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ASSEMBLY OF FIRST NATIONS (AFN)
REVIEW OF DEVELOPMENTS: CANADA 1987-88:

PRESENTATION TO THE UNITED NATIONS
WORKING GROUP ON INDIGENOUS POPULATIONS

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UNITED NATIONS WORKING GROUP ON INDIGENOUS POPULATIONS

REVIEW OF DEVELOPMENTS: CANADA 1987-88:

1. Madame Chairperson and members of the Working Group, I am pleased to have the opportunity to speak to you on behalf of the Assembly of First Nations (AFN) regarding developments which have taken place in Canada over the past year.
2. Keeping in mind the major focus of the Working Group, that is, development of standards relating to indigenous people's rights, we are pleased with the progress that has been made in the past year regarding the standard setting process, and in particular we commend Madame Daes on the contents of her draft working paper. The Assembly of First Nations (AFN) has developed a response to the working paper which we would like to table at this time, and we trust that it will contribute positively to the Working Group's efforts. I will now turn to a review of this past year's developments in Canada, in light of the need for a strong and enforceable Universal Declaration of Indigenous People's Rights.
3. The past twelve months have been good for Canada, in strictly economic terms. Canada's gross domestic product has grown by an annual average of 4.2% since 1982, well above the other western industrialized nations. At the same time, corporate profits have increased substantially. Regrettably, Madame Chairperson and members of the Working Group, I must report to you that First Nations of Canada have, as in the past, been excluded from the benefits of this prosperity. In fact, Canada's national development continues to be founded upon the marginalization of indigenous societies and the destruction and displacement of traditional economies. Beyond this, when one factors in population increases among First Nations and inflation, federal expenditures on Indian people have experienced a significant decline since 1984-85.
4. Land and resources are essential for the survival of a people. Without them, the maintenance of indigenous societies is at risk, let alone their development and enhancement. First Nations in Canada are experiencing growing restrictions on the use of land and resources within their traditional territories, and this continues to have a destabilizing effect on indigenous economic, social and political institutions.

5. Canada measures about 9.9 million square kilometres in size. Indigenous peoples hold legal title to less than 1/2% of this total. This is not enough to provide for basic housing needs in the case of many First Nation communities, and for most, far below the minimum which would be required to provide the economic basis for self-sufficiency. Events of the past year have made the problem even more acute.
6. A new federal government policy on the creation of and addition to reserve lands has made it more difficult, if not impossible, for First Nations to obtain lands. At the same time, large increases in the "officially recognized" citizenship rolls of First Nations, as a result of federal government legislation, have added substantially to the population pressures within existing First Nation communities. The combined effect of these initiatives stands to have a devastating impact on all aspects of indigenous societies in Canada.
7. In areas of Canada where First Nations have entered into treaty relations with the Crown, the allocation of lands and resources remains an unresolved issue. Competing jurisdictions and competing economic regimes outside reserve lands have undermined traditional economies, and in many cases have led to the systematic deprivation of First Nations' means of subsistence and livelihood. In the absence of a political forum in which to clarify and resolve these matters, recent initiatives on the part of some governments to accelerate the alienation of First Nations traditional territories to third parties will severely prejudice the rights of indigenous peoples in Canada, without any opportunity for appeal.

8. In other cases, where there are clear examples of unfulfilled treaty land entitlement, the situation has regressed over the past year. In both Saskatchewan and Manitoba, province wide agreements had been reached some time ago respecting the formulas to be used in calculating the amount of lands to be transferred to First Nation jurisdiction. These formulas were the result of years of good faith negotiations, and were waiting to be implemented. However, during 1987 the federal government unilaterally renounced the agreements which had been reached, preventing the transfer of millions of acres of much needed land to the First Nations in these provinces. If governments can scuttle agreements such as these at their whim, then the usefulness of even entering into negotiations to resolve issues becomes questionable.
9. In the regions of Canada which are still covered by unextinguished aboriginal title, traditional lands and resources continue to be alienated to third parties without compensation and without consent. Needless to say, this severely compromises the opportunities for future negotiations regarding the sharing of First Nation's traditional lands and resources.
10. The government of Canada's "comprehensive claims" policy is supposed to provide a forum in which the sharing of First Nations traditional territories can be negotiated, but it has not proved effective. Only three "comprehensive claims" have been settled in the past fifteen years, and some First Nations have been negotiating for as long without successful conclusion. Meanwhile, other First Nations must wait their turn to negotiate, without interim protection for their traditional territories, and at the mercy of provincial jurisdictions who are accelerating the dispossession of these same lands and resources.

11. The findings of a government commissioned task force, known as the Coolican Report, were largely ignored when a new "comprehensive claims" policy was introduced by Canada in December 1986, and, instead, further restrictions were placed on the nature and extent of the negotiation process. First Nations who are legitimately striving to protect their rights and interests are subject to threats that negotiations will be cut off if they do not comply, and there is no forum in which arbitrary decisions by Canada can be appealed.
12. The Constitutional forum remains the preferred one for obtaining recognition of First Nations rights and jurisdictions. However, five years of Constitutional discussions related to indigenous rights in Canada ended in March 1987 when the federal government terminated the process. The provincial governments were not willing to acknowledge a general right to aboriginal self-government without a detailed definition. However, shortly thereafter, the provinces, with the federal government, agreed on a radical constitutional revision now known as the Meech Lake Accord. This agreement acknowledges that Quebec, because of its French heritage, is a "distinct society", with special rights to protect and enhance that distinction. The very same politicians who, one month before, viewed aboriginal self-government as "too vague" a concept to be taken seriously, turned around and granted one of their own a constitutional carte blanche.
13. As well, the Meech Lake Accord establishes an agenda for future constitutional conferences. Many of the items, such as fisheries, have a direct bearing on aboriginal and treaty rights which are recognized and affirmed in the existing constitution, and yet there is no allowance for the participation of indigenous peoples in these discussions. To be fair, there was a token acknowledgement of existing constitutional guarantees regarding aboriginal and treaty rights in the form of a non-derogation clause, which was inserted into the Accord as an afterthought. However, given the unwillingness of governments to acknowledge or implement these existing guarantees, it does not leave us with much optimism.

14. Recently, the federal government did make an offer to aboriginal peoples in Canada respecting the terms of a possible renewal of constitutional discussions related to indigenous people's rights. What would have been required was the agreement of aboriginal peoples to go and seek consent from provincial jurisdictions on the nature and extent of their rights. This proposal could not be taken seriously by the First Nations, because it was clearly an abrogation of the federal government's legal and constitutional responsibility to take leadership in these matters. Provincial jurisdictions have benefited the most from the marginalization of indigenous societies and institutions in Canada, and stand to lose the most if a more equitable sharing of jurisdiction, lands and resources is to take place. On this basis alone, it was improbable that this approach could have contributed anything positive toward the further recognition and definition of aboriginal rights within the constitutional framework.
15. Legislative reform is another method of addressing problems related to systemic discrimination and indigenous rights. Over the past year, some amendments to the Indian Act have been introduced by the government of Canada, but this approach is being taken on a piecemeal basis, without due regard for the wider issues that need to be dealt with. No matter how it is amended, the Indian Act will always remain a racist and colonialist piece of legislation which has controlled the lives of First Nation citizens from cradle to grave for over one hundred years, and which is at the foundation of many of the problems confronting First Nations today. What is required, if real solutions are to be found, are comprehensive political level negotiations between First Nations and the federal government to resolve the wider issues.

16. Three years ago, the federal government introduced a policy called "community based self-government", which was intended to be the basis for negotiation of First Nation self-government arrangements. The legislative delegation of authority is not the preferred method for resolving the jurisdictional questions which are at stake in Canada, because it does not acknowledge the inherent right to self-government which indigenous peoples in Canada have always possessed, and never given up. The constitutional process is the proper forum for issues such as these.
17. Only one self-government arrangement has been reached pursuant to this policy, and less than half of Canada's First Nations have agreed to become involved in the process. Most of these are reluctant to proceed to the point of substantive negotiations, given the constraints of the legislative approach in general, and the very narrow terms of reference of the policy in particular. In addition, much of the financial resources allocated for this exercise are gobbled up by the bureaucracy before they even reach First Nations.
18. This year, Canada announced a National Child Care strategy to the public. Initially this national strategy did not make specific reference to the unique needs and rights of indigenous peoples in Canada: It was only after public debate and scrutiny that additional resources were set aside for the use and benefit of First Nations. To date, however, indigenous peoples have had no meaningful participation in the development or the implementation of this strategy, and we are waiting to see whether or not Canada is willing to respond positively to the First Nation's goal of specific federal-First Nation transfer agreements for child care.
19. There is danger that monies allocated for First Nations child care may be channelled through provincial jurisdictions who have no inclination to respect the distinct nature of traditional indigenous child care practices. It is hoped, however, that as this strategy unfolds, First Nations will be able to play a major role in the development and delivery of, and jurisdiction over, their own child care regimes.

20. The proposed transfer of health services to First Nations is another example of the delegation of administrative responsibilities to indigenous communities, against a backdrop of federal cutbacks and a withdrawal of existing resources. The proposed transfer process is a step in the right direction, but cannot succeed until there is a willingness to deal with the jurisdictional issues that are at the heart of the problem. We look forward to the opportunity for serious negotiations with Canada on the issue of health care jurisdiction.
21. The AFN has just completed a three year review of Indian education. The final report reaffirms the need for First Nation control of First Nation education, with respect to financing and jurisdiction. This review was undertaken on the understanding that its recommendations would be the basis for future Canadian government policy on First Nation education. However, before the review was even completed, Canada saw fit to implement its own changes unilaterally by cutting back and capping funds available for the education of First Nation citizens.
22. This came at a time when many indigenous peoples were just beginning to avail themselves of educational opportunities, and the current policy is having the effect of perpetuating the low educational levels which have contributed to the marginalization of First Nation societies in the past. This is particularly alarming given the increased number of First Nation citizens on "officially recognized" rolls as a result of recent federal legislation.
23. The 1984 Canadian Supreme Court judgment in GUERIN et al v. THE QUEEN established that the Crown had a legally enforceable fiduciary obligation to the Indian peoples of Canada. Prior to this judgment, Canada had contended that it had no legal obligation to be accountable for its treatment of indigenous peoples at all. Subsequent to the GUERIN judgment, the Auditor General of Canada, in his 1986 report to Parliament, singled out a number of areas of government responsibility which required detailed scrutiny and revision if Canada was to keep pace with the law.

24. As a result of these developments, a review of the Lands, Revenues and Trusts (LRT) sector of the Indian Affairs Department was initiated. This review deals with critical questions of First Nation land and resource management, but First Nations have had little or no role in its development and implementation. Although Canada insists that it has consulted widely with First Nations on this matter, most First Nations we have contacted have little or no knowledge of the review, its status, or its implications. It is widely feared that First Nations will only be consulted when the review is complete and the options have been chosen by Canada.
25. Because of Canada's refusal to negotiate many outstanding issues at the political level, many First Nations are being forced to resort to the courts as a way of obtaining some resolution. The situation poses difficult problems for all parties. Many of the issues brought to the courts are of a political nature, which the courts are ill-equipped to deal with. At any rate, having been dispossessed of their land and resources, most First Nations do not have the financial capability to defend their rights adequately in the courts. Canada does provide token test case funding for aboriginal and treaty rights litigation, but the amounts available are not adequate to meet existing needs and are not comparable to the resources which the federal government, the provincial governments, and corporations have at their disposal. In many instances, Canada is involved in the litigation proceedings as an adversary of the First Nations, and this also poses serious problems regarding conflict of interest in the setting aside and allocation of funds related to litigation.
26. There are over two hundred cases now before the courts in Canada related to aboriginal and treaty rights. The cost to the First Nations in terms of human and financial resources, risk and delay, cannot be borne much longer. As well, First Nation citizens continue to be charged, convicted, fined, and in many cases incarcerated for their exercise of treaty and aboriginal rights to hunt, fish and gather. This is despite the fact that these rights are recognized and affirmed in the Canadian Constitution. It is most unfortunate that, in the absence of any political forum, First Nations citizens and their families must continually live in fear of law enforcement agencies while engaged in basic subsistence activities which are supposed to be protected by the Canadian Constitution.

27. Treaty implementation remains a major priority, and a major problem area, for the First Nations of Canada. The federal government continues to resist any attempts by the First Nations to enter into political level discussions related to treaty implementation. This is in spite of the fact that treaty rights are recognized and affirmed in the Canadian Constitution, and despite the fact that each year, many First Nation citizens are harassed by law enforcement authorities while engaged in the legitimate exercise of these rights.
28. One recent development concerns implementation of the James Bay Northern Quebec Agreement (JBNQA). Canada agreed to make an out of court settlement with the Grand Council of the Crees of Quebec respecting past entitlements which were due them and which had been agreed to by a Minister of the Crown, but withheld by the current government. The ongoing disputes regarding implementation of the JBNQA point to very fundamental questions regarding the spirit and intent of treaties, and the Crown's obligations to fulfill its commitments. Although this out of court settlement is regarded as a victory of sorts, it does not eliminate the possibility of future litigation, because Canada has still not made commitments respecting future entitlements due to the GCCQ for the exercise of self-government.
29. Relations between First Nations and the government of Canada are at a low point, largely due to the conduct of the current Minister of Indian Affairs and his bureaucracy. Although technically, the Minister has an obligation to protect the rights and interests of indigenous peoples in Canada, he also carries Cabinet portfolios dealing with Northern Development and the administration of a regional economic development fund. These latter duties give rise to a serious conflict of interest, since quite often the promotion of economic development in the private sector calls for the dispossession of First Nation's traditional territories.

30. There has been no attempt on the part of Canada to reconcile this conflict of interest, and repeated requests for the Minister's resignation have been ignored. Instead, we find that the government's relations with the First Nations have become increasingly unilateral, arbitrary and dictatorial. There are no domestic remedies available to even begin to address this matter. Obtaining accountability on the part of Crown representatives for their actions as they affect indigenous peoples remains a major priority for First Nations in Canada.
31. In spite of the abovementioned realities, the First Nations of Canada remain committed to seeking a just and equitable solution to the problems of discrimination and the clarification of indigenous rights through good faith negotiations. We are continuing our efforts to secure a renewed and meaningful process of constitutional reform within Canada. We will continue to try and engage the government of Canada in serious and good faith negotiations related to jurisdictional issues such as self-government, health care, child care, education and housing.
32. Based on direction provided to us by the Chiefs of Canada, we are seeking to advance realistic, positive and forward looking proposals to the federal government in connection with each of the items enumerated in this report. In areas where Canada is clearly unwilling to engage in discussions, for instance, treaty implementation, we are pursuing an internal First Nation workplan which will serve as the basis for future initiatives on our part, with or without Canada's participation.
33. We are also expanding our efforts to seek protection for our traditional territories and resources. An adequate and secure land and resource base is essential for our survival as peoples, and cannot be compromised. Already in Canada some First Nations have been forced to assert jurisdiction over their traditional territories in the absence of a willingness on the part of Canada to recognize their rights. We look forward to the day when such strategies are no longer needed, and when the government of Canada is willing to provide us with an equitable share of Canada's vast lands and resources. Until such time as this occurs, however, steps must be taken to protect our rights for the benefit of future generations.

34. Once again we reiterate our support for the working group's efforts related to the standard setting process. It should be clear from the substance of our report that a strong and enforceable Universal Declaration of Indigenous People's Rights is essential if nation-states are to respect our rights and interests. In Canada, domestic remedies are fast being exhausted and the opportunity to have recourse to available international remedies is becoming more and more important.
35. We would also stress the need for a strong orientation toward collective rights in any standards which may be developed. Our existence as peoples is a historical fact which cannot be denied, and which needs to be acknowledged by the international community. Much of the United Nation's work since its inception has been devoted to bettering the relations between peoples, and we feel that an explicit recognition of the collective rights of indigenous peoples would be perfectly consistent with these past efforts.
36. Moreover, this acknowledgement would be consistent with domestic Canadian practice and norms. The collective rights of Canada's aboriginal peoples are recognized and affirmed in Section 25 and Section 35 of the Constitution Act, 1982. As well, the Meech Lake Accord recognizes the collective rights of the citizens of Quebec as a "distinct society" within Confederation.
37. It should be borne in mind that there is a very real danger of condoning the application of double standards based on race if the collective rights of indigenous peoples are not recognized in the standard setting process. The collective existence of indigenous peoples is a historical fact, as is the collective existence of other peoples. Racism can be the only basis for assuming that one group of peoples is deserving of collective rights, while another group of peoples is not. We would warn the members of the Working Group of this fundamental issue and we look to you for support on this matter.

38. Madame Chairperson, we are encouraged by the United Nation Commission on Human Rights, Resolution No. 1988/74 entitled "Development of Public Information Activities in the Field of Human Rights". This resolution opens for the first time the possibility for indigenous peoples to be included in programs of public information undertaken by the Secretary General, encouraging NGO's to carry out activities in support of the United Nations work on human rights. We hope this Working Group will give attention to the importance of the development of standards for indigenous peoples around the world and recommended to the appropriate United Nation bodies inclusion of relevant information on the development of instruments for the promotion and protection of indigenous peoples rights.
39. An early dissemination of information on the situation of indigneous peoples and the work of the United Nations in this field will serve as a positive step towards enhancing the understanding of wider audiences, including governments. We hope Madame, that these views are reflected in the United Nations Secretary General's report to the forty-third session on the advisability of launching a world public information campaign on human rights in 1989.
40. The AFN also expresses its support for the work of Mr. Martinez related to the development of an outline for a study on the treaties and the treaty-making process. This issue is of critical importance not only to the First Nations of Canada, but to indigenous peoples throughout the world. This is partly because the treaty-making process is, in itself, a recognition of the collective rights of indigenous peoples.
41. We were disappointed in the changes which were made to Subcommission Resolution No. 1987/17 of September 2, 1987, when it reached the Human Rights Commission this past spring, because they altered the intent behind the original recommendations made in the Martinez Cobo Report of 1983. However, we are still committed to supporting Mr. Martinez' endeavours, and assisting him as best we can. We would hope that the members of the Working Group will also give a strong signal of support on this issue to the Subcommission when it meets later this month.

42. Finally, we would once again express our thanks to the Working Group for the opportunity to present a review of this past years developments, and comment upon the endeavours which you are involved in.

Thank you.

ASSEMBLY OF FIRST NATIONS (AFN)
AUGUST 1988

ATTACHMENTS