

ABORIGINAL GOVERNMENTS AND POWER SHARING IN CANADA

**Edited by
Douglas Brown**

**Institute of
Intergovernmental Relations
Queen's University
Kingston, Ontario
Canada**

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Sommaire

Le présent volume offre un résumé des actes d'un colloque tenu les 17 et 18 février 1992 et organisé par l'Institut des relations intergouvernementales. Ayant pour thème "Les gouvernements autochtones et le partage des compétences", le colloque visait à confronter les vues de deux communautés d'intérêts qui se rencontrent rarement d'ordinaire; soit le groupe oeuvrant dans le domaine des affaires autochtones canadiennes et le groupe concerné par les relations intergouvernementales et les questions constitutionnelles.

La première séance du colloque traita des "approches en matière de partage de compétences". Georges Erasmus entama cette séance en brossant un tableau des pratiques gouvernementales autochtones de type traditionnel. Il fit aussi un compte rendu du commentaire sur l'autonomie gouvernementale et la constitution publié récemment par la Commission royale sur les peuples autochtones. Le paneliste suivant, John Kincaid, examina divers systèmes de partage des pouvoirs. Selon ce dernier, il est impérieux que le monde actuel soit régi par une telle répartition des compétences; c'est pourquoi Kincaid prône une redéfinition du concept de souveraineté. Le commentateur Alan Cairns souleva quant à lui quelques questions stimulantes relativement à la citoyenneté et l'identité au regard de l'éventuel ordre de gouvernement autochtone.

La deuxième séance portait sur les "problèmes actuels au Canada". En premier lieu, Robert Young présenta une analyse de l'ensemble du débat constitutionnel et du type de place qu'y occupent les questions autochtones. (Ce texte est reproduit en deuxième partie de ce volume). La discussion aborda ensuite les options constitutionnelles s'offrant aux autochtones. Robert Groves du Conseil national des autochtones du Canada, Leroy Little Bear de l'Assemblée des Premières Nations, et Mark LeClair du Ralliement national des Métis présentèrent le point de vue de leur organisation respective. Malheureusement, le représentant des Inuit Tapirisat du Canada fut dans l'impossibilité de participer, tel que prévu, au panel. David Elkins, pour sa part, décrivit dans ses grandes lignes son concept d'une province autochtone (voir son texte en seconde partie), alors qu'Andrée Lajoie exposa sa vision des trois nations au sein du territoire actuel du Canada.

opérationnelle ladite autonomie gouvernementale. D'aucuns furent d'avis que la prépondérance de l'ordre du jour constitutionnel aura eu pour conséquence: (a) de détourner l'attention des analystes des initiatives en cours au niveau local, et (b) de porter ombrage à toutes les questions ayant trait à la mise en oeuvre de l'autonomie gouvernementale. Par ailleurs on constate, chez les peuples autochtones, une nouvelle compréhension des enjeux politico-constitutionnels. Manifestement, leur approche face à l'autonomie gouvernementale a évolué au cours des ans, et tout laisse croire qu'elle continuera d'évoluer. Si chacun admet l'importance de bien clarifier ce concept, il demeure toutefois que son caractère changeant et variable rend plus complexe encore le type de relations existant entre les autochtones et les gouvernements non autochtones, tant à l'échelon local que national.

Même si certains progrès ont été accomplis depuis le milieu des années 80, on note cependant, dans plusieurs domaines, un fossé réel au chapitre de la compréhension mutuelle. Comme le faisait remarquer David Hawkes, il arrive fréquemment que les discours respectifs des peuples autochtones et non autochtones ne coïncident pas. Cette absence de compréhension envers l'un et l'autre démontre à l'envi la nécessité de faire se rencontrer les autochtones et les spécialistes des relations intergouvernementales dans le cadre de forum comme celui-ci. Ce colloque aura jeté un éclairage sur plusieurs points et, à ce titre, il pourrait s'avérer très avantageux d'organiser d'autres rencontres de ce type, ainsi que de réaliser des projets de recherche afin d'aborder toutes ces questions. Parmi celles-ci, mentionnons notamment: le rôle du droit international et les définitions de la souveraineté autochtone; la reconnaissance du droit inhérent à l'autonomie gouvernementale sur le plan constitutionnel; les problèmes relatifs à la mise en oeuvre de l'autonomie gouvernementale tels que son entrée en vigueur, le financement, l'éducation et la formation; des modèles de répartition de compétences pouvant convenir à l'ensemble des situations auxquelles les peuples autochtones peuvent faire face: l'on renvoie ici notamment, qui à des problèmes à caractère territorial, urbain ou nordique, qui au cas-type des Métis, etc. La Commission royale sur les peuples autochtones s'apprête à examiner pour une large part toutes ces questions. Au demeurant, le fait de s'atteler au défi posé par le thème de notre colloque *Les gouvernements autochtones et le partage des compétences* constitue en soi une tâche urgente et on ne peut plus exigeante. L'Institut des relations intergouvernementales est heureux d'avoir pris part à cette entreprise et, nous osons le croire également, d'avoir contribué de façon significative à cet important débat.

Acknowledgements

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The Institute is also grateful to several individuals for their advice in planning the conference, in particular David Hawkes, Robert Groves, Moses Okimaw, Evelyn Peters, Marc Lafrenière, Mark Krasnick and Robert Young.

Our thanks are due as well to the conference presenters and the chairpersons of each session (listed at the end of this publication). They and their fellow conference participants made this enterprise worthwhile by their thoughtful discussion of the issues. Special thanks to Robert Young, Rosalee Tizya and David Elkins who agreed to have their remarks published in the second part of this book.

At the Institute I would like to acknowledge the cheerful and professional support of all the staff, especially Jill Wherrett (who also prepared the digest of the discussions) and Patti Candido for conference organization and Valerie Jarus for publication preparation.

Douglas Brown
July 1992

Introduction

Douglas Brown and Jill Wherrett

This book presents a summary of the proceedings of a conference organized by the Institute of Intergovernmental Relations held on 17 and 18 February 1992, along with three papers presented at the conference. Entitled *Aboriginal Governments and Power Sharing*, the conference was designed to bring together the perspectives of two communities of interest who seldom meet: the policy community involved in Aboriginal affairs in Canada, and the policy community involved in constitutional and intergovernmental relations. The 60 participants included Aboriginal government leaders and advisors, federal and provincial government officials, university and other researchers, and some members of the media.

The timing of the conference in the midst of Canada's current constitutional upheaval presented both obstacles and opportunities. Conference organizers had to compete with the busy schedules of people involved with the ongoing federal, provincial, and Aboriginal constitutional processes. But for those who were able to attend, the conference provided an opportunity to step out of the constitutional morass and reflect on where we stand now and where we might be going. As well, participants were able to move away from the current constitutional issues to look at models of power sharing currently in place or under consideration.

The summary report of the conference in Part I does not provide a verbatim transcript of the proceedings; rather, it provides a summary of the presentations of speakers and commentators, followed by an outline of the themes emerging from the discussions. Speakers in the discussion periods who represented a specific group or perspective are identified by name.

The first session, "Approaches to Power Sharing," was led off by Georges Erasmus' description of traditional Aboriginal governing practices. He also outlined the recent commentary on self-government and the constitution released by the Royal Commission on Aboriginal Peoples. Erasmus was followed by John Kincaid, who discussed different methods of power sharing. Kincaid emphasized the need for power sharing in the contemporary world, and suggested a redefinition of the concept of sovereignty. Commentator Alan

Thus, the presentations and discussion at the conference reflected two ongoing, intersecting agendas: the national constitutional agenda, focused on the entrenchment of a right of self-government; and the local or regional agenda, concentrated on working out self-government in practice. Some opinion was expressed that the preoccupation with the constitutional agenda may have led to a lack of analysis of current initiatives at the local level and a neglect of issues regarding the implementation of self-government. Underlying both of these agendas is an evolution of understanding and realization among Aboriginal peoples themselves. It seems clear that the meaning of self-government to Aboriginal peoples has changed over the years and will continue to evolve. While the increasing clarity and fullness of meaning is important, its variability and changeability presents a challenge for relations with non-Aboriginal governments at both the local and national level.

Despite some progress made since the mid-1980s, there still appear to be gaps in understanding in many areas. As David Hawkes suggested, the discourse between Aboriginal and non-Aboriginal people does not always connect. This lack of understanding demonstrates the need to bring Aboriginal and inter-governmental experts together in conferences such as this one. This conference covered much ground, and could be followed most productively by other conferences and research projects to address the very specific issues that emerged. Some of these issues include: the role of international law and definitions of Aboriginal sovereignty; the constitutional recognition of the inherent right of self-government; issues in implementing self-government such as financing, enforcement, and education and training; and power-sharing models for the variety of specific circumstances that Aboriginal people face, such as land based, urban, northern, Métis, and so forth. Much of this agenda will become part of the broader work of the Royal Commission on Aboriginal Peoples. In any case, the theme of *Aboriginal Governments and Power Sharing in Canada* is urgent and absorbing. The Institute of Intergovernmental Relations is pleased to have participated, and, we hope, to have contributed to this important debate.

PART I
Conference Summary

Digest of Conference Discussion

Jill Wherrett

SESSION I: APPROACHES TO POWER SHARING

GEORGES ERASMUS:

ABORIGINAL PHILOSOPHY AND APPROACHES TO GOVERNING

The first session began with a presentation by Georges Erasmus, former Grand Chief of the Assembly of First Nations and current co-chair of the Royal Commission on Aboriginal Peoples. Drawing on his own heritage as a Dene, Erasmus identified equality, democracy, and consensus as central principles of traditional Aboriginal philosophy. Self-reliance and individual responsibility, nurtured by early freedom for the individual, were also important beliefs. These values were reflected in a governing structure that provided for equality of representation, the participation of all members of the community, and the balancing of essential family and tribal interests in communal decisionmaking. In an effort to come to a consensus, discussions among the Dene sometimes continued over weeks, or even months, resulting in what Erasmus described as a "hybrid" final decision. Underlying Aboriginal attitudes towards governing are their strong spiritual beliefs.

The arrival of European powers and the imposition of the *Indian Act* altered the operation of traditional governing structures, as band councils became the only officially recognized Aboriginal governments. Erasmus noted that the impact of the Act has varied across Canada. Traditional structures continue to operate alongside band councils on some reserves, while on others band government has almost completely replaced traditional forms. Erasmus added that there is significant conflict between traditional and band government on some reserves, but in most places there is at least a working relationship between the two forms of government. He argued that as Aboriginal peoples move towards self-government, they will have to decide what form of government they want and what powers they wish to exercise. The powers they hold under an inherent right to self-government will likely include many, if not all, of those exercised by the provinces, as well as powers in some areas of federal jurisdiction, such as fisheries.

for Aboriginal peoples to design a single, overall charter. Thus, a two-part charter could be a possibility, with universally accepted values expressed in the first section and principles unique to each Aboriginal nation in the second part.

Other participants questioned Erasmus about the means by which the inherent right to self-government will be defined. Erasmus suggested that Aboriginal peoples will first attempt to work out an amendment using fairly flexible language to recognize the inherent right, and then move on to negotiate agreements or treaties across the country. As a last resort, a move to the courts may be necessary if agreements are not reached or as a means to implement agreements. Several different paths might be taken. An Aboriginal group could launch a broad Gitksan-type case,² in which they suggest they have an un-circumscribed right, or go to court on specific issues. However, Erasmus noted that the second approach would be a time-consuming and costly means by which to establish the jurisdiction of Aboriginal governments.

JOHN KINCAID:

FEDERALISM AND PLURALISM AS METHODS OF POWER SHARING

At the outset of his talk John Kincaid, executive director of the United States Advisory Commission on Intergovernmental Relations, noted that the organization of diverse ethnic, racial, linguistic, and national communities into larger political societies of self- and shared-rule has proven to be extremely difficult. Historically, agreements in which all parties are satisfied have been relatively rare. In recent years, the spread of liberal ideas of individual freedom and equality along with increasing global interdependence have produced an explosion of nationalism and traditional communalism throughout the world. Thus, ethnic and cultural diversity are posing increasing challenges to the traditional nation state and rights to self-government have become increasingly important. The movement to local self-government and power-sharing arrangements, Kincaid argued, will be the "wave of the future." In the final analysis, no single community will be fully sovereign in the traditional sense of the word.

When negotiating power-sharing arrangements, groups at the bargaining table need to speak a common "language" and share power equivalencies. However, dominant groups have no essential need to share power, and so the presence of a "federal will" or "federal character" is required: a dominant group "must come to the bargaining table believing that it has an obligation to reach an equitable power sharing arrangement." Kincaid suggested that a federal will appears to be emerging in the Western world. As an example he pointed to the increasingly favourable reception the concept of Aboriginal self-government is

2 *Delgamuukw v. the Attorney General of B.C. and the Attorney General of Canada* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

Thus, a number of federal arrangements are possible. In negotiating a self-government agreement, Kincaid stressed that three dimensions — cultural, economic, and governmental powers — must be considered. As well, both the process and the consent required for future change should be established.

Kincaid's presentation provoked questions on a variety of issues. One participant wondered if, in the evolution of power sharing, we might be moving towards the concept of federalism as a covenant. Kincaid responded to this query positively, remarking that a covenantal basis for power sharing involves notions of trust, sharing, and stewardship, in contrast to an agreement based purely on power bargaining. Kincaid restated his earlier observation of a growing recognition in the United States and Canada of the need for a more covenantal attitude towards governing in the majority partner. He used the analogy of a marriage, describing a covenant as "a coming together to accomplish common purposes while maintaining the integrity and identity of the individual partners."

COMMENTARY:**ALAN CAIRNS, UNIVERSITY OF BRITISH COLUMBIA**

In his commentary on the Session I presentations, Alan Cairns highlighted a number of issues that require further research and discussion. His themes centred on the Charter, citizenship, and Aboriginal identities. Cairns noted that a crucial issue in the Aboriginal self-government debate has been the question of the application of the Charter to Aboriginal governments. He argued that the Charter is becoming one of the most important identifying features of Canadian citizenship. Consequently, if the Charter does not apply to Aboriginal peoples, it may lead to the premise that they are not part of the broader Canadian community. A shared charter, Cairns argued, might provide a common bond of citizenship and produce an incentive for the federal will discussed by Kincaid. In turn, the lack of a shared charter could be a disincentive for power and resource sharing. Cairns suggested that we might think in terms of overlapping charters or a series of charters, each different from the others but sharing symbolically important elements so as to recognize a feeling of common citizenship and shared values. Cairns also made note of conflicts within the Aboriginal community on the application of the Charter.

Cairns then turned to the interaction of individual identity and citizenship. He argued that federalism is a device for dividing personal identities as well as jurisdiction. Thus, Aboriginal self-government can be thought of as an emotional division, fostering and reflecting multiple identities in the same person. Aboriginal communities will not be discrete, bounded units, for individuals living in these communities will identify with and relate to three orders of government. Cairns questioned how these individuals would identify

assimilate to some degree, there is not a reciprocal recognition of Aboriginal values and culture by the dominant society. Rather than assimilate, Mohawk peoples want to bring traditional values into the modern world. The Mohawk know they must adjust, but they have always and will always adjust according to their fundamental collective identity. Norton argued that there will always be two worlds. While these worlds will at times conflict, they must learn to co-exist.

Norton's comments prompted Cairns to question whether Aboriginals and non-Aboriginals are to become part of each other's society, or whether they are to remain separate and co-exist. For example, will Aboriginal peoples be citizens and voters in Canada, and not just in Aboriginal nations?

Speaking from a Métis perspective, Tony Belcourt agreed that the Aboriginal leadership needs to deal with the issues raised by Cairns. However, he pointed out that the ongoing Métis constitutional process has already focused thought on these concerns. On the issue of the Charter, Belcourt made an observation like that of Erasmus, noting that the Métis had been offered no role in drafting the Charter. He drew attention to basic Métis laws, long codified, which protected and adjudicated between individuals' rights, not unlike some Charter provisions; hence he suggested that the Métis and other Canadians could agree on universal principles. Belcourt also expressed concern over the gap in understanding between the Métis, and federal and provincial leaders who seem unaware of Métis history and political positions.

Leroy Little Bear agreed with Cairns that there is no common denominator of citizenship in the current constitutional debate. However, Little Bear warned that we should not underestimate the difference between First Nations and the general Canadian society. For example, the Charter and the justice system will simply not work for Aboriginal peoples unless they incorporate Aboriginal world-views. If power-sharing arrangements do not embody this sense of difference, Aboriginal people will always be pressing for a separate system.

Dwight Dorey of the Native Council of Nova Scotia commented on Cairns' concerns about Aboriginal representation in legislatures. He noted that an Electoral Boundaries Commission in Nova Scotia is examining the issue, and that the premier of Nova Scotia had given his support to a full voting seat in the provincial legislature for the Micmac people. However, Dorey explained that the Micmac people had opted to oppose a full voting seat on the grounds that it could compromise the recognition of their inherent right to self-government. Instead, they are examining the concept of having a nonvoting treaty delegate sit in the provincial legislature.

Quebec, British Columbia, and perhaps Alberta will resist the entrenchment of an open-ended right. At the same time, he argued, the diverse Aboriginal groups are unlikely to achieve quick consensus on how to circumscribe the right. Consequently, he concluded that the timing of the constitutional process, combined with provincial resistance and the complexity of the issue, will prevent an inherent right from getting into the constitution during this round of reform. Ottawa would not sacrifice the round if Premier Bourassa could not sell the inherent right in Quebec. In the end, Young argued, the absence of an inherent Aboriginal right of self-government from the constitutional package would not be allowed to be a "deal-breaker." Aboriginal peoples will then be left with two options — to give up on the inherent right, which he does not see as a likely alternative, or to pursue a separate process.

DISCUSSION

In the ensuing question period, Tony Belcourt suggested that if the package contains nothing for Aboriginal peoples, we could be facing a replay of the defeat of the Meech Lake Accord. Those in the west opposed to the distinct society clause could use the argument that there is nothing in the package for Aboriginal peoples to prevent a deal from being reached. Young disagreed with Belcourt. In Young's view, public support for Aboriginal rights in English Canada is very broad but rather shallow.

Joe Norton spoke about the relationship between his community and the Quebec government, describing it as a stalemate. Each side has refused to recognize the sovereignty of the other side, and each lacks trust and understanding for the other. He believes that ultimately they will have to reach an agreement based on necessity, rather than a covenant founded on mutual trust and respect. While they may come to trust each other in the long term, in the meantime relations are volatile. He suggested that there seems to be a "race going on here as to who is going to reach the point of sovereignty," as both the Quebec government and Aboriginal peoples argue over who has the right, or who had the prior right of self-government.

Another participant questioned Young about the possibility of a national treaty under section 35, referring to the proposal advanced by Prince Edward Island Premier Joe Ghiz.⁶ Young responded that any such treaty would have to be acceptable to both Aboriginal peoples and the blocking coalitions. The essential dilemmas of timing and of Premier Bourassa's vulnerability on the issue would remain.

6 Remarks by Premier Joseph Ghiz, "Aboriginal Self-Government and the Canadian Constitution," Faculty of Law, University of Ottawa, 14 January 1992.

that self-government must not be in any way linked to the existing *Indian Act* or the status system.

Groves raised several other matters that need attention, including financing, and ownership of land and resources. A difficult issue will be the impact of self-government on the division of powers, and the relationship between self-government and Quebec's distinct society (especially since the majority of Quebec Indians live off-reserve). Groves argued that the fiduciary obligations of the federal government require the Crown to both preserve and promote Aboriginal cultures and societies. However, he noted that the federal government maintains that protection is its only responsibility.

Leroy Little Bear, Assembly of First Nations

Leroy Little Bear outlined the themes that have emerged from the AFN parallel constitutional process and the constitutional options of the AFN. Since late in 1991 the AFN constitutional commission has held hearings in 60 communities and expects to hold another ten to fifteen sessions. Three constituent conferences of Aboriginal youth, women, and off-reserve Indians have been held, and an elders' and a treaty conference will also take place. Thus far, the themes emerging from the process have revolved around culture, language, land, treaties, and self-government — although self-government has not been the issue of greatest concern. Instead, culture has received the greatest attention. Little Bear explained that this is not surprising, given the different Aboriginal value system and world-view. Out of the cultural emphasis on sharing has emerged Aboriginal attitudes towards land and treaties. Land is a sacred thing, not a commodity, and Aboriginal peoples assumed that treaties allowed for a sharing of land rather than an extinguishment of their rights. Little Bear suggested that non-Aboriginals need to be reminded of their treaty obligations. He spoke of an elder who described treaties as those things Aboriginal peoples have reached agreement on, and Aboriginal rights as the remaining "unfinished business."

Little Bear suggested two ways of looking at the constitutional options of the First Nations. First, they could work within the existing constitutional framework, in which the federal government has dictatorial jurisdiction over Indians. Under the second, and preferable option, First Nations and other governments would return to the primacy of the treaty relationship and negotiate within that framework of equality.

Mark LeClair, Métis National Council

Mark LeClair observed that in this round of constitutional reform there appears to be a much greater acceptance of the concept of self-government. He identified land and the recognition of an inherent right to self-government enforceable by the courts as the most important issues for the Métis. Jurisdictional

constitutional provisions, and moreover, they presuppose that those who enter into them do so from a fully sovereign status.

DISCUSSION

The panel presentation on constitutional options led to a discussion focused on the provincial model and the treaty process. A number of participants questioned the provincial model suggested by Elkins, wondering if it would be acceptable to Aboriginal peoples, who do not always identify themselves as a single group and who do not necessarily fit into the provincial mould. Elkins agreed that this was possible and suggested that his proposal might not be acceptable to many people. Tom Courchene emphasized that the model was evolutionary, and could be valuable as a benchmark for further discussions. He also noted that it is important to consider the provincial model in terms of fiscal arrangements.⁹

Turning to the topic of treaties, Tony Hall suggested that a national treaty could provide a sense of equality for all peoples in Canada. He used the image of the treaty as a circle that would avoid a hierarchy of collective rights. A treaty based on equality would lend legitimacy and credibility to the constitution. However, Joe Norton spoke of the unhappy record of treaties in Canada and wondered who would ensure that the parties lived up to the terms of the treaties. In response, Robert Groves noted that the NCC is looking at an enforcement procedure as part of a national treaty.

9 See Thomas J. Courchene and Lisa M. Powell, *A First Nations Province* (Kingston: Institute of Intergovernmental Relations, 1992).

provincial laws of general application will apply. Each First Nation will sign a separate self-government agreement, but if later agreements are perceived as better than those signed previously, First Nations are entitled to renegotiate their agreements. The financing provisions of the Self-Government Agreement will also provide for equalization and a standard level of services for First Nations citizens.

ROSALEE TIZYA, UNITED NATIVE NATIONS

Rosalee Tizya spoke about the activities of the United Native Nations (UNN) in providing services for off-reserve Indians in British Columbia.¹⁰ She noted that approximately 91,000 off-reserve Indians live in the province, about 40,000 of whom reside in the greater Vancouver area. She argued that the *Indian Act* system has left off-reserve Indians in a no-man's land between the jurisdiction of federal and provincial governments. The federal government has limited its responsibility to on-reserve Indians, while provincial governments have argued that all Aboriginal peoples are a federal responsibility. Thus, provinces have generally not extended special services to off-reserve Aboriginal peoples. As a result, a mindset of self-reliance has developed among this group. Tizya argued that this sense of self-reliance will prove to be the strength of the Indian movement in the long run.

Tizya suggested that there are a range of political models facing Aboriginal peoples in Canada. At one end of the spectrum is the colonial model of assimilation and the *Indian Act*. Most Indians have rejected this model of band councils, reserves, and status definitions. At the other end of the spectrum lies total sovereignty, based on Aboriginal spirituality and ancient ties to the land. Governments are essentially spiritual in nature, so to talk about them in political or legal terms destroys the essence of what self-government is about for Aboriginal peoples.

Associated with this spectrum are what Tizya described as different "psychological levels" among Indians. Some Indians have become assimilated through the colonial model, while others have continued to adhere to traditional ways and values. Other Indians may be "transitional" or "bicultural." Bicultural Indians are those who are able to function in the general Canadian society but have maintained or adapted their traditional Aboriginal values and culture. Tizya noted that a real conflict exists between traditional and assimilated values, so few bicultural people have emerged.

In Vancouver, the UNN is attempting to further the bicultural model. Rather than waiting for the federal and provincial government to take action on

10 A full text of her remarks is provided in Part II.

practice, the Mohawks of Kahnawake and the Government of Canada have developed a Canada-Kahnawake Relations plan that outlines an agenda and process for the negotiation of a new relationship with Canada.¹¹

Joe Norton added to Alfred's comments, emphasizing the notion of adaptation rather than assimilation. He argued that sovereignty lies in the inherent beliefs, values, and traditions of the Mohawk people, and not in constitutional documents. Norton spoke of the need to rebuild the holistic Aboriginal social structure which had been divided by the *Indian Act*. He illustrated his point with the image of a circle in which the practical, political, cultural, and spiritual aspects of Aboriginal society are joined together.

COMMENTARY:

KATHERINE GRAHAM, CARLETON UNIVERSITY

In her commentary Katherine Graham raised a number of issues for further reflection. First, she expressed concern about the length of time taken to reach settlements, referring to the 18 years that elapsed in negotiating the current Yukon agreement. Second, Graham warned against using existing models and methods, such as provinces and the property tax, as a basis for self-government. While these models might make discussion easier, they may not be appropriate to Aboriginal traditions and philosophy. Graham's third point related to the tension that arises between starting from first principles and working within the system, as she noted the different processes going on at the national constitutional level and at the local level. Fourth, Graham drew attention to the need for a greater focus on issues of implementation. The cost of implementing self-government, the training of Aboriginal peoples, and the development of programs all need more attention. Finally, Graham stressed the need for an exchange of views between Aboriginal communities and non-Aboriginal communities at the local level. Drawing on Kincaid's analogy of a covenant as marriage, Graham suggested that we might need "marriage counsellors." Local governments, she argued, must also be considered in planning and implementing self-government.

COMMENTARY:

MARK KRASNICK, ONTARIO NATIVE AFFAIRS SECRETARIAT

Mark Krasnick's commentary advanced the idea that non-Aboriginals need to "get out of the way" of Aboriginal self-government. He noted that at the close

11 Mohawk Council of Kahnawake, "Agreement on an Agenda and Process for the Negotiation of a New Relationship Between the Mohawks of Kahnawake and Canada," December 1991.

opposition to blood quanta, reflecting their concern that identity and community membership be based on culture, not on biology. Tizya noted that restrictive membership provisions have been used as a means of assimilation. She was concerned about the membership status of the many Aboriginal people who marry outside their communities. Paul Chartrand argued that the right to self-determination should include the right to define who that self is.

The concept of a national treaty received further attention. Tizya expressed a preference for a covenant embodying a nation-to-nation agreement. She argued that since current Indian governments are a creation of the federal government, treaties negotiated between them and the federal government would be equivalent to the government signing a treaty with itself. Dwight Dorey noted that some of the 50 bands comprising the Micmac nation have "fallen into the trap" of calling themselves nations. He argued that self-government inheres in distinct tribal groups, not *Indian Act* bands. Dorey suggested that a treaty process is necessary to lay out the fundamental ground rules for each nation to reestablish self-government.

Like Brown, Hawkes questioned what the cost of failure to achieve constitutional change might be. He concluded that it is vital to recognize the inherent right to self-government and emphasized that the symbolic importance of the right cannot be overstated.

DISCUSSION

Brad Morse disagreed with Hawkes' conclusion that understanding has not improved. He pointed to the increasing acceptance of the concept of an inherent right to self-government. As the concept becomes more widely accepted, the parameters of the debate have widened to include things like fiscal arrangements, the application of the Charter, and dispute resolution mechanisms.

Turning to the issue of power raised by Hawkes, Morse suggested that a more relevant problem is the legitimacy of government. Katherine Graham, however, argued that the role of the Crown is still important because of the historical relationship of the Crown to Indians. Robert Groves noted that since Aboriginal peoples were not conquered and did not sign a treaty voluntarily consenting to become part of Canada, the imperial connection to public order provides an explanation for the historical relationship of Aboriginal peoples to Canada.

Groves also argued that the inherent right to self-government needs to be seen as a "full box." In circumscribing the right, we need to be careful with the text, or the "symbolic packaging" of the box. Groves argued that we cannot be seen to take items out of the box and throw them away. Rather, we should deal with some items now and leave the remaining ones in the box.

Another participant pointed to the lessons of Meech Lake for this round of Aboriginal constitutional reform. He noted that issues of popular understanding and trust continue to play an important role in the debate. As well, he pointed to the difficulty created by attempting to deal with two symbolic issues (Quebec and Aboriginal peoples) at the same time. We may be facing a "clash of symbolisms" similar to that which occurred between the Charter and the distinct society during the Meech Lake process.

PART II
Conference Papers

Aboriginal Inherent Rights of Self-Government and the Constitutional Process*

Robert A. Young

INTRODUCTION

This is an analysis of how Aboriginal issues could become the constitutional deal-breaker in 1992 — or, more likely, of how native peoples could suffer a harmful failure to obtain their key demand, recognition of their inherent right to self-government.

The analysis is speculative. I hope it is flawed. But if it correctly depicts how Aboriginal demands intersect with Quebec politics and Quebec's constitutional position, then concerned actors should be searching now for the compromises that will soon be essential.

THE SETTING

This constitutional round began with the determination of the Quebec National Assembly to hold a referendum on the acceptability of proposals for reform. This sets up the Quebec-Canada game (the first of four interconnected games). The referendum can be finessed by putting it off, using it to get a mandate to negotiate further, asking a soft question or a tough one ("Are you in favour of Quebec independence?"), or by substituting an election. In any case, the deadline exists, and Quebec drives the process. The primary objective of the Mulroney government in this round is to have Quebec sign on to a reformed constitution. Premier Bourassa's objectives are less clear, but they must be to avoid splitting his party, to hold power, and to avoid pitting Quebecers against each other as in 1980.

*A slightly modified version of this paper is found in *Inroads*, 1:1 (June 1992).

5. restrictions on the federal spending power;
6. substantial transfers of power to the provinces, probably offered under the concurrency-with-provincial-paramountcy formulation; and
7. some device for coordinating policies of the central and provincial governments.

The important point is that the list of powers on offer be extensive enough to compare tolerably in Quebec with the Allaire committee recommendations.¹ But the more that Quebec "gets," the more probable is the formation of a blocking coalition among the other provinces. This leads to the critical conclusion: any package acceptable to the rest of Canada will be a tough sell in Quebec. The Canada-Quebec game is very finely balanced. Even with the recession, and with constitutional fatigue among the public, and even with a substantial set of powers on offer, Bourassa and the Quebec federalists will have a fight on their hands.

THE ABORIGINAL GAME

The fourth game in this round of constitutional reforms involves the provinces, Ottawa, and the Aboriginal communities (the Inuit, represented by the Inuit Tapirisat of Canada [ITC], the Métis, represented by the Métis National Council [MNC], the Indian nations, represented by their leaders, the band Chiefs, united in the Assembly of First Nations [AFN], and the off-reserve and non-status Aboriginals, represented by the Native Council of Canada [NCC]).

That this is a distinct game is demonstrated by the privileged participation of Aboriginal peoples in the constitutional negotiations. Ottawa is funding distinct processes through which each of the four communities will formulate a position, and Aboriginal peoples will hold a separate constitutional conference in Ottawa. Representatives will also participate in at least some of the federal-provincial meetings to be held through the spring of 1992.

For some time, the Aboriginal position has been centred on the concept of an "inherent right of self-government." Stripped of its strategic overlays, this implies that Aboriginal nations enjoy full rights of self-determination, and that these rights are not conferred by any Canadian constitution or by any other treaty or document, but rather derive from "sources within the Aboriginal

1 André Blais, "Is a Deal Possible? Public Opinion and Political Strategies," in Douglas Brown, Robert Young and Dwight Herperger (eds.), *Constitutional Commentaries: An Assessment of the 1991 Federal Proposals* (Kingston: Institute of Intergovernmental Relations, 1992), pp.113-18.

interests. The attention of the Inuit is focused on partition of the Northwest Territories and the Nunavut claim. The Métis want a land base, first and foremost. Off-reserve Indians want services and non-status Indians want recognition. For all these groups, the inherent right is not a central priority. It may help advance their immediate interests, although the struggle to attain it might also drain resources and exhaust the willingness of federal and provincial governments to make other concessions. Among status Indians, the inherent right demand is a unifying force, simply because it is both abstract and tends towards the extreme "sovereigntist" side of the ideological spectrum. But unity disappears as soon as the debate turns to any language that would circumscribe the right. Moderates want to concentrate on land claims and service provision through treaties and self-government agreements. Sovereignty is not high on their agenda. The same is not true of more hard-line leaderships among nations like the Mohawks and the Micmacs, who already claim full sovereignty. Similarly, many Chiefs may favour forms of circumscription, yet fundamentalists do not recognize their legitimacy, or that of band councils, because they often are creatures of the *Indian Act*. These serious divisions of interest within and between First Nations and the major Aboriginal organizations are driven, as always in politics, by different conditions of life and by the personal rivalries of political competition: they are also a function of past and current relationships with external, dominant governments.

CIRCUMSCRIBING THE INHERENT RIGHT

It is very difficult to imagine that a unified Aboriginal position on constitutional process and language can be reached by the summer of 1992. Most leaders are strongly committed to the principle of the inherent right. Indeed, it has been sold as something of a constitutional panacea, and few leaders could accept a constitutional settlement that did not include it. But there is no consensus on how to enshrine it or on how to circumscribe it. The Royal Commission suggested the following possibilities:

- 1.a. an inherent right of self-government to be "recognized and affirmed" within Section 35, through adding it as S35(5)
- 1.b. for greater certainty that the right is circumscribed, S35(5) to include "the inherent right of self-government *within Canada*"
2. as above, but also with a preamble to Part II of the Constitution Act which would mention Aboriginals' "inherent rights, powers and responsibilities under God"

communities that would favour sufficient precision to confer immediate, if limited, legislative authority accompanied by tangible benefits. But any circumscription of the right would entail extensive debate. It would also raise the possibility that some First Nations would refuse to sign on, and since they claim the inherent right to self-government, what authority could compel them to do so? A precise list of powers or a substantive National Treaty would require a lengthy consultative process. This could not be accomplished within the time frame set by Quebec's referendum commitment.

So the dilemma is simple. To the extent that the right is uncircumscribed, Aboriginal agreement is assured. But existing governments would have little certainty about its scope and its implications for their powers, obligations, and territorial control. Moreover, they would have correspondingly little protection from the vagaries of domestic and international legal interpretation. To the extent that the right is circumscribed to provide more certainty, consensus within the Aboriginal communities will be difficult to achieve, and it surely will not be attained within a very few months.

QUEBEC

Quebecers, like Canadians in general, support the concept of Aboriginal self-government.⁵ But francophone Quebecers are extremely sensitive about native issues. There are several reasons for this. Quebec was the locus of the first big claims settlement, which involved the James Bay Cree. This subjected to native agreement a project that commanded widespread public support, and so showed the power of the First Nations and the dependency of the provincial government on both the Cree and Ottawa. This drama is being repeated in the Grande-Baleine project, as a sophisticated Cree lobby effort threatens the New York contracts upon which early construction depends.⁶

The Oka crisis was another sharp reminder of the vulnerability of Quebec society to native solidarity and determination. This event humiliated Quebecers, even moderate nationalists, by requiring the presence of the Canadian military to keep order. The blockade of the Mercier bridge brought home native issues and power to urban dwellers in a way never witnessed in Toronto or Vancouver: tens of thousands were severely inconvenienced by a tiny minority possessing special rights. Further, the treatment of Aboriginal people in Quebec is seen there as being closely monitored from the outside, raising the troubling issue of Quebec's treatment of minorities in general. Quebecers do

5 See the poll results in the *Ottawa Citizen*, 15 February 1992, p. A-1.

6 Christian Rioux, "Comment les Cris ont planté Hydro," *L'Actualité*, 15 décembre 1992, pp. 46-50.

because it places Aboriginals and Québécois on an uncomfortably similar footing.¹¹

To Quebecers, native self-government through an inherent right has the following negative implications:

1. claims to control of territory;
2. control over other areas of provincial power, including resource management, the environment, education, language and culture, and criminal law, on native lands and perhaps beyond them;
3. the inapplicability of provincial laws to off-reserve Aboriginals (e.g., could Bill 101 be applied to Indians in Montreal?);
4. the ability to invoke the protection and assurance of these rights from the central government;
5. a claim to international surveillance of Quebec's treatment of native peoples;
6. the re-opening of treaties signed when the inherent right was not recognized;
7. a stronger case in outstanding claims, such as that of the Kahnawake Mohawks to seigneurial lands; and
8. the settlement of these matters by a Canadian Supreme Court upon which Quebec has no constitutionally guaranteed representation, and upon which it could hope for three of nine judges at best.

What is the upshot of this? Simply enough, it is that an Aboriginal inherent right to self-government must be very tightly circumscribed if Bourassa is to accept it as part of a package that will be very hard to sell in Quebec in any case.

Sensitivity in Quebec to the Aboriginal issue is so great that Jacques Parizeau and the Parti Québécois could find good strategic ground to oppose a constitutional reform that included an ill-defined inherent right. Any constitutional accord that did not close off Quebecers' concerns would be terribly vulnerable to PQ attack. It is true that the PQ platform accepts the right of First Nations to "autonomy within Quebec." It also proposes that a Quebec constitution would enshrine a new social contract between the Québécois nation and the Aboriginal nations, and that it would "define" the right of these nations to give themselves responsible governments. This is ominous enough for the First Nations. But the second thrust of the platform is that Québécois and Aboriginals will become

11 See Luc Chartrand, "Hydro ... tochtones?" *L'Actualité*, 1 décembre 1992, p.39: "Les chefs cris, formés par des bureaux d'avocats à la lutte juridique contre les gouvernements, se comportent comme ces élites traditionnelles du Canada français qui, pour conserver la mainmise sur leurs ouailles, les tenaient jadis à distance du développement industriel 'protestant.' Aujourd'hui, le mythe est celui de développement 'blanc,' 'destructeur de l'environnement.'"

Suppose Bourassa were opposed to an open-ended inherent right because it would expose a vulnerable flank to the PQ. Even if nine other provinces supported this inherent right, what would Ottawa do? It seems evident that the federal government would side with Quebec, thus forming a blocking coalition.

Here, then, is the crux of the dilemma. On the one hand, it is inconceivable that the First Nations and their four representative organizations could agree, within the time frame laid down by Quebec, on how to enshrine the inherent right and on how to circumscribe it. Consensus is readily attainable to the extent that the right is open-ended. On the other hand, to the extent that the implications of the inherent right are not fully defined, but are left to future court decisions and to negotiations between First Nations, provincial governments and Ottawa, then Quebec public opinion can be aroused against it, and against any constitutional package that includes it. In this context, the Mulroney government will be inclined to side with Quebec. As Joe Clark has already warned, after Chief Mercredi's interventions in February 1992, the Aboriginal game will not be allowed to destroy the federal-provincial game or the Ottawa-Quebec game:

We are going to do everything we can to have a large settlement that includes making historic progress on Aboriginal questions. But if Aboriginal leaders themselves act in ways that take the Aboriginal issues off the table, or make it impossible for us to make progress on Aboriginal issues, we can't put at risk the whole process.¹⁴

POSSIBLE SOLUTIONS

It seems the constitutional negotiations may well be heading for impasse on Aboriginal issues. How could this be resolved?

Ideally, in my own view, all provinces and Ottawa would accept an open-ended inherent right to Aboriginal self-government, trusting that mutual respect and an inevitably shared future would spur negotiations towards acceptable self-government agreements. This would be a great accomplishment.

But this seems unlikely to happen. Quebec, and other provinces, would oppose this outcome. Whatever his personal beliefs, Bourassa could not afford to fight the sovereigntists on this issue. Recently, the Quebec premier suggested he would accept an inherent right if the inviolability of Quebec's borders were made part of the constitutional package. But the inherent right could be read as trumping any such guarantee, were it not circumscribed, and were the right

14 *Globe and Mail*, 13 February 1992, p. A-1.

Enshrinement elsewhere could not be accomplished yet, either in a National Treaty or in section 35. Instead, an amendment to section 37 would, once again, commit governments to a set of conferences where the issue would be resolved. This would allow time — and money — for reaching a consensus within and among the First Nations on the appropriate form for recognizing, and circumscribing, the inherent right.

In order for this to occur, Aboriginal peoples must understand how gravely an intransigent stance would threaten either their own public support or the integrity of Canada. There is always a tendency among oppressed people — or their leaders — to suppose that conditions could not get worse. This certainly is not true in the case of native people in Canada. In a fractured Canada, the economy would deteriorate and government spending would be cut. Decentralization in what is left of Canada would expose First Nations more fully to provincial governments. In Quebec, the use of military force is a real option, and even were it avoided this would likely be at the cost of much public anger and an unsympathetic government of a sovereign Quebec. If Aboriginal peoples, excluded from the process because their demands cannot be met, resort to explosions of anger and frustration, they risk alienating the public support which is their strongest ally. Their power, like their capacity to endure, is founded in the end on moral grounds, and should the current negotiations cause this power to be sacrificed then it will take many years to rebuild.

In any compromise, the key player would be Bob Rae (along with Andrew Petter of the B.C. government and Premier Joe Ghiz of P.E.I.). Premier Rae has enormous credibility with the First Nations — and vice versa. It is he who put the settlement of Aboriginal issues at the top of his province's constitutional agenda, and he has consistently championed their cause as a matter of principle. But it is also Rae who would have to choose, in an impasse, between this loyalty to Aboriginal rights and the welfare of all Ontarians. If the inherent-right issue threatens to turn into a deal-breaker for Bourassa, could Premier Rae sacrifice the Ontario-Quebec axis, and the jobs and trade involved, and the integrity of the whole country, in order to meet his commitments on Aboriginal rights? I think he could not. And yet it is also clear that only Bob Rae has the credibility among First Nations to persuade them of Canada's commitment to negotiate seriously in another Aboriginal round, and only he has the political muscle to ensure that those negotiations bear fruit.

This is only the outline of a possible solution to an impasse. The advisability of taking steps towards it depends, of course, on whether the underlying problem it is meant to solve actually does exist. The preceding analysis of how the inherent right fits — or fails to fit — into the critical Canada-Quebec constitutional game may well be flawed. It is impossible to discern how the various constitutional games are progressing; even for key actors the state of play is unclear. Nevertheless, it seems likely that in the main Canada-Quebec

Comments on Urban Aboriginals and Self-Government

Rosalee Tizya

I have been asked to speak on the urban model. I work with the United Native Nations in British Columbia. This organization is a political organization that speaks for the Aboriginal people in British Columbia who do not live on reserves. We estimate that some 91,000 Aboriginal people in British Columbia do not live on the reserves. There are many status Indians, people who for one reason or another — economic, education or whatever — who cannot live on reserves, as well as the non-status, Métis, and Indian peoples from outside British Columbia. We estimate that there are some 40,000 of us in the greater Vancouver area alone.

Now, the United Native Nations in the past year and few months has been sitting down with federal and provincial agencies to discuss tripartite arrangements for self-government. I would like to go through a number of models we are examining and I would like to do it in the framework or the context of the range of political realities between both Canada and the Aboriginal people; and that is looking at models ranging from the perspective of total assimilation through to total sovereignty. These are the realities we are faced with as people. At the end, I will give you an indication of where people want to head.

At the present time, we have to look at the very bottom of the barrel, the colonial factor of Canada's democratic institutions and what that has created in the mindset of Aboriginal people. Within the Canadian democratic framework, Indian Affairs was the way in which Indian people are governed and that includes off-reserve as well, because the people who live off the reserves are defined as such. Since we are not on Indian land, the *Indian Act* doesn't necessarily apply, and it becomes a fuzzy area and people are caught between two jurisdictions. There is a federal policy that says all Indian people do not qualify for rights and benefits as Indian people because they do not live on reserves. Then we have a provincial government that says Indian people are a federal jurisdiction and if it takes on our problems and begins to try and help resolve them then the federal government will abdicate its total responsibility.

talking about are the band council-type system that causes division in the Indian communities. This includes the *Indian Act* definition of who is an Indian. It also includes the reserve systems that seem more like a concentration camp than communities because once you step off it, you are not really an Indian anymore, according to Canada. And it also includes the mindset of Indian people that land then is not an obligation that it is inherited by our children, and land becomes a commodity that an individual can do with whatever he or she wants. So we end up with people sitting at a table negotiating land as a commodity as if it is a business arrangement. And we end up a lot of times as people who look at our lives in political and legal terms and jurisdictions. There is a joke that floats around the Indian community that there was a teacher who wanted the students in a classroom to write an essay on the elephant. One student wrote his essay on the elephant as a means of transportation. Another student wrote on the sex life of the elephant. And the Indian student wrote on the elephant: federal or provincial jurisdiction. But we live with that on a daily basis.

So, within the framework of this kind of assimilative process we look first of all at the whole *Indian Act* system as intending to do that and then because it is intending to do that, there is a lot of resistance by Indian people both psychologically, emotionally, and whatever other ways people can. On the other side, when you look at the people who are not on reserves, the off-reserve Indian people, the pressure comes for them from the provincial side. And you can imagine in British Columbia what kind of pressure that is under a very conservative provincial regime. Because in that system the total focus has been on free enterprise and economic development, not on the human development that needs to happen among Indian people.

So we have among our people several levels of psychological and emotional bases. We still have our *traditional* people who retain and maintain and protect our sovereignty, our traditions, our culture. We have people now who are *transitional*. They are caught between two cultures, not able to fit really in either world for a number of reasons. We have people who are *assimilated* — not to condemn them in any way, we all have freedom of choice and free will. And we have people who are *bicultural*, able now to function well in either world. The real conflict is between the traditional values and the assimilated ones. So when you hear about even the Nunavut or the Yukon land claim or any land claim issue, you are going to find that there is a conflict between the traditional values and the assimilated values of selling land for money. What we have not really seen emerge are the bicultural people. There is a lot of work that has to be done at the community level, a lot of feeling that has to take place. At the community level you will find a number of bicultural people working there in various ways.

In Canada's attempt to resolve the constitutional crisis, the Lands, Revenues and Trust review of Indian Affairs is examining the fiduciary obligation at three

A lot of the resistance by Indian people to government initiatives relates to a suspicion that we are being assimilated. If we must give up our Aboriginal title, then nothing moves ahead. So what we have done is looked at models of bicultural arrangements such as the Navaho's tribal court system, where they have adopted the American court system but built in Navaho cultures and values. Now that tribal court system does not replace the traditional governing system but it complements it and acts as a bridge between both the Navaho traditional system and the American system. Thus, we look at URBAN now as something that's evolving into a bicultural bridge that is practical and manageable for the people in Vancouver. And that's under the present system as it is. This is just looking at what is possible now. When we move into the kinds of negotiations taking place in relation to the constitution, that moves us into looking at section 91 — that is a legislative model — without any changes to the Charter or defining section 35 even. Rather than a society-type model, we are examining the idea of giving these organizations a legislative base, whether from the federal or provincial government, so that they have their own statutes to go by. Very much like the Legal Services Society in British Columbia, there is a statutory base for that as well as the Open Learning Institute. So they are not spending a lot of time competing for funds and all of that. Everything is set there. Now that's another level of what could happen between governments at this point in time. I am not talking about the Sechelt-type model but, within an urban setting, giving a legislative base to the organizations that presently exist so that we are not subject to the vagaries of the Societies Act system. And that again puts a certain amount of authority into an organization that could more strongly deal with government agencies.

We can look at section 35 of the constitution and we can talk about an inherent right to self-government. However, when I talked about the seven holy men, and when we talk about the original jurisdictions and obligations of First Nations to protect our lands for our children, and we look at what section 35 and the existing Aboriginal and treaty rights, how can we now practically make an arrangement that would meet the spiritual obligations of the First Nations and at the same time not cause people to be so frightened that they are going to lose their golf clubs and their golf courses and their houses and estates and microwaves?

What the Aboriginal people in Vancouver will very likely be proposing is a definition of an inherent right to self-government as a practical kind of arrangement that includes at an advisory level a Council of Elders in Vancouver. Many people now raise the question of what are you going to do when you have so many different nations living in Vancouver. You have the Cree, the Ojibway, the Nisga'a and the Haida and all these different groups, how can you really hope to arrange something that meets all of their needs? Well, the one beautiful aspect of First Nations is that we all share the same philosophy no matter where

opportunities for Aboriginal students to go to universities in other countries and that sort of thing.

And so, that is about as far as the thinking has gone to this point because there is so much complexity being thrown at people in the community. There are many other topics such as: the Charter; the equality of men and women; section 15; and Senate reform. What we tried to do is not worry too much about all of that at this point, but try and see it from the local people's perspective, from the perspective of sovereignty, from the perspective of the destruction of the colonial mentality, and try and work through something that is reasonable, practical, and workable. So, to this point that's the kind of work that the United Native Nations has done.

And how does it all relate then to the ordinary Canadian person? Well, if we take Quesnel as an example, the Town of Quesnel, the people that live in the town, the people who work in the mill, who are on the town council, all of them, are now sitting down with the local Indian people. What was basically recommended to them is to forget about the governments, to forget about the courts, just sit down and see if you can work out some kind of co-existing relationship with one another. See if you can just learn to live side-by-side, see if you can work out the conflicting values between forestry and land protection. That has been going on for quite a while and I understand that it is going fairly well. Just sitting down and learning from one another. We see a lot of this kind of local initiative as the way to resolve a number of these issues, because waiting for provincial and federal governments to do something is taking too long. I do not want to be 80 years old and still dealing with it. And I do not want to see my son have to deal with it or my children in any way, shape or form, and at the same time I am not prepared to compromise some very important values that I have. But I think we've come farther than most people have in looking at these things. I think we've come farther in the spirit of cooperation. We've come farther in terms of teaching a lot of these things, too.

So, I just want to conclude by saying that there is a certain bottom line that Indian people have and it does not matter how many threats get thrown at us. It doesn't matter how much people desire to own this whole country. There is a bottom line that is never going to go away — our spiritual obligations that go way beyond Canadian constitutions. So I just want to conclude with that and thank you.

Aboriginals and the Future of Canada¹

David J. Elkins

No credible discussion of the future of Canada can ignore the Aboriginal peoples. No argument can be made for autonomy or self-determination for Quebec that does not apply equally to Aboriginal concerns. No good reason can be given for the Government of Quebec speaking on behalf of its distinct society with all the sovereignty that goes with provincial status without consideration of the possibility that Aboriginals should have provincial status in order to defend their distinct societies. No solution will be found for "the Quebec problem" without simultaneously solving "the Aboriginal problem." It is the central thesis of this paper that "the Quebec problem" and "the Aboriginal problem" are, politically at least, largely the same problem.

If Quebec has the power to paralyze Canada in the process of seeking its destiny, it can find itself paralyzed if it fails to understand that its destiny is inextricably intertwined with that of Aboriginals as well as the rest of Canada. There are "three scorpions in the bottle" where we used to think there were two. There are not just "two nations warring in the bosom of a single state," as Lord Durham thought; there are at least three types of nations embedded in Canada. Each must seek distinct identities, and none can do so without the utmost attention to each of the others.

These assertions should have been clear to Canadians for a long time, but after 1990 the linkages between Quebec and the Aboriginals should be even more obvious. Elijah Harper's role in the death of the Meech Lake Accord in the Manitoba Legislative Assembly was one visible link, even if there were several other things that would have killed the Meech Accord if Harper had not. The armed seige and standoff at Oka (Kanasetake) made more visible the interdependence of the Quebec government, the Mohawks, and Canada.

Of course, there are important differences between the situations of Aboriginals and the French in Quebec. I will return to these differences after exploring some ways in which these groups share historical, structural, and political

1 I have benefited from the comments of David Hawkes, John Trent, Alan Cairns, Douglas Brown and Robert Young.

officially recognized by the *Constitution Act, 1982* which states (in section 35) that Métis are one of the three Aboriginal Peoples: Indian, Inuit, and Métis.

DISTINCT SOCIETIES

One of Quebec's key concerns in the Meech Lake process was recognition as a distinct society. Partly this was a desire for the obvious: this is a society that has always been overwhelmingly French and has been getting more so in this century. Another part, however, was a fear that some of the individualistic rights and freedoms in the Charter would erode Quebec's distinctness, which has a more communitarian or collective basis. Hence, the use of the "notwithstanding" clause (section 33 of the *Constitution Act, 1982*) in December 1988 to override the equality of English commercial signs with French ones aroused a great deal of concern in the rest of Canada. Yet as a province Quebec had the power — legally and constitutionally — to shelter its culture in this way, just as Saskatchewan had the right to override labour union rights when it used the same device earlier. Even without using section 33, Alberta and Saskatchewan have in recent years negated various French language minority rights and have seen their legislation upheld by the courts.

Aboriginal groups cannot invoke the "notwithstanding" clause in section 33, but they have an analogous form of protection. Section 25 reads in part: "The guarantee in this 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 the Aboriginal peoples of Canada." One can hardly imagine a more potent protection of a distinct society, and it is remarkable that Quebecers have so seldom noticed that Aboriginals have the protection Quebec seeks.² It is also remarkable that Aboriginals should have criticized the distinct

2 There has been disagreement among scholars about the importance of this protection. Of course, we must await relevant Supreme Court decisions which rely on or interpret this section, just as we will not know the value of a distinct society clause for Quebec (if there is one) until its use in court cases. See the discussions of section 25 in Noel Lyon, "Constitutional Issues in Native Law" (pp. 422-23) and Peter Cumming, "Canada's North and Native Rights" (pp. 732-34), both in Bradford W. Morse (ed.), *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1989). Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal and Kingston: McGill-Queen's University Press, 1990), pp. 200-202, argues that there is an additional protection for Aboriginal and treaty rights beyond that contained in section 25, because section 35 is in Part II of the *Constitution Act, 1982* and thus is not subject to the "reasonableness" test of section 1 of the Charter, which applies only to Part I. Since section 35 guarantees existing Aboriginal rights and treaty

Métis, nor would one need to assume those identities, in order to live in this province of First Peoples. Self-selection here refers to location, not to identity as an Aboriginal.

At present, the *Indian Act* determines who is an Indian. Since I assume that the *Indian Act* would be rescinded, perhaps in its entirety, once First Peoples had been established, the definition of an Aboriginal would be a matter for the groups concerned to work out. This is no different, in its own way, than the situation in regard to members of French, English, or other minorities who identify themselves to each other or not, as they please.

After a period of time, one would undoubtedly find that not all Aboriginals lived in First Peoples and not all who lived in First Peoples were Aboriginals by our conventional measures, but that the majority of Aboriginals would live there and the majority there would be Aboriginals. Substitute the word "French" for "Aboriginals" and "Quebec" for "First Peoples," and the previous sentence would be equally meaningful. The two provinces would, in short, respond to a market-like situation and eventually an equilibrium would be reached in which a group that is a minority in Canada would have its "own" province where it could be a majority without restricting members of other groups from residing there.⁴

FIRST PEOPLES

The proposed province of First Peoples would, in the first instance, consist of all the land and water now contained in the 2,000 or so reserves south of 60°. As current land claims are settled, land would presumably be added to First Peoples. The province might trade some territory for that of surrounding provinces in order to consolidate currently scattered reserves or to create land bridges. Additional land might need to be set aside in recognition of the lack of land base of many Métis.

The most important aspect of First Peoples would be its status.⁵ As a province, it would have the same powers as existing provinces: jurisdiction over education, health, welfare, administration of criminal justice, natural resources,

4 For further discussion, see David J. Elkins, "Where Should the Majority Rule? Reflections on Non-Territorial Provinces and Other Constitutional Proposals," *Point of View* (Edmonton: Centre for Constitutional Studies, 1992), no. 1.

5 This would also result, presumably, in changes to the current situation where provincial laws of general application apply on the reserves. As a province, First Peoples would have its own laws. For a description of current applicability of some provincial laws, see Douglas Sanders, "The Application of Provincial Laws" in Morse (ed.), *Aboriginal Peoples and the Law*.

Prime Minister Trudeau often argued that the provinces aimed for a "power grab" from the federal government. By that he seemed to mean that the provinces wished to have sufficient taxing powers to pay for all of their responsibilities without interference from the federal government. This, many have argued, would weaken the federal government so much that it could not play its proper roles of maintaining national unity and protecting Canadians from American influence. No one, it should be clear, can protect us fully from American influence, judging by the inability of countries distant from the United States (Australia, for example) to resist. So the real issue is: Will national unity be helped or hindered by the federal government carrying out its own responsibilities and letting the provinces carry out theirs? Why would one expect that sovereign governments — as the provinces are, at least in certain areas of jurisdiction — would be induced to support calls for national unity by federal intrusions in those jurisdictions central to their autonomy such as health and education in Quebec or natural resource rents in Alberta? To the extent that a First Peoples Province is viewed as weakening the federal government, the issue cannot be divorced from the broader conceptions of federal-provincial relations which have been contending in this country for at least two generations. Again, the "Aboriginal problem" leads back to other problems.

Let us leave aside, then, issues of paternalism and centralism as irrelevant or unresolvable in the short run. What are some other implications of the creation of First Peoples?

Canada has always been proud of its image as a haven of freedom and dignity for immigrants and refugees. But it has sometimes appeared hypocritical about its treatment of Aboriginals. Creation of a province of First Peoples would almost certainly put Canada back in a leadership role in regard to Aboriginals, oppressed peoples, and human rights generally. This may be especially urgent at a time when Canada claims to be linking its foreign aid to human rights improvements in target countries.

How would the new province affect existing provinces? Three areas should be mentioned: loss of land and other resources, equalization payments, and dynamics of future constitutional changes.

The 2,000 or so existing reserves in the ten provinces do not belong to the provinces. The constitution gives the federal government exclusive jurisdiction over Indians and lands reserved for their use. Thus, to cobble them together and call them a province would not subtract any land or natural resources from existing provinces.⁸ Of course, currently ongoing land claims will almost

8 Lyon, "Constitutional Issues in Native Law," pp. 448-50, argues that some lands (but not all) ceded by Indians to the Crown generate revenue (e.g., from timber) for a province rather than for the federal government. If so, the statement in the text would need qualification, although Lyon seems to say that most such ceded

could bring new perspectives or new objections. Where unanimous agreement is mandated, change will generally be more difficult where more groups have a veto. But one must recall that Elijah Harper exercised what was, in effect, a veto regarding Meech Lake; and Aboriginals were quite effective in 1981-82 in lobbying for changes in the Charter. Hence, it might happen that their official representation could smooth the process rather than inhibit it, since some of their grievances would have been met. The dynamics of the Oka crisis might have been quite different if the premier of First Peoples Province could have met with other first ministers.

Where unanimity is not necessary, the presence of First Peoples should have only a small impact. Two-thirds of the provinces with, together, more than 50 percent of the total Canadian population is the amending formula for most constitutional matters. Two-thirds of 11 is 7.33 or eight, which is slightly larger than two-thirds of ten, namely, seven provinces (actually 6.7). Since First Peoples would be a medium-size province — with roughly 4-5 percent of the population — it would not be decisive in the way Ontario or Quebec are, since at least one of the latter must support any amendment in order to achieve the 50 percent rule.

Each of the existing provinces would presumably become less diverse, socially and demographically, by the "removal" of Aboriginals to their own province. The fact that a certain proportion of Aboriginals would choose to live in provinces other than First Peoples would not change the generality of this point. Hence, it might be easier for any given province to reach a consensus on its own political or constitutional position under this proposed arrangement.

Under section 42(f) of the *Constitution Act, 1982*, the creation of new provinces must occur under the amending procedure specifying concurrence of seven provinces with at least 50 percent of the population, plus the federal Parliament. Hence, this proposal would not require unanimity, as had been proposed in the Meech Lake Accord. This does not guarantee that approval would be easy, but at least the conditions are less stringent than they would have been if the Meech Lake Accord had been entrenched in the constitution.

One significant advantage of creating a province as the avenue to fulfil the demand for the inherent right of self-government is that we know what a province is and how it works in general. Thus, one might be able to avoid divisive and slow-moving court cases about land claims and about the meaning of self-government.

No political or constitutional change works out exactly as predicted. All have unexpected consequences, and some of those may even run directly contrary to expectations. Thus, what I have outlined may be wide of the mark, but at least there appear to be good reasons for thinking that the creation of a First Peoples Province would not destabilize Canadian politics beyond its already somewhat

aspirations, the policy conference adopted as a goal the creation of "autonomous native nations within an independent Quebec."¹²

Rather than pursue the ways in which some of our customary assumptions would be violated, let us ask whether those violations matter. Are there positive or negative consequences of this territorial peculiarity of First Peoples? Let us consider first the possible negative implications. These can, for shorthand reference, be grouped under the label of inconveniences and diversity. By inconveniences, I mean that the distances among the parts of First Peoples would be great, much greater than in any other province, and that one would have to cross at least one of several provinces to get to other parts of one's own province. So what? It takes two days to drive across Ontario; why should three days or four days matter in any critical sense? There are large parts of British Columbia and other provinces that cannot be reached at all by road. Surely distances are less important in the age of telecommunications and jet air travel than in earlier periods. (This is one of the historical explanations of territoriality to which I alluded above.) To me, a five-hour drive from Vancouver to Kelowna and a five-hour flight to Montreal are the same; both are equally distant.

Another inconvenience may seem more serious. Would there be any cities in First Peoples? Although there are urban reserves (one of which owns much of the Vancouver harbour waterfront), there are no reserves that are themselves major urban centres.¹³ If one wants to retain a traditional life-style, this may be an advantage. Or perhaps cities will grow up in some of the larger reserves. Or perhaps we are incorrect in believing that cities are essential to all forms of civilized life.

Diversity is a potential negative. First Peoples would consist of groups speaking several very different languages (although most also know French or English) and enjoying distinct cultures with different social organizations. That, plus the distances from one part of the territory to others, might make political organization, election campaigning, and administration cumbersome and

12 This policy appears to move in the direction that has been standard in the United States since the 1820s and 1830s. At that time, a series of Supreme Court decisions written by Marshall established the Aboriginal peoples as "domestic, dependent nations." See Bruce H. Wildsmith, "Pre-Confederation Treaties" in Morse (ed.), *Aboriginal Peoples and the Law* (esp. pp. 131-43).

13 One of the greatest dilemmas in devising policies and institutions for dealing with Aboriginals concerns "urban Aboriginals." The creation of First Peoples would not deal with the problem fully, since most urban Aboriginals are not urban because of living on an urban reserve. Of course, where they did, they would automatically be a resident of First Peoples and would receive services from the province. For urban Aboriginals not on reserves, the creation of First Peoples would have, at most, an indirect effect to the extent that this province would help to publicize the plight of these people or to pressure other governments to improve services.

Social services could, in principle, follow the model just outlined for health and hospitals. Some modifications might be necessary to reflect the fact that Aboriginal groups often want somewhat different types of services or styles of delivery. Of course, provinces already differ quite a bit in these ways, but First Peoples (or units within it) might want or need radically different services or combinations of services. Besides the fact that this is clearly feasible — although requiring imaginative thinking — I would argue that we might find that existing provinces come to imitate some innovations pioneered in First Peoples. One of the values of federal systems is tolerance for local experiments which may then (as with health care in Saskatchewan) be copied by other jurisdictions.

Let me reiterate that I do not have solutions to all problems, and many problems will prove vexing. What I wish to emphasize, on the other hand, is that current problems for Aboriginals are already extremely vexing, and current solutions are not working. This proposed province may not solve all the problems, but it offers some hope of dealing favourably with some of them. And it allows Aboriginals to take charge of dealing with their own problems at last.

On the other side of the equation, diversity may have some advantages. Underlying the great diversity is an important unity: Aboriginals would at last have a clear institutional voice instead of working through several organizations to try to influence ten provinces and the federal government. If an analogy is possible, one might contrast the security and self-confidence of the French in Quebec compared to the small and isolated communities in many other parts of Canada.¹⁵ Furthermore, one must concede that Aboriginals have demonstrated considerable political skills in their fragmented situation up until now. Perhaps organizing and running a province would prove no more daunting a task.¹⁶

The central questions regarding diversity are three. First, would there be enough coherence within the new province to support and sustain extensive redistribution of resources? After all, some bands or nations enjoy impressive resources while others live in the most abject poverty. Second, would some bands feel just as oppressed by the new province as they do now by Ottawa? Third, will Aboriginal women eventually be comfortable within First Peoples Province? Spokeswomen have become increasingly concerned about their status if the *Charter of Rights and Freedoms* does not apply fully.

15 The analogy is developed further in Elkins, "Where Should the Majority Rule?"

16 One way of dealing with the diversity inherent in First Peoples would be through political parties. We usually think of parties in electoral terms, but they are also ways of organizing ideologies, of expressing regional grievances, and of integrating minority and majority groups. As with my other suggestions, I repeat that no single solution will handle all problems, but there are many vehicles to consider and many institutional forms compatible with provincial status.

productively and less antagonistically, and if so we will owe some thanks to Aboriginal peoples for making us face and question some assumptions no longer necessary.

But will it not be terribly confusing if boundaries overlap and many types of groups share a place? Think for a moment about how one's own town or city is organized. Some agencies and institutions co-exist in the same territory; for example, a school board and a parks board may coincide with the boundaries of a municipality. But there is no commonality of territory for others: telephone toll-free areas, hospital boards, water districts, hydroelectric power utility districts, air traffic control regions, and rapid transit systems. Each functional institution is designed to deal with a specific problem or issue, and thus each adopts a size of territory that seems appropriate to that issue. Why should one expect all problems to fit neatly within the same territorial boundaries?

Some people respond to this question by answering that these agencies do not relate to the same territory because, of course, they do not all stem from the same sovereign government. Why should we assume that sovereign governments must be all-purpose entities, dealing with all issues in regard to the same territorial base? It is arguable that the federal and provincial governments might perform better if they undertook fewer activities and instead allowed political units larger and smaller than them to handle some other problems.

CONCLUSION

The interdependence of Aboriginals, Quebec, and Canada poses serious problems to political leaders and to our sense of ourselves as a country. It may also present opportunities. Recognizing the interdependence may lead us to consider solutions not commonly assumed acceptable or normal in the past. Thinking about novel conceptions cannot hurt and may shake us loose from harmful preconceptions. One such set of assumptions that may need questioning concerns how we organize our politics around very particular territorial foundations. Whether we like it or not, nations as we have known them have existed in Europe for only about 300 years and are now evolving into new forms.¹⁷ Canada has never been a traditional kind of nation — homogeneous, spiritually

17 It is salutary to recall the recency of the "invention" of the territorial nation state and equally so to note that its ubiquity around the world is a result of European imperialism. It was imposed on Aboriginals in North America, as it was on other political and social organizations elsewhere; and thus there may be ironic justice to find that the evolution of political organizations "beyond the nation state" may, in some cases, bring us closer to the nonterritorial forms that were common before its imperial spread.

Aboriginal Governments and Power Sharing in Canada

17-18 February 1992

Participants

Frances Abele
School of Public Administration
Carleton University

Gerald Alfred
American Indian Program
Cornell University

Janet Armstrong
Department of Political Studies
Queen's University

Andrée Bélanger
Secrétariat aux affaires autochtones
Gouvernement du Québec

Tony Belcourt
Wolfwalker Communications

Robin Boadway
Department of Economics
Queen's University

Daniel Bonin
Institute of Intergovernmental
Relations
Queen's University

Christopher Bredt
Ministry of Intergovernmental
Affairs
Government of Ontario

Kathy Brock
Department of Political Studies
University of Manitoba

Douglas Brown
Institute of Intergovernmental
Relations
Queen's University

Alan Cairns
Department of Political Science
University of British Columbia

Anthony Careless
Ministry of the Attorney General
Government of Ontario

Fred Caron
Department of Justice
Government of Canada

Marlene Brant-Castellano
Royal Commission on
Aboriginal Peoples

Paul Chartrand
Royal Commission on
Aboriginal Peoples

Katherine Chiste
Centre for Aboriginal Management
University of Lethbridge

Murray Coolican
Eastern Forestry

Thomas J. Courchene
School of Policy Studies
Queen's University

Alexandra MacQueen

Department of Political Studies
Queen's University

Kevin Malone

Cabinet Secretariat
Government of New Brunswick

Michael McGoldrick

Makivik Corporation

Bradford Morse

Faculty of Law
University of Ottawa

Rolande Nadeau

School of Public Administration
Queen's University

Joe Norton

Mohawk Council of Kahnawake

Evelyn Peters

Department of Geography
Queen's University

Catharine Read

Government of Yukon

Jonathan Rose

Department of Political Studies
Queen's University

Peter Russell

Department of Political Science
University of Toronto

Jennifer Schaffer

Department of Political Science
University of Toronto

Tom Schneider

Centre for Resource Studies
Queen's University

Scott Serson

Federal-Provincial Relations Office
Government of Canada

Elizabeth Snider

Ministry of Intergovernmental
Affairs
Government of the
Northwest Territories

Rosalee Tizya

United Native Nations
Vancouver

Anne Trotier

Ministère de la justice
Gouvernement du Québec

Robert Watts

Native Affairs Secretariat
Government of Ontario

Jill Wherrett

Institute of Intergovernmental
Relations
Queen's University

John Whyte

Faculty of Law
Queen's University

Robert Young

Institute of Intergovernmental
Relations
Queen's University

Program*

All sessions will take place in the Confederation Rooms at the
Howard Johnson Confederation Place Hotel, Kingston

SUNDAY, FEBRUARY 16

8:00-10:00 p.m. RECEPTION — Salon "A"

MONDAY, FEBRUARY 17

9:00-10:15 a.m. **SESSION I: Approaches to Power Sharing**

Chair: *John Whyte*, Faculty of Law, Queen's University

- Aboriginal Philosophy and Approaches to Governing
Georges Erasmus, Royal Commission on Aboriginal Peoples
- Federalism and Pluralism as Methods of Power Sharing
John Kincaid, Advisory Commission on Intergovernmental Relations, Washington

10:15-10:30 a.m. BREAK

10:30 a.m.-12:00 noon Commentator: *Alan Cairns*, University of British Columbia

General Discussion

12:00 noon-2:00 p.m. LUNCH

2:00-2:45 p.m. **SESSION II: Current Issues in Canada**

Chair: *Peter Russell*, Department of Political Science, University of Toronto

- The Current Constitutional Debate in Canada
Robert Young, University of Western Ontario and Visiting Fellow, Queen's University

General Discussion

2:45 p.m.-3:00 p.m. BREAK

*Program revised to reflect actual proceedings.

List of Publications

Aboriginal Peoples and Constitutional Reform Series

NEW RELEASE

Thomas J. Courchene and Lisa M. Powell, *A First Nations Province*, 1992. (\$7)

BACKGROUND PAPERS

1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services*, 1984. (\$12)
2. David A. Boisvert, *Forms of Aboriginal Self-Government*, 1985. (\$12)
3. (not available)
4. Bradford Morse, *Aboriginal Self-Government in Australia and Canada*, 1985. (\$12)
5. Douglas E. Sanders, *Aboriginal Self-Government in the United States*, 1985. (\$12)
6. Bryan P. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984*, 1985. (\$20)
7. David C. Hawkes, *Negotiating Aboriginal Self-Government: Developments Surrounding the 1985 First Ministers' Conference*, 1985. (\$5)
8. John Weinstein, *Aboriginal Self-Determination Off a Land Base*, 1986. (\$7)
9. Marc Malone, *Financing Aboriginal Self-Government in Canada*, 1986. (photocopying costs)
10. Jerry Paquette, *Aboriginal Self-Government and Education in Canada*, 1986. (\$10)
11. Richard H. Bartlett, *Subjugation, Self-Management and Self-Government of Aboriginal Lands and Resources in Canada*, 1986. (\$10)
12. C.E.S. Franks, *Public Administration Questions Relating to Aboriginal Self-Government*, 1987. (\$10)
13. Ian B. Cowie, *Future Issues of Jurisdiction and Coordination Between Aboriginal and Non-Aboriginal Governments*, 1987. (\$7)
14. Delia Opekokew, *The Political and Legal Inequities Among Aboriginal Peoples in Canada*, 1987. (\$7)
15. Evelyn J. Peters, *Aboriginal Self-Government Arrangements in Canada*, 1987. (\$7)
16. Bradford W. Morse, *Providing Land and Resources for Aboriginal Peoples*, 1987. (\$10)

