

# *Native Women's Association of Canada v. Canada*

Mary Eberts, Sharon McIvor, and Teresa Nahanee

## *Authors' Note*

The decision by the Women's Court of Canada to recruit us to write the judgment in *Native Women's Association of Canada v. Canada* was taken in full knowledge that we had played a significant role in the original case, leading to the Supreme Court of Canada decision from which this "reconsideration" is taken. Sharon McIvor was one of the individual applicants. Teresa Nahanee was a key constitutional advisor to the Native Women's Association of Canada (NWAC) and was instrumental in its work throughout the early 1980s to secure Aboriginal women's equality in self-government. She and Sharon McIvor were among the major architects of the NWAC strategy in this period. Mary Eberts was retained by the NWAC to represent it in the original application to compel Canada to fund it and allow it equal participation, and she represented the NWAC throughout all of the stages of this case and through the subsequent application for an injunction to quash the national referendum on the Charlottetown Accord.

As authors of this Women's Court of Canada decision, we have thus been given an opportunity that no other litigants and counsel may possibly ever have—writing the decision in one's own case. In doing so, we have revisited the questions at issue in the original proceeding and added one more—a consideration of the meaning of "representatives of Aboriginal peoples" in section 35.1 of the *Constitution Act, 1982*, which is considered only peripherally by some, but not all, of the judges who gave reasons in the original case. Developments since the Supreme Court of Canada's decision in the *NWAC* case, particularly the increasing occurrence of discussions, negotiations, and consultations between governments and Aboriginal peoples, have heightened interest in this issue of representativeness.

Our role as the Women's Court of Canada bench in this appeal does, we acknowledge, defy the conventions of judicial impartiality and disinterestedness, as does the composition of other benches in the Women's Court of Canada project. More significantly, our involvement in this judgment illustrates the combination and recombination of roles that women's equality advocates must undertake in the struggle to achieve substantive equality. Women from the grassroots are fundraisers, litigants, and participants in

consultations to develop arguments in test cases and are instrumental in creating and maintaining the non-governmental political organizations that both lobby and litigate in the search for equality. Women academics create knowledge that is used in women's litigation and, in doing so, undermine old "knowledge" that has been used to confine women. They step out of the classroom into the courtroom, non-governmental organizations, and government lobbies and then back again to write, teach, and lecture, mentoring and inspiring new generations of equality advocates. Barristers, too, create and destroy knowledge and fashion arguments in collaboration with women from the grassroots and the academy. Given the magnitude of the task, achieving equality does not permit any woman to play only one role.

Transcending all of these roles is the daily practice of the equality seeking that women do in our families, our workplaces, and our communities. As illustrated so vividly by the experience of Aboriginal women during the constitutional debates of 1980 to 1987 and beyond, this daily practice of equality is not risk free and can require enormous courage.

### *Working Together*

The office of the National Speaker was upstairs at the NWAC office on Melrose Avenue in Ottawa. We spent so many hours and days there over the years working on this case and the successor case that challenged the referendum. Gail Stacey-Moore, Sharon, and Teressa would tell stories about Mary Two-Axe Early, running the blockade in the Oka crisis, the Women's March from New Brunswick to Ottawa, and other cases. Gail once said that she was sure the women were going to prevail in their struggles—if not in her lifetime, then in her children's, or their children's. They would just keep going. The stories were sometimes humorous, and, in spite of the crisis conditions in which we worked, we could still find a laugh or two. Mostly, though, the stories were affirmations of a steadfast commitment and grounded in the assumption that there was little choice about whether to continue. It was just what had to be done.

### *The Case*

The decision to bring forward the *NWAC* case in 1992 at the height of the constitutional talks between the prime minister, the first ministers, and male Aboriginal organizations was the brainchild of then vice president Sharon McIvor and the late Jane Gottfriedson, former president of the British Columbia Native Women's Society. Like the first ministers' accord in November 1991, the *NWAC* case was born in a kitchen, this one on the

Lower Similkameen Reserve near Keremeos, British Columbia, in a private discussion between Sharon and Jane.

It was well known to them in 1992 that the Métis National Council was shut out from the earlier constitutional talks between the first ministers and Aboriginal organizations because it was a newly founded organization representing Métis interests. The Métis had broken away from the Native Council of Canada (NCC), which is now known as the Congress of Aboriginal Peoples, because they wanted their own voice to be heard separate from the non-status Indians represented by the NCC. Although the Métis lost their case in court, they were invited to sit at the constitutional table in their own right, representing Métis interests. The government of the Yukon Territory also went to court to establish its right to sit at the first ministers conference discussing constitutional change, and it also lost its case in court.<sup>1</sup> Despite this loss, the governments of the Northwest Territories and the Yukon Territory earned a seat at the constitutional table.

Sharon and Jane reasoned that if the Métis and the Territorial governments could earn their way to the constitutional table, win or lose in court, why not Aboriginal women and the NWAC? A win would ensure them a seat and equal funding at future constitutional talks affecting Aboriginal women and a loss, in fact, did earn them a seat in 1993 when they were invited to attend as the fifth national Aboriginal organization. Of course, by then, the four mandated constitutional meetings between first ministers and Aboriginal peoples had expired, hence, the need for this decision of the Women's Court of Canada. The intention of a win at the Women's Court is to turn back the clock and place the Aboriginal women at a place they would have been had it not been for discrimination based on sex and a failure to uphold the *Persons* case premise that Aboriginal women are an integral part of "Aboriginal peoples." The Aboriginal peoples of Canada are not those defined by the government of Canada and the provinces/territories. Rather, they are the people who live among the Aboriginal peoples and who identify themselves as being Aboriginal, but, more importantly, the Aboriginal peoples are comprised of "men" and "women."

Anyone involved in the Aboriginal women's movement in Canada throughout the 1970s, 1980s, and early 1990s would appreciate the courage and conviction it took for Gail, who was then president of the NWAC, and Sharon, to bring the *NWAC* case into court. Gail stood up as an Aboriginal leader at a forum of one thousand sponsored by the Assembly of First Nations (AFN) in Ottawa amid stillness you could cut with a knife when she demanded Aboriginal women be given a seat at the constitutional table alongside their brothers, uncles, and fathers. At Whistler

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1. See *Penikett et al. v. R. et al.* (1987), 45 D.L.R. (4th) 108 (Y.T.C.A.), leave to appeal to S.C.C. refused 46 D.L.R. (4th) vi.

in 1992, Jane and Sharon stood before the national meeting of chiefs demanding a seat at the upcoming meeting with premiers only to be offered tickets to a wine-and-cheese party with the premier of British Columbia.

As a law student and constitutional adviser to the NWAC in 1992, Teresa Nahanee had the privilege of meeting some of the high-powered women lawyers at the University of Toronto, Faculty of Law to inform them of the NWAC's plight—being blocked as women from the constitutional table. The NWAC recruited Anne Bayefsky and Mary Eberts from this meeting—they were interested and they volunteered to get involved. The Aboriginal men's organizations had already employed all of the leading constitutional experts in Canada that had not already been taken by the federal and provincial governments. Teresa knew from her work with the Honorable Bertha Wilson, retired justice of the Supreme Court of Canada, that Mary Eberts was among the best of lawyers to appear before the Court. As constitutional adviser, Teresa oversaw the court case, provided documentation, and liaised with the men's organizations to ensure the involvement of Sharon in the AFN process and Jane in the NCC process.

While the *NWAC* case was being heard at the Federal Court Trial Division<sup>2</sup> and the Court of Appeal, the NWAC leadership was blocked from every constitutional meeting in twenty-one cities stretching from Vancouver to Charlottetown. While men in power in all these levels of government in Canada met with the men's Aboriginal national organizations, the female leadership of the NWAC were protesting in the wintry cold on Parliament Hill, in the windy streets of Toronto, and under the rainy skies of Vancouver. The denials of access to participation for Aboriginal women were as harsh as the winter wind on Parliament Hill.

The Women's Court of Canada decision is the one we should have had—one that truly recognizes the equality and personhood of women and one that demonstrates the need to involve women in decision making and law making in all aspects of Canadian life. Women are persons with equal rights in every aspect of Canadian life, and though it is a fact, it is not reality.

### *Note des auteures*

Le Tribunal des Femmes du Canada a décidé de nous recruter pour rédiger le «réexamen» de l'affaire *Association des femmes autochtones du Canada* («AFAC») *c. Canada* en pleine connaissance du fait que nous avons joué un rôle important dans l'affaire originale qui a mené à l'arrêt de la Cour

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2. During that argument in the Federal Court Trial Division, characterized by quite an unruly courtroom of male lawyers, Ian Scott, Q.C. appearing for the NCC, noted in a break that a button was loose on his jacket. "Sew this on for me, would you Mary?" he asked NWAC's lead counsel.

suprême du Canada. Sharon McIvor était l'une des demanderesse à titre personnel. Teresa Nahanee était l'une des conseillères clés en matière constitutionnelle auprès de l'AFAC et elle a contribué largement au travail entrepris par l'AFAC au début des années 1980 en vue de garantir l'égalité des femmes dans l'autodétermination autochtone. Teresa Nahanee et Sharon McIvor comptaient parmi les principales architectes de la stratégie de l'AFAC durant cette période. Les services de Mary Eberts ont été retenus par l'AFAC pour la représenter dans son premier recours visant à contraindre le Canada à leur fournir financement et participation égale et elle a représenté l'AFAC à travers toutes les étapes de cette affaire ainsi que dans la requête d'injonction subséquente visant à annuler le référendum national sur l'Accord de Charlottetown.

En qualité de rédactrices de ce jugement du Tribunal des Femmes du Canada, nous avons donc l'occasion qu'aucune autre partie à un litige et aucun procureur n'aura jamais—rédiger la décision dans sa propre cause. Ce faisant, nous avons passé en revue les questions en litige dans le premier recours et nous y en avons ajouté une autre—une analyse du sens des termes «représentants des peuples autochtones du Canada» énoncés à l'article 35.1 de la *Loi constitutionnelle de 1982*, qui fait l'objet de commentaires incidents par certains, mais pas tous les juges qui ont rédigé des motifs dans le recours original. Depuis la décision de la Cour suprême du Canada dans l'affaire *AFAC*, des faits nouveaux, particulièrement la plus grande fréquence de discussions, négociations et consultations entre les gouvernements et les peuples autochtones, ont intensifié la pertinence de la question de la représentativité.

Nous avouons d'emblée que la composition de notre banc de juges du Tribunal des Femmes du Canada dans cet appel, ne respecte pas les conventions de l'impartialité judiciaire et du désintéressement, comme c'est le cas d'ailleurs d'autres bancs du Tribunal des Femmes. De façon plus significative, notre participation à ce jugement illustre la combinaison et la recombinaison des rôles qu'occupent les militantes de l'égalité des femmes dans la lutte pour obtenir l'égalité substantive. La base fait des levées de fonds, entame des poursuites judiciaires et participe aux consultations afin de mettre au point des arguments pour établir des précédents. Elle aide, de plus, à créer et à assurer la survie d'organismes politiques non gouvernementaux qui exercent des pressions sur le gouvernement et sur le système juridique dans la quête de l'égalité. Les universitaires féministes font des recherches qui sont utilisées dans les recours des femmes et, ce faisant, elles font contrepoids aux anciennes «connaissances» qui servaient à confiner les femmes. Elles quittent la salle de cours pour la cour, les organismes non gouvernementaux et les associations exerçant des pressions sur les gouvernements pour retourner ensuite écrire, enseigner, donner des conférences, jouer le rôle de mentors et de sources d'inspiration pour de nouvelles générations de militantes de l'égalité.

Les praticiennes du droit créent et détruisent aussi des connaissances et formulent des arguments en collaboration avec les femmes de la base et de la tour d'ivoire. Étant donné l'ampleur de la tâche, aucune femme ne peut se permettre de jouer un seul rôle dans la quête de l'égalité.

Coordonner tous ces rôles demeure pratique courante dans le quotidien des femmes militantes, tant dans nos familles, que dans nos milieux de travail et nos communautés. Comme l'illustre de façon frappante l'expérience des femmes autochtones durant les débats constitutionnels de 1980 à 1987 et depuis, cette pratique quotidienne de l'égalité n'est pas sans péril et exige beaucoup de courage.

### *Un travail d'équipe*

Le bureau de la représentante nationale était situé à l'étage des bureaux de l'AFAC, rue Melrose à Ottawa. Nous y avons passé de nombreuses heures et des jours entiers pendant des années, à travailler à cette affaire et à l'affaire subséquente contestant le référendum. Gail Stacey-Moore, Sharon et Teresa racontaient des histoires au sujet de Mary Two-Axe Early: le jour où elle avait forcé le blocus pendant la crise d'Oka, sa participation à la Marche des Femmes du Nouveau-Brunswick à Ottawa, et d'autres exploits du même genre. Gail a dit une fois qu'elle était sûre que les femmes allaient réussir dans leurs luttes—sinon de son vivant, alors du vivant de ses enfants ou de ses petits-enfants. Elles poursuivraient la lutte. Les anecdotes étaient parfois comiques et, en dépit des conditions de crise dans lesquelles nous travaillions, nous pouvions quand même rire un peu. La plupart du temps, toutefois, les histoires confirmaient un engagement constant, fondé sur la prémisse qu'il n'y avait pas vraiment d'autre choix que de continuer. C'était tout simplement ce qu'il fallait faire.

### *La cause*

Ce sont Sharon McIvor, alors vice-présidente de l'AFAC et la défunte Jane Gottfriedson, ancienne présidente de la Native Women's Society de la Colombie-Britannique, qui ont eu l'idée d'intenter un recours en 1992, à l'apogée des pourparlers constitutionnels entre le premier ministre du Canada, les premiers ministres des provinces ainsi que les organisations autochtones masculines. Tout comme l'accord des premiers ministres en novembre 1991, l'affaire AFAC est née dans une cuisine, cette dernière située dans la réserve de Lower Similkameen, près de Keremeos, en Colombie-Britannique, au cours d'une discussion en tête-à-tête entre Sharon et Jane.

Elles savaient pertinemment qu'en 1992, le Ralliement national des Métis avait été exclu des conférences constitutionnelles préalables entre les premiers

ministres et les organisations autochtones, parce qu'il s'agissait d'une organisation nouvellement établie pour représenter les intérêts des Métis. Les Métis s'étaient détachés du Conseil national des autochtones du Canada (CNAC), qui s'appelle aujourd'hui le Congrès des Peuples Autochtones (CPA), parce qu'ils voulaient que leur propre voix soit entendue séparément de celles des autochtones sans statut représentés par le CNAC. Bien que les Métis aient perdu leur cause devant les tribunaux, ils ont néanmoins été invités à siéger à la table constitutionnelle de leur propre chef, pour représenter les intérêts des Métis. Le gouvernement du Territoire du Yukon s'est également adressé aux tribunaux pour faire reconnaître son droit de siéger à la conférence des premiers ministres pour discuter de changements constitutionnels et il a également perdu sa cause devant les tribunaux<sup>1</sup>. En dépit de cet échec, les gouvernements des Territoires du Nord-Ouest et du Yukon ont pourtant obtenu de siéger à la table constitutionnelle.

Sharon et Jane ont déduit, en toute logique, que si les Métis et les gouvernements des Territoires pouvaient ainsi obtenir de siéger à la table constitutionnelle, peu importe les résultats devant les tribunaux, pourquoi n'en serait-il pas de même pour les femmes autochtones et l'AFAC? Une victoire garantirait un siège et un financement égal aux conférences constitutionnelles futures affectant les femmes autochtones et un échec, de fait, leur a valu un siège en 1993, lorsqu'elles ont été invitées à participer en qualité de cinquième organisation nationale autochtone. Évidemment, par ce temps-là, les quatre conférences constitutionnelles prévues entre les premiers ministres et les peuples autochtones avaient déjà eu lieu, d'où la nécessité pour le Tribunal des Femmes du Canada de réexaminer l'arrêt *AFAC*. Ce que nous voulons faire ici, en donnant gain de cause devant le Tribunal des Femmes, c'est de revenir en arrière et de placer les femmes autochtones là où elles auraient dû être, n'eût été la discrimination fondée sur le sexe et le défaut de respecter la prémisse de l'arrêt *Persons*, selon laquelle les femmes autochtones font partie intégrante des «peuples autochtones». Les peuples autochtones du Canada ne sont pas les peuples définis par les gouvernements du Canada et des provinces ou territoires. Ce sont plutôt les personnes qui vivent parmi les peuples autochtones et qui s'identifient comme autochtones mais, de façon plus importante, les peuples autochtones se composent «d'hommes» et de «femmes».

Toute personne impliquée dans le mouvement des femmes autochtones au Canada à travers les années 1970, 1980 et le début des années 1990 est en mesure d'apprécier à sa juste valeur le courage et la conviction qu'il a fallu à Gail, alors présidente de l'AFAC, pour intenter le recours. En sa qualité

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1. Voir *Penikett et al. c. R. et al.* (1987), 45 D.L.R. (4th) 108 (C.A.T.Y.); permission d'appeler à la C.S.C. refusée 46 D.L.R. (4th) vi.

de cheffe autochtone, Gail s'est levée lors d'une assemblée de 1 000 personnes à Ottawa, réunion parrainée par l'Assemblée des Premières Nations (APN), alors qu'il régnait un silence de cimetière, pour réclamer que les femmes autochtones aient également un siège à la table constitutionnelle à côté de leurs frères, de leurs oncles et de leurs pères. À Whistler, en 1992, pendant une assemblée de chefs nationaux, lorsque Jane et Sharon ont réclamé un siège à la réunion prochaine avec les premiers ministres des provinces, on leur a offert des tickets à une dégustation de vin et de fromage en compagnie du premier ministre de la Colombie-Britannique.

Comme étudiante en droit et conseillère en matière constitutionnelle auprès de l'AFAC en 1992, Teresa Nahanee a eu le privilège de rencontrer certaines avocates réputées à la Faculté de droit de l'Université de Toronto pour les informer de la situation critique de l'AFAC—étant exclues comme femmes de la table constitutionnelle. L'AFAC a recruté Anne Bayefsky et Mary Eberts grâce à cette rencontre; toutes deux étaient intéressées et elles se sont portées volontaires pour poursuivre l'affaire. Les organisations d'hommes autochtones avaient déjà engagé tous les spécialistes de renom en droit constitutionnel au Canada dont les services n'avaient pas déjà été retenus par le gouvernement fédéral et les gouvernements provinciaux. Grâce à son travail auprès de l'honorable Bertha Wilson, juge retraitée de la Cour suprême du Canada, Teresa savait que Mary Eberts comptait parmi les meilleurs juristes à plaider devant cette Cour. Comme conseillère en matière constitutionnelle, Teresa dirigeait la cause, obtenait la documentation et assurait la liaison avec les organismes masculins pour veiller sur les rapports de Sharon avec l'APN et de Jane avec le CPA.

Pendant l'audition de l'affaire *AFAC* devant la Cour fédérale, Division de première instance<sup>2</sup> et Division d'appel, le comité de direction de l'AFAC s'est fait interdire l'accès à chaque réunion constitutionnelle qui a eu lieu dans vingt et un villes de Vancouver à Charlottetown. Alors que les hommes au pouvoir dans tous les niveaux de gouvernement au Canada rencontraient les associations nationales d'hommes autochtones, le comité de direction de l'AFAC protestait dans le froid hivernal de la Colline du Parlement, dans les rues balayées par les vents de Toronto et sous les cieus pluvieux de Vancouver. Les interdictions d'accès à la participation des femmes autochtones ont été aussi cruelles que le vent froid sur la Colline du Parlement.

Le jugement du Tribunal des Femmes du Canada est le jugement que nous aurions dû obtenir—celui qui reconnaît véritablement l'égalité et la

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2. Pendant l'audition devant la Cour fédérale, Division de première instance, audition caractérisée par la turbulence du groupe d'avocats masculins, Ian Scott, c.r., représentant l'APN, a remarqué à la pause qu'un bouton de sa veste était sur le point de céder. Il s'est tourné vers la conseillère juridique principale de l'AFAC en lui disant: «Recouds ce bouton pour moi, veux-tu, Mary?»

personnalité juridique des femmes tout en illustrant la nécessité d'inclure les femmes dans le processus décisionnel et législatif concernant tous les aspects de la vie canadienne. Les femmes sont des personnes disposant de droits égaux dans chaque aspect de la vie canadienne et bien qu'il s'agisse là d'un fait, c'est encore loin de la réalité.

# *Native Women's Association of Canada v. Canada*

Women's Court of Canada  
[2006] 1 W. C. R. 76

*Le Tribunal des Femmes du Canada réexamine la décision de 1994 de la Cour suprême du Canada dans l'affaire Association des femmes autochtones du Canada («AFAC») c. Canada en vertu de laquelle la Cour a entériné la décision du gouvernement fédéral d'exclure l'AFAC des négociations constitutionnelles avec les autochtones concernant l'autodétermination autochtone. Le Tribunal des Femmes retrace l'histoire des conférences constitutionnelles et met en relief le rôle égalitaire que les femmes ont traditionnellement joué dans les communautés autochtones. Cette position a été sapée par la loi et la politique du Canada, dont le caractère patriarcal et discriminatoire imposé par la Loi sur les Indiens continue d'exercer une influence malheureuse sur les activités des bandes «Indiennes». En donnant pleinement effet aux articles 37, 37.1 et 35.1 de la Loi constitutionnelle de 1982, le Tribunal des Femmes juge que les femmes autochtones sont des «peuples autochtones du Canada» ayant le droit d'être consultés en cas de changement constitutionnel. Étant donné qu'aucun groupe désigné par le gouvernement fédéral n'était prêt à représenter les intérêts des femmes autochtones, le défaut d'inclure des groupes de femmes autochtones viole les articles 37, 37.1 et 35.1. Les gestes posés par le gouvernement fédéral constituent des contraventions à la liberté d'expression des femmes autochtones en vertu de l'alinéa 2 b) et de l'article 28 de la Charte, puisque l'AFAC prônait une interprétation différente de l'application de la Charte aux gouvernements autochtones.*

*Le gouvernement fédéral a également porté atteinte aux droits de la demanderesse prévus à l'article 15 de la Charte. L'exclusion des femmes autochtones ne peut s'expliquer par un manque d'espace ni par un but améliorateur; de plus, la dignité et le mérite d'une personne est étroitement liée à la possibilité de prendre une part active et autonome dans le gouvernement de sa propre communauté. Pour les mêmes raisons, l'exclusion viole également les droits des femmes autochtones en vertu du paragraphe 35(4) de la Loi constitutionnelle de 1982. Le Tribunal des Femmes juge que ces violations ne peuvent se justifier étant donné que le gouvernement fédéral n'a pas fait la preuve d'un objet suffisamment important pour exclure les femmes des négociations constitutionnelles et les effets néfastes de l'exclusion des femmes l'emportent sur tout avantage prétendu. Le Tribunal des Femmes ordonne au gouvernement fédéral de convoquer à nouveau une conférence constitutionnelle conformément aux articles 37, 37.1 et 35.1 de la Loi constitutionnelle de 1982, en y invitant l'AFAC en qualité de participante à part entière.*

*The Women's Court of Canada reconsiders the 1994 case of Native Women's Association of Canada v. Canada, in which the Supreme Court of Canada upheld the federal government's decision to exclude the Native Women's Association of Canada (NWAC) from constitutional negotiations concerning the Aboriginal right to self-governance. The Women's Court reviews the backdrop to the constitutional negotiations, and highlights the generally egalitarian role of women in Aboriginal societies historically. This position has been eroded by Canadian legislation and policy, in which the patriarchal structure and discrimination imposed by the Indian Act continues to influence the activities of "Indian" bands. Considering the full meaning of sections 35.1, 37, and 37.1 of the Constitution Act, 1982, the Women's Court finds that Aboriginal women are "aboriginal peoples" with the right to be consulted on constitutional change. Given that no group chosen by the government had a willingness to represent the interests of Aboriginal women, the failure to include women's representative organizations in the constitutional talks is a breach of sections 35.1, 37, and 37.1. In light of the NWAC's differing position on the application of the Charter to Aboriginal governments, the federal government's actions amount to a restriction on Aboriginal women's expression, contrary to sections 2(b) and 28 of the Charter.*

*The claimants' rights under section 15 of the Charter were also violated by the federal government. Aboriginal women's exclusion from the constitutional discussions cannot be explained by any lack of capacity or ameliorative purpose, and individual dignity and worth is closely linked to the ability to take an active and autonomous part in the governance of one's community. By similar reasoning, the exclusion also amounts to a violation of Aboriginal women's equality rights in section 35(4) of the Constitution Act, 1982. The Women's Court holds that these violations cannot be justified, as the federal government did not offer a sufficiently significant objective for the exclusion of the NWAC from the constitutional talks, and the deleterious effects of excluding the NWAC outweigh any purported advantage. The Women's Court orders Canada to reconvene the constitutional conferences held pursuant to sections 37, 37.1, and 35.1, inviting the NWAC as a full participant.*

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Reconsideration of *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 (judgment of the Supreme Court of Canada reversed).

The decision of the Women's Court of Canada was delivered by:

MARY EBERTS, SHARON MCIVOR, AND TERESSA NAHANEE

## ***I. Introduction***

1. This is a reconsideration of the decision of the Supreme Court of Canada in *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 (NWAC SCC). There are four questions before the Women's Court of Canada on this reconsideration, the first originating in this court and the other

three arising directly from the decision of the Supreme Court of Canada. The questions are:

- 1) Does the phrase “representatives of the aboriginal peoples of Canada” in section 35.1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, include female representatives of the Aboriginal women of Canada in their own right?
- 2) Did the government of Canada violate the equal right to freedom of expression of the individual appellants or of Aboriginal women represented by the appellant Native Women’s Association of Canada (NWAC), as guaranteed by sections 2(b) and 28 of the *Canadian Charter of Rights and Freedoms*, by denying them the equal right to participation and funding in the constitutional amendment discussions?
- 3) Did the Government of Canada violate the equality rights of the individual appellants or of Aboriginal women represented by NWAC, as guaranteed by section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982* by denying them the equal right to participation and funding in the constitutional amendment discussions?
- 4) Did the government of Canada violate section 35(4) of the *Constitution Act, 1982*, by failing to recognize existing Aboriginal and treaty rights, which are guaranteed equally to male and female persons?

2. In our reconsideration, we formulated question 1 because of our view that no examination of the role of Aboriginal women’s organizations in constitution making that affects Aboriginal peoples would be complete without attention to the proper interpretation of section 35.1 of the *Constitution Act, 1982*. Section 35.1, which was added by the *Constitutional Amendment Proclamation, 1983*, SI/84-102, provides as follows:

- s. 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “*Constitution Act, 1867*,” to section 25 of this Act or to this Part,
  - (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of

- Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
- (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

3. Although question 1 arose originally in the context of the constitutional discussions in 1991 and 1992, known as the Canada Round, it has an importance well beyond that phase in Canada's constitutional history. The *Charlottetown Accord*, which was produced in the Canada Round and defeated in a national referendum held 26 October 1992, recognized in Article 29 that the Aboriginal peoples of Canada have the inherent right of self-government within Canada and recognized the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada. It provided for continuing negotiations between Canada, the provincial and territorial governments, and the Aboriginal peoples of Canada for the implementation of the right to self-government (draft legal text, based on the *Charlottetown Accord*, 28 August 1992 and 9 October 1992, Article 29, at 37-43). Although these and related provisions were lost with the defeat of the accord, Canada and the provinces and territories continue to engage in discussions and negotiations with Aboriginal peoples about a range of matters of enormous significance.

4. In 1995, Canada issued a policy guide outlining its approach to implementation of the inherent right to self-government and the negotiation of self-government agreements (Canada, *Federal Policy Guide: Aboriginal Self Government* (Ottawa: Minister of Public Works and Government Services, 1995)). In British Columbia, a six-stage treaty process was incorporated into the *British Columbia Treaty Commission Agreement* of 1992. There are now fifty-seven First Nations participating in the BC treaty process (British Columbia Treaty Commission Agreement Six-Stage Treaty Process, <<http://www.gov.bc.ca/arr/treaty/negotiating/sixstage.html>> accessed 2 July, 2007; and Negotiation Update, <<http://www.bctreaty.net/files-3/updates.html>> accessed 2 July, 2007). Canada and the Assembly of First Nations have entered an accord on the recognition and implementation of First Nation governments (*A First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments*, 31 May 2005). In none of these processes do Aboriginal women negotiate through Aboriginal women's organizations. Nor is there yet any authority in Canadian law that mandates consultation with women through women's organizations when the duty to consult Aboriginal peoples is placed before governments making decisions that affect their rights (see, for example, *Haida Nation v. British*

*Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canada Heritage)*, 2005 SCC 69; and *Métis National Council of Women and Sheila D. Genaille v. Attorney General of Canada*, 2005 FCA 77).

5. By the time the NWAC case was heard by the Supreme Court of Canada in 1994, the Canada Round and the *Charlottetown Accord* were well past, but the Supreme Court of Canada dismissed an application to declare the appeal moot. We agree with this determination, particularly in light of the continuing resort to negotiations and consultations as a way of recognizing the rights and addressing the needs and the future of Aboriginal peoples. The NWAC case deals with fundamental and far-reaching issues about which “representatives of Aboriginal peoples” are to be included in constitutionally mandated constitutional discussions that transcend the particular fact situation in this appeal. The principles governing constitutionally mandated discussions will, in turn, have an important impact on the issue of representation in other negotiations, discussions, and consultations.

6. Section 35(1) of the *Constitution Act, 1982* provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Aboriginal women’s rights are also constitutionally entrenched in section 35(4), which states that “aboriginal and treaty rights . . . are guaranteed equally to male and female persons.” Finally, it was section 37.1 that constitutionally mandated first ministers to consult the Aboriginal peoples in four national meetings called for that purpose after the passage of the *Constitution Act, 1982 (Constitutional Amendment Proclamation, 1983, supra*, repealed 18 April 1987). The Supreme Court of Canada and the lower courts erred in law by not considering the full meaning of these sections, which, in our view, together signify that “Aboriginal peoples” includes Aboriginal women and gives them the right to be consulted on constitutional change. We find that the refusal by first ministers and the prime minister to accord the NWAC and its constituents the right to be consulted first-hand was such a fundamental error that the meetings mandated under section 37.1 should be deemed not to have taken place. In the absence of women representing their own interests at the section 37.1 constitutional talks, the prime minister and first ministers are deemed to have *not* consulted with Aboriginal peoples—a term that includes “women.”

## ***II. Constitutional History***

### ***A. Aboriginal Rights in the Canadian Constitution 1981–7***

7. Before describing the judicial history of this case, we set out the background to the constitutional amendment process that gave rise to it.

Establishing the historical context for any litigation involving Aboriginal peoples is critical to a complete understanding of the perspective they have on their rights and the interpretation of those rights. Since the enactment of section 35(1), the Supreme Court of Canada has set out the need to contextualize Aboriginal rights as they were practised in the pre-contact period and how they ought to be interpreted today.

8. The version of section 35 of the *Constitution Act, 1982*, as originally entrenched in 1982 included only two subsections:

(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 Métis peoples of Canada.

9. These two subsections were hard won. The original model for Aboriginal rights in the proposed new *Constitution Act, 1982* was the undeclared rights model, whereby a saving provision (eventually section 25 of the *Charter*) would specify that the guarantee in the *Charter* of certain rights and freedoms should not be construed as denying the existence of other rights and freedoms, including “any rights or freedoms pertaining to the native peoples of Canada.” The National Indian Brotherhood (NIB), which later became the Assembly of First Nations (AFN) opposed patriation without the entrenchment of Aboriginal and treaty rights. The NIB, the Native Council of Canada (NCC), and the Inuit Committee on National Issues (a predecessor of the Inuit Tapirisat of Canada (ITC)) appeared before the Special Joint Parliamentary Committee in December 1980 with specific proposals for the entrenchment of rights. In January 1981, the government of Canada produced a new version of the *Constitution Act, 1982*, recognizing and affirming the Aboriginal and treaty rights of the Aboriginal peoples of Canada, who were defined as including the Indian, Inuit, and Métis peoples.

10. At the November 1981 First Ministers’ Conference on the Constitution, a new accord was reached that withdrew this recognition of Aboriginal rights. A series of public protests and other actions were undertaken by the Aboriginal Rights Coalition, a group including the NCC, the Inuit Committee on National Issues, the NWAC, the Dene Nation, the Council for Yukon Indians, the Nishg’a Tribal Council, and the National Association of Friendship Centres. These protests led to the inclusion of sections 35(1) and (2) in the *Constitution Act, 1982* three weeks after the November first ministers’ meeting (Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 4: Perspectives and Realities* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 70-71, <<http://www.ainc-inac.gc.ca/ch/rcap>> [RCAP Final Report] accessed

2 July, 2007). However, right up until patriation in April 1982, the NIB and various provincial Aboriginal organizations, tribal councils, and individual chiefs pursued a vigorous lobby strategy in the United Kingdom, including representations to Westminster and the filing of legal action (see James Youngblood Henderson, I.P.C., *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 25-34).

11. Section 37 of the *Constitution Act, 1982* obligated the prime minister of Canada to convene a constitutional conference within a year of the act coming into force and to include in the agenda of that conference an item respecting constitutional matters that directly affected the Aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada. Section 37(2) required the prime minister of Canada to invite representatives of the Aboriginal peoples of Canada to participate in the discussions on that item.

12. The first ministers' conference mandated by section 37 was held in March 1983, and a constitutional accord was signed by the government of Canada, all provincial and territorial governments except Québec, and by the representatives of the Aboriginal peoples who attended the meeting. This accord, later proclaimed as the *Constitutional Amendment Proclamation 1983*, *supra*, added two new subsections to section 35:

(3) For greater certainty, in subsection (1), "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

13. The *Constitutional Amendment Proclamation, 1983* also added section 35.1, described earlier, and section 37.1. Section 37.1 required the convening of at least two more first ministers' conferences on the Constitution, at which constitutional matters that directly affected the Aboriginal peoples of Canada would be on the agenda. The prime minister was obligated to invite to these conferences "representatives of the Aboriginal peoples of Canada." Section 37.1 was repealed on 18 April 1987 by section 54(1) of the *Constitution Act, 1982*, which had also been added by the *Constitutional Amendment Proclamation, 1983*.

14. Three more first ministers' conferences on Aboriginal issues were held in 1984, 1985, and 1987, but there was no agreement reached on any matters, including the crucial right of self-government. The representatives of Aboriginal peoples who attended the first ministers' conferences between 1983 and 1987 were four national Aboriginal organizations: the AFN, NCC,

the Métis National Council (MNC), and the ITC. The first ministers' conferences held under section 37.1 were "closed meetings," meaning that no one had access to the meetings except those who were invited to attend. Each of the recognized national Aboriginal organizations held two seats at the constitutional table and could have as many as twelve to twenty advisers in the meeting room, as could the first ministers. The NWAC was not a recognized national Aboriginal representative organization for the purposes of invitation to these constitutional talks, which meant no direct participation by the NWAC—it had to await the invitation of one of the recognized Aboriginal organizations. In 1983, the NWAC received an invitation to attend through the NCC, and, in 1985, an invitation was extended through the AFN. However, the NWAC delegate was not permitted to address the full range of agenda items. In 1984, the premiers of Québec and New Brunswick invited one or two Aboriginal women to attend, including Mary Simon, an Inuit leader, and Sandra Lovelace, a Maliseet.

15. When the Constitution of Canada was patriated in 1982, there existed a number of national Aboriginal representative organizations that received core funding from the federal Secretary of State Department dating from the 1970s. The Aboriginal peoples of Canada had organized themselves nationally in 1969 in response to the federal government's *Statement of the Government of Canada on Indian Policy* (The White Paper, 1969) (<[http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/cp1969\\_e.html](http://www.ainc-inac.gc.ca/pr/lib/phi/histlws/cp1969_e.html)> accessed 2 July, 2007). Under the white paper, then minister of Indian and northern affairs, the Honourable Jean Chrétien, proposed to turn over responsibility for Indians to the provinces, contrary to section 91(24) of the *Constitution Act, 1867*, which gave the Federal Parliament jurisdiction over Indians and lands reserved for Indians. Their vehement opposition to the white paper caused Aboriginal people to form the National Indian Brotherhood (NIB). Its membership comprised, in the main, chiefs of the approximately 633 bands formed under the *Indian Act*, R.S.C. 1985, c. I-5. The NCC, later called Congress of Aboriginal Peoples (CAP) came into existence in this same period, to represent non-status and off-reserve Indians.

16. Around this same time, Aboriginal women in Canada formed their own national Aboriginal representative organizations to advocate on their behalf. These included the Inuit Women's Association (Pauktuutit), the Métis Women's Association (MWA), and the Indian Rights for Indian Women (IRIW). The IRIW was formed by a large gathering of status and non-status Indian women meeting in Ottawa to give their support to Jeanette Lavell in her case to end sex discrimination in the *Indian Act*, R.S.C. 1970, c. I-6. Made up of volunteers from across Canada, the IRIW formed for the sole purpose of seeking civil rights for Indian women, including repeal of section 12(1)(b) of the *Indian Act*. Section 12(1)(b) took Indian status away from registered Indian women who married non-Indians, while, under section 11 of the act, Indian

men marrying non-Indian women gave their wives Indian status. This political activism of Aboriginal women paralleled efforts in the courts to have section 12(1)(b) declared contrary to the *Canadian Bill of Rights*, S.C. 1960, c. 44, in the cases of Yvonne Bedard and Janette Lavell launched at the trial level in 1969 (*AG. Canada v. Lavell; Isaac v. Bedard*, [1974] S.C.R. 1349).

17. Following an organizational period from 1971 to 1973, the NWAC was incorporated in 1974 with a broad mandate to promote the rights of Aboriginal women in Canada in all social, health, economic, civil, and political matters. It worked on repeal of section 12(1)(b) and has also done considerable advocacy work on status and membership issues since the passage of Bill C-31, *An Act to Amend the Indian Act*, S.C. 1985, c.27. The NWAC advocates on behalf of status, non-status, and Métis women.

18. The Inuit were organized under two national umbrella organizations. The ITC was formed largely to deal with land claims issues within their traditional territories, and Pauktuutit, the Inuit Women's Association, formed in the same time period as the NWAC to deal with social, health, economic, civil, and political rights of Inuit women in Canada, regardless of their place of residence.

19. The Métis of Canada had been subsumed in their beginnings within the NCC. However, prior to the 1983 first ministers' conference pursuant to section 37(1) of the *Constitution Act, 1982*, the MNC was formed to represent the interests of the Métis of western Canada, who claimed a distinct culture. The MNC sought in a court case to compel the prime minister to invite it to the first ministers' conference or, in the alternative, to prevent the meeting. The case was settled out of court, with the MNC permitted a seat at the conference (Richard Dallon, "An Alberta Perspective on Aboriginal Peoples and the Constitution," in Menno Boldt and J. Anthony Long with Leroy Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto, 1985) at 88-89). With this settlement, the MNC joined the AFN, the NCC, and the ITC as the four national groups funded by the government of Canada to represent Aboriginal peoples at subsequent meetings called under section 37.1. The Métis women of Canada had organized nationally and provincially prior to the creation of the MNC. When the MNC was invited in its own right to the 1983 first ministers' conference, the MNC disregarded the existing Métis women's national organization, the MWA, and formed its own Métis National Council of Women (MNCW). Neither of the two Métis women's organizations, nor Pauktuutit, nor the NWAC participated in their own right at the constitutional talks held in 1983 and after.

### B. Constitutional Process, 1987–92

20. The *Meech Lake Constitutional Accord*, formulated by the governments of Canada and the provinces in 1987, was not ratified within the required three-year time limit. The *Meech Lake Accord* and its defeat in the Manitoba legislature are significant to the Aboriginal movement in Canada because Aboriginal peoples were not invited to the meetings leading up to the accord, and Aboriginal issues were not on the table for discussion. Aboriginal leaders believed that because their issues had not been resolved in the mandated section 37.1 meetings, Aboriginal rights should be on all constitutional agendas until these rights were resolved, particularly the right to self-government. The defeat of the *Meech Lake Accord* in the Manitoba legislature was achieved by a single negative vote cast by the Indian member of the Legislative Assembly, Elijah Harper, on 23 June 1990. The *Meech Lake Accord* went down to defeat not only in Manitoba but also in the rest of Canada.

21. Late in the summer of 1990, after the failure of the *Meech Lake Accord*, Québec established the Bélanger-Campeau Commission, which concluded that the National Assembly should adopt legislation establishing a process by which Québec would determine its political and constitutional future. In June 1991, the National Assembly enacted a law requiring the Québec government to hold a referendum on Québec sovereignty in June or October of 1992 (see James S. Frideres and René R. Gadacz, *Aboriginal Peoples in Canada: Contemporary Conflicts*, 6th edition (Toronto: Prentice Hall, 2001) at 330-4; Lilianne E. Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982–1987*, Nijmegen Studies in Development and Cultural Change Saarbrücken, Germany: Verlag Breitenbach Publishers, 1991) at 146-215; and Lilianne E. Krosenbeck-Gelissen, “The Canadian Constitution, the Charter and Aboriginal Women’s Rights: Conflicts and Dilemmas” (1993) 7-8 *International Journal of Canadian Studies* 207).

22. Working within the timeframe established by Québec, the government of Canada also took a number of constitutional initiatives in this period, establishing in November 1990 the Citizens’ Forum on Canada’s Future, chaired by Keith Spicer, and, in January 1991, the Special Joint Committee on the Process for Amending the Constitution of Canada. The Spicer Committee reported in 27 June 1991, and the Special Joint Committee on the Amending Process reported on 20 June 1991. In June 1991, the Special Joint Committee of the Senate and House of Commons on a Renewed Canada was established for the purpose of soliciting Canadians’ views on the constitutional renewal package being prepared by the government of Canada. This special joint committee, chaired by Senator Gérard Beaudoin and Member of Parliament Dorothy Dobbie, reported in February 1992.

23. The prime minister tabled Canada's constitutional proposals, called *Shaping Canada's Future Together*, in the House of Commons on 24 September 1991. One of the proposals, entitled *Aboriginal Peoples, Self-Government, and Constitutional Reform*, noted that Aboriginal peoples identified recognition of the right to self-government as their highest priority and reported that up to that point it had not been possible to achieve agreement on a constitutional amendment embodying self-government. The document made several proposals on self-government and other outstanding issues and stated that Aboriginal involvement in the current constitutional discussions would continue through the four organizations recognized and involved in previous discussions: the AFN, the NCC, the MNC, and the ITC.

24. These four organizations were involved in the consultation process of the Beaudoin-Dobbie Commission, which spent a day with each one. The Beaudoin-Dobbie Commission also received a written submission from the NWAC and agreed with its position that the *Charter* should apply to Aboriginal self-government (Canada, Parliament, Special Joint Committee on a Renewed Canada, *Report of the Special Joint Committee on a Renewed Canada*. (Ottawa: Queen's Printer, 1992)).

### C. Aboriginal Constitutional Process, 1991–2

25. The summer of 1990 saw not just the failure of the *Meech Lake Accord*. A confrontation took place in and around Oka, Québec, which lasted almost three months. The town of Oka had proposed to extend a municipal golf course over land held sacred by the Mohawks of Kahnésatake. The Canadian army was deployed against the Mohawk protesters. The events around Oka, and elsewhere in Canada triggered by Oka, highlighted the need for serious attempts to address fundamental issues of Aboriginal rights.

26. In May and June 1991, Canada established the Royal Commission on Aboriginal Peoples (RCAP), which conducted hearings across Canada and undertook a comprehensive program of research. The RCAP's final report was released in 1996 and stated that in its judgment, the right of Aboriginal governments to exercise authority over all matters relating to the good government and welfare of Aboriginal peoples and their territories is an existing Aboriginal right and is therefore recognized and affirmed by the Constitution (*RCAP Final Report, supra, Volume 2: Restructuring the Relationship*, recommendations 2.3.4-2.3.6). The report recommended that the *Charter* apply in the context of self-government and that Aboriginal governments should be able to access the "notwithstanding clause" on the same basis as the federal and provincial governments (at part 1.3).

27. The RCAP made it clear, however, that self-government cannot countenance the denial of equality to women because of their protection under section 35(4). The RCAP report specifically states that it is inconceivable that

Aboriginal women's civil, political, and property rights would not be included in the Aboriginal rights recognized and affirmed in section 35. The RCAP found no convincing argument that Aboriginal women's rights had been extinguished before 1982, despite their treatment under the *Indian Act*. The RCAP declared: "[O]ne of the challenges facing Aboriginal nations will be to give full effect and recognition to the rights by according Aboriginal women equal participation in designing and implementing self-governing structures and in creating Aboriginal law and policy" (*RCAP Final Report, supra, Volume 3: Gathering Strength*, at 94).

28. In 1991–2, Canada also established and funded a separate constitutional process involving the four national Aboriginal groups that it recognized. This process operated parallel to the processes that Canada had set in motion through the various commissions and parliamentary committees that were soliciting the views of the general public on constitutional reform (the Canada Round). The Aboriginal Constitutional Review Program of the Department of the Secretary of State was funded by means of parliamentary appropriations (see *Appropriations Act*, S.C. 1991, c. 53 and S.C. 1992, c. 7). Under this program, the AFN, the NCC, the MNC, and the ITC shared \$10,000,000 pursuant to contribution agreements signed between each organization and the government of Canada. The resources available to the NWAC were found by the lower courts to be approximately 5 per cent of those given to the other four organizations. The NWAC received \$130,000 from each of the NCC and the AFN, taken from the funds available to them under their contribution agreements, and a further direct grant of a little over \$200,000 from the Secretary of State Women's Program, to fund a study of the *Charter* and its application to Aboriginal governments.

29. Using funding from its contribution agreement, the AFN organized a parallel process of consultation, headed by its constitutional commission, the First Nations Circle on the Constitution. The First Nations Circle consisted of seven male and three female commissioners, one of whom was nominated by the NWAC. It conducted hearings from coast to coast between October 1991 and March 1992 and compiled a report from those hearings called *To the Source* (AFN, *To the Source: The First Nations Circle on the Constitution* (Ottawa: AFN, 1992)). The AFN also established a Constitutional Working Group (CWG) of twenty-four individuals, mostly chiefs and vice-chiefs. Three of the CWG members were women, including one representative from the NWAC.

30. The representatives from the NWAC occupied a severe minority position in those bodies associated with the AFN parallel process, and there were no NWAC representatives or participants in the processes of the other three organizations. This pronounced minority position was repeated at the government of Canada-sponsored Aboriginal Conference on the Constitution, which was held in Ottawa on 12–25 March 1992. Of 184 delegates, the NWAC had only eight official seats, and it also had four observers at the conference.

The 184 seats were divided among the delegates of Canada, the provinces, the territories, and the four recognized Aboriginal organizations (sixteen bodies). While the NWAC had some representation in the room, it had no voice. The only constitutional amendments put forward on Aboriginal rights came from the national chief of the AFN who obtained his mandate from the chiefs in the AFN. The NWAC had no status within that group except as an invitee with no voice. The NWAC could suggest wording for a constitutional amendment to guarantee women's rights but, if this recommendation was not endorsed by the chiefs, the women's amendment could not be proposed at the constitutional table. Failing to get the chiefs' approval did leave the NWAC the alternative of seeking a supporter from among the provinces or their delegates, but these delegates were lobbied by constitutional advisers of the AFN to not speak to, or propose wording suggested by, Aboriginal women. Whether the NWAC was in the room or shut from the room made no difference—effectively, they had no voice, could propose no amendment, and had no vote or representation.

31. The government of Canada refused to provide direct funding and representation to the NWAC. The minister responsible for constitutional affairs, the Right Honourable Joe Clark, told the NWAC that it must put its position forward through the other national associations and seek funding from these four associations and not the government of Canada. Clark told the president of the NWAC, Gail Stacey-Moore, on 16 March 1992 that he would not intervene in the internal decision making of these four organizations although he knew of the problems the NWAC was having securing its own voice and funding. He refused to provide direct representation and funding, suggesting instead that the NWAC hire a media consultant and engage in a press briefing (Supplementary Affidavit of Gail Stacey-Moore, sworn 24 March 1992, paras. 9 and 10).

32. The factual record before us clearly establishes that the NWAC was excluded from the discussions of the Canada Round, which created the *Charlottetown Accord*. As we will discuss later in this decision, expressing oneself on street corners with placards, or in the media, as suggested by Clark, cannot be considered equivalent to participation at the table with the other four national Aboriginal associations.

### ***III. Judicial History***

#### ***A. NWAC's Application***

33. The NWAC and the two individual appellants made an application for judicial review of the decision by the government of Canada to fund only the AFN, the MNC, the NCC, and the ITC to take part in the process leading to development of the *Charlottetown Accord*. They sought an order of

prohibition to prevent the government from disbursing the next installments of the groups' funding under the contribution agreements.

34. The NWAC argued that the four funded national Aboriginal groups were male-dominated and did not represent Aboriginal women. The male-dominated groups were opposed to application of the *Charter* to Aboriginal self-government, while the NWAC supported its application, in particular, the *Charter's* sex equality provisions. The NWAC claimed the government funding provided to anti-*Charter* male-dominated groups infringed women's freedom of expression under section 2(b) of the *Charter* and violated their sex equality rights under sections 15 and 28 of the *Charter* and subsection 35(4) of the *Constitution Act, 1982*.

35. The individual appellants, Gail Stacey-Moore and Sharon McIvor, are both Aboriginal women and were respectively the president and vice-president of the NWAC when this application was brought. Gail Stacey-Moore is a Mohawk of Kahnawake, Québec, and Sharon McIvor is Nle?kepmxcin of Merritt, British Columbia. The NWAC, a non-profit organization incorporated in 1974, has a Board of Directors comprised of Aboriginal women representatives from all provinces and territories.

36. The NWAC argued in its application to the Federal Court Trial Division that where the government provides funding to male-dominated groups, section 2(b) in combination with section 28 of the *Charter* obliges the government to provide equal funding to an association representing the interests of Aboriginal women so that it can represent the views of women in those discussions. Alternatively, it argued that the equality guarantees of section 15 or the provisions of section 35(4) of the *Constitution Act, 1982* compel this result.

*B. Federal Court Trial Division, [1992] 2 F.C. 462, [1992]  
F.C.J. No. 255 [NWAC FCTD]*

37. The NWAC's application for judicial review was heard by Deputy Justice Allison Walsh on 25-30 March 1992. There were three intervenors: the MNC, the NCC, and the ITC.

38. The NWAC's application was dismissed on 30 March 1992. Walsh D.J. held that the applicants' section 2(b) rights had not been violated and that to guarantee a right for "everyone" to be present at constitutional discussions would "paralyze the process" of constitution making (*NWAC FCTD* at para. 36).

39. Walsh D.J. also held that the reason Aboriginal women's groups were not funded was because the government was unwilling to recognize them as a separate group within the Aboriginal community. The court found that this was not discrimination based on sex (*NWAC FCTD*, at para. 38).

40. Further, Walsh D.J. found there had been nothing unfair or contrary to natural justice in the selection of groups considered to be representative of Aboriginal peoples. The government was entitled to conclude that the male-dominated groups represented the views of Aboriginal women as well as men. Walsh D.J. held that it was speculative to assert that the anti-*Charter* views of the Aboriginal men's groups would prevail. If and when that became a reality, the NWAC could make its views known at that time.

41. The court concluded that it did not have jurisdiction to impose its views on the legislative process such as consulting on constitutional amendments: "It is not the place of the courts to interpose further procedural requirements in the legislative process" (*NWAC FCTD*, at para. 49, citing *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 559 (per Justice John Sopinka)).

*C. Federal Court of Appeal, [1992] 3 F.C. 192, [1992]  
F.C.J. No. 715 [NWAC FCA]*

42. The appeal of the Trial Division's decision was heard on 11 June 1992 and was decided by Justices of Appeal Patrick Mahoney and Arthur Stone and District Justice W. Gibson Gray on 20 August 1992. Again, there were three intervenors: the MNC, the ITC, and the NCC.

43. Writing for the court, Justice Patrick Mahoney described the AFN as an organization of Canada's 633 chiefs, of whom sixty were women in 1992. Mahoney J.A. noted that the AFN "has vigorously and consistently resisted the struggle of native women to rid themselves of the gender inequality historically entrenched in the *Indian Act*" (*NWAC FCA*, at para. 16). Further, the court noted that the AFN opposed the repeal of section 12(1)(b) of the *Indian Act* when section 15(1) of the *Charter* came into force, and it opposed the addition of section 35(4) to the *Constitution Act, 1982* (at para. 16).

44. In noting the NWAC's concerns that the *Charter* may not apply to Aboriginal self-government as it was being negotiated by the male-dominated organizations funded by Canada, Mahoney J.A. held it was in the best interests of Aboriginal women to continue to enjoy protection of the *Charter* under self-government. The court was unwilling to leave Aboriginal women with less protection *vis-à-vis* Aboriginal governments than was available *vis-à-vis* other governments under sections 15 and 28, considering that to do so would violate "the norms of Canadian society as a whole" (*NWAC FCA*, at para. 27).

45. Mahoney J.A. concluded that,

by inviting and 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-government a preferred position in the exercise of an expressive activity, the freedom of which is guaranteed to everyone by paragraph 2(b) and which is, by section 28, guaranteed equally to men and women. It has thereby taken action that has had the effect of restricting the freedom of expression of aboriginal women in a manner offensive to paragraph 2(b) and section 28 of the *Charter*. In my opinion, the learned Trial Judge erred in concluding otherwise (*NWAC FCA*, at para. 28).

46. The Federal Court of Appeal held that the right to participate in constitutional discussions did not emanate from the existing Aboriginal and treaty rights provisions of section 35 of the *Constitution Act, 1982*, but from the sections dealing specifically with constitutional negotiations (sections 37 and 37.1). Accordingly, section 35(4) was found to be inapplicable because this section refers only to equality as it relates to section 35.

47. The Court of Appeal disagreed with the Trial Division by holding that it “would not be interfering in a legislative process if it were to grant... an appropriate remedy” (*NWAC FCA*, at para. 43). Instead, the court characterized the *Charlottetown Accord* process as “integral to policy development rather than implementation” (*ibid.*). The court held that if the government of Canada chooses to provide funding, it must do so according to the dictates of the *Charter*. A decision to fund one group, but not another, should be justified by the government under section 1 of the *Charter*. The Court of Appeal rejected the “floodgates” argument that allowing the NWAC to be funded and participate equally would require allowing in all other kinds of voices. In the end, the court granted a declaration that the appellants’ *Charter* rights were violated by the government.

#### *D. Supreme Court of Canada, [1994] 3 S.C.R. 627 [NWAC SCC]*

48. The government’s appeal to the Supreme Court of Canada was heard on 4 March 1994. There were four intervenors: the MTC, the NCC, the ITC, and the AFN, which was intervening in the proceedings for the first time. By this stage, the *Charlottetown Accord* had been defeated in a national referendum, and there were no constitutional discussions taking place.

49. In the majority decision of Justice John Sopinka, on behalf of himself, Chief Justice Antonio Lamer, and Justices Gérard La Forest, Charles Gonthier, Peter Cory, Frank Iacobucci, and John Major, the Court held that the NWAC’s sections 2(b) and 28 rights under the *Charter* had not been violated “since s. 2(b) does not guarantee any particular means of expression

or place a positive obligation upon the government to consult anyone” (*NWAC SCC*, at para. 73). The majority held that the NWAC had many opportunities to express their views to the multilateral Aboriginal process operated by the funded Aboriginal groups and to the Beaudoin-Dobbie Commission of Parliament, a process for all Canadians, even if they were not funded to do so.

50. The majority held that there was no evidence to support the contention that the funded groups were less representative of the viewpoint of women with respect to the *Charter*, or that the funded groups advocated a male-dominated form of self-government. Further, the majority found that there was no evidence with respect to the level of support of the NWAC by women as compared to the funded groups. The four Aboriginal groups invited to discuss possible constitutional amendments were all found to be *bona fide* national representatives of Aboriginal peoples in Canada and, based on the facts in this case, the majority found there was no requirement under section 2(b) of the *Charter* to also extend an invitation and funding directly to the NWAC.

51. The majority also held that section 15(1) of the *Charter* was not violated, citing again the absence of evidence supporting the NWAC’s contention that the funded groups were male-dominated and advocated an anti-*Charter* point of view.

52. With respect to section 35, the majority held that the right “of the Aboriginal people of Canada to participate in constitutional discussions does not derive from any existing Aboriginal or treaty right” (*NWAC SCC*, at para. 79). Therefore, section 35(4), guaranteeing the Aboriginal and treaty rights referred to in section 35(1) equally to male and female persons was found to have no application in the case (*ibid.*).

53. Sopinka J. did not comment on the finding of the Federal Court of Appeal that Canada had an obligation to consult Aboriginal peoples on constitutional amendments as mandated under sections 37 and 37.1. Nor did the majority comment on the Federal Court of Appeal’s finding that the NWAC’s right to funding and participation in constitutional talks with Canada was a constitutional right under sections 37 and 37.1.

54. In a concurring judgment, Justice Claire L’Heureux-Dubé agreed with the majority but found that in certain circumstances “funding or consultation may be mandated by the Constitution by virtue of the fact that when the government does decide to facilitate the expression of views, it must do so in a manner that is mindful of the *Charter*” (*NWAC SCC*, at para. 88). However, she agreed that section 2(b) had not been breached by the government because she found that the NWAC was not prevented from expressing its views, even if it was underfunded and not allowed to participate in the formal constitutional talks.

55. Justice Beverley McLachlin (as she then was) held that the freedom of governments to choose and fund their advisors on matters of policy is not constrained by the *Charter* and characterized the discussions to which the AFN, the NCC, the MNC, and the ITC had been invited as mere “policy consultation” (*NWAC SCC*, at para. 91).

56. McLachlin and L’Heureux-Dubé JJ., like their colleagues, did not deal with sections 37 or 37.1 or with section 35.1 of the *Constitution Act, 1982*.

#### ***IV. Factual and Legislative Context***

57. All four of the questions on appeal require a consideration of the historical position of Aboriginal women in Canada, both before and after the passage of legislation by Canada and its pre-Confederation predecessors.

##### ***A. Traditional Roles of Aboriginal Women in Aboriginal Society***

58. The Women’s Court of Canada accepts arguments by the appellants that the historical position of Aboriginal women differed from that of their European counterparts in that women enjoyed an equal or egalitarian position in most Aboriginal societies with respect to property, economics, political, and civil rights. They provided evidence, which we accept, that, historically, Aboriginal women played a prominent enough role in Aboriginal life prior to European contact that they would have been consulted within their community on important affairs of state.

59. We agree with the appellants’ argument that, historically, Aboriginal women enjoyed an equal or egalitarian role in traditional Aboriginal societies, within the family, within traditional governments, and in spiritual ceremonies (see, for example, A.C. Hamilton and C. Murray Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, Volume 1 (Winnipeg: Province of Manitoba, 1991) at 475). Aboriginal women, children, medicine men, and warriors were consulted by their communities, and women “played a predominant role in the consensual decision-making process of their communities” (at 479).

60. The central role of Aboriginal women within their pre-contact societies is evidenced in oral history. “In Ojibway and Cree legends, it was a woman who came to Earth through a hole in the sky to care for the Earth” (Hamilton and Sinclair, at 476). The report of the Manitoba Justice Inquiry supports the view that “Aboriginal men and women were equal in power and each had autonomy within their personal lives” (*ibid.*). It states that Aboriginal teachings and oral traditions emphasize “the equality of man and woman and the balanced role of both in the continuation of life” (*ibid.*). Similarly, the Mi’kmaq Federation in Atlantic Canada recognized men and women as being equal and bound by a multitude of councils that began with the

family unit and extended to regions and to the national level (see James Youngblood Henderson, "First Nations' Legal Inheritance" (Winnipeg: University of Manitoba, Faculty of Law, Canadian Legal History Project, 1991). Aboriginal women had a predominant economic, political, and legal role enshrined in the Iroquoian Constitution (see NWAC, *Matriarchy and the Canadian Charter: A Discussion Paper* (Ottawa: NWAC, 1992) at 2). Descent and inheritance were transmitted through the female line, and women controlled property. Clan mothers were involved in appointing political leaders and could also have them removed (Warren Lowes, *Indian Giver: A Legacy of North American Native Peoples* (Toronto: Canadian Alliance in Solidarity with Native Peoples, 1985).

61. The appellants argued that "Aboriginal societies were egalitarian and based on matriarchal systems, which clashed with patriarchal systems of Europeans who claimed to have discovered this continent" (citing Thomas Isaac and Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right to Self-Government" (1992) 21 *Manitoba Law Journal* 453 at 454; see also Eleanor Leacock, "Women's Status in Egalitarian Society: Implications for Social Evolution" (1978) 19(2) *Current Anthropology* 247). This position is confirmed by the findings of the RCAP:

Many Aboriginal societies were more egalitarian before contact than they are today. Women had important roles in the social, economic and political life of their community. They were the wisdom-keepers. They selected chiefs. They taught their children about the nature and qualities of a leader. They were responsible for resolving internal disputes and healing their communities (*RCAP Final Report, supra*, Vol. 4, at 79).

62. The report of the AFN's First Nations Constitutional Circle, *To the Source*, agrees with this account of the historical position of Aboriginal women. It states:

[W]omen and men may have played different roles and had different responsibilities, as has been true in virtually all societies in human history, but unlike European women, Aboriginal women were viewed as equals, not inferiors (*To the Source*, at 59).

63. *To the Source* identifies the role of Canadian legislation and policy in constructing a view of Aboriginal women as subordinate, stating that the European view of women as subordinate to and owned by their men folk

infected the First Nations of Canada in three ways. These were the *Indian Act*, which tied women's identity and rights as Aboriginal people to those of their husbands; government policies that reinforced women's status as dependents; and the deliberate disruption of traditional life.

### B. Indian Act

64. The *Indian Act* was enacted under the federal government's jurisdiction over "Indians and lands reserved for Indians" in section 91(24) of the *Constitution Act, 1867*. It establishes a governance regime for the persons subject to it, known as "Indians." Those registered under the act as Indians are controlled in all aspects of their lives by the act, which deals with political structures, land tenure, property, economic life, residence, and a host of other matters. Many in Canada's settler communities had intermarried into the various Indian tribes of Canada, and their offspring were children of mixed heritage: European and Indian. With the establishment of Indian reserves through treaty processes in the 1700s and 1800s, it was necessary to determine which "Indians" such lands were established for, and this required a legal definition. While initially broad and including any person living within the Indian territories or any person living among the Indians, the government gave the term "Indian" an increasingly narrow definition to restrict the number of persons living on what became established Indian reserves and to promote the assimilation of Aboriginal people (Mary Eberts and Beverly K. Jacobs, "Matrimonial Property on Reserve," in Marylea Macdonald and Michelle K. Owen, eds., *On Building Solutions for Women's Equality* (Ottawa: Canadian Research Institute for the Advancement of Women, No. 15, 2004) at 17-21).

65. *An Act for the Gradual Enfranchisement of Indians (AGEI)*, S.C. 1869, c. 6, contained a number of features designed to hasten the assimilation of Aboriginal peoples, which would have a drastic and lasting negative effect on all of them but on women in particular. The first of these was the introduction of the rule that any Indian woman marrying other than an Indian would cease to be an Indian within the meaning of the act (at s. 6). The definition of "Indian" by the turn of the century came to mean any male Indian person and his male descendants. This was the class of "Indians" recognized in law for almost a century. Women early on in this history lost their Indian status or Indian recognition as soon as they married a non-Indian. Children of the marriage would not be recognized as Indians. This statutory exile of Indian women who "married out" and their children was in effect continuously for 116 years from 1869 to 1985, when Bill C-31, S.C. 1985, c.27, was passed and repealed the most recent version of the provision, section 12(1)(b) of the *Indian Act*, R.S.C.1970, c. I-5. By contrast, white women continued to receive Indian status when they married status Indian men, as they had done since the first status legislation in 1850 (see *An Act for the Better Protection of the Lands and*

*Property of Indians in Lower Canada*, S.C. 1850, 13 & 14 Vict., c. 42, s. 2). This entitlement did not end until 1985, 135 years after it had started.

66. The second relevant feature of the *AGEI* was the rule that an Indian woman marrying an Indian of another tribe or band would lose her own band membership and be assigned to that of her husband. Children of the marriage would be members of the husband's band as well. This provision also continued in effect for 116 years until 1985.

67. Given the statutory rule that no one but an Indian could enter upon or reside on reserve lands, these provisions that stripped women of their status and band membership upon marriage made it impossible for them to live with their own families and communities. The exile was permanent: a woman did not regain her Indian status or band membership if she was divorced or widowed.

68. Other features of the *AGEI* were also decidedly patriarchal in nature. The act provided that chiefs of the nations or bands living on reserve would be elected by male members of the band who had reached the age of twenty-one years (at s. 10). Subsequent legislation introducing the Band Council and requiring governance by Band Council rather than traditional chiefs preserved this all-male electorate. Women did not receive the vote in Band Council elections until 1951, eighty-two years later (*Indian Act*, S.C. 1951, c. 29). Off-reserve band members, a large proportion of whom are women, did not become eligible to vote in Band Council elections until 1999, with the decision of the Supreme Court of Canada in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

69. The *AGEI* also laid out the details of the "location ticket" system of allocating parcels of land on reserve, a system that would continue until replaced by the certificate of possession system established by the 1951 *Indian Act*. It is very clear that the *AGEI* envisioned that land holding would be by Indian males. The act provided that the number of "locations" on a reserve would ordinarily be determined with reference to the number of heads of families and "male members not being head of families" who had reached fourteen years of age (at s. 17).

70. The first *Indian Act*, S.C. 1876, c. 18, was passed in 1876, consolidating all of the statutory provisions relating to Indians and lands reserved for Indians. This consolidation added yet another significant patriarchal dimension to the land management scheme. Until 1876, surrenders of Indian lands could be made by the chief or chiefs, tribe, or band summoned for the purpose. The 1876 *Indian Act* provided that surrenders could be authorized by a majority of the male members of the band who had reached twenty-one years of age. Women band members would not regain a role in land surrenders until 1951, eighty-two years later (for an historical oversight on the definition of "Indian," see <[http://www.ainc-inac.gc.ca/qc/csi/hist1\\_e.pdf](http://www.ainc-inac.gc.ca/qc/csi/hist1_e.pdf)> accessed 2 July, 2007).

71. By 1876, then, the exclusion of Indian women from *Indian Act* band governance was complete, and the male preference in the land holding regime was clear. The *Indian Act* also provided that only male status Indians could pass on Indian status to their children. A woman could not confer status on a child unless that child was born out of wedlock, and no one established his or her non-Indian paternity. Transmission of Indian status only through the male line was the statutory norm until 1985. To all intents and purposes, the status Indian woman was legally a non-person, made so by the *Indian Act*.

72. The Canadian government promoted the destruction of Aboriginal practices of family formation, governance, and land holding and use through the *Indian Act* but this was not the only policy instrument for accomplishing the dissolution and assimilation of Aboriginal societies. Forcible education of Aboriginal people in residential schools tore them as children from family and community and strove to inculcate them with disrespect and shame towards their own languages, cultures, and religious practices. These measures were deliberately aimed at destroying the social, political, and cultural power of women. To quote *RCAP Final Report supra, Vol. 1: Looking Forward Looking Back*, Part 2.10, at 61,

[p]erhaps the most appropriate term to describe that impact is “displacement.” Aboriginal peoples were displaced physically—they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools—which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.

### *C. Continuing Statutory Discrimination against Aboriginal Women*

73. The patriarchal and male-dominated *Indian Act* continues to influence the structure and activities of bands operating under the act. Amendments made in 1985 by Bill C-31, *supra*, to address the exclusion of Indian women who married out did not root out this patriarchal structure. They remedied the immediate effects on the women and their children but left the women’s

grandchildren and subsequent generations excluded and disenfranchised. Section 6(2) of the *Indian Act*, enacted by Bill C-31, provides that children of a person with one status Indian parent and one status Indian grandparent cannot have status. This provision, known as the “second generation cutoff,” disproportionately affects the children and grandchildren of women restored to status by Bill C-31. The people reinstated to status by the 1985 amendments are an underclass of band society, often denied the same rights and benefits as those whose status derives through the male line.

74. Discrimination against Indian women within bands and reserve communities is openly acknowledged. *To the Source* states that “women who have been raped, beaten, sexually harassed, overlooked, excluded, ignored or otherwise oppressed by Aboriginal men are hardly eager to trust the men to look after their interests” (*supra*, at 61). Yet, the political reality of the *Indian Act* bands, and the national organization founded upon them (the AFN), is that power is effectively concentrated in male hands.

75. Aboriginal women lack effective means of calling to account Band Councils that discriminate against them. When the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, was passed in 1977, section 67 was included as a temporary measure to prevent women from using the act to challenge Band Councils’ actions. It provides that “nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that *Act*.” This “temporary” measure still remains in place in 2006, a state of affairs critiqued by the Canadian Human Rights Commission (CHRC) (*A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act* (Ottawa: CHRC, 2005); see also NWAC, “Aboriginal Rights are Human Rights,” <<http://www.justice.gc.ca/chra/en/eberts.html>> accessed 2 July, 2007).

76. In our view, this history of exclusion from the activities of governance and most civil rights within the Aboriginal communities established by the *Indian Act* explains why the NWAC has taken such a strong position that the *Charter* must apply to Aboriginal self-government. It also explains the NWAC’s argument that Aboriginal women’s own representatives must be at the constitutional tables to ensure that this happens and that other constitutional provisions are included to reinstate the equality of women in Aboriginal self-governing societies. As Gail Stacey-Moore stated in her affidavit in these proceedings, in a passage quoted by the Federal Court of Appeal:

NWAC wants an equal chance to influence public debate, and to safeguard the destiny of its members, and other Aboriginal Women of Canada. It believes that a collectivity cannot be strong if over one-half of that collectivity is without rights and without a voice

(NWAC FCA, at para. 9, citing para. 92 of the affidavit).

77. Even though its report, *To the Source, supra*, agrees that the historical equality of Aboriginal women has largely been lost within contemporary Aboriginal societies, the AFN does not endorse the application of the *Charter* to self-government. The AFN takes the position that the rights guaranteed in the *Charter* are individualistic, reflecting European liberal philosophy, and therefore inimical to the traditional communitarian values and organization of Aboriginal society. This position would continue the vulnerable and dispossessed state of Aboriginal women and deprive them of any of the potential benefits of exchanging self-government for the state-imposed patriarchal governments of the *Indian Act*.

*D. Survival of Aboriginal Women's Civil and Political Rights—Section 35 of the Constitution Act, 1982*

78. The NWAC argued that Aboriginal “women continue to be of the view that their traditional civil and political roles, rights and responsibilities have survived” today. They are among the “existing Aboriginal rights” entrenched within section 35 of the *Constitution Act, 1982* (see NWAC, *Native Women and the Constitution*, 17 volumes (Ottawa: NWAC, 1992)). The RCAP agreed with this position, as does this court. The *RCAP Final Report, supra*, states that it is “inconceivable” that Aboriginal women’s civil, political, and property rights would not be included in the Aboriginal rights recognized and affirmed in section 35 of the Constitution. It observes:

Although women’s ability to exercise their rights was subject to extensive regulation under the *Indian Act*, there is no convincing argument that these rights were extinguished before 1982. They were therefore “existing” Aboriginal rights within the meaning of *Sparrow* and protected by the equality guarantee . . . in s. 35(4) (Vol. 3, *Gathering Strength*, at 94).

79. The RCAP articulated its expectation that Aboriginal nations will “give full effect and recognition to these rights by according Aboriginal women equal participation in designing and implementing Aboriginal self-governing structures and in creating Aboriginal law and policy” (*RCAP Final Report*, Vol. 3, at 94). Indeed, the RCAP states in its final report that “Aboriginal women’s participation in developing self-government is absolutely critical” (Vol. 4, at 82). The RCAP recommended that the government of

Canada provide funding to Aboriginal women's organizations, including urban-based groups, to facilitate their participation in all stages of discussion leading to the design and development of self-government processes, and to enable them to participate fully in all aspects of nation-building, including developing criteria for citizenship and related appeal processes (Vol. 4, at 53).

### *E. No Legal Disability of Aboriginal Women in Canada*

80. The NWAC argued that because of their prominent, equal, and egalitarian role in Aboriginal societies pre-contact, women would have directed or been consulted on important community decisions. The NWAC argued that the legal disability of Aboriginal women began with the imposition of English common law and civil law and that it significantly altered their way of life in all respects. It led to women's displacement in their traditionally equal role in politics, government, economics, and domestic relations. All of this was accomplished under section 91(24) of the *Constitution Act, 1867* and through successive *Indian Acts* legislated by the federal Parliament since 1869.

81. The Women's Court of Canada accepts these arguments. We find that any legal disability of Aboriginal women was introduced into their society by Canadian law and not historic Aboriginal practice. Since 1869, the government has put in place laws that have ensured the legal disability of Aboriginal women, who have been forced upon intermarriage to leave their communities once they marry a non-Aboriginal man. The dismantling of sex equality within Aboriginal communities has been a concerted effort by the settler governments to disrupt and dissipate the Aboriginal social and political structure. The role of Aboriginal women in their governments has been eviscerated by Canadian law in the form of the *Indian Act* depriving women of their right to vote, their right to hold land, and their Indian status and identity.

82. The alteration of the historical egalitarian role of women in Aboriginal societies to one of subservience and the total displacement of their political role as well as their right to remain "Aboriginal" or "Indian" in law does not in itself erase their rights. It is a principle of law that such rights must be specifically abolished in law. While all Aboriginal societies may not have accorded women the same rights in each society in which they lived, it is clear in Canadian constitutional law that all Aboriginal women enjoy Aboriginal and treaty rights equally with Aboriginal men and enjoy sexual equality to the same extent as women in Canadian society. The modern context of this equality principle as it applies to Aboriginal women is important in defining self-government rights in the Constitution and modern treaties. Section 35(4) imposes on this process the constitutionalized equality rights of women, meaning sex equality is guaranteed to women when the inherent

right to self-government is recognized and defined. Sex equality is already part of the definition of the inherent right to self-government under section 35(4). Section 15 of the *Charter* guarantees to Aboriginal women the right to be accorded equal rights with other Canadian women in every legal and political context including, for example, the right to matrimonial property.

### F. Conclusion

83. The review of the historical and contemporary position of Aboriginal women's rights establishes several principles of importance to the analysis of the questions before this court. Aboriginal women's historical position was generally one of equality and full rights and participation within their traditional societies. This role was taken from them, not by their own peoples, but by settler society, and their subordinate role in *Indian Act* communities was constructed by the legislation of Canada. Aboriginal women's rights to full and equal participation in the life of their communities is thus protected by section 35 of the *Constitution Act, 1982* by reason of both sections 35(1) and (4). Although section 35 does not itself directly give Aboriginal women the right to participate in constitutional discussions, it establishes that Aboriginal women have fundamental rights to engage in the governance of their societies on an equal basis with Aboriginal men. These rights have a significant bearing on the interpretation of the question posed at this level about section 35.1 of the *Constitution Act, 1982* as well as on the issues raised by the NWAC under sections 2(b), 15, and 28 of the *Charter*.

84. The Constitution must be interpreted in a way that will allow Aboriginal women to protect and advance their rights under section 35. It would be unacceptable if women's exclusion from constitutional discussions were to mean that subordination visited upon them by the Canadian state after contact was to be perpetuated under self-government, which is meant to restore to Aboriginal peoples the autonomy and dignity that was taken from them by the settlement of Canada.

85. The long history of profound structural inequality visited upon Aboriginal women by the Canadian state is, in our view, sufficient support for the NWAC's right to be present at the constitutional discussions. The NWAC and other women's organizations need not demonstrate on the facts of each particular case the negative proposition that male-dominated groups do not represent their interests, although we agree that in this case they have done so. There is no constitutional norm that men or male-dominated organizations must represent women unless women can show why, in a specific instance, this would deny their equality. Rather, this court finds that the constitutional norm is that women shall be entitled to speak for themselves. Only through such

speech can Aboriginal women rebuild and reclaim their recognized position of equality in Aboriginal societies and promote their equality within Canada.

### *V. Analysis*

86. Before turning to the first question, we wish to comment on two findings from the Federal Court and Supreme Court of Canada. First, the Federal Court of Appeal based its decision in part on sections 37 and 37.1 of the *Constitution Act, 1982*. While we agree with the proposition that Aboriginal peoples have a specific right to participate in constitutional discussions conferred by the Constitution itself, we note that sections 37 and 37.1 were spent and had been repealed by the time the *Charlottetown Accord* discussions at issue in this case began. Thus, we are dealing in this appeal primarily with the general rights to consultation before constitutional amendment that are conferred on Aboriginal peoples by section 35.1 of the *Constitution Act, 1982*. This was, in part, the basis for the addition of the first question before this court. Our analysis of section 35.1, nevertheless, has implications for the meetings held pursuant to sections 37 and 37.1.

87. Second, we disagree with the Supreme Court of Canada to the extent that its decision implies that Aboriginal women's representative organizations need more stringent evidence to support their *bona fide* status than that required of Aboriginal men's organizations. The requirement that Aboriginal women's representative organizations need to substantiate whom they represent with more than evidence of "good standing" in the corporate sense will over-burden these organizations in the future. In effect, governments will rob them of their voice over and over again if the Supreme Court of Canada decision is allowed to stand. Canada did not demand of the other four national Aboriginal organizations that they produce membership lists prior to their approval for participation in the mandated constitutional conferences. It should not have used a double standard with women's organizations.

88. The Women's Court of Canada agrees with the Federal Court of Appeal that the evidence establishes that the NWAC is a grassroots organization founded and led by Aboriginal women. Among its objectives is to be a national voice for native women, to advance their issues and concerns, and to assist and promote common goals towards native self-determination. Ample evidence was provided, including published reports, position papers, and appearances before judicial inquiries and parliamentary committees, to support the Court of Appeal finding that "NWAC is a bona fide, established and recognized national voice of and for Aboriginal women" (*NWAC FCA*, at para. 3).

*A. Section 35.1: Legal Analysis of the Term “Representatives”*

89. We turn now to consideration of question 1, which addresses the provisions of section 35.1 of the *Constitution Act, 1982*. Section 35.1 provides that the governments of Canada and the provinces are committed to the principle that before any amendment is made to section 91(24) of the *Constitution Act, 1867* the prime minister of Canada will convene a first ministers’ meeting and invite “representatives of the Aboriginal peoples of Canada to participate in the discussions” on the proposed change.

90. The term “representatives” is not defined in the *Constitution Act, 1982* or in other constitutional instruments. However, its use does not occur in a constitutional vacuum. Canada is a representative democracy, and, thus, the very political character of Canada will shape and inform the meaning of “representatives” used in section 35.1.

91. The provisions of section 35.1 do not establish an electoral system or even explicitly reflect or invoke the electoral dimension of Canada’s representative democracy. However, in interpreting the language of the Constitution, we must strive for a meaning that is consistent with the most basic elements of Canada’s constitutional democracy.

92. The role of representation in parliamentary democracy is clearly delineated in the final report of the Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy* (Ottawa: Minister of Supply and Services Canada, 1991). In volume 1 of this report, the commission states:

Representation is fundamental to the concept of Parliamentary democracy. In one sense, representation in governance identifies those represented, designates representatives and legitimizes institutional processes for securing agreements and resolving conflicts. In another and more fundamental sense, *representative governance incorporates a society’s definition of itself as a political community*. Distinctions about who has a legitimate claim to political power are established in elections. In the process, a society pronounces whether it is open or closed to the claims of its citizens to stand as candidates for electoral office, regardless of their sex, ethno-cultural heritage or financial resources. In this respect, a society is explicitly representing itself. In so doing, it reveals a great deal about its political culture and values [emphasis added] (at 8).

93. In deciding which groups it would recognize as the “representatives” of Aboriginal peoples for constitutional purposes, the government of Canada is not only defining itself as a political community. It is also expressing what sort of political community it is prepared to recognize and acknowledge for self-governing Aboriginal peoples. According to the process used by Canada to identify and include representatives of Aboriginal peoples in the constitutional discussions, it is the government who validates and authenticates the ability of a group or groups to speak for Aboriginal communities of interest. In the circumstances of this case, it did so in a way that reflects the worst elements of Western political traditions, elements that have been condemned for excluding women from having a political voice. To our minds, this is an inauspicious beginning for a process that is aimed at developing the basic constitutional principles of Aboriginal self-government.

94. In choosing to recognize only four, male-dominated groups to represent Aboriginal peoples in these discussions, the government announced that it is, in fact, closed to the aspirations of Aboriginal women for autonomy and self-expression in the constitutional process and, inevitably, in the self-governing entities that emerge from this process. In saying that Aboriginal women must win the approval of the male-dominated organizations for their points of view before those proposals can be brought to the constitutional table, the government suggested that Aboriginal women should continue to be subordinate to men. The evidence before this court, which was also before the Supreme Court of Canada, indicates quite clearly that the few women representatives from the NWAC who managed to insert themselves into the processes of the AFN had no realistic chance to have their perspectives adopted and taken by the AFN to the discussions with Canada.

95. Not only was the numerical and financial disparity between the NWAC and the AFN a strong indicator that the women’s perspective had no chance of reaching the discussion table. Over 150 years of legal non-personhood for Aboriginal women, created by the *Indian Act* and government practices, had created a culture inside and outside the Aboriginal communities in which women’s views and women’s voices counted for little or nothing. Not only white authorities, but the Aboriginal political leadership created and recognized by the government in its own image, were prepared to undervalue the contribution of Aboriginal women, even while acknowledging that in traditional Aboriginal societies, women had an equal position and played strong leadership roles.

96. The model of representativeness being imposed on Aboriginal women by the government’s exclusion of the NWAC from the constitutional discussions was the traditional European model of men being the only authorized representatives of women. Rooted in legal and social traditions that once completely submerged a woman’s identity into that of

her husband and father, these traditional European political institutions provide an unacceptable model for an inclusive constitutional democracy in the late twentieth and twenty-first centuries.

97. In *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), the landmark “*Persons case*,” five Canadian women argued that the word “persons” in section 24 of the *Constitution Act, 1867* should be interpreted to permit women to be summoned to sit in the Senate of Canada. This case was one of a series of decisions dating from the nineteenth century in which women in Canada, the United States, and the United Kingdom challenged the exclusion of women from public office by reason of their gender.

98. The Supreme Court of Canada decided that the term “qualified” modifying “persons” in section 24 imported into contemporary Canadian constitutional law a long tradition of excluding women from public life (*Reference as to the Meaning of the Word “Persons” in Section 24 of the British North American Act, 1867*, [1928] S.C.R. 276 at 281, 287, and 290). On appeal to the Judicial Committee of the Privy Council, this decision was reversed. Lord John Sankey stated

that the Constitution must be viewed as a “living tree, capable of growth and expansion within its natural limits” (at 136) to meet the circumstances of an evolving society, and he refused to allow ancient restrictions on women to circumscribe their ability to serve in the Senate.

99. The Supreme Court of Canada has, quite properly, held that the *Charter* is grafted onto the “living tree” that is the Canadian Constitution (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155-6; *Reference re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 509; see also *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 180, where the Supreme Court held that “[t]hat tree is rooted in past and present institutions, but must be capable of growth to meet the future”).

100. Application of this principle to the interpretation of “representatives” in section 35.1 of the *Constitution Act, 1982* requires that contemporary values should guide its construction. Such values include not only the changed social expectations about the role of women in European “settler” society and democratic traditions but also the clear gender equality values enunciated in sections 15 and 28 of the *Charter* and section 35(4) of the *Constitution Act, 1982*, and in the international instruments to which Canada is a signatory, including the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3; the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407; the *Convention on the Elimination of All Forms of Discrimination against Women* 18 December 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33; and the *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination*

against Women, 6 October 1999, Doc. A/RES/54/4. These values illuminate the fact that the model of representation imposed on Aboriginal women by the government of Canada is outmoded even by the standards of the European political and social traditions on which it is based.

101. The Royal Commission on Electoral Reform and Party Financing was highly critical of the exclusion of women from the Canadian political process. It states in volume 1 of its report that the “virtual exclusion” of women from the corridors of political power is no longer acceptable. The commission continues: “It is not merely a matter of political symbolism; elected representatives will not and cannot effectively represent the full range of Canada’s interests if they do not reasonably reflect its society” (*Reforming Electoral Democracy*, *supra*, at 8). The report documents that women are the most politically underrepresented segment of Canadian society (at 94).

102. A study undertaken for the commission by political scientist Janine Brodie describes the under-representation of women in liberal democratic politics, on the levels of form and substance. Under-representation in form (exclusion from participation and control in public affairs), leads to under-representation in substance (absence from the public agenda of values and issues of significance to women) (see Janine Brodie (with the assistance of Ceilia Chandler), “Women and the Electoral Process in Canada,” in Kathy Megyery, ed., *Women in Canadian Politics: Toward Equity in Representation, Volume 6: Research Studies of the Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991) at 47). The record in this case demonstrates the justifiable concern of Aboriginal women that their exclusion in form from the constitutional discussions will mean that their issues and values will not be at the table in substance.

103. The Supreme Court of Canada considered the nature of Canada’s representative democracy in *Reference re Provincial Electoral Boundaries (Saskatchewan)*, *supra*. The cardinal issue on the *Reference* was whether the principle of voter parity (one person, one vote) or the principle of effective representation should guide the construction of electoral districts in light of the guarantee of democratic rights in section 3 of the *Charter*. The majority of the court identified effective representation as the appropriate grounding principle. Justice Beverley McLachlin, speaking for the majority, noted that Canada is a representative democracy, and that representation “comprehends the idea of having a voice in the deliberations of government” (at 183). She stated that “[f]actors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic” (at 184). McLachlin J. specifically grounded the majority’s interpretation of the requirements of section 3 of the *Charter* on the “living tree” doctrine (at 180 and 187) and referred to her own prior observation in *Dixon v. B.C. (A.G.)*, [1989] 4 W.W.R. 393 at 409 (B.C.S.C.), that Canada’s tradition is one of

evolutionary democracy, moving in uneven steps towards the goal of universal suffrage and more effective representation (at 186). According to McLachlin J.:

In the final analysis, the values and principles animating a free and democratic society are arguably best served by a definition that places effective representation at the heart of the right to vote. The concerns which Dickson C.J. in *Oakes* associated with a free and democratic society—respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society—are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity. Respect for individual dignity and social equality mandate that citizen's votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated (at 188).

104. We agree with the Supreme Court of Canada's decision in *Reference re Electoral Boundaries* to align the principle of effective representation in the electoral system with the concept of substantive equality and avoid a strictly formalistic approach. Although the Supreme Court of Canada's decision in this case was decided within the framework of section 3 of the *Charter*, conferring the right to vote, in our view this approach should also inform interpretation of the term "representatives" used in section 35.1 of the *Constitution Act, 1982, supra*.

105. Interpreting the term "representatives" in section 35.1 in accordance with the Supreme Court of Canada's own views on the nature and foundations of representativeness in Canadian political democracy compels recognition that "representatives" of women should have been included in the constitutional discussions.

106. The Supreme Court of Canada's reasoning in the *Reference re Electoral Boundaries* also strongly suggests that such representatives should be willing and able actually to represent the interests of women. Simply appointing an organization as a representative, regardless of its record and current position on the interests of the community it is meant to represent, does not satisfy the constitutional imperative for representativeness. As the Supreme Court of Canada has also ruled, albeit in the context of class actions, the Court should be satisfied that a proposed representative "will vigorously

and capably pursue the interests of the class” (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41).

107. As noted earlier, the evidence in this case clearly establishes the NWAC as a *bona fide* and committed representative of Aboriginal women, as recognized by the Federal Court of Appeal. The record also demonstrates that no group among the four chosen by the government had a willingness to represent the interests of Aboriginal women. Indeed, the AFN, in particular, had historically taken a position opposed to one of the core aspirations of the NWAC, namely parity with men in matters of status and citizenship. Because of its own role in opposing, and eventually granting only in part, Aboriginal women’s desire for equality in status matters under the *Indian Act* the government knew very well that the position of the AFN and its predecessor the NIB had been opposed to the women’s desire for “Indian rights for Indian women.”

108. The decision by the Supreme Court of Canada to refuse the NWAC’s claim to represent the interests of Aboriginal women was based, in part, on its holding that the NWAC had not established who its constituents were. We do not agree. The NWAC, like each of the recognized groups, identified its constituency and had a long record of advocating on its behalf. It has a system of attracting board members from each region of the country and of ensuring representation from elders and youth. The evidence shows that the organizational structure of the NWAC was developed from the philosophy that the basis of the movement is the community. The women at the grassroots were seen as being the heart and strength of the association. They were represented by their locals or chapters, aggregated into the provincial/territorial member associations (PTMAs), which, in turn, formed the national association. As stated by the NWAC in its own organizational history, “the women in the community were the centre of the movement, and provided direction that flowed outwards” (NWAC, *A Voice of Many Nations* (Ottawa: NWAC, 1985) at 3). In philosophy and structure, this organization is representational.

109. The Supreme Court of Canada did not ask the recognized groups to establish the legitimacy of their representativeness or to show that there was no dissent among their identified constituencies about whether the groups spoke for all those they claimed to represent. With the exception of the AFN, the method of organization and board member selection of the other groups are not appreciably different from those of the NWAC. The AFN is the only one of the four groups that is, in any way, based on a statute-based form of election, namely that established to elect Band Councils and chiefs under the *Indian Act*. This system excluded women totally until 1951, and, until the decision in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, off-reserve band members were totally excluded from voting in Band Council elections. In spite of these well-documented problems with the representativeness of the Band Councils, and thus any

organization based on this structure, and the actual evidence of very low numbers of women chiefs in the AFN, the Supreme Court of Canada did not raise any question of the representativeness of the AFN.

110. It is to be remembered that the meetings under section 35.1 of the *Constitution Act, 1982* were between elected governments in Canada and the non-governmental representatives of Aboriginal people. Among non-governmental representatives, it is to be expected that there will be a variety of forms of organization and selection. Where a group, like the NWAC, has a long record of effective advocacy on behalf of the constituency it claims as its own, and an organizational structure that ensures input from various regions and sub-groups in this constituency, we consider that sufficient for it to be acknowledged and included. The concerns expressed about the representativeness of the NWAC seem, to this court, simply to mask the real concerns of both the government of Canada and the Supreme Court of Canada—that the NWAC is an all-woman group in which women claim to speak for women. This unacknowledged concern may be based on bias or it may be an example of unwitting discrimination, but either way it has the effect of denying voice to Aboriginal women and is no reason to disqualify the NWAC as their representative.

111. The Women's Court of Canada has come to the conclusion that the term "Aboriginal representatives" in section 35.1 of the *Constitution Act, 1982* includes members of both the female and male sexes. Therefore, the question propounded by the appellants should be answered in the affirmative. Women are to be included in the "Aboriginal representatives" to be invited by the prime minister to first ministers meetings on constitutional reform and definition. Such women may be represented by their own national representative organizations, representing Indian, Métis, and Inuit women of Canada. We find that the failure to include Aboriginal women's representative organizations in the constitutional talks is a breach of the *Constitution Act, 1982*.

### *B. Freedom of Expression under Sections 2(b) and 28 of the Charter*

112. Like the Supreme Court of Canada, this court considers that the activity of making one's views on the Constitution known to government is within the sphere of expressive activity protected by section 2(b) of the *Charter*. Unlike the Supreme Court of Canada, we consider that the actions of the government in giving funding and a preferential position at the Canada Round to four male-dominated Aboriginal groups and excluding the NWAC from funding and a direct role in these talks to be in violation of the guarantee in section 2(b), particularly in light of the proviso in section 28 that the rights and

freedoms in the *Charter* are to be available on an equal basis to women and men.

113. The appellants contend that the guarantee of freedom of expression, as inflected by section 28 of the *Charter* gives women an equal right with men to speak for themselves. They adopt the words of Nelle Morton in *Journey Is Home* (Boston: Beacon Press, 1985) as quoted by a Nova Scotia Human Rights Tribunal in *Keyes v. Pandora Publishing Ltd.*, [1992] N.S.H.R.B.I.D. No. 1 at para. 25:

[W]omen cannot become powerful or expressive by being spoken to, by being spoken for, or, especially, by being spoken about. It is by being heard that women become empowered.

114. We agree with this argument. In the context of political representation under consideration by this court, Aboriginal women's equal right to speak requires that they be able to speak for themselves on an equal basis with Aboriginal men and not be compelled to speak through men or bargain with those men, from a position of unequal power, for the expression of their concerns.

115. A fundamental flaw in the decision of the Supreme Court of Canada is its failure to recognize and give effect to the distinction between participation in constitutional talks, on the one hand, and, on the other hand, participation in the general processes of public consultation set in motion by the government of Canada in 1991. The NWAC and the four preferred groups were all participants in the public consultations. However, only the four preferred groups had direct access to the parallel process of constitutional discussions created by the government. Only those four groups were given direct access to the process of constitutional amendment that is guaranteed by section 35.1.

116. Similarly, it is an error of law to conclude, as did McLachlin J., that the government was merely choosing policy advisors when it invited the four Aboriginal groups to take part in the Aboriginal Constitutional Review Program. While it may be open to governments to choose policy advisors without review by the courts, the government was doing far more than this when it seated these four groups at the table for the Canada Round. It was selecting them to exercise the rights of Aboriginal peoples in section 35.1 to have representatives at the constitutional talks. It was confirming their identity and role as constitutional actors, not mere policy advisors. In so doing, the government was subject to the requirements of the Constitution itself.

117. The actions of the government limited the NWAC, and thus Aboriginal women, to the same role in the constitutional talks as all other Canadians, while recognizing the entitlement of only four groups to the enriched rights offered to Aboriginal peoples by section 35.1. These governmental actions prevented the NWAC from making the same meaningful and authoritative contributions on the Constitution that the four preferred groups were making. In qualitative terms, the government's behaviour was a barrier to the NWAC's effective speech on the Constitution. Given the NWAC's position on the application of the *Charter* this was effectively a content-based restriction and, thus, a violation of section 2(b) in combination with section 28 of the *Charter* (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927).

### *C. Equality Rights under Section 15 of the Charter*

118. Section 15 of the *Charter* provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

119. In *Lovelace v. Ontario*, [2002] 1 S.C.R. 950, the Supreme Court of Canada determined that government action taken pursuant to a statute may be scrutinized under section 15, as it is within the meaning of "law" used in section 15(1).

120. The interpretation of section 35.1 adopted by this court has taken into account the values expressed in section 15. What we now consider is whether the NWAC and the individual applicants have made out a violation of section 15 in its own right, arising from the refusal of the government of Canada to permit the NWAC to represent women's interests in the constitutional discussions. Such refusal, being action taken pursuant to a provision of the *Constitution Act, 1982*, is subject to review under section 15.

121. We find that the government's actions in denying the NWAC a seat at the constitutional discussions fail the test of substantive equality. The government treated Aboriginal women differently from Aboriginal men in the constitutional discussions. Aboriginal men were represented in the discussions by men, through the agency of the male-dominated organizations recognized by the government. They were also accorded the ability to speak on behalf of women. Women, on the other hand, were not given the ability to be represented at the constitutional talks by women. They could only be represented by men, again through the agency of the male-dominated organizations recognized by the government. The structure of representation arranged by the government also means that men's representatives had the right to speak directly to the government representatives gathered at the constitutional meetings. On the other hand, women's representatives were able to speak only to the male organizations and not directly to governments; they had to convince the male-dominated organizations to carry their concerns forward and express them to the government representatives at the constitutional talks.

122. It is an inescapable conclusion that this distinction was made on the basis of gender. It reflected the historical preference within Western democracies of having men represent the concerns of all "people." This preference was imposed by the government of Canada on Aboriginal peoples through the *Indian Act* and other government policy and resulted in the long denial to Aboriginal women of any political or civil rights within their *Indian Act* communities, a denial that paralleled the denial (until 1960) to all Indians, except those enfranchised individuals who had lost status under the *Indian Act*, of the right to vote. The refusal to recognize the NWAC as a representative of Aboriginal women's concerns carries this historical nullification of Aboriginal women forward into the new era of Aboriginal constitutionalism.

123. In *Law v. Canada (Minister of Employment and Immigration)*, [1991] 1 S.C.R. 497, Justice Frank Iacobucci elaborated an intricate set of contextual factors that the Supreme Court of Canada considers in its analysis as to whether distinctions on prohibited (or analogous) grounds amount to wrongful discrimination. These factors are (1) pre-existing disadvantage, vulnerability, stereotyping, and prejudice; (2) the relationship between the basis of the differential treatment and the claimant's characteristics and circumstances; (3) any ameliorative purpose served by the distinction; and (4) the nature of the affected interest. This court does not wish to adopt the approach to section 15 of the Supreme Court of Canada, which since the *Law* decision has demonstrated a predisposition to approve any government action it considers "reasonable" on a pragmatic calculus, regardless of the equality-denying impact of that action on the disadvantaged who are meant to benefit from section 15. Yet it is undeniable that the NWAC has in this

case demonstrated a wrongful denial of equality, even on the government-positive standards of the Supreme Court of Canada.

124. There is no doubt that all Aboriginal people within Canada have endured a long and painful record of disadvantage, vulnerability, stereotyping, and prejudice. The Supreme Court of Canada recognized as much in the *Lovelace* case, *supra*. Aboriginal women, as found by the Federal Court of Appeal, are a profoundly disadvantaged group within this larger disadvantaged group. The legal nullification of Aboriginal women's civil and political rights for over a hundred years after contact was not visited to the same degree upon Aboriginal men. While oppressing Aboriginal men, the Canadian state created through the *Indian Act* a position of dominance for them over Aboriginal women, establishing an invidious hierarchy foreign to traditional Aboriginal societies. While the result of Canada's laws and policies was the disadvantaging of all Aboriginal peoples, Aboriginal women have borne an additional burden as a result of their subordination at law to Aboriginal men under the *Indian Act*.

125. The choice of the government of Canada to require representation of women by male-dominated organizations at the constitutional discussions is not explained by any relationship between that measure and the situation of Aboriginal women. Aboriginal women are not under any incapacity that requires them to be under the tutelage of Aboriginal men. Aboriginal women are fully able to speak for themselves and, indeed, have concerns particular to them arising from the long record of unequal treatment to which they have been subjected under the *Indian Act*, *supra*. The actual situation of Aboriginal women, in fact, requires that they speak for themselves and not through a state-imposed proxy.

126. The overall purpose of section 35.1 is, in a broad sense, ameliorative. It is intended to further the self-government and other constitutional negotiations that had proceeded inconclusively before the patriation of the Constitution in 1982. However, this positive and constructive purpose does not explain or excuse Aboriginal women's exclusion from the constitutional table. In addition to their common interests with Aboriginal men, women had been pursuing before 1982 interests particular to them arising from their position under the *Indian Act*. Specifically, the pursuit of Indian rights for Indian women was part of Aboriginal women's constitutional brief, pursued through the courts, at the United Nations, and also, to the extent possible, in the preceding constitutional discussions. The full ameliorative purpose of section 35.1 would only be served by allowing Aboriginal women's representation at the table, not by excluding it.

127. The nature of the interest at stake in this case is fundamental. Courts have long recognized political rights as being among the most serious and important because political participation is essential to the full realization of many of the other fundamental values in Canadian society. At stake here is

nothing less than the right to be present at the founding discussions for the future governance of one's own community. What is done, and not done, in constitution making will affect the structure of the governments under which Aboriginal people will live in the future; Aboriginal women, equally with Aboriginal men, will be affected. Aboriginal children, for whom the women have traditionally accepted special responsibilities, will be profoundly affected. To exclude women from the legal foundation of their communities repeats, for them, the experience of colonialism, in which only governments decreed how Aboriginal communities would be organized.

128. The preamble to the *Charter* states that Canada is founded upon the rule of law. Both sections 15 and 28 of the *Charter* guarantee to women the equal benefit and protection of the rule of law. Being effectively represented at the constitutional discussions to establish the order of government within which one will live in the future is absolutely essential if this equal access to the rule of law is to be secured. The individual dignity and worth of each human being is closely linked to the ability to take an active and autonomous part in the governance of one's community. To be told that one can play no real role in determining the fundamental constitutional framework of one's community does not just diminish human dignity, it negates it altogether.

129. It was suggested in argument that the NWAC's single gender composition was itself contrary to section 15 and provided a total answer to the appellants' claim under this section. According to this argument, as an organization that itself excludes and discriminates against men, the NWAC could not benefit from the protection of section 15 of the *Charter*.

130. This contention overlooks the role of section 15(2) in the analysis of the section. We agree with the Supreme Court of Canada's ruling in *Lovelace* that section 15(2) is not simply a defence to a finding of wrongful discrimination made in an analysis under section 15(1). Rather, the provisions of section 15(2) inform and illuminate the whole of section 15, making it clear that the purpose of section 15 is to resist and remedy disadvantage. Section 15(2) also undergirds the principle, which is fundamental to section 15 analyses, that the same treatment does not necessarily produce equality. Sometimes different treatment is required in order to ensure true equality (see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164, quoted in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624).

131. The Royal Commission on Electoral Reform and Party Financing recognized the relevance of this principle to the under-representation of women in Canada's electoral democracy, stating that many countries now adhere to the principle that it may be necessary to treat some groups differently to achieve a greater measure of political equality (*Reforming Electoral Democracy, supra*, at 113). It pointed out that section 15 of the *Charter* provides for the possibility of special measures to address problems of systemic discrimination and that the Supreme Court of Canada has approved

employment equity remedies to redress historical inequities resulting from systemic discrimination (at 114).

132. The Royal Commission on Electoral Reform and Party Financing identified two sources for what it called “Canada’s obligation to pursue political equality” (*Reforming Electoral Democracy, supra*, at 113-14), namely the *Charter* and Canada’s international obligations. It pointed out that Canada became a signatory on 19 August 1976 to the *International Covenant on Civil and Political Rights, supra*, Article 3 of which provides that the states parties “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” On 9 January 1982, Canada adhered to the *Convention on the Elimination of All Forms of Discrimination Against Women, supra*. Article 7 of this convention requires the states parties to “take all appropriate measures to eliminate discrimination against women in the political and public life of the country” and to ensure the rights, on equal terms with men, to participate in the formulation and implementation of government policy and to perform all public functions at all levels of government.

133. Inviting the NWAC’s participation as a representative of Aboriginal women is exactly the sort of positive measure that will promote the equality of a historically disadvantaged group. It ensures that women have the dominant voice in fashioning the position that the NWAC brings to the table and that their concerns will not have to be negotiated from a minority position within an organization that historically has been unsympathetic to them. Inviting the NWAC to participate provides substantive equality for Aboriginal women, by recognizing their particular interests and experience, including over a century of systemic discrimination against them by the government of Canada. In the *Reference re Electoral Boundaries* case, *supra*, the Supreme Court of Canada emphasized the need to find substantive effectiveness for the vote rather than formal mathematical parity among voters. Recognizing the NWAC’s right to represent Aboriginal women in talks convened pursuant to section 35.1 is entirely consistent with this emphasis on substantive equality and representativeness. For all of these reasons, this court rules that Canada’s exclusion of the NWAC from the constitutional talks is a violation of section 15 of the *Charter*.

#### D. Section 35(4)

134. The Federal Court of Appeal and the Supreme Court of Canada both held that section 35(4) of the *Constitution Act, 1982* was not engaged because the constitutional discussions to which the NWAC sought entry were not Aboriginal rights within the meaning of section 35(1) of the *Constitution Act, 1982*. They were of the view that section 35(4) was thus inapplicable to the NWAC claim. Their view would produce a negative answer to the fourth

question on this appeal, namely whether the government of Canada violated section 35(4) by failing to recognize existing Aboriginal and treaty rights, which are guaranteed equally to male and female persons.

135. In our view, the lower courts took too narrow a view of the question with respect to section 35(4). The foundation for the NWAC's claim to attend the constitutional talks as "representatives" of Aboriginal peoples is not solely the language of the *Constitution Act, 1982*. Rather, this foundation reaches back into the rights, roles, and responsibilities of Aboriginal women in pre-contact political entities, which we are prepared to characterize as "existing" Aboriginal rights within the meaning of section 35(1). This view was also expressed by the Royal Commission on Aboriginal Peoples in the passages cited at paras. 79 to 80 of our decision. The right is to participate in governance and decision making and in shaping the culture and norms of the polity—a right very closely akin to the core right of self-governance possessed by the nations themselves. It is simply not possible that the Constitution of Canada, with its strong guarantees of gender equality, would contemplate that Aboriginal women do not have fully equal rights to be involved in governance of their own polities.

136. Although this issue has not been thoroughly canvassed by Canadian courts, it is interesting to note at least one decision in which it was held that a traditional custom providing for the selection by elders of a male chief had evolved to become gender equal (*Harpe v. Ta'an Kwach'an Council*, [2006] 2 C.N.L.R. 70 (Yukon Territory Supreme Court) at para. 88). Indeed, Justice Ronald Veale held in that case that the power of the Elders Council to appoint an acting chief is an Aboriginal right within the meaning of section 35(1), and, thus, the power would include the appointment of both male and female persons (at para. 89). Even had the custom of the nation not evolved to the point of gender equality, it seems that Veale J. would have been prepared to mandate such equality by reason of section 35(4), if necessary.

137. The decision in *Harpe* is consistent with the views on section 35(4) expressed by the RCAP and with our own views. We would thus answer question 4 in the affirmative.

### *E. Justification under Section 1 of the Charter*

138. Section 1 of the *Charter* sets out the standard of justification that must be met by the government once violation of a *Charter* right has been established. The government instrument or action must be a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. Chief Justice Brian Dickson stated in *R v. Oakes*, [1986] 1 S.C.R. 103, that inclusion of words "free and democratic society" in section 1 refers the Court to the very purpose for which the *Charter* was originally entrenched

in the Constitution. Canadian society is to be free and democratic. He declared that in addressing the requirements of section 1,

the Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society (at para. 64).

139. Analysis under section 1 involves, first, a consideration of whether the objective of the legislation relates to concerns that are pressing and substantial in a free and democratic society. Second, the party seeking to justify the law must satisfy a form of proportionality test: the means must be rationally connected to the objective (and not arbitrary, unfair, or based on irrational considerations); the means should impair as little as possible the right; and there must be a proportionality between the effects of the measure and the importance of the objective (*Oakes, supra*, at paras. 69-70).

140. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, the Supreme Court of Canada added a further element to the last branch of the proportionality test. In addition to demonstrating the proportionality between the objective of the measure and its deleterious effects, there must also be proportionality between the deleterious and the salutary effects of the measure (at 889).

141. Section 1 only applies to justifications of *Charter* violations and not to violations of Aboriginal rights guaranteed in Part II of the *Constitution Act, 1982*. While the Supreme Court of Canada “read in” a similar test of justification for Aboriginal rights in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, we find it unnecessary to elaborate on the proper approach to section 35 justifications in this case. It is clear that any standard of justification requires a compelling objective on the part of government, and this was lacking in this case.

142. The government of Canada did not advance a convincing justification for refusing the NWAC’s independent participation in the Canada Round as a representative of Aboriginal women. It recognized the other four groups for purposes of the Canada Round because it had recognized them previously in the discussions mandated by sections 37 and 37.1. This begs the question of whether the phrase “representatives” of Aboriginal peoples has the same meaning in section 35.1 as in section 37. We have decided that this language requires that the female representative organizations of Aboriginal women

participate in the conferences mandated by section 35.1, and this requirement is no different for sections 37 and 37.1. Thus, the government was also behaving unconstitutionally in the period 1983 to 1987 when it denied direct participation in their own right to Aboriginal women's organizations.

143. The government takes the position that Aboriginal women could and should work within the four preferred organizations to advance their points of view. This ignores, in the case of the AFN, the structural oppression of women present in the *Indian Act* since its inception, which has created a Eurocentric political and social environment that does not permit Aboriginal women an equal voice in the *Indian Act* communities comprising the AFN. As the RCAP has pointed out, Aboriginal women's concerns need to be advanced by a women's representative organization, and we believe that the evidence is clear that the NWAC is such an organization.

144. It is no answer to say that the subordinate position of Aboriginal women is similar to that of non-Aboriginal women within the broader Canadian society. Aboriginal women occupied an equal position within their traditional societies. The government of Canada's policies have taken this equality from them. Having reduced Aboriginal women from their original equality with Aboriginal men to the subordinate position historically occupied by non-Aboriginal women, the government can hardly rely on the parity between Aboriginal and non-Aboriginal women as a justification for excluding Aboriginal women from self-government talks. Moreover, as discussed earlier, the traditional Western approach of excluding women from direct participation in political life has become discredited in the very states in which it originated.

145. Nor is it acceptable in a free and democratic society to apply to all women, or to particular groups of women, the lowest standard of civil and political rights accorded to any woman. The Canadian Constitution guarantees a society that treats all women as fully autonomous actors, with plenary civil, political, and legal rights. These include the right to participate in the founding of the order of government that will affect one's daily life.

146. We agree with Chief Justice Brian Dickson about the need to consider the fundamental values underlying a "free and democratic society" in the Court's approach to section 1. We also agree with the Supreme Court of Canada's holding that the concept of freedom of expression has been firmly accepted as a necessary feature of modern democracy, without which democracy cannot exist (see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336-7). The participation of individuals and groups in society through democratic institutions is integrally related to freedom of expression. These cannot be separated into two spheres, the expressive and the participatory, as did the Supreme Court of Canada and the government of Canada in this case. Political participation is a fundament of democracy, to which Aboriginal women in Canada are unmistakably entitled.

147. Since the government of Canada did not propound a sufficiently significant objective for the exclusion of the NWAC from the constitutional talks, its justification fails on this ground alone. However, it is abundantly clear to this court that the deleterious effects of excluding the NWAC from a direct role in creating the institutions of Aboriginal self-government far outweigh any purported advantage that may be suggested.

148. In 1867, there were only Fathers of Confederation, since all Canadian women were excluded from full citizenship. In 1982, and after, the Canadian Constitution ensures that the Mothers of Confederation, and of Aboriginal self-government, will be at the negotiating tables.

### *VI. Questions Answered and Remedy*

149. Accordingly, this court would answer all four questions on the appeal in the affirmative.

150. This is an appropriate case for a remedy under section 24 of the *Charter*. Given the seriousness of Canada's constitutional breaches, we would order that Canada should reconvene the constitutional conferences held pursuant to sections 37, 37.1, and 35.1 between 1983 and 1992, inviting thereto as full participants the NWAC and the other established national women's organizations representing Aboriginal women that were excluded from participation in the original processes. We would also order funding for representative Aboriginal women's organizations to ensure their full participation in the constitutional discussions.