

AN EVALUATION OF THE DISCUSSION AT THE WORKSHOP ON ABORIGINAL SELF-GOVERNMENT AND THE FEDERATION

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The purpose of this workshop was to discuss the values underlying aboriginal self-government and the Canadian political system, ideally identifying the potential for accommodation between the two. As could be expected from a discussion of such broad scope, a comprehensive array of diverse, disjointed and intriguing comments emerged. The imposition of order upon an unstructured discussion is not without its dangers, and it is my hope that the following retains the essence of the debate as well as providing a coherent overview of the issues discussed. Three main threads were discerned: the tension between theory and practice; the tension between diversity and conformity; and, finally, a questioning of the political will to bring about constitutional change.

Separating the abstract from the concrete is a difficult task to sustain. Throughout the afternoon session, participants frequently slid into discussing concrete problems, concerns or past practices in an attempt to illustrate why abstract values were not reliable indicators of actual political behavior. The reliance upon the concrete to elaborate abstract concepts is by no means unusual, but the importance of this phenomenon to this debate was significant. In a fundamental sense the entire discussion could be seen as a see-saw between the attempt to identify abstract commonalities, and expressions of scepticism based upon observations of those values in action - the age-old tension between theory and practice.

This was most evident in Richard Simeon's presentation on federalism as the "appropriate lens" through which accommodation of aboriginal self-government could be viewed. Elaborating a "community of communities" conception of federalism, he proposed that the values underlying federalism could provide the rationale required to refute the presumed inconsistency between the Canadian political system and aboriginal self-government. The greatest potential for accommodation lies, according to Simeon, in the larger complementaries present in federalism, in the:

legitimacy of multiple communities, the virtues of shared and divided authority, the hostility of homogeneous models, the advantages of small communities and decentralized power idea of covenants among communities.

In addition, the redistributive mechanisms of federalism - unconditional grants, equalization payments and regional economic development agreements - were seen as viable means through which aboriginal self-governments could be financed.

Some support for this optimistic view was present, with the adaptability of federal processes and arrangements on pragmatic grounds cited as cause for hope. However, more practical concerns continued to emerge throughout the session. Logistical problems were raised (how could so many parties conceivably meet); queries on how executive federalism could accommodate aboriginal self-government were put forward; and there were reminders that, while values such as those articulated by Simeon may be a part of the Canadian political system, in reality they have seldom been extended to aboriginal communities. Perhaps the most insightful comment on federalism was advanced by Leroy Little Bear concerning an issue which he felt was understated in Simeon's presentation - that federalism also means two levels of government with divided but exhaustive powers. The problem, it was implied, is not in adopting the appropriate theory, but that potentially, aboriginal self-government represents a real loss of power to both levels of government.

The difficulty, it seems to me, is in finding the appropriate balance between theory and practice. Neither optimistic theoretical discussions nor pessimistic pragmatic criticism are sufficient in and of themselves to facilitate accommodation. Highlighting this truism may do little more than emphasize the difficulty in trying to formulate a framework that captures the complexity of aboriginal issues, but it is also a fact of life that finding a common thread will be required if a more acceptable form of co-existence is to emerge.

The second tension, that between diversity and conformity, reflects the problems inherent in trying to achieve the balance noted above within the context of an ongoing debate. At the heart of this issue is the extent to which differences can be tolerated while maintaining an identity as a "whole" - how can aboriginal Canadians "complete the circle of confederation", incorporating their distinctiveness and diversity into this "whole"? The tendency, by participants on all sides of the constitutional table, is to generalize and to demand comprehensive explanations, manifestations of the desire to render complexity comprehensible, thereby reducing uncertainty.

A good example of this phenomenon was the presentation by Little Bear. His dominant theme was the distinction between the "native" and "western mind-set". The former was characterized as holistic, repetitive, and concerned more with space and place than with time and person. The latter, on the contrary, was described as linear, singular, and concerned

with either/or categorizations that do not easily handle new concepts. The characterization of all aboriginal peoples in this manner serves many strategic purposes: building a pan-Canadian aboriginal identity; distinguishing aboriginal peoples from other Canadians and thereby lending additional legitimacy to demands; and promoting the development of a united organizational stance vis-à-vis the 11 Canadian governments. The trade-off is that, the more generalized is the model promoted, the less clear is the diversity in problems, opportunities and aspirations, and the more the debate becomes "western" in structure and language. As participants noted in the session, the tendency was to adopt the language of "aboriginal people" when in reality the concerns being expressed were those of Status Indians on reserve - i.e. disallowance of Band by-laws, the restrictive *Indian Act*, and devolution of programs.

I would speculate that the need to encompass the diversity among aboriginal peoples likely introduces a rigidity into the debate such that bridging differences at the collective level between aboriginal people and the dominant society becomes harder. It does not seem reasonable that distinctiveness and the politics of solidarity would mesh well with the imperative of negotiating nor the search for common values, except at the most abstract levels. In a larger sense there is a Catch 22 situation: the diversity among aboriginal groups points toward a general constitutional accommodation, yet that same diversity makes the 11 governments wary of any amendment that might be interpreted as acknowledging equal rights or obligations.

The tension between conformity and diversity was also evident in the brief presentation by Noel Lyon on constitutional interpretation. The thrust of his article, "An Essay on Constitutional Interpretation", is to promote changes in constitutional interpretation more in keeping with the 1982 intent to make the constitution the supreme law of Canada. The direction of desired change is toward a comprehensive approach, one guided by the principle of fundamental justice in the consideration of the purpose and context of constitutional matters. To Lyon, Part II of the constitution provides the opportunity for fundamental justice to be done, representing a commitment to aboriginal peoples to honour their rights and redress historical wrongs. He proposes that instead of applying the Charter to aboriginal peoples, section 35 should be allowed to evolve as necessary, elaborating only those rights consistent with aboriginal values. However, this will not occur, according to Lyon, without a change in judicial thinking, a movement away from technocratic doctrinaire adherence to precedent and tradition.

Unfortunately, little discussion occurred regarding Lyon's thesis, beyond general condemnation of the preoccupation with legalistic considerations in the constitutional debate. Despite Lyon's support for

constitutional elaboration of aboriginal rights, the implication of his thesis is that this would be an insufficient accomplishment in the face of an unchanged, inherently conservative court. In his estimation, the current mode of judicial thinking is incapable of reconciling the diversity and demand for justice implied by section 35, and hence, he is pessimistic about the possibility of judicial "gains" for aboriginal peoples. The only direct response to Lyon's pessimism was from a lawyer who suggested that, since post-1982 constitution decisions are only just occurring, it is too early for conclusions, and further, that litigation also plays a positive role in constitutional matters, as a mechanism for articulating the balance between competing principles. There was, however, no discussion of another implication of Lyon's thesis, namely, given the tradition of non-political involvement by the courts, that five years of constitutional wrangling may have limited legal efficacy in the absence of political will. While this may seem extreme, it does not seem likely that a proactive court would emerge overnight, or that a profound change in the constitutional order would be imposed in the face of known political antipathy.

It was the question of political will that underlay the third, most dominant thread of the session, pessimism. In a fundamental way, the very purpose of this session, the identification of common values, could be seen as a telling commentary on the state of the section 37 process. A mutually satisfactory conclusion appeared unlikely when agreement on values (upon which specific agreements could be developed) had not yet occurred. The overwhelming sense was that the upcoming final FMC in Ottawa seems destined to fail, with little movement toward an acceptable compromise apparent among participants. Explanations abounded for the perceived stalemate. It was noted that the preoccupation by the governments with legal interpretation, justiciability and inherent versus negotiated rights, was more suggestive of commitment to the status quo than to change. In the words of Little Bear, "one gets the impression we are engaged in a search for a legal loophole that will allow aboriginal self-government without affecting federal or provincial jurisdiction." Others questioned the quality of the dialogue, wondering why, after all this time, it is still necessary for eloquent oratories on the significance of self-government to aboriginal peoples. In response, participants to some of the working sessions of the FMC process noted that the complexity of the issues tended to keep the discussions at the level of endless mind-numbing details, with little opportunity or incentive to consider common values or principles. They also admitted that a great deal of positional bargaining and talking past each other occurs, with "loaded" phrases, such as sovereignty, inherent rights and third-order of government acting as barriers to interaction, as do contingent, negotiated

or delegated rights. Still others questioned the efficacy of the process itself, pointing out that public forums are more conducive to symbolic concerns than negotiation imperatives, requiring extensive time, energy and resources to pursue elusive agreements on abstract levels. Perhaps the most prevalent comment was that, in the absence of public pressure to the contrary, the 11 governments could "appear" to be working for change, placing the onus for initiative and compromise on aboriginal organizations.

Interestingly enough, the counter-argument to the pessimism came from two local Chiefs of the Mohawk Nations. They felt it was important to remember that the March conference was not the end of the struggle, though it might well mark a missed opportunity. To them the focus should be on the gains made in understanding, and on the general movement toward self-governing status being pursued through other avenues. The reminder that there are many ways to achieve meaningful co-existence did not, however, dissuade the majority of participants from the feeling that the governments should not be "let off the hook" so easily. This sentiment was elaborated upon repeatedly by the observation that aboriginal rights had remained on the public agenda for five years, a phenomena unlikely to continue, nor quickly or easily reoccur.

In retrospect I was struck by how the general cynicism and pessimism was founded upon a belief that something is (was) possible, that meaningful accommodation is (was) conceivable through the constitutional process. One cannot help but wonder if the faith in the constitutional policy process was too profound, unrealistically presuming that a politically expedient inclusion of provisions confirming aboriginal rights in 1981 could be parlayed into positive, honourable, workable arrangements. Considering the tempestuous nature of federal-provincial relations in the decade leading to patriation, much less of the differing historical, legal and constitutional situations of aboriginal peoples, the scope of the changes desired may have been predestined to fail. The constitutional politics of the "lowest-common denominator" seems decidedly unsuited to the task at hand, particularly in the wake of an acrimonious struggle that has left Quebec outside the new constitutional agreement and many other issues unresolved. For those who have been actively involved in the FMC process for the past five years anything short of a constitutional recognition of an inherent right to self-government may appear to be failure, but a more detached perspective might notice that public opinion has improved and the legitimacy of the claims enhanced - no small feat in the context of the political climate of restraint, and considering the dominant society's unease regarding special groups. One almost hesitates to suggest that pluralist, incrementalist approaches to public policy (generally

condemned as "conservative" perspectives) might provide a more useful framework through which the past five, or indeed, the 20 years might be viewed. A more critical assessment of the changes in policy and attitudes among all concerned parties might yield some pleasant surprises, as well as a realization that much remains to be done.

A consistent theme throughout the session was the need to change attitudes, and it is to this purpose that the strategic advice offered to aboriginal peoples has most meaning, i.e. use the words that evoke the most sympathetic response from the Canadian public. While I can appreciate the real contradictions and dangers of promoting similarities in defense of maintaining diversity, I cannot imagine how the Canadian public is to be "won over", as it were, if not at the level of ideas. It is easier, as noted by Vina Starr, to focus on differences and problems rather on the shared values, opportunities and requirements of co-existence. Further consideration of the values underlying Canadian federalism would appear to be a promising place to start, particularly if the experiences of the Iroquois Confederacy and tribal council structures are advanced as comparable institutions. Unfortunately neither of these received much attention during the discussions, nor did the European model of consociational democracy arise, a theoretical construct felt to accommodate political recognition of ethnicity within a liberal democratic society. None of this is intended to imply that the task of changing attitudes will necessarily be any easier, but finding common language can't but help build public support. It has been suggested to me that this smacks of capitulation, one more example of aboriginal peoples bowing to the demands of those who just won't listen. This is a fine, principled stance to take if one is in the position of not needing the other party to listen, or have the power to make them do so. The reality is that many of the aspirations of aboriginal peoples depend upon extensive cooperation and assistance from the 11 governments of Canada, something unlikely to be elicited without substantial public support and pressure.

Finally, it has to be noted that, not only were there few of the active participants of the FMC process present at the session, but also, that the sentiment appeared to be solidly "pro-aboriginal", with little sympathetic elaboration of government perspectives or concerns. It may be that this was inevitable in the context of the current debate, especially when government policy (at both levels) is frequently condemned as morally indefensible, but a more rounded discussion may have more fully clarified the dilemmas, problems and potential for accommodation through the identification of common values. Regardless of the outcome of the final FMC next week, it would appear that the challenge of promoting understanding and accommodation will continue to remain a

priority for aboriginal peoples. This task will be necessitated by changes in social, economic, and political conditions which, in turn, will alter the attitudes, values and aspirations of aboriginal and non-aboriginal Canadians alike. Perhaps, to paraphrase Chief Norton, symbolically completing the circle of confederation is only as important as continuing the struggle for co-existence.

Session IV

Legal Obstacles to a Self-Government Amendment

THE ABORIGINAL SELF-GOVERNMENT AMENDMENT: ANALYSIS OF SOME LEGAL OBSTACLES

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The last of the constitutional conferences, comprising the Prime Minister, the premiers of the Provinces and the political leaders of the four major aboriginal groups in Canada, that is mandated under Section 37.1(1) of the *Constitution Act, 1982*, will be held in March, 1987. The long period of negotiations relating to constitutional matters directly affecting the aboriginal peoples of Canada that has taken place between 1982 and the present day has served to focus the issues in debate. In particular, the demand for constitutional reform that has emerged as dominant (and perhaps even exclusive) has been the aboriginal self-government amendment. Various versions of this amendment have been produced. Typically, they have a number of clauses relating to recognition, implementation and entrenchment; but the essence is caught in this clause of one of the proposed drafts:

The rights of the aboriginal peoples of Canada to self-government within the context of the Canadian federation, that are set out in agreements [subsequently entered into between representatives of governments and representatives of aboriginal peoples] are hereby recognized and affirmed.

As the First Ministers' Conference to be held in the spring of 1987 has approached and officials' and ministers' meetings have been held, it has become increasingly apparent that the placing in the constitution of a recognition of aboriginal self-government and a commitment to implement self-government regimes has created a series of significant legal problems.

One of the things to note about the identification over the past year of legal problems attached to the self-government amendment is how recently in the process they have become apparent. This fact might induce observers to believe that it has only been since the self-government amendment has proven to be the major political option available at the upcoming First Ministers' Conference that legal obstacles have been discovered. In truth, it does appear that these legal obstacles, raised in the discussions between ministers and officials, have become a surrogate for the expression of opposition to the self-government amendment. However, this is not the same thing as saying that the legal obstacles that have been raised are a subterfugeous form of opposition -

that they are hollow objections designed simply to place roadblocks in the march to aboriginal self-government, or that they are being used cynically as instruments for the expression of political opposition. It seems that the legal obstacles that have been raised are genuine enough and are, in truth, an expression of principled objections. Furthermore, it seems that they can be summed up in precisely the same way that any opposition to a self-determination claim is likely to be expressed, and that is by asking the question: How much special status can a nation permit and still stand as a nation? It is true that we are defined as a political unit by structures and values, and if significant numbers of persons or groups of persons are able to opt out of the structure and to evade living by the values, what is it that is left by which the nation is to be defined? Hence, the legal obstacles to the self-government amendment are rooted in real legal concerns and, at the same time, are a genuine and plaintive expression of concern about the loosening of the ties that bind all the peoples of Canada together. The contribution to state disintegration that some feel the self-government amendments represent leads logically to the discovery of law-based opposition. After all, the modern state represents the concentration of power in public government and the significant lessening of corporate power - that is power formed through alliances, class, family, sect, community or covenant. State power is held together and mediated in the wide community through the instrument of law, and state values are expressed through the legal normative order. In this way, legalism is the handmaiden of statism and when proposals emerge that destroy the normal statist assumption and that suggest that there can be genuine autonomy *within* the state (in other words, that sovereignty can be divided), it is the legal tie, the legal norms, or the legal rules that will first show the sign of strain.

There is a further preliminary comment that might be made about the legal obstacles that have been discovered concerning the proposed self-government amendment. In some ways the legal objection to self-government has been the product of the self-government amendment's excessive political modesty. Aboriginal self-government as a concept has not been expressed in a way that is comprehensible to the general population in terms of liberation, revolution and self-determination. It has not been talked about in terms of turning upside-down normal, everyday assumptions about the sovereign power of the state. Instead, it has appeared to the general population as being a claim made by persons within the country for a different degree of legal authority. Aboriginal self-government is viewed as adjusting the yoke so that it chafes less and not as removing altogether the yoke of compulsory membership in the Canadian state. In this connection, it is perhaps significant that the leading metaphor available in Western civilization for

expressing liberationist claims - the story in Exodus of the escape of the Israelites from slavery in Egypt has not been drawn upon in making the political claim for aboriginal self-government. Michael Walzer of Princeton University in his recent book, *Exodus and Revolution*, has pointed out the almost universal use of the Exodus story by those engaged in fundamental liberation struggle. Whether it has been the growth of parliamentarianism in England, or the American Revolution, or (in some of its aspects) the Marxist revolution in Russia, or the fight in Latin America for freedom from international capitalism and its attendant political apparatus, or the movement for black equality in the southern states in the 1960s, the explaining language behind these political movements has been drawn from Exodus. Of course, the Exodus metaphor is a Western one and perhaps for this reason it and its forcefulness have not been available to aboriginal peoples. If it had been, it is possible that Canadian society would have come to a better understanding of what is at stake - the removal of a people from an oppression. This means not simply the removal from a form of apartheid, or from early and sometimes violent death, or from bad housing, or from joblessness - but quite simply from a tie that does not belong. The unavailability of this central imaginative figure in Western culture for explaining liberation has, I believe, caused something to be lost in the political campaign for the recognition of aboriginal self-government and we have, therefore, consistently underrepresented what it is that is being asked for.

This observation is not merely a sociological one but bears directly on our understanding of the legal obstacles to self-government. These legal obstacles can be seen as reflecting the sense of self-government as a legal claim within the general category of claims under the national legal system. Hence, the claims for self-government are ones in respect of which it is entirely appropriate to apply normal legal conditions. However, if we were able to see aboriginal self-government as the removal of peoples from a dominating yoke, then we would be more inclined to think of the process of constitutionalizing aboriginal self-government as an exercise in statecraft. We might view our responsibility to be to help in the designing of a political arrangement that allows aboriginal peoples authority to determine their own social order. We would view ourselves as involved in the recognition and articulation of basic conditions of liberation. Viewing the process as being this sort of exercise of statecraft would produce, I believe, a different stance in relation to points of legal analysis than would be produced if the process is seen as simply responding to claims made under the existing constitutional order.

The legal problems are tentacles which keep liberation under the control of the dominant society, and confine it to the terms that our legal system and political system are familiar with. In fact, the dominantly legal perspective on the self-government claim is the perspective of non-liberation. Having said that, however, it must be, and can be recognized that political leaders feel that whatever they do, it must accord with the basic terms of the constitution. Hence, at least some of the legal obstacles that have been presented reflect a genuine sense of limited power felt by those who are engaged in working out the new shape of the Canadian state. The relevance of the discussion about the importance of understanding aboriginal self-government in the framework of liberation politics does not go to declaring the legal obstacles to be misguided and irrelevant but, rather, to arguing for an analysis of them which is governed first and foremost by the realization that a novel and distinctive political order is being sought. In practical terms, this can bear on the interpretative stands that might be taken in relation to the legal issues raised. If the enterprise is to fit a new basic structure (the product of an exercise in statecraft) into the present constitutional order, then the legal conditions for doing so (beyond of course, obtaining the general level of national consent required for constitutional entrenchment) will be minimal or non-existent. If, on the other hand, the exercise is seen as creating new governmental bodies that stand in the same orthodox relationships to legislative bodies that other public authorities do, then the normal constitutional and legal conditions for the devolution and alteration of powers will be strictly construed.

Let us now look at the catalogue of legal problems that has arisen around the aboriginal self-government proposal. First, since the text by which the self-government idea will be placed in the constitution will likely contain a clause that permits future automatic entrenchment of self-government agreements, it will be an amendment which enables the making of changes in the powers of provincial governments at some subsequent date. As such it might be seen as an amendment to the amending formula found in Part V of the *Constitution Act, 1982*. If so, it will require unanimous consent of all provinces under the terms of Section 41(e) of Part V of the *Constitution Act*.

The second problem is that since self-government agreements, when implemented, will entail a loss of legislative power of both provincial legislatures and the Parliament, it can be argued that the offices of the Governor-General and the Lieutenant-Governor will be altered. In other words, legislative provisions with the full force of law will be put in place by newly created aboriginal self-governments, through a process which does not include assent being given by the Governor-General or the Lieutenant-Governor. As such, the self-government agreements will

amount to an alteration in the roles of the Governor-General and Lieutenant-Governors and, therefore, this too will be an amendment which, under Section 41(a) of the *Constitution Act, 1982*, requires unanimous consent.

The third problem is the possibly limited capacity of provincial legislative assemblies to implement aboriginal self-government agreements once they are concluded. It is possible that many self-government agreements when entered into will require some implementing legislation from the province, for example, in order to set aside certain lands. Such legislation might be viewed as being legislation in relation to Indians under Section 91(24) of the *Constitution Act, 1867*, and as such it will run the risk of being beyond the competence of provincial legislators.

The fourth problem is the concern that the commitment to negotiate (which has been included in some of the drafts of the aboriginal self-government amendment) will not be enforceable. It is feared that any general recognition of self-government for aboriginal peoples will be hollow if there is no effective way to ensure that the parties to the commitment to negotiate will work assiduously towards reaching agreements.

The fifth legal problem is the question of the appropriate relationship between the protections for individual groups found in the Canadian Charter of Rights and Freedoms (which is Part I of the *Constitution Act, 1982*) and the operation of aboriginal governments under aboriginal self-government agreements. It is felt that by virtue of the operation of Section 25 found in the Charter of Rights and Freedoms, it is possible that the basic human rights and fundamental freedoms articulated in the Charter of Rights will not be available to citizens under aboriginal self-government. Therefore, special provisions will have to be contained, either in the general self-government amendment or in specific self-government agreements, to ensure that at least some of the basic rights enjoyed by Canadian citizens will be available to persons under aboriginal government.

The sixth problem is whether any recognition of aboriginal self-government will give rise to justiciable claims for authority outside the terms of any negotiated self-government agreements. In other words, are there dangers which, from the governmental perspective, are unknown and unknowable in recognizing self-government in a blanket manner? On the other hand, if self-government rights are expressed as being contingent upon the entering into of self-government agreements, will this represent a complete abandonment by aboriginal groups of a right that is already present, albeit not explicitly stated, in the text of the constitution?

It is beyond the scope of this paper to deal with each of these problems in detail. Instead, I will look in some detail at the first legal problem identified - the problem of whether the aboriginal self-government amendment as proposed will amount to an amendment of the amending formula.

As already described, the first problem is whether a provision placed in Part II of the *Constitution Act, 1982*, which gives constitutional (or entrenched) status to aboriginal self-government agreements that are concluded subsequent to such constitutional amendment will, in essence, amount to the alteration of the constitutional rules (found in Part V of the *Constitution Act, 1982*) by which the Constitution may be amended. If such a provision for automatically conferring entrenched status on self-government agreements is viewed as a provision that amends the amending rules, that provision will only be placed in the Constitution if it is authorized by resolutions of the Senate and House of Commons and all of the provincial legislative assemblies.

The first point that might be made in support of the view that a provision automatically entrenching self-government agreements does not amend the amending rules is that self-government agreements, although they change (derogate from) the constitutional powers of Parliament and the provinces, are not alterations of the Constitution. In other words, Part V contains rules for amending the "Constitution of Canada". This concept is defined in section 52(2) of the *Constitution Act, 1982*, albeit in a non-exhaustive way. However, the definition in section 52(2) is totally referential to constitutional texts. If a provision to entrench does not produce changes to constitutional texts (but only to constitutional powers) it might be thought that Part V is not involved. On the other hand, it could be argued that Part V is actually about the amendment of not simply constitutional texts but "matters" that have been constitutionalized (i.e., governmental powers). Self-government agreements bear on and alter those matters and as such they are amendments to constitutionalized matters.

However, it does not necessarily follow that because a constitutional provision produces an automatic entrenchment of self-government agreements (that, in turn, amend constitutional powers), that such a provision is an amendment to Part V. It should be noted that the unanimity rule in section 41(e) states that unanimous consent is needed for "an amendment to this Part" and does not state that the unanimity rule applies to all amendments that provide for, and allow, future alterations of constitutionalized matters. In short, there seems to be an "aspect" theory at work; amendments are in relation to Part V or Part II, and to discover which rule applies (the unanimity rule under section 41 or the seven province with fifty per cent of the population rule under

section 38) it is necessary to determine the "matter" of an amendment. It is at this point that the distinction between statecraft and adapting the constitution to new legal claims comes into play. If we view the clause under which self-government agreements will be automatically entrenched as part of the implementing device for giving new governmental agencies special status, we shall be concerned about whether this derogation of normal governmental power fits the conditions for certain forms of constitutional amendment. But if we view the clause as expressing the autonomous status of aboriginal peoples, analysis based on the impact on existing powers will become beside the point.

It is worth noting that when section 35(3) was added to Part II of the Constitution in 1984, it was not done in accordance with the unanimity rule. It should also be noted that it expanded the class of documents that are considered to be constitutionally entrenched. In other words, it effected a mode for future alteration or limitation of constitutional legislative powers. Section 35(3) indicates that new land claims agreements are automatically entrenched and new constitutional limitations on powers can be put in the Constitution by simply concluding a modern land claims agreement. Section 35(3) changed the way that constitutional powers can be altered and was placed in the Constitution through the process under section 38 of the *Constitution Act, 1982*. It is unlikely we would say that the amendment which produced section 35(3) is mistaken and unconstitutional.

In any event, even if placing section 35(3) in Part II through the process in section 38 is a legal mistake, it is significant that nine provinces and the federal government thought in 1983 that they could do it that way. They thought that what they were doing was amending Part II. This is a strong message so soon after the coming into force of the *Constitution Act, 1982* that section 35(3) was seen as an amendment to the substance of aboriginal rights, and that the appropriate formula for such an amendment is the general amending formula.

The conclusion that section 35(3) was properly amended depends upon the view that, if an amendment is not going outside of the scope of Part II or is resolving an unclear point in connection with Part II, it is appropriate to consider it as an amendment to that Part and, therefore, to be achievable through the general formula.

Furthermore, it is clear that land claim agreements have included self-government rights. Once it is seen as being at least a plausible claim that land claims agreements include self-government, then there is strong historical evidence that self-government amendments and consequently self-government agreements are matters within the original understanding of section 35(1) of Part II.

But let us take the weakest case. Let us take section 35 (the basic recognition section within Part II) at its most minimal scope. This would entail saying that the word "existing" in section 35 means that the aboriginal rights recognized are those frozen in time, and let us suppose that section 35 treaty rights even as modified by section 35(3) do not include self-government rights. In these circumstances we could still say that there is no fundamental change in the amendments proposed for 1987. First, the shift from land rights to self-government rights does not represent a fundamental change, but only an expanded conception of the appropriate content of aboriginal rights claims. As for the word "existing", treaties are necessarily forward looking and that fact establishes that the concept of treaty rights must be interpreted from time to time into the future. Therefore, the idea of treaty rights being frozen in 1982 is too limited an idea to hold in relation to treaties. The whole range of dispositive norms, in relation to treaties, including the future elaboration of meaning, was the range that was actually known in 1982. Therefore, it seems unlikely that new constitutional language which entrenches new treaty rights is anything more than a change of degree in the terms of section 35.

Let us build up from the weakest assumptions. The build-up would include a denial that section 35 treaties don't include self-government - that an implicit condition of treaties entered into was the continuation of a self-government power. Another basis for expanding the scope of Part II would be to show that the word "existing" in section 35(1) was also understood to include rights that are created from time to time into the future. "Existing" did not freeze rights in time. Once it is conceded that it is at least arguable that "existing" was not frozen in time - that new aboriginal rights can be created - then the way to entrench new rights is through expanding the operation of section 35. Under this view section 35(3) establishes that existing rights cannot be seen to be frozen in time.

Even if one ignores the argument based on section 35(3), it seems improbable that self-government agreements are not dealing with the substance of Part II. In fact, what is contemplated by these amendments relating to aboriginal self-government is essentially a section 35 process. It is a treaty process of one collectivity bargaining with another collectivity (of aboriginal persons) for inter-community co-existence. It is hardly a radical change if, in bargaining, the collectivities make a decision about self-government as opposed to land. Even at its weakest, we are dealing with Part II matters.

Furthermore, it is absolutely clear from the provisions of Part IV of the *Constitution Act, 1982*, that there is a distinct amending formula for section 35 matters - the "Constitutional Conference". In fact, the placing of Part IV in the Constitution is part of a general historical truth that

when the question of aboriginal rights was contemplated as a matter for future amendment, it was not contemplated in terms of a rule of unanimity. In addition, the presence of Part IV is strong evidence that there was not legislative silence about aboriginal rights development. It is clear evidence that the framers of the *Constitution Act, 1982* adverted to the possibility of aboriginal rights amendments in the future, and self-consciously created a special regime which partly conditions such amendments. In light of this clear record of advertence it is significant that they did not include in section 41 - in the list of matters which must be agreed to unanimously - the question of aboriginal rights amendments. It can be inferred from this that it was understood that amendments to aboriginal rights would be achievable through the normal process. Part V is, after all, explicit about which amendments require unanimity and is an exhaustive list of those matters. If it was thought that section 35 amendments were in a category of matters which needed unanimity, it would have been included. This claim, of course, depends on the claim that section 35 amendments were a recognized category of amendment. This can be established by the presence of Part IV; it is neither just inadvertent, nor a matter of categorical non-existence, that it was not placed in section 41. This argument is something more than saying that if one wishes to amend section 35, such amendments must be placed within section 35. It is an argument based on the substantive nature of amendments to section 35 and it accepts that there is a substantive category into which such amendments fall.

The amendments that are being contemplated in the 1987 process are amendments to Part II since Part II contains a recognition of a process for defining aboriginal rights - that is, the treaty process. The category of aboriginal rights matters includes the idea of aboriginal treaty. In other words, the 1987 amendments are simply amending treaty-making matters, a matter already within Part II. In this way, we are brought back to the point that what is at the heart of the constitutional process in relation to aboriginal peoples shapes the way in which any amendments will be classified. If they are amendments about the meaning of aboriginal status in the Canadian polity, then they will be amendments to Part II and require only the normal consent for constitutionalization. If they are amendments to present structures of governmental power, the legal obstacles to change will have a greater constraining role in the March 1987 process.

It is important, in engaging in legal analysis of the problems that have been presented as arising from the concept of aboriginal self-government, that we do not give them undue weight - that we do not let them hide from view the fact that the achievement of aboriginal self-government in Canada will be an exercise of constitutional politics, an exercise of

statecraft. As such, the legal precepts at play must be kept to basic points of constitutive ordering, and must be applied in accordance with the spirit of the political enterprise that is being conducted.

William Pentney, Discussant

The legal obstacles to a self-government amendment are in some senses quite real, but in other ways they are the product of a failure of imagination on the part of lawyers and politicians.

The diversity of groups involved in these negotiations, and the dazzling array of issues which lie behind the negotiations present immense legal obstacles. The aboriginal groups do not share common legal, social or political realities, and this has created a need for a broad framework or umbrella in the constitution, under which diverse self-governments can flourish. This obstacle is compounded by the lack of consensus on basic legal questions concerning the nature or origins of self-government, and more arcane questions of jurisdiction and responsibility. All of this presents a formidable legal challenge, which has not become less daunting over the course of these negotiations.

I would like to address two points in dispute: the concept of justiciability, and the extent to which the Charter will apply to actions of an aboriginal government. As I understand it, justiciability (which is a notoriously slippery concept, and a very difficult word to pronounce) has been raised as a barrier to placing a commitment to negotiate self-government, or a commitment to implement any agreements once they are negotiated, into section 35. Justiciability is a very big word; basically it refers to three different problems:

- (i) are there any relevant legal standards to apply in this dispute?
- (ii) is the remedy sought properly available in a court of law?
- (iii) is the application brought at an appropriate time, and is the applicant an appropriate person to bring it?

All of these concerns have been expressed in other cases in which the issue of justiciability was raised. This doctrine is a matter of judicial discretion, and in respect of aboriginal self-government it is easy to see why the governments are concerned about it. For example, if a commitment to negotiate was placed in section 35, could a province claim that its failure to deal with the group before the court seeking to enforce the promise was due to its occupation with other groups negotiating section 35 agreements? Could a court order that a specific proposal be accepted, or implemented, in regard to health or education? The main

point at issue here is whether some matters are best left out of court, to be dealt with by political rather than judicial authorities.

Of course, aboriginal peoples know only too well the dangers inherent in that solution - political failures in the past have spurred aboriginal leaders to demand legally enforceable promises. To the extent that governments are concerned that they will be dragged into court at the first opportunity, it seems to me that a political compromise may be appropriate. If aboriginal leaders pledged to refrain from court action for a "reasonable" negotiating period, some of the concerns of the provinces would be removed. On the larger issue, however, I submit that justiciability is a legal bugaboo which can never be fully addressed.

Although it is probably correct to state that a bare commitment to negotiate or implement self-government is largely not justiciable, it is important to remember that some parts of that promise can be dealt with by a court - so the key thing is the nature of the question brought before the court. If governments are afraid of judicial enforcement of all aspects of an amended section 35, then their concerns can never be addressed, because some parts of such an amendment would undoubtedly be justiciable.

The second issue to be discussed is the extent to which aboriginal self-government would be constrained by the Charter of Rights and Freedoms, with its predominantly individualistic focus. This is not an easy question to answer. On the one hand, as an embodiment of the collective rights of aboriginal peoples, an aboriginal government must be free to be different from similar white governments. On the other hand, aboriginal people, no less than anyone else in Canada, are entitled to the basic protections contained in the Charter of Rights.

In my view, the answer to this question can be derived from the nature of aboriginal rights, which must be the foundation for any aboriginal self-government. Before explaining how I think this would work, I would like to emphasize that in my view the conflict between individual and collective rights that is so often referred to is not, in practice, as inevitable or as common as is usually supposed. For example, an aboriginal person charged with a criminal-type offence under the laws of an aboriginal government would not always lose all of the individual rights guaranteed in the Charter simply because some collective right was involved in the situation. The basic procedural guarantees set out in the Charter could protect this person without ever encroaching upon the collective right of the group.

At some point, however, the rights of the individual will conflict with those of the collectivity, and some principles are required in order to determine which right should prevail. I believe that the appropriate principles inhere in the concept of aboriginal rights as collective rights.

If aboriginal rights (including the right of self-government) are to be meaningful as collective rights, they must at a minimum guarantee that the survival of the collectivity, and its essential functioning as a social organization, are not impaired by external forces. They must also guarantee a right to be different - otherwise there is no need for a right guarantee. From this it is possible to derive principles in specific cases to determine whether a claim of individual right guaranteed in the Charter must give way to the right of the collectivity to survive, and to be different.

This approach is already required by the existence of section 25 of the Charter, which requires the interpretation of the Charter so as to take account of the collective rights guaranteed to aboriginal peoples. My submission is that if an individual claim based on a Charter right challenges or calls into question the future existence or functioning of an aboriginal self-government (for example by undermining its land base, or authority in matters internal to the group), then the right of the individual must give way in order to preserve the right of the collectivity. If aboriginal rights do not guarantee the future survival and "differentness" of aboriginal groups, then they are not really worthwhile at all.

Session V

Financing Issues

THE JAMES BAY CREES AND THE FINANCING OF ABORIGINAL SELF-GOVERNMENT

Billy Diamond

The Constitutional Conferences have moved away from their central initial purpose, that is, to define aboriginal rights. We are now being led astray by governments, which seek to have a conference to define self-government.

The right to self-government already exists under Section 35 of the Constitution. The constitutional, legal and moral rationales for the recognition of aboriginal self-government have been developed only over the last ten years. What should have been accepted as an inherent right - the right of the aboriginal peoples of Canada to govern themselves - has only recently been accepted for discussion by other governments. Even at this point, it has been a frustrating and difficult process to get these rights fully recognized and appreciated.

There is, however, a corollary principle which accompanies that of self-determination and self-government. This principle is the need to have the resources to fully implement and execute the powers which a group has to govern itself. One must be a realist. Granting or recognizing self-determination without the appropriate resources to allow for its realization is a charade. Powers granted without the means of attaining objectives is an unacceptable and meaningless process.

The Crees of Quebec feel that we are in the forefront of developments with respect to self-government, to relations with the federal government generally, and on many constitutional issues. The James Bay and Northern Quebec Agreement is the first modern Canadian land claims settlement, and the reaction of Government to it, particularly to the question of implementing a financing agreement for self-government, should be a major concern to all other aboriginal peoples in Canada.

In 1971, the Quebec government began to construct the James Bay Hydro Electric Project in an area in which Indian Rights still existed, and in which our people continued to engage in a traditional hunting economy. The province ignored requests by the Crees and Inuit to negotiate land claims, and we had to institute legal proceedings against Quebec and its Crown Corporations.

We obtained an interim injunction to halt the project from Mr. Justice Malouf, but that decision was later overturned by the Quebec Court of Appeal. After years of negotiations, and before the Supreme Court of Canada was able to hear our case, an out-of-court settlement was reached in the form of the 1975 James Bay and Northern Quebec Agreement.

The James Bay and Northern Quebec Agreement provided for the adoption of self-government legislation which was to replace the *Indian Act* for the Crees of Quebec. This has in fact been done and the *Cree-Naskapi (of Quebec) Act* now provides us with full regulatory power at the community level, control over our local governments, and the ability to assert that we have obtained self-determination and self-government. This legislation was adopted pursuant to an avowed federal recognition of its special responsibility toward the Crees (and toward other Indians) and the legislation itself recognizes this.

As the legislation was being drafted, however, it was also clear on our part and on the part of federal negotiators that the responsibility for self-government legislation could not be fulfilled without the necessary financial guarantees allowing it to be practiced and implemented. To deal with the financing of the *Cree-Naskapi (of Quebec) Act*, a negotiating group was established by the Crees and the Department of Indian Affairs and Northern Development to analyze the needs of the Cree communities, and to develop appropriate financing techniques. This process was approved by Cabinet and by Treasury Board.

These negotiated financial arrangements were condensed into a Statement of Understanding executed by the negotiators on May 25, 1984, and confirmed in a Letter of Guarantee by the then Minister, John Munro, on June 7, 1984. Mr. Munro also confirmed to Parliament that he had agreed with the Crees on behalf of the Government with respect to financial measures necessary for the Act. In other words, the Government had recognized its responsibility, not only to provide the necessary legal mechanism to exercise self-government in the *Cree-Naskapi (of Quebec) Act*, but also to make the necessary financial and fiscal arrangements to allow it to take place.

The financial arrangements dealt with the level of funding; the fiscal element involved the change of funding from contribution-type arrangements to an unconditional grant system. Thus, as in the relationships between other levels of government (for example, federal and provincial governments or the Northwest Territories and Ottawa), funding was provided on a clear basis without condition, provided that certain minimum financial accountability provisions were met.

This manner and mode of funding was perfectly consistent with the federal responsibility to finance aboriginal self-government. It was also consistent with the self-government regime contemplated by the James Bay and Northern Quebec Agreement.

Since the 1984-85 fiscal year, however, the Crees have not received the appropriate amounts for the annual adjustment of funding. Even though a technical agreement was reached with the Department regarding a funding formula, the senior officials of the Department have blocked

all efforts to have that formula approved by Treasury Board, have misinformed Treasury Board of the nature of the agreement with the Crees, and have caused a major financial crisis for our communities.

The response of governments to financing the *Cree-Naskapi (of Quebec) Act* should be a major concern for all aboriginal peoples in Canada. The Department of Indian Affairs and Northern Development has rejected the commitment for an adjustment formula as provided for in the Statement of Understanding and envisages, instead, an agreement whereby it can review and unilaterally determine the nature and type of financing which is available.

This is not the new relationship that we negotiated. This is the old relationship of government agency to client population, whereby the Indian bands have no control over their funding arrangements, no certainty as to their future revenues beyond the current fiscal year, and no opportunity to plan or budget in accordance with the band's priorities and needs.

The intent of having a base year and a negotiating formula was to provide financial certainty with respect to planning and administration. This goal is now being frustrated by the government. Apart from the difficulties of maintaining and developing self-government in these circumstances, we have encountered an extension of the original attitudinal problem that has blocked the implementation of key sections of the James Bay and Northern Quebec Agreement.

The message we have received with alarming frequency over the past year is that federal commitments can be abandoned at will. More particularly, this means that federal bureaucrats feel free to ignore as they see fit commitments previously made by their ministers. This is not the way in which the federal government should deal with its responsibilities toward aboriginal peoples. The responsibility is clear and flows from the responsibility of the federal government toward aboriginal peoples, and from the constitutionally protected guarantees in sections 25 and 35 of the Constitution.

Role of the Provinces

The recognition of the right to aboriginal self-government brings with it a corollary principle which affects the provinces. Apart from requiring the necessary financial resources from the federal government, which has prime responsibility for the implementation of powers by aboriginal groups, the provinces must recognize the necessity for sharing their jurisdiction over wildlife, natural resources and territory adjacent to reserves or aboriginal lands, if aboriginal self-government is to succeed.

If the necessary resources to properly become self-sufficient do not exist on individual reserves or on lands reserved to aboriginal peoples, it is necessary for the effective jurisdiction of aboriginal groups to be extended to cover adjacent areas. As in the examples of British Columbia and St. Regis, the territorial jurisdiction of a band may have to be extended into the province's domain in order to allow it to have the necessary control and jurisdiction to provide for the development of the reserve.

This may not be direct financing, as in the case of federal-provincial transfer payments, but more in the realm of the sharing of resources and the surrender of certain provincial rights to allow aboriginal communities to develop and prosper.

The financial "pie" in Canada from which various governments can finance activities is limited. For aboriginal self-government, that "pie" can grow by an extension of jurisdiction over wildlife and mineral resources into provincial territory, rather than by any direct provincial funding.

Conclusion

All the above underlines one fatal defect in the present FMC process on aboriginal constitutional matters. The process fails to recognize as the primary condition the requirement for adequate and guaranteed financial resources to make sure that aboriginal self-government works.

The Crees of Quebec have experienced a process where a constitutionally entrenched agreement - supported by comprehensive legislation, defined for financial purposes by a Statement of Understanding approved by Cabinet and Treasury Board, signed by a Minister, and referred to Parliament - is being arbitrarily dismissed by the present Government.

If the Crees find themselves in such a position after all we have done to ensure that the powers and financing under the Act are appropriate to us, what can other aboriginal groups in Canada expect? The honest reality is that aboriginal self-government and self-sufficiency are still absent from the objectives of the federal government.

Self-government and self-determination must be read as synonymous with self-sufficiency. Until that point is recognized by governments, the constitutional process will never be a success.

THE ENGINE OF AGREEMENT: FINANCING ABORIGINAL SELF-GOVERNMENT

Robert Groves

It is the general impression of aboriginal delegates to the FMC process that some basic arrangement on financing is needed if there is to be any reasonable hope of effectively implementing a constitutional amendment of the right to self-government. Aboriginal people know too well from past experience that without first clearing away such basic issues as the nature of cost-sharing between federal and provincial levels, local and regional communities are simply going to be left to the mercies of buck-passing between Ottawa and the provinces over "who pays". For that reason the aboriginal organizations, especially the NCC, the ICNI and the AFN, have been attempting since last summer to raise the interest, particularly of the provinces, in this issue.

Perhaps the single most pressing motive to clearing away the uncertainty around financing lies in the simple question: "Why would governments agree to self-government?". What is the motivation; where is the encouragement; what countervailing powers do aboriginal groups bring to negotiations that would make agreement, under reasonably objective terms, more attractive to governments than no agreement at all?

My own interest is also in finding an answer to this basic question, since I have always been troubled by the thought of Canada investing enormous political energy in establishing a process for the negotiation of self-government agreements which, because of the absence of one critical component, will only lead to frustration and conflict.

In my remarks, I am going to touch on two dimensions of this issue: (1) the context of the likely amendment on self-government, which makes agreement on financing a practical necessity; and (2) a review of the options for resolving financing issues, along with my own assessment of what can be done and how this might lead to enhancing the implementation of self-government.

The Context of an Amendment

The current negotiations over self-government provide a fairly good sense of what an amendment package, minus a financing provision, might look like:

1. Some statement of the right to self-government that is neutral with regard to the issue of whether it is a pre-existing or a new right.
2. A commitment to negotiate toward agreements with "identifiable" local and regional aboriginal communities, as well as a commitment to participate in province-wide "nature, timing and scope" discussions. At present, this commitment is phrased in the federal version as being "to the extent that each has authority".
3. A clause allowing the provisions of agreements to receive constitutional protection, probably as treaty rights within section 35(1), and possibly allowing for bilateral or trilateral agreements and entrenchment procedures.
4. An assurance that the process for implementation applies to all aboriginal peoples in an equal fashion. This is the NCC's "Equity of Access" demand, which addresses the need to insure that such distinctions as "Status" under the *Indian Act* or reserve-residence are not carried forward into the new process as valid criteria for government policy.
5. A non-derogation clause with respect to aboriginal and treaty and other rights set out in the Constitution.

It is important to keep these five "building blocks" in mind when considering why a sixth - concerning financing - is crucial. The context of the amendment package can be summarized handily: the amendment package is silent, almost, about the link between implementing self-government and the federal-provincial division of authorities. It is this silence that has allowed the talks to proceed as long and as far as they have.

Nevertheless, it has generally been assumed that if governments don't know in advance what they are getting themselves in for in the way of broad obligations, then they certainly won't agree to a non-contingent right, and will avoid committing themselves to negotiate. The ability of a financing provision to do just this has made it attractive to a majority of provinces. From the aboriginal side, the concern has been to ensure that their local and regional affiliates are not left in an impossible negotiating position, and thus to reinforce the special relationship with the federal government. However, these considerations have led to some confusion because they seem to lead to a violation of the general rule of silence on the amendment package's link to "authorities".

The relationship, or lack of one, between "authority" and self-government is critical to the success of an amendment. However, this

is not to say that there must be a similar relationship, or non-relationship, between financing and self-government. The two issues are distinct.

The first relates to the issue of whether sections 91 and 92 are exhaustive or not, and whether self-government is seen as a delegated, delegatable or autonomous field of jurisdiction. It has recently become a point of emphasis by most parties at the constitutional table that any successful amendment package will have to be fairly neutral with respect to the issue of how federal and provincial authorities under sections 91 and 92 will be reflected in self-government agreements.

The second issue is more practical: whether any implementation of an amendment can, in the current climate, be successful without groundrules for the level, sources and nature of financing. It is important to keep this issue and the first one - dealing with the general link between the right to self-government and sections 91 and 92 authorities - distinct. Unfortunately, some have confused them.

I will briefly recap the positions taken to date on the link between these two issues, which will also provide some sense of the options on financing that are being proposed.

The Aboriginal View

As a general point, it is useful to keep in mind that most of the aboriginal organizations believe that, legally, an amendment to the constitution is *not* required to implement the right to self-government, or to see self-government rights entrenched as treaty rights. This is an important point since it reflects the view that aboriginal people do not think that they are in the position of having to "convince" the provinces to "come on board". They believe the whole exercise is to convince the federal government to live up to its already existing capacity for action. It is the federal government that is the real concern of aboriginal groups. The federal government, under section 91(24), is already able to make treaties with any aboriginal group, probably on a very extensive range of issues. Since the results of these treaties would be entrenched within section 35(1), the aboriginal view is that it is they, and not the federal or provincial governments, that are really bending over backward to be accommodating.

The general aboriginal position is to allow for the participation of provinces in self-government arrangements, so long as this participation is not mandatory or reflective of any change to the already extant capacity of aboriginal peoples to be self-governing under treaties negotiated with the federal government pursuant to section 91(24). When it comes to financing arrangements however, the aboriginal groups want three things: a link with the "special relationships"; some ground-rules about what

local and regional groups can expect to address in the way of fiscal powers and financial transfers; and some clarity about the role of the provinces, where they are involved, in financing the negotiation and outcome of agreements.

Provincial Views

Despite the fact that most provinces see the federal government as generally "responsible" for aboriginal people, they are not sure they want exclusive federal power under section 91(24) over everything coming out of self-government negotiations. Most provinces believe that some aboriginal self-governments would be exercising at least some of the legal powers that provinces exercise under section 92 (just as bands do now). Therefore provinces are caught in the apparent dilemma that comes from believing that sections 91 and 92 are mutually exclusive and exhaustive. They want control but they don't want to assume financial responsibility. To date these conflicting desires have expressed themselves in terms of the provincial demand for a veto over self-government agreements, coupled with a strong reluctance about an entrenched provincial commitment to negotiate agreements. Most recently, provinces have begun to realize that even with a veto and no commitment, the real cost of self-government could still come to rest with provincial treasuries, and they have begun to suspect the federal government of attempting to shuffle "responsibility". So they have looked to a separate financing provision that is linked to some notion of federal "authority", without appearing to limit the reasons for provincial involvement to ones of practicality.

The Federal View

The federal government has engaged in a tremendous amount of posturing over this issue, all by way of hinting that the federal government might see (reserve-based) Indian and (northern) Inuit self-government as being a general federal financial responsibility. However, with a view to getting provinces involved in paying the costs (as provinces now are involved), they argue that legislative authority under 92(24) can and should be separated from financial responsibility for aboriginal self-governments. The federal delegation has accordingly argued that since self-governments will or may "get" current provincial powers (an argument that is hardly neutral in the broad sense), then the provinces are just as much "responsible" for resourcing self-governments. It is this shuffle which gets them into trouble. They know their section 91(24) argument is weak, so they are nervous of pushing the matter. However,

they also know that if they drop any linkage of self-government financing from their restrictive interpretation of their "responsibility", it may net the federal treasury no real savings, since it is the cost of Métis, Non and new-Status Indian (MNSI) authorities which is the greatest unknown.

A Side Note on the Amendment Package

Despite the general willingness of federal and provincial politicians to reinforce the view that section 91 and 92 "authorities" should not dictate the outcome of self-government arrangements, there is nevertheless a direct link between "authority" and the implementation of self-government. It is in the commitment language proposed by the federal government, which was placed there, we are informed, at the request of the provinces. The problem that flows from this approach is two-fold in nature. On the one hand, there is no commitment to conclude agreements, just to participate in negotiations. On the other hand, the Métis, the Non-Status and Off-Reserve Indians, and now the Inuit south of 60°, face the real threat that both levels of government will attempt to limit their "authority" to participate in negotiations to whatever issues each is least threatened by - namely those discrete areas that are elaborated in sections 91 and 92, read as if section 91(24), as well as other provisions like section 109, did not exist.

Now imagine the following scenario: An aboriginal group in a non-reserve context seeks to negotiate self-government, and approaches both levels of government with a fairly detailed proposal setting out areas of jurisdiction for an aboriginal authority. Both governments set out their assessment of their respective "authority" to negotiate, which in turn places the lead role on the other government. In the absence of an up-front financing agreement, it is almost certain that each government will also indicate that the party with the lead authority also has the lead financial responsibility. This would extend not only to the issue of paying for the "output" of an agreement, but also to the issue of who is to provide funding to the aboriginal group to prepare for and participate in the negotiations themselves.

What does the aboriginal group do? It would have two courses of action. First, it could attempt to negotiate within the terms of the limited authorities each government has specified. This is precisely the situation that all MNSI groups have faced since 1985 during the so-called "bottom-up" exercise. We know from that exercise that the financing question has been the basic stumbling block. Indeed, the failure of the "bottom-up" approach has led aboriginal peoples to support the "bottom line" approach of specifying in advance the ground-rules on financing, which also allows governments to predict their obligations - but in a way

that encourages local and regional agreements, rather than simply transferring the "who pays" battle down to the level where aboriginal groups are least able to influence the outcome.

There is a second option. The aboriginal group in our scenario could go to court. What would the courts address? They would have to address the respective constitutional authorities of the federal and provincial governments and the consequent extent of their commitment to negotiate. The court couldn't force an agreement. But it could set a basic rule for the division of authority, taking into account section 91(24), which would in turn lead to an "authority-based" rule for the division of financial responsibility. It is very hard to predict the precise terms of such a division. It might vary from group to group, or it might vary according to the jurisdictions sought by the group involved. The point is, however, that the basic rule of division would be one of constitutional jurisdiction and authority, taking into account section 91(24). Ironically, the amendment package as it now stands would encourage exactly the sort of "authority-based" division of financing responsibility that everyone thought it was important to avoid.

Financing Options

The discussion of options has drawn upon a general sense that there are three basic objectives that could be accomplished by agreeing to provisions on financing in advance of implementation:

- To enhance the negotiation of agreement by reducing uncertainty. This especially concerns the Maritime provinces, and off-reserve and south of 60° aboriginal groups;
- To bring some order to the current anarchic system in a way that does not penalize either level of government; and
- To provide a solid fiscal basis for aboriginal autonomy.

The various options on the table to address these objectives are quite numerous. I won't deal at this stage with the options on where to place financing provisions. Some governments, such as Ontario, seem to think that general guidelines in an accord would be enough. Aboriginal groups and a few provinces, led by Manitoba, are convinced that amendment wording is needed for at least some of the key provisions respecting financing. For the moment, I will look at the substantive options, which basically fall into three categories:

1. A general equalization provision concerning levels of services and autonomous resourcing of aboriginal governments;
2. A provision dealing with cost-sharing criteria; and,
3. A process provision.

An Aboriginal Equalization Clause

The idea of an equalization clause is to provide a broad framework of principles that apply to all aboriginal groups and to which the federal government and, where they are involved in agreements, the provinces are committed. The various alternative principles that have been elaborated address two basic issues:

1. Levels of Service:
 - a) Comparability of services with non-aboriginal peoples; *or*
 - b) Existing levels of support not to fall below current levels.
2. Autonomous resourcing:
 - a) Commitment to ensure aboriginal governments have fiscal authority and tax room; and
 - b) Commitment to ensure financing is provided via block or direct transfer payments.

The general approach that has been suggested to encompass a general equalization provision is akin to the current section 36(a) in the *Constitution Act, 1982*, with the result that the federal government, given its "special relationship", has the primary commitment, which is shared by provinces involved in agreements.

The federal government has opposed this approach adamantly, arguing that "there isn't enough experience" with such aboriginal equalization. Well, I'm not sure any response is possible to that point. It is certainly true that aboriginal people have never been treated on any basis remotely akin to equality. But that surely is no reason for ditching the principle and adopting the alternative, which the Government of Canada had suggested, of committing to nothing more than current levels of service and working toward comparable services. The trouble with this "status quo" approach is that it is meaningless in the context of self-government, and it says nothing that is helpful in terms of federal involvement in financing self-governments off the reserves. The federal

government has also said that it will not provide any service-level incentives to aboriginal governments that are not provided to other groups who choose not to negotiate self-government. Since MNSI communities now get little or no service support from the federal government, does this mean they can expect none lest this indicate an "unwarranted incentive"? This is surely a peculiar way to reflect a supposed commitment of the federal government to aboriginal self-government.

So far the response of provinces to the proposed equalization approach has been less than coherent. Manitoba has given strong support for a full commitment to both comparability and autonomy. Other provinces, including the Maritimes and even Quebec, have stated support for a simple principle that the federal government has primary financial responsibility for aboriginal self-government. This latter view is all very nice but it misses the point. Aboriginal people aren't concerned with "sticking it" to the federal government. They are concerned with committing both levels of government, when both levels are involved, to the basic principles of comparability and autonomy of resources. Ontario has been the most surprising contributor to this discussion, since they have taken a very conservative, *status-quo* approach. Why is this so? Perhaps it is because Ontario is more heavily involved in on-reserve program and service expenditures, and is fixated by a concern that a clear commitment will affect Queen's Park as much as Parliament Hill. However, in the absence of a commitment, financing for MNSI self-government will, given the federal view on cost-sharing, come fully to rest in Toronto.

A supplementary note. There has been much comment on the dearth of adequate data against which to judge different options for financing arrangements. However, this has not however stopped the federal government and key provinces, such as Ontario, from assuming what the rough balance of current expenditure is. The assumption is that the provinces currently assume the lion's share of off-reserve costs and the federal government the lion's share of on-reserve costs. This assumption is bolstered by an axiom - which is untested - that even if provinces spend not a dime on directed programs to off-reserve Indians and Métis or Inuit, they benefit from the general provincial expenditures, and this exceeds whatever directed or general expenditures the federal government contributes.

I have two problems with this syllogism. First, very few provinces outside of the Prairies spend any amount in directed programs or services to MNSI remotely comparable to the funds they spend on-reserve. In terms of directed costs, it could be argued that the federal government spends the lion's share off-reserve, and about half the provinces share the

load on-reserve. Exceptions, as usual, are legion. In Newfoundland, all aboriginal people are off-reserve yet the Federal-Newfoundland Agreements for Native communities that have managed to get recognized to date provide for about 9:1 federal funding.

Secondly, I am not so sure that the axiom that "provincial spending off-reserve by way of general programs amounts to the lion's share for MNSI" is accurate. It may be true in Ontario, Alberta and Saskatchewan, but doubtful in the Maritimes and B.C.. Manitoba may be a toss-up. The point really is that the myth that the "provinces have traditionally been responsible for aboriginal peoples off-reserve" is just that - a myth. Even if the data showed that general provincial funding for services, minus federal transfers, did outpace federal direct expenditures off reserve, this myth still has to contend with the fact that none of that track record is relevant to self-government, which is all about *directed* expenditures and the responsibility for them.

Cost-Sharing Options

This is the meat and potatoes issue on the table as far as governments are concerned, although it suffers from the same mix of wishful, assumptive and myth-ridden thinking that I just referred to. Everybody, even Saskatchewan, has set out possible criteria for cost-sharing. Certainly it is the one area where the federal government wishes there to be clear understanding, if not an actual provision.

On this matter I will comment from the point of view of my work with Métis and Indian communities in the non-reserve context. In this regard I will state my own assumptions: that it is not desirable to undercut the chances of currently landless groups from acquiring a land base; and that it is not desirable, or constitutionally appropriate, to smuggle variable federal legislative or policy criteria as regards recognition into the future self-government context. I state these assumptions in case they are suspect, in which case my following remarks may not carry the same weight.

There is general agreement, at least, that there are clear ways to go when it comes to cost-sharing: to divide responsibility by group, by cost category, or by a combination of these two criteria. As I have mentioned, one could go on the basis of the existing split of relative expenditures, but no one really knows what this split is. It is highly variable across the country, and it has dubious relevance to the self-government context.

Cost-Sharing Options

1. By Group:
 - a) on-reserve vs. off-reserve
 - b) by constitutional group: Inuit, Indian, Métis
 - c) Status vs. Non-Status
2. By Cost Category:
 - a) negotiation costs
 - b) institutional and infrastructure
 - c) basic programs and services
 - d) special developmental costs

I won't detail the voting line-up on the numerous possible equations that these criteria yield. I will stick to my assessment of them as criteria. First, I am very doubtful that any simple group-based criteria can or should be adopted. The first and third options simply carry forward the status-quo as reflected in the *Indian Act* regime. Surely the constitutional process was not intended to do that. Besides, the *Indian Act* can be amended at any time unilaterally. No partner to the constitutional process would want this kind of one-way control over matters.

Some maintain that the "on/off-reserve" criteria is a valid one. My response is to ask: how do you define what is a reserve? Are aboriginal title lands "reserves" - the courts have supported that view. Do you mean "land base" when you say "reserve"? Aside from the problem in Alberta and Saskatchewan, this would tend to undermine any chance of landless groups getting a land base, since the federal government controls land claims policy and would likely become even more restrictive in allowing access to such processes. Do you mean only Order-in-Council reserves for Status Indians? Then you have to deal with the awkward problem of reserves created under treaty, but access to which may be restricted to Status Indian band members rather than treaty descendants - another constitutional issue. Going this route also involves having to make a "special" rule for the Inuit, and for the communities in Newfoundland/Labrador, as well as for the 30 or so bands that now have no reserve lands. The same holds for some Métis with entitlement to treaty lands or "half-breed reserves".

The remaining option is to strike a deal based on the three constitutional categories now reflected in section 35(2). This would have

the merit of not importing legislative definitions. However, there are no other definitions available. One consequence of going this route would be to force the abandonment of the *Indian Act* regime. It could not survive in the face of any constitutional regime that had to untangle the current reality of Non-Status Treaty Indians, Status Métis, and so forth. The second problem is that many northern and mid-north Indian and Métis communities are co-located, and may wish to share in a common authority over some or even all jurisdictions. At any rate, going this route is so fraught with uncertainty and so likely to disrupt local communities (rather than support their self-government) that it is best left to the future.

With respect to the "cost categories" approach, I think this is best since it is neutral. So far, all governments and aboriginal groups have referred to these four types of costs as the basic ones to address. All governments have also imported various group-based criteria into their cost category formula as well, but the latter hold up in the absence of any group segregation.

One advantage of this approach is that it actually does provide governments - federal, provincial and aboriginal - with a basis for predicting impacts without undermining negotiations. A number of approaches are possible and a number of mechanisms, including a common negotiation fund, joint consolidated revenue funds, and third party oversight to establish levels, are thinkable. But what is likely?

At present the federal government provides almost all core and institutional support costs for all aboriginal groups. In addition, it would be important that no party be in control of the pace of negotiations by being given a monopoly or "trigger" control over negotiation funding. So these two areas, at least, should likely remain a federal responsibility for all groups, unless of course a group chooses to negotiate an agreement bilaterally with a province or agrees to some other scheme. However, this basic guideline is necessary to keep consistency, to enhance autonomy, and to prevent breakdown over at least a few key financing issues. When attached to a reasonable principle that encourages aboriginal own-source revenue raising for infrastructure, such an approach would not lock the federal government into any permanent obligations.

The other cost categories, dealing with programs and services, and with developmental or interim special funding (such as would be involved in land purchases and economic development) would be cost-shared, based on the understanding that bilateral agreements are not to be actively discouraged. Some legitimate measure of current relative expenditure, perhaps in the form of a "no-off-loading" rule, combined with measures to allow aboriginal governments to participate in the

normal range of federal-provincial economic development agreements, would provide guidance for the specific levels of obligation.

Process Options

The need for and prospects of a new Federal-Provincial-Aboriginal fiscal federalism has been raised in the financing discussions, notably by the aboriginal delegates and Manitoba. Other provinces have at least seen the need for a comprehensive exercise in data collection, or for a meeting of aboriginal representatives with federal and provincial ministers to address the need to integrate aboriginal self-government within the current transfer, taxation, regional development, and equalization systems. Unfortunately, others have suggested that we carry over the entire financing issue to the future - that is the extent of their process suggestions. It means basically "if you accept the status quo, maybe we will talk about changing it later".

I think that one possible area for agreement is a follow-up process, more heavily represented by regional input, to deal with adjustments to the current extensive and complex federal-provincial financial and development regime. In the event that any provision on financing is accepted for either amendment or an accord, this goes without saying. If there is no financing provision at all, or if the issue is merely reflected in a general way in an accord, I have grave doubts about the utility of a follow-up process involving other ministers, other bureaucrats, and other aboriginal organizations - unless its purpose is simply to delay further the implementation of self-government.

The likely attitude of aboriginal groups, in the absence of a financing provision but with an amendment, will be to "frog-jump", just as has happened in the land claims forum. Some groups will get bad deals, and others will learn from their mistakes. Those groups not completely ousted from the process will wait until the strongest and most influential aboriginal communities have been through the exercise, then hire their advisors as consultants, take their agreements as models, and have at it. In the end, the small, fragmented and isolated communities, those in mixed areas and without land bases, will be forgotten.

Conclusion

In the next six weeks leading up to the First Ministers' Conference, the lines are going to be drawn between those who wish to see a progressive change from the poverty, dependency and denial that marks aboriginal peoples, and those who prefer to risk the future of aboriginal peoples by maintaining the *status-quo*.

Avoidance of the issue at the First Ministers' level will only mean a worsening of the climate for negotiations at the local and regional levels. Without an arrangement for essential resourcing, the entrenchment of the right self-government may prove hollow.

My remarks will be very brief. The panelists have covered a good deal of ground and I suspect there are many who are eager to get into the discussion. I confess that after listening to Billy Diamond and Ian Cowie it is difficult to be sanguine that the forthcoming First Ministers' Conference will reach a major resolution of the constitutional and political issues surrounding aboriginal self-government. And after listening to Rick Ponting's survey results one could be discouraged about the level of public receptivity to the possibility of historic advance. In these circumstances, a strategic and tactical mind might suggest that the time is similarly inopportune to attempt to begin to open dialogue on the complex issues of financing self-government, particularly when these complex issues have not, as yet, been fully on the table.

If, however, progress should be made and agreement emerge on the issues of constitutional entrenchment and future political negotiations, it would seem a great error if the issues surrounding financing were left exclusively to the negotiation process, with no background and understanding of agreement in principle. Ian Cowie's work makes readily apparent how complex the negotiation process must ultimately become. And there is no reason why work of that character should not proceed in preparation for that day. But it will become an intractable quagmire if it is not guided and instructed by fiscal principle as an integral component of a self-government understanding and commitment.

The structures of fiscal federalism, though they have not evolved without the appearance of considerable contention and abrasion, seem to me to embrace considerable enlightenment and farsightedness. And the principle pillars of this structure, equalization and the block financing of the Established Programs, seem entirely appropriate to the evolution of aboriginal self-government. Indeed, even in a mechanical sense the equalization program seems admirably designed to be phased in over time, as the self-governing communities take on increasing autonomous functions and acquire the tax bases for their support. It would seem a great misfortune, therefore, should historic agreements be struck which support the evolution of self-government, if these agreements did not also include the principled right of these communities to participate in the structures of fiscal federalism and the constitutional right to equalization.

I agree that the equalization principle is strategically important. Nor is it inconsistent with the public opinion data which I summarized this morning, and the importance which Canadians attach to equality.

There are a number of points I wish to make regarding the financing of aboriginal self-government. First, the off- vs. on-reserve differences must be considered in relation to financial negotiations. Any arrangements will fluctuate with time, following demographic and migratory trends. Such built-in instability should be recognized and accepted.

Second, financing should include economic development, given the importance of facilitating the establishment of institutions in aboriginal communities which can capture and recycle some of the funding flowing into them. It could also assist in providing a taxation base. Yet, taxation is an unmitigated non-starter in some aboriginal communities. If the perception among aboriginals of the illegitimacy of taxing aboriginal peoples and businesses becomes widespread, this could become a major problem.

Third, new special taxes need to be considered, such as that used to finance Petro-Canada's acquisition of Petrofina. Consideration should be given to incremental sales tax, land transfer tax, resources tax, and so forth.

Fourth, joint ventures should be pursued between crown corporations and aboriginal corporations. This could be linked to affirmative action in hiring, contracting and sourcing.

Fifth, we need new modes of sharing information, especially with respect to models which have been successful. We cannot afford to keep "reinventing the wheel" - it is too costly for all concerned.

David C. Hawkes, Discussant

It is useful, in examining the key financing issues facing aboriginal self-government, to briefly review the main concerns of governments - federal, provincial and territorial - and those of the aboriginal peoples.

The major concerns of governments are listed below in point form.

1. Not to provide aboriginal self-governments with a blank cheque - a legitimate concern and a responsible position to take;
2. To ensure public accountability for government expenditures;
3. To ensure that aboriginal governments do not become solely dependent upon federal and provincial governments;
4. To ensure that they do not lose any sources of revenue; and
5. To encourage aboriginal peoples to become self-sufficient.

The major concerns of aboriginal peoples are as follows.

1. To ensure that their governments have adequate finances - again, a legitimate concern and responsible position;
2. To ensure that financial arrangements are long term and stable;
3. To ensure that they have control over - and are responsible for - their expenditures;
4. Not to become entirely dependent upon federal and provincial governments;
5. To acquire their own sources of revenues, and to build their own revenue base; and
6. To become self-sufficient.

Although the concerns of governments and aboriginal peoples differ markedly on some matters, such as a revenue base, they are strikingly similar on several key financial issues. Governments at all levels and aboriginal peoples agree that aboriginal peoples should become self-sufficient. All agree that aboriginal governments should not become

solely dependent upon federal and provincial governments. And there is agreement with respect to public accountability for government expenditures, although some difference in terms of whether aboriginal governments should be accountable to their own members, or to Parliament and/or legislatures.

In terms of addressing the key financing issues, it might be most productive to begin by building agreement in areas where there are shared concerns.

Session VI

Jurisdictional Issues

ISSUES OF JURISDICTION BETWEEN ABORIGINAL AND NON-ABORIGINAL GOVERNMENTS

Ian B. Cowie

What I was asked to do today is to summarize some of the main points from my background paper for this project, on jurisdictional issues between aboriginal and non-aboriginal governments. Before I do this however, I will make some general observations on the current constitutional process and the financing of self-government. I share Billy Diamond's point of view that it's difficult to be optimistic about the possibility of any meaningful agreement being reached at the 1987 First Ministers' Conference.

A lot of time has been spent at the First Ministers' Conferences and it is a matter of regret that we are facing the last of this series with differences in positions of substance, policy, and understanding which have only marginally closed over the last few years. If I look at where governments and aboriginal associations are now, in contrast to where things were in 1985, I cannot see a tremendous increase in the level of understanding and willingness to compromise.

In part the current situation reflects the question of where public attitudes are in relation to aboriginal issues and constitutional change, and the extent to which government leaders around the table reflect those public attitudes. It is my conclusion, and I think Rick Ponting's work sustains this view, that at a high level of generality the public and the political leadership of this country want to try to do the right thing by the aboriginal people. They are trying to make an effort, they are trying to see some changes made. However, that attitude does not embrace the fundamental changes in systems of government, and the financing required to realize self-government, in the way that aboriginal peoples are talking about it.

Care must be taken in reading general public attitudes. The general questions in the recent survey: "Are you in favour of aboriginal people acquiring more self-government?" can be too simple. It becomes easy to say: "Yes, we can relate to that, we can empathize with where aboriginal people are at and support the need for new approaches including self-government." But when you get to the next level of detail, that public support essentially disappears. For example, the B.C. salmon dispute, the fishing agreements in Northern Ontario, and the land entitlement issues in the Prairie provinces show that when aboriginal issues affect the non-aboriginal constituency more immediately, that general support quickly evaporates. This reality is also reflected around the constitutional

table. There are continuing attempts to make a "best effort", but the enthusiasm, the real political will to make the fundamental changes required is not there.

For any self-government amendment to be contemplated without some precision of understanding regarding future fiscal relations between federal, provincial and aboriginal governments means that the amendment will merely perpetuate the kinds of disputes and lack of adequate financing present under current arrangements. It is encouraging to see that for the first time in the preparations there is intensive discussion on financing. I would like to be able to say that the results of those discussions give us some optimism, that we will see governments come to grips with issues of financing. I don't see that happening. I see the federal government, which has consistently sought to defer a discussion of financing, continuing to avoid the issue. I see a continued reluctance on the part of many provincial governments to acknowledge, in a meaningful way, that a level of contribution will continue to be required on their part.

The discussion on financial aspects has been entered into very late in the game; it has not focussed on the totality of the fiscal relationship that has to exist between aboriginal and non-aboriginal governments in the future; it has not focussed in detail on taxing authorities; and it has not focussed on alternative revenue raising possibilities such as access to resources, sharing schemes, royalties, and licencing possibilities. Indeed, it has not focussed on the central issue of what should be the future distribution of financial responsibilities between federal and provincial governments with respect to aboriginal self-government. As a result, there is not a lot of reason for optimism that the required assurances on financing will be arrived at in the meetings to be held over the next few weeks.

It seems to me that governments are prepared to walk away from the 1987 FMC empty-handed - the same kind of result that came out of the 1985 FMC. If this occurs it will be because governments and aboriginal associations were not prepared to make the kind of *major* changes in position that are required; and it will be easy for the federal government to point to the provinces or aboriginal associations and say they weren't prepared to compromise, the demands were excessive, and there's not the public support for the changes required. Similarly, it will be easy for the provinces to point the finger at the federal government and say: "You didn't make enough movement on financing and a whole range of other questions."

It was interesting to hear the comments yesterday to the effect that:

Look, this is just another meeting. It's an important meeting but if failure is the result, things will continue on. Things are happening at the community level and it's better to walk away without a deal than to enter into a bad deal.

I can relate to those views but it is with a sense of regret. What we have had, since the patriation of the constitution in 1982, is a process that has placed aboriginal issues close to the top of the national agenda. The First Ministers' process has focussed the attention of national political leaders, the media and the general public on issues that have been around for a long time, and which deserve consideration and results at that level. It would be extremely unfortunate if this window of opportunity passed without any positive results.

On the other hand, the comments were very refreshing this morning:

Look, get things in balance, the constitutional process is important but there are other very important things that are happening. The key for now and for the future in relation to self-government is what aboriginal peoples are doing themselves.

We are starting to see a situation where aboriginal communities are determining for themselves their own priorities, and their own institutions, ensuring through a wide variety of mechanisms that the capacity for self-government is recognized and related to the other political institutions and structures of Canada.

In this regard, the Cree-Naskapi legislation and the experience of the Crees under that legislation is tremendously important. There are other examples - the Kahnawake police force, the child-care arrangements in Manitoba, and the *Sechelt Act* which in the view of the Sechelt people meets the requirements as they've defined them. Across the country Indian people as well as Métis and Non-Status Indian groups are setting down their own definition of what self-government means, and are starting to assert that self-government capacity as best they can within the existing legal and administrative constraints.

While these developments are encouraging, they also underline the fact that the constitutional process is important. Constitutional amendments that commit governments must be in place as a basis for the negotiation of specific arrangements. However, the initiative and the real burden to effect change rests with the aboriginal peoples. Governments cannot generate the ideas, indeed they shouldn't. Governments should be responding to the requirements identified by aboriginal peoples.

My paper does not look at the legal aspects of the current constitutional discussions. It starts with the premise that irrespective of the outcome of the constitutional discussions, there are a variety of opportunities and processes now open to aboriginal peoples for moving forward with the negotiation of self-government. We have concentrated much of our energies on the constitution; now we must translate some of the concepts discussed. A lot of aboriginal communities are now focussing on questions which are constants in a number of negotiation processes - self-government negotiations under a constitutional amendment, negotiating comprehensive claims, or the so-called Indian community self-negotiation policy announced in 1986. The paper tries to identify some of the questions and issues that now confront governments and aboriginal participants in defining the strategies - the policies, the powers, the authorities and the financing requirements of self-government for the future. It says that while we are focussing all of this energy constitutionally, we must become aware that, at the community level, people are grappling with more fundamental questions. It outlines what some of those fundamental questions are, and gives an indication of how people prepare for the substantive negotiations and arrangements required.

The Cree-Naskapi and Sechelt experiences reflect the need for individual aboriginal communities to define their own priorities relative to self-government. After these priorities have been identified, changes in federal and/or provincial legislation and programs must be negotiated to accommodate aboriginal self-government. Then the new arrangements must receive the required constitutional recognition and protection.

The paper starts off by identifying the need to move away from the more political and rhetorical definitions of self-government, and proposes a definition: "the negotiation and recognition of a defined level of jurisdiction or control which will be exercised either exclusively or on a shared basis, with either aboriginal or non-aboriginal governments" (page 13). Such self-government capacities could encompass a broad range of governmental powers and activities or, at the option of the particular group or community involved, could focus on a more limited range of jurisdictions and government areas.

I move on to put some operational content into that definition. What are the working, planning and policy requirements for preparations for negotiation? Before moving into those issues, I identify self-government options open to aboriginal communities under present and proposed policies (page 16 of the paper). These range from the most comprehensive option - that is, negotiating major comprehensive claims together with comprehensive self-government - to the narrower, more conservative options that really can't be termed self-government under

anyone's definition. The most comprehensive option is applicable to every one of the Indian groups in British Columbia. The more conservative options are processes currently underway within the Department of Indian Affairs under the headings of alternative financial arrangements, devolution programs, and the negotiation of sector-specific agreements under current arrangements, whether it be education, child-care, or policing.

The important point that comes from this matrix of options is that the particular aboriginal community can work toward a more macro concept of self-government, and that self-government can be sequenced or divided in different ways. There is nothing in present government policies, other than attitudes and bureaucratic difficulties, that says an aboriginal community has to move in one direction or another. The requirement is for a particular community to determine its own needs, to reflect on its own history, culture, and other traditions, its institutions, and its structures, and to determine what are its requirements for the future. The capacity is there under current policy to negotiate any of these options.

It then becomes important for the community in question to say:

What is self-government going to mean for us? What kinds of analysis assist our community in coming to grips with describing the kinds of powers in different areas, the kinds of financing and the kinds of institutions?

In the paper I incorporate a framework that was developed by David Nahwegabow some years ago. It's a framework based on a critical premise - that self-government has to be defined in aboriginal terms. It has to reflect the holistic reality of how an aboriginal community functions on a day-to-day basis. The paper identifies five broad sectors of human interaction and activity which are a critical starting point for working out approaches to self-government (page 27). These sectors provide an integrated, holistic joinder of activity that non-Natives and non-Native governments have had great difficulty understanding in the past.

First, the paper describes the natural environment sector. This includes everything that occurs within the setting of the collectivity naturally, and the impact of individual and collective activities on that natural setting. It includes management of land, water and natural resources, conservation and environmental issues - anything that affects the natural environment which has to be the subject of collective decision-making by the particular community. The second sector is the socio-cultural environment. Everything that a collectivity does that is

related to the social interaction of the people is included here. Third, the economic environment is everything that a collectivity does that relates to economics, life-support or wealth creation. This incorporates resource development, manufacturing activity, and taxation. The physical environment is distinct from the natural environment. The physical environment is what humans add, for example housing, community infrastructures, and sewage systems. Finally, the government environment has to do with the institutions and mechanisms of self-government that have been in place historically and traditionally, the kinds of mechanisms in place today, and those required in the future.

This framework is a starting point. The next question is: how do the contents in each of those environments match with what non-aboriginal governments are doing on a day-to-day basis in relation to those aboriginal communities? On pages 28 to 29 the five environments are subdivided into 23 primary governmental sectors. This is where the Indian or the aboriginal view of the world and the non-aboriginal government view of the world start to interrelate.

Now what's the point of doing all of this? The point is that it provides a framework to assist an aboriginal community in defining its present and future needs and priorities. It is a framework which will facilitate the design of institutions and programs, but perhaps most importantly, it provides a starting point for discussions with the federal and provincial governments. It enables an aboriginal community to say, as the Cree and Sechelt did:

This is how we define self-government, and these changes will have to occur in present federal and provincial occupation of those sectors to accommodate the self-governing capacity of the community.

What is required is to have an aboriginal community present its own self-government requirements, identify powers and financial requirements for the future, and provide a basis for integrating those requirements with the non-aboriginal view of how governments function. In some respects, it's simplistic.

The document outlines a process which would lead to the question of future financial requirements. It does not review in full detail the present pattern of financial arrangements. In this regard however, I would like to make one specific point about provincial financial involvement. Comments have been made over the course of these two days regarding provincial incursions under present programs into Indian community areas which are a matter of federal government responsibility. In fairness to many of those provinces, those areas have been entered into at

substantial cost - in the sense that provinces pick up a third of Status Indian costs across the country, and are not reimbursed by the federal governments. In large part, those incursions have resulted where the federal government, for a variety of different reasons, has opted not to fulfill its responsibilities for the Status Indian population. The framework in this paper can be used to identify where provinces are involved (e.g., health, education, social services and the administration of justice). Such analysis will in turn assist in identifying areas that might have to change for the future.

The final part of the document does two things. It takes each area of jurisdiction and describes the present constitutional and legal interface. It takes the 23 primary jurisdictional areas and examines how the federal and provincial governments constitutionally and legislatively occupy those areas. Changes can be expected in all of these areas. I indicate in the paper that I do not find the examination of current constitutional occupations of these sectors to be of a lot of assistance in relation to the work that has to be undertaken.

In conclusion, the paper poses a series of questions about the future interrelationships between the laws of aboriginal governments and those of federal and provincial governments. It raises questions as to whether there is a need for some sort of planning and review mechanism to address issues of jurisdictional interface and coordination with federal and provincial governments, once aboriginal governments are operating. It further examines the question of whether there is any argument that can be made for any sort of continued or residual disallowance powers, on which I conclude that there is no convincing argument for continuation.

I've done short shift with the end of the paper. I believe that the front parts are important because it is in relation to the issues identified there that both the aboriginal leadership and government policy-makers have failed to focus adequately in the past. These issues are key in the process of implementing the concepts that aboriginal people are talking about. In many respects this is as great a challenge as trying to bridge the gaps in constitutional positions between the aboriginal leadership and governments.

CONCLUSION - EXPLAINING THE FAILURE AND LEARNING FROM IT

Several themes emerged from the workshop, none of which left participants hopeful regarding the outcome of the upcoming First Ministers' Conference. In terms of their outlook for the March FMC, most participants were of the view that the parties to the negotiations were growing further apart on the key issues, and that the expectations of failure were increasing.

Public opinion appeared to be mixed. While most Canadians generally seemed to support aboriginal self-government, they were also opposed to "special status" for aboriginal peoples. Public opinion was not an obstacle to success: if anything, it was sympathetic toward and permissive of it. However, nor was it such that it could be used to convince government of the necessity of constitutional reform.

Many workshop participants called for a discussion of the basic values underlying aboriginal/non-aboriginal relations, rather than a debate framed in legal jargon. Constitutional reform concerns the fundamental structure of our nation, and negotiations should reflect this fact. It was widely felt that the ideas and values underlying federalism might provide the raw materials with which to accommodate aboriginal self-government.

Finally, the opinion was voiced repeatedly that we must not lose sight of the longer term. Aboriginal self-government cannot be won or lost in two days in March. The 1987 FMC is neither a beginning nor an end to the drive for aboriginal self-government. Progress has been made. Patterns of self-determination are evolving independently of the constitutional process - patterns which will lead to completing the circle of confederation.

This report has described the issues in entrenching aboriginal self-government, and the possible areas of consensus and conflict in the

search for accommodation. However, even the most promising forms of accommodation did not attract sufficient support at the 1987 First Ministers' Conference.

The 1987 FMC was an historic event, a milestone in Canada's relations with aboriginal peoples. The unsuccessful conference, indeed the section 37 process itself, most certainly will be remembered as a significant opportunity lost. In time, however, it may also be remembered in a more favourable light - for the strides toward aboriginal self-determination that were made during this period, and for the lessons that it has, and will continue to teach us.

Why did the First Ministers' Conference fail to reach an agreement? Although a complete answer to this question will not be available for some time, a number of conclusions suggest themselves, based in large part on the analyses presented at the workshop.

We begin with what is a conspicuous, albeit essential observation. There was a lack of agreement among parties to the negotiations on some of the major issues. This was particularly evident with regard to the issue of a land base for currently landless aboriginal peoples, the right to self-government ("inherent" or "delegated"), and (perhaps most importantly) the constitutionally entrenched commitment to negotiate self-government agreements.

A large part of the problem, in our view, was the failure of the parties to the negotiations to agree to - or even to address - an overall goal or objective for the section 37 process. Without a mutually acceptable objective, agreement on specific issues is difficult. And it seemed that several incompatible goals - ranging from assimilation to nation-status - were being pursued at the same time.

But failure cannot be attributed solely to the lack of shared objectives, or to disagreement on key issues. This cannot explain the total lack of accommodation - on matters of process, on further negotiations, and even on some major issues.

Also contributing was the lack of political leadership on the part of some governments, and the lack of political will on the part of others. This appeared to be due, in no small measure, to the perceived marginal impact of failure. The costs of a failed FMC on aboriginal constitutional matters were low, or thought to be so. The issues were not high on the public agenda, nor were they as important - particularly to the federal government - as rebuilding the constitutional relationship with Quebec. Continuing uncertainty, particularly concerning what entrenching the right to aboriginal self-government would mean for the reallocation of existing government powers, served to further limit government leadership and hamper political will.

It is also the case that many of the government leaders had changed during the constitutional reform process. Compare, for example, the First Ministers' table of 1981 (the time of the patriation debate) with that of 1987 - Trudeau vs. Mulroney, Blakeney vs. Devine, Lougheed vs. Getty, and Levesque vs. Bourassa (who did not attend the March 1987 FMC). We have today a very different cast of characters and some, we would argue, do not share or feel bound by their predecessors' commitments to aboriginal peoples and constitutional reform.

Nor were the aboriginal peoples' organizations at the table without blame. They adopted a negative approach from the outset of the Conference (e.g., their response to the Ontario draft constitutional resolution), and missed many signals of accommodation and compromise. Their expectation of failure may have reinforced the "hard line", as they assumed an unaccommodating posture.

For some portion of the failure there is no one to blame. The absence of communication was stunning. That participants talk past one another should hardly be surprising, given the lack of shared: symbols, values, language, mind sets, cultures and concepts. For example, the source of political power for aboriginal peoples is not the individual (as in John Locke, with the concept of contract, and the separation of government and society), but the collectivity (the political, economic, religious and cultural aspects of which are indivisible). Although a great deal of learning occurred during the section 37 process, this lack of communication and understanding highlights the need for even further education.

Some part of the failure can be attributed to the negotiation process itself. With 17 parties to the negotiations, and with an ill-defined agenda, the complexity of the process numbed many observers. Moreover, aboriginal peoples were never close to being on an equal footing in the negotiations. They were there at the sufferance of federal and provincial governments, hardly a position from which to bargain effectively. Furthermore, the policy arena was one chosen by governments - not aboriginal peoples, and one dominated by lawyers - not political leaders.

Finally, the federal government's attempt at a compromise proposal on the final day of the Conference was disastrous, with almost no party prepared to support it. Why did the federal government try to do this alone, rather than with the assistance of some provinces and aboriginal peoples' organizations? Was this, as some observers suggested, the result of incompetent, but well-intentioned federal leadership, or was the move strategic and purposeful, designed to ensure federal control of the agenda?

In a sense, the section 37 process was an exercise in trying to find a legal loophole for aboriginal self-government, one which would not alter

existing relationships. It was not, as Zebedee Nungak of the Inuit Committee on National Issues put it, "doing constructive damage to the status-quo".

So much for an initial attempt at explaining the failure of the 1987 FMC. What accomplishments were achieved during the constitutional reform process, and what lessons have we learned?

The "window of opportunity" with respect to aboriginal peoples and constitutional reform may disappear for a long time. Aboriginal self-government will likely slip down the public agenda. However, this should not blind us to the significant progress which was made during the section 37 process. In 1982, the concept of aboriginal self-government was openly ridiculed. Just five years later, first ministers were discussing how to entrench that right in the constitution. Although the 1987 FMC ended without agreement, the section 37 process provided the impetus for substantial movement on aboriginal policy matters both within the constitutional arena and without.

The impact will also be felt in the wider political and policy-making arenas, although in ways that now seem difficult to determine. For example, what role are aboriginal peoples to play, if any, in future constitutional negotiations? What precedents have been set by the section 37 process? Will aboriginal peoples and territorial leaders be fully involved in constitutional negotiations on Senate reform? Guaranteed representation in the Senate for aboriginal peoples has certainly been a prominent proposal. And what of constitutional negotiations regarding fisheries - another constitutional agenda item in the so-called "Langevin text"? Aboriginal peoples have a strong and direct interest in the fisheries, and are profoundly affected by jurisdiction in this field.

More fundamentally, however, the failure of the section 37 process has left a large policy vacuum in aboriginal affairs. Since 1984, policy development in this field has been focussed on (and framed around) aboriginal self-government and the constitution. To a large extent, policy regarding aboriginal peoples and economic development, resources, education, culture, health ... (the list is long) has gone untended. In the absence of the constitutional framework, corporate policy and strategic planning will have to be basically reconsidered. Renewed efforts at policy development in these fields, hopefully with the participation of aboriginal peoples, should yield more positive results.

There is at least one development of a constitutional nature, unnoticed to date, that is possible. Constitutions can change - in practice if not in letter - without amendments. The use of the federal government's power of disallowance with respect to provincial legislation, or rather the loss of this power, is a good case in point. The same result could occur with respect to aboriginal self-government. Through the active practice

of self-government by aboriginal peoples, together with broad public support for it, it may become unthinkable someday to disallow.

If we have learned a lesson from this exercise, it is that we need a new framework or lens through which to view aboriginal - non-aboriginal relations. We must look to fundamental values rather than arcane legalism. We must seek to remove a tie that does not belong, and that should not bind. We have, in the ideas and values that underlie our federal system, a framework with the capacity to encourage many communities with different values to flourish.

If legalism is part of the problem, then perhaps federalism is part of the solution. Recognizing diversity while promoting harmony has long been the strong suit of Canadian federalism. The unique needs of Quebec, the West, Atlantic Canada and the North have all been addressed, with varying degrees of success, in Canadian politics. Nor is federalism new to aboriginal peoples - the Iroquois or Six Nations Confederacy (Haudenosaunne) was formed almost one thousand years ago. If we can use the values and ideas that mould this common lens of federalism, perhaps we can see a successful end to the search for accommodation.

It was noted earlier that a large part of the problem was the failure of the parties to the negotiations to agree upon a common goal or objective. The likelihood of "completing the circle of confederation", as the aboriginal peoples phrased it, will be greater when we realize a mutual goal of coexistence with aboriginal peoples, and when we drop the unstated goal of assimilation. A common goal of *co-existence* would be mutually beneficial, ensuring respect for different cultures, and allowing cultural identity to flourish. Government policy should assist aboriginal peoples in achieving this end, through measures to promote greater self-determination and self-reliance (such as self-government and economic development), and through working with aboriginal peoples in a participatory policy process.

The key is *negotiating arrangements* which enable aboriginal peoples to take more control of their lives, be it through the settlement of outstanding land claims, the devolution of programs and services, the implementation of self-government, or enhanced economic development.

To sum up, we have learned several important lessons. First, we must recognize a mutual goal of co-existence as our overarching policy framework. Second, we must recognize negotiated arrangements or agreements as the key method by which we can achieve that objective. And we must continue to learn from our past failures. We need to step

back from the constitutional negotiations and examine, in a comprehensive fashion, the section 37 process and the "failure" of the March 1987 FMC. We need to explore the negotiation process, how it was structured and the issues that emerged, with a view to uncovering lessons for future negotiations, and with the ambition of suggesting more effective public policy in this field.

Appendix A

Workshop Agenda

This session will explore the values underlying aboriginal self-government and the Canadian political structure, and the potential relationship between the two.

Evening

Dinner - open (restaurants to be recommended)

Wednesday, February 18

9:00 a.m. - 12:00 noon

*The Self-Government Amendment:
Debunking Some Legal 'Obstacles'*

PANEL:

John Whyte, Queen's

DISCUSSANTS:

William Pentney, University of Ottawa

This session will address the justiciability of a constitutional commitment to negotiate; self-government agreements and section 35; automatic constitutionalization of self-government agreements; and the commitment to implement self-government agreements.

12:00 noon - 1:15 p.m.

Lunch - open

1:15 p.m. - 1:45 p.m.

*Public Opinion and Aboriginal
Self-Government*

Rick Ponting (a review of survey results conducted for the University of Calgary by Decima)

1:45 p.m. - 4:30 p.m.

Key Financing Issues

PANEL:

Billy Diamond, Chief Negotiator,
James Bay and Northern Quebec
Agreement Implementation
Ian Cowie, Ottawa

AGENDA

Workshop on "Issues in Entrenching Aboriginal Self-Government"

Monday, February 16

7:00 p.m. - 10:00 p.m. Registration and Opening Reception
Sir John A. MacDonald Room

Tuesday, February 17

9:00 a.m. - 12:00 noon *Prospects for Agreement in 1987*

1. David Hawkes, Institute of
Intergovernmental Relations:
"The Search for Accommodation"

2. Keith Penner, M.P.:
"The Politics of Aboriginal
Self-Government"

12:00 noon - 1:30 p.m. Lunch - open

1:30 p.m. - 4:30 p.m. *Aboriginal Self-Government and
the Federation*

PANEL:

Richard Simeon, Queen's, on political
community and Canadian federalism

Noel Lyon, Queen's, on values, justice
and the constitution

Leroy Little Bear, University of Lethbridge,
on aboriginal self-government and the
Canadian political system

DISCUSSANTS:

William Pentney, University of Ottawa

Vina Starr, UBC

Micha Menczer, Vancouver

DISCUSSANTS:

Ian Stewart, Queen's

Rick Ponting, University of Calgary

**David Hawkes, Institute of
Intergovernmental Relations**

This session will explore issues such as the placement and justiciability of a commitment to financially support aboriginal self-government; possible principles for fiscal arrangements and cost-sharing; and questions of federal/provincial jurisdiction and responsibility.

4:30 p.m.

Workshop adjourns

Appendix B

List of Participants

PARTICIPANTS

PANELISTS & DISCUSSANTS

Ian Cowie
Ian B. Cowie and Associates
Management Consultants

Billy Diamond
Chief Negotiator
Federal Cree Negotiations on Implementation of
James Bay and Northern Quebec Agreement
Grand Council of the Crees (of Quebec) and
Cree Regional Authority

Leroy Little Bear
Native Studies
University of Lethbridge

Noel Lyon
Faculty of Law
Queen's University

Micha Menczer
Vancouver

Keith Penner, M.P.
Cochrane - Superior

Professor William Pentney
Faculty of Law
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Rick Ponting
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School of Public Administration
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Vina Starr
Barrister and Solicitor
Indian Self-Government Advisor
Faculty of Law
University of British Columbia

Ian Stewart
Department of Political Studies
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John Whyte
Faculty of Law
Queen's University

PARTICIPANTS

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Associate Professor of Law
University of Calgary

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Indian Affairs
Government of Canada

David Boisvert
Analytic
Public Policy Consultant

Kathy Lenore Brock
University of Toronto

Bernadette Hardaker
CBC

Murray Hogben
Whig Standard

Grand Chief Michael Mitchell
Mohawk Council of Akwesane

Grand Chief Joseph Norton
Mohawk Council of Kahnawake

Norm Prelypchin
Ministry of Attorney-General

Harvey Schachter
Editorial Department
The Whig Standard

Robert E. Simon
Tribal Director
Shuswap Nation Tribal Council

Kelly Speck
Queen's University

Sam Stevens
Native Law Program
Faculty of Law
University of British Columbia

Inuit Committee on National Issues

Michael McGoldrick
Consultant

Gary Mitchell
Labrador Inuit

Federal

Phillipe Doré
Aboriginal and Constitutional Affairs
Federal-Provincial Relations

Gordon Shanks
Policy Advisor

New Brunswick

Dan Horsman

Ontario

Deborah Doxtator
Ministry of Natural Resources

Linda Stevenson
Race Relations Division
Ontario Human Rights Commission

Staff

David C. Hawkes
Project Director

Pauline Hawkes
Conference Coordinator

Peter Leslie
Institute Director

Evelyn J. Peters
Research Associate

List of Titles in Print

Aboriginal Peoples and Constitutional Reform

PHASE ONE

Background Papers (second printing)

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)

Discussion Paper

David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?*, 1985. (\$12)
Set (\$75)

PHASE TWO

Background Papers

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. (\$7)
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 Government*, 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.

Position Papers

- Martin Dunn, *Access to Survival, A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada*, 1986. (\$7)
- Inuit Committee on National Issues, *Completing Canada: Inuit Approaches to Self-Government*, 1987. (\$7)

Workshop Report

- David C. Hawkes and Evelyn J. Peters, *Implementing Aboriginal Self-Government: Problems and Prospects*, 1986. (\$7)

Bibliography

- Evelyn J. Peters, *Aboriginal Self-Government in Canada: A Bibliography 1986*, 1986. (\$12)

Discussion Paper

- David C. Hawkes, *The Search for Accommodation*, 1987. (\$7)

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