



Position of
QUEBEC NATIVE WOMEN

ON THE CANADIAN RATIFICATION OF THE AMERICAN
CONVENTION ON HUMAN RIGHTS, AND THE INTER-AMERICAN
CONVENTION ON THE PREVENTION, PUNISHMENT, AND
ERADICATION OF VIOLENCE AGAINST WOMEN

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INTRODUCTION

Quebec Native Women (QNW) is a non-profit aboriginal organization that represents over 3,000 First Nations women in Quebec. Since its inception in 1974, the association's main objective has been to support women in their efforts to improve their living conditions. Our work is of a political and socio-economic nature, with an accent on justice, the promotion of non-violence, health, employment and youth. QNW is the only existing organization that aims to unite women from all over Quebec. We provide these women with a voice, so that their priorities and concerns may be known, particularly in the areas of justice and human rights. As their voice, QNW stresses the importance of Canada joining

- the American Convention on Human Rights (the American Convention) and its Additional Protocol in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador), and
- the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Convention of Belém Do Pará).

Quebec Native Women recommends that Canada ratifies these conventions in order to lend its weight to the protection and promotion of the human rights of Aboriginal peoples in the Americas. We consider that ratification of these conventions is a serious international issue, one that is crucial to the future well-being of Aboriginal women and children.

Since 1969, Canada has been bound by the American Declaration on the Rights and Duties of Man (the American Declaration). Canada, as a member of the Organization of American States (OAS), can seek judgments of the Inter-American Commission on Human Rights (the Inter-American Commission) on its compliance with the American Declaration, but not the American Convention or the Convention of Belém Do Pará, since Canada has yet to ratify these two Conventions. If Canada were to ratify these Conventions, the Inter-American Commission and the Inter-American Court of Human Rights (the Inter-American Court) would have the authority to consider complaints from individuals under Canadian jurisdiction about alleged violations of their rights protected by the American Convention¹ and the Convention of Belém Do Pará², once they had exhausted all their domestic remedies.

The Inter-American Court also has the power to issue advisory opinions regarding whether national laws are compatible with the American Convention and the Convention of Belém Do Pará.³

Quebec Native Women urge ratification of these conventions because it will enable us to work more effectively with other groups of Aboriginal women in the Americas to use the Inter-American Court of Human Rights to foster compliance with the human rights protected by the American Convention and the Convention of Belém Do Pará.

1 American Convention, Articles 44-51 & 61-69.

2 Convention of Belém Do Pará, Article 12.

3 American Convention, Article 64 and Convention Belém Do Pará, Article 11.

We understand that these conventions do not necessarily provide any additional rights to those protected by the Canadian Charter of Rights and Freedoms and other human rights treaties to which Canada is a party, such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. However, the American conventions do provide important means to apply human rights of Aboriginal people in the particular context of the Americas.

Once these two conventions are ratified, there would be an incentive for Canadian advocates to invoke and for Canadian courts to apply the jurisprudence emerging out of the Inter-American Commission and Court on the human rights of Aboriginal peoples generally, and Aboriginal women specifically protected by the American Convention and the Convention of Belém Do Pará. Yet today, Canada has not joined the 25 countries that form the Organization of American States (OAS), in ratifying these key Inter-American human rights conventions. We recognize that Canada recently ratified the Inter-American Convention Against Terrorism, adopted by the OAS in June 2002. As a result, we remain hopeful that Canada seeks further engagement in the Americas, by ratifying the American Convention and the Convention of Belém Do Pará.

In addition to being able to use the American Court of Human Rights to foster compliance with our human rights, we advocate ratification for the following reasons:

1. ABORIGINAL PEOPLES' RIGHTS

During the Indigenous Peoples' Summit, held in Ottawa in March 2001, Aboriginal people from the Americas got together and wrote a declaration summarizing our position with respect to the OAS. It reads in part:

“1 – It is important that Aboriginal human rights be recognized and respected in a fair and equitable manner, according to international laws. These rights are transferable and cannot be extinguished nor repealed.

2 – These fundamental rights must include, above all:

- Rights over our lands and territories;
- The right to self-government and the recognition of our traditional leaders;
- The respect and protection of our cultural landmarks and sacred ceremonies;
- The protection of our heritage and our intellectual and cultural property rights;
- Respect for our history and oral laws.”

With regard to the rights of Aboriginal peoples over their lands and territories, the Inter-American Court decided in *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*⁴ that the Awas Tingni community does possess land to which it has legal entitlement. The Court found that Nicaragua had violated the American Convention by failing to make effective the

⁴ The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua Inter-American Court of Human Rights, Judgment of Aug. 31, 2001.

rights of indigenous peoples to lands and resources that are recognized in Nicaraguan law. The Court found

“violations of Article 25 of the Convention, which affirms the right to judicial protection, in connection with Articles 1 and 2 of the Convention, which obligate state parties to adopt the measures necessary to secure the enjoyment of fundamental rights. The Court thus established that the faithful implementation of domestic legal protections for the rights of indigenous peoples is an obligation under the American Convention of Human Rights and that states may incur international responsibility if they fail to make those rights effective.”⁵

The Inter-American Court held that the right to property protected by Article 21 of the American Convention includes communal property of indigenous peoples that is defined by their customary land tenure, irrespective of what domestic Nicaraguan law provides.⁶

To show solidarity with the Awas Tingni peoples of Nicaragua, the Assembly of First Nations filed an *amicus* brief (friend of the court brief) in this case.⁷

2. PROTECTION OF INTELLECTUAL PROPERTY, CULTURE AND HERITAGE OF ABORIGINAL PEOPLES

Over the past few hundreded years, Aboriginal Nations in the Americas have been wiped out, and cultures, heritages, languages, and peoples have become extinct as a direct result of colonization.⁸ Today, throughout the Americas, Aboriginal cultures tread close to extinction. The dispossession and exploitation of a rich cultural heritage continue today, under the North American Free Trade Agreement (NAFTA), and the World Trade Organization’s international trade agreements, such as the agreement on trade-related aspects of intellectual property rights. Aboriginal women are particularly affected by this lack of protection of their exclusive knowledge. The knowledge and culture of Aboriginal peoples are interconnected with spiritual and physical relationships with our lands, our waters, our natural resources and our territories.

Ratification of the American Convention and its Protocol of San Salvador would facilitate Inter-American discourse and use of the Inter-American Court to address the continuing challenges to our property, culture and heritage from developments such as NAFTA and comparable trade agreements. In particular, our rights to freedom of thought and expression (Article 13), our rights to freedom of association (Article 16), and our right to property (Article 21) would be given added protection with Canadian ratification of the American Convention, and our right to the benefits of culture and to participate in cultural life (Article 14) would be given added protection by Canadian ratification of the Protocol of San Salvador.

5 S. James Anaya and Claudio Grossman, *The Case of Awas Tingni v. Nicaragua : A New Step in the Internaitonal Law of Indigenous Peoples*, *Arizona Journal of International and Comparative Law* 19 : 1- 15 (2002) at 11-12.

6 *Ibid* at 12.

7 Patrick Macklem and Ed Morgan, *Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in Awas Tingni v. Republic of Nicaragua*, *Human Rights Quarterly* 22 : 569-602 (2000).

8 S. James Anaya, *Indigenous Peoples in International Law*, 1996.

Where states are integrated through trade and financial arrangements, they have more leverage with each other with regard to securing human rights. Canadian ratification of the American Convention and its Protocol of San Salvador would give Canada the legitimacy it needs to protect and promote human rights of Aboriginal peoples in the Americas, because our domestic and foreign policies would be guided by the treaty obligations. Canadian ratification presents fair and equitable protection of our rights as peoples.

3. MEANS OF PROTECTION OF THE HUMAN RIGHTS OF ABORIGINAL WOMEN

Significant strides have been made in the Americas to empower women to participate in the protection and promotion of human rights of women.⁹ Inter-American legal scholars are addressing issues of concern to women in their research and writing,¹⁰ and QNW is convinced of the importance of beginning to use human rights treaties to advance their causes. Currently, no women or Aboriginal people sit on the Inter-American Commission or Inter-American Court. As a member of the OAS, Canada can nominate human rights experts for membership of the Inter-American Commission, but to date no Canadian has sat as Commissioner. It is hoped that, through Canadian ratification of the American Convention, Aboriginal women experts from Canada will be nominated and elected to the Court to help develop the norms on the protection of human rights of all women and Aboriginal peoples.

4. RESPECT FOR THE DIGNITY AND THE SECURITY OF ABORIGINAL WOMEN

For over 10 years, QNW has been committed to the promotion of non-violence in Aboriginal communities. Violence victimizes men, women and children. We want to acknowledge this epidemic, deliver concrete remedial action, and adopt tough policies to eradicate all forms of violence. We also want to see a fair and equitable justice system set up for the victims, particularly of violence. Victims often lack the necessary resources to seek legal help. We do not want any acts of violence to go unpunished.

Significantly, the Inter-American Commission has applied the American Convention to hold the governments of Mexico and Peru accountable to remedy forms of terrible violence against indigenous women.

In the case of *Ana, Beatriz and Cecilia Gonzalez Perez v. Mexico*,¹¹ three indigenous young women (20, 18 and 16 years of age) were illegally detained, beaten and raped several times by military personnel who picked them up in the Chiapas zone for interrogation under suspicion of being members of Ejército Zapatista de Liberacion Nacional in 1994. The State of Mexico denied the veracity of the allegations of rape, and argued that the military had acted within their

9 Cecilia Medina, *The Human Rights of Women: Where are We Now in the Americas?* Paper presented at the Feminism and the Law Workshop, University of Toronto, January 28, 2003.

10 See, for an introduction to the international human rights literature, Women's Human Rights Resources website, <http://www/law-lib.utoronto.ca/diana>, the Bora Laskin Law Library, University of Toronto.

11 *Ana, Beatriz and Cecilia Gonzalez Perez v. Mexico* (2001) Report No. 53/01, Case 11.565, 4 Apr 2001.

power and complied with their obligations to protect the security of the Mexican population by arresting the women. Further, the State argued that the claims could not be investigated fully “due to lack of cooperation on the part of the victims,” who had refused to appear before the Military Prosecutor and subject themselves to yet another gynecological examination.¹² On the basis of the testimonies of the three sisters and an unchallenged medical certificate stating that rape had occurred, the Inter-American Commission found Mexico responsible for the violations of the right to personal liberty (Article 7), the right to humane treatment (Article 5) and the right to privacy (Article 11).

The Inter-American Commission reached a friendly settlement in the case of a poor, indigenous, rural woman, *Maria Mamérita Mestanza Chávez v. Peru*.¹³ In this case, Peru accepted responsibility for violations of the right to life (Article 4), the right to humane treatment (Article 5), and the right to equality (Articles 1 and 24) of the American Convention, resulting from death resulting from the compulsory sterilization of Maria Mamérita Mestanza Chávez. The fact that the State of Peru accepted responsibility for the violations in this case is significant, because there was a systematic policy on the part of the Fujimori government during the nineties to sterilize poor indigenous women, neglecting to ensure that there was proper counselling and free and informed decision making regarding whether or not they wanted to be sterilized.

The Convention of Belém Do Pará reinforces the norms of respect for the integrity and dignity of the individual in the American Convention, and specifies how these norms are applied in the context of the prevention, punishment and eradication of violence against women. It is critical that Canada should ratify the Convention of Belém Do Pará. Article 1 of this Convention explains that

“violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”

Article 3 states that “every woman has the right to be free from violence in both the public and private spheres.” Moreover, Article 5 requires ratifying governments to recognize that violence against women prevents and nullifies the exercise of their civil, political, economic, social and cultural rights.

Ratification of the Convention of Belém Do Pará would helpfully add to the existing norms of prohibition of violence against women in our communities, and provide additional mechanisms to deliver justice to victims of violence, especially Aboriginal women and children.

5. RESPECT FOR EQUALITY OF ABORIGINAL WOMEN

The promotion and protection of the human rights of all people without discrimination on grounds of sex, and, for example, Aboriginal status, will be enhanced by Canadian ratification of the American Convention. Article 1 requires that ratifying States

¹² Ibid. paras 33-37.

¹³ *Maria Mamérita Mestanza Chávez v. Peru* (2000) Case 12.191, friendly settlement of 14 October 2002.

“...undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.”

Non-discrimination provisions need to be applied in ways that prohibit discrimination on grounds not only of sex but also of Aboriginal status. Canadian Aboriginal scholars have begun to question the effectiveness of single axis frameworks to expose discrimination against Aboriginal women.¹⁴ It is hoped that, given the creative application of the American Convention to ensure the rights of Aboriginal peoples, there is scope for applying the American Convention to prohibit multiple forms of discrimination. More refined application of work of this nature is required to improve understanding of the interaction of ethnic, gender, economic and other forms of discrimination, and to translate this understanding into the legal prohibition and elimination of multi-dimensional forms of discrimination.¹⁵

Consideration might be given to a broadly drafted Interpretive Declaration that would make clear Canada’s strong commitment to improving the status of women and to the conditions necessary for women to exercise their rights. The following formulation might be a useful starting point:

“Canada understands this Convention to be read as a whole, and consistently with the object and purpose of the Convention to ensure that all women, including Aboriginal women, enjoy all the rights of this Convention on a basis of equality with men. Moreover, Canada understands that this Convention will be applied in Canada consistently with Canada’s obligations under other international treaties to which it is a party, including the Convention on the Elimination of All Forms of Discrimination against Women. Canada understands that this Convention is to be interpreted to ensure that women’s distinct needs with regard to pregnancy, childbirth, pre and post-natal care, and nutrition will be respected, protected and fulfilled, and where they are not, that constitutes sex discrimination contrary to object and purpose of the American Convention.”

Effort is also needed to ensure equality in the enjoyment of economic, social, and cultural rights, particularly relating to women’s health. Health indicators show that the health status of Aboriginal women in all countries of the Americas is significantly poorer than among their society generally. Regarding the right of Aboriginal women to life and survival, filing an Interpretive Declaration would require that the American Convention is read consistently with the international normative development under the Women’s Convention, especially Article 12 on women’s health. The 1999 General Recommendation 24 on Women and Health of the Committee on the Elimination of Discrimination against Women makes clear that Article 12

14 Mary Ellen Turpel, *Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women*, *Canadian Journal of Woman and the Law*, 6: 174-192 (1993).

15 Rebecca J. Cook, *Fostering Compliance with Women’s Rights in the Inter-American System*, *Revue Québécoise de Droit International* (Special issue in collaboration with the Inter-American Institute of Human Rights on the 50th Anniversary of the OAS Declaration on the Rights and Duties of Man) 11(1): 129-142 (1998).

requires that states provide basic health services, including those that relate to women's health needs. Moreover, this General Recommendation explains that "criminalizing medical procedures only needed by women" is a form of sex discrimination." (see paragraph 14)

Quebec Native Women thinks that consideration might be given to filing an Interpretive Declaration to ensure that Article 4 of the American Convention be applied to ensure equal exercise of the right to life and survival of Aboriginal women, especially given their higher rates of maternal mortality. QNW suggests that the following formulation might be considered as a starting point:

"Canada interprets this Convention to ensure sexual nondiscrimination in access to health care. This requires access to services that are distinctive to women's health needs, and that enable the reduction of maternal mortality and morbidity. Such services include those that enable all women, including Aboriginal women, to survive pregnancy and childbirth, including services to ensure women free choice of maternity, and access to basic obstetric care, pre and post-natal care, and nutrition. Moreover, Canada understands this Convention to mean that such services can be provided only consistently with women's rights protected under this Convention and under other Conventions to which Canada is party."

This formulation builds on the extensive international work that is being undertaken to reduce maternal mortality and morbidity through the Inter-Agency Group on Safe Motherhood. As part of that initiative, the World Health Organization has published *Advancing Safe Motherhood through Human Rights*, 2001. This provides extensive documentation of how human rights are being applied to require governments to reduce maternal mortality and morbidity, and to address the underlying causes. This builds upon the important work accomplished at the UN Conferences in Cairo (1994) and Beijing (1995) and their subsequent five-year reviews, to take a comprehensive approach to reproductive and sexual health.

CONCLUSION

There is creative space in the Inter-American system of human rights for enhanced protection of rights and for amplifying the meaning of human rights to the advantage of Aboriginal women. Some groups, such as the Assembly of First Nations, have worked with similar groups in other countries to apply the Inter-American system to secure indigenous rights to land in a successful case concerning Nicaragua.

Canadian ratification of the American Convention and the Convention of Belém Do Pará would permit the application of these two conventions to advance a range of human rights of Aboriginal women, since the Inter-American system provides opportunities that do not necessarily exist in the wider international systems of rights protection. Geographic proximity, cultural similarity, and economic interdependence can all facilitate the development and application of human rights standards. The Inter-American system provides opportunities to establish and refine legitimacy of the human rights of Aboriginal women across all of the Americas.

In conclusion, Quebec Native Women urge Canadian ratification of:

- the American Convention on Human Rights and its Additional Protocol in the Area of Economic, Social and Cultural Rights, and of
- the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women

in order to ensure:

- the promotion and protection of human rights for all peoples, without discrimination;
- the improved recognition of Aboriginal peoples' rights;
- the right to equality for Aboriginal women;
- the right to humane treatment and the eradication of violence against Aboriginal women;
- rights to ownership of ancestral lands; and
- the right to maintenance of Aboriginal culture.