

**NATION TO NATION AND INDIGENOUS WOMEN**

**Committee on the Elimination of Racial Discrimination  
21st – 23rd Reports of Canada**

**ALTERNATIVE REPORT**



**NATIVE WOMEN'S  
ASSOCIATION OF CANADA**

**L'ASSOCIATION DES FEMMES  
AUTOCHTONES DU CANADA**

**Submitted on 21 July 2017 by:**

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## **Introduction**

The Native Women's Association of Canada (NWAC) welcomes the opportunity to provide perspectives on Canada's Twenty-first to Twenty-third Periodic Reports to the Committee on the Elimination of Racial Discrimination (the Committee).

NWAC acknowledges the collaborative report prepared in conjunction with the Canadian Feminist Alliance for International Action (FAFIA) made to the Committee. NWAC fully endorses all recommendations made in the aforementioned report and has prepared the following report to further articulate our concerns with the actions of the Government of Canada that have specific impact on Indigenous women and girls and NWAC's ability to advance the wellbeing of Indigenous women and girls.

## **About the Native Women's Association of Canada**

NWAC is a national non-profit Indigenous organization representing the political voice of Indigenous<sup>1</sup> women throughout Canada. It was incorporated in 1974 as a result of the activities of local and regional grassroots Native Women's Associations over many years. NWAC was formed to promote the wellbeing of Indigenous women within Indigenous and Canadian societies and works to end sex-based discrimination against Indigenous women.

NWAC is actively committed to raising the national and international profile of issues affecting Indigenous women's and girl's basic human rights, including, but not limited to: violence; lack of access to the legal system; high rates of incarceration; multiple and intersecting forms of discrimination, including racial discrimination; poverty; ongoing sexual exploitation; and domestic human trafficking.

Today, NWAC engages in national advocacy measures aimed at legislative and policy reforms that promote equality for Indigenous women and girls. Through advocacy, policy, and legislative analysis, NWAC works to advance the wellbeing of Indigenous women and girls, as well as their families and communities. NWAC collectively works to preserve Indigenous culture, achieve equality for Indigenous women, and have a say in the shaping of legislation directly affecting women, their families and their communities. NWAC is dedicated to promoting gender and racial equality issues through research, policy, programs, and practice.

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<sup>1</sup> In the Canadian context, *Indigenous* refers to the Aboriginal peoples of Canada as defined in Section 35(2) of the Canadian Constitution (First Nations, Inuit, and Métis), as well as non-status First Nations people. First Nations refers to Status and Non-Status Indians as defined in the *Indian Act, 1985* <http://laws.justice.gc.ca/eng/acts/I-5/>

## Indigenous Peoples - Federal Strategies (Article IV)

In 2012, this Committee recommended that all levels of government in Canada adopt special measures to address the situation of Indigenous people.<sup>2</sup> The Committee recommended that policies, strategies, and programmes on Indigenous peoples be a part of a comprehensive strategy at the federal level with clear and coherent actions, enhanced efficiency and to ensure any differences of treatment are based on reasonable and objective grounds.

The Government of Canada has reported to this Committee on its framework for the overarching strategy to renew its relationship with Indigenous Peoples.<sup>3</sup> This framework has been described as taking place on a “nation-to-nation” basis which intends to improve socio-economic conditions, address violence against Indigenous women and girls, and consult with Indigenous peoples with respect to treaty rights.

The Royal Commission on Aboriginal Peoples (RCAP, 1996) described the foundations of a nation-to-nation framework as the following:

*“The federal government should provide a forum for negotiating a Canada-wide framework agreement to lay the ground rules for processes to establish the new relationship.*

*The forum should be convened under the authority of the first ministers of federal, provincial and territorial governments and leaders of national Aboriginal organizations and should address at least these issues:*

- *treaty renewal and new treaty making*
- *redistribution of lands and resources*
- *clarification of areas of independent and shared jurisdiction*
- *redesign of short-term and long-term fiscal arrangements”<sup>4</sup>*

The National Indigenous Organizations (NIOs) in discussions about the issues that concern Indigenous people: NWAC, Assembly of First Nations (AFN), Inuit Tapiriit Kanatami (ITK), Métis National Council (MNC) and the Congress of Aboriginal Peoples

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<sup>2</sup> “Consideration of Reports Submitted by States parties under article 9 of the Convention” (4 April 2012) (CERD/C/CAN/CO/19-20) online

<sup>3</sup> Canada - “Consideration of reports submitted by States parties under article 9 of the Convention” (13 May 2016) (CERD/C/CAN/21-23) online

<<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/114/64/PDF/G1611464.pdf?OpenElement>>

<sup>4</sup> Canada, Royal Commission on Aboriginal Peoples. *Highlights from the Report of the Royal Commission on Aboriginal Peoples - People to People, Nation to Nation*, “The Relationship Restructured” (1996), online <<http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>>

(CAP). The Government of Canada has unilaterally decided to include only three of the National Indigenous Organizations: AFN, ITK and MNC. NWAC has been excluded from the implementation of this overarching strategy. **This approach fails to acknowledge that the constituents of NWAC are within the groups identified as being distinctions-based, and denies equality to the body in which they have chosen to represent them on issues that matter most.**

Additionally, RCAP identified steps to making the change to end violence against Indigenous women, one of which is to “assure the full and fair representation of women in decision making.”<sup>5</sup>

NWAC has been excluded from numerous high-level nation-to-nation discussions:

- December 9, 2016: NWAC excluded from climate change / First Ministers’ Meeting in Ottawa
- December 8, 2016: NWAC excluded from nation-to-nation / reconciliation meeting in Ottawa
- March 2016: NWAC excluded from First Ministers’ Meeting / climate change talks in Vancouver<sup>6</sup>

The Government of Canada has not provided any meaningful or reasonable rationale for this exclusion. Asked in a press conference about NWAC’s exclusion from the December 2016 First Minister’s Meeting, Prime Minister Justin Trudeau “confirmed that the exclusion was deliberate” and stated that:

*“we always have to make choices about who to include in different venues and at different points. We continue to engage, listen and talk with and work with a broad range of organizations and stakeholders on important issues. We will always continue to but in any given meeting we have to make choices and we made those choices.”<sup>7</sup>*

NWAC wrote to the Federal Government about not being invited to the March 2016 First Minister’s Meeting, a spokesperson replied that:

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<sup>5</sup> Ibid. “Ending the Cycle of Family Violence”

<sup>6</sup> NWAC, “Statement on NWAC Exclusion from March 2016 First Ministers Meeting“ (2 March 2016), online <https://www.nwac.ca/>

<sup>7</sup> Elizabeth McSheffrey, “Aboriginal leaders shocked by exclusion from climate change meeting” *National Observer* (7 March 2016), online <http://www.nationalobserver.com>

*“The government of Canada has committed to working and meeting regularly with the national aboriginal organizations, and will continue to engage in robust bilateral discussions with all five ... on issues of importance to their members.”<sup>8</sup>*

Both of these incidences occurred after Prime Minister Trudeau reiterated his promise of a renewed nation-to-nation relationship between the Government of Canada and Indigenous peoples, “based on recognition, respect for rights, co-operation, and partnership”.<sup>9</sup> Having promised a renewed relationship, the Government of Canada must fully to include the distinct perspectives of Indigenous women from these conversations, who experience multiple and intersecting forms of discrimination.

Further, the Prime Minister has committed to the full implementation of UNDRIP, Article 18 of which states the following:

*“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.”<sup>10</sup>*

Concluding observations from the last periodic review broadly identified improvement to socio-economic conditions, addressing violence against Indigenous women and girls, and consultations with Indigenous people with respect to Indigenous and treaty rights as areas that the state must adopt special measures to address. By identifying priority issues directly affecting Indigenous women and issues where Indigenous women have unique perspectives and considerations, the Government of Canada must respect that Indigenous women have established the Native Women’s Association of Canada as their representative body for national and international issues.

### ***Traditional Governance & The Canadian Constitution***

A pre-existing right of equal governing amongst Indigenous women and men existed prior to European contact. Traditionally, both women and men had equal political, social and legal voices/perspectives on issues related to overall governance and societal living. The role of Indigenous women in governance was disrupted at contact, and

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<sup>8</sup> Kristy Kirkup, “Indigenous groups disappointed by lack of invite to first ministers' meeting” *CBC News* (23 February 2016), online

<http://www.cbc.ca/news/indigenous/indigenous-groups-disappointed-by-lack-of-invite-1.3460507>

<sup>9</sup> Office of the Prime Minister, “Statement by the Prime Minister of Canada on meeting with National Aboriginal Organizations” (16 December 2015) online <http://pm.gc.ca/>

<sup>10</sup> United Nations Declaration on the Rights of Indigenous Peoples, online [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

throughout the treaty-making process, where their leadership and authority was not recognized. By excluding NWAC from nation-to-nation discussions, the Government of Canada is continuing historic colonial and patriarchal practices which are contradictory to traditional laws which respect women's roles and responsibilities. Arguably, this pre-existing right is guaranteed under section 35(1) of the 1982 Canadian Constitution Act,<sup>11</sup> which recognizes and affirms existing aboriginal and treaty rights of the aboriginal peoples of Canada.<sup>12</sup>

In *R. v. Van der Peet*<sup>13</sup> the Supreme Court of Canada clearly indicated that the goal of section 35(1) is to protect historically important practices that persist in the present.<sup>14</sup> The ruling additionally stated that:

*“Section 35(1) must be given a generous, large and liberal interpretation and ambiguities or doubts should be resolved in favour of the natives. Aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown vis-à-vis aboriginal people. Most importantly, aboriginal rights protected under s. 35(1) must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. It is not appropriate that the perspective of the common law be given an equal weight with the perspective of the natives.”<sup>15</sup>*

It has been a longstanding protocol (embedded in traditional law) to include the presence of women and for them to be heard. With many First Nation societies being matrilineal, this sacred law has not wavered since European contact and continues to be observed today. *R. v. Van der Peet* also noted:

*“History is important. A recently adopted practice would generally not qualify as being aboriginal. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the imposition of European law and which often dated from time immemorial.”<sup>16</sup>*

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<sup>11</sup> The signing of the Canadian Constitution Act, 1982 marked the full patriation of the Canadian Constitution. Roughly half of the Act consists of the the *Canadian Charter of Rights and Freedoms*, which further protects the civil and political rights of Canadians, including Aboriginal peoples.

<sup>12</sup> Government of Canada, “Constitution Acts, 1867 to 1982” *Justice Canada, online* <http://laws-lois.justice.gc.ca/eng/Const/page-16.html>

<sup>13</sup> [1996] 2 S.C.R. 507.

<sup>14</sup> *Ibid* at para 60-67.

<sup>15</sup> *Ibid* at para. 22

<sup>16</sup> *Ibid* at para. 39

The Government of Canada is undermining the pre-existing right of women's role in politics and law and violating s. 35(4) of the Canadian Constitution.<sup>17</sup>

Article 9 of UNDRIP additionally guarantees this right and includes an additional protection against any discrimination that may arise as the result of implementing these rights:

*"Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."*<sup>18</sup>

If the Government of Canada continues or further moves to extinguish, they will effectively be removing the ability of First Nations women to practice their traditional roles and responsibilities within First Nation society. It is for this reason that the Government of Canada must recognize, respect, and include NWAC in the same way as AFN, ITK, and MNC.

### ***NWAC's Historical Inclusion in National Discussions***

Former Prime Minister Paul Martin included NWAC in the First Ministers' and National Aboriginal Leaders meeting leading up to the Kelowna Accord in 2005. Former Prime Minister Stephen Harper heard NWAC's recommendations as to how Indigenous communities can contribute to Canada's economy at the First Ministers' Meeting in 2009. The lack of consideration and lack of continued consistency with the current government runs contrary to its party's platform which promised:

*"...a renewed, nation-to-nation relationship with Aboriginal Peoples, based on recognition, rights, respect, co-operation, and partnership. This is both the right thing to do and a sure path to economic growth. ...we will ensure that the Kelowna Accord – and the spirit of reconciliation that drove it – is embraced, and its objectives implemented in a manner that meets today's challenges."*<sup>19</sup>

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<sup>17</sup> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s. 35(4) which states: "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."

<sup>18</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, online <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>

<sup>19</sup> Liberal Party of Canada, *The Platform, A New Nation-to-Nation Process* (Ottawa: Liberal Party of Canada, 2016) online: <<https://www.liberal.ca/realchange/a-new-nation-to-nation-process>>.



For over 40 years, NWAC has demonstrated its capacity to be a key player in regional, national, and high-level discussions with the Government of Canada. The Federal Court of Appeal found that “NWAC is a bona fide, established and recognized national voice of and for aboriginal women”.<sup>20</sup> This notion was reaffirmed when the Supreme Court of Canada found that there was “...no question ...of the Government of Canada attempting to suppress NWAC’s expression of its point of view with respect to the Constitution.”<sup>21</sup>

## **RECOMMENDATION**

1. The Government of Canada must include the Native Women’s Association of Canada in the nation-to-nation framework and provide the necessary capacity support to fully participate in decision making frameworks that affect the lives of Indigenous women and girls.

## **Impacts of Nation-to-Nation on Indigenous Women**

NWAC has the expressed purpose to amplify the perspectives of Indigenous women and girls. This distinction should serve as a legitimate cause for absolute inclusion. NWAC is an NIO that helps to complement and strengthen the representation of Canada’s Indigenous population in conjunction with AFN, ITK, and MNC. By excluding NWAC, the Government of Canada has promoted the misconception that gender is not a critical lens deserving to be applied at the highest levels of negotiation and partnership; given the well documented, ongoing colonial impacts on Indigenous women, NWAC strongly disagrees.

The current nation-to-nation framework approach has resulted in a hierarchy of priorities in which violence against Indigenous women is framed as secondary and separate from issues of housing, employment, health, community safety, policing, child welfare and education. These issues, which intersect and bolster one another, necessitate a gender-based analysis in order to establish critical mechanisms which respond to the lives of Indigenous women and girls.

On 9 May 2016, Canada announced its full support of United Nations Declaration on the Rights of Indigenous Peoples, and Prime Minister Trudeau asked his Cabinet to implement the declaration. *Article 1* of the Declaration mandates that Indigenous

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<sup>20</sup> *Native Women’s Assn. of Canada v Canada (F.C.A.)*, [1992] F.C.J. No. 715 at para. 3.

<sup>21</sup> *Native Women’s Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 at para. 59.

women, as individuals, are entitled to “all human rights and fundamental freedoms”,<sup>22</sup> which includes freedom from sex-based discrimination. Despite this, the Government of Canada has continued to deny Indigenous women equality in the *Indian Act*, as evidenced by its inadequate response to the *Descheneaux v. Canada* and *Gehl v. Canada* court decisions.

With the emergence of priorities identified without the input of Indigenous women, Canada has failed to address sex-based discrimination in the *Indian Act*<sup>23</sup>, which continues to affect thousands of First Nations women and their descendants. Previous attempts to end sex-based discrimination failed to adequately address issues of discrimination, and RCAP also noted that:

*“Instead of solving the status question once and for all, Bill C-31<sup>24</sup> created new divisions and new fears. As we see it, the solutions should be found by Aboriginal people themselves, as part of the nation-building process outlined in Chapter 2. Definitions of membership - or citizenship - in Aboriginal nations are not the business of Canadian governments. However, Aboriginal women and their organizations must be assured the resources to participate fully in this process, and in all aspects of nation building, before the federal government vacates the terrain.”<sup>25</sup>*

This sex-based discrimination has been identified as a root cause of violence against Indigenous women and girls<sup>26</sup>. By continuing to be subject to sex-based discrimination, First Nations women and their descendants are prevented from exercising their Indian status<sup>27</sup> which includes participation in a promised nation-to-nation dialogue.

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<sup>22</sup> United Nations Declaration on the Rights of Indigenous Peoples, online <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>

<sup>23</sup> The *Indian Act* defines how the Government of Canada interacts with Status Indians, and defines who is eligible to register for Status.

<sup>24</sup> Passed in 1985, Bill C-31 (An Act to Amend the *Indian Act*) reinstated status to some women who had been lost status to 1985. In doing so, the Government created new “tiers” of status that again disproportionately impact how and when women can transmit status.

<sup>25</sup> Supra note 4, “Women and Indian Status”, online <<http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>>

<sup>26</sup> See CEDAW Report of the inquiry concerning Canada of the CEDAW under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/OP.8/CAN/1, 6 March 2015 at 51, para X(C)(v), online at: <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW\\_C\\_OP-8\\_CAN\\_1\\_7643\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf)> ; *Missing and Murdered Indigenous Women in British Columbia, Canada*, Inter-Am-Ct HR (OEA/Ser.L/V/II.Doc.30/14, 21 December 2014 at paras 68-69, 93, 129, online <<http://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf>>

<sup>27</sup> Individuals who the Government of Canada deem to be Status Indians have the right to access certain federal programs services that are otherwise inaccessible, including tax exemption, health care benefits, and some education subsidies.

## RECOMMENDATION

2. NWAC once again calls on the Government of Canada to remove all sex-based discrimination from the *Indian Act* as recommended by the Committee on the Elimination of Discrimination Against Women, the Inter-American Commission on Human Rights,<sup>28</sup> and by this Committee.<sup>29</sup>

## Concluding Remarks

In failing to address the gender and sex-based discrimination in its approaches to addressing racial discrimination, the Government of Canada is continuing to entrench systemic discrimination against Indigenous women and girls. Reconciliation and ending violence become impossible without Indigenous women and girls leading as full and equal participants in the decision making processes that affect their lives.

Canada cannot move forward with meaningful implementation of the United Nations Declaration on the Rights of Indigenous Peoples through a nation-to-nation framework without Indigenous women. The existing marginalization of Indigenous women that results from the ongoing impacts of historic discrimination cannot be resolved if they are exacerbated by the Government of the day, transcending differences across the political spectrum.

A meaningful dialogue on a nation-to-nation basis must recognize of the role of women in decision making, enhance the right of Indigenous women to be meaningfully included, respect matriarchal practices of Indigenous peoples, and build a relationship with Indigenous women based on cooperation and partnership.

Moving forward, NWAC will continue advocacy work that enhances the crucial voice of Indigenous women. During the past four decades, much has been done to champion the cause of Indigenous women through legal and human rights mechanisms, social and health inclusion, political participation and education, employment and economic empowerment. But much work still remains to achieve equality in a country that continues to exclude and oppress Indigenous women. In order to be more effective advocates, NWAC needs to be included in all the nation-to-nation discussions.

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<sup>28</sup> Supra note 26

<sup>29</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, CERD/C/CAN/19-20, 9 March 2012, at para. 18, online <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf>