# TREATY INDIGENOUS PEOPLES AND THE CHARLOTTETOWN ACCORD: THE MESSAGE IN THE BREEZE

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## INTRODUCTION

When the October 26th constitutional referendum was over and done, questions remained regarding the position of the Treaty Indigenous Peoples. Why had the Treaty Indigenous Peoples rejected the Charlottetown Accord negotiated by the Assembly of First Nations? Prior to the October 26th vote, many Treaty First Nations had announced their intention to boycott the vote. The National Chief of the Assembly of First Nations expressed his confidence that the First Nations' citizens would support the Accord despite the position taken by the Chiefs and Headmen. This proved to be a completely wrong assumption.

In the final analysis of the Alberta results, the breakdown of Treaty Peoples that voted for and against the Charlottetown Accord was merely a breeze across the prairie. Of the people who chose to vote, 74.4 percent voted against the Accord. For example, among the four bands (Samson, Ermininskin, Montana and Louis Bull) at Hobbema, one hour south of Edmonton, with on-reserve populations reaching into the thousands, 42 persons voted "no" while 14 persons voted "yes". The four bands at Hobbema are in the riding of Wilton Littlechild, the only Treaty member of the House of Commons. Mr. Littlechild, a member of the Conservative Party, attended a meeting with Joe Clark when Clark met with some of the Treaty Chiefs of Alberta at Nisku prior to the vote. Joe Clark tried to convince the Chiefs to support the Accord. Mr. Littlechild chaired the meeting without commenting upon the Accord. Despite the pressures put upon the general citizenship of the First Nations, the Indigenous Peoples chose not to vote.

In Southern Alberta, the Blood Tribe, with an on-reserve population of over 7,000, had 60 persons voting "no" while 26 persons voted "yes". Out of a population of several thousand eligible voters, 86 persons voted. Is there a message in the breeze?

The Elders of the Blood Tribe had reviewed the Charlottetown Accord some weeks prior to the referendum. After discussion of the provisions contained in the documents, the Elders directed the Chief and Council of the Blood Tribe to boycott the constitutional process. In an attempt to get their message across to the general population of Canada, the Blood Tribe along with the Chiefs of the Treaty Six Area of Alberta took a full-page advertisement in the *Globe and Mail* to declare their position. In a message addressed to all Canadians, the Treaty Peoples outlined their concerns about the Treaties and called upon all Canadians to respect the Treaty position of the First Nations.

There was also notice served that the Assembly of First Nations did not represent the Chiefs. The notice stated that the Chiefs would not be bound by any agreements which were negotiatied by the Assembly or its leaders. The reason: The package "did not honour the binding sacred trust obligations set out in our sacred Treaties".

The Blackfoot did not sign the advertisement. Chief Strator Crowfoot was the only Chief in Alberta to publicly support the Charlottetown Accord. With an on-reserve population reaching into the thousands, he managed the following vote: 261 persons voted against the Accord while 242 persons voted in favour. In total there were 503 voters out of an eligible list of approximately 2,500 eligible voters.

Treaty Indigenous Peoples knew the consequences of voting for the Charolottetown Accord. They chose to stand for their Treaty Rights. In Indigenous Country, silence speaks volumes.

I have used Alberta statistics, but similar results can be seen across the country with the exception of the Inuit in the Eastern Arctic. The Inuit have a different reality than the Treaty Peoples of the southern part of Canada.

The Mohawks of Kahnawake took the following view, as expressed in their newspaper *the Eastern Door*:

> The Constitutional amendments now offered to Canadians gives the Canadian Government authority to recognize us as a third order of government. It recognizes an inherent right to self-government for Natives which must be defined in five years. Our laws must conform to their laws in matters of peace, order and good government and no new land rights would derive from this deal. The Mohawks, as People who have never given up our lands, our constitution, our government nor have we given anyone the authority to negotiate on our behalf, would feel that this deal is less than the Nation to Nation relationship that has been the cornerstone of our relations with other Governments.

The question remains — why did the Treaty People reject the Charlottetown Accord? The answer lies in the nature of the Treaties. If one understands the Treaty reality, then one can easily understand the position of Treaty Peoples.

## TREATY RIGHTS

The issue of the treaty rights of Indigenous Peoples is one of the most clouded and distorted in the entire colonial history of Canada. Failure to comprehend it in its correct perspective has caused historical, political and legal confusion. Canada is a product of imperialism, colonialism, foreign occupation and rule by non-indigenous settlers. Through these forces led by France and Great Britain, the Indigenous Peoples were relegated to the footnotes of colonial history.

In the attempt to perpetuate the colonisation of the Indigenous Peoples, many methods have been used: military suppression, economic exploitation, political oppression, distortion and mutilation of the country's history, the Indigenous institutions and culture and the manipulation of international law.

One of the most notorious distortions invented by some European historians and other settler writers is that the Indigenous Peoples did not really own the lands. The lands were "discovered" by the Europeans. Early in the period of discovery of the new world, the papacy articulated the doctrine of discovery, which announced that Christian princes discovering new lands had a recognized title to them. This papal bull remains, in effect, to this date.

Using the European settler concepts of *terra nullius* (land belonging to nobody) and discovery, the settlers have tried to secure their title to our lands and resources. All methods are defective in the face of Indigenous Peoples' rights.

In the alternative, it was claimed if Indigenous Peoples did occupy some of the lands, they did not occupy all of the lands. European settlers then impose another form of definition upon the term *terra nullius*. The European settlers said that the term "terra nullius" meant not only land belonging to no one, but also lands without a sovereign as understood in Europe. Indigenous Peoples without a sovereign could not really own lands. The Indigenous Peoples could not really enter into treaties with "civilized" sovereigns. Who defines civilized? Who defines sovereign?

It has been a commonly held notion that the Indigenous Peoples have no land rights because they did not till and use all the soil. This is an argument which was used in the *Gitskan* case. The judge was heard to say that the Gitskan had no beasts of burden and no wheeled vehicles which implied that they did not till and use all the soil. As a consequence, the assertion was made that the Indigenous Peoples had an imperfect title to the lands.

Henry Reynolds, an Australian professor of law, in *Law of the Land* writes:

> Common sense, let alone the law itself should tell us that this argument can't be justified. Only about half of Britain was farmed. There was much forest, mountain and coastal wetland in England. There was land with very few residents —waste and unfenced. But it was [very] (sic) all owned. Title to waste land in Britain was as secure as title to the best farm land. There was absolutely no obligation to cultivate...

Reynolds goes on to argue that the Australian Aboriginals possess their country; they made use of it and took from it and lived on the lands in their own manner of life.

C. Wolff, one of the most respected jurists of the first half of the 19th century, regarded as the founder of a reasoned approach to international law, writes in his book, *The Law of Nations*, about the place of nomadic or Indigenous peoples and the issue of land.

> He said that if the people in question had no settled abode but wander through uncultivated wilds... They are understood to have tacitly agreed that the lands in that territory in which they change abodes as they please, are held in common, subject to the use of individuals, and it is their intention that they should not be deprived of that use by outsiders... They are supposed to have occupied that territory as far as concerns the lands of their use.

It is clear that even nomadic people who move from place to place cannot be legitimately dispossessed of their lands merely because their method of using land differs from that of the Europeans. Mr. Von Martens explains:

> From the moment a nation has taken possession of a territory in the right of first occupier, and with the design to establish itself there for the future, it becomes the absolute and sole proprietor of it and all that it contains; and has the right to exclude all other nations from it.
>
> International law dictates that the settlers cannot acquire title to the territory of indigenous peoples by merely asserting sovereignty or their legal system or idealogy upon the Indigenous Peoples.

## TREATIES

In the historical context of settlement by the non-indigenous people in the Americas, Great Britain and other European states began a system of signing treaties with the Indigenous Peoples. These treaties took many forms. Some treaties were for the establishment of peace and friendship while other treaties set aside lands to establish posts for farming and trading. Still other treaties set up boundaries and dealt with a number of issues which arose as a result of contact between Indigenous and non-indigenous peoples.

One well-known treaty signed between Indigenous Peoples and non-indigenous peoples is the two row wampum treaty signed in 1645 between the Dutch and the Iroquois Confederacy. The two rows represented their relationship: each independent and sovereign, never to interfere with one another.

The Treaty of 1645 set down the principles of Indigenous Peoples' sovereignty which would guide the signing of treaties with Indigenous Peoples. The treaty signing set out the boundaries and

the political system of each signatory. The treaty was to guarantee non-interference in one another's affairs. This is a basic principal of international law.

Another basic principle of international law is: *all peoples have a right to self-determination.* Indigenous Peoples have the right to freely determine their own political and legal status without interference by another state. When Indigenous nations entered into treaties, they did not surrender their rights to self-determination. Indigenous nations did not through the treaty process allow for the implementation of and interference by an alien legal system.

It is clear from the negotiations of treaties between Indigenous Peoples and non-indigenous governments that there was no intention on the part of Indigenous Peoples to relinquish their governments and legal systems to the settler governments.

In almost every treaty, the concern of the Indigenous Peoples was to preserve and ensure the continuing existence of the Indigenous Peoples for the future. It is this basic concept that non-indigenous people do not understand nor attempt to understand. Each treaty, for Indigenous Peoples, was a sacred undertaking made by one people to another which required no more than the integrity of each party for enforcement. That the Government of Canada insists that the treaties should be interpreted rigidly as strictly legal documents within the non-indigenous legal system has provoked disputes between the Indigenous Peoples and the settler government for the last hundred years.

## THE STATUS OF CANADA IN RELATION TO THE TREATIES

Canada did not sign any pre-confederation or any numbered treaties with the Indigenous Peoples. Canada did not posses the authority to enter into international treaties until after the 1931 *Statute of Westminster.*

The colony of Canada was a creation of the United Kingdom Parliament in 1867. Canada was subordinate to the Imperial Parliament and the legal system of Great Britain. Canada often refers to itself as a dominion. Under international law, there is no term nor concept for dominion. In *Webster's Dictionary*, dominion is defined as: "[A] self-governing nation of the British Commonwealth other than the United Kingdom that acknowledges the British monarchy as chief of state."

Under international law, Canada is a municipal government of the United Kingdom despite the *Statute of Westminster*. H.J. May, a constitutional lawyer, declares that "on strictly legal grounds the dominions were subordinate to Great Britain". He also points out that the term came into usage at the 1907 Imperial Conference when the colonial territories evolved from colonial to "dominion". It is a non-indigenous manipulation of the language to give apparent authority where none existed within international law.

There is no valid reason why Great Britain should be deemed to have been correct in international law in designating her colony of Canada a "dominion", supposedly "independent", and thus confusing international law with her municipal law concepts.

International law would be abetting British colonialism, and its consequences of genocide and theft of resources and lands, if it were to lend any legal validity to the status of Canada as an "independent" state based upon the abuse and manipulation of international law by Great Britain and Canada. Indigenous Peoples have long maintained that the *only* time Canada will be an independent state in international law is when the vast dispossessed Indigenous Peoples have regained control of our territories and political power in accordance with the international law principle of *our inalienable right to self-determination.*

Under international law principles, Canada is a colony that was never decolonized. This case should be brought to the attention of the United Nations' Committee on Decolonization. When a colony is decolonized its control reverts to the Indigenous Peoples who were colonized. It does not remain in the hands of the settlers who were the instruments of colonization. Decolonisation is for the colonized peoples not for the settlers of the colonial power. Canada is the Americas' equivalent to South Africa on the African continent.

There are many tenets of international law which Indigenous Peoples can accept to help them regulate their lives. But there is one tenet of international law which cannot be accepted in the twentieth century, that is, support for the colonial powers assertion of their sovereignty over our peoples and territories in complete violation of our international treaty rights.

## THE STATUS OF INDIGENOUS PEOPLE UNDER INTERNATIONAL LAW

Our treaties must be recognized. Strictly speaking, recognition is a matter of political or state policy rather than of law. It is not a legal act or a requirement. Recognition may be *de facto* (by fact) or *de jure* (by right). Our governments exist as *a matter of pure fact.* Our governments entered into treaties with non-indigenous people upon contact. That is a fact. It is a legal fact. Indigenous Peoples did not need any settler sovereign to give us a government to enter into treaties. The governments existed because we existed as Peoples.

Under Article I of the 1933 *Montevideo Convention*, in order for a nation to be recognized under international law, it must possess four characteristics:

1. A permanent population;

2. A definite territory;

3. A government; and,

4. A capacity to enter into relations with others.

When Canada, in 1982, formed itself into an independent state, the Indigenous treaties were not dealt with by the Government of Great Britain. Canada has tried to unilaterally assume jurisdiction

over the treaties. This is not acceptable and is contrary to the principles of international law. When Great Britain and Canada failed to deal with the treaties at an imperial conference prior to patriation, as required by British constitutional convention, control over the lands and resources should have reverted to the Indigenous Peoples as a matter of international law.

Indigenous Peoples are still maintaining their treaty rights. These rights have obligated the State of Canada to provide certain benefits to the Treaty Peoples. However, Canada has increasingly characterized the rights enjoyed by Treaty Indigenous Peoples as a result of Canada's benevolent actions rather than as an obligation.

## THE FUTURE OF INDIGENOUS TREATIES

We do not want to have our international treaties entrenched under the municipal laws of Canada through the constitutional process. We do not want to have our treaties subjected to interpretation by a system based upon oppression and outdated European notions of settlement, conquest and discovery. We want to set up something outside of the constitutional process to deal with the issues related to the treaties.

The provinces of Canada do not possess any international law status to enter into or sign international treaties with Indigenous Nations. First Nations do not want the provinces to be part of the treaty process. It would seem that the legal position is that the First Nations with treaties must first come to some agreement with Canada on the recognition and implementation of the treaties prior to involving any of the provinces. Why would Indigenous Peoples want to elevate the status of the provinces from their municipal law position in international law to that of being equal partners with Indigenous Peoples? It seems clear that the Indigenous Peoples are the ones possessing the real legal power under the treaties. It remains for us to determine how best we want the treaties protected.

The position is clear. Implementation of the treaties as signed by our forefathers requires no constitutional change. First nations' citizens know their treaty law. Hence, the opposition to the Charlottetown Accord. The breeze could turn into a real storm if the treaties remain unimplemented.

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