



Native Women's
Association of Canada



L'Association des
femmes autochtones
du Canada

NWAC Written Brief to the Honourable Vice Chair, Marilène Gill and the
Standing Committee on Indigenous and Northern Affairs

Bill C-29:

***An Act to provide for the establishment of a national council for
reconciliation***



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Question:

The Honourable Vice Chair, Marilène Gill and the Standing Committee on Indigenous and Northern Affairs (INAN), requested that the Native Women's Association of Canada (NWAC) provide a written response to whether NWAC supported that the Truth and Reconciliation Council should have an equal split of male and female directors on the board legislated within Bill C-29, *An Act to provide for the establishment of a national council for reconciliation* (Bill C-29).

Will an equal split of Indigenous men and women on the TRC Committee's board of directors achieve substantive equality within Bill C-29?

The Native Women's Association of Canada (NWAC) supports Bill C-29 as a progressive step towards reconciliation, however, the statute itself must clearly include representation of Indigenous women and two spirit, transgender, and gender diverse people (2SLGBTQIA+ people). NWAC calls on the Government of Canada to take accountability and recognize the importance of reconciliation with Indigenous women and 2SLGBTQIA+ people, specifically.

Through Bill C-29, NWAC expects to see the Government of Canada utilize the national council as an opportunity to amplify the voices, while incorporating the knowledge and recommendations of Indigenous women, 2SLGBTQIA+ people at the decision-making tables and through all phases of the action plan in reconciliation efforts.

While NWAC's position is that Bill C-29 must legislate the inclusion of Indigenous women, girls and 2SLGBTQIA+ peoples, it is important to understand that equal representation on the Council's board will not necessarily advance our expressed stated objectives of achieving substantive equality instead of formal equality for the individuals that NWAC advocates for. Canadian constitutional litigation has long recognized that the *Canadian Charter of Rights and Freedoms* (the *Charter*) guarantees substantive and not formal equality; rejecting the model of treating everyone the same to achieve true equality.¹ Substantive equality refers to the achievement of equality in outcomes through legislation² which is achieved both through the processes in making the laws and measuring the actual attainment of the goals within in the law. Substantive equality works to overcome the barriers that have led to the inequality in the first place,³ considering the actual impact of the legislation itself⁴ while recognizing that "identical or facially neutral treatment may frequently produce serious inequality".⁵ Having substantively equal representation would mean Indigenous women and

¹ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at p 164 to 169, online: < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/407/index.do>>.

² National Inquiry into Missing and Murdered Indigenous Women, Girls 2SLGBTQIA People, *Calls for Justice*, at p 170, online: <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Calls_for_Justice.pdf>.

³ Government of Canada, *Jordan's Principle: substantive equality principles*, (21 November 2019), online: <<https://www.sac-isc.gc.ca/eng/1583698429175/1583698455266>>.

⁴ *Fraser v Canada (Attorney General)* [2020] SCC 28 at para. 42, online < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18510/index.do>>.

⁵ *Ibid* at para 47; *Supra* note 1 at p 164.

2SLGBTQQIA+ people’s perspectives are specifically sought and valued in alignment with efforts to remedy their historic and systemic disempowerment in governance decisions and activities.

Simply striving to have an equal balance of Indigenous women and men on the TRC’s board will mask substantive equality issues and risk further perpetuating discrimination against Indigenous individuals who do not ascribe to either identifying as male or female. In other words, having an equal balance of Indigenous men and women on the board will not achieve substantive equality, and will likely continue to disenfranchise Indigenous individuals who identify as two spirit, transgender or gender diverse.

This is not the first time that NWAC has been asked to consider the issue of gender-balance. During discussions at the United Nations Framework Convention on Climate Change (UNFCCC) regarding the “Facilitative Working Group for the Local Communities and Indigenous Peoples Platform”, NWAC had urged Canada to support gender-equality on the working group but recognized that there were concerns that such a clause would dictate to Indigenous peoples who their representatives could be. NWAC argued that gender equality was an affirmation of the *United Declaration on the Rights of Indigenous People (UNDRIP)*, not a derogation from it; however, the ultimate decision landed on a compromise in which the parties stressed the importance of “striving for gender balance in the appointment processes of representatives”.⁶ NWAC reiterates our same position and suggests that in the context of the TRC Board similar language could be considered, in which the importance of gender balance is recognized, but maneuverability is afforded for additional considerations, like the inclusion of 2SLGBTQQIA+ individuals.

How has colonization impacted Indigenous women, girls, and 2SLGBTQQIA+ peoples leadership roles and entrenched internalized patriarchy both historically and today?

Colonization interrupted Indigenous societies across Turtle Island and Inuit Nunangat. Women, girls, and 2SLGBTQQIA+ people historically and presently, play distinct roles in their Indigenous societies with distinct responsibilities as leaders.⁷ Traditionally, their thoughts and opinions were sought before making decisions that affected their communities and they were highly respected.⁸ Women were historically the “backbone” of many Indigenous societies; teaching tribal laws and customs⁹, fostering their peoples’ land-based identities and passing

⁶ FCCC/CP/2018/10/Add.1, [Decision 2/CP.24](#), at para 14, online <<https://unfccc.int/sites/default/files/resource/10a1.pdf>>.

⁷ Brenda L. Gunn, “Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples” in Centre for International Governance Innovation, *UNDRIP Implementation More Reflections on the Braiding of International, Domestic and Indigenous Laws, Special Report* (2018), pdf online: <<https://www.cigionline.org/static/documents/documents/UNDRIP%20Fall%202018%20lowres.pdf>> at p 33.

⁸ Royal Commission on Aboriginal Peoples (RCAP vol 4), *Report of the Royal Commission on Aboriginal Peoples: Volume 4, Perspectives and Realities* (Ottawa: Supply and Services, 1996), pdf online: <<http://data2.archives.ca/e/e448/e011188230-04.pdf>> at p 7.

⁹ Royal Commission on Aboriginal Peoples (RCAP vol 1), *Report of the Royal Commission on Aboriginal Peoples: Volume 1, Looking Forward, Looking Back* (Ottawa: Supply and Services, 1996), pdf online <<http://data2.archives.ca/e/e448/e011188230-01.pdf>> at p 68.

knowledge down to their descendants.¹⁰ Community survival often fell to women as they provided their moral and spiritual strength to their communities.¹¹

Colonization undermined the traditions and roles that Indigenous women held while breaking down Indigenous social orders, traditions, and governance systems.¹² Disempowerment of Indigenous women in their communities is a product of the *Indian Act* and other colonial impositions which introduced unfamiliar and unsuitable forms of government to Indigenous communities.¹³ Until the 1951 amendment of the *Indian Act*, only Indigenous men were permitted to vote in band elections which has effectively removed Indigenous women from political band life.¹⁴ Indigenous women and 2SLGBTQQIA+ peoples experiences of exclusion, powerlessness and vulnerability¹⁵ is a direct result of racism, sexism and stereotyping which has resulted in most damaging of attitudes among Canadian society¹⁶, including within Indigenous communities themselves. Indigenous men hold a privilege in leadership roles today that Indigenous women and 2SLGBTQQIA+ people do not, and it is time that this privilege is not only unpacked but actively remedied. In addition, it must be understood that the impacts of colonization have also resulted in internalized patriarchal values among some Indigenous women as well.

As such, in the spirit of reconciliation and self determination, it is important that the TRC board of directors strive to achieve a gender-balance among the board of women, men, and 2SLGBTQQIA+ individuals who are true elected representatives of their communities. Directors should be chosen from a consensus decision from Indigenous grassroots organizations and community members, whom should have a chance to express their preferred candidate to represent their unique community. This will ensure that there is true representation and that the process to is independent, non-political, permanent, and Indigenous-led. Equal representation of Indigenous men and women alone is not an adequate solution within a true reconciliation framework.

The Royal Commission on Aboriginal Peoples (RCAP) final report in 1996 wrote “[i]f Indian people generally can be said to have been disadvantaged by the unfair and discriminatory provisions of the *Indian Act*, Indian women have been doubly disadvantaged.”¹⁷ Bill C-29 presents an opportunity to improve Canada’s reconciliation with Indigenous women, girls, and 2SLGBTQQIA+ people as distinct rights holders and leaders. This will only be achieved

¹⁰ *Supra* note 7 at p 34.

¹¹ *Supra* note 9 (RCAP vol 1) at p 68.

¹² *Supra* note 8 (RCAP vol 4) at p 7.

¹³ Royal Commission on Aboriginal Peoples (RCAP vol 2), *Report of the Royal Commission on Aboriginal Peoples: Volume 2, Restructuring the Relationship* (Ottawa: Supply and Services, 1996), pdf online: <<http://data2.archives.ca/e/e448/e011188230-02.pdf>> at p 119.

¹⁴ *Supra* note 9 (RCAP vol 1) at p 253.

¹⁵ Royal Commission on Aboriginal Peoples (RCAP vol 3), *Report of the Royal Commission on Aboriginal Peoples: Volume 3, Gathering Strength* (Ottawa: Supply and Services, 1996), pdf online: <<http://data2.archives.ca/e/e448/e011188230-03.pdf>> at p 50.

¹⁶ *Ibid* at p 57.

¹⁷ *Supra* note 9 (RCAP vol 1) at p 226.

if the government of Canada includes explicit equitable inclusive legislation guaranteeing NWAC, Indigenous women, girls, and 2SLGBTQIA+ people secured spots at the decision-making table.

What sections of *The Constitution Act, 1982 (the Constitution)*, the *Canadian Charter of Rights and Freedoms (the Charter)*, and the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIPA)* speak to relevant provisions in Bill C-29 regarding the equal inclusion of, and substantive equality for, Indigenous women, girls, and 2SLGBTQIA+ people?

Both independently and while read as a whole, section 35(4) of the *Constitution* and section 28 of the *Charter*, constitute an “unshakeable guarantee” that Indigenous “women and men have equal access to the inherent right of self-government and that they are entitled to equal treatment by their governments.”¹⁸

Furthermore, the *UNDRIPA* is arguably the most comprehensive international, and now domestically legislated, instrument establishing a universal framework of minimum standards for the survival, dignity, and well-being on the rights of Indigenous peoples worldwide. Additionally, the UNDRIP expands on existing human rights standards and fundamental freedoms as they apply specifically to Indigenous peoples.¹⁹ The UNDRIP is an invaluable human rights instrument that specifically identifies the rights and socioeconomic prosperity of Indigenous women as key to the survival and wellbeing of Indigenous peoples worldwide.²⁰ Article 44 states that all the rights and freedoms recognized are equally guaranteed to all Indigenous people, both male and female, so each Article should be interpreted through a gender-based lens to ensure this equality manifests. Additionally, Articles 21 and 22, which draw special attention to women and girls with disabilities, protecting them from all forms of violence and discrimination, and outlining that when implementing and policy or programs, Indigenous women’s needs must be addressed. Lastly, Articles 5 and 18 call for the right of full participation by Indigenous people, and NWAC submits, this call includes Indigenous women, girls and 2SLGBTQIA+ people.

NWAC submits that the above noted legislated illustrates that it is not enough for Indigenous women, girls, and 2SLGBTQIA+ people to be considered as an afterthought for inclusion, sometime in the next 5 years, as Bill C-29 has done in section 12(d). Instead, NWAC strongly asserts that the law is clear that Indigenous women, girls and 2SLGBTQIA+ people should be expressly included in decision making that affects their rights. Thus, NWAC also calls on the government of Canada to expressly prioritizing Indigenous women, girls, and

¹⁸ *Supra* note 13 (RCAP vol 2) at 221.

¹⁹ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, (2022), online: Department of Economic and Social Affairs Indigenous Peoples <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

²⁰ Native Women’s Association of Canada, *NWAC Statement of Support – Bill C-262*, (5 December 2017), online: <<https://nwac.ca/media/2017/12/nwac-statement-of-support-bill-c-262>>.

2SLGBTQQIA+ people throughout the entirety of Bill C-29, in the preamble, purpose and function, board of directors, and annual report sections. Again, NWAC strongly advocates that there must be a mandatory representative position for Indigenous women and girls, and a mandatory position for 2SLGBTQQIA+ people on the Council's board of directors.

NWAC's Recommendations

1. Section 10 be amended to read as follows:
10(1) The board of directors is to include...
(d) one director who may only be elected after having been nominated by the Native Women's Association of Canada.
2. Section 10 be amended to read as follows:
10(1) The board of directors is to include...
(e) one director who may only be elected after having been nominated by grassroots organizations and community members representing two spirit, transgender, and gender diverse peoples.
3. The TRC board will strive for a gender balance in the appointment processes of representatives.
4. Bill C-29 shall explicitly prioritize Indigenous women, girls, two spirit, transgender, and gender diverse people throughout the entirety of Bill C-29, including adding clear language to this effect in the preamble, purpose and function, board of directors, and annual report sections.
5. Bill C-29 shall strive to achieve substantive equality for Indigenous women, girls, two spirit, transgender, and gender diverse people.
6. The TRC council will work to amplify the voices, while incorporating the knowledge and recommendations of Indigenous women, 2SLGBTQQIA+ people at the decision-making tables and through all phases of the action plan in reconciliation efforts.