Native Women's Association of Canada v. Canada

Mary Eberts, Sharon McIvor, and Teressa 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. Teressa 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

CJWL/RFD
doi: 10.3138/cjwl.18.1.67

test cases and are instrumental increating 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 68 Eberts, McIvor, Nahanee, and Pothier CJWL/RFD 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 Me´ tis 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.[1] 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

---

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, Teressa 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. Teressa 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, Teressa 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 Division2 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.