

SIGNIFICANCE OF INDIAN CONSENT

DOCUMENTATION

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In reviewing the present day issues of Indian people in relation to the Canadian Government, it is important to review the historical developments leading up to the circumstances we are in today. We have, of necessity, reviewed the entire Canadian experience and the Indian Nations' experience to reach the conclusions we have regarding all these issues.

This paper will review the entire spectrum of Indian/Canada experiences to understand the significance of the arguments being put forward by our leadership today. We will begin with an outline of the conclusions of our research and follow-up with a provision of the supporting information crucial to the basic questions of the Indian Nations status with Canada.

THE ROAD BACK:

The key to Indian survival as Nations will lie in our look back to the parallels which exist between the Indian/Crown relations and the Indian/Canada relations. To do this, we will be looking at the accommodation of Indian interests by England when colonizing and the accommodation of Canada yet to be defined. In this lies a formidable weapon for the Indian Nations position.

Strongly based in historical documentation is the fact that England recognized Indian ownership to North America. England also recognized that there were numerous Indian Nations and negotiating with one group would not solve their need to justify a process for the taking of lands in the Americas. In sessional papers of King George V, 1912, the Canadian Government in their section on Treaties (page 472) states: "The British Government has always recognized the Title of the Indian tribes to the territory they

..2, consent

occupied". In other sections, they also recognize tribes as political units with defined territories, governing systems and jurisdictions.

This statement begs the question then of WHY DID ENGLAND RECOGNIZE INDIAN TITLE TO THE LAND? There were two fundamental and important reasons why they did at that time.....

The First Reason: The Indian Nations were in total control of the land and had the people, the political and military power to defend the territories in the Americas. England had to move cautiously if she was to gain access into this new world which a sovereign tribe inhabited. There were plentiful Indian wars with the British and the Indian Nations proved to be a military might which forced the British to recognize Indian political will to protect their land.

The Second Reason: By the time North America was discovered and settlers moved to the new world, an International law was established to protect inhabitants of the territories being colonized. England recognized International law and had come to agreement with other nations in who would colonize what territories. In recognizing International law, England had to prove ownership of the land by conquest or consent.

Faced with the impractical solution of gaining the land by conquest, the only other choice open to the English for gaining ownership was by negotiation with the Indian Nations and gaining their consent for occupation.

...3, consent

The fact that the Indian Nations were in control was exemplified by Chief Pontiac who commanded an Indian uprising against the British and along with other Indian leaders fought with such comprehensive military actions that the English chose to negotiate with the Indians. As the Indians continued to maintain a strong position as the sovereign nation, the Royal Proclamation was negotiated to gain consent of the Indian Nations. In this Proclamation, England was forced to maintain her position as an invader and agreed to recognize an Indian territory beyond which she would neither have jurisdiction nor legislate for the Indian Nations. The Indian Nations agreed that if it was in their goodwill they would cede land to the English before ceding to any other nation and would not interfere in England's internal affairs.

England negotiated other Treaties with particular groups in the Eastern part of Canada. The major fact is that England had developed a process recognized by International law as a means of claiming ownership or jurisdiction. England had done her homework and developed a legitimate means of acquiring land recognized by the Indian Nations as a legitimate means for dealing with them (...and *recognized internationally*). The qualifying component of this process is getting Indian consent which could be proven as being acquired legitimately. The Royal Proclamation and the Treaties were the proofs.

A significant detail of this process which should not be lost on us is when the Royal Proclamation was being negotiated and ratified by both sides, the Indian Nations had no way of knowing that the King of England was in a power struggle with the English Parliament for jurisdiction. Those defining the terms of these agreements on the English side did not inform the Indian Nations that his power struggle was taking place in England and would have no way of knowing what the eventual outcome would be. For this particular period in 1763, the King had the power and his Royal Proclamation had the force of law. Furthermore, settlers were informed in coming to the

...4, consent

new world that wherever they carried the British flag, the English law would follow. As it was the British flag reached across Canada and throughout the North therefore carrying with them the force of the Royal Proclamation of 1763. Since the Indian Nations did not know of this power struggle taking place, they naturally held to the agreement and the understanding that their deal was binding and so it was.

THE BRITISH NORTH AMERICA ACT OF 1867:

Back in Canada, the leaders of the five colonies met and developed the British North America Act which they proposed to England as the proper relationship they wished to have in forming a Confederation of their colonies. However, the environment and activities of the Indian Nations was still powerful enough to keep the settlers respectful and the government officials mindful to keep the relationship with the Indian Nations on an even plane. To prevent further outbreak of wars with the Indians, the English government in conspiracy with its government officials in Canada did not dare openly discuss *further access to Indian Lands and deliberately left the Indians out of all constitutional discussions*. It was in this mood that the English Parliament agreed to pass the British North America Act of 1867. By this time, the English Parliament's statutes had the force of law superceded only by the Magna Carta and their constitutional freedoms. Within the B.N.A. Act was Section 91(24) outlining Canada's responsibility to administer Britain's obligation to the Indian Nations. In maintaining the International law, England ensured her obligations in this way. Canada, in the meantime was still faced with settling the territories West and Northward. She had inherited Britain's obligations but had yet to develop her own process for dealing with the Indian Nations. Again, by the sheer knowledge of the existence of the B.N.A. Act as their law, they acknowledged the English Parliament statutes as superior to the King's law. If this were not so, then they would have sought a Proclamation from the Queen for the

...5, consent

confederation of their colonies. Knowing this situation existed, Canada was faced in 1867 with the same dilemma that England faced in 1760 of the right to occupation of the lands. Once more, for Canada the Indian Nations were in a superior position. We can point to England as having legitimate relations with the Indian Nations up to this point but in her passing the administration of these obligations to Canada the process of consent broke down. The agreement reached by England and Canada, in this respect, was done without the knowledge of the Indian Nations and nowhere is their consent to be found for this arrangement. Canada therefore took over Britain's obligations illegally as it was entirely unknown to the Indian Nations.

What was Canada's true situation at the time. First of all, as a young Nation she had no laws of her own other than the B.N.A. Act by which to deal with the Indian Nations. Secondly, England had developed a process and the vehicles by which to obtain Indian consent by acceptable International standards of protocol and agreement through the Royal Proclamation and Treaties. Without her own process to depend on, Canada had only England's experience by which to carry on settling the west and north. In the meantime, as far as the Indian Nations were concerned their agreements were still with the Queen and not of Canada's making, rightly so. Canada then looked to the United States experience of settling their country and their dealings with the Indian Nations. What they saw were numerous Indian wars costing the United States government at that time some \$20,000,000. Canada's total budget for all her affairs was \$20,000,000. She could not afford these wars and yet her ambitions would not let the issue go. Secondly, when she looked west, the Indian Nations on the Plains were in as powerful a position as the Indian Nations in the East when England settled there. If Canada went to war, she had no military force to speak of and no policing ability at all. The number of settlers in these areas was minimal counting in some settlements nine people or thirty people but never

...6, consent

enough anywhere to be able to wage a war with the Indian Nations. Faced with the prospect of being run out of the country by the Indians, not being able to go to war, not being able to afford one, wanting to settle the west and stretch Canada from coast to coast, Canada had no alternative but to negotiate with the Indian people. But in choosing to negotiate, Canada also had another option and that was to lie to the Indian Nations about the negotiations. This she did. Rather than begin all over again what England had carried out, Canada based her ownership of the Eastern Nations land on what England had done. Canada did not renegotiate England's terms in the name of Canada with the Indian Nations. Furthermore, in choosing to negotiate with the Indian Nations for the right to occupation, Canada's representatives did so in the name of the Queen knowing full well the Queen in England was without power having the force of law. The Indian Nations to this day believe that their relationship is with the Queen (Crown) in right of England. This deliberate deception was part of a larger scheme within which Canada is still enmeshed.

That larger scheme was to obtain the land by deception. Once a foothold had been gained the plan was to weaken the Indian people by whatever means available and eventually put the Indian Nations in a position so vulnerable that *consent would end up fully in Canada's favour*. This scheme worked for Canada as far as obtaining the land fraudulently from the Indians but to this day it has not worked to obtain Indian consent regardless of how weakened our Nations have become. The scheme did not work and Canada is still trying.

Let's examine this information in more detail and see what evolves from our thinking of the situation. Canada cannot point to the Royal Proclamation of 1763 as a legitimate means by which she obtained consent of the Indian Nations. That process was accepted by the Indian Nations for dealing with England and no other

...7, consent

country. The Indian Nations' Treaties with England cannot be pointed to by Canada as legitimate means of obtaining Indian consent since these too were England's. England had abided by the International standards in these agreements. Canada cannot point to the B.N.A. Act of 1867 as a legitimate means of obtaining Indian consent since she cannot show the vehicle by which the Indian Nations consented to the terms of the B.N.A. Act. To make matters worse, Indian people did not know of the B.N.A. Act as Canada's authority for dealing with them until this past decade. At least 99% of the Indian people believed Canada was an agent of the Queen. Without England, Canada had no basis for her occupation and still today has nothing on which to base her occupancy. If Canada pointed to the Indian Act, she cannot demonstrate Indian consent to its terms. Nowhere can Canada point to the Indian Nations consenting to this legislation. What history does not have within its pages anywhere as far as Canada is concerned is Indian consent. We cannot find it. The only other place Canada can point is to the James Bay Settlement Agreement in 1975. This Agreement was made under duress and its legality can be questioned: it does not speak for all the Indian Nations in Canada. Finally, there is the Constitutional Accord of March 1983 to which not all the Indian Nations have subscribed.

From 1867 to the present day, Canada cannot prove ownership by conquest or consent. Nowhere can Canada show the International community that she has obtained *consent* from any Indian Nation in Canada. What Canada has been participating in throughout this period is collusion to develop a basis of strength from which to obtain Indian consent giving up as little as she can in the process. To do this, Canada went to England in 1931 and through the Statute of Westminster passed by the English Parliament increased her jurisdiction. This Statute stated that any law passed by Canada and sent to the English Parliament would be passed without being changed but the English Parliament would retain the amending formula. This process again was done without the knowledge of Indian people as Canada in-

...8, consent

creased her law-making pwer to deal from a position of strength. In spite of this, Canada still did not have the basic requirement of Indian consent.

In talking to the generation of Indian people throughout this period and from testimony presented to the Sub-Committee on Indian Self-Government, it is clear that this generation of Indian people, for the majority, did not know of the Canadian Government, the B.N.A. Act, the Indian Act, or the Statute of Westminster. Many believed they were agents of the Queen until the Constitution became an issue in the 1980's. Indian leaders had to fight for this information and we can conclude that Canada did not want the Indian people to know what she was doing until she could establish her base. Because of this conspiracy, Indian people continued to believe their relationship was with the Queen of England until 1980.

It is significant that through this period of starvation, disease, religious repression, non-education, alcohol, economic blackmail, and assimilation, Canada could not obtain Indian consent for the taking of lands. Regardless of the process they engaged in or how the question was put, Indian Nations refused to consent and demanded instead a recognition of our title, sovereignty and right to self-determination.

What this has built for the Indian Nations is a powerful leverage indeed. Canada has not yet found the means by which to obtain Indian consent and is still wrestling with the question. According to the Indian Nations, had they known the King had forsaken them in 1867, had they known of the changing political relationship, they would have renegotiated the terms of the Royal Proclamation on the basis that we are nations and sovereign. But we did not know and were not informed. What this creates for the Indian Nations is a history of collusion and conspiracy by both Canada and England for the taking of Indian lands by fraud. Such a

...9, consent

history could not stand up to scrutiny by the International community today. What position does this put Canada in today?

CANADA IN 1983 AND THE CONSTITUTION ACT OF 1982:

It is easy to understand why the English chose to negotiate with the Indian Nations in 1763 and why Canada chose the treaty route in the late 1800's and early 1900's as opposed to going to war.

What we must ask ourselves in 1983 is why is Canada sitting down with the Indian people in spite of the powerful position she seemingly has. We are not in the same powerful position we were in 100 years ago. If we can understand this question then we might clue in to the vulnerability of Canada's position. Looking at the Royal Proclamation and the Accord, both these documents were forced by Indian Nations. One process Canada may use to show some legitimacy in meeting international standards is that of the *Land Claims Process*. This process deals specifically with title and consent. Once Canada can demonstrate to the International community that she has a legitimate process in place to obtain title by consent, this will correct all her past history of collusion and conspiracy to defraud the Indian Nations of their title to their lands. At this point in time, it is correct for us to say that all of Canada is Indian land. The problem for the Indian Nations is that the Land Claims Process is still the most active policy of Canada to obtain our consent for extinguishment of title. Once we agree to this process, participate in it and sign an agreement, we have strengthened Canada's belief that this is the route to go and give her the incentive to pursue this policy with increased vigour. So far the Indian Nations have participated in negotiations through this process, but Canada cannot yet point to any Indian Nation's consent for Canadian ownership of the land. Once she has achieved consent even if it is Nation by Nation and

...10, consent

not all at once, she will have met international standards for acquiring right to occupancy and title to land. This is the leverage of the Indian Nations in 1983.

The record of the Indian Nations is clear and has been maintained by each succeeding generation so that Canada cannot point to any group as having given its consent. If she were asked to prove her right to the land and demonstrate how she obtained it legitimately, she does not have a leg to stand on. The only possible reference she can point to are the Treaties but it would be dangerous for her to do so since she has broken the terms of the Treaties and obtained them fraudulently in the name of the Queen knowing full well the Queen had lost her power to legislate.

It makes sense for Canada to have entrenched the Treaties and any Land Claims Settlement in the Constitution Act of 1982 as it shows the issue is being dealt with domestically. With nothing else to rely on and Indian testimony dangerously pointing out they didn't know of Canada but only of the Queen, Canada's own collusion would backfire in her face dramatically. She could not find a single Indian individual who could testify on her behalf that she had dealt with them honestly and obtained their informed consent for title to their lands.

We found, for ourselves, it is easy to understand the B.N.A. Act, the Indian Act and other legislation because it is so readily accessible to us. When we tried to fill the historical gap from the early 1900's to 1969, the Indian information was extremely limited. When we talked to this generation of people, they did not know of Canada, the B.N.A. Act, or the Indian Act. When we tried to find out why, it was simple: *Canada kept the information from them hoping to gain consent without this history ever coming to light.* It was helpful to Canada for the Indian people to believe that their agreements were with the Queen of England. As Canada allowed this

...11, consent

deception to continue, she could continue to weaken the Indian Nations' land base, aboriginal and treaty rights, and sovereignty in the name of the Queen until she found a way to obtain consent. This deception continued up to the patriation of the Constitution in 1980 where the Queen was brought out to perform her royal duties.

Natural Law prevails in the end. It was inevitable that Canada would be caught in her own deception. As a nation, Canada can no longer rely on English law for legitimizing consent. She is on her own. She cannot rely on the testimony of Indian Nations for proof of consent. She cannot rely on her own laws because Indian consent was not obtained and the Treaties were not entrenched in her laws. Furthermore, for her to obtain right to title by conquest in 1984 would mean that she would have to go to war with the Indian Nations. She cannot politically survive such a move within the International climate. Her only option again is to obtain Indian consent which can be justified internationally. The Third World would certainly understand the Indian Nations arguments to title - pressure which Canada would not be able to withstand. She could afford to fool around with us as long as the issue was kept domestic and out of the international arena's scrutiny. Once the Indian Nations went international on the issue of the Constitution in a dramatic and well-publicized way, Canada had to show somehow that a legitimate process was being developed. Thus the first time she included Aboriginal and Treaty Rights in the Constitution, she kept it to just that. Once our people went to the United Nations and Europe, she then included a Constitutional Conference as a means of identifying and defining those terms. Having included this in the Constitution would ensure most Nations that Canada was sincere in wanting to settle this whole matter and keep other Nations' scrutiny out of the picture while this process was being implemented. It bought time for Canada to prevent international intervention and gave the Indian Nations in 1983 a leverage for negotiations.

CONCLUSION:

What do we do now? What are we prepared to negotiate and on what basis will we legitimize this process? Will we, for example, negotiate to be a part of Canada's Constitution or do we negotiate the same terms of the Royal Proclamation of 1763?

For Indian Self-Government to be entrenched and demonstrate Indian consent, Canada must develop negotiations with the Indian Nations and somehow at the end of it show Indian Nations agreeing to the legislation. What is the form this will take? For her to simply legislate Indian Self-Government will again mean that she has done so without our consent. Testimony to the Sub-Committee made it clear that *Indian Nations do not trust the process* and this testimony would not serve Canada internationally as sufficient proof of consent. In any event, the Report does not go far enough in protecting Indian title and rights and unfortunately misses the major principles important to the Indian Nations before consent is given. In addition, Indian Self-Government is a component of the Indian Nations and not the sum total of its parts. Canada cannot confer jurisdiction on the Indian Nations but only recognize what was always there. Canada will continue this process looking for some means to keep us busy while finding some means of obtaining consent.

Is the Accord a legitimate route for obtaining consent? To ratify the Accord on behalf of the Indian Nations, the Assembly of First Nations would have to demonstrate a process for ratification by the Indian Nations as authorizing the A.F.N. to consent on their behalf. Are the Federal and Provincial Governments using the A.F.N. to do their work for them in organizing the Indian Nations to obtain their consent through the A.F.N.? It is conceivable that the A.F.N. could become the legitimate vehicle by which the Indian Nations could consent to terms worked out with Canada but this depends on

...13, consent

whether these terms satisfy all the Indian Nations and the Indian Nations mandate the A.F.N. to consent on their behalf. In the meantime, Canada will keep the land claims process going for obtaining consent Nation by Nation should the A.F.N. route not succeed.

What of the amending formula? We say we must be part of the amending formula to guarantee protection. Consent is the major issue of the Indian Nations within the constitutional discussions and yet we have not fully debated whether we should even give our consent. We must first deal with whether we are going to give our consent to what Canada had done in our past before even looking at whether we are going to give our consent in the future. When Canada receives Indian consent to title, then all her past is corrected. What we consent to in the future is yet to be defined.

What do the Elders say? First of all we look at our own pattern of discovery of these issues. Every time we faced a crises we discovered a new awareness of the truth which served to strengthen our position. We find this again in looking at the argument of consent. The older generation will say now to us - now we got the picture - right in our dealings with Canada and her robbing the Indian Nations of our land. But down the road are we going to uncover further truths which prolong the political uncertainty of our people. So even in this, they say we did not go far enough. We are right in what we have found on consent. But to go further, we should not be moving towards entrenching ourselves in the Canadian Constitution. Again we have to look at why they maintain this stance and seek out the meaning of this position.