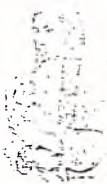


INDIAN RIGHTS FOR INDIAN WOMEN

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CONSTITUTIONAL
COMMITTEE.

DECEMBER 2, 1980

Before commenting on specific provisions of the proposed Canada Act, we want to make three general remarks. First, we think it is outrageous that the proposed document makes no emphatic reference to the special status of the aboriginal peoples of this country. The whole tone of the document gives the impression that anglophones and francophones are not merely numerically dominant but also the founding peoples of this country. It might be replied that emphatic recognition of the position of the aboriginal peoples would be purely rhetorical, since it would be preposterous to proclaim, say, that all the native languages and dialects should have the status of "official languages." But there is a difference between empty rhetoric and solemn proclamation. Constitutions can contain preambles which have an educative and moral force. We think a patriated Canadian constitution should contain a preamble which acknowledges emphatically the special status of the native peoples of this country.

Second, male-dominated native organizations have received funding from the national government to prepare sophisticated stands on the Government's constitutional proposals. But IRIW, even though it is a national organization of Indian women, has received no such funding. Are the assumptions underlying this policy different from those which have enraged many women independently of race, colour, or creed? We think not.

Finally, the concerns we express concentrate on the injustices suffered for so long by Indian women in Canada. But we are not just Indian women. We are Indian, we are women, we are persons, and we are citizens of Canada and of the various provinces and territories. We are proud, not ashamed, that some of our remarks concern native men and non-native women as well as ourselves.

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Letter to Canada

Our general response to the Canada Act is, in two important respects, favourable. First, like (we believe) most Canadians, we favour patriation. Enough ink has been spilt on this matter that we do not feel obligated to add our two cents worth. Second, we believe that a new, patriated constitution should contain a charter of rights, provided that, as is the case in the present proposal, affirmative action programs are not proscribed. Those who appeal to a British heritage of legislative supremacy and tolerance of diversity for protecting rights should look to the current condition of British citizens of black and East Indian ancestry. In these important respects, we support the Government.

But, we find that the current proposals insupportably vague and/or ambiguous on important points. Admittedly, we are not known for reluctance to write or speak at length on matters we consider important. But we recognize that the Committee's time is not unlimited, and so we have not commented on every point we consider unacceptable or potentially dangerous. Also, due to lack of funding and the subsequent necessity to rely largely on voluntary help, we have been unable to present our concerns in order of priority as we- and we are sure you- would have preferred. Accordingly, what follows is a commentary on some of the provisions of the proposed Canada Act as they appear in the document, The Canadian Constitution: 1980.

1.) Section 6 deals with mobility rights. As things stand now, Indians have special hunting and fishing rights within their own treaty areas, but not outside them. Does this provision mean that a status Saskatchewan Indian who moves to Ontario carries with him/her those special rights, or not? This matter should be stated clearly: it should definitely not be a matter of unconstrained judicial interpretation.

2.) Section 7 refers to "the principles of fundamental justice." It would be ridiculous to suggest that a constitution should (or could) define these principles. But it is surely not so much to ask that these principles be specified, at least broadly. Specifically, could the decision in the Lavell case be confirmed under this provision? If so, we are unalterably opposed to it.

3.) Section 11 has to do with the rights of a person accused of an offence. It neglects the fact that most Indians, and, indeed, most poor people cannot afford first-rate legal counsel, especially where appeal to a higher court is involved. This problem is not dealt with by provincial legal aid programs, because they apply only to certain offences.

4.) Section 12 guarantees everyone the right not to be subjected to unusual treatment. Obviously, this provision is meant to apply to those who are accused or convicted of legal offences. But we submit that Indian women who marry non-Indian men have long been subjected to treatment which is not only unusual but also cruel.

5.) Section 14 specifies that "A party or witness in any proceeding who does not understand or speak the language in which the proceedings conducted has the right to the assistance of an interpreter." This statement allows the court to decide whether or not the participant in a proceeding does or does not understand English or French well enough to express himself/herself clearly in one or other of those languages. But there are those who can speak only comprehensible English or French, but articulate Cree, Ukrainian, or Chinese. The decision whether or not a translator may be used should be, without exception, that of the accused.

6.) Section 15 deals with "equality before the law." We find

4

this provision thoroughly unsatisfactory, and we believe that all thoughtful Canadians should agree with us in demanding something more substantial. As it has been interpreted by Canadian courts, the requirement of equality before the law has been understood as entirely formal in character (as the notorious Bliss and Lavell decisions indicate). As this provision is now interpreted, "equality before the law" would be satisfied if there were a law specifying that all Canadian citizens with the surname Trudeau shall be decapitated and if all and only Trudeaus were decapitated. This is simply not good enough. "Equality before the law" requires clearer and more specific definition. We realize that this is not an easy task. Some differences in treatment are certainly warranted. Cabinet ministers, judges, medical doctors, and policemen (among others) must have rights and duties which are not possessed by other Canadians. At the very least, the types of justified inequalities should be stated with some clarity. And, to speak to our own main concern, these types certainly should not allow continued inequality between Indian men and Indian women.

7.) Section 24, the only one that includes reference to the Native peoples of this country, could be construed as supporting the defensibility and legality of section 12 (1) (5) of the Indian Act. Under that section of that Act, Indian men have rights denied to Indian women. We are unequivocally opposed to this.

8.) Section 31 of the proposed Act deals with regional disparities and equalization. What it fails to recognize is that disadvantaged "regions" can and do exist within comparatively affluent sectors. For example, there is no doubt that in general northern Alberta is a far more affluent region than eastern Quebec. But there are communities, typically native communities, in northern Alberta which would make many communities in eastern Quebec look rich by

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comparison. And what about urban native people? No doubt Regina and Vancouver are comparatively affluent places. But the native people in those cities are not suffering from the afflictions of the wealthy.

9.) We join with our native brothers and sisters, including those with whom we have had serious disagreements, in expressing deep suspicion of an extraordinarily complex amending formula which seems to permit unilateral alteration or abolition of sacred agreements between the Indian peoples of this country and subsequent immigrants. We cannot support a constitutional revision which allows this.

In summary, we commend the effort of the Government of Canada to patriate the constitution of our country and to include within it an entrenched charter of rights. But we find a number of the specific provisions in the proposed patriating document to be vague, ambiguous in intent, or simply unacceptable in principle. We are convinced that more work needs to be done before the Government's admirable objectives can be met. And we believe that we should be not only allowed but encouraged by reasonable funding to participate in the process of constitutional renewal so long overdue.

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on the Department of Indian Affairs, Native people are in many ways more aware of the effect on their lives of government than most white people.

However, there is a great deal of misunderstanding and confusion among us (and most white people are at least as perplexed) about the nature of and differences between, the Canadian constitution, the Indian treaties, and the Indian Act.

It is generally agreed that a constitution specifies what, when, and how governments may and may not act. Some governments, like the British, have constitutions which are mostly unwritten. Others, like the American are mostly written, but partly unwritten.

Most of the Canadian constitution is contained in the BNA Act of 1867 which, most importantly form the stand point of the Indian people, distinguishes between the powers of the federal and provincial governments. The powers of the federal government are listed in section 91 of the Act, and those of the provincial governments in section 92. It is seldom recognized, either by Native people or by non-Natives, that the BNA Act contains only one brief refernce to Indians. Section 91, provision 24, of the BNA Act specifies as a matter of exclusively federal jurisdiction (that is, as a matter which is no business

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of the provinces) "Indians and land reserved for the Indians." That is all that the BNA Act says about Indians, or, for that matter, about Native people in general.

But that short statement is not as insignificant as it may seem. For it means that certain services which are provided to non-Indian citizens by provincial governments must be provided to status Indians by the federal government. This is notably the case in regard to education. In the BNA Act education is specified as a purely provincial responsibility. That is, for non-Native Canadians, jurisdiction over education is entirely a provincial matter. But because of specific provision in section 91, the education of Indians is a federal responsibility for Indian education comes down to and obligation to foot the bill for the education of (status) Indian students.

One more thing should be said about the BNA Act in reference to Indians. Although "Indians and lands reserved for the Indians" are specifically designated in the BNA Act as a federal, not a provincial, responsibility, Indians are, like all other Canadians, citizens of a province as well as of Canada. Therefore, they are entitled, as much as any other citizen to the protection of their rights as provincial citizens. Thus, for example, under section 92 of the BNA Act, the provinces have authority over the solemnization of marriage (Item 12) and over property and civil rights (Item 13). But of course Native people in general, and

status Indians in particular, are covered by these provisions as much as anyone else. Indian women who are victims of the Indian Act are not entitled educational rights, as well as her children but an Indian man's white spouse is entitled to that right.

The constitution of a country is law but it is more fundamental, or, as one might say, more "powerful" than other laws. What this means is that if the Canadian Parliament or a provincial legislature tried to make a law that conflicted with the BNA ACT, that law would be declared unconstitutional- that is, null and void- by the Supreme Court of Canada. For example, the BNA Act gives the federal government exclusive jurisdiction over "currency and coinage." Therefore, if a province tried to pass a law enabling it to print its own money, the Supreme Court would declare that unconstitutional. Similarly, if a province tried to pass a law regulating the conduct of an Indian Band Council, it too would be declared unconstitutional because, as we've seen, "lands reserved to the Indians" is a matter of federal, not provincial jurisdiction.

The Indian Act is not part of Canada's constitution. It is an ordinary law, just like the law that we must drive on the right side of the road, or the law that grocery stores can't sell beer. Just as those laws could be changed in a perfectly ordinary way by government decision, so could the Indian Act.

The Indian Treaties are much harder to explain simply.

Obviously they are not ordinary laws. Parliament cannot simply decide to change or abolish the Treaties as it sees fit. But, on the other hand, court rulings clearly indicate that the Indian Treaties are not treaties in the ordinary sense of agreements between nations. What are the Indian Treaties, then? That question has never really been decided. We will return to it later in this discussion. In the meantime, we hope we have made it clear that there are important differences between the BNA Act, the Indian Act, and the Indian Treaties. Both Native and non-Native Canadians have been led into some confused thinking by failing to recognize these differences.

There has been a great deal of talk in the past few years about changing the Canadian constitution (or, at least, that part of it which is embodied in the BNA Act). In order to understand this discussion, it is necessary to grasp the basic meaning of three terms which play a large part in it. The three terms are "patriation" (sometimes the word "repatriation" is used), "entrenchment" of a bill of rights, and "amending formula".

1.) Patriation

The BNA Act is an Act of the British Parliament which was passed in 1867. Some parts of this fundamental constitutional document cannot be changed except by the British Parliament. In a way, this is a mere formality, for the British Parliament automatically makes whatever changes in the BNA Act that are requested by the

Canadian Government. But many Canadians consider it an affront that ours is the only country in the world which can change its constitution only with the consent of a foreign government.

"Patriation" (sometimes misleadingly called "repatriation") of the constitution means that the BNA Act could be amended in any respect without asking the British Parliament to enact the amendment. In short, "patriation" means "bringing the BNA Act home".

2.) Entrenchment

A bill of rights is a law which prohibits legal discrimination among people on such grounds as religion, age, race, or sex.

Canada has a Bill of Rights, but it is not part of our constitution.

It is just an ordinary law, like the law that crossing the street against a red light is jaywalking. In the United States, in contrast, their Bill of Rights is part of their Constitution. The practical importance of this difference is easy to illustrate.

In 1954 the Supreme Court of the United States was faced with the question whether or not segregation of black and white school students was permissible under the U.S. Constitution. Their Bill of Rights being part of the U.S. Constitution, the Court found that such racial discrimination was unconstitutional. In the notorious Lavelle case in Canada, in contrast, sexual discrimination in the Indian Act was found to be constitutionally acceptable, precisely because the Canadian Bill of Rights is not

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part of the Canadian constitution, but just an ordinary law. If the Lavelle case had been decided in the U.S., there is little doubt that Mrs. Lavelle would have won, on the ground that the Indian Act violated the Bill of Rights. "Entrenchment" of a bill of rights thus means that discrimination on grounds of race, colour, creed, sex, age, etc. becomes a matter of constitutional law and not just ordinary law.

3.) Amending Formula

As was pointed out earlier, constitutional provisions are more fundamental or "powerful" than ordinary laws. But this does not mean that constitutional provisions should be written in stone. We want to be able to amend our constitution to correspond to changing circumstances. No doubt we want to make it harder to amend the constitution than to change particular laws. But we don't want to be stuck with a constitution that is so inflexible that it cannot be altered to keep pace with changes in our manner of life. This means that we need a way of amending the constitution that makes it harder to amend than ordinary laws but not so hard to amend that it becomes a golden cow.

What we need to consider now is how possible changes to the Canadian constitution could affect Native people. Probably the most important change that could be made to the INA Act, from the standpoint of Native people, would be ones that affected band

12

membership. Suppose for example, that an attempt were made to include in a new constitution a definition of the term "Indian" - or even, to go a step further, to spell out who is eligible for membership in any particular Band. This would be a matter of great concern to all Indians. For, on the one hand, the National Indian Brotherhood has been arguing that guarantees of Indian self-government should be written into a new constitution and that decisions as to who may be a member of a particular band should be within the authority of the band councils. On the other hand, Indian Rights for Indian Women has been insisting that the term "Indian" should be given a broader definition than it has now and the, while Indian self-government is in principle highly desirable, it is essential that an appeal body be established to ensure that band council decisions regarding membership are consistent and fair.

- Another area of potential concern is the entrenchment of a bill of rights. On first consideration, such entrenchment would seem to hold nothing but advantages for Native people. After all, who could profit more from a law prohibiting discrimination on the basis of race, colour, or creed? But there is another side of the story. In some places there is a practice called "affirmative action" (or, sometimes, "negative discrimination"). The purpose of affirmative action programs is to give special advantages to members of groups which are disadvantaged as a

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result of long-standing discrimination against them, such as black Americans. Affirmative action programs are especially common in the field of advanced education. In Alberta, for example, if a Native student applies to enter law school, he or she is almost certain to be accepted, even over a white student who has better formal qualifications. With an entrenched bill of rights this could be declared unconstitutional on the ground that it involves discrimination! That is not mere speculation. It has actually happened in the United States that laws favouring black students have been declared unconstitutional.

Still another area of concern has to do with the division of powers between the federal and provincial governments. For many years the federal government has been trying to shift some of its responsibility for Indian people to the provinces. There is probably nothing wrong with this in principle. In fact, it might be advantageous to Indians to make use of the expertise of provincial governments in such areas as municipal government, provision of health services, and local policing. But Indian leaders have taken the very astute position that there should be no transfer of jurisdiction over Indians until there is an absolute guarantee that a revision of the distribution of power between the federal and provincial governments would not violate, or leave open the possibility of violating, the sacred debts of white people to Native people. The upshot of all this is that

14

Indians should not tolerate the transference of powers from the Federal to provincial governments without perfect assurance that such transference would not detract from their status as "citizens plus."

Finally, there is the incredible difficulty of the status of the Indian Treaties. The position of the National Indian Brotherhood is that the treaties should be renegotiated and then included in a revised Canadian constitution. This seems reasonable, but it is not certain that this is the best way for Indian people to go. There are two reasons for this. First, because no one is really sure what the status of an Indian Treaty is, embodying them in the constitution may make them less powerful than they could be. And second, it may be a mistake to enshrine the treaties in law at this point in time, simply because it may be discovered soon that they are unfair, or that the Indians who signed them were not fully aware of what they were doing, or that some Indians simply did not understand the idea of a treaty. If any or all of these possibilities were real ones, it would be most unwise of Indians to lock themselves into a constitutional settlement which prevented them from raising

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later questions about the justice of the treaties.

Since the foregoing was written, the Liberal Government in Ottawa has declared its intention to patriate the Canadian constitution "unilaterally" - that is, without securing the approval of the provinces or other important interested groups, including Indians.