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INDIAN GOVERNMENT AND CANADA'S REFORM CONSTITUTION: INDIAN INHERENT RIGHTS AND RESERVE POWERS

Statement of the Grand Chief, Four Nations Confederacy, to Provincial Territorial Organizations meeting in Winnipeg, April 1-2, 1981 on the proposed Constitutional Package.

BROTHER LEADERS IN INDIAN GOVERNMENT:

I. Introduction

Welcome to Winnipeg and to Four Nations Confederacy: The Chiefs and Grand Council of Four Nations Confederacy are pleased that you accepted our invitation to visit with us, to talk with us and to listen with us about a matter that affects all of us. We have been at the crossroads many times in our history: we are at the crossroads again.

II. Fundamental Principles of Indian Higher Law

We, the Chiefs and Grand Council of Four Nations Confederacy affirm the higher law of our people and its fundamental principles as set out at the First Nations Constitutional Conference held in Ottawa, April 28th to May 1, 1980. Today, with our brothers in Indian government, we RE-AFFIRM them:

1. We are Nations. We have always been Nations.

2. As Nations, we have inherent rights which have never been given up.

3. We have the right to our forms of Indian Government.

4. We have the right to determine our own citizens.

5. We have the right to Self-determination.

6. We, through our Indian Governments, shall have full control of our land. "Land" includes water, air, minerals, timber and wildlife resources.

7. We wish to remain within Canada, but within a revised Constitutional framework.

8. The negotiations to revise the Canadian Constitution shall have full and equal Indian involvement at all levels and stages of negotiations.

9. The rights of Indian Nations must be entrenched and protected in the Canadian Constitution. These rights include Aboriginal rights.

10. In the Treaties, our Nations placed themselves under the protection of the Crown. While, in establishing this protectorate relationship; we shared power; we did not give up or surrender our sovereignty.

11. Our Treaty rights must be entrenched and protected in the Canadian Constitution.

12. We seek to end our economic dependence on others. To do this, we need enough land and resources to provide an economic base for the present and the future.

13. Our Indian Governments have the right to share in all the revenues from this land and its resources. A sound financial base in required for the full operation of any government.

14. Neither the Federal Government of Canada nor any provincial government shall unilaterally affect the rights of our Nations or our citizens.

WHY DO THE CHIEFS AND GRAND COUNCIL OF FOUR NATIONS RE-AFFIRM THEM TODAY?

We reaffirm them because they have been violated! They have been violated by the Federal Government. Unfortunately, they have been violated by our own national organization, the National Indian Brotherhood. The Constitutional "package" before Parliament, if patriated as is, will eradicate the principles of Indian higher law entirely:

What are some of the basic elements of that higher law and, how is it being violated?

III. Indian Higher Law

The most basic principle of INDIAN HIGHER LAW is INDIAN CONSENT. Our history has shown us and taught us that our institutions of self-government, our laws, our culture, our religions, our language -- OUR NATIONS -- are institutions based on our consent. Democracy reigned and lived in our Nations long before the teachings of Plato, the founder of democracy in the Western World. The fundamental notion of "compacts" where people voluntarily join together (consent to) is older than and more fundamental to Indian Nations and Indian self-determination than it is in the non-Indian world.

The principles of INDIAN HIGHER LAW have been developed and recognized among our people for many centuries. In the non-Indian world, they were developed much later. Yet, those principles are very similar and they have been embodied in International law. The principle of consent is the same as the principle of the sacred trust concept. This concept can be traced back to the 16th century.

In 1832, Chief Justice John Marshall wrote in the Worcester v. Georgia case:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate that the first discoverer of the coast of the particular region claimed. The settled doctrine of the law of nations is, that a weaker power does not surrender its independence -- its right to self-government -- by associating with a stronger, and taking its protection.

More recently, the "sacred trust" principle of law was recognized in the Charter of the United Nations. Canada and Great Britain have signed the Charter. It reads:

> Accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present charter, the well-being of the inhabitants of territories whose people have not yet attained a full measure of self government:
>
> (a) to develop self government, to take the account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of development.

The Declaration of Human Rights (adopted by both Canada and the United Kingdom) further declares that:

> All peoples have the right to self determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The International Court of Justice stated in the South-West African cases that:

> "The sacred trust,...is a 'sacred trust of civilization'. Hence, all civilized nations have an interest in seeing that it is carried out. An interest, no doubt; but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humani-

tarian ideal..."

The CONSENT principle of Indian Higher Law and recognized in the Law of Nations was entrenched in the Royal Proclamation of 1763, the British North America Act of 1867 and in the treaties signed between the Imperial Crown and sovereign Indian nations.

The Prime Minister of Canada stood before the First Nations Conference on April 29, 1980, and said:

> My colleagues and I believe that the key to the problem is to encourage the Indian people of Canada to assume a greater degree of control over your own affairs - at your own pace, by your own choice, while at the same time the government maintains and reaffirms the responsibility it shares with you for the well-being of the Indian people.

The Honorable Jean Chretian, then Minister of Indian Affairs said in Ottawa on August 8, 1973, that:

> ...the present policy statement (signifies) the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians. The Government sees its position in this regard as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country.

The Four Nations proposal entitled _Indians and The Canadian Constitution_, dated November 1980, reviewed and clearly stated Indian Higher Law in its chapters on political, economic, social and religious rights of the Four Nations in Manitoba. Under the heading of "Inherent Rights and Freedoms", the proposed paper put forward by The Pas Indian Band before the Chiefs of Treaty Five, firmly articulated the higher law and that law is inherent.

IV. The Proposed Constitution and The Violation of Indian Higher Law

We need not at this time detail each of the happenings, events and activities that have thus brought us to this point in the constitutional reform movement as it affects Indian people. But I would like to draw to our attention some of the issues and some of the processes which documents the violations of Indian higher law.

Discussion about, proposals on and conferences to reform Canada's Constitution have been on the scene for a number of years. The involvement of Indian people in those discussions, proposals and conferences have ranged from no involvement to limited

involvement. More recently, Indian people have ranged across the constitutional drama from that of observers to First Minister's Conferences to presenters of position papers before the Steering Committee of the Continuing Committee of Ministers and, to a limited extent, to the Joint Parliamentary Committee studying amendments to the Government's constitutional "package".

In addition to the more formal process, Indian people have carried on various types of lobbying with politicians, public servants, press and the Government of Great Britain in London. Four Nations Confederacy intervened in the Manitoba constitutional reference case.

I need not remind any of you that at no time was there genuine consultation. There was no listening to, there was no consent by Indian people in any of the above. We were puppets on the strings of power of the Federal and Provincial governments.

On February 5th, tho President of the National Indian Brotherhood appeared before Chiefs of Treaty Five and members of the Grand Council of Four Nations Confederacy, He indicated that there were three principles upon which the National Indian Brotherhood was working with respect to Indian concerns and the Constitution. They were:

(1) RECOGNITION, (2) PARTICIPATION, and (3) PROTECTION.

He further indicated to you that because of the insertion of then section 24 (now section 33) Indian rights had been RECOGNIZED. He further indicated that section 32 (now section 35) gave Indian people PARTICIPATION in the amending process on those agenda items respecting constitutional matters that directly affect Indian people. BUT, he did admit that while section 35 allows for some participation in the identification and definition of aboriginal and treaty rights, it did not nor did any other provision of the proposal PROTECT Indian aboriginal and treaty rights.

As leaders across Canada pointed out to the Prime Minister, Members of the Cabinet, leaders of the opposition and the N.D.P. that there was No PROTECTION, No CONSULTATION, No CONSENT!

More recently, the National Indian Brotherhood has proposed an amendment. I should like to read it to you in its entirety. (I'm sure all of you got a copy.)

DRAFT - SECTION "55"

55A

(1) Notwithstanding any other provisions, any amendment to the Constitution of Canada that affects any aboriginal or treaty rights and freedoms, (including the identification and definition. of such rights and freedoms, and including any amendment to any of those matters recognized by sections 25 and 33, and including

> this section, may not be made without the consent of each of the aboriginal peoples so affected.
>
> (2) The consent referred to in subsection (1) shall be obtained by referendum of each of the aboriginal peoples of Canada so affected, which referendum shall be held in accordance with rules to be established by an appropriate person or body duly authorized for such purposes by the Governor-in-Council.
>
> (3) The procedure for amendment prescribed by this section may be initiated by the House of Commons or the Senate or by the aboriginal peoples of Canada.

An N.I.B. Conference call was held on Tuesday, March 17th with all P.T.O.s across the country. The overwhelming majority of Indian leaders responded negatively to the proposal. Again, there had been no consultation. There was no CONSENT.

Brother leaders: Our higher law and its fundamental principles continue to be violated. The Prime Minister's statement before the First Nations Constitutional Conference is a mockery. The announced policy, position of the Honorable Chretian on the Royal Proclamation is mischievous and insincere.

The proposed Charter of Rights addresses individual rights and privileges. It is silent on collective rights. Furthermore, it places Indian people in a majority - minority position. We do not ask to be equal - we ask to be separate; to seek our self-determination, to maintain our own institutions of governance, to own and control our own land and its resources. We oppose with all our might for the majority - minority argument which will assimilate us.

Sections 25 and 33 do not mention the right to self-determination and self-government as stated so clearly by the Supreme Court of the United States in 1832, the U.N. Charter on Human Rights nor by principles of international law.

Section 35 grants provinces jurisdiction over Indian people, their rights, laws, institutions and land. The Cherokee case held that:

> The Cherokee Nation...is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the laws of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties...

Further, in 1837 a Select Committee of the British House of Commons wrote that the protection of aborigines was considered a duty:

> peculiarly belonging and appropriate to the executive government, as administered either in this country (Great Britain) or by the Governors of their respective colonies. This is not a trust which could conveniently be confided to the local legislatures.

Therefore, Brothers in Indian Government, we cannot accept not only the current proposed amending formula of section 55, we cannot accept sections 25, 33 and 35.

We cannot accept them for they are empty; they are mischievous. How can we accept the so-called entrenchment of aboriginal and treaty rights when the Courts of Canada have not recognized any fundamental rights under them? How can we accept them when there has been no dialogue, no consultation, no working out of their meaning between sovereign Indian Nations and the Nation of Canada? How can we accept them when they, violate not only our higher law, but the higher law of Nations -- their own law? How can we accept them when the Nations of Canada still talks about the "devolution" of power to Indian Nations? How can we accept them when we are told that we have only a "usufruct title" to our land and when we are told that Indian people do not own the resources of that land? How can we accept them when Indian people have not been compensated for their land? How can we accept them when there is no recognition of Indian government and Indian self-determination? The proposals have been dictated. There has been no INDIAN CONSENT!

V. Conclusion

Brothers in Indian government, OUR FEARS ARE NOT UNFOUNDED. THE EVIDENCE IS CLEAR AND BECOMES CLEARER BY THE HOUR. Proposed sections, if patriated, will assimilate us because they violate our higher law.

Our time is short AND our options limited.

WHERE DO WE GO FROM HERE!