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By Hand

Dear Chiefs,

Re: Health and Consent Matters

Roy Romanow recently presented his proposal regarding medicare and today, Canada's provincial health ministers began meeting with Anne McLellan, federal Minister of Health. There will be "frenzied talks" targeted on getting a health deal in place in time for the next federal budget, expected in February. The provinces are of course advocating for increased funds and more flexibility in addressing service needs.

It promises to be contentious as is always the case when it comes to health. The federal government provides transfer payments for health to the provinces but health is a subject matter of jurisdiction for the provinces under the division of powers set out in the *Constitution Act, 1867*. The provinces are always extremely concerned about any overt or innocent attempt by the federal government to begin occupying the field. Yet Ottawa provides the money.

Indigenous people are being asked to provide their consent so that the federal government may receive all personal information from medical providers being paid by the federal government under the uninsured benefits program.

Where do Her Majesty's treaty obligations to Indigenous peoples regarding health come into this picture?

Indigenous people should not be tied into provincial or federal healthcare numbers, cards and systems. Their personal information should not be owned and maintained by the provinces and by the federal government.

There should be a health card for Indigenous people which carries nations, treaty areas and local band membership information and a unique number for administration of all health information, which is wholly within the administrative purview of the Indigenous peoples. This same number by individual would be used by Indigenous government to inform provinces which doctors and other service providers the province needs to pay for services rendered to the card holder and to inform the federal government who is owed money by the federal government for those services the federal government is paying for rather than the provincial government.

How Her Majesty's governments decide between them or are bound by constitutional division of powers to provide the obligations owed to the Indigenous peoples is a matter internal to Her Majesty's governments. This was clearly explained by Her Majesty's Privy Council in 1892. The only thing that is of concern to the Indians, the justices said, is that the check is in the mail and is in fact received. It must be the amount owed under the treaty. In this case however, there was no issue as to how much was owed. The particulars of the case[1] were regarding treaty annuity increases.

Thus if Her Majesty's governments say to the Indigenous peoples, the provinces will pay for the doctor visits and the federal government will pay the dentists, it really does not matter to the Indigenous peoples. What does matter is that the services are paid for.

The Indigenous peoples can provide information to Her Majesty's governments to assist them in fulfilling the obligation to pay but must collect and control that information internally and give only that that is necessary for the cooperation. All consents must be given by individual Indigenous people only to benefit their governments receiving the otherwise confidential information. The people are assured that that information will be used by their governments only for nationhood purposes, local government purposes or for purposes of cooperating with Her Majesty's governments in order that the service providers are paid.

What also matters is that Her Majesty fulfils Her obligations to the Indigenous peoples. Whether Her Majesty has fulfilled Her obligations is a matter for Indigenous peoples to determine and inform Her Majesty. To determine this, there is the need for information. The information must not only be available to the Indigenous peoples' governments but also collected and owned by them. It must be available to Indigenous governments to analyze and report on. The talents of the skilled people currently wasted on endless and needless clerical filling in of papers can be applied to the very fields of their expertise. They can review the collected and reported data and advise Indigenous governments who in turn can inform Her Majesty as to Her current level of success in treaty obligations.

Instead, there currently exists a reverse response, with the federal government dictating the level of obligation as follows: "the way in which INAC allocates funds is not based on need as shown in the required reports but rather on a funding formula which has been capped since the mid-1980s, according to communities."[2]

It is insufficient for Indigenous people to be lumped into provincial lines. While Her Majesty may very well determine that She should provide for Her people equal to Her obligations to Indigenous peoples, such that standards of health care are very similar if not absolutely identical, these are still two very distinct situations. They cannot be treated as being one and the same. To do so is to undermine treaty and to undermine Indigenous peoples. The same applies for the federal government. But once Her Majesty sets a standard for Her people, Her obligations under treaty to the Indigenous peoples require Her to match that standard regarding the Indigenous peoples. Of course it is fair to state from the statistics and analysis done on the subject domestically and internationally that the reality is that health care standards for Indigenous peoples are significantly below those of Her Majesty's people.

The critical problem with the current situation is that Indigenous sovereignty and thus the treaties, are under attack. Who controls the infrastructure and administration determines the sovereign. The United States may well cooperate with Canada and share information, but each owns and controls their own infrastructure and information and each decide what is released or shared with the other.

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[1] Attorney General for the Dominion of Canada v. Attorney General for Ontario; Attorney-General for Quebec v. Attorney-General for Ontario, [1897] A.C. 199; (1896, C.R. [11] A.C. 308 (JCPC). The Federation of Saskatchewan Indian Nations assisted.

[2] Paragraph 1.37 of the Auditor's Report referenced in footnote 6 below.

"Federal organizations that receive information from the communities do not tell them how it is used, except for the review of audited financial statements. Nor do they communicate the results, if any, of their analysis of the information."[3]

There is an ongoing need to cooperate and share information between Her Majesty and Indigenous peoples, yet "The prime interaction between communities and local Health Canada officials was to deal with community members' complaints about health service delivery."[4]

As in all treaty matters, there is the need for continued diplomatic relations, communications between treaty diplomats and Her Majesty's diplomats.

The national forum on aboriginal issues is not that vehicle. Since the *Constitution Act, 1982*, meetings have continued but the participants are only the representatives of nationally structured organizations that fit into a domestic-minorities-with-lobby-groups-advocating-for-them model.

The most recent addition to the select group of organizations is Pauktuutit, which represents Inuit women across Canada. The association took part in the recent "federal-provincial-territorial meeting of aboriginal affairs ministers and leaders of "Canada's national aboriginal associations" in Iqaluit on Nov 15, 2002 and is convened once each year. The other five of "Canada's national aboriginal associations" represented are the Inuit Tapiriit Kanatami, the Congress of Aboriginal People, the Metis National Council, the Assembly of First Nations and the Native Women's Association of Canada. These are all structured in the nature of lobby groups for minorities.[5]

This is not at all about treaty relations.

Certainly Canada and the provinces can consult their assimilated aboriginal people, after all, 'tis the civil thing to do.

But what of Her Majesty's continuing relationship founded in treaty?

And then there is the practical day-to-day situation surrounding health, and many other areas for Indigenous peoples. The December 2002 Auditor's Report[6] goes into details about the absurd amount of reporting[7] Indigenous peoples must juggle that rarely assists Indigenous governments.[8]

There is an opportunity. If it is not taken, Her Majesty's governments will usurp full administrative sovereignty. This equates to assimilation of the Indigenous peoples into Her Majesty's people leaving only present-day remnants of former peoples that only have domestic ethnic minority rights.

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[3] Paragraph 1.67 of the Auditor's Report referenced in footnote 6 below.
[4] Paragraph 1.41 of the Auditor's Report referenced in footnote 6 below.
[5] Except that a recent resolution of the chiefs in assembly in Ottawa during November 19 and 20, 2002 meetings suggests that the original model for the Assembly of First Nations was as an internationally-based assembly of Indigenous peoples and not as is described by the current National Chief Matthew Coon Come, who has stated on many occasions that the AFN is a lobby group.
[6] The Report of the Auditor General of Canada to the House of Commons released December 2002, Chapter 1 Streamlining First Nations Reporting to Federal Organizations.
[7] Approximately 168 reports on average per year; see paragraph 1.1 of the Auditor's Report referenced in footnote 6 above.
[8] See paragraph 1.28 of the Auditor's Report referenced in footnote 6 above.

"The federal government is committed to improving the current reporting structure… there is a need to address this issue across departments and strive for a more results based system in support of government-to-government relationship. Such as system needs to be responsive to the requirements of First Nations and they clearly should be consulted. … The ideal is to strive for a system of information exchange that serves the interests of both parties."[9]

It needs to be a nation-to-nation relationship. It is not a single system as described by the auditor above that the Indigenous peoples are consulted on. Rather, there needs to be separate systems that can talk to each other when it is necessary to facilitate the nation-to-nation relationship. It is not merely a government-to-government relationship. The Indigenous peoples governments remains theirs, separate and apart from that of Her Majesty but linked in sharing through the law of the treaties.

"Electronic data exchange continues to be pursued by the federal government, consistent with the Government on Line (GOL) initiative. For example, systems have already been implemented to facilitate electronic monitoring and management of reports in a number of departments. The federal government will build on these successes and promote electronic data exchange as a way of doing business with First Nations."[10]

Frequently Indigenous peoples have been warned not to attempt their own solutions with excuses such as the systems being too complex or effort would be duplicated.

It can be done. It must be done.

And that's all I have to say.

Janice G.A.E. Switlo

Encl.

[9] See Conclusions of the Auditor's Report referenced in footnote 6 above.
[10] *Ibid*.