**TREATY FEDERALISM - A PATH TOWARDS A CONSITUTIONAL & SOCIO-ECONOMIC RECONCILIATION BETWEEN CANADIANS AND FIRST NATIONS**

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AS A RESULT OF COLONIALISM, THE RESIDENTIAL SCHOOL LEGACY, THE INDIAN ACT OF 1876, TREATY RIGHTS WERE ROUTINELY IGNORED AND DISRESPECTED BY CANADIAN GOVERNMENTS UNTIL 1982 - THE YEAR THAT ABORIGINAL AND TREATY RIGHTS WERE CONSTITUTIONALLY PROTECTED. THE CONSTITUTION ACT OF 1982, SECTION 35(1) STATES:

35.(1) THE EXISTING ABORIGINAL AND TREATY RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA ARE HEREBY RECOGNIZED AND AFFIRMED.

WHEN CANADA ACHIEVED ITS POLITICAL INDEPENDENDENSE FROM GREAT BRITAIN IN 1867, THE FOUNDING FATHERS SUCH AS JOHN A. MACDONALD AND ALEXANDER MACKENZIE IGNORED INDIAN TREATY RELATIONS.INSTEAD, FIRST NATIONS WERE TREATED AS WARDS OF THE FEDERAL GOVERNMENT NO BETTER THAN FEDERAL PRISIONERS, THE MENATLLY ILL AND FOSTER CHILDREN. THAT IS 150 YEARS OF LACK OF FREEDOM AND EQUALITY IN A "FREE AND DEMOCRATICE SOCIETY". SUCH TREATMENT IS CONTRARY TO THE HISTORIC TREATIES SUCH AS THE GREAT PEACE OF MONTREAL WITH NEW FRANCE IN 1701, THE TREATY OF NIAGARA OF 1764, AND THE ROYAL PROCLAMATION OF 1763, WHICH IS REFERRED TO AS "THE MAGNA CARTA OF INDIGENOUS RIGHTS". IT WAS RATIFIED AT FORT NIAGARA BY THE BRITISH AND OVER 2000 MOHAWK PEOPLE REPRESENTING 24 DISTINCT NATIONS. ITS NATION-TO-NATION SIGNIFICANCE CAN BE FOUND IN ITS INTENT. THE BRITISH RECOGNIZED INDIGENOUS SOVEREINTY AND INDIAN TITLE IN THE YEARS PRECDING THE AMERICAN WAR OF INDEPENANCE (1775 - 1783) AND THE WAR OF 1812. INDIGENOUS NATIONS FOUGHT ON THE BRITISH SIDE AS ALLIES IN BOTH WARS. AS A RESULT GOVENOR SIR WILLIAM JOHNSON CONCLUDED THAT TREATIES WITH INDIGENOUS NATIONS MUST BE RESPECTED AND GIVEN THEIR FULL EFFECT.

THOSE EARLY HISTORIC TREATIES LAID THE CORNER STONE FOR LATER TREATIES WITH FIRST NATIONS, SUCH AS THE VICTORIAN TREATIES (1871 - 1921) COVERING ABOUT 50% OF THE CANADIAN LAND MASS. CANADA AND THE PR0VINCES HAVE NEVER THANKED FIRST NATIONS FOR THEIR GENEROUS GIFT WHICH CONTINUES TO ENRICH PROVINCIAL RESOURCE REVENUES, ESPECIALLY ALBERTA'S. THE SO CALLED "HAVE NOT PROVINCES" SUCH AS QUEBEC AND THE MARITIME PROVINCES CONTINUE TO ENJOY GREAT BENEFITS IN THE $$$BILLIONS FROM CANADA'S ABUNDANT NATURAL RESOURCES. FIRST NATIONS CONTINUE TO BE EXCLUDED FROM SUCH WEALTH THAT ARE EXTRACTED FROM THEIR TRADITIONAL TERRITORIES. IT IS OBVIOUS THAT THE STATUS QUO CANNOT BE ALLOWED TO CONTINUE.

THERE ARE CERTAIN TRUTHS THAT MUST BE ACKNOWLEDGED IN ORDER TO CRAFT A NEW BEGINNING FOR CROWN - INDIGENOUS RELATIONS.

1. FIRST NATION TREATIES FROM THE EARLIEST TIMES HAVE SERVED AS THE BACK BONE OF CANADIAN CONFEDERATION.

2. THERE ARE THREE (3) FOUNDING NATIONS: FIRST NATIONS, THE FRENCH AND THE ENGLISH

3. THERE ARE THREE (3) DISTINCT LEGAL ORDERS IN CANDA: ABORIGINAL LAW, THE FRENCH CIVIL CODE AND THE ENGLISH COMMON LAW.

4. FIRST NATION TREATIES MADE POSSIBLE AN ORDERLY AND PEACEFUL EUROPEAN SETTLEMENT ON INDIGENOUS TERRITORIES.

5. FIRST NATION TREATIES ARE NOT LAND SURRENDER TREATIES CONTRARY TO THE FEDERAL POSITION BUT ARE MEANT TO SHARETHE BOUNTY OF THE LAND. "SHARING" IS AN IMPORTANT VALUE OF FIRST NATIONS AND THAT IS THE WAY THEY UNDERSTOOD THE TREATIES.

6. THE DIVISION OF CANADIAN CONSTUTIONAL POWERS MADE NO PROVISION FOR THE EXERCISE OF ABORIGINAL AND TREATY RIGHTS, EXCEPT FOR THE FEDERAL INDIAN ACT OF 1876 WHICH PROVIDES UNLATERAL DECISION MAKING POWERS TO PARLIAMENT IN RELATION TO INDIGENOURS AFFAIRS. CANADIAN CONSTITUTIONAL FEDERALISM SERVES THE GOVERNANCE OF EUROPEAN SETTLER AFFAIRS VIA SECTIONS 91 AND 92 AND IT IS SILENT ON INDIGENOUS AFAIRS.

SO WHAT ARE ABORIGINAL PEOPLES OF CANADA CALLED UPON TO DO WITH SUCH OBVIOUS CONSTITUTIONAL OMISSION?

II

A PARADIGM SHIFT IN CANADIANS' THINKING AND ATTITUDES IS REQUIRED IN ORDER TO MAKE RECONCILIATION POSSIBLE

FIRSTLY, THERE MUST BE A SIGNIFICANT PARADIGM SHIFT AWAY FROM THE THREE PILLARS OF CANADIAN PREJUDICE: (1) DENIAL OF INDIGENOUS LEGAL RIGHTS, (2) DOMINATION BY FEDERAL AND PROVINCIAL LAWS AND POLICY, AND (3) DISPOSSESSION OF ABORIGINAL PEOPLES FROM THEIR TREATY RIGHTS TO RESOURCE REVENUES. SUCH PARADIGM SHIFT CAN OCCUR UNDER THE RUBRIC OF TREATY FEDERALISM WHICH IS A CONCEPT AND A PRINCIPLE FOR EQUALITY. TREATY FEDERALISM IS NOT NEW. IT IS AS OLD AS THE EARLIEST TREATIES BETWEEN INDIGENOUS NATIONS AND EUROPEANS SUCH AS THE TREATY OF NIAGARA OF1764.

THE THREE PILLARS OF CANADIAN PREJUDICE STEM DIRECTLY FROM THE DOCTRINE OF DISCOVERY WHEREIN POPE ALEXANDER VI ISSUED THE PAPAL BULLS THAT STATED NON-CHRISTIANS ARE NOT ENTITLED TO OWN LAND THEREFORE CHRISTIAN KINGS IN SPAIN CAN SEIZE THEIR LANDS IN NORTH AND SOUTH AMERICA. THE PAPAL BULLS SHAPED TODAYS' ARGRUMENTS AGAINST RECOGNIZING TREATY AND ABORIGINAL RIGHTS IN CANADA SUCH AS THE TREATY RIGHT TO FISH BY THE MICMAQS IN THE MARITIMES.

TREATY FEDERALISM IS DEFINED BY LEGAL SCHOLARS SUCH AS SAKEJ YOUNGBLOOD HENDERSON, A MIKMAQ, FROM THE UNIVERSITY OF SASKATCHEWAN LAW SCHOOL. ACCORDING TO SAKEJ, TREATY FEDERALISM'S PRIMARY OBJECT IS AIMED AT SECURING INTERNAL TRIBAL SOVEREIGNTY OR DOMESTIC DEPENDENT NATIONHOOD CONSISTENT WITH LIBERAL AND DEMOCRATIC PRINCIPLES THAT CHARACTERIZE WESTERN POLITICAL SOCIETIES SUCH AS "CONSENT OF THE GOVERNED", "EQUAL AND FAIR REPRESENTATION IN THE INSTITUTIONS OF GOVERNMENT", AND MOST IMPORTANTLY, "ECONOMIC RESCIPROCITY". A LOT OF SUCH DEMOCRATIC PRINCIPLES HAVE ALREADY BEEN LAID IN FIRST NATION TREATIES DATING BACK TO PRE- CONFEDERATION TIMES. TREATY FEDERALISM RECOGNIZES THE PERMANENT UNION OF BOTH INDIGENOUS PEOPLES AND EUROPEAN SETTLERS. INDIGENOUS NATIONS OF NORTH AMERICA DO INDEED OCCUPY A SPECIAL STATUS UNLIKE ANY OTHER GROUP IN SOCIETY.

SO WHY ARE INDIGENOUS PEOPLES OF CANADA REMAIN IMPOVERISHED COMMUNITIES IN SPITE OF THEIR SPECIAL CONSTITUTIONAL STATUS? THERE ARE SEVERAL EXPLANATIONS FOR THIS:

1. AFTER INDIGENOUS NATIONS WERE SUBDUED BY RAPID EUROPEAN IMMIGRATION, THE FATHERS OF CONFEDERATION SIMPLY IGNORED THEIR TREATY OBLIGATIONS TOWARDS INDIGENOUS PEOPLES. .

2. THE VICTORIAN TREATIES PROVIDE FIVE (5) SIGNIFICANT GUARANTEES: (I) EDUCATION "TO LEARN THE CUNNING OF THE WHITEMAN", (II) HEALTH SERVICES, (III) ECONOMIC ASSISTANCE "TO LIVE IN THE FUTURE IN SOME OTERH WAY WHEN THE BUFFALO ARE NO MORE" (IV) RIGHTS TO HUNTING, FISHING AND TRAPPING, AND (V) "NO TAXATION OF ANY KIND" IN TREATY 8 OF 1899.

3. THE EDUCATION TREATY CLAUSE IN THE VICTORIAN TREATIES WAS DISTORTED BY THE MACDONALD GOVERNMENT AND INSTEAD WAS USED AS A METHOD TO DESTROY INDIGENOUS CULTURES AND LANGUAGES OR "TO KILL THE INDIAN IN THE CHILD". THE CHRISTAIN CHURCHES WERE CALLED UPON TO ADMINISTER THE CULTURAL GENOCIDAL POLICIES. THE MACDONALD GOVERNMENT CREATED THE INDIAN RESIDENTIAL SCHOOL SYSTEM ACROSS CANADA. IN 1883, THE INDIAN RESIDENTIAL SCHOOLS BECAME THE CENTRAL ELEMENT OF FEDERAL INDIAN POLICY WHOSE BASIC AIM WAS TO ASSIMILATE INDIGENOUS PEOPLES INTO THE CANADIAN POLITY.

4. FEDERAL CULTURAL GENOCIDAL PRACTICES REMAINED HIDDEN FROM CANADIANS UNTIL THE REPORT OF THE ROYAL COMMISSION ABORIGINAL PEOPLES WAS PUBLISHED IN 1996. UP UNTIL THAT TIME, ABORIGINAL STUDIES WERE NOT TAUGHT IN CANADA'S PUBLIC SCHOOL SYSTEMS. THEREFORE CANADIANS REMAINED GENERALLY ILL-INFORMED OF ABORIGINAL ISSUES. EVEN AS LATE AS 1969, PRIME MINISTER PIERRE ELLIOT TRUDEAU WANTED TO UNILATERALLY ABOLISH CANADA'S INDIAN TREATIES, INCLUDING THE INDIAN ACT AND TO SHIFT RESPONSIBILITY FOR ABORIGINAL AFFAIRS TO THE PROVINCES. THE FINDING OF UNMARKED CHILDRENS' GRAVES IN KAMLOOPS LEAD TO THE STARK REALITY OF THE HORRORS OF THE RESIDENTIAL SCHOOLS.

III

IS THERE A PLAUSIBLE & HONOURABLE RESOLUTION?

YES THERE IS. IT IS CALLED "RESOURCE REVENUE SHARING" WITH THE PROVINCES SUCH AS ALBERTA.

WE CAN BEGIN BY FIRST ACKNOWLEDGING THE FACT THAT CANADA'S INDIAN TREATIES ARE NOT LAND SURRENDER TREATIES BUT REMAIN AS LAND AND RESOURCE SHARING AGREEMENTS.

TREATY FEDERALISM PROVIDES THE CONSTITUTIONAL MECHANISM AND THE RATIONAL FOR THE INCLUSION OF INDIGENOUS ECONOMIC INTERESTS IN CANADA'S FISCAL DISTRIBUTIVE SYSTEM.

IT MUST BE CONSIDERED THAT WHEN HBC TRANSFERED ITS FUR TRADING INTERESTS IN REPURT'S LAND, INCLUDING THE NORTHWESTERN TERRITORIES IN 1867 TO CANADA, THE U.K. GOVERNMENT OBLIGATED CANADA , PURSUANT TO TERM 14 OF THE RUPERT'S LAND ORDER TO MAKE ADEQUATE PROVISIONS FOR THE PROTECTION OF ABORIGINAL INTERESTS THAT WERE INVOLVED IN THE LAND TRANSFER AT ISSUE AS FOLLOWS:

"14. ANY CLAIMS OF THE INDIANS TO COMPENSATION FOR THE LANDS REQUIRED FOR THE PURPOSES OF SETTLEMENT SHALL BE DISPOSED OF BY THE CANADIAN GOVERNMENT IN COMMUNICATION WITH THE IMPERIAL GOVERNMEMT; AND THE COMPANY SHALL BE RELIEVED OF ALL RESPONSIBILITY IN RESPECT OF THEM".

SUCH STIPULATION WAS NOT ALWAYS RESPECTED NOR FOLLOWED BY THE PROVINCIAL GOVERNMENTS ESPECIALLY BY BRITISH COLUMBIA AND THE MARITIME PROVINCES AND WE HAVE ALL WITNESSED THE INTERNAL TURMOIL CAUSED BY SUCH UNWARRANTED MALFEASANCE SUCH AS ROADBLOCKS, INDIGENOUS CONFRONTATIONS WITH THE RCMP. THE WORST BEING THE OKA CRISIS OF 1990 THAT SAW A QPP POLICE OFFICER KILLED,

WE SHOULD NOT HAVE TO KEEP DEFERRING TO THE COURTS TO RESOLVE SUCH LONG STANDING CONSTITUTIONAL MATTERS. WE HAVE ALL THE HUMAN AND FINANCIAL RESOURCES TO RESOLVE SUCH ISSUES AMICABLY.

IV

THE PROPOSAL

IT IS PROPOSED THAT CANADA`S EQUALIZATION PROGRAM BE AMENDED AND TO BE INCLUSIVE OF THE ECONOMIC INTERESTS OF INDIGENOUS NATIONS, ESPECIALLY WITHIN ALBERTA`S OIL WEALTH DISTRIBUTIVE SYSTEM WHICH GARNER $$BILLIONS IN RESOURCE REVENUES EACH FISCAL YEAR. IT IS NO LONGER JUSTIFIABLE THAT FOREIGN INTERESTS AND OTHER PROVINCES CONTINUE TO BENEFIT FROM ALBERTA`S OIL WEALTH WHILE FIRST NATIONS CONTINUE TO BE EXCLUDED FROM SUCH WINDFALL PROFITS. AS FORMER NATIONAL CHIEF, PERRY BELLEGARDE ONCE STATED:

``WE DID NOT SIGN TREATIES TO LIVE IN POVERTY. WE DID NOT CEDE OR RELINQUISH RESOURCE RIGHTS. WE SAID WE`D SHARE THIS LAND. THE TREATIES WERE NOT MEANT TO MAKE ONE SIDE POOR AND ONE SIDE RICH. WE WILL NO LONGER ACCEPT POVERTY AND HOPELESSNESS WHILE RESOURCE COMPANIES AND GOVERNMENTS GROW FAT OFF OUR LANDS AND TERRITORIES AND RESOURCES. IF OUR LANDS AND RESOURCES ARE TO BE DEVELOPED, IT WILL BE DONE ONLY WITH OUR FAIR SHARE OF THE ROYALTIES, WITH OUR OWNERSHIP OF THE ROYALITIES AND JOBS FOR OUR PEOPLE. IT WILL BE DONE ON OUR TERMS AND OUR TIMELINE``

AS WELL, OUR LATE PREMIER, THE HON. JIM PRENTICE ALSO ADDED AS FOLLOWS:

``I DON`T BELIEVE THERE WILL BE PIPELINES TO THE WEST COAST UNTIL THERE ARE MEANINGFUL ECONOMIC OPPORTUNITIES FOR FIRST NATIONS AND ABORIGINAL INTERESTS``

OUR CURRENT PREMIER, THE HON. DANIELLE SMITH STATED THAT CANADA`S EQUALIZATION PROGRAM IS POORLY DESIGNED; THAT IT SHOULD BE REVISED TO BENEFIT ONLY THE PROVINCES WITH LOW POPULATIONS AND LOW REVENUES ``ONLY TO ENSURE THAT THEY HAVE THE SAME SERVICES AS EVERY ONE ELSE FOR ROUGHLY THE SAME TAXES FEDERAL FISCAL TRANSFERS IS MORE THAN ONE AND A HALF TIMES AS MUCH AS B.C. AND ONTARIO COMBINED. WITHOUT A DOUBT, ABORIGINAL COMMUNITIES WOULD EASILY QUALIFY FOR SUCH TRANSFERS.

THE TREATY ANNUITY CLAUSE PROVIDES THE BEST MECANISM FOR RESOURCE REVENUE SHARING. HOWEVER AND CURRENTLY THE YEARLY TREATY ANNUITIES ARE MINISCUL AT THE MOST @ $12.00 PER YEAR PER PERSON WITH NO CHANCE FOR THAT AMOUNT TO EVER INCREASE.

WE CAN TAKE A LESSON FROM THE ROBINSON-HURON TREATY OF 1850, WHICH COVERS THE NORTHERN SHORES OF LAKES HURON AND SUPERIOR IN ONTARIO, 21 ANISHINAABE NATIONS SIGNED A TREATY WITH THE FEDERAL CROWN. IT PROVIDED INITIAL PAYMENTS OF $1.70 PER PERSON AND INCREASED TO $4.00 IN 1875 AND HAS NOT INCREASED SINCE THAT TIME. THE TREATY PROMISED THAT IF THE TERRITORY IN QUESTION BEGAN PRODUCING ENOUGH RESOURCE WEALTH, THE CROWN WOULD INCREASE THE ANNUITY PAYMENTS "FROM TIME TO TIME" IF RESOURCE REVENUES ALLOW. THE 21 ANISHINAABE NATIONS TOOK THEIR GREVIENCE TO THE COURT OF APPEAL FOR ONTARIO, WHICH FOUND THAT THE CROWN HAD VIOLATED THE TERMS OF THE TREATY BY CAPPING THE ANNUAL TREATY PAYMENTS TO $4.00 PER YEAR FOR MORE THAN A CENTURY. THE SURRENDERED AREA CONTAINS VAST AMOUNTS OF TIMBER AND MINERAL WEALTH WHICH ARE UNDER PROVINCIAL JURISDICTION. THE FEDERAL GOVERNMENT CURRENTLY PAYS THE ANNUITY.

AS A RESULT OF THE COURT'S DECISION, THE 21 ANISHINAABE NATIONS AGREED TO AN OUT-OF-COURT SETTLEMENT OF $10 BILLION WITH BOTH THE FEDERAL AND PROVINCIAL GOVERNMENTS SUBJECT TO SUBSTANTIVE NEGOTIATIONS AND CONSULTATIONS ON A GO-FORWARD PLAN ON HOW TO SHARE RESOURCE REVENUES GENERATED FROM THE ANISHINAABE TERRITORY.

THE LESSON TO BE LEARNED IS THAT IF THE VICTORIAN TREATIES OF 1871 TO 1921 CONTINUE TO PROVIDE ONLY MINISCULE ANUITY PAYMENBTS FROM RESOURCE REVENUES OF THE PROVINCES, SIMILAR CASES WILL ARISE ACROSS THE COUNTRY SEEKING IMPROVED RESOURCE REVENUE SHARING ARRANGEMENTS BASED ON HONOURING TREATY PROMISES. THIS SENARIO NEED NOT HAPPEN IF GOVERNMENTS CAN AGREE TO RESPECT AND ACCOMODATE THEIR RESPECTIVE TREATY OBLIGATIONS TOWARDS FIRST NATIONS THAT HAVE ENTERED VOLUNTARILY INTO SIGNING AGREEMENTS WITH THE CROWN TO ALLOW ACCESS TO THEIR LANDS AND RESOURCES.

THE RATIONAL

THE RATIONAL THAT SUPPORT A RESOURC REVENUE SHARING AGREEMENTS WITH THE PROVINCE OF ALBERTA ARE AS FOLLOWS:

* CANADA'S INDIAN TREATIES ARE NOT LAND SURRENDERS BUT MEANT TO SHARE THE LAND AND RESORCES TO BENEFIT BOTH PARTIES.
* THE PROVINCE OF ALBERTA HAS CO-EXISTING TREATY OBLIGATIONS BECAUSE IT BENEFITED FROM TREATIES 6, 7 & 8 PURSUANT TO THE NATURAL RESOURCES TRANSFER AGREEMEN (1930), IN PARTICULAR SECTIONS 92A & 109 OF THE CONSTITUTION ACT, 1982, ARE SUBJECT TO "ANY TRUSTS & ANY INTEREST" THEREIN BELONG TO FIRST NATIONS. THE COURTS HAVE DETERMINED THAT "TRUSTS & INTERESTS" HAVE CREATED THE CROWN'S FIDUCIARY RESPONSIBILITY TO INDIGENOUS PEOPLES.
* THE TREATY OBLIGATION TO PAY INDIAN ANNUITIES IMPOSED A TRUST ON PROVINCIAL LANDS. *MIKISEW* [2005]
* THE HONOUR OF THE CROWN INFUSES EVERY TREATY AND THE PERFORMANCE OF EVERY TREATY OBLIGATION. *MIKISEW* [2005]

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