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Dear Elders, Chiefs, Headmen, Councillors, Members of Indigenous Nations, Various Advisors

Enforcement of Treaty v. Implementation of Treaty

The focus in Indigenous politics is now returning increasingly to the Crown's outstanding obligations owed under treaty after years of distraction from various federal proposals intended to replace the treaties with domestic contractual relations. It is critical to understand the difference between using enforcement terminology and implementation terminology in the context of existing international treaties with Her Majesty.

Implementation of a treaty in law means doing whatever needs to be done in order to bring the treaty into force and make it binding between the parties. Steps usually necessary to implement an international treaty signed by a constitutional head of state, such as Her Majesty, include ratification votes and passing of federal legislation.

Take the *Jay Treaty*, for example. The Canadian courts have held that although it was signed, it was never implemented by or on behalf of Canada. The federal government has not passed any ratifying or accepting legislation to implement it. Canada has not acted consistent with the *Jay Treaty* being in force. Thus the *Jay Treaty* still needs to be implemented and indeed, may never be implemented by Canada, as the Canadian government cannot be forced to do so.

His Britannic Majesty and the United States of America are the parties to the *Jay Treaty* and it has been implemented by the United States, the details being: "Concluded November 19, 1794; ratification advised by the senate with amendment June 24, 1795; ratified by the President; ratifications exchanged October 28, 1795; proclaimed February 29, 1796."

The Indigenous peoples are not parties to the *Jay Treaty* and thus have no part to play regarding implementation by the parties to the *Jay Treaty*, other than trying to encourage the implementation by the federal government of Canada. (There are issues to explore regarding whether failure to implement the *Jay Treaty* constitutes breach of the treaties with the Indigenous nations, but that is a separate issue for another time.) There is no international standing for the Indigenous peoples specifically regarding the *Jay Treaty*. Even if a party, the party can only work diplomacy to try to get the *Jay Treaty* implemented. Seeking implementation can be a very difficult course of action, especially where a party has already refused to do so for many years (unless implementation can be linked to other commitments i.e. other treaties, again for another time).

This is very different from having treaties that have already been implemented.

The federal government has encouraged the use of the term "implementation" and "the need for treaty implementation" in its discussions regarding treaties between Her Majesty and Indigenous nations precisely for this reason. The federal government wishes to convey the impression internationally that these treaties, though in existence and signed and therefore "concluded," have not in fact been made legally binding; i.e. Canada wishes these treaties to be seen as not having been implemented. Canada prefers to limit reference to the treaties to being of "historical" interest or "significance" only – terminology that can be found in most current agreements offered by the federal government.

This allows the federal government to deny that there has been any breach of any treaty, because you cannot breach what has not come into full force and effect. This also allows the federal government to defend itself against damages for breach of treaty. If there is no binding treaty, there can be no breach; there can be no damages because there has been no wrongdoing. This enables the federal government to control the exercise and to falsely project an elevated position of power that Canadian lawyers acting for Indigenous peoples are all too willing to fall for. Indigenous peoples are thus encouraged by their advisors to focus their energies on "getting treaties implemented" rather than *on asserting enforcement of the treaties and seeking damages for years of continuing breach*. It must be appreciated that the magnitude of damages under the implemented treaties is staggering, and this, no doubt, is the most likely motivator for current federal Indian affairs strategy.

This also allows Canada to project a noble international position. Based on this illusion, as embraced by Indigenous people, their organizations and advisors alike, Canada can assert that it is gratuitously extending a dispute resolution mechanism that Canada is not legally obliged to provide. This mechanism, currently the federal Specific Claims Policy, is the subject of proposed overhaul by federal *Bill C-6*, *The Specific Claims Resolution Act*. One of the complaints about *Bill C-6* is that it limits the amount of payments that can be made under the dispute mechanism. Since Canada is attempting to dissolve any link to actual obligations under existing, implemented treaties by shaping the debate to be one of "implementation" rather than "enforcement" of treaty, thus extending a gratuitous mechanism, it becomes impossible to criticize the monetary cap now being contemplated through *Bill C-6*. It changes an international legal obligation with definable damages criteria into one of solely charitable federal discretion. (Also reinforcing this notion of charitable overture is reference in the Specific Claims Policy of the federal government not relying on limitation periods, suggesting that the provincial limitation periods imposed by statute would in normal circumstances apply to prevent recovery of damages. Most lawyers adopt this presumption that fails to consider that such unilateral action cannot affect the treaties as international covenants, but this is a subject for another time.)

Furthermore, if the federal government is successful in having Indigenous people agree that their treaties need to be implemented, then it leaves the Indigenous peoples to deal constitutionally with the federal government because this implementation would happen much later than 1930 (*Statute of Westminster*) and 1982 (*Constitutional Act, 1982*). This then would require Indigenous peoples to accept how the federal government desires to and is shaping section 35 of the *Constitution Act, 1982* (i.e. to put in place the legal framework through "interpretation" by the courts of section 35 to enable the federal government to unilaterally infringe or extinguish treaties and/or their parts), as opposed to being able to control the federal government's actions and enforce the treaties by application of the actual constitutionality of the actions of Her Majesty and the constitutional safeguards that She insisted upon through insertion of section 35 into the *Constitution Act, 1982* outside of the minorities provisions (outside the *Charter of Rights and Freedoms*) and section 25 of the *Constitution Act, 1982*.

Enforcing treaties, as fully in force and implemented in past centuries, involves identifying the steps and dealings that the federal government must take and do in order to comply with the treaties and thus be constitutional. It is strategizing on how to deal with breaches and failures of Her Majesty's governments to abide by constitutional law, i.e. the treaties. It is the challenge of provincial and federal laws as being unconstitutional in terms of the treaties, for example, the *Indian Act* and *Bill C-7, The First Nations Governance Act* (the details of which I provide in separately published words). It is planning on how to set the example for Her Majesty's governments to follow.

The federal government needs help in understanding Her Majesty's obligations under treaty and much of the Indigenous political agenda must deal with such matters. Such an agenda simultaneously addresses the every day issues that seriously impede the lives of Indigenous people: health care, shelter, education, self-esteem, and interfere with the exercise of self-governance, thus threatening continued joint sovereignty in Canada and the very existence of Indigenous peoples.

Indigenous people, their spokespeople and representatives, and their advisors and lawyers *must be absolutely clear* in their understanding that everything has already been done to conclude *and implement* the treaties. This includes those Indigenous peoples and their advisors from areas outside the treaties, such as the West Coast and Interior, who are too quick to repeat the misleading federal position on treaties by speaking of Treaties 1 – 11 erroneously as if they resulted in a surrender of land and resource ownership and of sovereignty. This steers these Indigenous peoples away from demands to adhere to existing treaties or from insisting on comparable treaties, (or at least in one case, the putting into written form an already done deal) and delivers them into the hands of the "modern-day treaty" domestic regime, which *does* result in a surrender of land and resource ownership and of sovereignty.

To speak of having to "implement" the treaties says to the world that while the treaties may be in writing and signed, they are not legally in force. It gives to the Canadian governments powers to decide whether or not to implement that they do not have in law; the constitutional framework of the treaties binds the Canadian governments – they have no choice but to comply should they desire to be constitutional, to uphold the Honour of the Crown and the reputation of being a place where the rule of law is respected.

Unless, of course, the Indigenous peoples waive the requirement by inferred or direct action or inaction, as the case may be. Waiver occurs by going along with this "implementation" agenda.

The treaties have already been implemented.

It bears repeating: ***the treaties are implemented.***

What needs to be done is to *enforce* the treaties. Consideration may be given to seeking damages for breaches of treaty, as those amounts are potentially extra-ordinary. However, in no circumstances should it be represented in any way that the treaties are not already in full force and effect.

Unfortunately, the agendas I regularly receive for meetings often speak of "*implementation* plans," "Forum for Treaty *Implementation*," "*Implementing* Sovereignty/Treaty Relations," and "*Implementation* of Inherent Rights, Aboriginal Rights and Title, Treaties and Treaty Rights." These are problematic representations.

And apart from treaties, Indigenous peoples either have sovereignty or they do not. If Indigenous peoples have sovereignty, which the law supports except for those who have chosen to relinquish this, such as in the case of the James Bay Cree, most Inuit and the Nisga'a, then all of the relations between Her Majesty, as represented by Her Majesty's governments, and the Indigenous nations, are by definition "sovereign relations;" there can be no such thing as "implementing" sovereignty or sovereign relations. Her Majesty's governments may not be responding to Indigenous nations in ways that are respectful of the law, i.e. the treaties, but they are nonetheless, from the point of view of law, conducting sovereign and treaty relations.

The difficulty for the Indigenous nations with the tasks at hand is the inheritance of industry language and approaches, or these having been hi-jacked by federal government and embedded with contrary meaning, that are not treaty-based. They go further than that: they undermine and waive treaty. Continued use of these can result in the death of the treaties in international law. Part of the challenge is to understand and use policy and legal terminology that is consistent with the treaties and Indigenous sovereignty. This is critical.

Even law schools are appreciating that the students they are turning out are not prepared and equipped for the tasks at hand. The University of British Columbia, for example, is establishing the Centre for International Indigenous legal studies but acknowledges that there is no available expertise in this field. Hence the dilemma: how to prepare students when there are no teachers.

I wish to share with you recent personal developments and my plans for the near future in light of all this.

I have been recently contacted and informed that I have been recognized as one of 2000 Outstanding Intellectuals of the 21st Century in the world for my research and academic work in the very issues that the above discussed are but a small part: international Indigenous law. I have also been invited to become a Fellow of the Centre for International Legal Studies. What is interesting about these invitations is that no Canadian lawyers who practice "aboriginal law" are involved; rather, international banking, financing and business lawyers and professionals dominate. Increasingly in Canadian conferences the following can be found represented: banks, US Department of Defence, Canadian National Defence, Department of Justice, Foreign Affairs, International Trade, and the World Trade Organization. Agendas are being devoted to international law developments in Canada.

I have been published in the International Journal on Minority and Group Rights, Faculty of Law, Lund University, The Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The journal is "a key forum for discussion of the rights of minorities and groups, including the rights of indigenous peoples, at the highest scientific level" and "reaches a world-wide audience comprised of specialists in the field of minority and group rights, indigenous rights and more generally, human rights scholars and activists." Many understand my supported position that Indigenous peoples are far more than mere minorities in their own land, which is contained in this publication of one of my papers.

I was scheduled to speak in Salzburg, Vienna to professionals at an international conference on the implications of terrorism legislation, my focus being in relation to Indigenous peoples asserting their sovereignty and various international and domestic rights. I was not however able to attend because of the outbreak of war in Iraq and the international concern about the threat of SARS.

In the interest of offering a good footing to begin dealing with the tasks at hand, to help warn of the various legal pitfalls, to release and share the long-awaited conclusions and analysis of my recent years of intensive research and study on the treaties, to provide strategic opinion and guidance, and to launch a communications infrastructure to facilitate continued education and networking, I am convening a small, intensive three-day program for *September 10 – 12, 2003* in Edmonton.

Included in this program is important advice on how to proceed effectively and consistently should *Bill C-7*, *The First Nations Governance Act* be passed in the next fall sitting; how to not only undermine the *FNGA* but also the *Indian Act* and numerous other offending legislation and colonial unconstitutional documents and policies without sacrificing Indigenous nationhood in the process. Attendees will understand what the federal government's "new" vision of a "third order of government" means for sovereignty and international Indigenous rights, what the federal playing of this card really amounts to and how to avoid the traps, and how to ensure full respect for Indigenous peoples as peoples and in accordance with the treaties. Attendees will learn how to better recognize subtle assimilation tactics, and how not to confuse assimilation tactics with legitimate strategic processes designed to ensure the health and longevity of the Indigenous peoples and their lands and resources. Participants will also be instructed on strategy to gain important positions in industries and trade and compensation for resources being removed from territories in contravention of treaty.

This program is not limited to application to Indigenous peoples within Treaties 1 – 11, but is equally important to those outside of Treaties 1 – 11, such as the Coastal and Interior areas west of these treaties. Certainly anyone involved in negotiating under current federal processes would benefit from attendance.

Seats will be limited. Anyone interested in attending should let me know as soon as possible via email: switlo@hotmail.com, by toll-free telephone: (800) 332-1191 or by mail to Suite 170, 10654 Whyte Avenue, Edmonton, AB, T6E 2A7. The final agenda, location, and registration details will be forthcoming. Advance payment of $895.00 by cheque or money order made payable to "Janice Switlo" is required to secure registered attendance.

Look for www.switlo.com this fall (possibly late summer) for further details and assistance, where I will be releasing my papers and research and commenting on the many Indigenous issues of the day.

And that is all I have to say.

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