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I N D I A N A S S O C I A T I O N O F A L B E R T A

CONSTITUTIONAL EXCLUSION
LEAVES US NO CHOICE

April 22, 1981

The legal status and legal rights of the Indian People in Canada are anterior to and independent of the British North America Act of 1867.

Despite racist European legal doctrines that distinguish between so called "civilized" and "non-civilized" peoples in the application of international treaty law, the Treaties concluded between the British Crown and the Indian Nations are full international treaties.

Indian status and legal rights, aside from conquest, can only be derogated from by treaties.

Entering into an agreement does not subject the agreeing parties to each other for things that are not the subject of the agreement. Indian treaties basically address two subjects: 1) lands (owned by the Indians) in exchange for a number of 2) perpetual promises. The Indian agreed to share the land but did not agree to alienate the land. Treaties did not address Indian Government, lands exclusively retained by the Indian, mineral rights, water rights, Indian status, relationship to other nations, taxation, etc. These areas of jurisdiction remain solely with the Indians.

Indian nations are not conquered nations, thus they retain inherent jurisdiction. Any power that the British or the Canadian federal government acquired over Indian people was consented to by the Indian nations through treaty agreements. Any power not surrendered is retained.

It is politically unfeasible to "drive the invader into the sea". Most African nations have successfully followed this tactic. Indian nations in Canada are a minority group, and therefore must in the long term come to mutually acceptable terms of co-existence with the majority. In the end, the critical factor is the will of the people to strive for and achieve self-determination.

The original "national" rights of the Indian peoples exist independent of the B.N.A. Act. Indian leaders have attempted to point out these rights as entitling them to full, equal and on-going participation in any political process to legitimize a Canadian Constitution for the purpose of safe-guarding their sovereignty-association ties with Canada. However, the friendly

and co-operative attempt to participate in the current round of Canadian constitutional proposals denies the reality and existence of Indian Government. In other words, Indian Government is not now nor was ever recognized as a legitimate entity within Canada Confederation. Self-determination is constitutional recognition of Indian Government, and under the Canadian Government's proposals, there is no self-determination for Indian people.

In the final analysis, exclusion from the amending formula is clearly a rejection of Indian Government. It is indeed unfortunate that Indian Governments must now seek self-determination outside Canada because the question might have been open at one time but it is no longer. The matter is settled.

In terms of the constitutional debate, Indian leaders would have to adopt a stand of "Self-Determination" through Indian Government. This would mean acknowledging to themselves and to the world that the Tribes and Bands now located inside the boundaries of the Canadian Federation, and that they remain separate from Canada and associated by Treaties and agreements with the Imperial Crown of England. In other words, Indians remain sovereign, and will stay out of Canadian Confederation unless acceptable terms and conditions can be formulated for their entry into Confederation.

This decision would have to be formally communicated to the Government of Canada and Great Britain -- that the Indian leaders are not participating in discussions on the Canadian Constitution as a matter of choice, and furthermore, that the Constitution if and when patriated does not apply to Indians.

In view of the above, the Indian people of Alberta have two choices: 1) Indians can take a passive attitude toward the current patriation efforts by the Trudeau Government. Indians can reaffirm their sovereignty and continue to remain outside of the Canadian Confederation framework. The only worry regarding constitutional changes in Canada should revolve around sovereignty-association ties we have with Canada and that these ties not be affected by any constitutional changes. However, merely safe-guarding existing ties implies that we are content with existing treaties. But are we?

2) The second choice is to take active positive steps to not only safe-guard but strengthen our sovereignty-association ties with Canada through a new Treaty Agreement. This can be done by making our intent very clear to the Canadian Government and by lobbying the British Government to make new treaty negotiations a condition of its agreement to patriate the B.N.A. Act. The choice is ours -- which shall it be?

Simultaneously to either of the above choices, each Tribe should exercise sovereign power by passing its own constitutions, issuing its own passports, establishing its own police forces, justice systems and the like.

Despite gross ignorance of the fundamental Principle of

the Indian Government among many Indian leaders -- that the power to form and operate Indian Government is derived from the people, not from the Crown -- many Indian leaders are today asserting inherent rights in the framework of modern Indian Government structures.

The recent move by Indian leaders to assert their inherent governing authority is, if properly organized, the strongest form of leverage that Indian leaders may employ to create a negotiating framework. Such a framework does not now exist, nor will it if the current course of "limp-wristed discussions" are maintained. What is in fact required is an organized assertion of inherent governing authority by Indian leaders at this critical time when the Canadian Government wants to legitimize its control over Indian nations and their territories by patriation in the eyes of the world.

The first critical step is obtaining the support of the members of each Tribe and Band for assertions of inherent authority. Without this support, any assertions would only have symbolic value. Once there is strength in the Indian community and a commitment therein to support Indian leadership, the picture changes.

In examining this strategy, Indian leaders must be fully aware of its consequences, particularly as these will affect their existing Band Government operations. This move will no doubt be seen by the Canadian Government as a move towards a kind of Indian independence, and may be treated as such. The most predictable reaction would be one of hostility and the withdrawal of existing financial supports, e.g. federal program dollars.

Another predictable consequence is the use of the RCMP and the Canadian Courts to suppress Indian assertions of inherent rights. In response to this, Indian leaders may have to support these assertions with manpower. In this no win - no loss situation, the best Indian leaders could hope for would be an impasse and hopefully the creation of conflict settlement and negotiation mechanisms. Each assertion would have to be carefully situated in a context which addresses the "contradictions" in Canadian law and policy.

Adopting this strategy would cause certain reactions from the Canadian Government, from tolerance to outright hostility, It would be necessary for Indian leaders to be organized to withstand and whether these consequences. Such organization could take a number of forms, such as the creation of an autonomous inter-tribal communications network, the creation of the policy and security forces along with a Justice System in the community, the adoption of a mutual defense pact, the creation of modern trade and transport linkage, etc.

The act of enacting a modern treaty agreement would in itself be a definition of the meaning and extent of the political association between Canada and the Indian Nations in Canada.

- Recognition of the Indian Nations' right to self-

determination within the International law framework.

- One of the more important parts of a new treaty would have to be the affirmation of Indian ownership to unceded Indian land, and the recognition that the Royal Proclamation of 1763 applies to all Indian territories.
- Carry out this statement of intent, it would be necessary that there be some commitment by both sides to participate in negotiations to define the measures necessary to resolve territorial disputes. It has been suggested that Great Britain be involved in "trilateral" negotiations.
- Another important area would have to be addressed in a new treaty agreement is an agreed definition of the terms for political existence between the Indian nations and Canada. One suggestion along these lines was submitted to the Joint Committee on the Constitution by the Indian Association of Alberta.

"The Indian Government shall have exclusive power to make laws with regard to Indians and Indian lands in the following matters:

- the establishment of a Covenant of Indian Self-Government including the institutions, procedures and processes of government, and the establishment of a Court of Indian jurisdiction, and the power to amend such a Covenant;
 - education, health, welfare, Indian citizenship, labour, the administration of justice, municipal affairs, Indian Corporations, and the preservation and protection of fish, plant and wildlife;
 - the raising of money by any mode or system of taxation including participation in existing intergovernmental taxation and revenue sharing agreements, or similar agreements that may be concluded in the future;
 - the strengthening and maintenance of the distinctive languages, culture, and the traditional and religious values of the Indian Peoples."
- What is needed in a new treaty agreement is a mutually agreeable definition of the role and authorities of Indian Governments over Indians and Indian lands and resources. Indian Governments would define and administer their own citizenship, but the principle of "joint citizenship" should be considered.
 - The important areas of (a) the amount of compensation due

to Indians because of lands and natural resources already confiscated or expropriated and (b) the ongoing inter-governmental fiscal and other revenue-sharing arrangements will have to be considered. A fiscal commission should be established to make initial arrangements on the above, and should meet periodically to review these arrangements.

- The new treaty agreement should define the means by which future conflicts between the Indian Nations and Canada can be resolved. It has been suggested that the Indian Nations rely on the decolonization committee of the United Nations to assist in establishing these mechanisms.

IN SUMMARY

- Treaties confirm our rights as Nations and does not limit our rights.
- As Nations, we have a right to participate in the process to change the Constitution of Canada.
- Our inherent right to have Indian Government participate as the third order of government along with the Provincial and Federal Governments.
- There are two basic choices:
 - a) remain outside the Constitution;
 - b) Negotiate our existence into Confederation.
- Assertion of Indian Government rights today.

The above statements and positions advocated may be strong medicine. However, it is time we quit reacting and start doing. The only way our rights will be protected is to protect them ourselves. If we are not going to take a strong stand, then let us forever hold our peace.

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