

RIGHTS OF INDIGENOUS PEOPLES The Experience of Canada's First Nations

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Marie Frawley-Henry,
Director, International Relations of the Assembly of First Nations

Indigenous Peoples of North America share many similarities with Indigenous Peoples around the world, while saying this it is also important to note the differences. Prior to colonization the First Peoples of North America were autonomous and self-governing. Populations of Europeans began arriving in the America's approximately 500 years ago. "The traditional Haudenosaunee peoples had their own constitution believed to be granted to them by the creator."¹ Upon arrival of the Europeans the First Peoples made agreements with them based on the principles of coexistence. The agreement is validated by the two-row wampum belt that visually conveys two parallel purple lines of wampum shells (the colour purple representing power) against a background of white wampum shells (representing peace). The relationship between the First Peoples and the Europeans would be peaceful as long as the principles of a respectful co-equal friendship and alliance were maintained. This agreement visually displayed two separate rows running parallel, indicating the First Peoples were in one canoe, one vessel and the visitors to this land were in the other vessel following one waterway. Each vessel would remain on its own route and the two rows were never to meet. This symbolized the true meaning of co-existence and neither people were to neither make laws nor impose laws upon one another.²

The French and the British relied on the support of the First Peoples not only for their survival but also as crucial partners and allies during the wars between the French and British. The French and later the British recognized the First Peoples of North America as independent and self-governing nations which they signed treaties with. The Royal Proclamation of 1763 was testimony to this and recognized an inherent proprietary right that was subject to alienation via treaties.

TREATIES

First Nations today continue to view the treaties that were signed by their ancestors as 'living treaties-lasting agreements'. Treaty making did not begin with the arrival of Europeans- it was a process that had been developed long before. First Nations negotiated

¹ Behiels, Professor Michael D. "In Quest of the Holy Grail: The Assembly of First Nations' Campaign to Entrench the Inherent Right to Self-Government, 1968-1987." Department of History, University of Ottawa.

² Behiels. "In Quest of the Holy Grail: The Assembly of First Nations' Campaign to Entrench the Inherent Right to Self-Government, 1968-1987."

with each other to establish peace, regulate trade, share use of lands and resources and arrange mutual strategic alliances. These agreements were sealed according to Nation-specific customs that may have included pipe smoking or other ceremonies. By this process they gave the agreements the stature of sacred oaths. By the 1500's European and First Nations contact began to increase in numbers and complexity. Caution cooperation, not conflict, was the theme of this period that lasted into the eighteenth or nineteenth century. First Nations and Europeans viewed themselves as separate, distinct peoples with responsibility over their own affairs. This cooperation was formalized in two important ways.

- 1) As earlier noted the process set down in writing by British, French and other European negotiators and solemnized by First Nations in oral and visual records including wampum belts.
- 2) In Part the Royal Proclamation of 1763 stated, "Whereas it is just and reasonable, and essential to our interests and the security of our colonies, that the several Nations or tribes of Indians with whom we are connects and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominions and Territories as, not having been ceded to or purchased by us, are reserved for them, or any of them, as their hunting grounds."

The British colonial government's approach was vastly different. By signing treaties largely to acquire land, the government appeared to recognize the nationhood of First Nations peoples and their equality as nations. The First Nations, who were not accustomed to the written word, believed that whatever the treaty commissioners told them on behalf of the Crown during their talks would be accurately recorded in the treaty and would be honored for all future generations to come.

Often during the treaty-making process the treaty commissioners and the First Nations came together with vastly different perspectives and expectations. The First Nations sought protection from invading land-hungry settlers and the disruptions they sensed would follow. First Nations sought large areas of land that would allow them to continue to live as their ancestors had. The treaty commissioners on the other hand saw Indian reserves as places where Indians could learn to be settlers and farmers and abandon their old ways. For this and other reasons, the treaties were left hanging with many questions that are yet to be resolved by government and First Nations.

Each treaty contained different promises and provisions for the First Nations signatories. In general, in exchange for large areas of land, First Nations were promised certain benefits such as annual treaty payments (\$3 to \$5); continued rights to hunt and fish; provisions of schooling, medical care ammunition, and farm equipment, etc.

INDIAN ACT

The following extract is from Bill Henderson's website which notes relevant information pertaining to the Indian Act.³ "The *Indian Act* seems out of step with the bulk of Canadian law. It singles out a segment of society -- largely on the basis of race -- removes much of their land and property from the commercial mainstream and gives the Minister of Indian & Northern Affairs, and other government officials, a degree of discretion that is not only intrusive but frequently offensive. The Act has been roundly criticized on all sides: many want it abolished because it violates normative standards of equality, and these critics tend to be non-Aboriginal; others want First Nations to be able to make their own decisions as self-governing polities and see the Act as inhibiting that freedom. Even within its provisions, others see unfair treatment as between, for example, Indians who live on reserve and those who reside elsewhere. In short, this is a statute of which few speak well.

Historically, the Act evolved to protect the small share of Canada's land base that remained to our original peoples. Statutes dating back to the middle of the last century created the concept of 'status' to separate those who were entitled to reside on Indian lands and use their resources from those who were forbidden to do so. In this respect, the early legislation was an expression of the concepts set forth in the *Royal Proclamation of 1763*. The exemption of reserve lands from municipal taxation and seizure under legal process were other measures intended to secure those lands for the intended occupants: Indians themselves.

Status soon came to have other implications. Status Indians were denied the right to vote, they did not sit on juries, and they were exempt from conscription in time of war (although the percentage of volunteers was higher among Indians than any other group). The attitude that others were the better judges of Indian interests turned the statute into a grab bag of social engineering over the years. When the Potlatch and Sun Dance were seen as uncivilized, the *Indian Act* was used to ban them. Possession of liquor, on or off the reserve, was punished more harshly under the Act than by general laws. Loitering in poolrooms was forbidden. Indian children were removed from their homes, under the Minister's authority to educate them, and sent to residential schools. Children who were habitually absent from school were 'deemed' to be juvenile delinquents. Most telling in relation to this attitude was the definition of 'person' that was in the statute until 1951: "an individual other than an Indian". Indians could become persons by voluntarily enfranchising -- renouncing Indian status -- and, in many circumstances, were involuntarily enfranchised by the Act.

A famous statement in 1920 by Duncan Campbell Scott, poet, essayist and Deputy Superintendent General of Indian Affairs, encapsulates the prevailing attitude of his day: Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department."⁴

³ This information is quoted from and can be found at: <http://www.bloorstreet.com/200block/sindact.htm>

⁴ <http://www.bloorstreet.com/200block/sindact.htm>

SPECIAL STATUS

Post World War 2 developments hailed in the social welfare state, including the dismantling of the church and state dominance in First Peoples education (i.e. residential schools/ boarding schools) and the emergence of the movement for equal equality and the right to vote. To this point the Canadian Constitution as per section 91-24 provided the First Nations Peoples in Canada with somewhat of a special status in terms of the Indian Act of 1867 and its keeper the Department of Indian and Northern Development. With it the systems of treaties, reserves set aside for Indians and exclusive federal jurisdiction of Indians seemed threatened by these post war developments. The First Peoples feared these developments would undermine the treaties and the federal government's fiduciary responsibility for First Nations Peoples. The first move by the federal government to end the 'special status' of Canada's Aboriginal Peoples was in June 1969. Under the then Prime Minister Pierre Trudeau who issues an Indian Policy called the White Paper.⁵

CONSTITUTIONAL REFORM IN CANADA

Through our Aboriginal and treaty rights Aboriginal Peoples of Canada argued successfully for change in the countries constitutional status to become an integral part of the supreme law of Canada. It is not until the 1970's that the First Peoples had recourse to the concepts of inherent right. Stemming from the agreements made between the First Peoples and the Federal government of Canada, the Federal Government holds a fiduciary responsibility to the First Peoples.

From the book edited by Marie Battiste, *Reclaiming Indigenous Voice and Vision* I quote the following:⁶ The colonialists asserted exclusive parliamentary jurisdiction over Indians, and land reserved for Indians and delegated powers from the imperial Crown. Provincial governments may only exercise authority over these peoples under a lawful delegation of the federal power. The supremacy of Parliament, the elected voice of the immigrants, was restricted by the 1982 constitution reform. Section 35 (1) of the Constitution Act, 1982, declares, "The existing aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed." Section 35 refers to two distinct categories of rights: rights of 'Aboriginal' or customary origin, 10 and rights derived from specific written treaties that are an integral part of the supreme law of Canada. Constitutional respect for these rights continues our Aboriginal identity on this continent. It links the original treaty federalism with the colonial order. Creating this balance was a condition of Canadian independence from the imperial parliamentary supremacy over Canadian legislation. It was a belated nation building process to create a significant postcolonial Canada. Lord Denning concluded that the United Kingdoms responsibilities to these rights have been delegated to Canada; that No parliament should

⁵ Behiels. "In Quest of the Holy Grail: The Assembly of First Nations' Campaign to Entrench the Inherent Right to Self-Government, 1968-1987."

⁶ Battiste, Marie. (editor and contributor) "Reclaiming Indigenous Voice and Vision." UBC Press, Vancouver, B.C. 2000.

do anything to lessen the worth of these guarantees. The Crown in respect of Canada so long as the sun rises and the river flows should honour them. That promise must never be broken. Similarly the Charter provides special protection for these rights. It states that the Charter does not affect Aboriginal rights and freedoms: “the guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to Aboriginal peoples of Canada. These two constitutional sections are complimentary, and they locate a constitutional home for Aboriginal rights. They affirm and protect Aboriginal rights as fundamental rights in the conscious of the nation. In locating a constitutional place for Aboriginal and treaty rights, these sections also locate a constitutional source for Aboriginal orders, visions, and dream lines. Since our transformation was led by Aboriginal visions and was not controlled or directed by any delegated powers from London, our constitutional reforms have perplexed colonial legal scholars, who have had a difficult time understanding the contextual shifts introduced by the new words in the constitution. The dominant response of Canadian politicians, judges, lawyers, and scholars is to pretend not too understand the constitutional reforms or even the meaning of section 25 and 35. They assert that they cannot understand the meaning of Aboriginal rights or treaty rights and imply that is beyond their superior intellect to comprehend such sui generis rights. All of this incomprehension is contrived. These reforms insist on the end of colonization in Canada and the development of a more equitable society and an extraordinary legal system. Such thoughts seem fair to us and so unrealistic to those in power and their supporters. Canadians have a responsibility to discover the new constitutional order of Canada. They have to discover how their colonial contexts have been transformed into postcolonial government.⁷

Indigenous Rights in International Law (Marie Battiste):⁸

Indigenous Lawyers in Canada moved from constitutional debates to the UN Working Group on Indigenous Populations 19 to assist Indigenous leaders and lawyers to create new standards for Indigenous peoples in both international and UN Law. The most comprehensive task was negotiating the Indigenous and tribal Peoples Convention in 1989 (the ILO-169), which defined Indigenous self-government and cultural rights in national and labour contexts. It recognized Indigenous peoples rights to self-development, cultural and institutional integrity, territory, and environmental and human security. Like many Indigenous peoples around the globe we learned to lobby the UN general Assembly and were successful in getting the assembly to proclaim the International Year of the Worlds Indigenous Peoples (1990) and later the International decade of the Worlds Indigenous Peoples. These resolutions assert a new relationship between Aboriginal Peoples and the member states of the United Nations, described as a partnership and stressing cooperation. The Indigenous network could lobby for and create new standards and describe the new vision, but we could not get the UN agencies or member states to implement our visions. Other international processes the First Nations peoples have been involved with were Agenda 21 and the World Summit of Sustainable Development, the World Conference on Racism in Durban South Africa, the

⁷ Battiste. “Reclaiming Indigenous Voice and Vision.”

⁸ Battiste. “Reclaiming Indigenous Voice and Vision.”

UN Convention on Biological Diversity, the World Women's Conference in Beijing as well as Beijing + 5 where Indigenous women of the world gathered in New York City. In many of these conferences First Nations lobbied for special provisions and inclusions of Indigenous peoples as distinct social partners, thus, reflecting in the UN Documents an Indigenous vision of our humanity for all people to see the vision of an ecological theory of good order and human rights.

The UN Declaration on the Rights of Indigenous peoples aims to address the dreadful gap between the life situations and human rights of Indigenous peoples and other peoples. The UN Charter and the Human Rights Covenants 28 declared self-determination and certain human rights to be universal, but most governments have interpreted them as not applying to Indigenous Peoples. We argued that Indian peoples are 'peoples' under the UN charter and the covenants. The declaration is an interpretative tool for applying the UN Human Rights covenants to Indigenous Peoples of the earth and to begin a belated design for postcolonial nation building. After 12 years of debate and reconciliation, we reached a broad consensus among the UN human rights experts and the Indigenous partners on a proper interpretative declaration, which articulates forty-five articles that set standards for Indigenous Peoples human rights. The declaration is not legally binding on member states until the UN General Assembly passes it.

The Assembly of First Nations has been involved with the UN Working Group on the Draft Declaration established in 1995 to address the pressures from member states not to adopt the declaration as is. The Sub commission passed the declaration but the Human Rights Committee found its articles too threatening. The review Committee found them consistent with existing UN human rights. Indigenous Peoples have taken the position in the nation states working that we will accept no changes to or censorship of the existing compact in the declaration. The states have no authority to appropriate our visions or our consensus for their purposes. Human rights are universal and not relative. Indigenous Peoples feel it would be pointless to accept human rights standards lower than those that apply to other peoples of the United Nations, because this would mean accepting our legal inferiority. Never before have victims of colonization been asked to celebrate their inferiority and to feel guilty about wanting equality with other peoples.

From an essay by Ted Moses of the Grand Council of the Crees he indicates: "The Declaration on the Rights of Indigenous Peoples is essentially an instrument that attaches the Indigenous Peoples to the basic human rights instruments that already existed. This should not have been necessary. It became necessary because certain states – Canada was one of the most insistent – proposed that the international recognition of the status and rights of the Indigenous peoples be contingent upon the effect this recognition would have on municipal law. In other words, states such as Canada deny our status in international law in order to avoid the recognition of the rights and status would confer upon the Indigenous peoples. This is in itself the most blatant form of racial discrimination, yet it is put forward as government policy without the least embarrassment. Thus when Indigenous peoples proclaim themselves to be 'peoples' who are subjects of international law, there is a chorus of objectifies from various states such

as Canada, France, Brazil, India to name a few-that believe their interests would be adversely affected by the recognition of our status.”

SELF DETERMINATION AND INHERENT RIGHT

What does the Assembly of First Nations (AFN) mean when using the term self-determination?

National Chief Matthew Coon Come has stated that “all peoples have the right of self-determination” as stated in the *International Bill of Rights* of the United Nations. Self-determination refers to the right of a people to freely (1) determine their political status and freely pursue their economic, social, and cultural development and (2) dispose of and benefit from their wealth and natural resources. Under international treaty law, Canada is obligated to respect the First Nations’ right of self-determination.

During the World Summit on Sustainable Development the AFN was instrumental in coordinating a meeting of Aboriginal advisors to lobby Canada’s Environment Minister to ensure Indigenous Peoples preferred text was implemented into the Final Political Declaration. Indigenous Peoples gained unprecedented recognition of their right of self-determination at the (WSSD), as member states adopted a Political Statement and Plan of Implementation in the final moments of the Summit and agreed to the inclusion of an addendum as follows: “We reaffirm the vital role of Indigenous Peoples in sustainable development.” For the first time in UN history, the term ‘Indigenous Peoples’ was adopted in a UN document without qualification. The ‘S’ issue, which acknowledges the collective rights of Indigenous Peoples, has been an item of contention since Indigenous Peoples first knocked on the doors of the UN in 1977, demanding a place at the table.

MODERN DAY TREATIES

Are the Nisga’a Agreement, the James Bay and Northern Quebec Agreement as well as Nunavut.

The creation of the Royal Commission on Aboriginal Peoples (RCAP)

Excerpt from the RCAP report: In the late 1980’s and 1990’s Canada attempted to deal with Aboriginal issues and settle the many concerns that were being raised. The RCAP was given a mandate to “deal with an accumulation of literally centuries of injustice”. The RCAP was given the direction to investigate and make concrete recommendations concerning a vast array of unsettled issues...” After some 500 years of a relationship that has swung from partnership to domination, from mutual respect and co-operation to paternalism and attempted assimilation, Canada must now work out fair and lasting terms of coexistence with Aboriginal people. The Commission identified four compelling reasons to do so:

- Canada's claim to be a fair and enlightened society depends on it.

- The life chances of Aboriginal people, which are still shamefully low, must be improved.
- Negotiation, as conducted under the current rules, has proved unequal to the task of settling grievances.
- Continued failure may well lead to violence.

Canada as a Fair and Enlightened Society

Canada enjoys a reputation as a special place - a place where human rights and dignity are guaranteed, where the rules of liberal democracy are respected, where diversity among peoples is celebrated. However, this reputation represents, at best, a half-truth. A careful reading of history shows that Canada was founded on a series of bargains with Aboriginal peoples - bargains this country has never fully honored. Treaties between Aboriginal and non-Aboriginal governments were agreements to share the land. They were replaced by policies intended to:

- remove Aboriginal people from their homelands.
- suppress Aboriginal nations and their governments.
- undermine Aboriginal cultures.
- stifle Aboriginal identity.

It is now time to acknowledge the truth and begin to rebuild the relationship among peoples based on honesty, mutual respect and fair sharing. The image of Canada in the world and at home demands no less. (RCAP) final report

The National Chief Matthew Coon Come often stated in his speeches the following fact: "Four years ago, the United Nations Human Rights Committee re-assessed Canada's compliance with its international human rights obligations. It declared that the situation facing aboriginal peoples in Canada is the most serious human rights challenge facing that country. As the U.N. reminded Canada, this fundamental human right includes the right to determine our own political future, to enjoy our natural wealth and resources, and never to be deprived of our own means of subsistence. For Aboriginal Peoples in Canada, full respect for our right of self-determination would mean political, economic and cultural survival. For non-Aboriginal Canadians and governments it would simply mean sharing the extraordinary wealth of that G8 country. Or in the words of the 1996 Royal Commission on Aboriginal Peoples, it would entail Redistribution of lands and resources, and to remedy the gross disparities between Aboriginal peoples in Canada and non-Aboriginal Canadians. Many Aboriginal peoples in Canada live in 'Third World' conditions. According to a recent official study, our ranking is approximately 63rd on the UNDP scale.

PERMANENT FORUM ON INDIGENOUS ISSUES:

At the recent Permanent Forum on Indigenous Issues in New York City, the Assembly of First Nations advocated for the participation of Indigenous women in the UN. It was

decided that the next session in 2004, the Permanent Forum's theme would be 'Indigenous Women'. Historically and traditionally, First Nations women held important social, political and cultural roles. Indigenous women often held leadership roles and even when this was not the case, were treated as equals in decision-making. In many First Nations societies in what is now known as North America, First Nations women served as Chiefs (or determined who the chief would be, as in the Iroquois Confederacy⁹ and were responsible for the most essential role of transmitting the history language and the culture to the children. In many cases, First Nations societies were matrilineal, and women owned the family assets. As part of AFN's Intervention to the UN Permanent Forum, part of the following statement was made on behalf of First Nations women. "It has never been lost to us that women are the backbone of the nations and not only until our women are uplifted, will the children choose to continue to die, rather than to live." This is in reference to our high suicide rate of our children and youth which is seven times the national average. As Indigenous Women, we have determined it is time to reclaim our positions and demand an end to the long history of oppression and violence against our women and children and the continued oppression by state regimes. We have mounted a campaign through our communities to use the venue of the "Unity Ride and Run" at the International Elders Summit. An AFN resolution endorsing the Unity Ride and Run and International Elders Summit is a vehicle in which First Nations may choose to deal with the historical trauma carried for generations by the worlds Indigenous Peoples. The International Elders Summit will produce affirmative recommendations not only for government, but also in our communities, where the Grandmothers will take affirmative action for the future of our peoples.

In closing, I would like to extend an invitation to those assembled here and to those from your home lands to join the Assembly of First Nations in the Unity Ride and Run and International Elder's Summit taking place in 2004.

⁹ See for example Jerry Mander In the Absence of the Sacred: The failure of Technology and the Survival of Indian Nations. Sierra Club Books 1991

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