

FEDERAL-PROVINCIAL CONFERENCE
OF
FIRST MINISTERS

Report of the Continuing Committee of Ministers
on the Constitution to First Ministers

ANNEX

Results of the Meeting of the CCMC Sub-Committee
with the Leadership of the Three National Native Organizations
August 26, 1980

Ottawa
September 8-12, 1980

Meeting of the CCMC Sub-Committee
with the Leadership of the NIB, NCC and ICNI

1. On August 26, 1980, a Sub-Committee of the CCMC met with the leadership of the NIB, NCC, and ICNI. This meeting was arranged in response to the CCMC Record of Decisions of June 17, 1980, Agenda Item 4(a).
2. In attendance at that meeting were the Ministers who form the Sub-Committee: Messrs. Jean Chrétien (who acted as Chairman), Roy Romanow, Gerald Mercier, and Dick Johnston; other members of the CCMC who were able to attend: Messrs. Edmund Morris, Rodman Logan, Claude Morin, Thomas Wells, and Garde Gardom; and, officials representing Newfoundland and Prince Edward Island. The delegations of the Native organizations were led by Messrs. Del Riley (President) and Sykes Powderface (Vice-President) in the case of the NIB; Mr. Charlie Watt (Co-Chairman) of the ICNI; and Messrs. Harry Daniels (President) and Louis Bruyère (Vice-President) of the NCC.
3. The leaders of the Native organizations presented briefs to the Sub-Committee. These documents were circulated to the CCMC and are attached to this report. It should be noted that the NIB tabled three submissions (numbered 830-85/003, 004 and 005).
4. The CCMC agreed:
 - a) To communicate to First Ministers the views of the leaders of each of the three organizations.
 - b) To confirm the invitation to the national Native organizations to attend the September meetings with First Ministers as observers. (This is the same as the status they had at the October 1978 and February 1979 meetings, and means that they would be able to observe all public sessions of the Conference.)
 - c) To recommend to First Ministers, as per their agreement of February 1979, that the item "Canada's Native Peoples and the Constitution" be on the agenda in the future round of negotiations and that Native leaders be able to meet with First Ministers at the negotiation table at that time, as a step in the consideration of this item.
 - d) To recommend to First Ministers that Native leaders be free to raise any of their constitutional concerns under the heading of "Canada's Native Peoples and the Constitution". Those discussions could lead to constitutional changes. Whatever might be decided at the September meeting of First Ministers would not preclude subsequent constitutional changes which reflect Natives' concerns.
 - e) To confirm the invitation to Native leaders by the Chairman of the Sub-Committee meeting to have them meet with the Chairman of the CCMC Sub-Committee of Officials on the Preamble to discuss the content of a possible constitutional preamble.

DOCUMENT: 830-85/001

CONFIDENTIAL

FEDERAL-PROVINCIAL SUB-COMMITTEE ON THE
CONSTITUTION AND CANADA'S NATIVE PEOPLE

Statement by Charlie Watt, Co-Chairperson,
and John Amagoalik, Acting Co-Chairperson,
on behalf of the Inuit Committee on National
Issues.

August 26, 1980
Ottawa

Statement by Charlie Watt, Co-chairperson, and John Amagoalik, Acting Co-chairperson, Inuit Committee on National Issues to the Federal-Provincial Sub-Committee on the Constitution and Canada's Native Peoples - August 26, 1980, Ottawa.

Mr. Chairman, Honourable Ministers, Colleagues:

John Amagoalik and I, as Co-chairpersons of the Inuit Committee on National Issues (ICNI), are pleased to be here on behalf of Canada's Inuit to continue our involvement with federal and provincial governments in regard to constitutional reform. For those of you who may not be familiar with ICNI, we have included a more detailed description in Appendix I.

There are approximately 25,000 Inuit inhabiting Canada's north. In our region which we call our homeland, we constitute a substantial majority population. Moreover, there are other Inuit in the circumpolar region of which the Canadian arctic is an integral part.

Last month in Greenland, Inuit of Alaska, Greenland and Canada met and established a Charter for an international organization of Inuit called the Inuit Circumpolar Conference. This organization is dedicated to the protection and promotion of the common interests of all Inuit. John Amagoalik, who is with me, is one of the Canadian executive members of that organization and Mary Simon, who is behind me, is the other Canadian member.

Inuit have lived for thousand of years in what is now northern Canada. This fact is often used by Canada when asserting Canadian sovereignty in the arctic. Yet, despite the huge area we inhabit, Inuit have little or no political representation in Canada's Parliament or in the Québec and Newfoundland Legislatures. Generally, we have no political structures

which we in fact control for the running of our own lives. Even in northern Québec, where Inuit of that region have negotiated a regional government as part of their land claims settlement, Québec has been reluctant to decentralize control over the many administrative matters affecting that region and its inhabitants, contrary to the express provisions of the James Bay and Northern Québec Agreement. These and other matters which we will discuss with you today impress upon us the need for constitutional reform.

Although additional meetings will obviously be required in the future, we would like to take this opportunity to put our views on record and to obtain some answers from the ministers about the timetable and agenda of our work in the year ahead.

Eighteen months ago, in February 1979, members at the First Ministers' Conference agreed to place the item "Native Peoples and the Constitution" on the agenda of subsequent federal-provincial constitutional talks. On December 3, 1979, the Steering Committee of the CCMC met with native leaders from the National Indian Brotherhood, the Native Council of Canada and the Inuit Committee on National Issues to initiate native participation in constitutional discussions with governments. The ministers present at that time expressed a positive outlook on the process and the structure of future discussions with the native leaders. Moreover, it was generally understood that in order to ensure effective native involvement in the constitutional reform process, our participation with governments both at the sub-committee level and at the First Ministers' Conference would be essential.

Soon after the 1980 federal election, a summer schedule for federal-provincial constitutional meetings was undertaken with a renewed sense of urgency and a First Ministers' Conference was slated for this fall. Based on past assurances by the Prime Minister of Canada and certain federal and provincial ministers, the Inuit of Canada through ICNI, expected to attend and actively join in discussions at the First Ministers' Conference this September—at least in regard to the item "Native Peoples and the Constitution". However, on August 11, the Right Honourable Pierre Elliot Trudeau informed us by letter that Inuit leaders were invited to the First Ministers' Conference solely as observers. There does not appear to be an item on the Conference agenda, as previously promised, relating to native peoples and the constitution.

It is our understanding that one of the purposes of the meeting today is to hear the respective views of the national native organizations in regard to the 12 constitutional items discussed by federal and provincial governments this summer. We will gladly indicate to you today our preliminary views within the time constraints of this short meeting .

In connection with the 12 items, ICNI experienced some difficulty in obtaining background information with respect to federal and provincial government positions to date. We are pleased by the federal and Québec government cooperation in regard to present draft papers and wish to emphasize that timely access to such position papers is crucial if ICNI is to work together with governments in the constitutional reform process. Without such position papers, we may not be aware how various government positions may affect Inuit rights and interests. In addition, Inuit position papers in this regard may not be sufficiently integrated with federal and provincial positions if we do not have the benefit of taking into account such government positions.

The following represents therefore our preliminary views as to how native peoples, particularly Inuit, are directly affected by the 12 constitutional items discussed by governments this summer. We have also included as Appendix II the list of constitutional items ICNI submitted at the meeting with the Steering Committee on December 3, 1979.

1. Statement of Principles

It is difficult to comment on the federal government's statement of principles without knowing what native rights and interests will be enshrined or protected in Canada's Constitution. However, we would expect adequate reference in the statement of principles to our special status as original inhabitants from which we derive our aboriginal rights and which is the basis for our unique and historical relationship with the federal government. The statement of principles should also refer to the intention to enshrine the rights of native peoples in the Constitution. In addition, it must recognize the need to protect and promote Inuit values and goals through our own distinctive language, culture and society. At the same time, such Statement must recognize a need, essential to Inuit pride and identity, that Inuit help shape social, economic and political aspirations of Canadian society.

We support Prime Minister Trudeau (and Mr. Claude Ryan, leader of the Québec Liberal Party) in opposing the inclusion of any false concept of dualism in the Constitution which may have the effect of undermining the status and interests of Canada's native peoples. We also support the federal government in opposing any specific mention of a province's right to self-determination in the Constitution. If a province such as Québec is specifically given the constitutional right to secede from the Canadian federation the Inuit of northern Québec must have a similar right of self-determination in their territory which has its own special significance and history.

2. Charter of Rights, including language rights

Native rights would have to be built into the federal draft proposal for a Charter of Rights on a number of areas in order to adequately protect Inuit culture and to provide for its continued development. Such areas would include but not necessarily be limited to the following:

- a) entrenchment of the concept of aboriginal rights as a fundamental freedom unique to indigenous peoples (see Appendix III);
- b) Adequate provision for the collective and individual nature of Inuit property rights;
- c) reasonable limitation to mobility rights so as to adequately protect Inuit communities and societies, particularly in the face of large-scale northern development activities;
- d) native language rights in the areas of education, health and social services and criminal justice; in hearings of a judicial, quasi-judicial, or administrative nature if such hearings are primarily related to native peoples; and in regard to laws which are of special significance to native peoples, such as those implementing settlements of aboriginal claims;
- e) adequate provision for affirmative action programs.

3. Dedication to Sharing and/or to Equalization; the Reduction of Regional Disparities

In regard to regional disparities, there are specific problems related to native "environments" which, in the present context, refers to our vast northern regions.

As the substantial majority population, our concerns have at least two dimensions.

First, it is hardly our concept of "sharing" that northern resources be increasingly exploited by others while the primary "benefits" which we enjoy are the adverse social and environmental impacts from such activities.

Second, we cannot accept that revenue-sharing and the reduction of regional disparities be considered solely on a provincial rather than on a regional basis. Nor can we support unconditional equalization payments to the provinces.

Provincial commitments to diminishing regional disparities within the province is not sufficient to ensure that viable programs and services will be implemented in the northern regions inhabited by Inuit. Therefore, we wish to discuss at future meetings regional disparities of particular concern to our northern homeland. We also seek to develop with you concepts or formulas for regional revenue-sharing. It is only in this way that we can positively alter the historical experience in Canada's north, namely the serious lack of both essential services and economic opportunities for northern inhabitants.

4. Patriation of the Constitution (including the Amending Formula)

ICNI fully supports the principle of patriation of the Constitution. However, prior to patriation, ICNI would expect to

participate in the federal-provincial constitutional reform process and to adequately provide for Inuit rights and interests at least on a number of significant items.

In regard to an amending formula, we would as a minimum seek to formalize the principle and procedure for native participation in any future constitutional amendment process. However, with respect to section 91(24) of the BNA Act, which specifically and directly affects native peoples, no amendment should be permissible without the approval of Canada's native peoples.

5. Resource Ownership and Interprovincial Trade

Throughout Canada's history, despite the aboriginal claims of native peoples in Canada, it has generally been an unwritten policy of governments to exclude native peoples from resource ownership. Such practices are regressive and colonialist. They are hardly consistent with the fundamental principles and spirit we are presently attempting to enshrine in Canada's Constitution.

As a very minimum, the Constitution should provide for a commitment by legislatures and governments to provide for some procedure whereby native peoples may obtain rights of ownership of resources. We must also obtain reasonable participation in the management and development of resources in those land and marine areas within Canada which have been used and occupied by us as indigenous peoples. Such rights and interests may be established through settlements of aboriginal claims, where applicable, or through other procedures.

In any event, federal or provincial jurisdiction over natural resources should not be used to unduly affect native rights and interests which often are of profound cultural significance. A commitment should be made to reconcile such native rights and interests with other interests of a federal or provincial nature.

6. Offshore Resources

Although Inuit are generally a coastal people with substantial interests in the offshore of Canada, no settlement of aboriginal claims presently exists in Canada which has settled Inuit aboriginal claims in the offshore area. Due to these predominant pre-existing claims, no transfer of jurisdiction, or other arrangement which may unduly prejudice Inuit aboriginal claims in the offshore, should be made between the federal government and the provinces prior to settlement of Inuit aboriginal claims.

In regard to development of offshore resources, the principle discussed earlier of regional revenue-sharing would also be applicable here.

Another aspect of offshore resources relates to the increasing international regulation of marine mammals and other wildlife whose habitats and migration patterns include offshore areas. Due to the special interests of Inuit in such matters, ICNI will be submitting a position paper in the future to adequately provide for Inuit interests at the international level.

Finally, federal-provincial discussions on offshore resources have implications on federal and provincial participation in coastal zone management. In light of the substantial and unique interests of Inuit, the principle of adequate Inuit participation through appropriate regional bodies must be established in determining any constitutional arrangement in regard to the offshore.

7. Fisheries

Inuit interests in regard to fisheries have been specifically recognized in the most recent federal position papers submitted for discussion in the present constitutional reform process. More specifically, fisheries and other wildlife constitute a vital source of food and nutrition for Inuit, are inseparably linked with Inuit cultural activities, and are an important part

of present and future Inuit local and regional economies. Rights related to fish are also an important aspect of Inuit aboriginal rights. Therefore, any transfer of jurisdiction or other arrangement in respect to fisheries would be carefully examined by ICNI in light of the possible repercussions on Inuit rights and interests.

Some of the principles we have discussed under "Offshore Resources" would also be applicable to fisheries.

8. Powers affecting the Economy

To date, federal-provincial discussions on this subject have focussed on creating an economic union in Canada. Such a union has important implications on natural resources, inter-provincial trade and mobility rights. We have already discussed the areas of natural resources and mobility rights in other sections of this paper.

Due to the divergent positions of federal and provincial governments and since other aspects relating to the economy have not yet been discussed, ICNI must study this aspect further before indicating how Inuit may be particularly affected by government proposals. We will also indicate in the future the nature and scope of Inuit interests in regard to economic development. However, we have already indicated some of our concerns in the discussion on "Sharing and/or Equalization: Reduction of Regional Dispartites".

9. Communications, including broadcasting

In any federal transfers of jurisdiction over certain aspects of communications to the provinces, Inuit interests may be significantly affected. It is generally accepted that communications is an extremely powerful cultural tool and, in this area, native cultures are particularly vulnerable if native people have insufficient rights and involvement in communications

affecting them. Moreover, Inuit access to communications, language rights and section 91(24) of the BNA Act are three important aspects having a direct bearing on native broadcasting and communications. Therefore, in the future, we will be making specific proposals in this vital cultural area.

10. Family Law

Certain Inuit customs and traditions relating to the area of family law constitute an important aspect of Inuit aboriginal rights. Such practices should receive legal recognition and protection and be appropriately integrated with existing (non-Inuit) concepts of family law. As in the case of communications, there are important implications related to section 91(24) of the BNA Act. Therefore, any federal-provincial arrangements in the area of family law must not prejudice the negotiation of Inuit rights and interests in this area.

Prior to submitting Inuit positions in regard to family law, more research and consultation must be undertaken.

11. New Upper House, involving the provinces

The virtual absence of native representation in federal and provincial legislatures is a continuing historical fact in Canada. Such lack of participation in Canada's most basic political institutions has serious implications for Inuit which affect most aspects of our daily life.

ICNI has already initiated research in the area of electoral representation and will be expanding this research to include the concept of special native representation in a new Upper House. In this regard, it will be most important to integrate our needs with any federal-provincial consensus on the nature and powers of any Upper House.

At this preliminary stage, ICNI is evaluating the possibility of native representatives in a new Upper House having a significant role in relation to matters which have primary and direct cultural significance to native peoples.

12. The Supreme Court, for the people and for governments

In the future ICNI intends to carry out research in the area of Inuit concepts and system of justice. Such system would have important implications on the provincial power to establish provincial courts and on section 91(24) of the BNA Act. It may not, however, affect the present federal-provincial discussions on the Supreme Court.

If the Supreme Court of Canada is to be established in the Constitution "for the people", including Inuit, our rights and interests as we have already briefly described today will have to be enshrined in the Constitution. In the absence of such legal recognition, the rights and interests of native peoples will continue to receive inadequate protection from Canada's judicial system, which includes at the highest level, the Supreme Court of Canada.

Conclusion

To conclude, it is evident that there exist complex and significant questions directly affecting Inuit as indigenous people in most, if not all, of the 12 items discussed by federal and provincial ministers this summer. While many of these items overlap with ICNI's own list of items for constitutional reform (see Appendix II), there still remain important additional areas which merit serious discussion. For such reasons, we have been emphasizing adequate involvement of ICNI in the federal-provincial constitutional reform process.

At this time, ICNI believes it is imperative to establish

a timetable and an agenda for subsequent meetings where the substance of Inuit constitutional concerns can be discussed in detail.

Despite the lack of background information and meaningful involvement experienced by ICNI to date in regard to the federal-provincial constitutional talks, we have made every attempt to communicate to you today the preliminary nature of our special concerns. However, it is an easier task to identify issues directly affecting Inuit than to draft and agree upon suitable constitutional amendments. In this regard, ICNI reaffirms its commitment to work together with federal and provincial governments. We remain optimistic that together we can resolve these issues not only to our satisfaction but in working towards a strong united Canada serving the needs of all its peoples and cultures.

Thank you.

APPENDIX I

Inuit Participation in National
Issues: Establishment of an
Inuit Committee on National Issues

INUIT PARTICIPATION IN NATIONAL ISSUES: ESTABLISHMENT OF AN
INUIT COMMITTEE ON NATIONAL ISSUES.

I. BACKGROUND

The Inuit Committee on National Issues (ICNI) was established by resolution at the Annual General Meeting of Inuit Tapirisat of Canada in Igloolik, N.W.T. in September, 1979 (see Appendix).

During the past two years, federal-provincial discussions on constitutional reform and other issues of vital national concern had begun to take place with a renewed sense of purpose. Such discussions clearly affected Inuit interests. The need, therefore, for a special committee with national Inuit representation became evident in order to represent the Inuit of Canada effectively and to participate in these government talks.

II. OBJECTIVES

Three principal functions will be carried out by ICNI, in order to represent Inuit interests adequately and to participate in federal-provincial talks (including First Ministers' Conferences).

The three essential functions include:)1) research; (2) regional Inuit participation in ICNI; and (3) consultation with Inuit communities. These functions are described briefly below.

Due to the complexity of the subject matters as well as the magnitude of the related tasks, substantial funding will be required.

1. Research

- (i) constitutional and other issues of priority to Inuit;
- (ii) constitutional and other issues of national concern (including international issues) affecting Inuit interests discussed at First Ministers' Conferences and other government talks.

The basic purpose of research is: to identify which constitutional and other issues are of priority among Inuit; to carry out adequate research to determine what amendments to the Canadian Constitution or other legislation are required; and to draft suitable amendment proposals for subsequent discussion and negotiation through the constitutional reform process and at other government talks.

A second purpose of equal importance is to study and research other issues slated for discussion on the agenda of First Ministers' Conferences. Inuit must determine in what ways and to what extent the various proposals of First Ministers affect Inuit rights and interests, as well as submit alternative proposals to avoid or minimize adverse effects to such rights and interests. We must also be in a position to discuss and indicate the means whereby decisions by First Ministers on national issues such as energy and the economy can at the same time meaningfully benefit Inuit and the regions we inhabit.

It should be noted that, in the case of most constitutional and other issues of national concern discussed at First Ministers' Conferences, existing studies and research do not for the most part take into account Inuit rights, interests or perspectives.

2. Regional Inuit Participation in ICNI

It is evident both to the federal and provincial governments and ourselves that Inuit priorities, values and perspectives may often differ among the various northern regions inhabited by Inuit. Even in N.W.T. itself, different perspectives naturally arise between the eastern and western Arctic. Moreover, the constitutional and other problems facing Inuit in N.W.T., Quebec and Labrador will be dictated to some extent by the legal political, economic and social issues particular to their respective regions.

For these reasons, in addition to its own research, ICNI depends upon significant input from the six Inuit regional associations. It is only in such a manner that ICNI can co-ordinate, unify and represent all Inuit interests and ensure that the specific interests of each region will be protected and dealt with adequately.

Therefore, in order to achieve meaningful participation by the regional associations, our funding proposal allocates a portion of funds to be distributed to each regional association to enable them to research their particular regional interests and participate in ICNI's overall research program.

3. Consultation with Inuit Communities

The third objective is to establish a communications network with all Inuit communities for the purposes of adequate consultation of all Inuit before positions on constitutional and other issues are finalized by ICNI and the regional associations, and are presented to federal and provincial governments.

Different ideas, options and proposals must be circulated and explained in the Inuit communities and adequate feedback or response must come from them.

For such purposes each regional association must at least have a small core staff responsible for carrying out this vital liaison between the regional association and Inuit of such regions as well as between the regional association and ICNI. In this regard, the larger distances between northern communities dictates considerable expenditures for travel, by regional staff, by ICNI researchers and by the ICNI committee members.

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Appendix

INUIT COMMITTEE ON NATIONAL ISSUES

1. COMPOSITION OF COMMITTEE:

- 8 members
 - 6 members chosen by the Board of Directors of each regional association or his/her alternate
 - 2 co-chairpersons (or their alternates)
 - President of ITC
 - one co-chairperson (C.W. Watt) selected by ITC Annual General Assembly

2. FUNCTIONS OF THE COMMITTEE

- generally, to represent Inuit of Canada on all issues of national interest to Inuit with a unified voice
- specifically:
 - preparation for full participation at First Ministers Conferences including energy and economic development
 - constitutional issues including international issues
 - protections for aboriginal rights
 - collaboration where necessary with other native groups
 - establish priorities in relation to functions of Committee
 - designation of sub-committees on particular issues
 - preparation of budget to ensure adequate ITC and regional participation in work of the Committee
 - research with respect to national and international priorities
 - reports to the Board of Directors

3. FUNCTIONS OF CO-CHAIRPERSONS:

- to represent Inuit at First Ministers Conferences and other government talks
- to act as spokespersons on behalf of Committee with governments, other native groups and media
- to lead discussions at Committee meetings
- to accept and carry out mandates delegated by the Committee

4. RESOURCES AVAILABLE TO COMMITTEE:

- Committee members may be assisted at meetings by technical and legal support, staff and consultants when required and to the extent available.
- Committee to reserve a portion of budget for the administrative and other costs incurred by Committee

5. QUORUM AND PROCEDURE:

- quorum and other procedures to be decided and amended as necessary by Committee (a quorum of 5 out of 8 members may be advisable)

6. RESPONSIBILITIES OF REGIONAL ASSOCIATIONS:

- to select a member of Committee and provide adequate direction to the member
- to provide adequate information and consultation with Inuit of the region
- to establish and research local priorities

7. FUNDING:

- direct government funding
- indirect government funding
- private foundation funding

APPENDIX II

AREAS FOR CONSTITUTIONAL REFORM (ICNI)

1. Aboriginal rights
2. Alternatives to the elimination of the concept of aboriginal rights
3. Cultural protections (including language rights)
4. Inuit interests on the international level
5. Political representation in Parliament and the legislatures
6. Inuit rights with respect to archaeological research and property
7. Alteration of provincial and territorial limits and the creation of new provinces
8. Economic development (including regional disparities)
9. Environmental protection, offshore resource development and coastal zone management
10. Equality before the law and equal protection of the law and special measures for native peoples
11. Trust responsibility of the federal government under section 91(24) of the BNA Act 1867.

APPENDIX III

MEETING OF THE STEERING
COMMITTEE OF CCMC AND THE NATIVE
PRESIDENTS

ITC Resolutions on Aboriginal Rights

Inuit Committee on National Issues

Ottawa
December 3, 1979

INUIT TAPIRISAT OF CANADA

Igloolik, N.W.T.

September 3-7, 1979

Resolution #1

Request for Clarification of Federal and Provincial Government

Positions on Aboriginal Rights

WHEREAS the Inuit of Canada, as original inhabitants, have aboriginal rights on the land which we have used and occupied from time immemorial;

WHEREAS it is the position of Inuit that aboriginal rights are legal rights and therefore are legally enforceable by Inuit;

WHEREAS in a policy statement dated August 8, 1973 the federal government declared that it was prepared to negotiate settlements of aboriginal claims with Native people who could demonstrate that they possess "a traditional interest in land";

WHEREAS despite the fact that the federal government recognizes in virtue of its 1973 policy statement the validity of the concept of aboriginal rights, the government has however denied as recently as the Baker Lake court case that aboriginal rights exist under the laws of Canada and that if such rights do exist, they are not enforceable in Canadian courts of law;

WHEREAS in order to enter into settlements of aboriginal claims, federal and provincial governments in Canada insist as an essential condition to such settlements that Native peoples surrender their aboriginal rights to the lands and that the Parliament of Canada extinguish permanently such aboriginal rights;

WHEREAS it is obvious that the above positions of the federal and provincial governments are contradictory since on the one hand they deny the existence of aboriginal rights in cases brought before the courts of Canada yet on the other hand they insist on a surrender and extinguishment of these same aboriginal rights when entering into settlements of aboriginal claims;

WHEREAS these inherent contradictions and confusion in the federal and provincial government positions on aboriginal rights do not contribute to a positive and healthy atmosphere for negotiation of settlements of aboriginal claims by the Native peoples of Canada;

THEREFORE BE IT RESOLVED

THAT Inuit Tapirisat of Canada, in collaboration with the Inuit regional

...

RESOLUTION #1(cont'd)

associations, request federal and provincial governments to reconsider and clarify their position on surrender and extinguishment of aboriginal rights so as to fully respect Inuit perspectives and our position on the significance of maintaining the concept of aboriginal rights.

INUIT TAPIRISAT OF CANADA

Igloolik, N.W.T.

September 3-7, 1979

RESOLUTION #2

Significance in Maintaining the Concept of Aboriginal Rights

WHEREAS Inuit, as original inhabitants of Canada, have special status and special rights;

WHEREAS these special rights include aboriginal rights and consequently, the inherent right to fair and equitable settlements of aboriginal claims based on aboriginal rights;

WHEREAS aboriginal rights derive from the use and occupation of lands by Native peoples from time immemorial as well as from the traditions and customs of their respective cultures and societies;

WHEREAS preservation of the concept of aboriginal rights is vital to the development of Native peoples as distinct, flourishing cultures insofar as it provides the central foundation for ongoing growth and evolution of Native cultures and traditions;

WHEREAS aboriginal rights constitute both cultural rights and human rights unique to Native peoples, indivisible from their ancestries, heritage and identities and these aboriginal rights are a sustaining historical source of their pride, dignity and self-worth;

WHEREAS Inuit continue to make a cultural contribution to Canada and the international community through the practice of their aboriginal customs and traditions;

WHEREAS it is the continuing policy of federal and provincial governments to demand the surrender of aboriginal rights as an essential condition of settlements of aboriginal claims, and the Parliament of Canada to extinguish permanently such rights upon surrender;

WHEREAS the primary objective for governments to enter into settlements of aboriginal claims is to secure peaceful settlement and development of Canada in areas where Native peoples possess aboriginal rights and not to eliminate the concept of aboriginal rights;

WHEREAS it has not been clearly demonstrated by governments that surrender and extinguishment of aboriginal rights as presently conceived by them are necessary in order to achieve their primary objectives for entering into settlements of aboriginal claims;

...

RESOLUTION #2(cont'd)

WHEREAS it is the Inuit position that this primary objective of governments can be achieved through settlements of aboriginal claims without eliminating the concept of aboriginal rights;

WHEREAS perpetuation of federal and provincial government policy of surrender and extinguishment, as conceived and implemented by governments, serves to unnecessarily deprive the Native peoples of unique and intrinsic cultural and human rights and ultimately results in a form of assimilation with the mainstream of Canadian society in a manner detrimental to Native peoples;

WHEREAS this process of assimilation is clearly inconsistent with Canada's declared and affirmed policy of multi-culturalism;

THEREFORE BE IT RESOLVED:

THAT Inuit do not accept the position, as presently conceived by federal and provincial governments, calling for surrender and extinguishment of aboriginal rights as an essential condition to settlement of aboriginal claims.

INUIT TAPIRISAT OF CANADA

Igloolik, N.W.T.

September 3-7, 1979

RESOLUTION #3

Alternative to Present Government Position on Surrender and
Extinguishment of Aboriginal Title

WHEREAS Inuit do not accept the position, as presently conceived by federal and provincial governments, calling for surrender and extinguishment of aboriginal rights as an essential condition to settlement of aboriginal claims;

WHEREAS the Inuit Tapirisat of Canada, in collaboration with the Inuit regional associations, are requesting federal and provincial governments to reconsider and clarify their position on surrender and extinguishment of aboriginal rights so as to fully respect Inuit perspectives and our position on the significance of maintaining the concept of aboriginal rights;

WHEREAS Inuit Tapirisat of Canada, in collaboration with the Inuit regional associations, are in the process of formulating a viable alternative to the elimination of the concept of aboriginal rights as presently demanded by governments when entering into settlements of aboriginal claims;

THEREFORE BE IT RESOLVED:

THAT after consultation with the National Indian Brotherhood and the Native Council of Canada, the alternative to be formulated by I.T.C. and the regional associations be submitted to the federal and provincial governments for appropriate action;

THAT I.T.C., in collaboration with the Inuit regional associations, meet and discuss the issue of aboriginal rights and the proposed alternative to elimination of the concept of aboriginal rights with Canada's First Ministers with a view to securing adequate legal protections of aboriginal rights and their entrenchment in the Canadian Constitution;

THAT in carrying out the above, I.T.C. and the regional associations give suitable recognition to the following principles:

- a) that the concept of aboriginal rights be recognized as a dynamic and evolutionary concept which must closely reflect the growth and evolution of Inuit society and culture and, therefore, additional rights relating to Inuit culture, traditions and customs may require

legal recognition from time to time as aboriginal rights through future legislation or agreements;

- b) that rights derived from aboriginal title may require from time to time greater protections than similar rights which other Canadian citizens possess, in order to provide appropriate recognition, respect and sanctity to Inuit historical and cultural origins;
- c) that aboriginal rights are the essential and unique characteristic of Native peoples culturally distinguishing them from other peoples of Canada, constituting their birthright as original inhabitants, representing an integral part of their special status and interests, and providing the central foundation for further development of their respective Native cultures and societies;
- d) that in the event that Inuit enter into settlements of aboriginal claims, those aboriginal rights possessed by Inuit from use and occupation of land from time immemorial must not be viewed in legal terms as "surrendered" or "extinguished" but instead as an "exchange" whereby in such settlements the new legal rights relating to lands or Inuit traditions or customs be legally recognized and defined as aboriginal rights which continue in favour of Inuit beneficiaries to such settlement as part of their cultural and human rights;
- e) that in the event that Inuit enter into settlements of aboriginal claims, those aboriginal rights possessed by Inuit from time immemorial, which rights are exchanged through such settlements for other legal rights and benefits, shall be deemed to be revived to the extent of the land areas affected, in the event of certain specified breaches by the government of the settlements or the legislation incorporating such settlements, where the nature of such breach is of an irreversible, irreparable and fundamental nature;
- f) that where no settlement of aboriginal claims has been entered into, the aboriginal rights of Inuit deriving from their use and occupation of land from time immemorial shall not be affected in any way by the proposed alternative.



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Native Council of Canada
Le Conseil National des Autochtones du Canada

PRESENTATION

To

SUB-COMMITTEE OF THE CONTINUING COMMITTEE OF MINISTERS

By

HARRY W. DANIELS
PRESIDENT
NATIVE COUNCIL OF CANADA

AUGUST 26, 1980

MR. CHAIRMAN, MINISTERS, FELLOW NATIVE PRESIDENTS, LET ME PREFACE MY REMARKS BY SAYING FRANKLY THAT I AM PUZZLED AT HOW THIS FORM OF OUR PARTICIPATION IN THE CONSTITUTIONAL REVIEW PROCESS HAS COME TO PASS AND WHY WE ARE BEING ASKED TO COMMENT ON A LIST OF PRIORITY ITEMS DISTILLED FROM OVER TWO YEARS OF FEDERAL AND PROVINCIAL MEETINGS AND NEGOTIATIONS FROM WHICH WE HAVE BEEN EXCLUDED. SUCH IS THE STATE OF CURRENT DISCUSSION THAT WE NOW UNDERSTAND MOVEMENT ON THESE ISSUES BY GOVERNMENTS HAS REACHED A STAGE WHERE A FIRST MINISTERS CONFERENCE IS SCHEDULED FOR EARLY NEXT MONTH.

AGAINST THIS TIMETABLE THE VERY RECENT DECISION TO HEAR OUR VIEWS APPEARS ANOMALOUS AND WE ARE COMPELLED TO ASK WHAT EXACTLY IS OUR STATUS IN THE PROCESS? HOW, IN OTHER WORDS, WILL WHAT WE HAVE TO SAY HERE INFLUENCE RATIFICATION? ARE WE TO TAKE IT AS AN ARTICLE OF FAITH THAT THE FIRST MINISTERS WILL ALTER THEIR POSITIONS ON THE ITEMS UNDER DISCUSSION TO ACCOMODATE US?

WE HAVE MADE IT CLEAR ON MANY PREVIOUS OCCASIONS THAT BEING TREATED AS JUST ANOTHER INTEREST GROUP WHOSE VIEWS ARE TO BE CONVENIENTLY CANVASSED IN THE ELEVENTH HOUR IS TOTALLY UNACCEPTABLE. AND WE HAVE BEEN PROMISED

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REPEATEDLY THAT SUCH WAS NOT THE INTENTION OF GOVERNMENT. IN CONSEQUENCE OF OUR SPECIAL RIGHTS AND OUR SPECIAL POSITION IN CONFEDERATION, WE HAD EXPECTED TO BE FULL PARTICIPANTS IN THE NEGOTIATIONS LEADING TO CHANGES IN THE CONSTITUTION. BUT AT THIS LATE STAGE IN THE DISCUSSION OF A DOZEN HIGHLY IMPORTANT ISSUES, WHAT IS THE REALITY OF OUR PARTICIPATION? IT WAS ONLY THIS MONTH THAT THE PROMISED FUNDING FOR OUR INVOLVEMENT WAS FORTHCOMING. FURTHERMORE IT WAS ONLY LAST MONTH THAT THE MASS OF FEDERAL DOCUMENTS TABLED BEFORE THE CCMC OVER THE PAST FEW YEARS HAS BECOME AVAILABLE TO US. WE HAVE YET TO RECEIVE MANY OF THE PROVINCIAL POSITION PAPERS, APPARENTLY BECAUSE THEY ARE FOR "PARTICIPANTS ONLY" AND CAN NOT BE CIRCULATED TO US WITHOUT CONSENT OF THE ORIGINATING GOVERNMENT.

CANADA HAS A UNIQUE OPPORTUNITY TO SHOW THE WORLD THAT GENUINE ACCOMODATION AND INVOLVEMENT OF INDIGENOUS PEOPLES IN THE FRAMING OF ITS CONSTITUTION IS A FUNDAMENTAL NECESSITY IF JUSTICE IS TO BE ITS AIM. SO I BEGIN THIS BRIEF WITH A SPECIAL PLEA. DO NOT FORCE US TO CONCLUDE THAT WHAT IS WITHIN THE REALM OF POSSIBILITY AND ACCOMPLISHMENT HAS IN REALITY DEGENERATED INTO A TOKENISM BECAUSE OF NARROWLY CONCEIVED PROVINCIALISM. DO NOT FORCE US TO CONCLUDE THAT BECAUSE OF THIS PROVINCIALISM THE PAST INJUSTICES SUFFERED BY US ARE TO BE PERPETUATED IN ANY NEW CONSTITUTION.

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OUR PARTICIPATION HERE TODAY IS WITH THE HOPE THAT OUR VIEWS WILL BE TAKEN SERIOUSLY AND ACTED UPON. LACKING THE TIME AND RESOURCES WHICH YOU HAVE AT YOUR DISPOSAL OUR REMARKS ON THE TWELVE ITEMS WILL BE TENTATIVE, SUBJECT TO MUCH MORE RESEARCH THAN WE HAVE HAD TIME TO COMPLETE AND DISCUSSIONS WHICH WE HOPE TO INITIATE ACROSS THIS LAND OVER THE NEXT MONTHS WITH OUR PEOPLE.

I MUST EMPHASIZE THAT WE ARE HERE TO BEGIN NEGOTIATIONS, NOT CAP OFF ALREADY PREDETERMINED CONCLUSIONS ARRIVED AT BY GOVERNMENTS AT MEETINGS FROM WHICH WE WERE EXCLUDED. WHILE I DO NOT WISH TO BE DISCORDANT AND HARP ON THE PAST, I DO HOPE WE ARE ABLE TO AVOID THE KIND OF FRUITLESS MEETINGS WE HAVE BEEN SUBJECTED TO OVER THE YEARS, WHERE WE ARE ASKED FOR OUR VIEWS, WE GAVE THEM, ONLY TO RECEIVE THE RESPONSE "DON'T CALL US WE'LL CALL YOU". WE ARE HERE TO BECOME INVOLVED IN A PROBLEM SOLVING DIALOGUE AND NOT A JUNIOR CHAMBER OF COMMERCE VERSION OF A DEBATE OR OTHER FORMS OF THE ADVERSARY SYSTEM.

I NOW TURN TO THE TWELVE ITEMS ON YOUR AGENDA. OUR COMMENTS ARE BASED ON THE FEDERAL PROPOSALS AND ARE OF NECESSITY BRIEF, GIVEN THAT ONLY THREE HOURS HAVE BEEN ALLOCATED BY YOU FOR ALL THREE NATIONAL ASSOCIATIONS TO MAKE REPRESENTATIONS ON ITEMS WHICH YOU HAVE TAKEN MONTHS

TO DISCUSS WITH THE HELP OF EXPERT ASSISTANCE AND ENORMOUS RESOURCES.

A STATEMENT OF PRINCIPLES

THE LIST OF PRIORITY ITEMS BEGINS ON THE MATTER OF FORMULATING THE PRINCIPLES ON WHICH CANADA IS AND SHALL BE FOUNDED.

AS A TENTATIVE STATEMENT OF THESE PRINCIPLES, THE FEDERAL PROPOSAL HAS LITTLE TO RECOMMEND IT TO NATIVE PEOPLES. IT IS AMBIGUOUSLY WORDED, UNINSPIRED IN TONE AND MISLEADING IN CONTENT. NOWHERE IS IT STATED THAT THE CONSTITUTION IS PREMISED ON AN AGREEMENT BETWEEN PEOPLES INDICATING HOW THEY WISH TO LIVE AND BE GOVERNED. THAT IS, A SOCIAL CONTRACT IN WHICH THE FUNDAMENTAL REQUIREMENTS OF THE VARIOUS PEOPLES OF CANADA CAN BE MET FOR THEM TO FLOURISH IN ACCORDANCE WITH THE VALUES THEY CHERISH.

SURELY IT IS ESSENTIAL THAT THE BASIS OF CANADIAN FEDERALISM HAS SUFFICIENT APPEAL AND DURABILITY TO ENLIST ALL PEOPLES, TO AROUSE THEIR RESPECT FOR EACH OTHER AND THE COMMON ENDEAVOUR, AND TO STIMULATE AN OVERRIDING SENSE OF DISTINCTIVE IDENTITY. WHAT IS IT

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THAT WE AS CANADIANS WISH TO ACCOMPLISH TOGETHER IN THIS LAND?

THIS QUESTION DOES NOT FIND EXPRESSION IN THE FEDERAL PROPOSAL. WORDED AS IT IS LIKE A LEGAL CONTRACT BETWEEN GOVERNMENTS, IT GIVES ALL THE SENSE OF DURABILITY AND DISTINCTIVE PURPOSE THAT A FIVE-YEAR TAX-SHARING AGREEMENT MIGHT.

NOR DOES THIS DOCUMENT BREAK WITH THE PATTERN OF REFERRING TO US IN A PATERNALISTIC, PATRONIZING WAY. WHO NATIVE PEOPLE ARE IS NOT SPECIFIED, AND WHAT REFERENCE THERE IS, MAKES US APPEAR TO BE PASSIVE, IF NOT IRRELEVANT ONLOOKERS TO THE IMPLIED HARMONIOUS FOUNDING OF THIS COUNTRY BY THE FRENCH AND ENGLISH - WHO HISTORY RECORDS, WERE CONSTANTLY AT ONE ANOTHER'S THROATS.

WITHOUT WISHING TO ENTER THE DEBATE ON WHETHER CANADA IS TO BECOME A MELTING POT LIKE THE U.S.A., OR REMAIN A MOSAIC IN WHICH DISTINCTIVE CULTURES MAY FLOURISH, I WOULD SUGGEST A REWORDING OF THE OPENING SENTENCE IN THE FEDERAL STATEMENT OF PRINCIPLES IN ORDER TO REFLECT THE REALITY OF CANADIAN CULTURAL PLURALISM. I WILL LEAVE ASIDE FOR A LATER MEETING THE REPUBLICAN IMPLICATIONS OF

THE OPENING PARAGRAPH WHICH GIVES PRECEDENCE TO "THE PEOPLE" RATHER THAN THE MONARCH AND MERELY POINT OUT THAT CANADA IS COMPOSED OF MANY PEOPLES.

ASSUMING THE TERM NATIVE WOULD BE DEFINED LATER, THE FRAMERS OF THE FEDERAL DRAFT WOULD HAVE MORE ACCURATELY REFLECTED THE TRUTH IF THEY HAD SAID:

BORN OF A MEETING OF NATIVE PEOPLES WITH THE ENGLISH AND FRENCH ON NORTH AMERICAN SOIL, THE HOMELAND OF NATIVE PEOPLES FROM TIME IMMEMORIAL.....

DISAPPOINTMENT ASIDE WE DO SUPPORT THE NEED FOR A PREAMBLE IN WHICH AS AN ABSOLUTE MINIMUM THE PLACE OF NATIVE PEOPLE MUST BE GIVEN PROMINANCE. WE WOULD OF COURSE WELCOME THE OPPORTUNITY TO HELP DRAFT A STATEMENT OF PRINCIPLE TO THIS END.

CHARTER OF RIGHTS

WE SUPPORT THE PROTECTION OF HUMAN RIGHTS OF ALL CANADIANS IN THE CONSTITUTION BUT AT THE SAME TIME INSIST THAT OUR SPECIAL ABORIGINAL RIGHTS SHOULD NOT BE

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SUBSUMED UNDER ANY GENERAL HUMAN RIGHTS PROVISIONS.
INSTEAD WE WANT OUR ABORIGINAL RIGHTS ENTRENCHED
SEPARATELY IN THE CONSTITUTION.

THE PATRIATION OF THE CONSTITUTION

THE PATRIATION OF THE CONSTITUTION IS AN
OBJECTIVE WHICH WE CAN SUPPORT BUT ONLY IF THE AMENDMENT
FORMULA FULLY INVOLVES US. OTHERWISE SPECIFIED RIGHTS
GAINED TODAY COULD BE ABOLISHED TOMORROW UNILATERALLY
BY GOVERNMENTS. WE ARE PREPARED TO WORK OUT WITH YOU
AN AMENDMENT CLAUSE WHICH WOULD GUARANTEE THAT OUR RIGHTS
ARE FULLY PROTECTED AND ONLY AMENDED WITH OUR CONSENT.

A NEW UPPER HOUSE

WE BELIEVE THAT A NEW UPPER HOUSE WHOSE COMPOSITION
WOULD REFLECT THE HETEROGENEITY AND REGIONAL DIVERSITY OF
THE COUNTRY CAN STRENGTHEN CONFEDERATION. HOWEVER, NO
REFERENCE IS MADE TO GUARANTEED REPRESENTATION FOR NATIVE
PEOPLES IN THIS NEW HOUSE. AS HISTORIC NATIONAL MINORITIES
WITH SPECIAL RIGHTS IN CONFEDERATION, NATIVE PEOPLES
SHOULD BE GUARANTEED REPRESENTATION IN ALL LEGISLATIVE
BODIES, INCLUDING THE NEW UPPER HOUSE.

SUPREME COURT

IN MANY CASES, METIS AND NON-STATUS INDIANS HAVE BEEN ADVERSELY AFFECTED BY THE UNIVERSAL APPLICATION OF THE LAW THROUGHOUT THE LAND. THE CONTEMPORARY LEGAL SYSTEM DOES NOT TAKE INTO ACCOUNT THE SPECIAL LEGAL PROBLEMS NOR THE SPECIAL ABORIGINAL RIGHTS OF METIS AND NON-STATUS INDIANS. WE PROPOSE THAT SERIOUS CONSIDERATION BE GIVEN TO A JUDICIAL SYSTEM AT THE HEAD OF WHICH A SPECIAL PANEL COULD RULE ON CASES INVOLVING THE RIGHTS, CUSTOMS AND BELIEFS OF OUR PEOPLE IN THE SAME WAY THAT A SPECIAL PANEL FROM QUEBEC IS EMPOWERED TO RULE ON CASES BASED ON CIVIL LAW.

FISHERIES AND OFFSHORE RESOURCES

THE RIGHT OF NATIVE PEOPLE TO FISH INLAND AND IN COASTAL WATERS AS WELL AS THEIR RIPARIAN AND OFFSHORE RESOURCE RIGHTS SHOULD BE GUARANTEED IN THE CONSTITUTION. WE WOULD PREFER THE FEDERAL GOVERNMENT GUARANTEE OUR RIGHTS AND SHARE WITH US THE POWER TO INTERVENE IN ANY DISPUTES OVER THESE WITH PROVINCIAL GOVERNMENTS.

POWERS OVER THE ECONOMY

OUR PEOPLE HAVE COMMON ECONOMIC PROBLEMS ACROSS

THE COUNTRY. WE REQUIRE NOT ONLY A CO-ORDINATED BUT SPECIAL APPROACH TO THE PROBLEMS WHICH HAVE LED TO OUR IMPOVERISHMENT.

WE DO NOT UNDERSTAND WHY THE FEDERAL GOVERNMENT DID NOT REFER TO OUR SPECIAL NEEDS IN ITS POSITION PAPER ON THE ECONOMY. IT SEEMS THAT THE FEDERAL GOVERNMENT WISHES TO RETAIN KEY ECONOMIC POWERS IN ORDER TO REDISTRIBUTE WEALTH AND REDUCE SOCIAL INEQUALITIES AS WELL AS REGIONAL DISPARITIES YET IT DRAWS NO REFERENCE TO THE DISPARITIES BETWEEN NATIVE AND NON-NATIVE PEOPLES. DOES THIS OMISSION MEAN THAT OUR ECONOMIC PROBLEMS ARE SIMPLY VIEWED AS PART OF THE GENERAL PROBLEM OF SOCIAL INEQUALITIES AND REGIONAL DISPARITIES? IF THIS IS SO WE MUST POINT OUT THAT PREVIOUS ATTEMPTS TO DEAL WITH US THROUGH THE PROVINCES AS A PART OF A LARGER PROBLEM HAVE NOT WORKED BECAUSE WE BECAME LOST IN THE SHUFFLE. ANY AGREEMENT ON POWERS OVER THE ECONOMY MUST TAKE INTO ACCOUNT THE SPECIAL NEED TO REDUCE THE DISPARITIES BETWEEN NATIVE AND NON-NATIVE PEOPLES.

THE FEDERAL GOVERNMENT WISHES TO GUARANTEE THE FREE FLOW OF GOODS, SERVICES, LABOUR AND CAPITAL ACROSS PROVINCIAL BOUNDARIES. WHILE NATIVE PEOPLES CAN SUPPORT THE SAFEGUARDING OF THE CANADIAN ECONOMIC UNION, SERIOUS

CONSIDERATION SHOULD BE GIVEN TO EXEMPT NATIVE ECONOMIC DEVELOPMENT FROM THE PRINCIPLE OF NON-DISCRIMINATION, ESPECIALLY IN REMOTE AREAS WHERE THEY HAVE SO OFTEN IN THE PAST BEEN DISPLACED BY SOUTHERN BUSINESS AND LABOUR INTERESTS. WITH REGARDS TO THIS MATTER WE WISH TO KNOW WHETHER OR NOT WE ARE INCLUDED IN THE AFFIRMATIVE ACTION AND REGIONAL DEVELOPMENT PROGRAMS FOR WHICH THE GOVERNMENT IS PLANNING EXCEPTIONS.

DEDICATION TO SHARING AND/OR TO EQUALIZATION:
REDUCTION OF REGIONAL DISPARITIES

THE CONCEPT OF SHARING IS INTRINSIC TO NATIVE CULTURES AND LIFESTYLES AND IS ONE TO WHICH NATIVE PEOPLE CAN FULLY DEDICATE THEMSELVES DURING THE PROCESS OF CONSTITUTIONAL REVIEW. NATIVE PEOPLE HAVE ALWAYS BELIEVED IN SHARING THE WEALTH OF THE LAND AND THE BULK OF CANADA'S NATURAL RESOURCES ARE EXTRACTED FROM HINTERLAND AREAS WHERE NATIVE PEOPLE FORM A SIGNIFICANT PROPORTION OF THE POPULATION. HOWEVER, NATIVE PEOPLE HAVE ENJOYED FEW OF THE ADVANTAGES ACCRUING FROM THE EXPLOITATION OF THEIR LANDS AND SUFFERED ALMOST ALL THE DRAWBACKS.

THE PROPOSALS FOR ENTRENCHMENT OF EQUALIZATION IN THE CONSTITUTION DO NOT PROVIDE FOR A MEANINGFUL

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EQUALIZATION OF WEALTH. THE REASON FOR THIS IS THAT THE FEDERAL AND PROVINCIAL GOVERNMENTS CONTINUE TO TREAT REGIONAL DISPARITIES AS DISPARITIES BETWEEN "HAVE" AND "HAVE NOT" PROVINCES INSTEAD OF "HAVE" AND "HAVE NOT" REGIONS. THE ECONOMIC DIFFERENCES BETWEEN THE NORTHERN AND SOUTHERN PARTS OF PROVINCES ARE AS GREAT IF NOT GREATER THAN THOSE BETWEEN PROVINCES, YET THE EQUALIZATION SYSTEM IS STILL SEEN AS A PROCESS BY WHICH PAYMENTS ARE TRANSFERRED Laterally FROM ONE PROVINCE TO THE NEXT BY THE FEDERAL GOVERNMENT. THIS INTER-PROVINCIAL RATHER THAN INTER-REGIONAL OR INTRA-PROVINCIAL FOCUS HAS MEANT THAT "HAVE" PROVINCES TRANSFER WEALTH TO THE SOUTHERN-BASED GOVERNMENTS OF "HAVE NOT" PROVINCES. THESE WHICH ARE VIEWED BY NATIVE AND PERHAPS OTHER NORTHERNERS AS BEING AN INTEGRAL PART OF THE INTRA-PROVINCIAL DISPARITIES PROBLEM, NOT THE SOLUTION. LIKEWISE THE "HAVE NOT" REGIONS WITHIN THE "HAVE" PROVINCES ARE EXCLUDED ALTOGETHER FROM EQUALIZATION PAYMENTS. AS WE ALL KNOW "CHARITY BEGINS AT HOME". IN BOTH BRITISH COLUMBIA AND ALBERTA FOR EXAMPLE, A SIGNIFICANT PROPORTION OF PROVINCIAL WEALTH COMES FROM THE EXPLOITATION OF THE RESOURCES IN THE "HAVE NOT" REGIONS OF THE PROVINCE, REGIONS TRADITIONALLY USED AND OCCUPIED BY NATIVE PEOPLE.

THE PROPOSALS TO PROMOTE ECONOMIC DEVELOPMENT TO REDUCE DISPARITIES BETWEEN REGIONS SUGGEST A CONTINUATION OF FEDERAL/PROVINCIAL AGREEMENTS SUCH AS DREE WHICH TOO OFTEN HAVE BEEN LESS SENSITIVE TO THE NEEDS AND RIGHTS OF NATIVE PEOPLE IN "HAVE NOT" REGIONS.

AT THE SAME TIME THAT FEDERAL AND PROVINCIAL GOVERNMENTS AGREE TO PROMOTE EQUAL OPPORTUNITIES, ECONOMIC DEVELOPMENT, AND ESSENTIAL PUBLIC SERVICES OF REASONABLE QUALITY OF ALL CANADIANS, THEY MUST TAKE INTO ACCOUNT THE NEED TO REDUCE THE DISPARITIES BETWEEN NORTHERN AND SOUTHERN REGIONS. THE CONSTITUTION SHOULD PROVIDE FOR THE DIRECT TRANSFER OF EQUALIZATION AND REGIONAL DEVELOPMENT PAYMENTS INTO THESE "HAVE NOT" REGIONS. CLEARLY NATIVE REPRESENTATION MUST BE PART OF ANY PROPOSED REGIONAL DISPARITIES REVIEW PROCESS.

RESOURCE OWNERSHIP

AS THE ORIGINAL INHABITANTS OF THIS LAND WE BELIEVE THAT THE CONSTITUTION SHOULD MAKE CLEAR REFERENCE TO OUR RIGHTS TO LAND AND RESOURCES. ANY AGREEMENT

BETWEEN GOVERNMENTS ON "OWNERSHIP" OF RESOURCES MUST RECOGNIZE THE SPECIFIC NATURE OF, AND MAKE PROVISION FOR, OUR RIGHTS TO AN EQUITY INTEREST IN ANY RESOURCE DEVELOPMENTS INCLUDING SHARING THE RESPONSIBILITY FOR THE MANAGEMENT OF RESOURCES.

COMMUNICATIONS

IF WE ARE TO MAINTAIN A DISTINCT IDENTITY WE MUST HAVE THE RIGHT OF ACCESS TO THE MODERN MASS MEDIA THROUGH WHICH WE CAN COMMUNICATE WITH EACH OTHER AND WITH OTHER GROUPS IN CANADA. WE MUST ALSO HAVE ACCESS TO ALL NATIONAL AND PROVINCIAL CULTURAL INSTITUTIONS, FOR THESE TOO ARE VITAL MEANS OF COMMUNICATION. AS THE SITUATION NOW EXISTS IT IS DIFFICULT FOR METIS AND NON-STATUS INDIANS TO REPRESENT THEMSELVES THROUGH THESE CHANNELS, ESPECIALLY WHEN INSTITUTIONS LIKE THE NATIONAL MUSEUM USE A RESTRICTED INDIAN ACT DEFINITION OF WHO IS A NATIVE PERSON AND CONSISTENTLY IGNORE IN ITS RESEARCH AND EDUCATIONAL FUNCTIONS THE CULTURAL CONTRIBUTIONS OF THE METIS AND NON-STATUS INDIANS IN THE HISTORY AND DEVELOPMENT OF CANADA.

THE CONSTITUTION SHOULD PROVIDE NATIVE PEOPLE WITH THE RIGHT OF ACCESS TO THE RADIO AND TELEVISION, THAT IS, THOSE MEDIA UNDER GOVERNMENT REGULATION. AT THE SAME TIME IT SHOULD BE RECOGNIZED THAT NATIVE COMMUNICATIONS SYSTEMS ARE INTER-PROVINCIAL, IN THAT THEY ARE FULFILLING THE NEEDS AND INTERESTS OF NATIVE GROUPS SPANNING PROVINCIAL BORDERS, AND THEREFORE SHOULD FALL WITHIN FEDERAL JURISDICTION.

FAMILY LAW

FAMILY LAW COMPRISES A NUMBER OF SUBJECTS, SOME OF WHICH ARE PARTS OF OTHER MAJOR FIELDS OF LAW. JUVENILE DELINQUENCY IS OFTEN THOUGHT OF AS PART OF FAMILY LAW, BUT IT IS ALSO AN ASPECT OF CRIMINAL LAW. SEPARATION AGREEMENTS ARE CONSIDERED PART OF FAMILY LAW BUT THEY ARE ALSO AN ASPECT OF CONTRACT LAW. THIS POINT SHOULD BE BORNE IN MIND WHEN DISCUSSING A RE-DISTRIBUTION OF CONSTITUTIONAL POWERS.

THERE ARE CERTAIN AREAS OF FAMILY LAW THAT MIGHT BE CONSIDERED "PROBLEM AREAS" INsofar AS METIS AND NON-STATUS INDIANS ARE CONCERNED BUT IT IS NOT EVIDENT THAT THE PROBLEMS RELATE TO WHO HAS THE POWER

TO MAKE THE LAW. IT MAY BE AS MUCH A QUESTION OF THE ATTITUDE OR LACK OF CONSIDERATION THAT WENT INTO THE FORMULATION OF, AND ADMINISTRATION OF, THE STATUTE.

THE OBVIOUS PROBLEM AREAS FOR US ARE:

- LOSS OF CULTURE THROUGH ADOPTION OF CHILDREN BY, OR PLACING OF CHILDREN IN, HOMES WHERE NO CONSIDERATION IS GIVEN TO ABORIGINAL ANCESTRY OF CHILD, INCLUDING CASES OF SEPARATION WHERE A WHITE PARENT RETAINS CUSTODY OF CHILDREN OF MIXED MARRIAGE.
- RELATED ISSUE OF RECOGNITION OF CULTURAL DIFFERENCES IN METHODS OF RAISING CHILDREN IN CHILD WELFARE CASES, INCLUDING CHILD ABUSE, ETC.
- QUESTION OF INHERITANCES OR PENSIONS IN CASES OF MIXED MARRIAGES OR RELATIONSHIPS THAT MAY BE ACCEPTABLE IN METIS COMMUNITIES BUT THAT DO NOT MEET PROVINCIAL TESTS OR FEDERAL TESTS OF A 'VALID' MARRIAGE.
- ENFORCEMENT OF MAINTENANCE ORDERS AGAINST ITINERANT HUSBANDS AND FATHERS, A PROBLEM WHICH CUTS ACROSS CULTURAL BOUNDARIES.

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MORE STUDY IS REQUIRED ON THESE PROBLEM AREAS BEFORE WE CAN COMMENT DECISIVELY ON THIS ITEM.

FINALLY, I WISH TO SAY, WE SHALL HAVE MUCH MORE TO ADD TO ALL THE ITEMS AT A LATER TIME, HOPEFULLY BY THE DATE SUGGESTED TO ME IN A RECENT LETTER FROM THE PRIME MINISTER.

THE PRIME MINISTER RECENTLY FOUND CAUSE TO PREMISE HIS DEMAND FOR PATRIATION ON THE NEED TO BREAK THE LAST VESTIGES OF CANADA'S COLONIAL TIES TO BRITAIN THE NEED TO ENTRENCH OUR RIGHTS IN THE CONSTITUTION ALSO FLOWS FROM A DESIRE TO BREAK THE INTERNAL-COLONIAL TIES TO WHICH WE HAVE BEEN SUBJECTED THIS PAST HUNDRED OR SO YEARS.

Del Riley,
President
National Indian Brotherhood

PRESENTATION FOR MEETING WITH THE SUBCOMMITTEE OF THE CONTINUING COMMITTEE
OF MINISTERS ON THE CONSTITUTION.

There is a consensus among Indian organizations and leaders in Canada on the need for constitutional recognition of our rights. This has been confirmed again at the General Assembly of the National Indian Brotherhood held two weeks ago in Calgary, Alberta.

There seem to be two common errors that non-Indians are making about our position. The first is that there should be some reasonable division of the issues which can be handled by legislation and those items which should be entrenched in a revised constitution. The federal Minister of Indian Affairs insists that the revision of the Indian Act and the constitutional discussions should proceed as separate and distinct exercises. We say no. The fundamentals of our relationship with Canada have yet to be defined. I am sure you understand that we are dealing with some fundamental questions. We are not just dealing with a group of urban misfits and rural poor, but with Indian nations whose experience of nationhood long preceeded the coming of the French, the English and the other peoples who now live on our land.

We know you have a busy agenda and hope to be able to report progress to the First Ministers meeting in September. We have a difference sense of time because we are intent on dealing with fundamental questions of our political and legal status within Canada. It seems that the present constitutional discussions have created a situation where these questions can be thoughtfully considered. We are concerned with the

Indian Act, with its paternalism, its rigidity and its discrimination. But we are not prepared to now deal with the Indian Act for that would mean accepting the assumptions that lie behind it - that the Parliament of Canada has complete jurisdiction over our nations and should continue to have such jurisdiction - that we have been conquered or overwhelmed. We have survived. We have begun a slow and deliberate discussion of our situation. As we are addressing fundamental questions, we trust that you, as well, are addressing fundamental questions about our country and will be willing to talk with us. So we hope you will understand that we are not prepared to discuss a reasonable separation of legislative and constitutional questions.

The second error that is commonly made about our position, again, seems very reasonable. There are some matters which directly affect Indians and there are other matters which do not. The matters which directly affect Indians will be included in the agenda item "Canada's Native Peoples and the Constitution". The Prime Minister has indicated certain subjects, which, in his view, would be included in that agenda item. On those matters the Prime Minister has said we will participate directly with the First Ministers. On other matters we would be limited to what, perhaps, we are supposed to do today, that is, make submissions as an outside group, excluded from direct participation in the talks.

I would like to table two documents that have been prepared by our staff and reflect our thinking. One examines the twelve items that have been discussed by the Continuing Committee of Ministers on the Constitution over the summer. The other examines a fuller range of constitutional issues. These documents confirm the position we took at

the meeting with the steering committee of the Continuing Committee of Ministers on the Constitution on December 3rd, 1979 and the position we have always taken - that Indians have a substantial interest in all the constitutional issues that are under discussion.

It is a fundamental position on our part that we are a distinct order of government within Canada. It follows directly that we have an interest in all of the constitutional issues that are currently being discussed. If Prince Edward Island or Quebec cannot be excluded from the discussion of certain of your agenda items, then we cannot be excluded either. The documents I am tabling support our position on a different basis. They show the specific interest of Indian people in all the items under discussion. As well we could take the five matters mentioned by the Prime Minister on April 29th as falling within the Agenda item "Canada's Native Peoples and the Constitution":

...aboriginal rights, treaty rights, internal native self-government, native representation in political institutions and the responsibilities of the federal and provincial governments for the provision of services to native peoples.

We could easily demonstrate how this list includes consideration of virtually all the subjects that are being considered in the constitutional talks.

Whether you agree with our fundamental positions or not, you can still agree with one of our conclusions - that the constitutional issues now being discussed cannot be divided into those that "directly affect native people" and those which do not.

We have willingly attended this meeting, though we do not yet share a common understanding of the process which is underway. We have

given you our reaction to the twelve point agenda you have been considering over the summer. We must make some comment on the process involved. We have been promised "full, equal and ongoing" participation with the First Ministers on constitutional issues that directly affect us. Yet twelve items that directly affect us are to be discussed at the First Ministers meeting in September here in Ottawa, without our participation. There is a direct contradiction involved. At no point have there been discussions about the process involved. In our view we should be invited to participate in the September meeting of First Ministers and in all future First Ministers meetings. In addition, in our view, we should be given a seat on the Continuing Committee of Ministers on the Constitution, which would mean ending the need for a special subcommittee of the CCMC on native questions.

We are committed to the process of constitutional renewal. As my predecessor, Mr. Noel Starblanket said in the meeting with the steering committee of the CCMC on December 3rd, 1979:

We know that the process will be long, difficult and often tedious, but we intend to participate in a patient, realistic and determined manner.

This is still true.

INDIANS AND THE CURRENT CONSTITUTIONAL DISCUSSIONS

On June 9th, 1980, the First Ministers met in Ottawa and agreed to a plan of action on constitutional renewal which involved meetings over the summer by the Continuing Committee of Ministers on the Constitution (made up of federal and provincial ministers of inter-governmental affairs) and a First Ministers meeting in Ottawa, September 8th to 12th. These meetings were to discuss a list of 12 subjects which were agreed to at the June meeting by the First Ministers. The 12 subjects are as follows:

1. A statement of principles.
2. A charter of rights, including language rights.
3. A dedication to sharing and or equalization: the reduction of regional disparities.
4. The patriation of the constitution.
5. Resource ownership and interprovincial trade.
6. Offshore resources.
7. Powers affecting the economy.
8. Communications, including broadcasting.
9. Family law.
10. A new upper house (senate), involving the provinces.
11. The supreme court, for the people and for governments.
12. Fisheries.

Each of these items is of concern to the Indian people of Canada.

1. A statement of principles.

The federal government proposed wording for a preamble or statement of principles at the First Ministers meeting on June 9th, 1980. Their proposal read as follows:

We, the people of Canada, proudly proclaim that we are and shall always be, with the help of God, a free and self-governing people.

Born of a meeting of the English and French presence on North American soil which had long been the home of our native peoples, and enriched by the contribution of millions of new Canadians from the four corners of the earth, we have chosen to create a life together which transcends the differences of blood relationships, language and religion, and willingly accept the experience of sharing our wealth and cultures, while respecting our diversity.

We have chosen to live together in one sovereign country, a true federation, conceived as a constitutional monarchy and founded on democratic principles.

Faithful to our history, and united by a common desire to give new life and strength to our federation, we are resolved to create together a new constitution which:

Shall be conceived and adopted in Canada.

Shall reaffirm the official status of the French and English languages in Canada and the diversity of cultures within Canadian society.

Shall enshrine our fundamental freedoms, our basic civil, human and language rights, including the right to be educated in one's own language, French or English, where numbers warrant, and the rights of our native peoples, and shall define the authority of Parliament and of the legislative assemblies of our several provinces.

We further declare that our Parliament and provincial legislatures, our various governments and their agencies shall have no other purpose than to strive for the happiness and fulfilment of each and all of us.

There are two references to "our native peoples" in this draft preamble, indicating that the federal government has already concluded that some reference to Indian people should be included in any statement of principles in a new constitution. But the concepts involved in the federal draft are faulty, indicating a need for Indian participation in the process of formulating such a statement. The reference to "our" native people has a clear paternalistic ring, and it is surprising to see it still in use. Additionally, the draft clings to the federal myth of "two founding nations". It describes Canada as "Born of a meeting of the English and French presence on North American soil which had long been the home of our native peoples..." Indians are no more significant in the founding and building of Canada than the trees which also found a home on North American soil.

The federal government has demonstrated a clumsy, self-conscious and arrogant attitude towards the place of Indian people and Indian

nations in Canadian history. No preamble or statement of principles should be drafted without thoughtful Indian participation in the process.

2. A charter of rights, including language rights.

Indian people have suffered a denial of basic human rights more extensively than any other group in Canada. From our experience, we strongly support actions by provincial and federal governments to end discrimination and protect basic human rights. But the European culture of Canada's political leaders has led them to promote individual rights and downplay collective rights. The preoccupation with Quebec separatism has led them to deny that there can be any application of the international law principle of the self-determination of peoples to groups within Canada. Indian people have had to fight European-Canadian campaigns for assimilation because of the value we place on our collective tribal life. We have a right to self-determination based on our tribal sovereignty which predates European-Canadian governments by thousands of years. While we support human rights, we have found that European-Canadians have used human rights arguments to deny us the fundamental right of collective self-determination.

We have made some progress in convincing federal officials that they must include our collective rights in their thinking about human rights. The Supreme Court of Canada has wisely retreated from applying the Canadian Bill of Rights to undercut the Indian Act. Federal human rights legislation exempts programs which come under the Indian Act. The Constitutional Amendment Bill (Bill C-60), which was proposed by the Trudeau government in 1979, contained a charter of human rights which specifically stated that it did not invalidate Indian rights deriving from the Royal Proclamation of 1763. Each of provisions acknowledged that in any formulation of human rights in Canada, Indian collective rights must be respected. But each of

these provisions was crude and inadequate, because of the inadequacies of the present Indian Act and because of persistent misinterpretation of the basis of Indian rights in Canada.

The federal government has already accepted the principle that Indian rights must be mentioned in a charter of human rights. Indian people must be involved in the drafting of the charter to ensure that Indian rights are properly protected.

3. A dedication to sharing and/or equalization: the reduction of regional disparities.

The issue of equalization or sharing is probably the most paradoxical issue that can be put to Indian people. By choice, fraud or force we have shared our wealth with the European-Canadians, only to be made outsiders in our own land. In many parts of Canada we have a struggle even to control natural resource revenues from the limited reserve land base that is supposed to be ours. The issues of treaty entitlements and aboriginal rights are issues of the equitable sharing of natural resources in this country. They must be understood as such. We have been told by both federal and provincial politicians that the present constitution divides the powers to settle Indian claims between the federal and provincial governments. The present constitution has been used as an excuse for inaction on Indian claims in Alberta, British Columbia, Atlantic Canada and other areas. If these constitutional problems are real they should be addressed in the present constitutional discussions. The first issue of equalization for Indian people is an adequate and proper division of natural resources through a just settlement of land claims.

The second equalization issue involves the status of Indian governments within Canadian federalism. The equalization program is designed to ensure that all provincial governments have access to sufficient revenues to provide a roughly uniform level of services to

their residents. We have long suspected that the presence of Indian reserve communities in a province has increased the eligibility of that province to equalization payments. Yet most provinces only supply services to Indian reserve communities if the cost is covered by the reserve or the federal government. This means a province can make a profit on Indians through equalization payments. While the phenomenon of provinces making money on "their Indians" is not new, there has not been a clear understanding of how to correct this paradox. Some would argue that the money should go to the province and the province, in turn, should recognize Indians as "citizens of the province" and supply services to them. Others might suggest that the money should go to the Department of Indian Affairs. For us the answer is clear. The money should go directly to the Indian governments. In legislation, policy and practice Indian governments are recognized in Canadian society. They exist, but they are downgraded and often ignored, though they have existed for thousands of years. A new constitution must recognize Indian governments as a distinct order of government within Canada. A natural result of that recognition would be the inclusion of Indian governments in the equalization program. This would not require additional expenditures, but neither would it, in the short run, reduce the necessity of federal appropriations in relation to Indians. It simply means that provinces, who habitually refuse to extend their services to Indian reserve communities, would cease to gain unearned, windfall profits through the equalization program from the fact of Indian communities within their borders.

4. The patriation of the constitution.

The constitution of Canada is still a law passed by the parliament in England. The basic parts of the constitution cannot be changed without going back to England and asking them to amend the original legislation. To European-Canadians this is an embarrassment, a

reminder of their colonial past. On May 9th, 1980, the Canadian House of Commons unanimously passed a motion asking that the English Parliament "patriate" the Canadian constitution, and thereby transfer all amendment powers to Canada. It was striking that all political parties in the House of Commons voted in favour of this motion. It is common for provincial governments to say that there should not be "patriation" until there is agreement in Canada on a formula for the amendment of the constitution.

Indians oppose "patriation" at this point in the history of Canada. The Indian position was clearly stated during the "constitutional journey" of the Indian Chiefs and Elders to England in July, 1979. The Chiefs opposed "patriation" until Indian people in Canada were participants in the constitutional discussions and until there was agreement that Indian treaty and aboriginal rights would be protected in a new constitution. As a result of the Chief's visit to England there are members of the English Parliament who are pledged to oppose "patriation" legislation unless the issues of Indian rights have been settled within Canada.

5. Resource ownership and interprovincial trade.

The federal government has acknowledged that there are outstanding Indian claims to lands and natural resources in their statement on aboriginal title claims in 1973, and by their negotiation of claims in Northern Quebec, the Yukon, the Northwest Territories and parts of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. As well there are unresolved Indian claims in southern Quebec, the Maritimes, Newfoundland and Labrador.

The question of Indian harvesting rights is a question of rights to use resources. The series of Indian rights cases in the 1960's and 1970's show an inconsistent judicial response to Indian harvesting rights. Treaty and aboriginal rights have been held to be overridden by the Migratory Birds Convention Act and the Fisheries Act (whether or not that was the intention of the federal government). Treaty

protected hunting rights have been upheld against provincial laws but not against federal laws. These rights were seen as sufficiently fundamental to be given constitutional protection in the Natural Resource Transfer Agreements and the British North America Act of 1930 (which applied to the three prairie provinces). There is no reason why they cannot have constitutional protection in all parts of Canada.

Indian resource rights should be recognized as including subsurface rights, riparian and foreshore rights and rights to offshore resources. Indian rights to manage resources should be exclusive over reserve lands and waters and shared over traditional lands and areas off reserves.

6. Offshore resources.

The land claims of the Indian and Inuit peoples living in coastal areas include offshore resources. This is acknowledged in the COPE agreement in principle. It was acknowledged by Prime Minister Clark on October 3rd, 1979, when he released documents concerning his plan to transfer offshore resources to provincial control. Prime Minister Clark, at that time

...noted that an important matter which would have to be considered in the implementation of the principles with the various provinces concerned was the status of Inuit and Indian claims in coastal areas. (Release from the Office of the Prime Minister)

The claims also include claims to fishing rights in offshore waters. It would be illogical to separate the question of Indian offshore rights from any federal-provincial discussion on the same subject.

7. Powers affecting the economy.

In the present constitutional negotiations the federal government is arguing that there are too many provincially created barriers to the movement of people and materials within Canada. The federal government is seeking a strong constitutional provision to

ensure that Canada has a single economy, a single internal market.

Indian people are often viewed simply as an economically deprived group, excluded from the mainstream of Canadian society. This has obscured the fact that many Indian communities have a separate economy, largely ignored by the larger society. The Berger and Lysyk reports described those separate economies in the Yukon and Northwest Territories. In some areas the distinct Indian economy is protected by law. This is true in parts of Canada in relation to trapping, fishing and the harvesting of wild rice. In southern Canada there are numerous Indian communities which are developing reserve based economies using band resources, government assistance and band labour. The goal is to secure an economic base for an Indian tribal community. The goal is not to maximize free movement but to end the need for people to leave their home community for economic reasons.

There is a danger that constitutional provisions designed to guarantee a single internal market in Canada will be used to weaken distinctive Indian economies, where they exist, and to prevent Indian people from developing reserve economies as an economic base for tribal communities. The Indian interest in these issues involves completely different goals than those expressed by the federal government. That fact underlines our concern with this agenda item.

8. Communications, including broadcasting.

The federal government presently has sweeping powers over radio and television broadcasting. The issue in the present constitutional talks is whether some degree of provincial control will be established in order to reflect the regional character of Canada and the cultural diversity of its people. The issues of language and cultural protection are more vital to Indian peoples than to any other groups in Canada. No other groups have had their languages and cultures so systematically attacked by the majority population. New telecommunications technology

holds the promise of distinctive native broadcasting not simply in northern areas where Indian and Inuit people form a majority, but in southern areas as well. If it is recognized that Indian communities have distinctive cultural and linguistic interests, their concern with telecommunications is obvious.

9. Family law.

The application of provincial child welfare laws to Indian communities is a continuing problem and one acknowledged by all observers. The integrity of the Indian communities, as distinct cultural and political groups, is violated by their lack of control over the welfare of their own children. The existence of federal jurisdiction over Indian education and over the guardianship of the property of Indian infants should make it clear that the federal government has legislative authority in relation to Indian child welfare and that this authority can be given to Indian governments. The federal government seems to deny this possibility by consistently deferring to provincial jurisdiction. If the federal government doubts that it has jurisdiction over Indian child welfare, then it should support a constitutional provision which would make it clear that Indian governments could take over the legislative, administrative and judicial control of Indian child welfare.

There has been a long standing problem, as well, concerning the legal recognition of Indian customary marriages. Since 1951 the Department of Indian Affairs has refused to recognize Indian customary marriages for the purposes of administering the membership sections of the Indian Act. This has led to an indefensible discrimination against Indian people on the basis of race and religion. The most sensible resolution of these issues would be to give Indian governments jurisdiction over marriage, divorce, custody, guardianship and adoption. In this way Indian custom marriages and other Indian customary family law would command the same respect as the family law provisions of

the federal and provincial governments. Such powers would form part of the list of jurisdictional powers assigned to Indian governments in a new constitution.

10. A new upper house (Senate) involving the provinces.

In order to make the institutions of the central government (such as the Senate, the cabinet and the Supreme Court of Canada) reflect the nation as a whole, there is a tradition of appointing people who represent the various regional, linguistic and religious groupings within Canada. This tradition is partly enforced by law. For example, by law, there must be three judges from Quebec on the Supreme Court of Canada. But often the tradition is simply a practice which federal politicians follow because it makes political sense. Only in one instance has this pattern been applied to Indian people. In the late 1950's Prime Minister Diefenbaker, recognizing the absence of Indians in the institutions of the central government, began the practice of having one Indian as a member of the Senate.

The main goal of the present constitutional discussions about a new upper house is to achieve fuller provincial representation in the institutions of the central government. If Indian governments are to be recognized as a distinct order of government in Canada it follows logically that they should be represented, as of right, in a new upper house. It follows, as well, that they should be represented in the other institutions of the central government. Prime Minister Trudeau acknowledged that Indian representation in the federal institutions is a question to be discussed when he spoke to the First Nations Constitutional Conference.

11. The Supreme Court, for the people and the governments.

In the past Indians have been almost completely excluded from the executive and legislative branches of government. This has

made the courts unusually important for Indian people, as one channel that might be open to them for a recognition of Indian rights. The conservative legal tradition in Canada has hampered the courts but, nevertheless, major court cases in the 1960's and 1970's have pointed out to Canadians some of the injustices in Canada's treatment of Indian people. In the last twenty years Indian cases have become a regular part of the work of the Supreme Court of Canada. But Indian cases are unlike almost any other kind of litigation. They require both a detailed understanding of Canadian and Indian history and the formulation of legal concepts which reflect Indian rights to self-government and cultural autonomy. Yet no judge has ever been appointed to the Supreme Court of Canada who has had any background or experience on Indian questions. This would not be an acceptable arrangement for Quebec or for any other region of Canada. It is one basis for Indian scepticism about the impartiality and integrity of the judicial system in Canada.

12. Fisheries.

Indian fishing rights have been guaranteed in many treaties, in the Natural Resources Transfer Agreements and in the James Bay and Northern Quebec Agreements. There have been a series of disputes and prosecutions in both New Brunswick and British Columbia over the last few years. Fishing rights have proven to be one of the most contentious Indian rights issues. No transfer of jurisdiction in relation to fisheries should occur without Indian fishing rights being clearly defined.

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CONFIDENTIAL

Position of the National Indian Brotherhood concerning
The Revision of the Canadian Constitution

Introduction

Special legislative and constitutional provisions for Indian people have been a continuing part of Canadian life for over 250 years. In the words of the Berger Report, special status has been "an integral part of our constitutional tradition."

Special constitutional provisions regarding Indian peoples are to be found in:

1. The Treaty of Utrecht (1713)
2. The Articles of Capitulation of Montreal (1760)
3. The Royal Proclamation of 1763
4. The Treaty of Ghent (1815)
5. The British North America Act (1867)
6. The Manitoba Act (1870)
7. The Order in Council of Her Majesty admitting Rupert's Land and the North-Western Territory into Union (1871)
8. The Terms of Union of British Columbia (1871)
9. The Quebec and Ontario Boundary Extension Acts (1912)
10. The Natural Resources Transfer Agreements (1930)

In addition, the treaties between Indian nations and the Crown should properly be considered as constitutional documents.

Special constitutional provisions were made for the purpose of recognizing Indian rights and protecting Indian interests. Yet governments have constantly denied Indian rights, at times even using the constitutional provisions as reasons to exclude Indians from the mainstream of Canadian life.

We approach the constitutional discussions that are currently under way with the intention of establishing some of the basic relationships of Indian people and Indian governments with the rest of Canadian society. We have never in the past been treated as political equals in constitutional discussions, but we know that a new constitutional order, to succeed, must be based on ideas of equality and mutual respect between our peoples and the other communities within Canada.

That is what we seek. We ask no more and will accept no less.

1. Treaty and Aboriginal Rights

Canadian society can never be truly just until it recognizes that Europeans found a continent inhabited by hundreds of Indian nations, each with its own culture and its own system of law and property. It must be realized that the issues of treaty and aboriginal rights are in reality the issue of those national rights enjoyed by peoples already established on this continent. Not only do these issues involve rights to land, but also to the right of self-determination based on the original sovereignty of each of the Indian nations.

The issues of treaty and aboriginal rights have raised a number of constitutional problems. Lying behind many of the problems is the fact that jurisdiction over Indians, Indian lands and Indian claims lies with the federal government, yet jurisdiction over lands, natural resources and hunting and trapping, in general, lies with the provincial governments. Indian have constantly been told that the resolution of major issues requires agreement between the federal and provincial governments. In other words, the complexity of the Canadian federal system has been used against Indians.

The following examples show that shared jurisdiction has hurt Indian people, defeating the purpose of special constitutional provisions. They further show that Canadian law has failed to recognize adequately either aboriginal rights or the character of Indian treaties.

(a) Aboriginal rights have not been adequately recognized in Canadian law:

Aboriginal rights stem from the national rights enjoyed by the Indian tribes which were established on this continent prior to European colonization. They do not come from the Royal Proclamation of 1763. In fact, the Proclamation itself does not purport to create or establish any rights, but rather describes the treaty mechanism which would be used to deal with lands which had not been "... ceded to or purchased by Us ...".

The Judicial Committee of the Privy Council misread and misinterpreted the Proclamation in 1898, in the St. Catherines's Milling case, when it attributed Indian rights to the Proclamation. Mr. Justice Hall was wrong in the Supreme Court of Canada decision in the Calder case in looking to English law for recognition of aboriginal rights. Our aboriginal rights were not granted by a proclamation of the British monarchy, but come from our own nationhood and the sovereignty inherent in that nationhood. As late as 1978, we saw that old ideas are slow to die, when the government of Prime Minister Trudeau suggested, in Bill C-60, that Indian rights come from the Royal Proclamation.

Because Canadian courts have failed to understand the origins of Indian aboriginal rights, it is logical that a new constitution correctly describe and establish these rights. This suggestion should make it quite clear to all that Indian people seek a confirmation of their rights within any new Canadian constitutional order.

(b) Federal responsibility to recognize Indian aboriginal rights should not be frustrated by provincial actions:

In 1973, the federal government stated that it recognized a need to negotiate settlements of aboriginal title claims to land

in certain parts of the country. It stated that in Quebec and British Columbia, settlements of Indian claims

... can only be satisfactorily reached if the Provinces concerned participate along with the Government of Canada in the negotiation and settlement.

Both Quebec and British Columbia had histories of hostility to Indian aspirations, making the quoted federal statement suspect from the beginning. Quebec began negotiations later that year, but only because the Quebec Superior Court had ordered a halt to the James Bay Project on the basis of unsurrendered Indian and Inuit rights. It took the government of British Columbia a year before it stated that it would have nothing to do with Indian aboriginal title claims. That is still the position of British Columbia in 1980. For the past seven years the government of Canada has been saying that it is unable to resolve aboriginal title claims in British Columbia because of the attitude of the provincial government. A similar problem exists with Indian claims in Labrador.

These problems make the concept that jurisdiction to settle aboriginal title claims lies exclusively with the federal government a farce. If Canadians feel that these claims should be resolved justly, it is necessary for the constitution to grant very clearly to the federal government those powers necessary to ensure that negotiations and a settlement can occur.

(c) Indian treaties have not been adequately recognized in Canadian law:

The power to negotiate treaties is a political power and was one of the national rights of the Indian tribes of Canada. To Indian people, the treaty process was one whereby a permanent alliance was forged between the Indian nations and the European colonial population. In fact, the records of the government negotiators show something of the political character of the arrangements involved. For example, the negotiators of Treaty #3 in 1899 reported:

"We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service."

Yet, the courts have described the Indian treaties as contracts. In an amazing judgement concerning the Robinson annuities the Judicial Committee of the Privy Council described the treaties as resembling "ordinary mercantile contracts". By describing the treaties as contracts, the courts rejected the stronger notion that the treaties were the equivalent of legislation because they were authorized by the Imperial parliament in the Royal Proclamation of 1763. However, even that interpretation of the treaties

would have been wrong, for it, like the contract idea, is based entirely in English law. A treaty, being an agreement between two political groups, must be valid in the law of both groups. In fact, the treaties were international law documents, even if they did establish what Europeans termed a relation of suzerainty between the colonial power and the Indian nations.

Again, because of the serious errors made by the courts in the past in interpreting the treaties, any new constitution must not only describe correctly the legal status of the Indian treaties in the Canadian legal order, but also entrench the terms of these treaties such that they cannot be abrogated.

(d) Canadian law has not dealt correctly with the interpretation of Indian treaties:

The records of government officials, even considered separately from Indian oral traditions, indicate that the written texts of the treaties are inadequate records of the agreements which were actually reached. Canadian law has done the indefensible in interpreting the oral agreements of people who did not understand English exclusively by the English words of the treaty document. Mr. Justice Morrow recognized in the Paulette case that the Indian understanding of Treaties #8 and #11 was clearly ascertainable, and was seriously at variance with the terms of the written documents. Both courts and writers have argued that the terms of the treaties should be interpreted liberally in favour of the Indians, but this is inadequate. It is necessary, if the basic political principles of the treaties are to be understood, to start with the actual agreement reached, using the written terms of the treaties as simply one piece of evidence in this process.

The courts have so seriously misunderstood the treaties, that the constitution should speak both about the legal nature of the treaties and how they are to be interpreted.

(e) Treaty entitlements:

The problems of the status of Indian treaties and the proper interpretation of those agreements have led to continuing problems concerning Indian rights under the treaties. For example, government officials promised substantial aid to develop new economic bases for Indian communities, but since these promises, in the treaties, were put in terms of plows, ammunition and twine, the government has never accepted a treaty obligation in relation to economic development. Also, the government officials promised the Indians education, but the promises were put in terms of a teacher or a school on the reserve. As a consequence, the government has never accepted a general treaty obligation to provide Indian education. The same is true with health services.

Even the most concrete and easily interpreted of the treaty

promises - the promise for reserves based on a formula of a certain number of acres per person - has faced continuing problems. For example, negotiations have been going on for ten years to settle the reserve entitlement under treaty for Fort Chipewyan, in northern Alberta, and for over ten years to settle the reserve entitlement at Big Trout Lake, in northern Ontario. The province of Saskatchewan has progressed farther than any other government in recognizing this problem and negotiating the details of compliance with the treaty promises directly with the Indian themselves. Alberta refuses to discuss the question except when a court orders the province to comply with its constitutional obligations under the Natural Resources Transfer Agreements. There have also been continuing problems in Manitoba, and in British Columbia, the "cut-off" lands issue, which is somewhat similar, has been the subject of negotiation for the past six years, although the claim has been asserted by the Indians involved since 1938. At present, these Indians have begun a court action against both the federal and provincial governments in this regard.

The Natural Resources Transfer Agreements of 1930 made provisions to ensure federal-provincial co-operation in resolving treaty land entitlements. The idea, then, of constitutional provisions to deal with this kind of issue is certainly not novel. In fact, history has indicated that such provisions are necessary.

2. Indian Government

Indian nations always had, and continue to have, the right to self-government. The full sovereignty they enjoyed prior to European colonization has only been modified, and not ended, by the establishment of non-Indian governments in Canada. The British North America Act of 1867 created a federal structure and defined the powers of the federal and provincial governments. In a negative way it recognized Indian communities as separate jurisdictional areas by removing them from the regular division of powers between the federal and provincial governments. Federal jurisdiction could have meant either domination by the federal government over Indians or the recognition by Ottawa of Indian bands as self-governing communities. The government chose the former interpretation, and any new constitution must now entrench the latter. There must be no ambiguity in the new constitution. Indian governments, as a distinct order of government, must be recognized and their exclusive powers specified.

Indian people see such constitutionally guaranteed jurisdictional areas complementing other treaty and aboriginal rights and including such areas as citizenship, family law, education, the administration of justice, resource rights and taxation.

3. Citizenship

Although there are over a million people in Canada who consider

themselves to be, to a greater or lesser degree, of Indian ancestry, only about a quarter of this number are eligible to be recognized officially by the Canadian government as Indians. This is because only those people who can bring themselves within the provisions of section 11 of the Indian Act are recognized by the government to be Indians, with all the rights and disabilities that such recognition entails. It is the contention of Indian people that such a determination should be made by the bands themselves, and not by the federal government. Indians know who Indians are.

Present inequalities in the membership sections of the Indian Act defining persons who are not eligible to be registered as Indians have led to dissention within bands and the removal from the band lists of people who would otherwise be Indian. For example, section 12(1)(a)(iv) of the Act says that a child who is registered as an Indian and whose mother and paternal grandmother gained their Indian status by marrying an Indian man, will cease to be registered as an Indian upon reaching the age of twenty-one. Further, section 12(1)(b) says that, although a non-Indian woman gains Indian status by marrying an Indian man, an Indian woman who marries a non-Indian man loses her status and ceases to be an Indian.

The question of band membership should be considered, constitutionally, as a question of citizenship. Each band should have the jurisdiction under the constitution to determine who may and may not be a member of that band.

4. Family Law

The application of provincial child welfare laws to Indian communities is a continuing problem and one acknowledged by all observers. The integrity of the Indian communities, as distinct cultural and political groups, is violated by their lack of control over Indian child welfare. The existence of federal jurisdiction over Indian education and over the guardianship of the property of Indian infants should make it clear that the federal government has legislative authority in relation to Indian child welfare, and that this authority is assignable to Indian governments. The federal government seems to deny this possibility by consistently orienting its policies to facilitate provincial jurisdiction in this area. If the federal government doubts that it has jurisdiction over Indian child welfare, then it should support a constitutional provision which would make it clear that Indian governments could take over the legislative, administrative and judicial control of Indian child welfare.

There has been a long standing problem as well concerning the legal recognition of Indian customary marriages. Since 1951, the Department of Indian Affairs has refused to recognize Indian customary marriages for the purposes of administering the member-

ship sections of the Indian Act. This has led to an indefensible discrimination against Indian people on the basis of race and religion. The most sensible resolution of these issues would be to give Indian governments jurisdiction over marriage, divorce, custody, guardianship and adoption. In this way Indian custom marriages and other Indian customary family law would command the same respect as the family law provisions of the federal and provincial governments. Such powers would form part of the list of jurisdictional powers assigned to Indian governments in a new constitution.

5. Education

The basic right to educational services for Indians stems from the trust obligations of the federal government toward Indians and from treaty and aboriginal rights. The ill-defined trust relationship has never been judicially recognized as conferring on Indians legal rights which they could enforce against the government.

The source of the trust concept is to be found in such generally worded documents as the Royal Proclamation of 1763, which speaks of the Crown as the protector of Indians. The traditionally conservative and constructionalist Canadian legal system has always refused to import any specific obligations into promises made to the Indian people, and the government has seen its relationship with Indians as simply a jurisdictional right on its part, with no concomitant mandatory obligations.

The enforcement of treaty rights to education has been hampered by the weak legal status of these rights in the face of conflicting legislation and by the refusal of the government to apply modern educational standards to promises made in the last century. The records of the treaty negotiators for the Crown show that general pledges were made to teach Indians "the cunning of the white man". This broad commitment to provide education to Indians was generally expressed in the treaties by the use of symbolic commitments to provide a school or a teacher on the reserve. The government has never admitted this symbolic nature of the language used in the treaties and has consistently interpreted its obligations as narrowly and literally as possible.

While denying any legal obligation to provide educational services to Indian people, the government has always acted as though it did in fact have some responsibility in this area. There is a long history of federal activity in the field of Indian education, but by refusing to admit any legal duty to provide to Indians educational services, the government rationalizes its right to decide unilaterally upon the extent of its obligations, the type of services it will provide and the educational goals of Indian children.

There now seems to be general agreement that Indian people should have maximum control over their own education. Yet, if the ultimate jurisdiction over Indian education remains with the federal government, Indian communities will have to rely ultimately upon the benevolence of the government for financial support and for legislative change. Their educational systems will continue to be subject to the political and bureaucratic scrutiny of the non-Indian population.

The only guarantee Indians have of gaining ultimate control over such a culturally important area as education would be a constitutional guarantee of the right of Indian people to have exclusive jurisdiction over Indian education.

6. Administration of Justice

Present arrangements concerning Indian policing do not permit bands to maintain officially recognized police forces in the same way as non-Indian towns and municipalities. As well, there seems to be an assumption of some provincial jurisdiction in relation to the administration of justice on reserves, both in relation to policing and prosecuting, which the federal government may not have power to assign or control. The present situation also leaves great uncertainty as to who has the authority to enforce band by-laws and who will do so.

Indian goals of self-determination require that authority be present to allow advanced bands to take over the administration of justice on their reserves. This would include policing and prosecuting, and could include as well authority in relation to detention, parole and pardons.

The present system provides merely for Indian justices of the peace, with very limited powers, under section 107 of the Indian Act. However, there is no reason why a separate system of Indian courts could not be established under the present section 101 of the British North America Act (1867). These courts could then handle the enforcement of band by-laws and federal laws such as the Criminal Code in relation to reserves and Indians.

Proposals for a special judicial structure for Indian communities have been greeted in the past with some skepticism as to whether the constitution would allow such a system. Any new constitution should clearly allow for both federal assumption of authority in this area from the provinces and Indian assumption of this authority from the federal government.

7. Resource Rights

The series of constitutional cases in the 1960's and 1970's involving Indian hunting and fishing rights have shown an inconsistent pattern in the recognition of these rights. Treaty and

aboriginal rights to hunt and fish have been overridden by the federal Migratory Birds Convention Act and Fisheries Act. As well, aboriginal rights to hunt and fish have been overridden by provincial laws of general application.

The Supreme Court of Canada has agreed that the Crown's treaty promises have been broken and that the federal government has apparently not realized what it has been doing in this regard, but although the injustices have been plain and clear, they have not been remedied.

The logical answer is constitutional protection for Indian resource rights - a concept that is not novel. The Natural Resources Transfer Agreements of 1930 gave constitutional protection to certain Indian hunting and fishing rights in Alberta, Manitoba and Saskatchewan, while similar protection can be found in the Yukon Act and the Northwest Territories Act.

Indian resource rights include subsurface rights, riparian and foreshore rights and rights to offshore resources. Indian rights to manage resources should be exclusive over reserve lands and waters and shared over traditional lands and areas off reserves.

Resource revenue sharing is a logical and important concept which should be included in any new constitution if the entrenchment of equalization payments is to be considered.

8. Taxation

An exemption is granted, by section 125 of the British North America Act (1867), from taxation for the lands and property of the federal and provincial governments. Although this exemption has been extended to municipal level government lands by the provisions of the Income Tax Act, the Minister of National Revenue has refused to apply this exemption to lands owned by Indian bands.

Constitutional revisions must take into account the position of Indian governments in relation to federal and provincial governments and, accordingly, provide for the exemption of band lands and property from taxation.

Further, the exclusive jurisdiction to tax individual Indian people and non-Indian individuals and corporations who are on reserve lands must lie with Indian governments.

Customs and excise duties are based on the political significance of the international borders, particularly that border between the United States and Canada. For the Indians of North America, that border is an artificial and recent imposition. In recognition of this, an Indian exemption from regular immigration laws and from customs and duties was granted by Jay's Treaty of 1794, between the United States and Great Britain. However, the

Canadian authorities have never recognized Jay's Treaty and have refused to allow Indians these exemptions. Although the Supreme Court of Canada ruled in 1956 that Canada was in breach of the provisions of Jay's Treaty, no remedial legislation has yet been passed to correct this problem.

In any new constitution, the Indian exemptions guaranteed in Jay's Treaty must be placed above legislative abrogation and entrenched.

9. Rights and Freedoms

The Indians of Canada are subject to a different legal regime from other Canadians because of their special constitutional status, their treaties and aboriginal rights and the provisions of the Indian Act. This fact creates a difficult problem respecting current proposals to entrench Canada's Bill of Rights in any new constitution.

While Indians constitute a distinct racial or national group within Canada, their unique legal status is seen not as any kind of racial discrimination, but rather as an essential protection of their cultural integrity. The entrenchment of the "equality before the law" provisions of the Bill of Rights in a new constitution could, therefore, threaten this situation by invalidating the Indian Act and other sources of Indian rights on the grounds that such special legislation violates the equality before the law principle of the Bill of Rights.

Until just a few decades ago, both basic substantive rights and protection against discrimination were matters left to the common law. There was therefore no constitutional difficulty with the idea of separate legal rights for Indians, since statutes such as the Indian Act clearly superceded and overruled the common law. Within the past twenty years, however, the federal government and several of the provincial governments have passed legislation attempting to codify the notion that there should be no discrimination on the basis of race or national origin in either the substance or application of federal or provincial laws. How such laws, especially the Canadian Bill of Rights, affect distinct Indian legal rights has been the subject of much concern to the Indian of Canada. There was considerable fear that the courts would use this Act to strike down or severely restrict the laws which pertain uniquely to Indians. Judicial interpretation of the Bill of Rights since 1960 has allayed these fears somewhat, but such interpretation has been based on the Bill's status as an ordinary Act of the Parliament of Canada, and not on it being a constitutional document.

In the Drybones case, the Supreme Court of Canada declared a section of the Indian Act inoperative because it discriminated on the basis of race against an Indian. Although the discrimination

in question was simply social, the decision immediately raised the possibility that the whole idea of distinct laws for Indians, whatever their intent, would be interpreted as a violation of the Bill of Rights and, therefore, illegal. Subsequent cases, most notably Lavell and Bedard, have affirmed the paramountcy of the Indian Act over the Bill of Rights, and therefore the legal basis for legislated rights seems to be secure under the present law. However, any elevation of the Bill of Rights from its present status as an ordinary statute to a constitutional restriction on Parliament's legislative capacity would certainly be a prospective threat to all laws applying uniquely to Indians.

In order to ensure the continuation of a distinct legal status for Indian people, the Bill of Rights will have to be clear and specific as to how it relates to laws respecting Indians and how it is to apply in Indian communities. The Indian concerns in this regard are clearly a matter to be considered within the wider constitutional debate on individual rights and freedoms in Canada.

The Senate

Canada has a strong tradition of accommodating its various regional, national, linguistic and religious interests through selected appointments to such non-elected government bodies as the Senate and Cabinet. This practice, enforced partly by law and partly by convention, is considered to be an antidote to the possible domination of the political process by any one group or region. The actual effectiveness of the tradition is a function of numerous factors, and varies with the personalities of the appointments, due to the partly informal nature of the practice. Only in one instance has this pattern been applied to Indian people. In the late 1950's Prime Minister Diefenbaker, recognizing the absence of Indians in the institutions of the government, established a single "Indian seat" in the Senate. Otherwise the federal government has never recognized Indians as being a national group whose political voice must be protected through this system.

The concept of a reformed or revitalized Senate is one which is now being actively promoted at both the provincial and federal levels. Most of these proposals reflect the idea of direct provincial government participation in the federal process. The constitutional entrenchment of Indian government concepts would lead to a third order of government, whose relationship with the other two levels would have to be clearly defined. If a new Senate would create a direct relationship of participation or control between these two other levels, the question of how this affects their relationship to Indian governments must be settled through joint Indian-government consultations.

Supreme Court

Because of the complete exclusion of Indian representation from the executive and legislative branches of government, the judiciary has been unusually important in the protection of Indian constitutional rights. The lack of a formal political

voice with government has seriously hampered the ability of Indians to effect legal or political change. Their past inability to change the law has made the interpretation of existing laws the prime avenue for the defence and enhancement of Indian rights. Unfortunately, a conservative legal tradition, the doctrine of parliamentary supremacy, and a legal misinterpretation of historical relationship between Indians and Canada have all made the judiciary incapable of properly fulfilling the task.

Provincial governments have long alleged that the federal right to unilaterally appoint Supreme Court judges inevitably results in a pro-centralist court. This problem also exists for Indians who regularly find themselves before the courts in an adversary position with the federal government. Yet the problem is even more acute for Indians, as it is compounded by cultural differences between Indians and members of the court, and an almost total lack of formal legal training in Indian legal rights. There has never been a Supreme Court justice who was generally acclaimed for his expertise or judicial creativity in the development of Indian law. Canadian law has not developed a satisfactory judicial theory of the unique constitutional status of Indians, and the Supreme Court has continuously refused to use the sources of Indian constitutional rights to defend the sovereignty of the Indian nations. If there is to be some continuing jurisdiction of the Supreme Court over Canada's relationship with Indians, the Indians should have some participation in the selection process for members of the court.

Indian participation in constitutional discussions on the Supreme Court can also be defended in relation to the jurisdiction of the court. Quebec has raised objections to having its civil law interpreted by a court composed mainly of common law justices. As Indian governments develop their own legal systems based upon Indian legal concepts, a similar problem will arise if the Supreme Court retains any appellate or judicial review jurisdiction over Indian courts. Although such a relationship is not inevitable, the possibility gives rise to the necessity of clearly defining Supreme Court jurisdiction within the whole context of Indian government.

Communications

One of the major goals of Indian government is the protection of a high degree of social and cultural cohesion within their communities. Indian communities face tremendous cultural pressure from non-Indian society, partly because of the pervasive influence of radio, television, and other forms of mass communications. As these information and entertainment sources exclusively reflect the values of the non-Indian society, they pose a serious problem for Indian governments who are responsible for linguistic protection, educational development and cultural enhancement.

While the long-term effects of modern mass culture are not yet fully understood, it is recognized that a rapid erosion of traditional lifestyles and skills follows an initial exposure to mass communications technology. The comparatively recent development of satellite communications and cable television has meant that most Indian communities are now experiencing intensive exposure to television for the first time. Northern communities of Indians and Inuit have expressed their concerns respecting the rapid changes of community life which are occurring as a result of this sudden general availability of television.

It is a fact that Indians have had little or no participation in the development of public or commercial broadcasting. Yet the scope of the dilemma goes beyond such policy questions as Indian input into programming, or how the mass media can achieve a better cultural balance. Indian governments, in order to protect and advance Indian culture, must have some control over such jurisdictional matters as access, regulations for programming content, educational television and radio, and general control over the licensing of commercial enterprises. The traditional argument of the province of Quebec respecting its need for jurisdiction over communications to protect the French language and culture is now received with much sympathy across the country. Considering that Indian governments must fulfill a similar mandate with respect to a smaller and more widespread population, the argument that they must assume jurisdiction over communications is just as compelling.

Fisheries and Off-Shore Resources

The basis of Indian government claims to oceanic and inland waterway resources is similar to that for land resources and hunting rights. Fishing rights are included specifically in several treaties and are further recognized to be an important element of aboriginal rights. Other sources of Indian fishing rights can be found in the "non-inference" provisions in the Royal Proclamation of 1763 and other international treaties signed by the British as allies of the Indians. Yet Canadian law has been ineffective in protecting fishing rights owing to its adherence to parliamentary supremacy and the unwillingness of the judiciary to respect the largely proclamatory language of the constitutional documents which recognize them.

The current plight of the coastal Indians of British Columbia presents a vivid example of the struggle facing Indians when their aboriginal rights are given neither legislative nor judicial recognition. These Indians, who depend upon fishing for their livelihood, face an on-going legal battle with the Department of Fisheries and the Department of the Environment to assert their constitutional and aboriginal rights. These

organizations and the British Columbia government have refused to recognize any special fishing rights for Indians and persist in enforcing conservation laws in the same manner as against non-Indian sportsmen and commercial fishing ventures. The recognition of Indian government jurisdiction over all aspects of marine resource management would appear to be the best method of accommodating Indian fishing rights within the Canadian legal system.

Jurisdiction over territorial waters and inland waterways is an adjunct of territorial sovereignty under international law. The claim to oil and other off-shore resources flows from the exercise of sovereignty over the contiguous land base, hence the question of off-shore resources becomes inextricably connected to the whole issue of land claims and sub-surface resources. Both the James Bay settlement and the COPE agreement in principle recognized the Indian and Inuit claim to sub-surface resources through royalty sharing. This principle must be extended to all those coastal lands where Indian title is established, whether by treaty, aboriginal title or land claim settlement. Resource development, royalty sharing and ecological conservation are just some of the jurisdictional problems requiring joint federal-provincial-Indian negotiations within the framework of the current constitutional discussions.

The Monarchy

All Indians in this country have a constitutional status or a right to a constitutional status involving a direct relationship with the Crown. The Indian treaties were negotiated directly with representatives of the Crown in either of these capacities. Special constitutional provisions regarding Indians can also be found in international treaties negotiated by the Crown, such as the Treaties of Utrecht and Ghent. Finally, many non-treaty Indians come within the scope of the Royal Proclamation of 1763, which guaranteed the independence of the Indian nations and established an on-going trust relationship between the Indians and the Crown.

Despite the evolution of responsible government and the assumption of executive power by the cabinet, the relationship between Indians and the Crown continues to be more than merely symbolic. The special constitutional status of Indians, now generally recognized by such authorities as the Berger report, the Pepin-Robarts report and constitutional proposals of the Quebec Liberal party, protects the independence of Indian nations. Although their constitutional position has been ill-defined within the Canadian judicial system, it is clear that Indians are not ordinary citizens of Canada and that they have a "separate nation" status - a status which has been recognized by the government by its formal commitment to uphold

treaty rights and its willingness to negotiate land claims in the north. To the degree that Indians do constitute separate nations, their dealing with Canada must be with the executive branch of government, which is now legally defined as being the Crown in right of Canada.

Because the special status of Indians can be traced directly to agreements with the Crown, any change in the status of the monarchy in Canada could have serious legal implications for Indian rights. A simple assumption of all royal obligations by an internal Canadian office would not guarantee these rights, since these have not yet been properly defined by the Canadian courts. This would amount to a unilateral revision of the legal underpinning of Indian constitutional status in the absence of a consensus as to what this status is. Indians have not and would never recognize any modification in their relationship with the Crown unless they had agreed to such a change through discussions with the Crown.

Foreign Affairs

In recent years the Indians of Canada have established formal relations with other indigenous peoples, such as those of North and South America, Australia and the Arctic regions. Aboriginal peoples throughout the world have recognized their common interests and problems and how they can assist one another through a continued active presence within the international community.

The World Council of Indigenous Peoples has been formally recognized by the United Nations, and accordingly has an international legal and political status. This signifies an international recognition that aboriginal peoples have rights as aboriginal peoples which go beyond anything conferred by the nation states created by colonialism.

The Pepin-Robarts report has recognized the importance of Indian involvement in international affairs, and called for greater communications between the native peoples of Canada and other indigenous peoples. There are additional questions of historic Indian treaty relationships with other nations. Because the province of Quebec has been active internationally, the question of jurisdiction in foreign affairs has been seriously debated in Canada. Indian international activity should be clearly recognized in any new formulation of foreign affairs jurisdiction.

Taxation, Trade, Equalization and Regional Development

The ability of Indian governments to effectively govern their communities, and the ability of these communities to be self-supporting, is clearly going to depend upon the establishment of a viable economic base. The attempt of the federal government to direct economic development from Ottawa has generally failed because of the small land base, bureaucratic insensitivity, and the inflexibility of the economic sections of the Indian Act. The result is that the majority of Indians remain to some degree economically dependent upon the government. There will be no amelioration of this situation until Indian governments can assume full authority for the planning and direction of their economies.

The question of Indian government economic jurisdiction cannot be divorced from those of resource ownership, resource revenue sharing, equalization and regional development. The resource base must be clearly defined in conjunction with taxation powers and jurisdiction over trade. The complexity of modern economic planning and implementation requires a "package" approach to the definition of Indian government economic jurisdiction.

Indians have traditionally been exempt from taxation if they work or reside on a reserve, although the extent and scope of the exemption has been the subject of much litigation in recent years. The principle of exemption must be extended to provide Indian Government with a tax base sufficient to maintain a maximum of economic self-sufficiency base. These governments must further obtain the necessary jurisdictional powers to protect local industries, regulate land development and minimize the social disruption of economic development.

Although the Jay Treaty purports to guarantee free movement and trade for Indians across the American border, this right has been denied by the Canadian judiciary. As with all treaty rights, this principle must be entrenched in the Constitution, but it also must be extended to provide Indian governments with the necessary jurisdiction to regulate trade within Canada. Many incipient Indian industries will have to be protected in their infancy. They must be allowed to grow to a competitive position with the huge and well-established commercial ventures which now dominate the Canadian economy.

The Amending Formula, Declaratory Power and the Spending Power

If joint Indian-government negotiations result in a new Constitution which entrenches treaty rights, aboriginal rights and Indian government jurisdiction, then some agreement must be reached on a consensual process for amendment of these provisions. As a constitutional entity, Indian governments clearly would not be bound by jurisdictional changes made without their consent.

The declaratory and spending powers are generally defended in terms of the paramountcy of the national interest over provincial concerns. Yet these sweeping powers can, and have been used to undermine provincial jurisdiction, and as such are deeply resented by many provinces. As a third order of government, Indian governments must be guaranteed protection against encroachment on their jurisdiction through the use of powers which should, at most, be reserved for true national emergencies. No such interference can be tolerated or recognized unless it resulted from jointly developed constitutional mechanisms, and with full and equal Indian participation.

Conclusion

The issue of treaty and aboriginal rights and Indian government are fundamental to the relationship of Indian people with the government of Canada. We have already rejected assimilation into the greater society as a goal, and we have been told by recent Prime Ministers and Ministers of Indian Affairs that they, too, reject the goal of assimilation. In fact, they have stated publicly that they favour the strengthening of Indian government in Canada.

The need for certain basic new arrangements has been conceded for a number of years in relation to the northern territories. The same understanding now exists for southern Canada as well.

Canadian political leaders have recognized the special position of Indian people by giving the National Indian Brotherhood a role in the constitutional discussions of the first Ministers. Also, they are aware of the national and international political activities of the Brotherhood, including its sponsorship of the World Council of Indigenous People and the Delegation to England in 1979.

Constitutional recognition of treaty and aboriginal rights and Indian government is logical and appropriate at this time. It will be seen nationally and internationally as a clear achievement coming from ten to twenty years of renewal in the relationship between Indians and non-Indians in Canada.