CONSTITUTIONALISING THE PATRIARCHY: ABORIGINAL WOMEN AND ABORIGINAL GOVERNMENT

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INTRODUCTION

During the pre-Charlottetown Accord politicking, a tension became apparent between Aboriginal women represented by the Native Women's Association of Canada (NWAC) and `male-stream'[1] Aboriginal organisations, particularly the `status' organisation, the Assembly of First Nations (AFN). The AFN, Metis National Council (MNC), Native Council of Canada (NCC), and Inuit Taparisat of Canada (ITC) were given participant status in constitutional negotiations,[2] and lobbied successfully to have the matter of the explicit[3] inclusion of the inherent right of self-government in the Constitution to be settled during this "Canada Round." As part of this package, the AFN advanced the proposition that the *Charter of Rights and Freedoms* not apply to Aboriginal governments. In this it was apparently supported by the other Aboriginal organisations.

It is important to note that three broad-based national feminist organisations had asked for and been denied participant status in the negotiations. The National Action Committee on the Status of Women (NAC), NWAC, and the newly-minted National Metis Women of Canada[4] all claimed that women's voices had to be explicitly included for the new constitutional package to adequately reflect Canadian /Aboriginal aspirations. They argued that their participation would provide content, context and analysis not presented by the First Ministers and the favoured lobby organisations. The First Ministers and the Aboriginal lobby organisations declined to support the inclusion of these women's organisations.

When NWAC sought status at the constitutional table equivalent to that of the four included organisations, the federal government encouraged NWAC to work through the `male-stream' organisations to advance its interests rather than to promote them separately. NWAC attempted to do this; however on some issues NWAC and these organisations, in particular the AFN, are in substantial opposition. This is particularly apparent where Native women identify a shared experience of oppression as women within the Native community, together with (instead of only as) the experience of colonial oppression as Aboriginals within the dominant society. Not for the first time,[5] the AFN sought to deny the reality of sex oppression in Aboriginal communities and to resist women's attempts to put these issues on the political agenda.[6]

The MNC similarly was criticized by Metis women for not incorporating women's agenda, and for not making space for women's voices at the table. Marge Friedel, speaking to the Royal Commission on Aboriginal Peoples on behalf of the Women of the Metis Nation of Alberta, said:[7]

> Metis women firmly believe that for the consti-tutional process to reflect a true Metis women's involvement it must ensure that our voices are heard, that our experiences are understood and that our expectations are given a respectful and responsive hearing. ... Aboriginal women have been and continue to be discriminated against by the un-accountable male dominated political organisations.

NWAC raised three issues at variance with the Canadian and Aboriginal `male-stream' participants at the constitutional table. First, NWAC wished to be a full participant, with status equal to the other four Aboriginal organisations. In support of this, NWAC argued that it represented a constituency whose interests were not articulated by any of the other Aboriginal players, and whose interests were being negatively affected by negotiations. Second, NWAC wanted equal funding with which to advance its position. Third, NWAC wanted the *Charter* to continue to apply to constitutional Aboriginal governments, at least until an equally authoritative Aboriginal Charter, whose terms would protect women's equality rights, was in place.

NWAC was excluded from full participation in the constitutional negotiations, and from equal federal funding for the negotiation process. The process of exclusion of Abori-ginal women by key players in the constitutional sandbox, with the tacit approval of all other players, is characteristically sexist, and indicative of political and policy hegemony by men. It is this process that is of primary interest here.

Ultimately the process excluded women *qua* women. That is, despite a significant court ruling[8] that the Charter rights of NWAC members were abrogated by the exclusionary process, despite the court's acknowledgement that the participant organisations, and particularly the AFN, acted in ways inimical to NWAC interests, and despite the court's acknowledgement that NWAC was the only valid voice of those interests, *nothing changed*. The select group of first ministers and Aboriginal lobby organisations, exclusive of explicit women's repre-sentation, was not expanded.

Perhaps this result could have been predicted, based on the difficult and frustrating experience of women organising to ensure protection for women's rights in the *Charter* in the 1980-1982 period. As Sue Findlay put it:[9]

> The resistance of the state — including both federal and provincial governments — to consultations with feminists about ways to guarantee women's rights in the new Constitution was a stunning display of the limits of state commitment to actively promote women's equality.

The political choreography of the state apparatus and the key players throughout the Charlottetown process was no less stunning. For Aboriginal and non-Aboriginal feminists alike, it seems a categorical rejection by the power-brokers of women's inclusion in the "unequal structure of repre-sentation."[10] This suggests the conclusion that the ideology of patriarchy is more fundamental to the premises on which the Canadian state is founded than is the principle of democracy.

The exclusion of Aboriginal women from the Charlottetown round has implications for all women, for the prospects for our inclusion in political processes, and for the unlikelihood, despite Charter guarantees, of a genuine societal accommodation of our interests. The state apparatus appears to be designed to maintain the existing power relations, not to integrate powerless groups like Aboriginal people or women in some equitable fashion.[11] The case study of NWAC's experience suggests that even when we win, (for example, the judicial decision that NWAC's Charter rights were offended by the exclusionary political process) we lose.

ABORIGINAL FEMINISM

The existence of a critical mass of Aboriginal women who identify as feminists — as evidenced by the viability of NWAC — is a relatively new phenomenon. Feminist identification and feminist analysis is weak within Aboriginal communities and organisations, and is not widespread among individual women. Indeed, Aboriginal women have been urged to identify as Aboriginal, in the context of the domination and exploitation by the newcomer community, to the exclusion of identification as women with women across cultures, and with the experience of exploitation and domination by men within Aboriginal communities. Nevertheless, many Aboriginal women from disparate contexts identify commonalities in the experience of being women and Native that are both dual oppressions,[12] and a unique way of understanding the world.

Many Aboriginal women do not adopt the label "feminist." Reasons for this range from those shared with many non-Aboriginal women — that is, a misunderstanding of feminism as an alienating ideology that negates the possibility of male-female relationships and detracts from the value of the family — to a refusal to identify with what is seen to be a middle-class white women's movement which has no understanding of race oppression. This, however, is changing as more individual women and more organisations share an analysis that is characterised by Aboriginality and gender, and in the case of organisations, whose internal organisation and political objectives and strategies are characteristically feminist.[13] A good example of this can be found in the presentation of the Manitoba Indigenous Women's Collective to the Royal Commission on Aboriginal Peoples:[14]

> As Aboriginal women, we face discrimination and racism because we are Aboriginal and because we are women. We lack access to jobs, to support, to training programs, and to positions of influence and authority. ... All across Canada, Aboriginal women are involved in the struggle for equal rights.

The analysis of inequitable relations between men and women has much in common with the feminism of other Canadian women, and provides a basis for solidarity between women's organisations.

Feminism has been represented by Aboriginal organisations and by many prominent male and female Aboriginal activists as undermining the "greater" objective of Aboriginal liberation; women have been assured that their needs, where they differ from those of the male-dominated political power structure, will be addressed by "traditional" mechanisms at some future point when Aboriginal governments have political, economic, social and cultural power.

While NWAC does not use the language generally associated with feminist theory, it pursues woman-identified objectives in a manner that is characteristically feminist. Before Charlottetown, the most prominent of the issues NWAC pursued included the fight to end the sexist status provisions of the *Indian Act* and its internalisation by some band governments, and the recognition of violence against women and children as a reality and a high priority issue. NWAC articulates Aboriginal women's experiences by way of a uniquely Aboriginal feminist analysis. Its political rifts and liaisons indicate that this analysis is being tested by implementation.

By virtue of being a national voice of Aboriginal women as women, NWAC (and its sister organisation, the National Metis Women of Canada) promotes gender equality. It does so by existing despite a hostile political environment, by offering women's analysis in a male policy arena, and by speaking for women's inclusion despite a climate of exclusion. NWAC's existence is an organised response by Aboriginal women to the sexism within male-dominated Aboriginal communities and organisations, and the failure of those organisations to respond to or to validate women's issues as defined by women's experiences. That is, NWAC's existence is a response to the political void left by the AFN and others.

ASSIMILATING THE PATRIARCHY

Most Aboriginal women acknowledge that traditional, that is, pre-contact Aboriginal societies, valued women and women's work.[15] However, the trauma of colonisation and the realities of social change in contemporary societies have changed social roles and expectations. The European model of the patriarchal family is now normative in most Aboriginal communities;[16] the dominant society's low valuation of women and women's work has been laid over Aboriginal values.

Combined with the social pathologies of wife assault, child abuse and sexual abuse, contemporary Aboriginal societies often manifest the worst of the European patriarchy. According to the Canadian Panel on Violence Against Women, eight out of ten Aboriginal women experience physical, sexual, psychological or ritual abuse, a rate twice as high as in non-Aboriginal society.[17] Similar findings led other researchers to conclude that "[t]his sadly confirms the family unit as a place of danger and high risk, instead of security and protection."[18] In a client survey of native women in Lethbridge, Alberta, of 63 respondents:

* 91% had personal experience with family violence
* 75% grew up as targets of family violence
* 46% identified alcohol as a factor
* 29% experienced violence without the alcohol factor
* 70% suffered violence at the hands of relatives
* 50% were currently single
* 75% lived on monthly incomes of less than $1,100
* 50% were supporting children

The writers concluded that "[f]amily violence is a constant reality in the lives of urban Native women."[19]

Violence against women and children has become a primary concern for many Aboriginal women, and is viewed as a priority for the political agenda. Many women worried that male politicians would make decisions around constitutional renewal and Aboriginal government structures and processes without integrating women's agenda, or understanding women's reality. "As women, we're saying, you're (men) making the decisions and you don't even know what the hell we need out here or what we want, said Lil Sanderson, a NWAC representative from La Ronge."[20]

This view was reiterated by Marilyn Fontaine, for the Aboriginal Women's Unity Coalition, in a presentation to the Royal Commission on Aboriginal Peoples. Fontaine stated that her organisation had no confidence in the primarily male Manitoba Indian leadership.[21]

> Aboriginal women have been reluctant in the past to challenge the positions taken by the leadership in the perceived need to present a unified front to the outside society which oppresses us equally .... However it must be understood that Aboriginal women suffer the additional oppression of sexism within our own community. Not only are we victims of violence at the hands of Aboriginal men, our voices as women are for the most part not valued in the male-dominated political structures.

Fontaine declared that "the abuse and exploitation of women and children is a political issue of equal importance to achieving recognition to govern ourselves."[22]

In an address to the Royal Commission on Aboriginal Peoples, Doris Young of the Indigenous Women's Collective said:[23]

> We believe that we have the inherent right to self-government, but we also recognize that since European contact, our leaders have mainly been men. Men who are the by-products of colonization ...

A June 25th, 1993 *Edmonton Journal* story featuring Chief Felix Antoine of Rosseau River proposing an amnesty for child and wife abusers illustrates some of the problems suggested by Fontaine, Sanderson and others.[24]

> By allowing them time to talk about their problems without fearing arrest, those who abuse their children or beat their spouses can work with others in the community and "begin to feel like a human being," he said.

The Chief was speaking to a Native task force inves-tigating charges of political interference by chiefs in Native child welfare cases. Nothing was reported about the Chief's concern with the safety and humanity of victims, nor of the responsibity of abusers. Indeed, one gets the sense that the abusers *are* the victims.

Systemic violence has come to be understood as a political expression of issues of power and control. Violence is one measure of the crisis in Aboriginal communities, and women's experience as primary victims of that violence is a measure of women's political marginalisation. The issue of violence against women and children is only beginning to be taken seriously by Aboriginal organisations and by some band councils. However, measurable response (such as programs for victims and batterers, and zero-tolerance of violence) to the issue is slow coming. This is consistent with the slow response or non-response of existing Aboriginal politics to other issues identified by Aboriginal women.

OLD ISSUES NEVER RESOLVED

In 1869, the federal government passed the first *Indian Act* by that name. The *Act* defined who was an Indian, and in so doing, applied European notions of patriarchal social and family

structure, and of legitimate birth. Indian women who married anyone other than a status Indian man lost their status; their children took the status or non-status of their fathers. This discriminatory provision persisted through a Supreme Court challenge[25] and in violation of international law,[26] until the Bill C-31 amendments to the *Indian Act* in 1985. The amendments were motivated by the *Charter of Rights and Freedoms*, which prohibits discrimination on the basis of sex, and under which the offensive provisions of the *Indian Act* would have inevitably been struck down.[27] While the discriminatory law no longer exists, its effects linger, a legacy of colonial legislation. Many band councils (also creations of the *Indian Act*) defend the old status provisions as "tradition," and are bitterly opposed to reinstatement.[28]

The refusal of many band councils to accept the legitimacy of women and children reinstated under the 1985 *Indian Act* revisions is another example of political intransigence on women's issues. The political marginalisation of women as a consequence of *Indian Act* `status' provisions continues. The *de facto* opposition from many band governments prevents many reinstatees from exercising their *de jure* legislative and constitutional rights. `We're going to be left out for the rest of our lives,' said [Philomena] Aulotte, who was one of a number of Indian women in Alberta who fought for years to have the old discriminatory section of the *Indian Act* struck down."[29] Now, eight years after the amendment, "C-31" people are finding the *realpolitik* remains a barrier to going home.

Much of NWAC's constituency are women who lost their status under the old *Indian Act*. Of those who are eligible for "reinstatement" as status Indians, 91,112 of 165,571 persons who have applied have been re-instated — at least on the federal membership list.[30]

However, "(i)n Alberta, it is estimated that less than two per cent of the 9541 persons Indian Affairs has added to the membership lists of the 43 bands in the province have been accepted by the bands."[31] Many more wait for an inadequate bureaucracy to process their applications to recognize their constitutional rights.[32] And only 2% of reinstated displaced native women have been able to return to their reserves since the 1985 amendments, due in large measure to the political and tactical opposition by band governments. This continued discrimination by bands invoking both tradition and the inherent right to control membership or citizenship has left many native women sceptical of the ability and political will of future Aboriginal governments to respect women's rights. NWAC suggests Aboriginal women's distrust of Aboriginal governments is a consequence of the latter's demonstrated resistance to women's rights.

Some chiefs and status Indians from Alberta, led by Senator Walter Twinn, Chief of the Sawridge Band, are asking the Federal Court of Canada to declare the C-31 amendment to the *Indian Act* to be unconstitutional and contrary to the *Charter*. The *Twinn* case argues that only Indian bands, and not the federal Parliament, can say who can be on the membership list. The case, one of several court challenges to C-31 amendments, is expected to be heard in September 1993.

THE (E)QUALITY OF RIGHTS

The injustices experienced by Indian women at the hands of the Canadian government have, since the 1985 *Indian Act* amendments, been continued by some bands. Some women first stripped of their Indian political rights by discriminatory federal legislation find that they now are being prevented from exercising their rights by certain hard-liners. These women have no immediate recourse apart from appeal, through the Canadian legal system, on the grounds of infraction of their *Charter* and other rights. However, many bands and the AFN, take the view that the *Charter* is itself an infringement on the inherent right of self-government. The pre-Charlottetown political discussions that included the AFN and other Aboriginal lobby organisations and the First Ministers, while excluding Aboriginal women's organisations, sought to find consensus on the elements of self-government. One of the points on which consensus was ultimately achieved was the possibility of suspending the *Charter* in relation to traditional practices in the exercise of self-government.

The split over whether the *Charter of Rights and Freedoms* should apply to Aboriginal governments came early. In January of 1992 NWAC was reported to support the inherent right of self-government but, in opposition to the AFN, was insisting traditional Aboriginal government practices be subject to the *Charter*.[33] Further, NWAC did not support Aboriginal governments' access to s. 33, the notwithstanding clause, fearing male-dominated Native governments would override women's equality rights.[34] NWAC was not standing alone on this issue: many feminists and other scholars of constitutional law agreed. Instructionally, within the Aboriginal feminist community there was solidarity on this point. Speaking to the Royal Commission on Aboriginal Peoples, Doris Young asserted: "We, therefore, want the Charter of Rights and Freedoms enforced in Aboriginal self-government until such time as when our own Bill of Rights is developed that will protect women and children."[35]

The Charter guarantees of equality rights were thought to be vulnerable to such an override, invoked to shield exercise of the inherent right and `tradition.' Section 15(1), equal protection and benefit of the law regardless of (among other differences) gender, could conceivably be suspended by s. 33. The existance of s. 35(4) of the *Constitution Act 1982* is no comfort: it guarantees Aboriginal and treaty rights equally to men and women, but it is not clear that s. 15 would be considered to be a component of Aboriginal and treaty rights. Therefore, it is conceivable that an abuse of gender equality rights could be insulated from judicial remedy by invoking s. 35 inherent rights as legitimating gender discrimination. This kind of constitutional possibility, together with the recent history around *Indian Act* status provisions,

moved NWAC to insist on Charter application to Aboriginal governments.

At a Native women's constituent assembly in Toronto on January 19th, 1992, Jeanette Corbiere Lavell said that Native women need the *Charter*'s protection because they have no other. Lavell had challenged the discriminatory membership provisions of the pre-1985 *Indian Act* in the Supreme Court of Canada, alleging it violated the Canadian *Bill of Rights*. In that decision, the Court ruled that, as all Indian women were treated the same way under the legislation, the legislation was not discrimination in law, and therefore was not in violation of the *Bill of Rights*. The National Indian Brotherhood and some bands intervened against Lavell at that time. Lavell pointed out it was a chief who initially appealed the Federal Court of Canada's favourable decision in her case.

Speaking of the situation of many women since the 1985 Indian Act amendments, Lavell pointed out:[36]

> Many of the provincial and national First Nations political organisations, as we begin the transition to self government, have fought this legislation, Bill C-31, all the way, and many of our communities are still in effect refusing to implement it today.

NWAC promptly found itself roundly criticized by other Aboriginal women for its position.[37] Women advocating the explicit protection of women's equality rights were attacked for undermining the greater cause of Aboriginal rights. Chief Wendy Grant of the Musqueum band, a regional vice-chief of the AFN, charged that "[d]ivision between First Nations people based upon the non-native fascination with extreme individualism simply supports the assimilation of our people into the non-native culture."[38] This debate continues. Over a year later, at the annual conference of the National Association of Women and the Law[39] lawyer Nancy Sandy, speaking in place of Chief Grant, argued that First Nations do not need external agents telling them how to handle rights. Lawyer Theresa Nahanee argued that the collective right to self-determination is premised on individuals being able to express rights to self-determination. She went on to answer the charge of "extreme individualism" in this way:[40]

> I think it is wrong to characterize the struggle by First Nations women for sexual equality rights as a struggle between individual versus collective rights. Why? The women have been trying since 1967 to erase the artificial, legal barriers which separate women from the collective.

NWAC, representing a largely disenfranchised community, found itself marginalised by the powerbrokers shaping the constitutional discourse. NWAC wanted a role in the form of a seat at the discussion table, and funding for constitutional participation. It had been surviving on grant money funnelled through the other organisations, primarily the AFN. This had the effect of incorporating NWAC into the AFN in terms of political access to the negotiation table, as well as with respect to priority agenda items for discussion at those tables. NWAC took the position that, by funding the AFN to promote its anti-Charter position and by not funding NWAC, the government was "expressing an unconstitutional preference for the promotion of views which will lead to the extinguishment of Aboriginal women's equality rights."[41]

Unwilling to continue to engage in an apparently fruitless negotiation process, NWAC initiated legal action against the federal government. In a March 18th, 1992 press release, NWAC said it had[42]

> brought this action to demand recognition at the Constitutional negotiation table. NWAC also demands funding equal to that which is provided to the four recognized Aboriginal organisations beginning April 1, 1992. Without those two essential conditions, NWAC asks the Federal Court to prohibit the government of Canada from giving any funds to the four organisations participating in the Canada Round.

Citing discrimination, NWAC asked the Federal Court of Canada to stop disbursement of the federally-allocated $10 million to AFN, NCC, ITC and MNC until NWAC was granted an equal share.[43] NWAC also argued it was an infringement on women's freedom of expression for the federal government to fund only male-dominated groups to speak on Aboriginal issues in the Constitution, while refusing to fund NWAC.[44]

At the trial level, Mr. Justice Walsh decided that there was no sex discrimination or infringement of freedom of speech in the federal government's refusal to include NWAC in the talks.[45]

> ... to hold that freedom of expression creates a right for everyone to have a voice in these discussions would paralyse the process ... With respect to discrimination as to sex the disproportionate funds provided for the [NWAC] results not from the fact that they are women but from the unwillingness of the government to recognize that they should be considered as a separate group within the Aboriginal community from the four named groups ... I find nothing unfair or contrary to natural justice in the selection of the said four groups to represent the Aboriginals at this conference.

NWAC appealed.

THE `CANADA ROUND': NO ROOM FOR WOMEN

As regards the constitutional specifics of the inherent right of self-government, NWAC wanted the *Charter* to apply, at least until an Aboriginal charter is developed. It argued that failing to apply the *Charter* to Aboriginal government could jeopardise Native women's equality rights. NWAC president Gail Stacey-Moore insisted that self-government must guarantee basic human rights.[46] AFN National Chief Ovide Mercredi argued that Aboriginal people want and need their own charter. Stacey-Moore responded that Aboriginal women want their human rights guaranteed one way or another.[47] At the same time, Mercredi told reporters questioning whether there was a rift between the AFN and Native women, "there's no issue here."[48] The AFN rejected the application of the *Charter* because it is "white;" its imposition would be a "continuation of imperialism, with one set of values imposed upon another culture" according to Mercredi.[49]

This is interesting, in light of the appeals Aboriginal peoples frequently make to the *Universal Declaration of Human Rights* and the *Covenants on Economic, Social and Cultural Rights*, and on *Civil and Political Rights*. The *Charter* reiterates many of the guarantees in the international instruments. The latter are taken to be universal standards for state behaviour. Presumably, Aboriginal governments would not be exempt nor would they want to be exempt from these standards.

In a July 8th, 1992 letter to all First Ministers, NWAC President Gail Stacey-Moore wrote "It is obvious from the `deal' you have now concluded that in the absence of Aboriginal women at the table – women elected to represent the interests of women – that our issues are not dealt with fairly and justly."[50] On July 10th, she wrote AFN National Chief Ovide Mercredi: "If, as you have publically (sic) stated, the Assembly of First Nations represents Aboriginal women as well as Chiefs, we demand to know the basis for the decision to reject demands by Native women for entrenchment of their sexual equality rights."[51]

And the First Ministers were apparently as willing as Aboriginal leaders for Native women's rights to be put on the back burner. The text of the Premiers' unity proposal, printed in the *Globe and Mail* on July 10th, commented:[52]

> On **gender equality**, the chair ... reported the agreement of the principles not to change section 35(4) already in the Constitution (guaranteeing Aboriginal and treaty rights equally to male and female persons) and to *add the issue of gender equality to the agenda of the future First Ministers' Conference (FMC) on Aboriginal matters.* (emphasis mine)

NAC cited this deferral of a discussion of Aboriginal women's equality rights in its campaign to have the Referendum on the Charlottetown Accord defeated.[53]

The exemption of Aboriginal governments from Charter application raised the spectre of some Aboriginal governments invoking "inherency" and "tradition" to support various kinds of sex discrimination (such as in relation to membership). NWAC feared, with some justification, that the existing section 35(4) would not shield women in such situations. As Michele Landsberg wrote:[54]

> Native women have good cause to fear the `collective rights' that the Aboriginal men are demanding. Nations around the world have used similar collective rights to suppress women's equality on grounds of `tradition, custom, and history.'

Reacting to the not unexpected betrayal by First Ministers and the Aboriginal organisations, Sharon McIvor, speaking for NWAC, said "This constitutional 'deal' wipes out the 20-year struggle by Native women for sexual equality rights in Canada."[55] McIvor said Native women would not be protected from "male-dominated" native governments because gender equality provisions in the Charter would not apply to Aboriginal governments. She pointed out that existing Charter guarantees could be insufficient in any case, as Aboriginal governments could resort to section 33, the notwithstanding clause.[56] (For those who think McIvor overstates the danger of this, consider how many First Nations would like to invoke a legal or political override of the C-31 status provisions; and watch the *Twinn* case in the Federal Court of Appeal this fall.) NWAC continued to request a seat in future negotiations.

Interestingly, the Native Council of Canada had unsuccessfully pressed for changes to accommodate NWAC's concerns; it did not get support from the other Native organisations.

ALL FOR ONE AND ONE FOR ALL: FEMINIST SOLIDARITY

In its response to the Beaudoin-Dobbie Report[57], the National Action Committee on the Status of Women (NAC) had served notice that it would be supporting NWAC in regard to applicability of the Charter and the principle that the notwithstanding clause not be available to Aboriginal governments. Subsequently, NAC support translated into solidarity with NWAC in opposing the Charlottetown Accord. "NAC strongly supports the (NWAC). We've agreed with them that they would take the lead on this issue – it's their issue – and we would back them" said then-NAC president Judy Rebick.[58] In a position paper issued by NAC shortly after the publication of the Accord, NAC called the Accord "a bad deal for women." It went on to warn that "There is no guarantee of gender equality for Aboriginal women in the text and NWAC and the National Metis Women of Canada believe that their rights will be threatened under this self-government agreement."[59] In a special edition of *Action Now*, the NAC newsletter, NAC issued a call

to members to vote no in the October 26th referendum and to engage in the "No" campaign because, among other reasons, "(The Accord) does not protect Aboriginal women under self-government."[60]

This support was a logical expression of NAC's commitment to accepting women's definition of their realities. NAC's feminist analysis includes an identification as women, with an obligation of solidarity with other women, because of the shared experience of gender oppression regardless of race or caste.[61] As Mary Daly put it, "Sisterhood is the bonding of those who are oppressed by definition."[62]

Some observers sought to discredit the alliance as poorly conceived or politically opportunistic. However, NAC has a long history of supporting Aboriginal women's struggles, notably since 1972. Further, some activists in NWAC have also held NAC membership, and as full and influential participants at senior levels. For example, NWAC leader Gail Stacey-Moore has been co-chair of the NAC committee on Aboriginal women.[63]

On August 24, 1992, NAC and NWAC sponsored a meeting attended by over 150 leaders of women's groups from across Canada to discuss the constitutional proposals. The consensus of the group was that the agreement threatened social programs and equality rights. By the end of the conference, and further to the decision by the Federal Court of Canada that the NWAC had suffered discrimination by its exclusion from the constitutional table, NAC had reaffirmed that position[64] and called upon the federal government to ensure that NWAC and the National Metis Women of Canada would get participant status in the pending First Ministers Conference.[65]

On August 26th, NAC sent a letter to Prime Minister Brian Mulroney asking for a "seat at the table", and:

(1) that the Prime Minister invite a delegation of Aboriginal women including NWAC and the National Metis Women of Canada "to sit as a full delegation at Thursday's meeting of First Ministers and in any future multilateral negotiations."

(2) that a delegation from the conference, organised by NAC, be given time on the agenda to present proposals and concerns and to discuss these with the First Ministers.[66]

Denied participation in discussions and negotiations, and faced with the prospect of constitutionally permissable discrimination if the Charlottetown package was adopted in its entirety, NWAC changed its strategy to obtaining a court injunction halting the constitutional referendum. The request by NWAC to halt the referendum was delayed until less than three weeks before the vote by Mr. Justice Yvon Pinard of the Federal Court of Canada, at the request of the AFN, which intended to intervene.

INVOKING THE CHARTER

On August 20, 1992, NWAC won the Federal Court of Appeal decision[67] ruling that its right to free speech had been violated by its exclusion from the constitutional talks. Mr. Justice Mahoney wrote:

> ... it is in the interests of Aboriginal women that ... they continue to enjoy the protections of the Charter ... The interests of Aboriginal women were not represented by the AFN ... nor ... the NCC and the ITC on this issue ... By funding the participation of the four designated organisations and excluding the equal participation of the NWAC, the Canadian government accorded the advocates of male dominated Aboriginal self-governments a preferred position ... by including the AFN, an organisation proved to be adverse in interest to Aboriginal women, while excluding NWAC, an organisation that speaks for their interest, in a constitutional review process, the federal government restricted the freedom of expression of Aboriginal women in a manner offensive to ss.2(b) and 28 of the Charter.[68]

Making its case, NWAC documented that the organisation had been ignored in its requests to participate, and alleged that the constitutional provisions on Aboriginal government did not protect Native women's equality rights. NWAC asked the court to "halt the referendum and prohibit other native groups from further constitutional talks with the federal and provincial governments."[69] However, the court said it had no power to order the federal government to invite NWAC to join the talks. No remedy was granted.

WELL-PLACED DISTRUST

When it was revealed on August 26th, the Charlottetown Accord, while not dealing with the issue of native sexual equality, suggested it should be on the agenda for future Aboriginal constitutional conferences. Apparently the old boys had incorporated the premiers' earlier package of proposals with regard to deferring consideration of gender equality. This "wait your turn" approach to Aboriginal women's concerns did not sit well with NWAC, NAC, and many other social justice groups.

And then the political negotiations and legal haggling began. The Accord would be interpreted and implemented by means of legal text and political accords, which were being drafted in elite working groups behind closed doors. The legal text was not available to the public until short days before the national referendum. NWAC was not alone in articulating anxiety about the process and the possible compromises that would be made behind the scenes: many "No" groups sprang up across the country to mobilise public rejection of the Accord.[70] Rumours abounded that the legal text substantiated NWAC's fears of political isolation and marginalisation.

NWAC had expressed concern that its exclusion from the federal, provincial and native officials' on-going discussions on a legal text of the political accord further jeopardized its position.[71] Subsequent events proved NWAC right. NWAC warned that the draft legal text contained changes that negated the guarantee in the political accord to have the Charter apply to Aboriginal governments.[72] Anne Bayefsky, a noted human rights scholar and legal adviser to NWAC, publicly charged that the draft legal text showed that native women's rights had been sold out.[73]

When the legal text was finally released, it proved those fears to be well grounded. The draft legal text of October 9, 1992, for example, provided for access by Aboriginal legislative bodies to Section 33, the notwithstanding clause.[74] The draft legal text went on to entrench "the inherent right of self-government" as "one of three orders of government", that right to be exercised by "duly constituted legislative bodies ... each within its own jurisdiction" ... "to safeguard and develop their languages, cultures, economies, identities, institutions and traditions."[75] There was some concern that this provided a legal arsenal for such bodies to defend discriminatory policy by invoking the right to "safeguard and develop ... tradition"; that is, to claim that exclusion of women in various circumstances was traditional and therefore justified.

> Joan Bryden, writing for the Calgary Herald, reported that "The consensus report says the Charter ... will apply to Aboriginal self-government. But the draft legal text effectively negates that provision, adding a clause specifying that nothing in the charter abrogates or derogates from the inherent right to self-government or the rights of Aboriginal governments to protect native languages, cultures and traditions.
>
> It further amends the charter to ensure that Aboriginal governments do not have to be elected." ...[76]

Mary Eberts for NWAC argued for an injunction to stop the October 26 referendum outside of Quebec. NWAC alleged that it was wrongly excluded from constitutional talks leading to the Accord, and that the Accord threatened native women's rights. The legal result, argued Eberts, "could allow male-dominated native self-governments to discriminate against women, using traditions to justify denying women the right to vote, band membership or even proper protection from sexual assault and other abuse."[77] By way of example, Eberts cited the judicial response to the defence of 'tradition' to the gang rape of a 13-year-old Inuit girl:

> In the case, three Inuit men were given light sentences – that were eventually raised to four months in jail – because a judge ruled that under Inuit tradition a girl is ready for intercourse when she is 13.
>
> The girl became pregnant as a result of the rape but the judge said she suffered no harm because Inuit tradition accepts children born out of wedlock.[78]

The drafting of the Accord, and of the more specific political accords, and of the critically important legal text was done with consultation with the four other Aboriginal organisations, but without NWAC. The referendum timetable clashed with the significant constitutional questions raised by NWAC in its largely successful appeal from the Federal Court decision. NWAC and political fellow-travellers could only interpret the process of constitutional evolution as willfully exclusionary of Aboriginal women, and as blind to the historical record of injustice to them at the hands of both Aboriginal and mainstream governments.

On October 26, 1992, Canadians overwhelmingly voted against the Charlottetown Accord. Analysts have suggested the rejection was more of the process that created it than of the package itself; most commentators were quick to say that of any component in the package, the Aboriginal government portion was perhaps the most supported and should survive despite the Accord's demise.

Expressing relief the day after the national rejection of the Charlottetown Accord, NWAC's regional executive director Sharon McIvor said "There are currently about five cases in Canada where women have taken their band councils to court because of sexual discrimination. Those cases could have been `thrown into limbo' if the vote had gone Yes."[79]

THIS IS A SONG THAT NEVER ENDS

The Charlottetown Accord may be dead, but its issues have a life of their own. The Aboriginal desire for self-determination has not been satisfied by the political process that resulted in the failure of the Charlottetown Accord. Aboriginal governments of various descriptions hold the view that the inherent right to Aboriginal government is implicitly contained in section 35 of the *Constitution Act 1982*. Many intend to exercise that right, and allow the Canadian political and legal institutions to respond to direct political action asserting Aboriginal sovereignty.

Issues of Aboriginal government, shared bilateral and trilateral jurisdictions, land claims, treaty modernization, and constitutional renewal now exist in an apparent policy vacuum. The federal government, by way of its largely discredited "community-based self-government" initiative[80], the Yukon government's land claims and band government initiatives, the Aboriginal government implications of Northwest Territories division, and provincial initiatives such as B.C.'s promising Treaty Commission, all attempt to inject some policy parameters into this vacuum. All governments are mindful that they can no longer pretend the issue of a third order of government does not exist, or that it does not have compelling merit. But none seem to be willing to grapple with the concomitant issue of gender

oppression within Aboriginal communities. Perhaps the issue is too close to home — for the sex oppression in Aboriginal communities is patterned on the sex oppression in Canada generally. Perhaps addressing the systemic gender oppression of Aboriginal women would logically lead to examining the oppression of non-Aboriginal women, and a host of discriminatory relationships. And perhaps white guilt is stifling any critique of Aboriginal social and political relations.

Aboriginal peoples, and especially some Indian bands, are not prepared to forgo self-government because of the referendum failure. Some have declared their intention to assert their political autonomy, and to replace mainstream institutions with Aboriginal ones. Women's interests are not often central to the analysis of the new order. A case in point is illustrated by the current tensions at the Rosseau River Reserve in Manitoba.

The Manitoba Chiefs have taken the position that gaming — gambling — is within the jurisdiction of Aboriginal governments. The potential creation of gaming establishments on-reserve offers economic benefits; similar establishments on American reserves have done much to improve reserve economies. However, the provincial government is not prepared to concede the jurisdiction, and Rosseau River decided to act in advance of any agreement, by setting up gambling machines on the reserve, without the requisite provincial permit. In accordance with the existing law, the RCMP removed the gambling machines, assisted by the tribal police. The tribal government responded by ordering the tribal police off the reserve.

On January 26, 1993, CBC Radio ran a story in which women from the reserve said they were worried about their safety and security in wake of eviction of RCMP and tribal police by the band council. The police were replaced by a warrior society, also known as the Peacekeepers. The eviction was over an RCMP-led raid on unlicensed gambling operations on the reserve, in violation of provincial law. The band council insists it has the right to jurisdiction in this matter.

The women wished to be anonymous, out of fear of harassment. Said one woman, "They (the band council and warriors) say they want to work with the women, but then they tell us to shut up." One woman's abusive former boyfriend, on probation for assaulting her, is a warrior. The women are afraid. They don't trust the warriors or the band council to guarantee their safety.[81]

On January 28, women from Rosseau River met with AFN National Chief Ovide Mercredi, to voice concerns about the handling of policing on the reserve, and the safety of the community. The women told Mercredi that they feared for their safety; several had been threatened or had witnessed threats by the Warriors to those who supported the tribal police.[82] They told how one woman had been told to "leave the reserve if she knew what was good for her." Phil Fontaine of the Manitoba Chiefs disagreed with the women's analysis; he argued this is part of self-government; and that self-government has its risks and they must be accepted.[83]

Those Aboriginal women who have a political analysis of their experience as women in addition to as Aboriginal are intimidated in the process of activism. As I have written elsewhere,

> Aboriginal organisations and many First Nations are bludgeoning dissent with the argument that dissent on this matter undermines the political strength of the organisations; and is orchestrated by "white Toronto feminists", and that Indian women are not feminists and do not support feminism, i.e. equal rights; and that Indian government, returning to traditional ways or basing processes on traditional values, will put something in place (but not the Charter) to ensure equality among citizens.
>
> Aboriginal women are vulnerable to being branded as puppets of the 'white' feminist movements, as being unAboriginal , if they speak up for women's participation and protection of women's rights in Aboriginal contexts. This kind of powerful silencing technique is familiar to women of all races. Sadly, it is often effective.[84]

Speaking of C-31, Nellie Carlson, a prominent activist for repeal of discriminatory sections of the *Indian Act*, said: "Indian women worked so hard to have that bill passed. We had no money; our lives were threatened, we were followed everywhere we went, our phones were tapped — that's how Indian women were treated for speaking out."[85]

Aboriginal feminists take great risks and display real courage in continuing their activism. This intimidation is shared by all feminists who find themselves targets of ridicule, marginalisation, and other sanctions including physical assault. However, it is a more profound threat for Aboriginal women, because the attackers deny the validity of their analysis as authentically Aboriginal. It is a painful thing to be labelled as a dupe of the colonizing society for undertaking to name and change women's experience.

The single most influential factor determining the exclusion of NWAC from the constitutional arena was the collective refusal to see Aboriginal women's concerns (or, for that matter, other women's concerns) as distinct from and equally legitimate with Aboriginal men's concerns; and to see 'male-stream' organisations as precisely that. Closely tied to this was the collective denial of the reality of the experience of the NWAC constituency — an experience of marginalisation and persecution.

In terms of policy outcomes, it is important to remember that neither the Court nor the political alliances and advocacy created a remedy for NWAC. Had the Charlottetown Accord

been approved and implemented, NWAC's concerns would not have changed the Accord's composition.

No one speaking for NWAC, NAC, or the National Metis Women of Canada is opposed to constitutional affirmation of the inherent right of Aboriginal peoples to their own governmental powers. But the women's organisations do not accept that a choice must be made between justice for Aboriginal societies vis a vis the dominant society, and justice between Aboriginal women and men. As the late Sally Weaver wrote, "First Nations women have continued to pursue socio-economic equality in Canadian society, while simultaneously seeking their primary targets of equality of Indian rights and human rights for Indian women."[86] Liberation from colonialism will be of no assistance to Aboriginal women, if sexism maintains a colonial relationship between Aboriginal men and women. So far Aboriginal organisations have been unwilling to be internally critical, to tolerate any criticism, or to accept responsibility for discriminatory behaviour and politics. In the wake of the Charlottetown fracas, the problem of sexism persists.

Once again, women who object to the exclusion of their interests as women are told that there is no issue; and that the political interests of the First Nations are served by denying women's issues. While male leaders speak for "their people", dissident women's voices are silenced. La plus ca change, la plus la meme chose.

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1. This term was coined by feminist theorist Mary Daly, to describe what are often represented as "main-stream" organisations but in fact are culturally and structurally male, primarily staffed by males, and pursue a male-identified and priorised agenda.
2. Commenting on behalf of the Women of the Metis Nation to the Royal Commission on Aboriginal Peoples, on May 11, 1992, Marge Friedel observed: "The Government of Canada treats these self-interest groups as though they are governments. ... because these groups are treated like governments, they now believe that they are governments ... this is totally unacceptable and somewhat ludicrous."
3. The argument has been persuasively made that the inherent right of self-government is implicit in s.35 of the *Constitution Act 1982*.
4. Metis women formed the National Metis Women of Canada on October 26, 1991. Throughout the last round of constitutional negotiations the NMW operated with the financial assistance of NWAC and the Native Council of Canada. Formerly under the NWAC umbrella, the NMW decided a parallel Metis-specific organisation would better articulate the views of Metis women. In an interview with the writer in March 1993, Marge Friedel, President of the NMW, indicated the NWAC preoccupation with status issues was not shared by Metis women; however the two organisations have a good relationship and share many views on women and on constitutional development relating to Aboriginal peoples. Because of the relatively greater prominence of NWAC, due in no small part to its longer presence on the political scene, it was a more significant player in the constitutional arena, and so this paper focuses particularly on NWAC.
5. *AG* v. *Lavell* and *Isaac* v. *Bedard*, [1974] S.C.R. 1349. The National Indian Brotherhood, the precursor of the AFN, had intervened against Jeanette Corbiere Lavell in her Supreme Court challenge of the discriminatory provisions of the Indian Act.
6. R. Platiel, "Women seek to block grants to other native groups in Charter fight" *Globe & Mail* (19 March 1992).
7. Presentation by Marge Friedel and Wendy Walker, on behalf of the Women of the Metis Nation,to the Royal Commission on Aboriginal Peoples" May 1992.
8. *Native Women's Association of Canada* v. *Canada* (1992), 4 C.N.L.R (F.C.A.).
9. "Facing the State: The Politics of the Women's Movement Reconsidered" H.J. Maroney and M. Luxton, eds, *Feminism and Political Economy: Women's Work, Women's Struggles* (Methuen, 1987) at 31.
10. Rianne Mahon, "Canadian Public Policy: The Unequal Structure of Representation" in L. Panitch, ed., *The Canadian State*, (Toronto: Univeristy of Toronto Press, 1977) at 165-198.
11. Findlay, *supra* note 9.
12. Arguably a third experience common to Aboriginal women, poverty, creates a third oppression, that of class.
13. For example, the Women of the Metis Nation in Alberta, the National Metis Women of Canada, NWAC, and the Manitoba Indigenous Women's Collective.
14. Evelyn Webster, Vice-President, Indigenous Women's Collective of Manitoba, to the Royal Commission on Aboriginal Peoples, 22 April 1992.
15. D. Hoffman, "A call for a return to historical values" *Saskatoon Star-Phoenix* (19 September 1992). "Equal, respected, revered. Historically, this is how aboriginal societies viewed women." See, also, Karen Anderson, "A Gendered World: Women, Men, and the Political Economy of the Seventeenth-Century Huron" in Maroney and Luxton, eds, *supra* note 9, for a discussion of the differently gendered but equally respected roles of traditional Huron society; and NWAC's Discussion Paper "Matriarchy and the Canadian Charter," reviewing the traditional Iroquoian matriarchy.
16. See, for example, T. Nahanee, "First Nations Government Without Women" (Presented to the National Association of Women and the Law, Vancouver, 20 February 1993) [unpublished].
17. *Supra* note 15.
18. B. Bastien, E. Bastien and J. Wierzba, "Native Family Violence in Lethbridge" (1991) 7 Native Studies Review 139.
19. *Ibid.* at 146.
20. *Supra* note 15.
21. R. Platiel, "Aboriginal Women challenge leadership" *Globe & Mail* (24 April 1992).
22. *Ibid.*
23. Indigenous Women's Collective of Manitoba, to the Royal Commission on Aboriginal Peoples, 22 April 1992.
24. "Amnesty proposed for child abusers", *Edmonton Journal* (25 June 1993) A-11.
25. *Supra* note 5.
26. *Re Sandra Lovelace*, United Nations Human Rights Commission 6-50 M 215-51 CANA. Canada was found to be in violation of s. 27 of the Covenant on Civil and Political Rights.
27. For a more thorough discussion of this issue, see J. Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act" (1985) 1 Native Studies Review; and K. Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Supply and Services, 1978).
28. Nahanee, *supra* note 16. "Many of our First Nations people believe paternalism, patriarchy and patrilocal customs are the great traditions to which we will return once we have cast off our oppressors."
29. Jack Danylchuk, "The long road home" *The Edmonton Journal* (30 January 1993).
30. *Ibid.*
31. Jack Danylchuk, "Bands challenge legality of amendment" *The Edmonton Journal* (30 January 1993).
32. Nahanee, *supra* note 16: "50,000 people are still waiting, and some may pass on to that other life before ever having their right to membership recognized."
33. R. Platiel, "Native women to challenge proposal on aboriginal rights" *Globe and Mail* (17 January 1992).
34. *Ibid.*

35. Indigenous Women's Collective of Manitoba, to the Royal Commission on Aboriginal Peoples, 22 April 1992.
36. R. Platiel, "Aboriginal Women divide on constitutional protection" *Globe and Mail* (20 January 1992).
37. *Ibid.*
38. *Ibid.*
39. Held in Vancouver, B.C., 19-21 February 1993.
40. *Supra* note 16.
41. *Supra* note 6.
42. NWAC, Press Release (18 March 1992).
43. *Supra* note 6.
44. "Native Women lose bid for spot at talks" *Globe and Mail* (1 April 1992).
45. *Supra* note 8 at 68-69.
46. S. Delacourt, "Self government must guarantee basic human rights - NWAC president Gail Stacey-Moore" *Globe and Mail* (14 March 1992).
47. *Ibid.*
48. *Ibid.*
49. *Supra* note 15.
50. NWAC correspondence to all First Ministers, signed by Gail Stacey-Moore, 8 July 1992.
51. NWAC correspondence to AFN National Chief Ovide Mercredi, signed by Gail Stacey-Moore, 10 July 1992.
52. "Text of premiers' unity proposal" *Globe & Mail* (10 July 1992).
53. "NAC says NO to this Constitutional Deal," undated NAC publication circa September 1992.
54. M. Landsberg, "Feminists have backed native women from outset" *Toronto Star* (31 March 1992).
55. R. Platiel, "Native women fear loss of rights" *Globe & Mail* (13 July 1992).
56. R. Platiel, "Native groups disunited over gender equality" *Globe & Mail* (20 July 1992).
57. NAC's Response to the Report of the Special Joint Committee on a Renewed Canada, 4 May 1992, at 6, 12, and 19.
58. *Supra* note 54.
59. NAC Constitution Position paper, undated, circa September 1992.
60. National Action Committee on the Status of Women, *Action Now*, September/October 1992.
61. Speaking of the feminist response to constitutional change in the earlier Meech Lake fiasco, Donna Greschner spoke of the logic of support for Aboriginal women: "Taking the perspective of aboriginal women as the standard of assessment for constitutional proposals is consistent with the feminist method of looking to the bottom, of asking who is buried beneath the social heap, why and what can be done about it. At the least, constitutional change should meet the Rawlsian standards of not making worse the position of the worst-off." "Commentary" *After Meech Lake: Lessons for the Future*. (Saskatoon: Fifth House Publishers, 1991) at 223.
62. M. Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (Boston: Beacon Press, 1973) at 59.
63. *Supra* note 54.
64. "Conclusions of the Women's Constitutional Conference," NAC fax, 25 August 1992.
65. R. Platiel, *supra* note 21: "In light of last week's court decision that the federal government had discriminated against the Native Women's Association of Canada by denying them a seat at the Constitutional table, participants called for a delegation of aboriginal women, including representatives of [NWAC] and the National Metis Women, to be seated as full participants at the upcoming First Ministers' Conference."
66. Correspondence from NAC President Judy Rebick to Prime Minister Brian Mulroney, 26 August 1992.
67. *Supra* note 8.
68. *Ibid.* at 72-73.
69. *Ibid.*
70. Apart from the NWAC-NAC alliance, there was no "No" coalition to oppose the Charlottetown Accord. It is as untrue as it is distasteful to suggest (as some commentators did) that "NAC is in bed with the Reform Party." There was a "Yes" coalition, however.
71. "Judge delays attempt by native women to halt referendum" *Globe & Mail* (September 1992).
72. *Ibid.*
73. J. Bryden, "Secret reports show unity deal reworked" *Calgary Herald* (19 September 1992).
74. "Draft Legal Text," a 'best efforts' text prepared by officials representing all First Ministers and Aboriginal and Territorial Leaders, 9 October 1992.
75. *Ibid.*
76. *Supra* note 75.
77. "Judge, lawyer disagree on loss of rights" *Calgary Herald* (15 October 1992).
78. *Ibid.*
79. W. Dudley, "Natives greet the vote with bitterness, relief" *Calgary Herald* (27 October 1992).
80. A federal Department of Indian and Northern Affairs policy initiative, this process is limited in access to a select number of bands, and in result, to a delegated municipal form of government within a legislated framework. Many First Nations, and the Assembly of First Nations, have criticized the "CBSG" process for being inadequate for real change, inappropriate for constitutional change affirming Aboriginal and treaty rights, and pernicious in that it potentially undermines more comprehensive political initiatives.
81. CBC Radio News, (26 January 1993).
82. "Native Women Fearful" *Globe & Mail* (29 January 1993).
83. CBC Radio news,(29 January 1993).
84. J. Green, "The Parthenogenic Child of the Fathers" (published as "A Comprehensive Analysis of the Charlottetown Accord"), (1982) 3 The Womanist.
85. J. Danylchuk, "Sweet taste of victory soured by band reaction" *The Edmonton Journal* (30 January 1993).
86. "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict" in S. Burt, L. Code and L. Dorney, eds, *Changing Patterns: Women in Canada* (Toronto: McClelland & Stewart, 1993) at 128-129.