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BRIEF OF THE NATIONAL INDIAN BROTHERHOOD OF CANADA

The issues of patriation and a charter of rights are historic. There should be a sense among Canadians that they are taking their destiny into their own hands and defining the kind of society they want. But we do not sense that spirit or that agreement among you. Our Indian cultures are based on values of harmony and agreement. We see it as tragic that there is so much bitterness and division on the constitutional issues in Canada. In our cultures we could not proceed in the face of such division.

We have our own sense of the meaning of these constitutional issues. It is clear that our view is a special view and one that has not been anticipated or understood by the government of Canada. This hearing and this issue are not new for us. This is one more stage in our long struggle to assert our rights as Indian nations within Canada.

We have always considered ourselves as members of Indian nations. As well your legal system recognized that we had at least some of the rights of nations. Your Royal Proclamation of 1763 referred to us as "the Indian nations or tribes with whom we are connected and who live under our protection..." In treaty negotiations, the representatives of the Queen negotiated with us as nations and referred to us as

nations. We were willing to enter into special relationships with the Crown and to agree to share our lands with the people who had come from Europe. But we found that after we agreed to share, you assumed the power and the authority to change the rules. By your laws we became subjects. We became a domestic matter - an ethnic minority.

When it became clear that you had changed the rules, our people began to protest in various ways. We did not journey to England for the first time in 1979. Indian delegations went to England from Canada at the turn of the century to demand justice and the protection of our lands. In that period the Nishga tribe tried to petition the Judicial Committee of the Privy Council in England. In the 1920's the Iroquois people travelled to Geneva seeking assistance and recognition from the League of Nations. In the 1920's the Allied Tribes of British Columbia sought a hearing before the Judicial Committee of the Privy Council in England, but instead were given a sham hearing before a special joint committee here in Ottawa. In the 1950's a Canadian Indian delegation went to the Human Rights Division of the United Nations in New York. There have been many Indian petitions to the United Nations from Canada and other parts of the Americas since the United Nations was formed. It is customary for Indians to meet with the Monarch on Royal visits to Canada. While the

government may have included us in the Royal visits for decoration, for us these events became opportunities for petitions for justice. On one such visit, the Queen gave a formal pledge to the Indians of Alberta that Her government would follow the spirit and the terms of the treaties. In 1976 the Queen received a delegation of Alberta Chiefs in England on the 100th anniversary of treaties 6 and 7. In 1979 300 Chiefs and Elders went to England to lobby the Queen and the British Government on the issues of patriation and constitutional recognition of Indian rights.

All these protests occurred because our rights were being denied within Canada. We went to England because we had been given solemn promises of recognition and protection by representatives of the Imperial Crown. We have gone to Geneva and New York because we believe that our rights are recognized and protected under international law. The obligation of stronger states to protect colonial territories has been described by the International Court of Justice as a "sacred trust of civilization". The principle of protection and trusteeship was developed by Spanish lawyers during the first stages of European colonial expansion in the Americas and has continued, since that time, both in international law and in the domestic law of countries such as the United States and Canada. We have a right to self-determination

that we seek to exercise within Canada. Canada is a signatory to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both Covenants recognize, without qualification or limitation, the right of peoples to self-determination.

I gather that Canadians are surprised at our protests - surprised at the Constitution Express - surprised at the court case begun against the government of Canada by the Union of British Columbia Indian Chiefs - surprised at the presence of Indians at the Russell Tribunal hearings in Rotterdam - surprised at the Office of the First Nations of Canada that we have established in London, England - surprised that Indians will be going on from Ottawa to the United Nations to renew our protests at the international level. Canadians are surprised that it was Canadian Indians that sponsored the creation of the World Council of Indigenous Peoples. If people are surprised by these actions, it is because they have not been listening to our people and because they have no knowledge of our protests in the past.

We see the issue of constitutional change as of fundamental importance for us. The question of our relationship to Canada and our rights of self-determination have never been adequately defined in Canadian law. As recently as

1978 a Canadian court stated that it is

...still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements.

In 1950, Mr. Justice Rand of the Supreme Court of Canada stated that the duty to protect Indian rights is a "political trust of the highest obligation." In 1973 Chief Justice Bora Laskin described an Indian reserve community as "a social and economic community unit, with its own political structure as well..." Clearly we have been recognized as distinct peoples within Canada, but the definition has been uncertain and incomplete. The federal government has seen fit to assume a full legislative jurisdiction over us and seen fit to create an oppressive colonial relationship that was never intended by the United Kingdom, by the Royal Proclamation or by the treaties. As one blatant example, the government of Canada decided that it had the power to decide who was an Indian and who was not.

The time has come for a better definition of our relationship. It seems that everyone agrees that this is necessary and timely. The Indian peoples of Canada have long struggled to give Canadian governments a better understanding of our relationship. The judges, in at least a dozen major decisions over the last two decades, have recognized the contradictions and problems in the present legal understanding of our relationship. All the constitutional studies

of the last few years have recognized the need for substantial new constitutional provisions for Indian rights. That was the conclusion of the Pepin-Robarts Task Force on National Unity, the Canadian Bar Association study "Towards a New Canada", Premier Leveque's white paper on Sovereignty-Association, and Mr. Ryan's beige paper "A New Canadian Federation". All the federal political leaders are on record as favouring something more on Indian rights in a new constitution. The governments view did not develop without some pressure. The National Indian Brotherhood took three hundred Chiefs and Elders to England in July of 1979 to meet with members of the English Parliament and with officials in the government of the United Kingdom, in an effort to explain the political dilemma we found ourselves in. Although the Canadian government of Prime Minister Clark blocked any meeting with the Queen, the strategy was more effective than non-Indian politicians in Canada had thought possible. A number of members of the English House of Commons and House of Lords agreed to support the Indian cause. Opposition leader James Callaghan gave his approval to support work by Labour back-benchers. Mr. Bruce George, a Labour member of the English House of Commons has continued to work on the issue. In September of 1979 the members of the Executive Council of the National Indian Brotherhood met with Prime

Minister Clark and were promised full equal and ongoing participation in the constitutional negotiations on matters that affected us. We must be very clear on this point. We were promised participation - not just the opportunity to submit briefs and be observers on the sidelines. When Mr. Trudeau was returned to power he complimented Mr. Clark on the position he had taken - and stated that Clark had been continuing a policy initiated by the Liberal government early in 1979. In April 1980, Prime Minister Trudeau stated:

...we set a valuable and historic precedent by involving native peoples directly, with the federal and provincial governments, in the process of the reform of the constitution.

He took personal credit for introducing the agenda item "Canada's Native Peoples and the Constitution" at the First Ministers meeting in February, 1979. He said it was understood by all First Ministers at that meeting that there would be Indian involvement in the constitutional discussions. He stated:

In the paper entitled "A Time for Action", published in 1978, my colleagues and I gave a high priority to the involvement of Indian, Inuit and Metis representatives in the process of constitutional reform.

And he bluntly recognized a history of government failure in the past: "what we have done, however well-intentioned it might have been, has not worked."



satisfaction to Canadians. In spite of a harsh and racist history, Canadian political leaders have recognized the rightful place of Indian nations within Canadian society by involving the Indian leaders directly in the constitutional discussions.

But, in truth, these have only been promises.

We have never participated in any of the constitutional discussions that have occurred to date. Let me recount the exact extent of our involvement, so there can be no question about the facts:

- We were invited to be observers at the First Ministers meetings held in October, 1978, February, 1979 and September, 1980. Most of the sessions of the second meeting were closed to observers.

- In September, 1979, we met with Prime Minister Clark to discuss our involvement.

- In December, 1979, we met with the steering committee of the Continuing Committee of Ministers on the Constitution, to discuss our involvement.

- We were excluded from the First Ministers meeting in June of 1980 and from the meetings of the Continuing Committee of Ministers on the Constitution over the summer of 1980.

- We met with a Sub-committee of the Continuing Committee of Ministers on the Constitution for two hours in August, 1980. This was nothing more than an opportunity to present a brief.

Both Mr. Chretien and Prime Minister Trudeau have said that the negotiations on the agenda item "Canada's Native Peoples and the Constitution" will occur in a second



stage of negotiations. This second stage is to occur after the present patriation and amendment proposals have been enacted. The logic is that we should be patient and wait for the proper time for our participation. But there is a false premise involved: it is the premise that the items on the summer agenda or the issues involving the present proposed resolution do not directly affect us. No one can seriously assert that that is true - and no one has tried. Yet we have been excluded from the discussions on issues like fisheries, equalization and a charter of rights (to pick three examples) which affect us directly. In August, 1980, we submitted documents to the Sub-Committee of the Continuing Committee of Ministers on the Constitution describing our interest in all of the twelve agenda items that had been agreed upon by the First Ministers in June. There has been no dialogue, no discussion, no interaction. The federal government has never come back to us and said "well, we agree that you have an interest in fisheries, but we don't think you have a real or distinctive interest in natural resource taxation". We have never had that kind of discussion. Mr. Chretien did indicate in August that, as far as he was concerned, the idea of Indian governments as a third order of government within Canada was a "non-starter" in any negotiations. But there was no opportunity to discuss the fact that Indian

governments are already a distinct order of government within Canada. We had no opportunity to quote the Prime Minister's statement that "internal native self-government" is a subject of "special importance" to Indian leaders and a subject that would be included in constitutional negotiations between Indian leaders and the First Ministers.

We have had no participation, no negotiations, no discussions. We were promised participation in matters that affected us both by Mr. Clark and Mr. Trudeau. The New Democratic Party have supported that position as well. The truth is that we have been denied participation. The Canadian Bar Association said, in their study of the constitution:

...we must scrupulously abide by our agreements with the native peoples ...Indeed constitutional recognition of our commitment to abide by our obligations should be expressly set forth in the constitution.

The Bar Association wanted to end a history of broken promises. That history has not ended. The government has broken a major political promise to our people. In spite of the rhetoric, we have been left out of the process of constitutional renewal.

#### THE ISSUE OF PATRIATION

The National Indian Brotherhood has consistently taken the position that there should be no patriation of the British North America Act until Indian people have been

involved in the constitutional discussions and until Indian rights have been adequately protected in new constitutional provisions.

Many people have misunderstood our position. To some we seem the most ardent colonials of all. When all the politicians support patriation (in principle, if not in practice), the Indians are saying 'wait a minute'.

The success of the European population in this country was built on taking the lands and natural resources that were the birthright of the original inhabitants. The transfer was justified in a number of ways. One part of the justification was the principle that the Imperial government assumed a solemn obligation to protect and assist the indigenous population. The obligation of protection is a principle both of domestic and international law. For Canada, the obligation rested with the Crown. It was deliberately removed from the authority of the local elected assemblies, because those bodies would represent the interests of the local European settler population. The obligation of protection is stated in the Royal Proclamation of 1763 and is restated in the Report of the Select Committee on Aborigines (British Settlements) in England in 1837 and in various pre-confederation reports in Upper Canada. It was known and understood at the time of Canadian confederation and is the reason behind section 91 (24) of the British North America Act of 1867.

Great Britain understood the mutual obligations that were involved. Great Britain acted on these understandings both to her benefit as a nation and to the benefit of many of her subjects.

When we went to England we explained to members of the House of Commons and the House of Lords and to government officials that we were only asking England to respect the obligations of the Imperial Government to continue the political recognition of our nations and act in conformity with the obligations of protection. Patriation will end the possibility of the Imperial Crown acting on it's responsibility of protection. Some would dismiss our right to appeal to the Imperial government as unimportant, on the assumption that the Imperial Crown will not act. But the people that we want to act, that we want to influence, are, in fact, the political leaders of Canada. It is the Canadian political leaders who are forcing us to go to England, who are forcing us to look to the Imperial Crown for protection. That is the reason that we appear, to some, to be ardent colonials. We are attaching a copy of our brief to the English Parliamentary committee which is currently holding hearings on Englands responsibilities in relation to the B.N.A. Act. What we are saying here today is what we have been saying in England as well.

As you should be aware, various Indian bands in

British Columbia have begun a court action against the proposed resolution on the basis of our link to the Imperial Crown. The court action has been discussed by the Executive Council of the National Indian Brotherhood and it has national support. If the government of Canada respects the integrity of its own legal system, it should wait for this case to be completed before proceeding with the proposed resolution.

#### THE PROCESS OF CONSTITUTIONAL CHANGE

As my submission indicates, we have fundamental disagreements with the process that is going on. We were promised participation and that has been denied. The legitimacy of our concerns has been widely recognized - by the Canadian Labour Congress, by various Church groups, by the Canadian Bar Association, by all three national political parties. For example the Policy Committee of the National Liberal Convention, meeting in Winnipeg in July of 1980, passed a resolution committing the Liberal Party to work toward the entrenchment of Indian rights and to include Indian representation "at all levels of constitutional reform discussions."

We have heard no one try to defend our exclusion from the process. No one can deny that the constitutional proposals affect us. The reference to native peoples in

are affected by the Charter of Rights and Freedoms and that a special provision is necessary. The fact that Indian rights, in general, are excluded from this Charter is not a neutral fact. It says a great deal about political priorities in Canada. The Indian questions that the political leaders of Canada have said are of great importance are relegated to what everyone must concede is a highly uncertain "second round" of negotiations, in which the role of Indian leaders is no more certain or defined than it has been over the past two years.

In spite of our basic objections to the kind of process that we have experienced and continue to have, we will speak specifically of the provisions in the proposed resolution. We do this with some reluctance, but we recognize that there are risks to our people if we do not point out the problems which are obvious, at least to us.

#### AMENDMENT

We are concerned with any amending formula for the Canadian constitution. We want our special constitutional position to be maintained and amplified. We fear, and with good reason, that governments may try to eliminate the constitutional basis for our separate existence within Canada. You may say that we have nothing to fear, but we, of

necessity, take a long range view of these questions. Mr. Trudeau's government proposed "termination" in its white paper of 1969. The long term assumptions of Euro-Canadians have usually been that the Indian tribes would die out or assimilate into the larger society. Those of you who are familiar with Indian questions in this country will know of the history of assimilationist provisions in federal legislation - the sorry history of "enfranchisement" laws - the strange proposal by Dr. Diamond Jenness to "liquidate" Canada's Indian population within twenty-five years. While we have gained widespread support for our view of the permanence of Indian life in Canada, we know that there are still many who cling to earlier assimilationist views - and those views may come back into fashion among federal politicians. For these reasons, we have a clear concern for any amendment formula. We are opposed to any amendment of the Canadian constitution which affects our special constitutional position, without our consent. The Royal Proclamation of 1763 provided that constitutional or political change would occur by a process of negotiation and agreement. That, to us, is a fundamental constitutional principle - and one that should be recognized in any amendment formula.

Secondly, we are opposed to section 42, which would allow a federally initiated referendum to amend the constitution of Canada. It was the federal government that



proposed "termination" in 1969. The government of Canada, at that time, envisaged amending the constitution to remove section 91 (24). There was opposition from the Indian people and also from certain provincial governments. Some of the provinces were our allies in that important struggle. From this experience, we cannot trust an amendment formula which allows the provincial governments to be completely bypassed.

Thirdly, we are opposed to sections 34 and 43 which permit changes in constitutional provisions which apply to one or more, but not all provinces. It might be initially thought that such constitutional provisions deal simply with language and denominational school rights. But, apart from those provisions, the most common provisions concern Indians. There are limited constitutional protections for Indian hunting rights in the British North America Act of 1930, which apply exclusively to the three prairie provinces. As well, there are provisions for treaty land entitlement, which are of current importance in the three prairie provinces. There are special provisions in the Manitoba Act, in the documents transferring Rupert's Land and the Northwestern territory to Canada and in the Terms of Union of British Columbia of 1871. No changes in these provisions, relating to Indian people, should be possible without the consent of the Indians affected.

Section 32 formally institutionalizes the First Ministers conferences and requires certain meetings to be held. A requirement of Indian participation, at least on matters affecting Indian people, should be included in any such provision.

If the political leaders of Canada mean what they have been saying over the last couple of years, there should be no objection to these proposals.

It may be thought that section 51 and Schedule 1 are intended to completely describe Canadian constitutional documents. So there can be no confusion, Schedule 1 should include the Royal Proclamation of 1763 and the Indian treaties.

#### THE CHARTER OF RIGHTS

The proposed resolution, at least in its present form, includes a charter of rights, including certain language and mobility rights. Indian people have been the victims of discriminatory and racist laws. There is no question of our support for human rights codes and bills of rights, which are designed to ensure fair and equal treatment in this country. Some of you may recall that Indian religious ceremonies were banned by federal laws and that the R.C.M.P. confiscated masks and carvings. Some of you may recall how Indians were denied the vote in federal elections until 1960 and in certain provincial elections for a decade longer. Some of

you may know that it was a criminal offence for Indians to collect funds to assert land claims from the late 1920's until 1951. We have known pervasive discrimination in Canada and we welcome protection from discrimination and racism. But, in a perverse kind of way, egalitarian laws have been used against us - in Canada and the United States, and in other countries, such as Mexico and New Zealand. We have to be very careful to ensure that our collective rights are protected. The Canadian government has understood that this problem exists and has included section 24 in the proposed resolution. It provides that the Charter of Rights does not deny the existence of any "rights or freedoms that pertain to the native peoples of Canada." We are unhappy about this provision for a number of reasons. It is negative, not positive. We have consistently worked to have treaty and aboriginal rights positively entrenched in a new constitution. Instead we have been given only a limited and negative provision. Our rights are now to be described as "undeclared rights and freedoms". There seems an implicit onus on us to prove our rights. Indeed Prime Minister Trudeau has said as much, in a letter dated October 30th, 1980:

You will have to persuade the Governments of Canada that the special rights you claim are reasonable and that they should be guaranteed in the constitution.

Section 24 is limited to rights and freedoms "that exist" in Canada. This seems to mean that there can be no additional rights or freedoms recognized in the future, without their being subject to challenge under the provisions of the Charter of Rights. This is particularly paradoxical because the present government of Canada has appointed representatives to negotiate land claims settlements with the Nishga Tribe and with groups in the Yukon and Northwest Territories. If settlements emerge from these negotiations, there could be major problems with the Charter of Rights. At least section 24 should apply both prospectively and retrospectively (as is the case with section 22 on rights to languages other than English and French).

There is another problem with section 24. While it would probably protect the reserve system (at least for reserves that presently exist), it would probably not protect other parts of the Indian Act. We could expect to have the Laval and Canard cases re-litigated. The Charter could be used against any proposals to have bands and tribes establish their own systems of membership (proposals that have been made by virtually every Indian organization in Canada). The ability to have special legislation for Indian populations must be maintained. Section 24 does not achieve that goal.

Section 15 (2) is designed to ensure that affirmative action programs will not be invalidated by the Charter of Rights. This is an important provision. As you may know, the Alberta appeal court has ruled that affirmative action programs in the oil sands projects are invalid because of Alberta's Individual Rights Protection Act. That case is presently on appeal to the Supreme Court of Canada. Section 15 (2) mistakenly sees special programs as simply designed to ameliorate the conditions of disadvantaged persons or groups. While it is true that Indian people are a clearly disadvantaged group in Canada today, that will not always be the case. There must be provisions that will allow band enterprises to preferentially hire band members, whether or not the band is disadvantaged. The important value is not relieving poverty (important as that is) but the survival of the tribes as distinct political, social and economic groups within Canadian society.

There are two other provisions that are troubling. Section 6 provides for mobility rights. The reserve system involves a restriction on mobility. Indians are free to live on or off their reserves, but non-Indians are restricted in their access to reserve lands. It must be clear that section 6 cannot be used to attack the reserve system. Section 3 provides that every citizen has the right to vote, without

unreasonable distinction or limitation, in any election of members of the House of Commons or of a legislative assembly. The term legislative assembly is not defined. As a generic term, it could be interpreted to include an Indian band council. It must be clear that section 3 cannot be used to enable non-Indians, who are resident on reserve lands, to vote in Indian government elections. It should also be clear that section 3 cannot be used to invalidate the residency requirements in northern areas that have been proposed by the Dene and the Inuit, to ensure that the permanent native populations have political power, rather than the transient Euro-Canadian population.

#### OUR PROPOSALS

Rather than a series of remedial changes to the existing proposed resolution (along the lines suggested by the last sections of this brief), the National Indian Brotherhood is proposing amendments which begin with a positive recognition of Indian treaty, aboriginal and self-determination rights. For us this is the appropriate way for a new constitution to begin to address our existence as nations within Canadian confederation.

Proposed Amendments to the

"Proposed Resolution for a Joint Address of  
the Senate and House of Commons to Her Majesty the Queen  
respecting the Constitution of Canada."

Aboriginal Rights and Freedoms

Section 23A

Explanatory Notes

This is a new section which provides for the recognition,  
confirmation and protection of Aboriginal rights.

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| (1) For the purposes of this Act the "Aboriginal peoples of Canada" includes the Indian peoples of Canada.   | (1) This is a definition section intended to indicate whom we mean to include within the meaning of Aboriginal peoples without precluding broader inclusions. |
| (2) The Aboriginal rights and treaty rights of the Aboriginal peoples of Canada are hereby confirmed and recognized.   | (2) This clause is the basic statement that is essential.   |
| (3) Without limiting the rights of the Aboriginal peoples of Canada all rights confirmed or recognized by the Royal Proclamation of October 7, 1763 shall continue in force and the said Proclamation shall be deemed to be part of the Constitution of Canada so far as it touches on the rights of the Aboriginal peoples of Canada. | (3) This section continues the force of the Royal Proclamation while including it within the patriated Canadian Constitution.                                 |



(4) Within the Canadian federation, the Aboriginal peoples of Canada shall have the right to their self-determination, and in this regard Parliament and the legislative assemblies, together with the government of Canada and the provincial governments, to the extent of their respective jurisdictions, are committed to negotiate with the Aboriginal peoples of Canada mutually satisfactory constitutional rights and protections in the following areas: inter alia;

- a) Aboriginal rights;
- b) treaty rights;
- c) rights and protections pertaining to the Aboriginal peoples of Canada in relation to Section 91(24) and Section 109 of the Constitution Act, 1867;
- d) rights or benefits provided in present and future settlements of Aboriginal claims;
- e) rights of self-government of the Aboriginal peoples of Canada;
- f) representation of the Aboriginal peoples of Canada in Parliament and, where applicable in the legislative assemblies;
- g) responsibilities of the Aboriginal peoples of Canada and the provincial governments for the provision of services in regard to the Aboriginal peoples of Canada;

(4) This section describes some of the basic ingredients that are essential to the recognition of Aboriginal rights and to the inclusion of the Aboriginal peoples of Canada within Confederation. Self-determination is the most fundamental and natural right of all Aboriginal peoples. This section stresses the intention to fulfill that self-determination within the Confederation of Canada. It also sets out those areas in which further negotiation and development need to occur.

- h) the right to adequate land and resource base and adequate revenues, including royalties, revenue sharing, equalization payments, taxation, unconditional grants and program financing.

so as to ensure the distinct cultural, economic and linguistic identities of the Aboriginal peoples of Canada.

- (5) a) Every treaty and agreement validly entered into between Her Majesty and any of the Aboriginal peoples of Canada and every treaty and agreement with the Aboriginal peoples validly authorized by Her Majesty shall continue in force after the coming into force of this Act, and all such treaties and agreement shall be deemed to be part of the Consitution of Canada.
- b) No treaty or agreement with any of the Aboriginal peoples of Canada, or any provision or term thereof, shall be diminished or abrogated by either Parliament or any legislative assembly, nor shall any Act of the Parliament of Canada or of any legislative assembly be construed or applied so as to diminish or abrogate
- a) This section ensures the continuity of treaties through the patriation process and into the era of complete Canadian independence.
- b) This section provides for amendment and revision of treaties with the consent of the Aboriginal peoples who are signatories. It also provides that no Act of any Canadian legislature will be interpreted as diminishing any rights confirmed or granted by treaty.

any provision or term of any treaty or agreement with any of the Aboriginal peoples of Canada without the consent of those Aboriginal peoples party to the treaty or agreement.

- (6) No Aboriginal right shall be subject to extinguishment by Parliament of Canada or by any legislative assembly.

- (6) Aboriginal rights are not to be subject to extinguishment once they have been recognized by this Constitutional provision. Past governments have said that Aboriginal rights can only be recognized at the moment that they are being extinguished. This section as a whole precludes that posture. Future agreements will be worked out on the basis of maintaining and enhancing Aboriginal rights.

- (7) No lands, waters or resources of the Aboriginal peoples of Canada shall be subject to expropriation under any law of the Parliament of Canada or any legislative assembly without the express consent of those Aboriginal peoples holding such lands, waters or resources.

- (7) Expropriation of the lands of Aboriginal peoples has been the greatest single source of grievance in non-Indian relations. The prohibition of expropriation is the foundation of a new and healthier relationship which the Aboriginal people wish to have with the Crown, Parliament and People of Canada. There has not been a major expropriation of Indian lands since the Seaway expropriations in the 1950's. Given the mutual benefits that have flowed from over 20 years of government abstention from expropriation of

Indian lands, it is now appropriate to have a constitutional undertaking that Indian people will, in fact, and in law, be secure in their lands.

- (8) The free movement of Aboriginal persons with their personal goods and possessions guaranteed by the Treaty of Amity, Commerce and Navigation, 1794, and known as Jay's Treaty, between Her Majesty the Queen and the United States of America, shall apply mutatis mutandis to all the Aboriginal peoples of Canada and the United States, and no Act of Parliament or any legislative assembly shall be construed so as to diminish this right.

- (8) This section gives force to what have traditionally been known as Jay's Treaty rights. Across the continent, the border between Canada and the United States was run through the lands of several Aboriginal peoples. The right to pass freely across the border was used to secure peace and cooperation from those peoples when it was desired to separate the lands of British North America from the United States following the War Among the English, as it was known in some circles. This section is intended to maintain the atmosphere of peace and harmony which the Indian nations had at that time with the British Crown.

#### Section 24

- (1) The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate, abridge or derogate from any undeclared rights or freedoms that exist in Canada.

- (1) The provision respecting native peoples is deleted because of its singular lack of clarity and its failure to provide for the continuity of previously existing rights. It is clear that Aboriginal and treaty rights are in no way to be confused with "undeclared rights".



Section 15

- (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
- (2) The section does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged persons or groups or the recognition of the Aboriginal and treaty rights of the Aboriginal peoples of Canada.
- (2) The addition of the words or the recognition of "of the Aboriginal and treaty rights of the Aboriginal peoples of Canada", will permit Parliament to pass laws which might be seen as discriminatory providing that they are directed to the fulfilment of those rights. No Aboriginal people wishes to have any special legislation on the basis of their appearing to be disadvantaged.

Section 32

- (2) Such constitutional conferences and all such future constitutional conferences shall include the direct participation of representatives of the Aboriginal peoples of Canada for matters on the agenda which affect them.
- (2) This section allows for the full, equal and ongoing participation in constitutional development which is essential to the Aboriginal peoples becoming full partners in Confederation.

Section 1

Delete the whole section.

The only purpose of this first section is to allow the governments to override our rights without consent which is completely unacceptable.

Section 51A

- (1) Nothing in Parts IV and V shall be construed as permitting any amendment to any constitutional provision that affects the rights, freedoms and privileges of any of the Aboriginal peoples of Canada without the consent of those Aboriginal peoples of Canada so affected.
- (1) This section provides that the rights secured in section 23A and elsewhere are not subject to repeal by the usual process of constitutional amendment without the express consent of the Aboriginal peoples of Canada.

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A DECLARATION  
OF THE  
FIRST NATIONS

WE THE ORIGINAL PEOPLES OF THIS LAND KNOW THE CREATOR PUT US HERE.

THE CREATOR GAVE US LAWS THAT GOVERN ALL OUR RELATIONSHIPS TO  
LIVE IN HARMONY WITH NATURE AND MANKIND.

THE LAWS OF THE CREATOR DEFINED OUR RIGHTS AND RESPONSIBILITIES.

THE CREATOR GAVE US OUR SPIRITUAL BELIEFS, OUR LANGUAGES, OUR  
CULTURE, AND A PLACE ON MOTHER EARTH WHICH PROVIDED US WITH  
ALL OUR NEEDS.

WE HAVE MAINTAINED OUR FREEDOM, OUR LANGUAGES, AND OUR TRADITIONS  
FROM TIME IMMEMORIAL.

WE CONTINUE TO EXERCISE THE RIGHTS AND FULFILL THE RESPONSIBILITIES  
AND OBLIGATIONS GIVEN TO US BY THE CREATOR FOR THE LANDS UPON WHICH  
WE WERE PLACED.

THE CREATOR HAS GIVEN US THE RIGHT TO GOVERN OURSELVES AND THE  
RIGHT TO SELF-DETERMINATION.

THE RIGHTS AND RESPONSIBILITIES GIVEN TO US BY THE CREATOR CANNOT  
BE ALTERED OR TAKEN AWAY BY ANY OTHER NATION.

COUNCIL OF CHIEFS.



recognizing them as able to represent their people. Relations between colonial officials and the Aboriginal leaders were formalized in treaties which dealt with a range of issues, some typical of international treaties - peace, political relations, territoriality - and some reflecting the new inter-relationship of aboriginal and European peoples that was being established. <sup>1</sup>

The major legal definition of the principles of colonial-aboriginal relations is found in the Royal Proclamation of 1763. The Proclamation was enacted by George III employing a Crown prerogative power to legislate directly for the colonies. The Proclamation was the first written constitutional document for Canada (beyond instructions to Governors). The provisions in the Royal Proclamation in relation to aboriginal peoples are of a constitutional character and are still in effect in Canada by virtue of their original enactment (not having been re-enacted either in the United Kingdom or Canada). <sup>2</sup> The Proclamation describes the Aboriginal groups as "the several Nations or Tribes of Indians with whom we are connected and who live under our Protection." The national or political character of the Aboriginal groups was recognized. The special relationship between the Tribes and the Imperial Crown, in general, was described as a protectorate relationship, familiar to international law. To both the British authorities and the Aboriginal leaders, Aboriginal self-government was to continue on the lands held by the Aboriginal peoples.

The political character of the relationship between Great Britain and the Aboriginal nations or tribes was emphasized in the treaty procedure set out in the proclamation. It was made clear, expressly, that treaty relationships were to occur only between representatives of the Crown and leaders of the Aboriginal nations. Private dealings were prohibited. Unless lands were acquired by treaties, they remained under Aboriginal political and legal control. The treaty procedure of the Royal Proclamation of 1763 remains in force in Canada and continues to be the only general procedure for adjusting aboriginal-white relations.

The Imperial Crown took on a basic obligation to protect the Aboriginal Nations or Tribes. This is stated in the Royal Proclamation and restated in the report of the Select Committee of the British House of Commons on Aborigines (British Settlements) in 1837. This is not a unilateral obligation, but a basic part of the understandings between Great Britain and the tribes. The Aboriginal peoples accepted a special relationship with the Imperial Crown, which gave Britain the right to acquire lands in Canada and expand its colonial jurisdiction there. In return Great Britain pledged protection to the tribes and recognized that change should only occur by negotiation and agreement (that is by treaties). Great Britain acted on these understandings to her benefit as a nation and to the benefit of many of her subjects. The obligations taken on in this manner cannot now be lightly disregarded without a basic breach of faith.

In the Royal Proclamation of 1763 the Imperial Crown authorized the governors or commanders in chief of the colonial governments in North America to negotiate treaties with the Tribes on behalf of the Imperial Crown. Treaties had been negotiated and signed before 1763. From 1763 until Canadian confederation in 1867, hundreds of treaties were negotiated in what is now southern Ontario. From 1867 to 1956 treaties were entered into with major tribes in western Canada. The sole authority for all these treaties lay in the prerogative powers of the Imperial Crown and in the Royal Proclamation of 1763.<sup>3</sup> Section 91 (24) of the British North America Act of 1867 (giving the Parliament of Canada responsibility in relation to "Indians, and Lands reserved for the Indians") did not give authority to the government of Canada to negotiate treaties with the Aboriginal tribes. Indeed Canada was incapable of negotiating treaties at the time of confederation. Its power to negotiate treaties was clearly established only in the Statute of Westminster of 1931. No piece of legislation in Canada, either before or after confederation, gave authorization to any Canadian officials to negotiate treaties with the Aboriginal nations. The sole authority for all Aboriginal treaties, on the part of the governments of Canada and the United Kingdom, has been the Imperial prerogative and Royal Proclamation of 1763. The treaties, then, were negotiated on behalf of the Imperial Crown (and not on behalf of the Crown in the right of Canada or the government of Canada). The only supplementary provisions dealing with these questions are of the Imperial government: in the Imperial order-in-council transferring

Rupert's Land and the Northwestern Territory to Canada in 1870 and in the Metis land rights provisions of the Manitoba Act which were confirmed by the British North America Act of 1871.

The Lieutenant-Governors and other representatives who negotiated the treaties in the Canadian west (where the best records survive of the actual negotiations), consistently asserted that they were acting for the Imperial Crown. Their own records of the negotiations indicate that they did not refer to the Government of Canada, the Prime Minister of Canada or the Crown in the right of Canada.<sup>4</sup>

Have the obligations under the treaties and the responsibilities under the Royal Proclamation of 1763 been transferred to Canada?

There have been shifts in financial responsibility. The Imperial vote for Indians ended in 1860. There is no other significance to that act in 1860. No Imperial action has purported to transfer the corpus of Imperial obligations and responsibilities to Canada, Administrative and financial responsibilities have gradually been assumed in Canada and in 1867 the British North America Act determined that those functions would lie with the federal government. But, again, no Imperial action purported to transfer Imperial obligations and responsibilities to Canada. In 1931 the Statute of Westminster confirmed Canada's status as a self-governing dominion with an international personality. The Statute of Westminster made no reference to the Royal Proclamation of 1763 or to the treaties with Aboriginal nations. Treaties continued to be negotiated with the Aboriginal nations after 1931 in the same way as before 1931.

In general it is clear that the Statute of Westminster was not designed to enable Canada to amend its own constitution. That is clear for the British North America Act of 1867 by section 7 of the Statute of Westminster. The Royal Proclamation of 1763 continued to be an operative part of the constitution of Canada in 1931 and Canada was not given the power in the Statute of Westminster to amend or repeal the Royal Proclamation. Section 2 (2) of the Statute of Westminster provides the Canadian laws can alter any "law of England"<sup>5</sup> or any act of the Parliament of the United Kingdom (or any order, rule or regulation made under such an act). The Royal Proclamation, as a prerogative Imperial enactment relating to Canada and with no application within England, is neither a law of England or an act of the Parliament of the United Kingdom. The Royal Proclamation continued after 1931 as an Imperial law structuring the relationship of the Indian nations to the Imperial Crown and through the Imperial Crown of Canada.

Parallel to the arrangements embodied in the Statute of Westminster of 1931, there had developed a convention that the Government of the United Kingdom will not interfere in the internal affairs of the self-governing dominions.

That convention would, of course, have no application to matters that were not "internal" or "domestic" in character because they involved direct legal obligations and responsibilities between the Imperial Crown and the Aboriginal Nations.

For this reason we submit that the convention does not properly apply to the issues here raised. In another sense, as well, the convention is not an appropriate guide in this situation. The essential virtue of conventions as opposed to codified rules, is their flexibility and adaptability. They embody general principles but do not mandate rigid application of any rule in an inappropriate situation. The convention that the government of the United Kingdom should not interfere, in general, in the internal and domestic affairs of Canada need not be extended to prevent the Parliament of the United Kingdom from examining any Canadian proposal in the light of the rights and status of the Aboriginal nations, groups which the United Kingdom recognized and pledged to protect. No other grouping within Canada has an equivalent historical, legal and moral claim to the concern of the Parliament of the United Kingdom.

The last possible date on which the obligations and responsibilities of the United Kingdom could have been transferred to Canada is 1949, when the Imperial parliament gave the Parliament of Canada the power to amend the "Constitution of Canada." There has been uncertainty about the meaning and role of the 1949 amendment, but it is clear that it could not have given the Canadian Parliament the power to amend the Royal Proclamation, which has an Imperial and not simply a Canadian character.

In summary, the early pattern of direct Imperial prerogative responsibility for relations with the Aboriginal nations or tribes involves an obligation to protect the Aboriginal nations and involves a commitment to change through agreement.

The Imperial Crown obligations and responsibilities have never explicitly been transferred to Canada. The shifts of power that occurred in 1860, 1867, 1931 and 1949 neither explicitly nor implicitly transfer the Imperial obligations and responsibilities to Canada.<sup>6</sup>

It follows then, that the act of "patriation" being requested by the government of Canada will shift those obligations and responsibilities to Canada. But those obligations and responsibilities are owed to the Aboriginal nations or tribes. The United Kingdom cannot legally substitute Canada for itself in its relationship with the Aboriginal nations, without the consent of those Aboriginal nations. This would be true of any treaty relationship. It is particularly obvious in this case because of the basic model of negotiation and consent in the treaty process prescribed by the Royal Proclamation of 1763.

There are great anomalies in the principles and conclusions asserted here. While the Aboriginal peoples of Canada retain a direct, protected, political link to the Imperial Crown, that legal reality has been denied, on a pervasive and continuing basis, by the governments of Canada and the United Kingdom and by the Crown and the Crown's direct representatives. Are we pursuing an elaborate lost cause? Are we, as we have been accused by some in Canada, the last of the old-fashioned imperialists? When there is a pervasive consensus in Canada that the constitution should be patriated, how can the Aboriginal peoples of Canada, the first victims of colonialism, be the only voice against the patriation?



Our nations have lost authority in two related ways, The colonial process gradually sapped our communities of the strength they needed to continue to be self-governing within the new state of Canada. We became dependent. In the last decades there has been a great rebuilding of our strength as Aboriginal nations. We are again claiming our birthright as peoples with rights of self-determination. Our cultures, our languages, our political ways have survived. But while we were weak, there was a gradual shift of control over our lives from the Imperial Crown to Canada. We could not resist that shift, but we never consented. Canada and the United Kingdom have assumed that the transfer was complete. It has occurred in practice - but not in law. The obligations and responsibilities, in law, are with the Imperial Crown. Just as the indigenous people of Zimbabwe called upon Imperial authority in their struggle against the white government of Rhodesia, we are calling upon the Imperial Crown under its historical obligations and responsibilities, to help us in our struggle to decolonize our relationship with Canada and with the United Kingdom.

What we are seeking is clear. We are seeking today to be self-governing nations within Canadian confederation. To ensure that we are self-governing, we want to maintain our special relationship to the Crown - a relationship parallel to that of the government of Canada and parallel to that of the governments of the Canadian provinces. We want this relationship in order to protect our rights of self-government. We want to re-establish the basic principle of the Royal Proclamation that changes in

our relations with the Imperial government and the Canadian government will be negotiated and will only proceed on the basis of consent. We are able to assert rights to protection, of self-government and of treaty relationships today because of the Imperial link. We have asserted these rights in Canada, without success. Now either the Imperial Crown must fulfill it's obligations and responsibilities itself - or ensure that these protections are explicitly entrenched in a new Canadian constitution (by refusing patriation to any proposal which ignores these matters). Otherwise the legal obligations and responsibilities assumed by the Imperial Crown will have been unilaterally denied by the United Kingdom. It would be a betrayal.

1. To the Aboriginal Peoples the treaties are clearly of an international law character. In English law they were treated as equal to international treaties, at least in the early period of treaty relations. Later the exact legal character of the treaties came to be described less clearly by governments and the courts. The Judicial Committee of the Privy Council ruled in Attorney General for Canada, Attorney General for Ontario (1897) A.C. 199, that they did not have to decide in the case whether a particular treaty with an Aboriginal Nation was a true international treaty. This question remains officially unresolved in Canadian law. Ontario District Court in 1978 in R. Batisse 84 D.L.R. (3d) 377 at 384 stated: "It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements." This is striking for it would appear to be in Canada's self-interest to define the treaties as purely domestic or private.
2. The Royal Proclamation of 1763 continues to be printed in the Appendix to the revised statutes of Canada in the series of constitutional documents that begin with the Royal Proclamation and include the British North America Act of 1867 and the Statute of Westminster of 1931. The statement of Exchequer Court of Canada in King v Lady McMaster (1926) Ex. C.R. 68, that the Royal Proclamation continues to have the force of law in Canada is a standard and accepted proposition.
3. The various Acts dealing with Aboriginal people that have been enacted in Canada, beginning in the early 19th century and continuing with the present federal Indian Act, have never dealt with the procedure for negotiating treaties, appointing commissioners or any other aspect of the treaty making process.
4. The primary source is Morris. Our treaties with the Indians of Manitoba and the Northwest, which was published in the late 19th century to defend the integrity of the treaty making process. The fact of consistent references to the Imperial Crown in the negotiations confirms the oral tradition of Aboriginal elders on the point.
5. The meaning of the phrase "law of England" is clear from the earlier issues that led to the Colonial Laws Validity Act. It was not law geographically originating in England but expressly applicable to Canada that were in issue, but domestic laws in England.

6. Mr. Feeland testified on November 12th that the United Kingdom had no remaining obligations under treaties with Indian nations, the responsibility having been transferred to Canada in 1867 or no later than 1931. In our submission that conclusion is legally incorrect. Mr. Feeland was asked whether his view had been challenged in the courts. He replied that it had not. In fact it has never been challenged or supported in the courts. Aboriginal people in Canada did not gain any degree of effective access to the regular political process or the courts in Canada until the 1960's. Many Canadian assumptions have been challenged in the last 20 years. The character of the treaties has been a major issue between the Aboriginal peoples and the Governments both of Canada and the United Kingdom. Reference should be had to the petition of the Canadian Chiefs to the Queen, the Government of the United Kingdom and the Imperial Parliament, submitted in July, 1979. These questions have not been resolved in the courts of either Canada or the United Kingdom.
  
7. There are many examples of the Canadian government and the Canadian courts denying or restricting Aboriginal rights. The Canadian government arbitrarily assumed the power to define who were "Indians" and who were not. The Royal Proclamation of 1763 involved the recognition of peoples who had their own established laws about citizenship. The Parliament of Canada has presumed, without authority, to redefine the terms of the British North America Act and the Royal Proclamation of 1763 and dictate to the Aboriginal people as to who they are. As well there have been illegal encroachments on Aboriginal lands and frequent denials of traditional rights to hunt, fish and trap.

November 1980