native women's association of canada

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NEWS LETTER:

on the 8th Annual Convention

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PRESIDENT'S REPORT

Many of you have heard me talk of "my mountains" and how I could hardly wait to get back home to my environment to be "re-energized". To those of you for whom a visit to the Okanagan Valley is a first, now you have experienced their beauty for yourselves; I hope you will agree that I am justified in missing them. And to those of you who have been here before, I am hopeful that you are glad to be back. I welcome all of you – I feel it is not only a pleasure, but an honour, to have you join me in my country!

As I have already indicated, I have been away from B.C. for a good part of the time since you elected me as your President. Many of you will no doubt remember my being in, what can only be termed, a state of shock when I realized (and I assure you, it did not take too long) that I had accepted the position of National Leader of an organization with which I had been associated for many years in varied capacities, but never as President! I must admit that at first I was close to being petrified with the enormous responsibilities I had been given and prayed many, many times for guidance and strength to carry on the work that my sisters had begun.

By no means do I wish to even imply that the report of the activities to follow is the work of mine alone. Those people who have provided me the tremendous support and encouragement needed throughout the year share fully in the accomplishments of the Association. Sadly enough, so too, do they share the burden of disappointment and the pain of adversity in not being able to fully attain all those goals which we had hoped to achieve on your behalf.

Perhaps the greatest advancement made this year has been the strengthening of working relationships that were previously established, and perhaps more importantly, the development of those that never existed. Quite naturally as a result of these liaisons, the N.W.A.C. is widely looked upon as a credible organization whose input is increasingly requested by Women's Groups, other Native Organizations, Departments of the Federal Government, and groups in the United States. Also quite naturally, greater demands have been put on the N.W.A.C. and the National operations.

As fruits of our efforts, I am pleased to report that the Department of Indian and Northern Affairs, once considered a very elusive body in terms of the N.W.A.C., this year granted an amount of $20,000.00, as contribution to this Annual Convention. We are also assured of resources to conduct work in the area of Economic Development. As well, a recent meeting with the Assistant Deputy Minister of Corporate Policy has led us to pursue funding to prepare for an invitation to provide input regarding amendments to the discriminatory provisions of the Indian Act.

On that issue I feel our work has just begun. Through funds from the Canada Community Development Program, one of the researchers has been assigned the Indian Act and its implications for Native women entering the labour force. On a more high-profile note, just last week the N.W.A.C. co-hosted an evening on Parliament Hill with Margaret Mitchell, Flora MacDonald, and Celine Hervieux-Payette. Margaret had contacted the office to request a joint effort in presenting the issue of 12(i)(b) to her fellow parliamentarians, the intent being to once more attempt to have changes made to the discriminatory provisions of the Indian Act. The film "Somewhere Between" was shown as an introduction, followed by our very special guest speaker, Jeanette Corbiere-Lavell. Also on hand to make presentations were Mary Two-Axe Early and Shirley Joseph. Flora very emphatically stated that she and her colleagues would continue to pressure the Government to change the legislation and urged us to convince our Chiefs and Councils to support a change.

Another "first" is our success in gaining approval to participate in the Health Liaison Program of Health and Welfare Canada. The receipt of monies enables the N.W.A.C. to have a Health Liaison Worker who among many other duties, will most likely participate in the National Native Alcohol and Drug Abuse Council, our seat on which is guaranteed. The Honourable Monique Bégin, in this way and communicating through her designated staff, has indicated her commitment to ensure Native women's input into the development of special strategies for us and our youth.

Another area in which we have progressed is in the implementation of the recommendations of the joint N.W.A.C./C.E.I.C. Working Group. I feel that it is safe to say that the N.W.A.C. now has a national employment program in place with a lot of room to grow. Considering the calibre of people who have been involved in the development of the program, I have no qualms that the growth will occur and movement can only be upwards.

A great deal has been said on the Canadian Constitution and the N.W.A.C.'s membership in the Aboriginal Rights Coalition (ARC). We believe that

through the efforts of ARC and other Native groups, the Government was forced to reinstate the section on aboriginal and treaty rights, albeit with the addition of the word "existing". Time does not allow, nor do I think it necessary to attempt to describe the events leading to Native peoples being at least mentioned in the Canada Act. Of course enormous amounts of work remain to be done, not the least being to secure funds to enable the N.W.A.C. to participate equally in the post-patriation process. A proposal has been submitted to the Government of Canada on your behalf. Based on the belief that Native women cannot look at the Indian Act in isolation from the Canada Act and vice versa, the suggested utilization of funds covers both issues.

Before I leave this topic, and in reinforcement of what I said earlier, I must emphasize to you the invaluable progress that was made in those hectic weeks regarding the development of ties with other Native and Non-Native Organizations, and the recognition of the value of N.W.A.C.'s participation in the Coalition. Not only has our relationship with the Native Council of Canada strengthened, but we maintain contact with the Inuit Committee on National Issues (ICNI) and the National Association of Friendship Centres on a regular basis, and with the other groups through exchanges of newsletters and the on-going attendance at Coalition meetings. Worthy of special mention, I think, is what I would like to refer to as a new friendship with Inuit women, largely through Mary Sillett, Co-ordinator of the ICNI, with whom we spent a lot of time during the most active weeks of the Coalition. With her accompaniment, we were able to make our trip to Labrador, a successful one. Inuit and Indian women alike, in the communities we visited, continue to organize for the betterment of conditions for their people.

I should also mention that David Ahenakew, National Chief of the Assembly of First Nations (AFN), accepted the invitation to meet with the Coalition Leaders at our last meeting in May. He expressed his hope that all groups could work in co-operation on areas of common interest. He assured me that he is concerned about Native women's rights, and advised the group that the AFN is willing to work with other aboriginal groups with the intent to resolve past problems with the B.C. Indians, Métis and Non-Status Indians. Although he is unable to attend our meeting this weekend, he wishes us success in what he writes is a "most worthy endeavour". I am also informed that a staff member in the AFN office has been assigned to be liaison person with our National Office. I think you will agree that this is a good indication that we are making progress towards unity.

As to our relations with non-Native groups, I am pleased to say that we continue to progress, nationally in Canada and even internationally! For the second time in its history, the N.W.A.C. was a member of the Canadian delegation to the World Congress of Women. At the event, held in Prague, Czechoslovakia, last fall, I was given the opportunity to make a presentation on Native women's issues in Canada to women from all over the world. The trip to Europe was my first, and the experience of speaking with women of their magnitude was truly an incredible one!

I believe that my interaction with the Congress of Canadian Women at that time contributed to their lending support to the aboriginal groups last November during the Constitutional crisis. In addition, I recently made a presentation to the women at their 13th National Convention held in Toronto last month.

Accompanied by several of the National office staff, I also travelled to Detroit, Michigan, at the end of March, to participate on a panel at the 13th National Conference of Women and the Law. I had the great pleasure of meeting Aby Abbinanti, an Indian lawyer from California, who, with the valuable assistance of Sandra Isaac, joined with me in conducting a workshop entitled "Native American Women: Issues and Solutions". Our small group was well received and the N.W.A.C. has been asked to become involved in the co-ordination of next year's Conference. This comes about as a result of the participants recommending future increased attendance by women from Canada, especially Native women.

Although I was unable to attend myself, the N.W.A.C., in the person of Marlyn Kane, also participated in a conference on Native Peoples of Canada and the U.S. at St. Lawrence University in Canton, N.Y., on April 17th. I am informed that many favourable comments about the conference and panelists were received, and that plans to organize subsequent seminars will definitely include the N.W.A.C. Ironically enough, as our representatives from Canada spoke on the issues of legal status, land claims, education, and health, the Queen and the Government of Canada were proclaiming the Canada Act 1982.

I hope you can appreciate that many, many other meetings were had over the year – I have tried here to highlight those that perhaps reflect and reinforce my earlier statement as to what I feel has been our greatest advancement over the months. At a time when only the other three National Native Organizations are recognized by the Government in the post-patriation process, I must also make special mention of the Canadian Indian Lawyer's Association. At its annual meeting in Regina in March, the

Association invited the N.W.A.C. to make a presentation on our activities especially as related to the Canadian Constitution issue. Bernice Dubec, Elaine Jessop, and the staff members who attended on N.W.A.C.'s behalf, appreciated the opportunity, so rarely given to us, to have a place on the agenda. I understand that Bernice and Marlyn are to be commended on their presentation.

In terms of visiting you in your provinces and territories I regret that my schedule did not always permit me to accept your invitations. I assure you that my absences were not of my choosing; on the other hand I am confident that the other Executive and staff members who did attend your annual meetings and the like did their jobs well. From all of us, please accept our gratitude for taking such good care of us when we were with you.

The National Office is now about two years old. When the Board was in Ottawa in the Fall we were fortunate enough to have a beautiful official opening – beautiful because our respected Elder Ernie Benedict performed a sweet grass ceremony for us, followed by a feast comprised of foods that had been brought from all parts of the country by the delegates, and beautiful because of the people who joined us in celebrating the move to our new home.

The number of staff members continues to grow, and for this reason, we have moved again – just next door – to more spacious quarters. The workload is always incredible. However, I am told that the fact that more people drop in, write, and call, only shows that we are becoming more and more known. We have maintained an open-door policy and believe that we have been the better for doing so. I am proud to report that many times I have been complimented on the National Operation and what we have managed to accomplish with so little and so few.

An initiative which is of utmost importance to us is the renewal of our Indian and Inuit ways. We regret that we have not been as attentive to it as we could have been. However, we are making conscious efforts to bring our Elders to the forefront of things, and with them, of course, a revival of our cultural and spiritual ways. An Elder has been present at our Board Meetings, and more than once when Ernie Benedict has been in Ottawa, we have asked him to perform sweet grass ceremonies. On our behalf Ernie also conducted a workshop on Indian spirituality at the Christian Festival which was held in Ottawa last month. His presence encouraged people to attend the N.W.A.C. workshop on the following day which was conducted by Sandra and Marlyn, on Native women's rights. Gloria George was in attendance and has strongly suggested our involvement in the organizing of the upcoming World Council of Churches Conference to be held next July at U.B.C. in Vancouver. I would urge you to think about this as I agree with Gloria that we must educate the Christian people in order to gain their understanding and support of our beliefs.

Finally, I think our greatest efforts have gone into the focus of this Convention. At the end of March we consulted with our Elder Eva McKay to obtain guidance and direction with respect to our desire to have a conference that centres around our Elders and our ways. We continued to keep in touch with her throughout the planning and she was to officiate over the proceedings this weekend. A tragic incident in her family has made it impossible for her to be with us at this time. She has assured us that her thoughts will be with us and in turn we have given her assurances that we will pray for her and her family during their time of difficulty.

We are truly fortunate to have with us Albert Lightning and Tom Porter, who with our own Elders, will be truly instrumental in making our meeting a success. In the months of planning we have looked very anxiously towards having the opportunity to openly demonstrate our respect and honor for our Elders. We know that the path we chose to follow is the right one. I thank each and every one of you for joining us in celebrating our good fortune!

Jane Gottfriedson
June 1982

TREASURER'S REPORT

The audited financial statements for the fiscal year ending March 31, 1982 show a loss of $27,479. The loss came primarily as a result of inadequate funding for the size of the operation; however, the loss was absorbed in the surplus of previous years of $36,218 resulting in a present surplus of $8,739. The decision to use the surplus was based on the fact that the Native Women's Association of Canada is a non-profit organization, and should not be building surpluses when the community is in need of services.

In order to avoid a reoccurrence, this was brought to the attention of the Secretary of State. Provisions have now been made for expansion (which were not provided before) because of the increased demands. Now, that the N.W.A.C. is the nationally recognized organization, more demands are anticipated to cover services previously serviced by other Native women's organizations.

The core funding has been increased from $96,000 to $235,500. Although there was a delay in obtaining approval for the $235,500 because the federal government was apprehensive that the N.W.A.C. could not handle such a large budget, and for other underlying reasons, the Native Women's Association of Canada took a firm stance and did much lobbying. The agreement proceeded as initially agreed.

In the national office, the permanent number of staff from last year has been increased to three. Two people cannot effectively manage the national operation. It is anticipated there will be four permanent staff for the coming year.

Some of the audit recommendations with which I am in full agreement are:

1. Signing Authority
   a) board decision is required for extra-ordinary expenses, i.e. furniture and fixtures.
   b) Executive Director decision only for every day business expenses.
   c) Treasurer and/or other Executive member as alternate signing officers.

2. The contracts officer should be the Executive Director.

I would like to emphasize that because the federal government was hesitant to approve the increased budget, and because we can expect government spending restraints, it is the onus of the new Executive to priorize the 1982-83 budget with a clarified, stringent spending policy.

Elaine Jessop
Treasurer

CHILD WELFARE

(Present Situation)

As is stipulated, Section 92(7) of the BNA Act provides that provincial governments are responsible for welfare including protection and care of children. Section 91(24) of the BNA Act also gives Canada special power to enact legislation with respect to Indians. Obviously, Canada has not exercised this discretionary power with respect to legislation which would govern the protection and care of Indian children. Additionally Section 88 of the Indian Act indicates that all laws of general application apply to reserves unless they are contrary to specific provisions in the Act. Since the Indian Act makes no provision for welfare services, including child welfare, then the provincial child welfare legislation is applicable on reserves. In many areas however, provincial services have not been extended to reserves. As a consequence, the Department has undertaken to establish services for Indian children where this situation exists. Action to place a child in a home or facility other than the parental home is taken on the basis of parental consent, although in emergency situations staff have had to act prior to obtaining consent because he or she had reason to believe that a child was being neglected or abused. The provision of child welfare services on reserves is therefore made up of a complex pattern of provincial and departmental services. There is considerable variation in the quality and quantity of service between one region and another. The reluctance and indeed the failure of many provinces to extend their services to reserves is based on a number of factors including:

(a) a difference of opinion on the interpretation of Sec. 91 of the BNA Act resulting in jurisdictional conflicts between the Federal government and Provinces;
(b) the high cost of providing services to reserves, particularly in isolated areas; and
(c) the reluctance of some Indian communities to accept provincial services arising from the fear that accepting such services may affect their treaty and aboriginal rights and Indian status.

To reiterate what Section (a) implies I will provide an example. "The major barrier has been the unwillingness of provincial and municipal governments to provide services or expend monies on a minority group regarded as the exclusive responsibility of the federal government." This statement expressed in the 1967 Hathorn Report indicates the jurisdictional conflicts of the governments at the expense of the children. It is noteworthy that policies for provision of child welfare services are incredibly varied and at the level of actual service delivery, whether they are in fact delivered depends on the accessibility or availability of local resources. If available, Native children in care are at the mercy of these local resources, and their futures are at their personal discretion. If a social worker has reason to believe that a child is being neglected he has the authority to apprehend that child regardless of the parent or guardian's protestations. Subsequent to this, a court hearing is held where a judge decides if this child is in fact being neglected or abused. He listens to both the social worker or agency and the parent or guardian of the child. If he decides in favor of the social worker the parent loses all rights as guardian to that child and his or her responsibilities are then terminated.

Considering the differences in the Native culture to that of the white society, it is probable that the

meaning of the word "neglect" can vary somewhat. In most cases, they will interpret neglect as something totally different from the Natives' interpretations, which will result in much unhappiness and chaos. Additionally, the placement of Native children in adoptive homes, more often than not, non-Native, results in incredible adaptation on the part of a child, to a society which is alien to him. It is difficult enough that a Native child would have to adjust to a new home, providing it were Native, but to have to adjust to one totally different from his culture is truly demeaning and such actions eventually lead to cultural genocide. The fact that some Bands have taken control of their Child Care services is an indication that a problem exists, but is one more step to alleviating this critical situation. It is apparent that not enough Bands are doing so but solutions are being sought by the Natives themselves to rectify this situation. It is disconcerting to face the phenomenal statistics regarding children in care who are being sent to the U.S. where the demand for Indian children has increased as a result of the new U.S. Tribal Court system. With the emergence of the U.S. Tribal Courts less U.S. Native children are being adopted out of the Indian communities, thus increasing a demand for Native children. Manitoba has been supplying this demand by adopting Canadian Indian children into the U.S. Such action has come to an end as a result of new legislation halting such undertakings by the province. Another relative example is in the Yukon where approximately 62% of children in care are Native. It has been the concern of the Yukon Indian Women's Association to try and eliminate this problem because statistics show that over three-hundred children from the Pacific Northwest have been adopted into the U.S.[1] To combat this problem, they wish to hire U.S. lawyers who have access to information through the U.S. freedom of information legislation to help locate data concerning these children, and to find out exactly how many from the Yukon area have been sent to the U.S. Statistics regarding Native children in care are high everywhere except the Northwest Territories where the Inuit retain a strong extended family structure, therefore less children are in care. In cases where parents cannot or will not care for their children, other Inuits of the same community or blood relatives will take that child into their care. These adoptions follow Inuit custom and discovering the identity of his or her natural parents is encouraged rather than prevented, as is done in most of society today. Inuit customary adoptions have now been recognized in law. Examples such as this do not exist anywhere else in Canada, with the exception of a few Bands such as the Spallumcheen Band or the Dakota-Ojibway Tribal Council who come a step closer to controlling Indian Child Welfare Programs, through tripartite agreements but who do not follow any traditional customs regarding child welfare. It is not an ideal situation but gives fuller control in directing and protecting the lives of their children.

[1] Workshop: "An International Comparison of Family Law," 13th National Conference on Women & The Law, Detroit, Michigan: March 25-28, 1982.

CONCLUSIONS: There are many indications that the present method of providing services in Child Welfare for Native people is failing. Indian children in care are estimated to be at about 4.29% compared to 1.35% of all children in Canada. This statistic alone provides the best indication of the failure of the present system. The existing services are designed and delivered by non-Indians and fails to recognize the different value system and lifestyle of the Native people. In some cases services are only provided in "life and death" situations which is not good policy for anyone concerned about the welfare of children. One way of providing opportunity for Natives to control the lives of their children is for Canadian legislation to delegate authority for Child Welfare Services to the Bands themselves so that they can be in a better position to counteract the disintegration of Indian families. It will enable them to protect their Indian identity and the identity of those children in care by decreasing, as much as possible, the number of Native children who are adopted into non-Native homes. The closest resemblance to delegating authority to the Natives themselves to allow control of their own program is the Dakota-Ojibway Tribal Council which is operated by an Indian Board of Directors recognized as a child welfare agency under the Manitoba Child Welfare Act. The Spallumcheen Band in British Columbia and the Alberta Blackfoot Band also control their child welfare services by an agreement made between the federal government and the Bands.

RECOMMENDATIONS

1. During the first Ministers Conference, negotiation of Aboriginal rights should include constitutional recognition of the rights to Band control of social services. Only if Indians control Child Welfare Services and provide input will Indian children in care and the unpleasant situations surrounding this issue, be eradicated.

2. Establishment of Child Welfare Committees who become involved in cases or situations where there appears to be need for child protection. Such committees (ie. Native Children's Advisory Council) could become incorporated to ensure legal entity and attract serious response from Bands, governments or other agencies.

3. Since local Indian Bands are male dominated, it would be in the best interest of Native women

concerned about the Child Welfare system, to become elected in their local Band Councils whereby they could set up committees and priorize child welfare. The male dominated Band Councils do not make this a priority and since it has been the traditional role of Native women to care for the children, it is only they who can seriously change the circumstances of the child welfare dilemma. Committees could be set up as was mentioned above to combat problems for children in need of protection. The job of the Native Women's Association who is affiliated with all the provincial women's associations, is to promote elective representation of women in Band Councils across the country.

NATIVE WOMEN AND THE CONSTITUTION

INTRODUCTION

The *Constitution Act, 1981,* which has finally brought the power to amend the Canadian constitution back home from Great Britain, vitally affects Canada's Native women. Native women face considerable challenges in the coming years to define, both as women and as Aboriginal peoples, their role in the Canadian political structure. The recent events concerning the Constitution is merely the first step in this long process.

The new Constitution contains many provisions that are of great importance to Native women. This paper shall first look at the sections of the Act dealing with Women's rights; it will then examine the aboriginal rights provisions; finally, the amending formula and the implications of the First Ministers' Conference on aboriginal rights will be discussed.

I

The *Canadian Charter of Human Rights and Freedoms,* Part I of the new *Constitution Act,* sets out the basic guarantees of rights and freedoms as they apply to all Canadians. Two points should at once be made. Firstly, the guarantees of rights and freedoms apply to individuals only, not to collective groups or peoples. Secondly, the *Charter* only gives rights to individuals against their Government, federal, provincial or territorial. Any activity or practice that infringes *Charter* rights and freedoms in the private sector is not covered. For example, should someone be denied a job or an apartment because she is a woman or native person, then that person would have to look to the federal or provincial human rights statute to see whether in that province or territory the discrimination is considered illegal. The federal *Charter* will, in this situation, be of no use. However, should a provincial government set up a programme or enact legislation that denies a right or freedom guaranteed by the *Charter,* then the *Charter* will cause that programme or legislation to fall (with one exception – to be discussed later.) The *Charter* is national in scope, and *all* human rights statutes (in Canada all provinces and the federal power have enacted human or civil rights legislation) are now made subject to it, in the public sector (s. 32 (1)).

For women, the provisions dealing with equality rights are of major importance. This is found in Section 15:

> "15 (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The earlier provisions relating to sexual equality rights, found in the *Canadian Bill of Rights,* was the object of a number of court challenges by Native Indian women. In the *Lavell* case, section 12(1)(b) of the *Indian Act* was claimed to discriminate against Indian women, since it obliged Indian women to lose their status upon marriage to a non-Indian when Indian men marrying non-status women would not be so affected. The Supreme Court of Canada was able to interpret the guarantee of sexual equality found in the Bill of Rights in a far more restrictive manner than Indian women wished for, and section 12(1)(b) was upheld.

In the new Charter, it will be a great deal more difficult for the Supreme Court to narrow the sweep of the equality guarantee. For one reason, this provision is found not in a simple statute (as was the Bill of Rights) but in the Constitution, to which all laws are subject. As well, the wording of Section 15 is much stronger – women, for example, are guaranteed equal "*before* and *under* the Law", and have "the equal protection *and* equal benefit of the law without discrimination and in particular without discrimination based on . . . sex . . ." None of this explicit language is found in the Bill of Rights. Women can now expect a greater chance of winning court cases based on the tougher wording of section

15 of the Charter. In addition, sub-section (2) specifically permits "affirmative action programmes", that is, programmes set up to favour special interests of groups at the expense of the rest of the population (because of the disadvantaged position of that group or interest). This will again be useful for women, particularly in the field of education and job training.

Another section of the Charter has received considerable attention and publicity. It has been dubbed the "women's rights clause". It reads as follows:

"28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".

Read carefully, it will be seen that this section does not give any extra rights or freedoms to women that section 15 has not already given. In fact, in my opinion, all section 28 aims to do is clarify that all rights and freedoms enumerated in the Charter apply equally to men and women.

This section was added to meet criticism of some women's groups who were concerned that the courts might interpret the word "persons", found so often in the Charter, in a manner that might exclude women. The last precedent for such an interpretation occurred in 1928 in the famous Edwards case. Henrietta Edwards wished to be appointed to the Canadian Senate and petitioned the Canadian government to submit to the Supreme Court the question whether the word "person" in the B.N.A. Act included women. The Court held that it did not, basing its interpretation on the traditions of the common law. Fortunately for Mrs. Edwards the Privy Council in London had a different point of view. From that time on, judges have generally considered that women should not be excluded from the scope of constitutional provisions which relate to all Canadians in general. It would have thus been highly unlikely that the Supreme Court, in 1982, would reverse 50 years of constitutional interpretation on this matter. In conclusion then, Section 28 has introduced, in my opinion, a clarifying provision, to remove all doubts and uncertainties that "person" means a woman as well as a man. However, there is another interpretation to this clause. The women's organizations who were lobbying for a guarantee of rights believed that the clause had an independent substantive effect. The government, in its publicity, has certainly encouraged this belief. We shall see, later in this paper, what consequences such a belief has.

A few more words about the *Charter*. Section 15 will not be law until 1985. Both federal and provincial governments claim that they will need at least 3 years to review and amend, if necessary, legislation which, now, may contravene section 15. Moreover, governments have the power, under section 33 of the *Charter*, to pass overriding legislation that, in effect, will nullify or suspend certain rights and freedoms in the *Charter*. This section has been termed "the notwithstanding clause", since governments must state that any legislation which they wish to pass that may violate certain *Charter* rights, applies *notwithstanding* what the *Charter* guarantees. Two conditions are attached to the use of this overriding power:

(1) that such infringing legislation explicitly state that the *Charter* will not apply; and

(2) that the infringing legislation will lapse after 5 years, and the *Charter* will again apply, unless the legislation is re-enacted. For example, a province may decide to pass certain legislation excluding women from a particular line of work. Such a statute will have to contain a "notwithstanding clause". If the province does not, after the expiration of 5 years from the time the statute was passed, re-enact the exclusion of women, the *Charter* shall again apply, and section 15 will make that discrimination illegal.

Thus section 33 gives governments the power to suppress the equality rights of the *Charter*. When the press reported that the women's rights clause had been reinstated as a result of the lobbying and protests of women's groups following the exclusion of women's rights in the November 5th Accord, this was in fact a misconception. Section 28 had not been removed from the resolution. What the nine provinces and the federal government had done was to subject section 28, along with sections 2, 7-15, (that is, the fundamental freedoms, the legal rights and the equality rights provisions of the *Charter*) to the notwithstanding clause. In other words, governments wishing to discriminate against women in certain statutes could merely declare that the rights and freedoms of the *Charter* dealing with the legal rights, fundamental freedoms, and equality rights, apply only to men.

After the lobbying and protests of mid-November, governments agreed that the notwithstanding clause should not apply to section 28. However – and this is most significant – the provinces and the federal government did not drop section 15 from the scope of the notwithstanding clause. The effect now is that governments need only to state that any legislation infringing on the equality rights of women shall apply, notwithstanding the *Charter*, and in particular, section 15 and the same result in my opinion is reached. This is particularly dangerous for women, since it is section 15 that most concerns women as women. The other sections which are subject to the notwithstanding clause (legal rights – the right to a lawyer, the right to be presumed innocent until proven guilty, etc. and the fundamental freedoms –

liberty of speech, expression, religion etc.) would not, if their application were suspended by the overriding power of section 33, discriminate against nor affect women in particular.

The controversy surrounding the real nature of section 28 may allow for another, far more beneficial consequence. For those who argue that section 28 has a substantive effect, and is not merely interpretory, the overriding power of Parliament and the provincial legislatures cannot override the sexual equality guarantee of section 28. If one looks again at this provision, the opening words: "Notwithstanding anything in this Charter. . ." must be given application. Here is another notwithstanding clause, greater in scope than the notwithstanding clause of section 33.

A number of consequences immediately follow, given this interpretation. Firstly, the overriding power given to the provinces and the federal government, in the field for example of equality rights under section 15, cannot operate so as to deny equality of the sexes (it still may deny equality based on race, religion, colour, age etc). This is precisely what the women's organizations wanted. Secondly, this guarantee comes into force immediately, without the three year delay for section 15. As was mentioned above, section 28 contains the words "notwithstanding anything" in the Charter, and this should then apply to section 32(2) which sets up the 3 year delay for the coming into force of section 15. Again, since the sexual equality guarantee of section 28 has substantive effect anyway, the three year delay only applies to section 15 and not section 28. Another consequence, but not one which is as beneficial to women, is that section 28 guarantees equality for men as well as women (if we give this provision substantive effect). This may well mean that affirmative action programmes, legitimized by section 15(2) of the *Charter*, may well be unconstitutional if they deny men the equality rights under section 28.

Before concluding this part on the *Charter*, the mobility rights provisions should also be mentioned. Under section 6, all Canadian citizens are given the right to enter, remain in and leave Canada, and, as well, to seek employment and take up residence in any province of Canada.

These rights are not subject to the overriding clause of section 33, and governments cannot pass any law, program or activity which may deny these mobility rights. One major exception to this rule was added in November, as a result of the conference – under sub-section (9) of section 6, affirmative action programmes are permitted, but only where the provincial unemployment rate is higher than the national rate. This means that in a province such as Newfoundland, the provincial government may enact a job programme which is open only to residents of that province, since the rate of unemployment there is higher than the national figure.

How does this affect Native women? As was mentioned above, the Charter has legalized under section 15(2) affirmative action programmes to better the conditions of women or any other disadvantaged groups. Under section 6(4), such programmes, in the field of employment, are conditioned by the national/provincial rate of unemployment. In my opinion, the courts would be obliged to interpret the equality provisions of section 15 as limited by the mobility rights provision of section 6 and could well strike down job programmes for women in provinces that have a high rate of unemployment.

For example: Alberta passes legislation to set up an affirmative action project which gives priority to Native women in a particular job or line of employment. Alberta's rate of employment is, at the present time at least, higher than the national. A male citizen coming from another province could involve section 6 of the Charter and argue that although the programme favouring women is legal under section 15(2), it is not legal under section 6(4) and it is the more specific provision that the Courts must apply. In my opinion, the courts would agree and be forced to strike down such a program.

In conclusion, the *Charter* has made significant improvements to ensure greater rights for women. However, there is still a great deal of controversy regarding the nature of the sexual equality guarantees of section 28, and a real danger that the notwithstanding clause given to government may also wipe out any practical gains made by women in forcing the introduction of section 28 into the *Charter* and insisting on a broad wording of section 15. There is still, then, a great deal of work that must be done.

Aboriginal rights are mentioned in two places in the new *Constitution Act*. Part II of the Act, entitled "Rights of the Aboriginal Peoples of Canada" contains one section, section 35 (the old section 34, renumbered in the final draft), which recognizes and affirms "existing aboriginal and treaty rights".

What is meant by "aboriginal rights"? To attempt an answer would, in the space of this paper, be impossible. For the aboriginal peoples, the Indians, Métis and Inuit, the responses would vary considerably, both within and among each group. In general one might say that there are several aspects that section 35 contains:

(1) *the legal* – the Canadian constitution now for

the first time explicitly recognizes and affirms the rights of aboriginal peoples, giving them increased legal standing in the courts;

(2) *the political* – rather than define or enumerate rights in Part II, there would be a further process where rights would be identified and elaborated politically, with the participation of the national aboriginal organizations; and

(3) *the symbolic* – the Constitution of Canada now provides for the rights of *all* Canadians.

Following the unexplained removal of section 34 on November 5th, the Aboriginal Rights Coalition was formed, in which N.W.A.C. played a major role. Due to its work, and the work and response of the various territorial, regional and provincial aboriginal associations, the nine provinces and the federal government were forced to restore the section, renumbered as section 35. However, the compromise reached in order to obtain the consent of all parties to the November Accord, stipulated that the Constitution would protect only "existing" rights.

What, then, are the "existing rights" of section 35? It is impossible here to hazard a guess at the scope of this provision. Only the courts can make a binding interpretation of the *legal* meaning of the term. However, there are many different interpretations that a court may choose.

These possible meanings are all quite varied, often contradictory, some innocuous, some dangerous. For example, "existing" may mean:

(a) "existing as of the date of the proclamation of the Constitution", that is, of 1982; this would imply that all future rights that may be acquired by treaty, political negotiations or otherwise, fall outside section 35. (This is reputedly what Premier Lougheed was concerned to achieve, according to the article by Mary Janigan, *The Toronto Star*, December 12, 1981.);

(b) "rights that have been recognized by the courts as of 1982" – this interpretation is equally dangerous, if not more so, since the courts have reduced the scope of aboriginal territorial rights considerably. Yet the decisions all involved issues dealing with land claims and no social, economic, linguistic or cultural issues have up to now been raised;

(c) "existing at the time the rights are invoked" – this would be a far more favourable interpretation. Aboriginal and treaty rights, as they exist from time to time, would be protected under section 35. A good argument can be made here, by referring to section 42(f), where "existing" is used with reference to existing provinces. In that context, the word means existing at the time the statute is read;

(d) "rights that have not been extinguished" – this is also a good possible interpretation and would mean that those rights which have been extinguished in the past, such as land rights, will not be brought back to life again by section 35. Many lawyers believe that the old section 34 would have been interpreted in much the same way. Jean Chrétien claimed that the purpose of adding "existing" was simply to make this point more clear. . . .

To conclude: it is obvious that the new wording creates even more imprecision and ambiguity in an area which was legally unclear before. It was believed that with the earlier wording, the political process of definition and elaboration could begin on a clear basis. The present wording may now serve to further complicate and confuse issues. As well, it places an additional legal burden on any case that may go to court – that of proving that the rights being claimed "exist" within the meaning of section 35.

The other provision dealing with aboriginal peoples can be dealt with more rapidly. Section 25 of the *Charter* stipulates that the guarantees of rights and freedoms to individual Canadians may not be used to erode (the wording of the provision is "abrogate or derogate") aboriginal, treaty, Royal Proclamation or land claim settlement rights. This is merely a negative shielding or protective provision, as it simply shields those rights enjoyed by Native peoples, from the *Charter* rights given to all Canadians. For example, the *Charter* provides for mobility rights, in respect of housing and employment (section 6(2). The effect of section 25 is to ensure that this mobility right will not nullify or erode for instance, hunting or fishing rights enjoyed by aboriginal peoples. As with section 28 of the *Charter*, this provision does not give any new rights, but serves to protect and shield any rights that Native people have from sources other than the Charter, with respect to the Charter rights given to Canadians in general.

III

According to the new *Constitution Act*, Part IV, a First Ministers' Conference will be held to discuss aboriginal rights, at which conference representatives of the aboriginal peoples have the right to participate. In the former version of the Act, before the Accord of November 5th between the federal government and nine provinces, there was to be a two year process, with at least one conference to be held per year. For reasons yet unexplained, this was arbitrarily dropped to one year in the final version which passed Parliament in December 1981. Now only one conference is constitutionally required, to be called within the year following patriation, after which time Part IV setting out the conference is automatically repealed.

Many aboriginal associations have voiced their concerns regarding this conference. No one believes it likely that one conference would achieve very much, given the great diversity of views that exist between and among the various organizations and governments. As well, aboriginal associations are aware that much research and political work has to be carried on, in order to create a coherent strategy and plan of action to deal with the challenge of negotiating, for the first time in North American history, with the combined presence of all the governments of Canada.

It is important to note that as of the present, only the three national Native Associations – I.C.N.I., N.C.C. and N.I.B. – will be invited. The N.W.A.C. has not received an invitation, and the recent letter of the Prime Minister to Jim Manly, M.P. makes it clear that the Federal government has no intention of inviting the N.W.A.C. to have a separate seat at the conference. This will have to be dealt with by N.W.A.C. in months to come. Only it can decide whether to endorse the existing national associations to speak for Native women or to demand its own seat at the conference table.

What will be the issues that Native women would want to raise at the Conference? Clearly clarification, or better, removal of the word "existing" should be sought. In addition, attention should be focussed on the equality rights provisions in the *Charter*. Moreover, Native peoples should seek changes in the Constitution – with respect to the amending formula and to constitutional development in the North.

The present amending formula (known popularly as the Vancouver formula) requires:

(1) the consent of Parliament; and
(2) the consent of the Legislatures of at least 7 provinces whose combined population exceeds 50% of the national population.

This is the general amending formula and, as such, applies squarely to section 35. What concerns aboriginal peoples is two features of this process. One, the role of the provinces in determining any future constitutional arrangements involving Native people is now firmly anchored. Prior to the Patriation Bill, the federal Parliament had exclusive legislative and constitutional responsibility over Inuit and Indian peoples under section 91(24) of the B.N.A. Act. While the federal government has in no manner surrendered its legislative capacity over aboriginal peoples to the provinces, consultation and approval of at least 7 provinces is now required should any amendments be made at the constitutional level. Many, if not all, of the aboriginal associations have objected to this, since the provinces have historically (and are with some exceptions presently) opposed to enhancing Native status within Confederation.

To ensure that aboriginal peoples are fully protected constitutionally, all the national organizations have demanded that the amending formula dealing with Native peoples contain a consent clause. It is to be expected that this demand will be repeated at the conference.

The other feature of the present formula that concerns Native peoples is the "opting-out clause". Up to three provinces may "dissent" from any proposed constitutional amendment, and that amendment will not be law within that province. To apply the opting-out provision to any future rights that Native people may gain in the Constitution may prove disastrous. For example, should there be agreement that customary practices in the field of family relations with respect to aboriginal peoples be accepted by at least 7 provinces and the federal government, then this amendment will be inscribed in Part II of the Constitution. However, the government of Newfoundland might decide to opt out and Labrador Inuit will be denied this right. Should customary adoption take place in the N.W.T. and the family move to Labrador, this adoption will not be recognized as law in Labrador. The same example can be multiplied in any other province or territory.

In other words, the effect of the opting out provision will be at least two-fold: it will create divisions within the aboriginal peoples themselves, one part of the population being denied the rights of the other, and it will create strains and tensions within the national associations. The representatives of the associations will have the morally and politically untenable task of explaining to their constituencies why a particular constitutional right was denied to them while granted to the rest. Surely the mandate of each national organization is to gain rights and status for the Native population as a whole. No organization could long survive were its leaders to come back from the negotiating table with such divisive results.

Thus the upcoming conference will prove to be the scene of many important demands by aboriginal peoples. Most essential will be a strategy that looks out beyond the one conference. Aboriginal peoples should not want to give governments the occasion to say that they have provided an opportunity to discuss aboriginal rights and interests and that no further discussions on the constitutional level is necessary. Thinking must be carried on at the present time as to the future constitutional process involving Native people. This is another topic which must be discussed and decided upon at the First Ministers' Conference.

CONCLUSION

With the participation of Canada's Native peoples in the constitutional developments surrounding the new patriation bill, it is now accepted that the aboriginal peoples of Canada will have an increased role to play in any future constitutional change. This poses an enormous challenge to Native people and they will be obliged to seek policies and approaches to meet the problems of dealing with evolution of their societies within the Canadian economy.

For Native women in particular, there must be an increased awareness that the present constitution affects their lives in vital ways. With the Constitutional Conference a few months away, it is now up to them to say how their needs and interests can best be met, both legally and politically.

J. Richstone
Ottawa
June 16, 1982

B.C. Native Women's Report

PROGRAMS

NATIVE WOMEN'S SKILL DEVELOPMENT PROJECT (IN SERVICE)

The Native Women's Skill Development Project was a one year project to employ one Receptionist and one Librarian Aide. The two jobs were created to help women obtain skills so they could seek other employment when they left the project.

Throughout the project several women that were hired left the project for other employment. Of the five women, two of the women are still unemployed at this time but are seeking employment. One of the ladies was successful in obtaining employment as a counsellor at Native Outreach for Women. Another lady is working for Interior Intensive Forest Services and still another is Resource Communications Co-ordinator for the B.C. Native Women's Society. One of the women who is unemployed is living out of the province at this time and the other who is handicapped is still seeking employment.

The project was funded by Canada Employment Commission.

NATIVE WOMEN'S SKILL DEVELOPMENT PROGRAM

Seven courses completed, two will commence on May 17, 1982. The program enables Native women to re-enter the working world, take training programs or lead a richer fuller life. The success of the program can not be measured as each individual grows at their own rate.

The course was offered in Kamloops, Chase and Cache Creek.

The program is funded by Canada Employment Commission, Ministry of Education and is directed through Cariboo College. To date eighty Native women have completed the course.

URBAN SURVIVAL FOR NATIVE WOMEN

The B.C. Native Women are sponsoring a Canada Community Development Project, through Native Outreach for Women's office. They have hired 4 staff members.

This project will be in existence for one year and will operate from 293 – 1st Avenue. Any enquiries should be addressed to this address regarding Urban Survival for Native Women. The project consists of a six week course to be taken to the outlying areas and to the areas that have specifically requested it. The first class began on March 8, 1982 and the second will begin on April 26, 1982.

Course content:
- Communication
- Goal Setting
- Time Management
- Careers
- Resumes and Interviews
- Week covering various women's health concerns
- Local agency awareness
- Some of the areas that we are hoping to take this course to are Lillooet, Lytton, Enderby, Hope-Seabird Island, Williams Lake, Vernon, Prince Rupert. We will try to respond to other areas as requested.

NATIVE OUTREACH FOR WOMEN

This program provides:

- Assistance in vocational counselling
- Training possibilities
- Job referral
- Job placement
- Promoting work skill programs and training courses to meet special needs
- Personal development workshops
- Follow-up counselling with Native women who are placed in employment

Counsellors:
Dodie Manuel
Anne Michel
Co-ordinator: Susan Tatoosh

Objectives:

- To place Native women in good employment by utilizing the services of the Canada Employment & Immigration and any other related departments.
- To promote the hiring of Native women into all sectors of employment.
- To promote the development of Native women to become self-sustaining citizens within their own communities and within the larger Canadian community.

Native Outreach Counsellors are available that speak a Native language.

The counsellors understand the work situation and can assist you after you have a job by providing contact with your employer if necessary.

The Native Outreach for Women office is located at 293 – 1st Avenue Kamloops, B.C.

Drop in for information regarding employment opportunities, training programs available or anything pertaining to employment. There is a resource library available and we have various kits available of service that are accessible within the community. There is information available regarding courses available within Cariboo College, Open Learning Institute, Ministry of Labour, etc.

The Outreach office is in close contact with other Native organizations in the community such as the Native Courtworkers, Interior Indian Friendship Center and the local bands.

Native Outreach for Women is funded by the Canadian Employment and Immigration Commission. The project is sponsored by the B.C. Native Women's Society.

SENSITIZATION WORKSHOPS

The B.C. Native Women's Society have presented Sensitization workshops to the Probation Officers, Social Workers, R.C.M.P. and two School Districts, covering native culture, traditions, values, spiritual and contemporary way of life.

These workshops bridged the communication between the Natives and the agencies serving them, developed an awareness of Natives on a positive level.

The Indian resource persons donated their time and knowledge at these workshops.

NATIVE WOMEN'S ASSOCIATION OF CANADA
222 QUEEN STREET, 5th FLOOR
OTTAWA, ONTARIO
K1P 5V9

NORTH
WISDOM
BUFFALO
WHITE

WES
INTROSPE
BEA
BLAC

EAST
LUMINATION
EAGLE
YELLOW

SOUTH
INNOCENCE
MOUSE
GREEN

Amongst the plains Indian People, every person possessed a Shield of one kind of another. The Shield, carried or worn at all times, visually reflected in symbols such things as the individual's Name, Clan and Medicine signs, personal characteristics, and Vision experiences.

The logo of the Native Women's Association of Canada is that of a Shield which symbolically represents the Medicine Wheel.

> "To the North on the Medicine Wheel is found Wisdom. The Color of the Wisdom of the North is White, and its Medicine Animal is the Buffalo. The South is represented by the Sign of the Mouse, and its Medicine Color is Green. The South is the place of Innocence and Trust, and for perceiving closely our nature of heart. In the West is the Sign of the Bear. The West is the Looks-Within Place, which speaks of the Introspective nature of man. The Color of this Place is Black. The East is marked by the Sign of the Eagle. It is the Place of Illumination, where we can see things clearly far and wide. Its Color is the Gold of the Morning Star."
>
> From "Seven Arrows"
> by Hyemeyohsts Storm