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NATIVE WOMEN AND THE CONSTITUTION



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AND THE
CONSTITUTION

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INTRODUCTION

The Constitution Act of 1981 makes our time a very important period in the history of Canada. This is an historically significant time for all Canadians, and particularly for the native people of Canada. Our actions in developing a sound Constitution will affect our lives and the lives of those to come. Efforts must be made to have aboriginal rights firmly entrenched in the new Constitution. Only then can native people rest assured that their inherent rights as the first people of this country will be recognized and protected.

Now is an especially important time for native women, who have long suffered under an unjust law. We deeply hope that the new Constitution will give native women the right to equality which has so long been denied. Indian Rights for Indian Women is firmly committed to making this a reality. This pamphlet is a response by I.R.I.W. to the major constitutional issues confronting native women.

A REVIEW OF THE TERMS

Before we proceed to discuss the issues, it may be helpful to review some of the terms most commonly used in discussions on the Constitution.

WHAT IS A CANADIAN CONSTITUTION?

A constitution is a law or a system of laws which governs the function of a country. It is the most powerful of all laws. A constitution provides boundaries within which governments and individuals must act.

The Canadian Constitution is largely contained in the British North America Act of 1867. This Act refers to native people in one section (91 (24)) which states that jurisdiction over Indians and land reserved for Indians is a federal responsibility. Until now, this has been the only constitutional reference to native people in Canada.

WHAT DOES PATRIATION OF A CANADIAN CONSTITUTION REALLY MEAN?

Unlike most countries, Canada's Constitution was enacted by a foreign government. It is an Act of the British Parliament. Because of this, some parts of it can only be changed with the consent of the British Parliament. Patriating the Canadian Constitution means bringing the B.N.A. Act home. In other words, it means bringing the B.N.A. Act under the jurisdiction of Canada's federal government. The Act could then be changed without asking for Britain's permission.

I.R.I.W. is in favour of patriation as long as protection of aboriginal and treaty rights and equal rights for Indian women are ensured in perpetuity.

WHAT IS UNILATERAL PATRIATION?

Unilateral means "one-sided". The federal government and some provincial governments are in disagreement over changes which the federal government proposes to make to the B.N.A. Act before it is brought home. Because of this the federal government has decided to patriate the Constitution without the consent of the provinces. This is why it is called one-sided, or unilateral patriation.



WHAT IS THE CHARTER OF RIGHTS?

It is a series of laws set down in the new Constitution which outlines the rights of the individual and prohibits legal discrimination on the basis of race, religion, age or sex. There is no Charter of Rights contained in the old B.N.A. Act. Canada has a Bill of Rights, but this is an ordinary law, which is less powerful than a constitutional law.

Indian Rights for Indian Women is in favour of including a Charter of Rights in the new Constitution. If this Charter were included, native people would benefit from it in a number of ways. The Charter outlines a number of legal rights including the right to an interpreter. It protects affirmative action programs. It guarantees protection for aboriginal, treaty, and other rights that pertain to the aboriginal peoples of Canada. Most importantly for native women, the Charter outlines rights of equality, and specifies that every individual is equal before the law and has the right to the equal protection and benefit of the law, without discrimination on the basis of race, national or ethnic origin, colour, religion, age, mental or physical ability or sex. Consequently,

section 12(1)b of the Indian Act might be eliminated because it is discriminatory on the basis of sex and thus conflicts with rights of equality established in the Constitution. The present Bill of Rights is not strong enough to do this because it is not a constitutional law.



WHAT IS AN AMENDING FORMULA?

The new Constitution contains a number of sections outlining methods which may be used to change the Constitution. These are called the Amending Formula. These sections provide the opportunity to change parts of the Constitution which are unacceptable, but make them harder to change than if they were ordinary laws. While several amending methods have been proposed, the new Constitution specifies that only one of these may be used for amending sections which pertain to aboriginal peoples (section 55(c)). This method is the standard amending formula outlined in section 46. It provides that changes in the Constitution can be made with the consent of the federal government and the majority of the provinces.

WHAT IS AN INTERIM AMENDING PROCEDURE?

The federal government's proposed amending formula is one of the major points of disagreement between the federal and the provincial governments. For this reason the federal government has given the provinces two years to devise a more acceptable alternative. During this two year period, the Constitution Act of 1981 may only be amended by following the methods outlined in the Interim Amending Procedure. After two years, the Interim Amending Procedure will be phased out. At that time the provinces alternative amending formula, or the amending formula (called the Victoria Amending Formula) already proposed by the federal government will take its place. The Interim Amending Procedure will not be used to amend sections dealing with aboriginal rights.

THE ISSUES

The following questions will address those aspects of the new Constitution which are of particular concern for native women. It is hoped that the questions raised will promote discussion on these topics.

DOES THE PROPOSED AMENDING FORMULA PROVIDE AN ACCEPTABLE METHOD FOR CHANGING THOSE SECTIONS OF THE CONSTITUTION WHICH PERTAIN TO ABORIGINAL RIGHTS?

No. As was stated earlier, the new Constitution specifies that the method outlined in section 46 may be used to change those sections which deal with aboriginal rights. While this method, involving the majority of the provinces and the federal government, is better than allowing changes to be made by only the province(s) affected and the federal government, it is not good enough. I.R.I.W. feels that in order to

be self-determining, and to ensure that native rights are protected, natives must have more control over decisions which affect them. Changes to those sections of the Constitution which apply to native people must only be made with the consent of those people who are affected.



DID THE CONSTITUTION SATISFACTORILY DEAL WITH THE TREATIES?

The treaties have been recognized and included in the new Constitution (section 34(1)). However, there has been no systematic review of these treaties to determine whether the agreements they represent have been met or are fair. This must be done and the treaties must be renegotiated before native rights derived from them are assured. I.R.I.W. feels that this is an area for continuing investigation.

IS THE CONSTITUTIONAL DEFINITION OF ABORIGINAL PEOPLES ADEQUATE?

No. The Constitution defines the aboriginal peoples of Canada as Inuit, Indian, and Metis peoples (section 34(2)). This is a first, as Metis peoples have never been officially recognized as aboriginal peoples. However, the Constitution does not define the words 'Indian', 'Metis', or 'Inuit'. This leaves a very important question unanswered. That is,

WHO WILL DECIDE WHICH INDIVIDUALS ARE ELIGIBLE FOR MEMBERSHIP AS INDIAN, METIS, OR INUIT PEOPLE?

I.R.I.W. feels that native people must have the freedom to make this decision. However, unlike some other native organizations, which state that membership should be solely decided upon by the bands, I.R.I.W. insists that an appeal board be established to review any decisions which seem to be unfair.

SECTION 15 HAS BEEN CALLED THE EQUAL RIGHTS SECTION. WILL IT GUARANTEE EQUAL RIGHTS FOR INDIAN WOMEN?

Section 15 provides that every individual is equal under the law and has the right to the equal protection and equal benefit of the law without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical ability. The federal government has assured I.R.I.W. that this section will eliminate section 12(1)b, thus giving native women equal rights.

IF SECTION 12(1)b OF THE INDIAN ACT IS FOUND TO BE DISCRIMINATORY UNDER SECTION 15, WHEN WILL IT BE REMOVED?

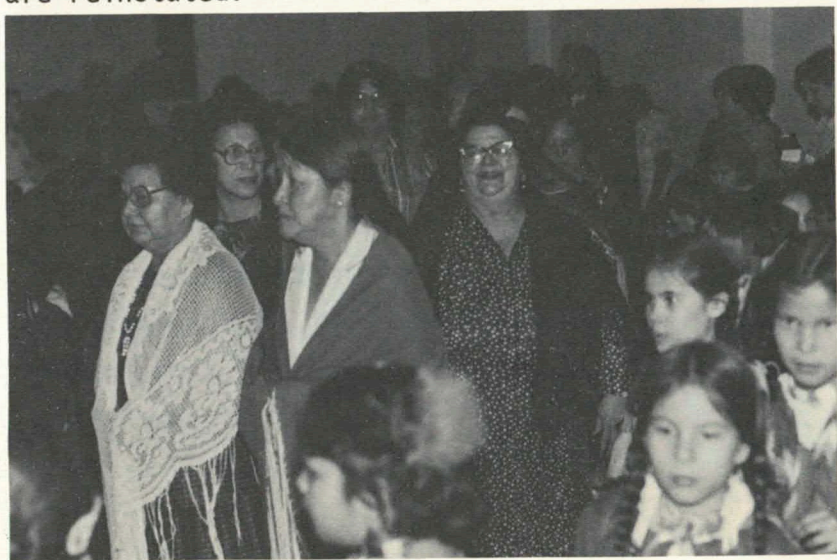
As the new Constitution outlines, section 15 will not come into effect until three years after patriation (section 31(2)). This means that section 15 cannot be used to eliminate 12(1)b until at least three years from now. However, the Prime Minister of Canada has made a commitment before the United Nations to have section 12(1)b eliminated within two years time.

I.R.I.W. feels that Indian women have suffered an injustice under the law for too long already. For ten years successive governments have said that this discrimination was about to end. I.R.I.W. urges the Prime Minister to end this injustice now.

IS THERE ANYTHING IN THE NEW CONSTITUTION TO GUARANTEE THAT ENFRANCHISED INDIANS WILL BE REINSTATED?

No. The new Constitution may help to remove section 12(1)b from the Indian Act. However, it says nothing about reinstating those people who have already lost their status because of an unjust law.

Half a remedy is just not acceptable. If the law is unjust for one, it is unjust for all. Equal rights must mean equal rights for everyone. I.R.I.W. is committed to seeing that those who have suffered because of this discriminatory law are reinstated.



DOES THE CONSTITUTION INDICATE WHETHER NATIVE PEOPLE WILL BE FAIRLY REPRESENTED IN DISCUSSIONS ON FUTURE CONSTITUTIONAL CHANGE?

No. Section 36(2) states that a conference on constitutional issues shall be held at least once a year. This section guarantees that native concerns will be on the agenda and grants native people the opportunity to negotiate with conference delegates on all matters which affect them. What the section does not indicate is whether the concerns of native men and native women both will be fairly represented. I.R.I.W. insists that native women must be given the opportunity to speak for themselves. Native women must have a voice in any future constitutional debates concerning native issues.

WHAT ARE THE MOST IMPORTANT ISSUES FOR NATIVE WOMEN?

This pamphlet has reviewed those constitutional issues which are of concern to native women. The most pressing issues centre around equal rights. It must be guaranteed that section 12(1)b of the Indian Act will be eliminated soon. Enfranchised Indians must continue to fight for reinstatement. Native women must have input on decisions regarding membership. To assure fair treatment in the future, native women must have equal representation at constitutional conferences on matters which affect them. It is most important that native women continue to be aware of the issues, and to make their presence known in the constitutional debate. Then a just constitution may be created for all.

HOW DOES INDIAN RIGHTS FOR INDIAN WOMEN PROPOSE TO DEAL WITH THESE ISSUES?

I.R.I.W. will carry out activities in a number of areas. The organization will continue to press for equality before the law, the elimination of section 12(1)b and the reinstatement of those affected by that section. I.R.I.W. has also developed a program of research and consultation on constitutional and general issues of concern to native women. This program includes the establishment of research committees to head the following topics:

- . Constitutional proposal on self-government
- . Indian Land Act
- . Indian Education Act
- . Indian Child Welfare Act
- . Indian Act Revisions
- . Other Federal Acts.

These committees will meet with native womens' groups across Canada to ensure input from native women, and to promote joint participation. By this process, a comprehensive package will be developed for consideration by the First Ministers. This package will present concerns in the following areas:

- . individual rights on Indian reserves
- . aboriginal rights
- . principles of self-government, including self-determination and limited sovereignty
- . application of International Law
- . Indian lands
- . hunting, fishing and trapping rights
- . federal, provincial and tribal jurisdiction on Indian reserves
- . federal and provincial responsibilities on and off Indian reserves
- . parliamentary representation for Indians
- . membership
- . the establishment of an appeal board to review decisions regarding membership

I.R.I.W. works to keep informed about the issues and to familiarize others. In addition, I.R.I.W. continues to lobby and to make its concerns public, thus ensuring that the voice of native women is heard.