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CONFIDENTIAL

# 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
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 embarassment, 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 pruposes 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 channe 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 pointe 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.