Section 35 of the Constitution Act on sex discrimination actions brought by aboriginal women against Indian Band Councils. The concern centered on how equality arguments could impair the rights of aboriginal people potentially protected

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[202] Mary Ellen Turpel. "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms, Contradictions and Challenges," Canadian Woman Studies, 10, Numbers 2&3 (1989), p. 153.

to similar questions posed by the Court Challenges Program which the Association had approached for financial assistance to pursue legal actions based on equality rights.[203]

The legal opinion stated:

> Equality based actions are a necessity because Canada has adopted a Charter respecting individual rights and subsequently amended its Constitution to include recognition and affirmation of 'existing aboriginal rights' which are largely collective in nature. As yet there is little direction in law, as to which legal rights take precedence. If court challenges brought by aboriginal women are funded and the legal outcomes are favorable to these women, pressure will be brought to bear on the government of Canada to rectify current discriminatory legislation affecting aboriginal women and their families. The aspiration of aboriginal people for explicit recognition of self determination and of aboriginal women for recognition of their individual rights are reconcilable goals. It is necessary for the courts to recognize and protect a minimum standard of rights for all people.[204]

The Native Women's Association of Canada pursued its funding proposal to the "Program" for a court challenge. By late 1991, the Native Women's Association of Canada had taken a very different public position from that of the Assembly of First Nations. They were also having problems obtaining funding dollars that had been committed to them through the First Nation national organizations. The Native Council

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[203] The Court Challenges Program provides assistance to test cases based upon the equality rights provisions of the Charter if the cases test federal legislation, policy or practice; the issues raised are of importance for equality seeking groups; a decision by the courts will lead to significant gains for equality seeking groups; the case has legal merit and importance, and the issues raised cannot be appropriately addressed under the Canadian Human Rights Act. [Canadian Council on Social Development, A Guide to the Charter for Equality Seeking Groups, Court Challenge Program (Revised Ed.) (Ottawa: Canadian Council on Social Development, 1988), p. 19.

Association of Canada through the Native Council of Canada and the Assembly of First Nations had changed their commitment to the Native Women's Association of Canada for the Women's Constituency.

The Assembly of First Nations knew that the women's organization had serious concerns regarding equality. A special Chief's Assembly was held on November 27, 1991 and Chief Joe Mathias proposed a First Nation's Charter. The Assembly passed a special Resolution stating that the Charter was to be drafted to "reflect the importance of collective rights in our Nations and cultures . . . and that it take into account international human rights standards, even beyond the recognition of those standards in the Canadian Charter."[205] Chief Mercredi invited the Native Women's Association of Canada representatives to work along side Assembly of First Nations in developing this Charter but they were cautious.

On December 3, 1991, Gail Stacey-Moore gave a speech to the Canadian Labor taking the following position:

> The Assembly of First Nations is proposing an Aboriginal Code of Human Rights which it claims will have more rights assured than the Charter of Rights and Freedoms. Will this AFN model code be entrenched in the Canadian Constitution? The answer is likely no it will not be entrenched. Why? Because First Nations leaders have

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[204] P.J Desjarlais, Op. Cit.,

[205] AFN, Special Chiefs Assembly on the Constitution Resolution, NO. 31/91, 27 November 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

> governments. First Nations do not want any code of human rights, federal or aboriginal, imposed from outside the community. This means individual women in each community must struggle daily in their own community, isolated from the aboriginal women's movement, to have a model community code of human rights put in place. Until that community code is in place, human rights of women and children are not guaranteed.[206]

The Native Women's Association of Canada was clearly uncertain about an Aboriginal Charter. They did not know if it would apply to all First Nations or if each First Nation would create its own Charter. The Native Women's Association of Canada wanted any aboriginal Charter to be a part of the Constitution and not just become a statement of principles. Again they were concerned that aboriginal women have all the same rights guaranteed them as all other Canadian citizens. They also wanted constitutional protection of aboriginal rights. The ambiguities surrounding an Aboriginal Charter led them to reinforce their position that Constitutional Charter application must be applicable to aboriginal governments.[207]

The Native Women's Association of Canada therefore decided to proceed with legal work for a court challenge. The four national Native organizations had split $10 million in constitutional funding and the Native Women's Association of Canada received $260,000, $81,000 of which had not yet been received from the Native Council of

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[206] Gail Stacey Moore, Native Women's Association of Canada, Speaker, Aboriginal Women, Self Government, The Canadian Charter of Rights and Freedoms, and the 1991 Canada Package on the Constitution, December 1991, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

Association of Canada felt they should have received $5 million in constitutional funding. The Native Women's Association of Canada argued that preference for male dominated organization resulted in subordination of women's interests. This was contrary to the guarantees of equality in Section 15, 28 and 35(4) of the Constitution. They sought to use the Charter Challenges Program to seek funding. This claim raised critical issues of whether under representation (or non-representation) of women in institutions of decision making constituted a denial of equality before or under the law. This issue had not yet been dealt with in Charter jurisprudence.[208]

In January 1992, the Court Challenges Application was approved and the Native Women's Association of Canada received $30,000 to proceed with the case. Mary Eberts of Tory Tory Deslauriers & Binnington was directed to proceed to the Federal Court-Trial Division. In February 1992, the Metis women affiliated within the Metis National Council approached NWAC with a request to be a part of their court challenge. The Metis National Council was given $130,000 for Metis women and their organizations to participate in constitutional research but the money had not been transferred to Metis women. The Native Women's Association of Canada supported their participation believing their participation strengthen their case.[209]

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[207] NWAC, Native Women and Self Government A Discussion Paper (Ottawa: Department of Secretary of State, 1992), p. 12.
[208] Eberts, 19 December 1991. Op. Cit.
[209] Teressa Nahanee, Letter to Mary Eberts, 4 February 1992 regarding Native Women and the Constitution, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

On March 16, 1992, members of the Native Women's Association of Canada and the Metis women met with the Hon Joe Clark to discuss concerns and their court challenge. Mr. Clark again made it clear that he would not interfere with the national aboriginal organizations and the manner with which they chose to participate in the constitutional process. There would be no consideration of a fifth place at the table for the women's group. He did say that he would try to place more rigorous conditions upon the aboriginal organizations regarding their internal distribution of funds and through the Secretary of State, try to ensure the Native Women's Association of Canada would be able to make a legal case.[210]

The constitutional proposals that were being negotiated between Aboriginal organizations and the Canadian government were not acceptable to the Native Women's Association of Canada. The Assembly of First Nations did not want the Charter to apply to aboriginal government and they also wanted assurance that their governments could use Section 33 if required. The Native Women's Association of Canada respected traditional forms of government with a history of respecting individual rights but they had concerns about how the notwithstanding clause would impact upon the gains won by native women under the Charter.

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[210] Julia E Holland, Notes from March 16th meeting with Hon Joe Clarke, Tory Tory DesLauriers & Binnington, Memorandum 17 March 17 1992, 10, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

law must be protected equally between male and female aboriginal persons. If the recognition and affirmation of the inherent right to aboriginal self government fell outside the Charter and outside Section 35, there had to be assurance of protection of Charter rights under section 2 and sections 7 to 15 to all aboriginal persons. If First Nations self governing bodies were able to use section 33, section 2 and sections 7 to 15 could be suspended by laws passed by First Nation governments. The Association therefore believed that rights such as citizenship, freedom of conscience and religion, freedom of thought and belief, freedom of the press, peaceful assembly, freedom of association and most importantlyof equality rights guaranteed by the Charter could potentially be suspended thus the Native Women's Association were quite threatened by First Nation use of section 33.[211] The struggle centered around how the rights of the individual could mesh with ideals of collective rights.

The Native Women's Association of Canada was criticized for their position taken regarding the application of the Charter. They were accused of being feminists following a white libertarian doctrine and putting forward foreign ideas because of their stand on individual rights. Sharon McIvor refuted this allegation in a speech given to the BC Homemakers Association in Vancouver. She stated:

> It is the Indians of the 'new world' who gave individual rights as a legacy to the civilized world, it is Indian political thought and development which gave rise to democratic ideals and democratic forms of government throughout the world, the settlers took what we had to offer including our

[211] NWAC, Statement on the "Canada Package (Ottawa: Department of Secretary of State, 1992) p. 12.

> ideas of John Locke . . . our accusers should examine where these men found their 'libertarian ideas' these ideas about individual freedom and political development originated in the Americas with the Iroquois Confederacy and other Indian democratic governments. We are not blind followers of European philosophers, nor are we followers of white feminist movements, we are reaching back to our roots . . . individual rights and freedoms are not foreign to Indian political systems"[212]

Chief Mercredi speaking on behalf of the Assembly of First Nations did not oppose equality. He stated that Assembly sought equality for their people when dealing with Canadian society. When First Nations participated in the political, economic life of the state, individualism is very important. What was also sought he said was "collective equality". Canada had a collective consciousness reflected in Parliament and institutions such as courts, education boards and other specialized agencies. For First Nations, "collective equality has to be based upon the distinct status as indigenous people of Canada".[213] The Assembly believed that the pressure to conform with a universal development of humanity had to be discussed and developed within First Nations and for that reason the Assembly opposed application of the Charter upon First Nations. There could be no imposition of a particular kind of society upon First Nations.

A distinct difference of perspective had placed a deep wedge between the Assembly of First Nations and the Native Women's Association of Canada. Women feared that contemporary First Nations governments, who derived their legitimacy from the Indian

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[212] McIvor, 20 August 1992, Op. Cit.
[213] M.A Gaudet. "First Nations and the Future," National, March 1992, p. 29.

Any threat of that possibility caused them to secure their position that equality was an aboriginal right which could not be given by any governing body. That right was inherent to their heritage.

The split further divided the First Nations and weakened their position. It exposed to Canadian society the complex issues intrinsic to First Nations politics and the experience made women more deeply committed to protecting their rights. The fact was that women were forced to seek out protection of their rights outside their nations in order to secure their rightful place within those same nations.

It was Assembly of First Nation's position that the Native Women's Association of Canada feared most. The Assembly had steadfastly opposed application of the Canadian Charter of Rights and Freedoms to First Nation governing institutions. In their document entitled *The Source,* the product of the Assembly's parallel constitutional inquiry, a revival and healing of their nations by returning to past values and practices was envisioned. They admitted First Nation women had been mistreated by men but they believed that resulted from the encroachment of European values which had subordinated women. They hypothesized that only by recovering past traditions could egalitarian relations surface. The Assembly of First Nations stated the Canadian Charter was a foreign document which valued individualism over collective rights and as such individual rights would ultimately conflict with First Nation group rights. Finally, they argued, the Charter was not an aboriginal document and acceptance of it could not contribute to solving problems faced by aboriginal people in contemporary society.[214] There was a general fear that if the Native Women's Association was successful in their equality arguments it could undermine the Indian Act's special protection and assimilation would succeed through the Canadian judiciary. Chiefs and councilors were concerned about the long range cultural and economic impact on their communities if they are forced to adhere to Charter provisions.[215]

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[214] Cairns, Op. Cit., p. 211.
[215] Imai, et. al., Op. Cit., p. 107.

Canadian constitutional discussions and the Native Women's Association of Canada strongly opposed not being given the similar chance to counter that argument at the constitutional table. They asserted that they were a national organization representative of Aboriginal women and it was their right to participate in constitutional review processes on the same terms as the other four aboriginal groups. They alleged that by funding the four male dominated groups and failing to provide the Native Women's Association of Canada with equal funding, the Government of Canada violated their freedom of expression and right to equality. That was in contravention of Section 15, 28 and 35(4) of the Canadian Constitution.[216]

Gail Stacey Moore, a Mohawk from Kahnawake, Quebec and Chief Elected Officer of the Native Women's Association of Canada stated:

> The exclusion of NWAC from direct funding for constitutional matters and from direct participation in constitutional discussions poses a grave threat to the equality of aboriginal women. The [Assembly of First Nations] in particular, has taken the view that the Canadian Charter of Rights and Freedoms should not apply to Aboriginal self government. Without the Charter, aboriginal women will be helpless to resist the discriminatory actions of Band Councils or any other form of self government to be developed. This is because the Canadian Human Rights Act does not apply to the Indian Act and the provincial human rights codes are also inapplicable for jurisdictional reasons. Although the AFN has expressed an interest in establishing an Aboriginal Charter of Rights, Ovide Mercredi, the Grand Chief,

[216] NWAC v. Canada, Op. Cit., p. 634.

development and NWAC should develop a Charter if we are intent of having some thing soon.[217]

The reason the Native Women's Association of Canada strongly pursued their right to be heard at the constitutional table was because they believed they were the only voice of thousands of aboriginal women living outside aboriginal communities with no political voice. The Native Women's Association of Canada wanted to secure aboriginal rights for all women who had suffered the effects of discrimination due to past historical imposition of colonial policies and laws. The Indian Act was discriminatory and although Bill C-31 solved some of the problems of status and women who lost it, it did nothing to solve the problems of membership. The Native Women's Association of Canada stated that women were still discriminated against when trying to return to their homelands and feared for their constituents believing that the possibility existed of other imposed sanctions if 'aboriginal patriarchs' were emboldened with new powers under the guise of collective rights:

> the fear is that they will not enjoy the same protection as others under the Charter unless they are party to the process of protecting their aspirations under an Aboriginal Charter. They are also afraid that political dissent and freedom of expression could be quashed with bylaws enacted by the local governments.[218]

The Native Women's Association of Canada strongly believed that aboriginal women should have the same protection and constitutional safeguards as other Canadian women

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[217] Native Women's Association of Canada et al. V. Canada et al. [1992] 146 N.R. 40, p. 46.
[218] Scott Smith, "Charter Dilemma Newest Wrinkle in AFN Constitutional Process," Tekawenna, 29 January 1992.

important to note here that the Native Women's Association of Canada supported certain elements of "White Man's Law" so to speak, in their desire to have the Charter apply to their governing institutions. In a speech at the National Association of Women and the Law in 1992, Teressa Nahanee elaborated on this:

> How can Canadians think that we as aboriginal people can come unscathed out of 500 years of oppression and live differently than other oppressed peoples who have found liberation...what you see being built today in the constitutional process is the mirror image of your patriarchal system and your male leaders think that is progress, they look at our men and see themselves. NWAC has adopted a pure gender equality stance, we will not tolerate any deviation from our sexual equality rights and reject any qualification put upon our sexual equality right. We do not want our equality interpreted through the prism of culture, tradition, traditional government or spiritual practices.[219]

Therefore through the Federal Court of Canada, the Native Women's Association of Canada sought to prohibit further distribution of funds to the four national aboriginal organizations until they were given equal share of the dollars and a seat at the constitutional table. They stated in their affidavit to the court that:

> the government of Canada exhibited a historical preference for the views of male dominated aboriginal groups on issues related to women's equality and that by not giving women equivalent dollars to facilitate their opinion during constitutional discussions, their rights were

[219] Sharon McIvor, "Aboriginal Women and Self Government and Our Struggle," speaking notes to Annual Meeting of the B.C. Indian Homemakers, Vancouver, B.C. 20 August 1992.

Charter and Section 35(4) of the Constitution Act, 1982.

The Native Women's Association of Canada further alleged that Section 15 of the Charter, which bars discrimination based upon sex or national and ethnic origin, was violated by disbursing funds allowing for the advocating of the removal of rights guaranteed by the Charter. The Native Women's Association of Canada therefore wanted further disbursal of funds prohibited as the action was unconstitutional. Representative members of the Native Women's Association of Canada included, Gail Stacy-Moore, and Sharon McIvor, Executive Members. Their Solicitor was Mary Eberts of Tory, Tory, Des Lauriers and Binnington. [221]

This case was heard and the action dismissed by D.J. Walsh, Federal Court of Canada Trial Division on March 30, 1992. The Justice took an approach in line with the direct letter of the law. He ruled that the Government of Canada did not act in an unfair manner nor did they act in contravention of natural justice. He believed that they had in fact acted in good faith by inviting and funding aboriginal groups in constitutional discussion. The Government of Canada had no reason to believe that the four funded aboriginal groups who were invited to the Constitutional table were not representative of all aboriginal constituents.

The Native Women's Association of Canada used, as part of their argument, historical fact alleging that the imposed inequities of the Indian Act applied to women, resulting in

[220] Native Women's Association of Canada et al. V. Canada et al. [1992] 53 F.T.R. p. 196

treatment was not relevant in the case but what must be considered was whether the court should intervene by prohibiting disbursement of Government funds and whether the Court, in this case had the right to do that. He pointed out that it was not conclusive that in Aboriginal societies women were not treated by men as equals, or were disadvantaged with respect to them and that men do not share women's views on all issues therefore could not be relied upon to present women's viewpoint at constitutional conferences. In fact, the Inuit Tapirisat strongly disputed the Native Women's Association's claim and stated " . . . their society is totally different from that of the other named Aboriginal groups (or associations), that women are not disadvantaged in it, and do not seek separate funding or representation.[222]

Judge Walsh stated that although the Native Women's Association of Canada did receive a disproportionate number of dollars, there was no clear evidence that the Native Women's Association of Canada had less of an opportunity, and in fact had many opportunities to express its views both to the appropriate politicians, the public and aboriginal groups who participated at the conferences. He further stated that although more money placed at their disposal would have made their voices louder, it could not be said that they were deprived of their right of freedom of speech in contravention of the Charter. He concluded that there was not an infringement of the applicants' Charter rights and freedom of expression. Disproportionate funding did not result from an

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[221] Ibid.
[222] Ibid.

a separate group but stemmed from the fact that the four aboriginal groups made an internal decision as to how those funds would be distributed. The Government of Canada had no legal obligation to impose an order to the aboriginal groups to disperse the funds any differently.

> To say that the court has a right to issue a writ of prohibition . . . is far from concluding . . . there is no evidence as to how the groups were selected, only the explanation given in argument by the respondent . . .neither is there any suggestion by applicants as to what other groups (other than themselves) would have been more representative of the aboriginal people than the broadly based umbrella groups selected . . . s37.1(2) of the Constitution Act 1982 imposes a duty of the PM to invite representatives of the aboriginal people to FMC. That cannot be reasonably interpreted as requiring the Prime Minister to invite to the conferences representatives of every special interest group among aboriginal peoples in Canada.[223]

The court determined that those decisions were political decisions and could not be determined in the courts. The Native Women's Association appealed the decision and the case was heard by the Federal Court of Appeal, Mahoney and Stone, JJ.A and Gray, D.J., on June 11, 1992.[224]

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[223] Ibid., pp. 195-205.

[224] In total the NWAC had five days in Canadian Courts. The first was the initial constitutional challenge regarding dispersal of funds. The **second** when the NWAC lost this case they appealed Justice Walsh's ruling to the Federal Court of Appeal, this case was heard on August 20, 1992. The **third** action taken by the NWAC was to the Federal Court of Canada Trial Division and this was for an Interlocutory Injunction to prohibit the referendum process until NWAC was accorded a right to participate in constitutional discussions. The **fourth** was when the Federal Court of Appeal declined to hear the injunction application stating the referendum issue was dead and the **fifth** was the appeal by the Government of Canada to the Supreme Court of the decision reached in the second ruling of the Federal Court of Appeal.

in July of 1992 requesting a seat at the Charlottetown meeting and additional funding. The request was acknowledged but Clark stated that the request for direct participation in the multilateral discussions should be sought through Native Council of Canada and the Assembly of First Nations. He reiterated that funding for aboriginal women's association would continue to be channeled through the national associations.[225] One should note that the Federal government was under considerable pressure to come to an agreement on proposed constitutional amendments because Quebec's deadline for a vote on sovereignty was fast approaching. The Federal government began planning a set of constitutional amendments that would be presentable to the rest of Canada.

Part of that planning had begun in March 1992 when the provinces set up a multilateral process for amendments. Discussion of any proposed amendments involved the federal and provincial governments plus the four national First Nation organizations. The Native Women's Association of Canada was not invited to those meetings. Weekly meetings lasted from April to July 1992 and they produced sixteen amendments which if agreed to, would have changed the face of Canada. Among the proposed changes to the Canadian Constitution were:

- an elected Senate
- recognition of Quebec as a distinct society
- a social charter and new division of powers between federal and provincial government
- recognizing the right to Aboriginal self government.

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[225] Teressa Nahanee, Speaking Notes 21 August 1992, Op. Cit.

On August 20, 1992, Mahoney, J.A., delivered the judgment for the Federal Court of Appeal agreeing in part with the Native Women's Association of Canada. Mahoney stated, on behalf of the court, that the

> . . . AFN do not speak for the women of the First Nations whose interest, at least as measured against the norms of Canadian society as a whole, are not only unlikely to be properly represented by AFN but are likely to be injured if AFN's position prevails; NWAC does represent those women. The evidence is clear that AFN is not addressing their concerns. It emphatically rejects imposition of the Charter on native self government and promises instead an Aboriginal charter which cannot yet be described.[226]

However, Justice Mahoney upheld the previous court's decision and did not order a prohibition of funding to national aboriginal organizations. He agreed that the Native Women's Association of Canada had ample opportunity to express its view to the appropriate political authorities and the public. Disproportionate distribution of funds resulted not from the fact that they were women but from the unwillingness of the Government to recognize that they should be considered a separate group. But Justice Mahoney further stated that in his opinion

> . . . the question is not whether the designated aboriginal organizations are male dominated but whether they advocate male dominated aboriginal self governments. I do not agree that a male dominated organization is, in fact incapable of advocating gender equality . . . measured against the norms of Canadian society as a whole, it is in the interests of aboriginal women, that if, as and when they become subjects of aboriginal self governments, they

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[226] Ibid.

> Rights and Freedoms accorded them by ss.15 and 28, or by the equivalent provisions equally entrenched in Aboriginal Charters . . It is by no means certain that the latter alternative can or will be realized. The interests of aboriginal women, measured by the only standard this court can recognize in the absence of contrary evidence, that of Canadian society are not represented in this respect by AFN, which advocates a contrary result, nor by the ambivalence of NCC and ITC . . . by funding the participation of those organizations in the current constitutional review process and excluding the equal participation of NWAC, the Canadian government has accorded the advocates of male-dominated aboriginal self governments a preferred position in the exercise of an expressive activity, the freedom of which is guaranteed to everyone by s.2(b) and which is by s. 28 guaranteed equally to men and women. It has thereby taken action which has had the effect of restricting the freedom of expression of aboriginal women in a manner offensive to ss.2(b) and 28 of the Charter. In my opinion, the learned trial judge erred in concluding otherwise . . . that is not to say that equal funding to NWAC would necessarily be required to achieve the equality required in s 28. The evidence does not permit a concluded opinion as to that. However, the funding actually provided is so disparate as to be prima facie inadequate to accord it the equal freedom of expression mandated in the Charter".[227]

The Appeal court did not allow the prohibition but they declared that aboriginal women's freedom of expression had been violated. The Native Women's Association of Canada celebrated a victory. The Court of Appeal took a very empathetic view of the law and declared the appellants' freedom of expression had been violated and ordered that the judgment of the Trial Division dated March 30, 1992 be set aside and that the appellants recover from the respondent their costs of the appeal.

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[227] Native Women's Association of Canada et al. V. Canada et al. [1992] 146 N.R. p. 53.

That decision was brought down on August 20, 1992 and the Assembly of First Nations, which did not intervene in the case, was hard hit by the declaration. The court recognized that the Assembly of First Nations and the former National Indian Brotherhood had vigorously and consistently resisted the struggle of First Nation's women to rid themselves of the gender inequality historically entrenched in the Indian Act. This opposition took the form of adverse interventions before Parliamentary committees and legal proceedings, including opposing repeal of section 12(1)(b) and the section 35(4) amendment.

Chief Mercredi, Grand Chief of the Assembly of First Nations went public, stating that attacking Indian men and chiefs would not help the women's groups get to the constitutional table. He said it was the quickest way to alienate people from their cause. He also asserted that the Federal Court did not have all the evidence when it made its decision. The Assembly of First Nations did not present any evidence because they did not want to be perceived as against the Native Women's Association of Canada. Chief Mercredi stated that the Assembly of First Nations had tried to deal with the Native Women's Association of Canada's concerns but the group walked away from a tentative deal earlier in the year. In light of this, he concluded that the Native Women's Association of Canada always had access to the Assembly of First Nations' process. He

problem.[228]

It was in the midst of constitutional activity that the Mahoney decision was announced. On August 26th, 1992, Glenda Simms, Ph.D and President of the Canadian Advisory Council on the Status of Women wrote to Ovide Mercredi, Ron George, Rosemarie Kuptana and Yvon Dumont requesting the inclusion of the Native Women's Association of Canada in constitutional discussion. The Native Women's Association of Canada was however, not included. Quebec agreed to join in on the Constitutional discussions in early August and on the August 28, 1992 at Charlottetown, P.E.I, an agreement was reached. A national referendum was scheduled for October 26.[229]

Highlights of the Accord which affected First Nations were as follows:

- the inherent right to self government.
- institution or bodies which exercise the right to self government would have to be dependent on the particular circumstance of the First Nation.
- aboriginal governments which exercised law making authority would constitute an order of government in Canada (the proposed amendments stated that the Canadian Charter of Rights and Freedoms would be available to Aboriginal citizens, but that Aboriginal governments could use the "notwithstanding Clause" to prevent the application of parts of the Charter).
- the scope of aboriginal law making would be flexible, but aboriginal laws could not be inconsistent with laws essential for the preservation of peace, order and good government.
- prior to implementing self government negotiations would take place between aboriginal, federal and provincial representatives.
- a five year adjustment period was provided before the courts could be called on to interpret issues related to the exercise of the right to self government.

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[228] Donella Hoffman, "Mercredi Scolds NWAC," Regina Leader Post, 19 September 1992.
[229] Imai, Op. Cit.

- continuing federal and provincial fiscal responsibilities were confirmed in a political accord.[230]

The Native Women's Association of Canada was angered that in spite of the Federal Court of Appeal's declaration, they were still excluded in the drafting of this accord. A press statement was issued by the Native Women's Association of Canada right after the Accord was announced in which they said they were deeply worried about the proposed amendments to the Constitution and how those amendments would impact upon their lives as aboriginal women.

> . . . Under the new package, every aspect of native life will be interpreted to recognize that aboriginal peoples have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies and their governments constitute one of the three orders of government in Canada.[231]

The Native Women's Association of Canada believed that culture, traditions and societies were undefined terms in law and nothing was in place to protect women if some First Nations governments chose to introduce gender discriminatory laws in their communities.

They were also concerned that aboriginal governments had the right to use section 33 to override Charter rights but there was no requirement for those governments to be democratically selected or allow women to participate in choosing them. NWAC stated that they needed Charter because:

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[230] Ibid., pp. 68-69.

- in the agreement there is no entrenched guarantee of sex equality that applied to aboriginal self government.
- provincial and federal human rights legislation did not apply to Indian Act Band Councils or the inherent right to self government and other protective legislation, like landlord and tenant law did not apply either.
- the Federal Court of Appeal had ruled that Aboriginal women suffer serious sex discrimination on reserves, for which NWAC says the Charter is our only available remedy.[232]

It should be noted here that the National Action Committee on the Status of Women also, did not endorse the Charlottetown Accord. They argued that nothing women asked for was included in the Accord. They felt that women's rights would suffer under the Accord. They stated that although women composed 52% of the population two provisions of the Accord infringed on their existing rights:

- The Canada clause which enshrined the supremacy of Parliament and equality of the provinces as fundamental characteristics of Canada.
- undermines equality rights because it makes no mention of individual equality guarantees for the '82 Charter of Rights.[233]

They believed that the Charlottetown Accord reduced government obligation to their issues and their fear was further increased when the federal government announced their decision to cut the program that funded equality based challenges to laws under the Charter since 1985. They were not pleased with the section of the Accord that allowed

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[231] NWAC, "Gender Equality Postponed to 1996," Press Statement released in August 1992, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[232] NWAC, "NWAC is bringing an injunction application to stop the referendum on October 26, 1992," Press Release, October 1992, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[233] Leader Post, "Women's Movement urges 'No' Vote," 14 September 1992, p. A8

federal government. They believed that this would have a negative impact on national child care programs and other schemes such as violence against women[234]. Many of the arguments put forward by the NAC were similar to what the Native Women's Association of Canada.

Angered by the fact that they had continued to be blocked from the constitutional table, and fully believing that they had lost their Charter rights with the signing of the Accord, the Native Women's Association of Canada armed with the declaration set out in the Federal Court of Appeal, decided to seek an injunction to stop the forthcoming October 26th Referendum. They sought to prohibit the continuation of discussions between the respondents and the four national aboriginal organizations on subjects dealt with in the Consensus Report on the Constitution, until they are given the equal opportunity to participate in the constitutional review process. In September of 1992, the AFN cut off all communication with the Native Women's Association of Canada. The Native Council of Canada had cut off all communication with the Metis women in March of that year, when the Native Women's Association of Canada launched its first legal challenge. Mary Ellen Turpel, the Assembly of First Nation's Lawyer, and Chief Ovide Mercredi of the Assembly of First Nations, discontinued providing constitutional documentation to the Native Women's Association of Canada and also ceased inviting the Native Women's Association of Canada members to the Constitutional Technical Working Groups of the

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[234] Ibid.

ensure constitutional amendments would place collective rights above individual rights.[235]

The Assembly of First Nations was firm in their position they did not want an individual rights based Charter to override collective rights. They feared that the Charter would weaken the cultural identity and inhibit true self government within First Nation communities. That was perceived as a dangerous opening for the Canadian courts to rule on individual versus collective rights. It would have the potential to break down community methods of dispute resolution and restoration.[236]

On October 16, 1992, and the Federal Court Trial Division heard and dismissed the Native Women's Association of Canada's injunction application. The Native Women's Association of Canada appealed this decision, but by the time it reached the Federal Court of Appeal, the referendum had already taken place. The Accord was rejected as unacceptable to the Canadian nation and to aboriginal peoples.[237]

The Government of Canada appealed the October 20, Federal Appeal Court decision to the Supreme Court of Canada and won. The Supreme Court of Canada ruled that the Native Women's Association of Canada had no grounds for appeal of the initial decision brought down by the Federal Court Trial Division.

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[235] Sharon McIvor, "The Charlottetown Accord, Sexual Equality and Native Women, Will Legal Text tinkering Satisfy Us?," 8 October 1992, Special Collection of Native Women's' Association of Canada Constitutional Papers in possession of Diedre A. Desmarais, Saskatchewan Indian Federated College, Regina.

[236] Turpel, Op. Cit., p. 153.

> The four aboriginal groups invited to discuss possible constitutional amendments are all bona fide national representatives of Aboriginal people in Canada and , based on the facts in this case, there was no requirement under s2(b) of the Charter to also extend an invitation and funding directly to the respondents... I have concluded hat the arguments of the respondents with respect to s.15 must also fail. The lack of an evidentiary basis for the argument with respect to ss.2(b) and 28 is equally applicable to any arguments advanced under s.15 of the Charter in this case.[238]

In the Native Women's Association of Canada's case, it had to be shown, beyond a reasonable doubt that there was concrete evidence that the charter rights of aboriginal women had been violated; that their freedom of expression had been retarded due to the inequitable funding by the government for the Native Women's Association of Canada. The fact remained that the Native Women's Association of Canada was given funding and this did come through the national aboriginal organizations and ultimately, the government was under no obligation to fund any of the organizations.

Another problem for the Native Women's Association of Canada, was arguing for a ruling on a hypothetical scenario. "If" self government was put in place for aboriginal nations, and they were allowed to use the Section 33 to override the Charter, this might have had a negative impact upon the Native Women's Association of Canada. Although there was ample evidence to indicate that the past was littered with injustices, the Supreme Court of Canada could not rule of what might happen in the future. It was very

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[237] Native Women's Association of Canada et al. V. Canada et al. [1992] 57 F.T.R. 114
[238] Royal Commission on Aboriginal Peoples Report, Vol 4, p. 71.

that they were discriminated against as a result of government action. There was nothing for the courts to overturn, there was no law in place. The Native Women's Association of Canada's attempt to use the Charter to secure individual political rights within the First Nations was unsuccessful.

CONCLUSION

This thesis set out to explore the Native Women's Association of Canada's struggle for equality as female members of First Nations in Canada. It examined the involvement of the Native Women's Association of Canada in constitutional negotiations and the position put forward by that organization that gender equality was "intrinsic" to the role of aboriginal women in their "traditional" societies and had been lost due to the Indian Act which caused assimilation of patriarchal political ideals into the political structures of First Nations. This fact, they argued, was evident when some First Nation leaders collectively chose to deny aboriginal rights to First Nation women when they began to express their discontent at having been oppressed. The obstacles First Nation women confronted, at the hands of both the Canadian state and their own First Nation leadership, caused them to use all of the political tools available in order to empower themselves in an attempt to regain what they believed to be their inherent aboriginal right, equality among their people.

In particular, this thesis examined the Native Women's Association of Canada, by focusing on their demand to be involved in constitutional negotiations. This led to a judicial challenge which eventually went forward to the Supreme Court of Canada. In their case, the Native Women's Association of Canada used the Canadian Charter of Rights and Freedoms in an attempt to secure what they believed was their "traditional" right to be present during those negotiations. They argued that contemporary First Nations structures and leadership were not true "traditional" governing bodies, and were

Canada had an aboriginal right to be participants in the constitutional negotiations ultimately leading to a restructured Canada that included an inherent right to self government. Ultimately they lost that fight, but it is clear that in conducting resistance they sensitized all Canadians to the plight of First Nations women.

It is evident from the review of the role of First Nation women in their communities prior to European influence, that the Native Women's Association of Canada was correct in arguing that in certain First Nations, women played a strong economic, social and political role. Contact with European economic and social systems subsequently reduced these roles and with the imposition of the Indian Act, First Nations women lost further power to their male counterparts. After several generations, patriarchal and paternalistic values permeated First Nation governing bodies ensuring that First Nation men held almost all the leadership roles in their communities. In essence, the Native Women's Association of Canada alleged that First Nation culture, tradition and leadership had been transformed by colonialism, and official power was placed in the hands of male leaders. Although, First Nations resisted assimilation, colonization of the first peoples became a fact and the negative impact of that process is evident today.

As a direct result of this process, First Nations women were excessively disadvantaged, denied their rights, and banished from their societies. Laws and policies were in the hands of First Nation men who in turn were answerable to Canadian male administrators from the Department of Indian Affairs. As we have seen, the mandate of Indian Affairs

First Nations, dividing them along lines of race and gender. The Act mandated different treatment, differing access to resources and differing state obligations and responsibilities. Differences between First Nations were encoded into the creating of a category of persons, who considered themselves to be members of First Nations, but were not recognized as such. The Indian Act was based upon patriarchal ideals which recognized women and children only in relation to either the husband or the father.[239] This caused great conflict within contemporary First Nations culture, as members of those societies were pitted against each other when they attempted to recapture remnants of the past with the hope of securing a better future for themselves and their children.

These changes eventually led to the birth of the Native Women's Association of Canada which protested the imposed patriarchal culture which affected the status of women, denying them certain rights accorded to other members of First Nations. In their battle to be heard and to effect political change, First Nation women were forced to overcome almost insurmountable odds. They were particularly hampered by the fact that Canadian governments acknowledged and legitimized only those First Nation governing bodies which were in large part, products of colonization. In particular, the Assembly of First Nations was composed of Chiefs elected via the Indian Act rules and regulations. First Nation men possessed almost all the positions of leadership in First Nation communities.

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[239] Krosenbrink-Gelisssen, 1991, Op. Cit., p. 212.

First Nations leaders that, as First Nations women's role changed, they also imported non-traditional ideals. As noted above the Native Women's Association of Canada was organized in 1974 to provide a political voice for women who had been excluded from political dialogue due to the discriminatory aspects of the Indian Act. Their membership was determined culturally, not by virtue of regulations developed by the federal government. The prime issue for the Native Women's Association of Canada was the denial of Indian status to women, a denial which had marginalized thousands of women and children often forcing them to live in extreme poverty. The era in which the Native Women's Association of Canada was born was permeated with ideals of equality, justice and human rights. This aided First Nations women in the political arena, both nationally and internationally. The Human Rights Movement and the Women's movement were strong voices with a great deal of political influence that supported both First Nations political organizations and the Native Women's political concerns. First Nation women were affected by the strong lobby made by the women's movement and their ultimate success in constitutionally affirming sexual equality. Following their lead, First Nations women demanded that sexual equality be entrenched and succeeded when the first amendments were made to the Canadian Constitution in 1983. Sexual equality was guaranteed within the Aboriginal rights provision of the Constitution Act, 1982.

The research also established that First Nation women's role did in fact change. They did import 'non-traditional' ideas the most notable being liberal democratic ideals of equality. Their ideals became an hybrid of traditional and non-traditional beliefs. The

sexual equality unambiguously and constitutionally protected, guarding all aspects of aboriginal rights and self government, was the effect of the sexually discriminatory regulations of the Indian Act which marginalized thousands of First Nation Women.[240] Thus, while structures and patriarchy provide part of the explanation for aboriginal women's action, changing ideas and ideals within their own movement were also a major catalyst. They therefore chose to use the Charter in their attempt to secure their right of equality as First Nation women. They strongly believed that without Charter protection, women would be unable to resist the discriminatory actions of band councils and future forms of self government.

Not all First nation organizations supported the Native Women's Association. The National Indian Brotherhood, having lived through and successfully aborted the proposed policy of assimilation represented in the 1969 White Paper, felt threatened by the prospect of governmental tampering of the Indian Act without their approval. As we have seen, this put them on a direct collision course with Native Women who wanted to change the Indian Act to abolish discriminatory sections and regain their lost status and rights. Thus, the Brotherhood and later the Assembly of First Nations tried to block all attempts made by First Nation women to have the Act changed. This conflict carried over into the struggle for First Nations participation in constitutional negotiation. During the constitutional talks which originated in the 1970s through to the failed Charlottetown Accord, First Nation leaders consistently reiterated their firm commitment to collective

[240] Ibid, p. 211.

rights accorded thereof. Although the Assembly recognized that the effects of the Indian Act caused hardship and stress for women of First Nations, they believed that concerns should be dealt with as a collective, and national First Nations political organizations were willing to sacrifice equal treatment for First Nation women in order to ultimately secure a right to self government. Their position was firm in their mind and they were clear in their reasons for taking that stand.

It is safe to state that self government was of primary importance to all members of First Nations, including members of the Native Women's Association of Canada. Each reached beyond the confines of colonialism to define what self government meant in contemporary Canadian society, the inherent right to rule their nations in accordance with their traditions and unique cultures. First Nation political organizations repeatedly assert that they had never given up the inherent right of self government and the Canadian state needed to recognize that fact. Complicating their vision of self government was the categorization and division of First Nations and the impact that process had on contemporary society. The Assembly of First Nation's vision was to have self government recognized so that they could deal with issues of inequality collectively within their own governing bodies. First Nation women did not believe that the First Nation governing bodies would deal with them fairly. Therefore they turned to the Canadian Constitution and its Charter of Rights and Freedoms in the hopes of protecting their aboriginal rights which they believed were already defined. One of those rights, in their mind, was equality.

The Native Women's Association of Canada attempted to use the Canadian Charter of Rights and Freedoms to secure a seat at the constitutional table because they concluded that it was the only tool left to them which would force governments to acknowledge and accept their right to speak on behalf of First Nations women. As noted in Chapter Five, their greatest fear was that if the inherent right to self government was entrenched within the restructured Canadian Constitution without their input, the imposed patriarchal culture which so negatively affected their status within their own societies, would be constitutionally secure. First Nation women wanted the power to put forward an equal voice in determining and securing their future.

The Assembly of First Nations took great offense at the tactics used by the Native Women's Association of Canada and accused them of promoting equality rights as individual rights to the detriment of their societies which had "traditionally" ruled their societies on a collective basis. The Assembly believed that members of the Native Women's Association of Canada had been unduly influenced by the contemporary feminist movement to the detriment of their struggle for true self government. The Assembly did not want another government imposing legislation upon their societies and was determined to do whatever it took to ensure that could not happen again.

First Nations women wanted constitutional assurance that the sins of past governments would be rectified. The Assembly of First Nations fought fervently for the entrenchment of the inherent right to self government. They were correct in their assessment that true

organized. The right to determine membership was integral to self government. Recourse to Charter provisions meant that members of their communities would have the option of challenging First Nations laws based upon an individual right thus creating an opening for a Canadian court to rule on individual versus collective rights. This would not be true self government. If internal disputes were brought before Canadian courts, it would undermine effective self government and impose a system of individual based rights. It would also encourage First Nation persons to go outside of custom to settle disputes in formal courts ruled by non First Nations.[241] In that assertion, they were correct.

However, examination of both positions reveals that both had legitimate concerns and were justified in the constitutional positions which they took. In spite of the legitimacy of the arguments put forth by the Assembly of First Nations, it was imperative that the Native Women's Association of Canada remained firm that sexual equality had to be paramount to self government. Autonomy could not be truly legitimate unless equality was assured. First Nation women endured the traumatic effects of the Indian Act differently than male members of First Nations.

Thousands of First Nation women had become displaced members within the Canadian nation belonging neither to the dominant society nor their own societies. Those issues had not been adequately addressed and women were weary and distrustful of being asked

[241] Turpel. Op. Cit., p. 154.

regain their rightful place within their societies and constitutionally ensure that no government would ever be able to take away that right. Sexual discrimination and its effects upon their nations was a painful result of the colonization process and the Native Women's Association of Canada was determined to lessen the possibility of that discrimination occurring again in the future.

Theresa Nahanee, prominent spokesperson for the Native Women's Association of Canada during the Charlottetown constitutional process, took a feminist legal approach as she stated that much of the problems faced by First Nation women were because men had almost total control of First Nation communities through band councils established by the Indian Act and they were unwilling to relinquish any of their power. The Canadian Constitution, the institutions that are produced because of it, the interpretations and traditions of constitutional dialogue were established long ago by men to the exclusion of women.[242] Times had changed, and if amended, the constitution must be made to accommodate women's concerns.

Thus it is the final conclusion of this thesis that the Native Women's Association of Canada was correct in their pursuit of equality.

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[242] Tully, Op. Cit., p. 2.

The First Nations women's political struggle within Canada has been tremendously complex and multi-dimensional. This made it much more difficult for First Nation women to accomplish their goals. They struggled to recapture rights lost due to colonization and for the right to be heard when decisions were being made that would directly impact upon their lives. Unfortunately part of that struggle extended to their own Nations who were asserting their rights to self government and were unwilling to guarantee membership to disenfranchised women.

The Charlottetown Accord was unsuccessful. The Canadian public voted against the proposed constitutional amendments and First Nations leaders were unsuccessful in convincing their people the Accord would be a secure alternative to the status quo. The Native Women's Association of Canada asserted that they were the organization which represented Canadian First Nation women, and in particular those women displaced by discriminatory legislation. Their political position was extremely fragile and unpopular among many of their own people and unsupported by the Canadian state. They had insurmountable odds to overcome and sought out the only recourse available to them. They set out to protect aboriginal women's individual rights within a 'collective' political paradigm arming themselves with the Canadian Constitution inclusive of the individual protectionist 'Charter' and in so doing were successful in alerting all Canadians of the dilemma they face.

women. They were successful in mending the wounds of the past with the Assembly of First Nations and have gone on to work closely with them on contemporary issues of concern to all First Nations. Their position regarding constitutional guarantees proved to be prophetic in light of some of contemporary problems facing First Nation women. The newly elected President, Marilyn Buffalo, Samson Cree Nation, has emphasized that poverty and discrimination are still serious problems for First Nations women and Band governments still attempt to limit membership in order to minimize the sharing of benefits to band members. Bill C-31 members are still blocked at the Band level in their attempts to regain their right to be members of their home nations. If women are to be true members of First Nations, it is now clear that they need to be equal with the men in those societies. Anything else would legitimize the errors of a painful past and that is unacceptable.

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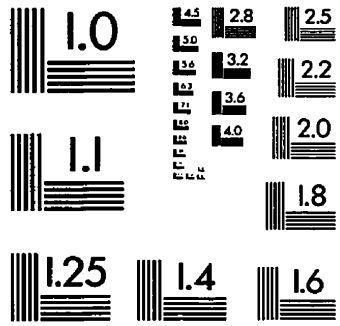

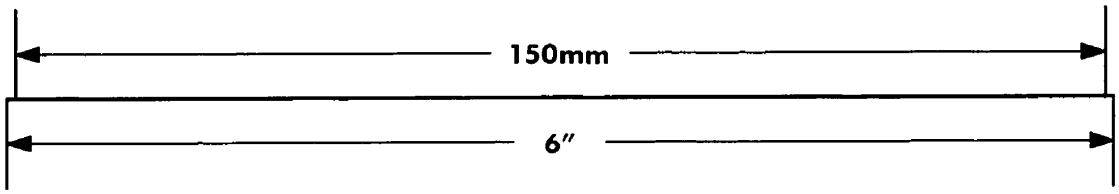

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