



Native Women's Association of Canada

Background Document on

Aboriginal Women and Negotiations

For the Canada-Aboriginal Peoples Roundtable
Sectoral Follow-up Session on Negotiations

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Introduction

Negotiations related to Aboriginal and Treaty rights, including the right to self-government, enshrined under section 35 of the *Constitution Act, 1982*¹ remains a contentious issue between First Nations, Métis and Inuit peoples in Canada and the federal government. Despite small steps made by the Supreme Court of Canada over the past several years, there has been little impact in terms of policy and implementation changes needed to make practical improvements in the quality of life for Aboriginal peoples in Canada.

This background document does not provide an in-depth review of Aboriginal and treaty rights. Instead, this document seeks to set out the unique needs and perspectives of First Nations, Métis and Inuit women in relation to these rights in the context of the three areas of discussion at the Negotiations Sectoral Follow-up Session, which are:

1. the legal and relationship objectives and principles,
2. policy renewal, and
3. the processes and mechanisms used in addressing section 35 rights.

The Role of the Native Women's Association of Canada

NWAC is founded on the collective goal to enhance, promote and foster the social, economic, cultural and political well-being of First Nations and Métis women within First Nations, Métis and Canadian societies. We work collaboratively with Pauktuutit Inuit Women's Association (Pauktuutit) towards the same collective goal for Inuit women, while recognizing the distinct needs and perspectives of Inuit women are well articulated by Pauktuutit when resources are available.

NWAC envisions Aboriginal communities which understand and respect the diversity and uniqueness of all Aboriginal Nations – where all Aboriginal organizations work in unity to ensure a strong voice in maintaining and enhancing the exercise of our Aboriginal and treaty rights. We envision a country in which Aboriginal peoples determine how our natural resources are utilized and find ways to co-exist within the broader Canadian society without jeopardizing our Aboriginal and Treaty rights. We want to live in a society that is free of racism and discrimination and in an environment where our rights are fully recognized.

Our organization recently celebrated its 30th anniversary – an occasion which marked the important contributions the leaders of NWAC have made to improve the lives of Aboriginal women in Canada over the past 30 years. This occasion also provided an opportunity to reflect

¹ Section 35 of the *Constitution Act, 1982* states:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (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 provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

upon the challenges still facing Aboriginal women in the struggle for equality – in all facets of our lives - political, civil, economic, social and cultural.

A strong national political voice for Aboriginal women is critical if we are to implement change and work towards the common goal of the advancement of Aboriginal peoples and their rights. We recognize that the gains or advancements accomplished by Aboriginal women benefit everyone. Our history has taught us that NWAC is in the best position in terms of knowledge, expertise, capacity and political will to bring forth the unique needs and perspectives of Aboriginal women. This is definitely the case in the area of Aboriginal and treaty rights, including the right to self-government.

The Application of a Gender-Based Analysis in the Area of Negotiations

It is critical that a culturally relevant gender-equality analysis (GEA), otherwise referred to as a gender-based analysis (GBA), is applied to the discussions to be held at the CAPR Sectoral Follow-up Session on Negotiations. This is critical because it is only through applying this analysis that the unique circumstances and position of Aboriginal women will become clear.

Applying this analysis is also consistent with upholding the equality rights guaranteed under section 15 of the *Charter*.² For Aboriginal women, their right to equality in relation to Aboriginal and Treaty Rights are specifically guaranteed under section 35(4) of the *Constitution Act, 1982*. The need for equality has been articulated by Quebec Native Women (the provincial member association to the NWAC):

“We, as Aboriginal people, want self-government so that we may better our living conditions. We hope to abolish injustice and inequality. For us, an Aboriginal government, as with any responsible government, would operate within specific guidelines that protect its citizens, men and women alike, from abuse of power. While we support the collective rights of our Nations, we also feel that there must be a balance between these collective rights and the individual rights of people within a society. To ensure this balance, we hope to see a charter that ensures the rights and freedoms of all Aboriginal people. Presently, the only existing model available to us is the Canadian Charter of Rights and Freedoms. The Royal Commission on Aboriginal Peoples concluded that Aboriginal governments would be subject to this Charter. We ask that this stipulation be included in any agreements on self-government.”³

Quebec Native Women’s perspective outlined above is representative of NWAC’s position on the issue, calling for recognition of collective rights while maintaining individual rights. An

² Section 15(1) states:

15. (1) **Equality before and under law and equal protection and benefit of law** – Every individual is equal before and under the law and has the right to 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.” Sexual orientation is now a recognized ground of discrimination under section 15(1).

³ Quebec Native Women, “Negotiations with the Innu Nation (Common Approach) Brief Presented to The Committee on Institutions Regarding the Consultation paper entitled “Entente de principe d’ordre general entre les Premières Nations de Mamuitun et de Nutashkuan et le gouvernement du Québec et le gouvernement du Canada” (January 2003), online: <http://www.autochtones.com/fr/baton/FAQNW_brief-0103.html>.

Aboriginal specific charter of rights and freedoms would be acceptable, but the suggestion of a legal framework without a democratic, rights-based guarantee of individual rights in the context of the collective right to self-government is unacceptable.⁴ This is consistent with international law, where there is a balancing of individual and collective rights in any given case. NWAC is not calling for a hierarchy of rights, where individual rights trump collective rights, but rather, the recognition that both sets of rights mutually coexist.⁵

A culturally relevant gender-based analysis must be applied in a way that is meaningful for Aboriginal peoples. In relation to policies and programs for Aboriginal peoples, Aboriginal women continue to express concerns that governments must “recognize that ‘sameness’ does not mean equality and that Aboriginal cultural and gender differences must be considered in all policies and programs devised for Aboriginal people.”⁶ Although some progress has been made, substantive consultation with Aboriginal women’s groups “to ensure greater transparency of federal programs and services and improved access by Aboriginal women”⁷ is still deficient.

Despite the theoretical implementation of a gender-based analysis in all federal government policies and programs since 1995⁸, the widespread application of non-Aboriginal Canadians’ values and approaches (devoid of a gender-based analysis) continues to be the norm. A legacy of policies and programs predating the gender-based analysis policy perpetuates numerous inequalities between men and women. For Aboriginal women, a culturally relevant gender-based analysis requires that the gendered racism facing them be particularly carefully examined. The reality is that gendered racism does affect Aboriginal women in relation to many areas of federal governance, including its role in addressing section 35 rights, particularly subsection 4. Even after 1995, policies and programs that have since been implemented still have not incorporated the requisite gender and cultural factors to ensure substantively equal outcomes for Aboriginal women. This means that First Nation, Métis and Inuit women in Canada continue to be at least doubly disadvantaged.⁹

In fact, in the CAPR process itself, it is clear that NWAC has often been the sole voice in articulating and applying a culturally relevant gender-based analysis to the issues at hand. The presence of gender equality experts of the federal government and, for the most part, other national Aboriginal organizations, has been starkly absent. While some background documents have noted in a sentence the need to incorporate the concerns of Aboriginal women, the failure to

⁴ *Ibid.*

⁵ See for example, the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, Vienna, 14-25 June 1993, paragraph 20 which states that:

“All human rights are universal, indivisible and interdependent and interrelated. The International community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

⁶ *Aboriginal Women’s Justice Consultation Final Report*, September 26-29, 2001 (Ottawa: Native Women’s Association of Canada, Métis National Council of Women, Inc. & Pauktuutit Inuit Women’s Association) at 28.

⁷ *Ibid.*

⁸ In 1995, Canada made this commitment to apply a gender-based analysis at the Beijing World Conference on Women, the 10 year review of which is in February 2005.

⁹ The wording “at least doubly disadvantaged” used here is intended to indicate that racial and sexual discrimination are not necessarily the only two discriminatory grounds which Aboriginal women experience. Individual situations and circumstances may in fact include additional disadvantages or forms of discrimination, such as disability and sexual orientation, recognized under the Canadian *Charter of Rights and Freedoms* and/or domestic and international human rights laws.

provide an analysis of what this entails is simply unacceptable and unhelpful to improving the lives of Aboriginal women. It demonstrates a lack of real commitment and/or capacity to provide a culturally relevant gendered race analysis to the critical areas identified by the Prime Minister in improving the lives of Aboriginal peoples and the relationship between Aboriginal peoples and Canada. Given this reality, it is essential that NWAC plays a key role in policy discussions and negotiations on section 35 rights following the CAPR process.

In the following discussion, NWAC sets out a summary of the particular concerns of Métis, First Nations and Inuit women in relation to the upcoming discussion on Aboriginal and Treaty rights and the related legal objectives and principles, relationship objectives, policy renewal, and the processes and mechanisms used in addressing section 35 rights.

Legal and Relationship Objectives and Principles for Addressing Aboriginal and Treaty Rights

Since Aboriginal and Treaty rights were enshrined under section 35 of Canada's Constitution in 1982, the Supreme Court of Canada has clearly articulated the legal and relationship objectives and principles for addressing section 35 rights. The Court has had this opportunity in large part because the federal government has time after time, across the country, and in relation to Métis, First Nations and Inuit peoples, not honoured its obligations to Aboriginal peoples in Canada to recognize and affirm section 35 rights. The legal and relationship objectives and principles that have developed, to name a few, include:

- reconciliation of “the pre-existence of aboriginal societies with the sovereignty of the Crown”¹⁰
- maintaining the honour of the Crown through good faith negotiations and meaningful consultation that includes accommodation of Aboriginal peoples' interests; and
- a need for fair, equitable, implementation processes and policies reflective of recognition of Aboriginal and Treaty rights.

NWAC looks forward to working collaboratively with the other NAOs and the federal, provincial and territorial governments to ensure that the principles and objectives established under section 35 case law are reflected at the policy and implementation levels. Currently, these are not adequately reflected in such policies as the Comprehensive Land Claims Policy and the Inherent Right Policy of INAC.

While the Court has articulated general principles for addressing Aboriginal and Treaty Rights, absent from this articulation by the Courts is the meaning of section 35(4), which provides that the Aboriginal and Treaty rights are guaranteed equally to men and women. Patricia A. Monture argues, in her article “The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?” (2004), that an analysis of gender has been absent from the discussion on what Aboriginal rights mean. She argues that the litigation strategies and court decisions have given legal prominence

¹⁰ *Delgamuukw* at para. 186 quoting *Van der Peet* at para. 31, referred to in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 17.

to the experience and responsibilities of First Nations men, “while women’s pursuits have remained invisible and unconsidered as legal rights.”¹¹

She provides a critique of the lack of construction of gender in section 35 case law, citing *Delgamuukw* as an example where gender is not visible. In a further example in the same paper, Monture notes:

“There is a plethora of cases on matters involving hunting and fishing rights. These are generally reactive decisions brought to defend against individual charges laid under provincial or federal wildlife or fishing regimes. However, the category “hunting and fishing” is incomplete. Gathering and agriculture were also central components of First Nations’ ‘sustenance’ practices (to borrow a phrase from the courts), even before contact. Contrary to popular belief, agriculture is not something the white man brought. In many nations, it was women who possessed the authority to gather and grow...

Women’s responsibilities were essential for the prairie nations’ survival; these contributions must be taken into account in the rights that First Nations try to protect today. In reclaiming legal recognition of the centrality of hunting and fishing practices, our view must be extended to include all ‘sustenance’ practices of the First Nations, including those responsibilities belonging to the women. It must not be only the women, but also our men, who bring forward this knowledge. Political organizations representing First Nations must also do their part in acknowledging the importance of women’s responsibility to community sustenance. The inclusive phrase we must embrace is the right to hunt, fish, gather and grow.”¹²

Furthermore, Monture calls for government to take “a contextualized process of consultation that takes into account the historic exclusions of women” in the implementation of the duty to consult in good faith.¹³ This is essential to overcome the patriarchal influences of the *Indian Act*:

“Further, given the assault on women’s place by the *Indian Act* system of governance, it seems essential that this duty to consult be a gendered duty. It is not just Band Councils that must have a voice, methods of consultation must ensure that gender exclusions are not unwittingly perpetuated. In addition, the state must resist using a divide and conquer strategy to interfere in matters of band and tribal governance. It must recognize the impact of the *Indian Act* prohibitions that disallowed women from holding political office until 1951. Consultation could, in fact, be an opportunity to correct gendered oppression and impositions. This would require that the Canadian government establish protocols, yes relationships, with First Nations entities other than band councils.”¹⁴

¹¹ Patricia A. Monture, “The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women?” (2004), unpublished, on file with NWAC at 20.

¹² *Ibid* at 19-20.

¹³ *Ibid* at 24.

¹⁴ *Ibid* at 24.

There is a need to apply a culturally relevant gender-based analysis to current Aboriginal and Treaty negotiations so that these negotiations reflect Aboriginal women's section 35 rights. NWAC recognizes the recent efforts by Indian and Northern Affairs Canada to consult with Aboriginal women's representative organizations and Aboriginal women negotiators in determining methods to include a gender-based analysis in a culturally sensitive manner in their policy framework. While not specifically addressing section 35(4), this approach to policy development is imperative and needs to be applied more broadly to areas such as section 35. Aboriginal individuals, communities and governments that bring forth litigation need to further examine section 35(4) rights in devising litigation strategies and priorities in the future. The result would be a gendered understanding of Aboriginal and Treaty rights as well as recognition and protection of these particular rights.

Policy Renewal for Self-Government, Land Claims and Treaty Negotiations

There is a need for policy renewal in the areas of self-government, land claims and treaty negotiations, given that much of the policy framework is outdated and does not reflect the legal principles and objectives that have been developed since 1982, when Aboriginal and Treaty rights received constitutional recognition under section 35. NWAC sets out below the policy considerations that are necessary to ensure the particular needs, rights and perspectives of Aboriginal women are included. Processes and mechanisms aimed at this objective are detailed as well.

Self-Government

True self-government can only be achieved when the circle is broadened to include women:

“First Nations women have too long been excluded from the circle of decision making. This has led to male bias and has perpetuated the disintegration of harmony between male and female in Aboriginal societies. Such conduct is unconscionable. While colonialism is at the root of our learned disrespect for women, we cannot blame colonialism for our informed actions today. This generation of First Nations men must take some measure of responsibility for the activities in which they engage (Borrows 1994: 46)”¹⁵

Aboriginal women also have a responsibility to empower themselves by taking on leadership roles within their communities. Youth must be encouraged to view men and women as equals. This learning should begin at an early age.

One good example of the need for a culturally relevant gender-based analysis in the context of self-government initiatives is the First Nations Land Management Initiative. NWAC and other Aboriginal women's groups have been vocal over the need for equal protection of the law in relation to matrimonial real property matters for First Nations women living on-reserve as compared to off-reserve jurisdictions. Although numerous federal commissions and studies have called on Canada to provide matrimonial real property laws that would provide this protection, Canada has not taken the steps to ensure this would occur. Although the federal government has

¹⁵ Judith F. Sayers and Kelly A. MacDonald, “A Strong and Meaningful Role for First Nations Women in Governance” in Judith F. Sayers et al. *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2001) at 11.

followed through with the implementation of the First Nations Land Management Initiative, there is very little evidence of the protection of women's rights. For the First Nations now participating in the First Nations Land Management Initiative, there is an obligation, within 12 months from the passing of their land code to create a code dealing with the resolution of matrimonial real property matters.

It remains to be seen what the codes contain and if they meet or exceed equivalent provincial protections, how they are applied and enforced, and if this is an effective instrument for dealing with housing during relationship breakdown, not only in division of property settlement but in cases of housing needs for women and children who are victims of violence. More enquiry and knowledge relating to this experience is required in the larger housing questions context. An evaluation that is based on a culturally relevant gender-based analysis could be established to measure the outcomes of the process. The NWAC is well-placed to conduct collaborative research and policy development in this area that would lead to the application of a culturally relevant gender-based analysis to the development and implementation of matrimonial real property codes required under the First Nations Land Management Initiative. Such research should be supported by all relevant governments.

Land Claims and Treaty Negotiations

Aboriginal women have traditionally not had equal participation at the land claims and treaty negotiations tables. This is reflective of the low levels of participation of First Nations women who hold political office. In 2001, only 87 out of 633 chiefs were women.¹⁶ Sayers and MacDonald state that:

“What is clear in reviewing the literature from a gendered perspective is that First Nations decision-making bodies “have come to be associated with the protection of male privilege and domination of Aboriginal women” (Dion Stout and Kipling 1998: 21). This is a result of the internalized patriarchy and devaluation of First Nations women. The *Indian Act* has contributed to the exclusion of First Nations women from decision-making bodies pursuant not only to the regressive membership regime but to the importation of European governance practices. It is incumbent for First Nations men (and women) to decolonize their attitudes about women and provide room at the negotiating tables and in governance structures for First Nations women to engage in political participation.”¹⁷

NWAC believes that if a culturally relevant gender-based analysis is applied to the entire policy framework applicable to land claims and negotiations, this will assist First Nations and Inuit women in achieving equitable participation. This analysis can be used in the context of negotiations with Métis peoples as Métis self-government initiatives develop. Mechanisms should extend to urban Aboriginal women and Aboriginal women living in rural areas.

An Aboriginal women's perspective to a particular land claim issue is likely to bring forth a holistic analysis that evaluates not only the economic and governance consequences that will arise, but also the social, cultural and environmental factors that arise. Of course, this is not strictly the domain of Aboriginal women, but there is likely to be a greater tendency to consider

¹⁶ *Ibid* at 11.

¹⁷ *Ibid* at 12.

these elements. For example, then President Martha Flaherty of Pauktuutit, spoke about the importance of the objective of self reliance and the cultural and social well-being of Inuit, and articulated a broad range of considerations reflective of an Inuit women's perspective:

...we have a concern that Inuit Impact and Benefit Agreements may be negotiated too narrowly. We would like to see the contents of these agreements broadened to include more requirements on the developer to support community development initiatives in communities affected by the specific development project. This is possible under the provisions of the Final Agreement. In our meetings, we have heard what women have said about development and its effects on the environment, their lives and their families, the delivery of goods and services, transportation, and housing. This information can help ensure Impact and Benefit Agreements address the needs of all Inuit in the community, not just those who will be working for the developer.¹⁸

The negative effect of ignoring the Inuit women's perspective and carrying out land claims negotiations without adequately applying a gender-based analysis is summarized by Archibald and Crnkovich:

...in considering the government purpose for land claims agreements, negotiation of political rights that address racial and sexual inequality would not appear to have a place in an agreement designed to address legal uncertainty related to the ownership of land and resources.

The preoccupation of government with major resource development not only influences the scope of negotiations but also the nature and process of the land claims negotiations as well, which negatively affect Aboriginal women.¹⁹

Archibald and Crnkovich are critical of the way in which INAC's comprehensive claims policy requires the initial statement of claim to focus on male-dominated spheres of activities – hunting, trapping and fishing in its land use study.²⁰

Processes and Mechanisms to Addressing Aboriginal and Treaty Rights

Some of the processes and mechanisms that are necessary to addressing Aboriginal and Treaty rights include:

- Build in mechanisms designed to ensure negotiations are carried out on the basis of meaningful consultation that is gendered,

¹⁸ Speech by Martha Flaherty, President, Pauktuutit, Speech to the Annual General Meeting of Tungavik Federation of Nunavut (now the Nunavut Tunngavik, Inc.), 1993 as referred to in Linda Archibald and Mary Crnkovich, "If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project" (Ottawa: Status of Women Canada, 1999) at 8.

¹⁹ Linda Archibald and Mary Crnkovich, "If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project" (Ottawa: Status of Women Canada, 1999) at 9.

²⁰ *Ibid* at 9.

- Implement programs aimed at increasing participation of Aboriginal women through funding to Aboriginal women's representative organizations, as supported by *Gathering Strength*,
- Include Aboriginal women's representative organizations at all policy discussions in the future,
- Financially support NWAC to develop a culturally appropriate gender-based analysis framework that can be applied to strategic plans and programs aimed at policy renewal, and
- Support and build partnerships among all of the other NAOs to ensure continuity of application of NWAC's gender-based analysis framework.

Sayers and MacDonald make many recommendations that NWAC agrees with. These include the following²¹:

- Have First Nations governments, women's groups and other representative First Nations bodies engage in full and meaningful consultation regarding the proposed governance legislation and its drafting. First Nations and the federal government must establish a consultation process jointly.
- Ensure the full and equal participation of First Nations women in self-government and treaty negotiations. In British Columbia, this could be done through the B.C. Treaty Commission as a requirement for negotiations. The federal government when entering into self-government negotiations could, as a prerequisite for negotiations, insist that there be women representatives on the negotiating teams.
- Include gender equality provisions in self-government agreements, treaties, First Nations charters/constitutions.
- Have *all* participants in treaty and self-government negotiations (federal, provincial and First Nations negotiators) use a gender lens.
- Include accountability frameworks for First Nations governments that embody principles of transparency, disclosure, redress and gender equality into First Nations governing structures (pursuant to the *Indian Act* or self-government agreements and treaties).
- Explore the possibility of national or regional human rights panels.²²
- Investigate the issues related to establishing a First Nations ombudsperson.

²¹ *Supra*, note 15 at 41-44.

²² This could be one avenue for recourse to ensure the protection of the most vulnerable populations (women, persons with disabilities, two-spirited people, etc.) within the group.

Results

Below is a summary of results that will occur from the implementation of the solutions proposed by the Native Women's Association of Canada:

1. In conformity with international human rights standards, the right to equality under subsection 35(4) and section 15 of the *Charter*, as well as other human rights, of those most vulnerable in Aboriginal societies (including women, people living with disabilities, two-spirited people and others) are addressed and protected in the developments related to addressing and recognizing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*.
2. The entire policy framework applicable to Aboriginal and Treaty rights under section 35 of the *Constitution Act, 1982* is reviewed and updated to reflect recent legal and relationship developments, which will improve the overall relationship between Canada and Aboriginal peoples, as well as the processes and mechanisms used to address section 35. Particular attention is paid to the way in which section 35(4) can be used to protect the Aboriginal and Treaty rights specific to Aboriginal women.
3. This policy framework review, along with any implementation processes and mechanisms, must involve the application of a comprehensive gender-based analysis of all aspects of land claims, self-government and Treaty negotiations. Renewal of policies to more effectively address section 35 Aboriginal and treaty rights is done, including an examination of the ways in which section 35(4) can be used to benefit Aboriginal women. This renewal is done with the active and equal participation of Inuit, Métis and First Nations women's representative organizations to ensure that policy developments adequately reflect Aboriginal women's needs and perspectives and fully integrate a culturally appropriate gender-based analysis.