

FORMS OF ABORIGINAL SELF-GOVERNMENT

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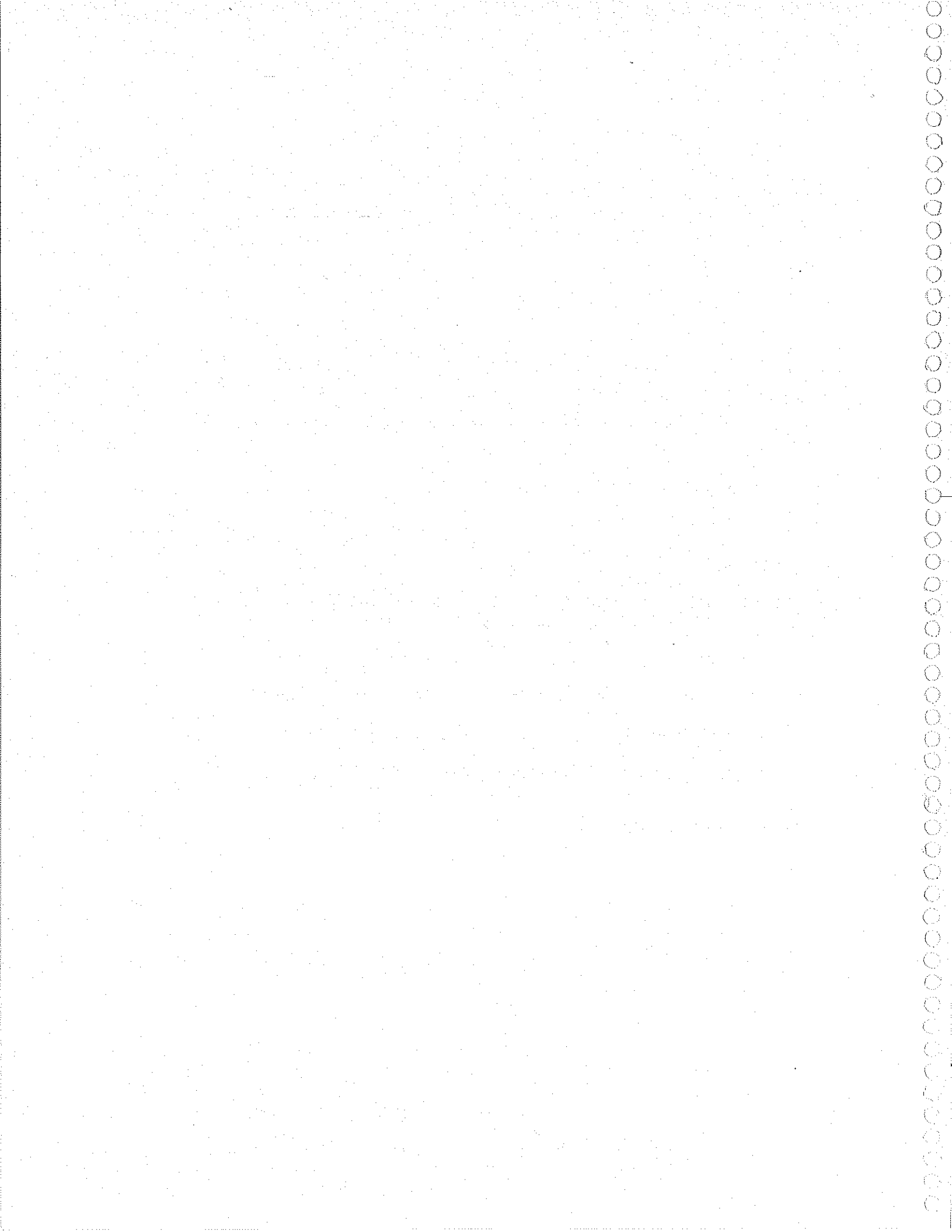
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## PREFACE

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The constitutional reform process, as it relates to aboriginal peoples, has come to focus on one major agenda item -- aboriginal self-government. At the First Ministers' Conference in March 1984, aboriginal peoples' leaders were calling for self-government while many federal and provincial ministers were openly questioning "What does it mean?". The aim of Phase One of the Institute of Intergovernmental Relations' research project on Aboriginal Peoples and Constitutional Reform, subtitled "Aboriginal Self-Government: What Does It Mean?", is to shed some light on this question by examining attitudes toward the principle of aboriginal self-government and by examining alternative concepts and models of aboriginal self-government.

Aboriginal peoples, being no more homogeneous than non-aboriginal Canadians, have no single model in mind. It would appear, from those models proposed to date, that any approach will have to be flexible enough

to accommodate diverse structures and allocations of policy responsibility. The wide variety of views as to what aboriginal self-government means -- ranging from "nationhood" to local school boards -- has yet to be clearly articulated and fully elaborated. This situation has led some observers to express alarm at the yawning gap between the expectations of aboriginal people, and the political wills of federal and provincial governments.

Diverse and conceivably conflicting views cannot be accommodated without a clear understanding and shared perceptions of what is at issue. Phase One of the project, including this series of papers, is designed to help take the first step toward developing such an understanding. This useful and important role can only be played by a body which does not have a vested interest in the outcome of the constitutional negotiations, and which is not a party to the debate. The Institute of Intergovernmental Relations, which is at arm's length from all of the parties, is ideally placed to perform the role of clarifying and extending public knowledge of the issues.

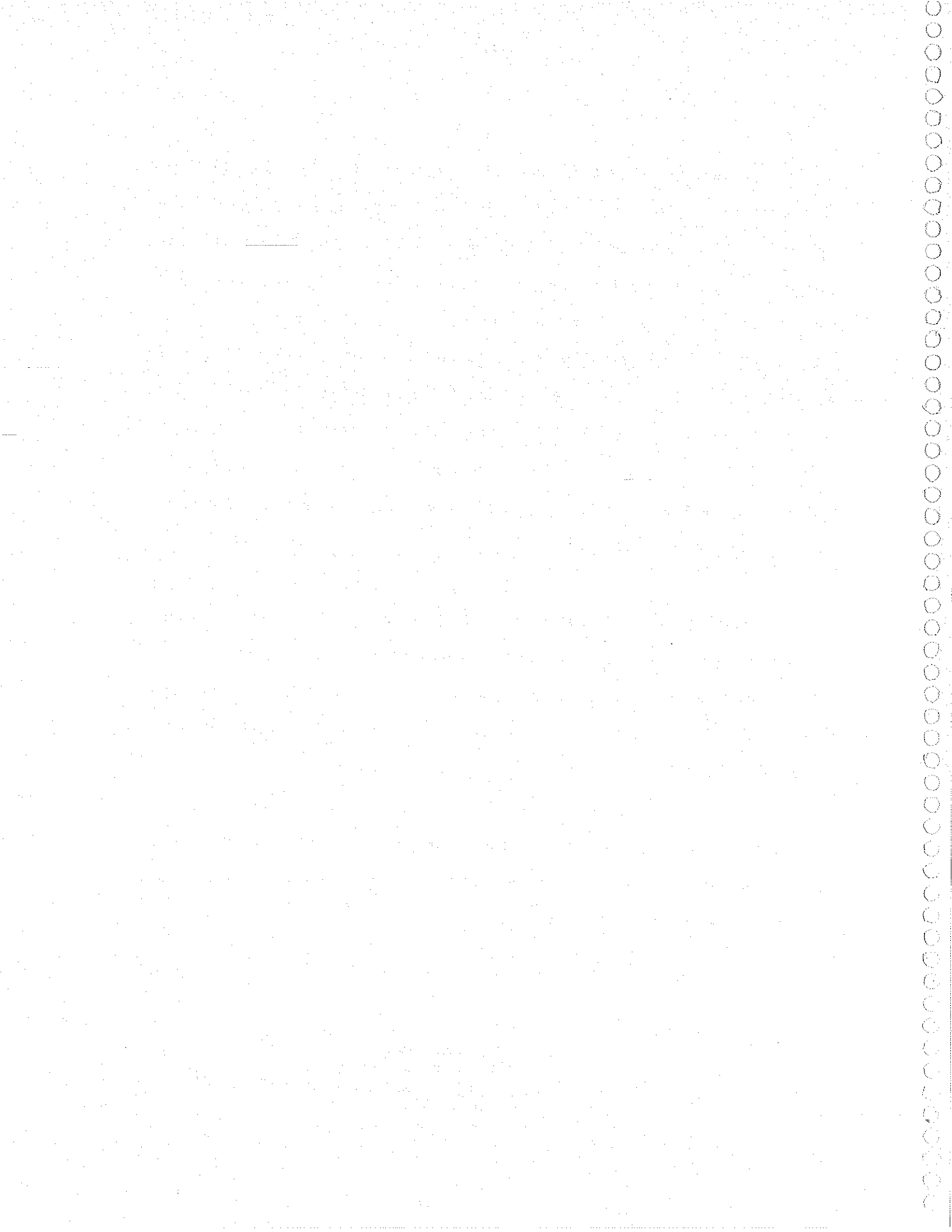
We are not alone in this viewpoint. The Institute has received support, encouragement and full cooperation from all parties to the negotiations -- federal, provincial and territorial governments, and aboriginal peoples' organizations. I would also like to acknowledge the financial support which the Institute has received for the project, in particular the generosity of the Donner Canadian Foundation, the Government of Ontario, the Government of Alberta, the Government of Québec, the Government of New Brunswick, and the Government of Yukon.

The principal objective of the project is to identify and operationalize alternative models of self-government, drawing upon international experience, and relating that experience to the Canadian context. David Boisvert's paper on "Forms of Aboriginal Self-Government" goes to the heart of the subject matter. He reviews the international experience with self-governing institutions for aboriginal peoples, and from this review, builds possible models for aboriginal self-government. He then relates these models to the proposals put forward for aboriginal self-government in Canada, and examines the potential methods for implementing self-government, touching on such aspects as the jurisdiction and resource bases entailed.

He concludes by advocating the consideration of several creative recommendations. Among these are the development of a national policy on self-government for aboriginal peoples, and the use of various "devolution techniques" to turn over to aboriginal peoples the management of their own affairs.

David Boisvert teaches in the Department of Political Studies at Queen's University, and is a former advisor to the federal and provincial governments on constitutional reform.

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March, 1985





## ACKNOWLEDGEMENTS

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This paper was written during the winter 1984-85 at a time when it was still uncertain how constitutional negotiations on self-government would proceed. It reflects the principal concerns of the moment which had to do with the steps which would have to be taken to establish self-government. This paper is an effort to cope with this question.

It could not have been written without the help of David Hawkes, Associate Research Director of the Institute of Intergovernmental Relations at Queen's University. His advice and support are very much appreciated.

The Conference on Aboriginal Self-Government held at the Donald Gordon Centre February 6 and 7, 1985 was a source of fertile discussion and many good ideas. I am indebted to all the participants at that conference.

Last but not least, I would like to thank Valerie Jarus who typed and re-typed all the various drafts of this paper.

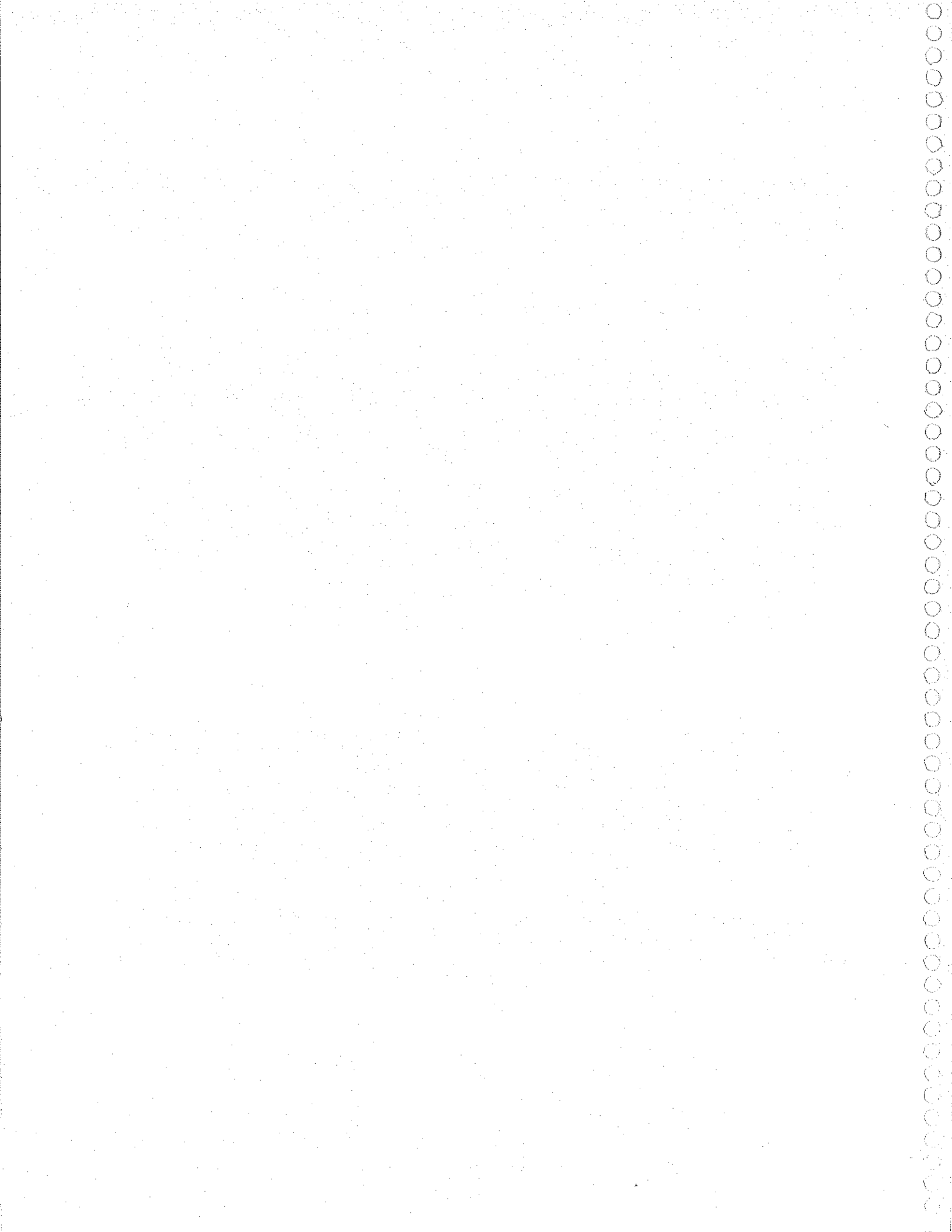
Any errors of fact or interpretation are purely my own.

#### ABSTRACT

Self-government has surfaced as the principal issue being discussed in aboriginal constitutional negotiations. This paper examines what sort of institutional arrangements could be established to respond to an aboriginal demand for self-government. It concludes that a national policy on aboriginal government should be flexible enough to allow aboriginal self-government to be implemented in a number of different ways. Each form of aboriginal self-government implies a somewhat different implementation procedure. This paper examines how to establish aboriginal authorities within Canadian federalism, and proposes that the devolution of authority onto aboriginal governments might be the best way to establish such aboriginal authorities in Canadian law.

#### *Sommaire*

*La demande de la part des peuples autochtones pour une plus grande autonomie politique est devenue la grande question à l'ordre du jour des conférences constitutionnelles. Cette étude tente d'élaborer les différentes façons de répondre à cette revendication, et arrive à la conclusion qu'une politique canadienne sur l'autonomie autochtone doit reconnaître que plusieurs formes d'autonomie politique sont possibles pour les peuples autochtones. Pour chaque forme de gouvernement proposé par les peuples autochtones, correspond un mode d'application particulier. Cette étude fait l'examen des moyens d'établir ces nouvelles autorités autochtones au sein du fédéralisme canadien et propose qu'une formule dévolutionnaire pourrait servir comme le moyen le plus approprié d'établir les autorités autochtones dans le système légal canadien.*



## INTRODUCTION

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Self-government for the aboriginal peoples has emerged as one of the principal matters being discussed in aboriginal constitutional negotiations. To many Canadians, self-government remains a perplexing issue. What does it mean? How would it work? What good would it do for the aboriginal peoples? But from the point of view of the aboriginal peoples themselves, the issue is how to survive as distinct peoples and this means reaffirming and reinforcing their power and ability to exist as distinct collectivities. It is the reaffirmation of what are in the nature of collective rights that is summarized in the demand for self-government -- the condition for the exercise of any collective right.

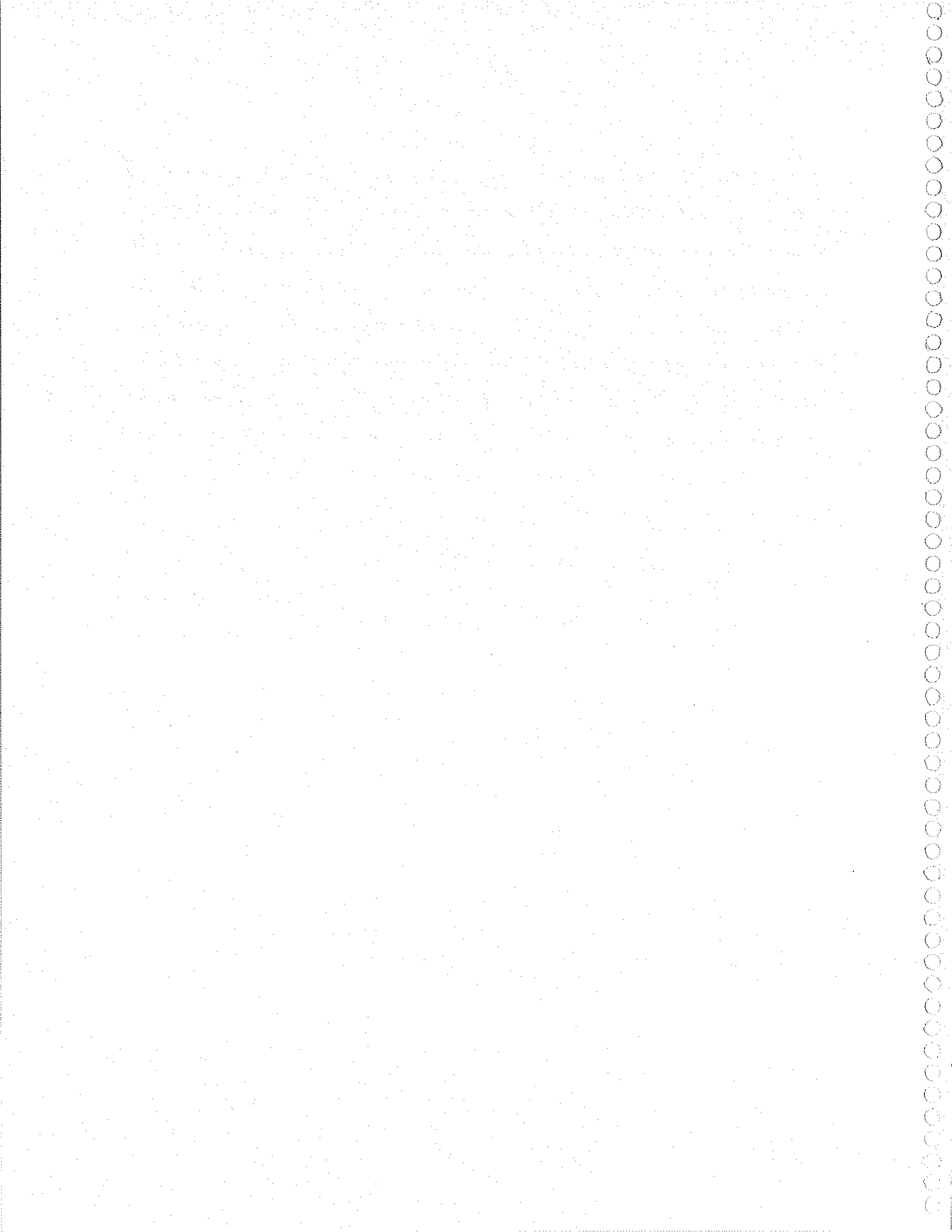
As a juridical concept, self-government suggests that aboriginal peoples should have the authority to rule themselves and to manage their own affairs, but it does not indicate if that authority is to be limited or absolute. It is generally understood that self-government for the aboriginal peoples does not imply national independence. Whatever

governments aboriginal peoples eventually develop would have to be constituted as governments within the Canadian political system. But this begs the question of what form such governments would take. How would they be constituted? What powers would they have? What relationship would they have to other governments in the Canadian political system?

This paper cannot answer any of these questions in a final and definitive manner. Only a political process can do that. But it can try to bridge the gulf between aboriginal self-government as a concept and its practical realization by examining how self-government could be put into place. It assumes that in recognizing a right to self-government we are concerned not with recognizing what exists -- which is not much -- but with establishing new institutions to respond to aboriginal demands for self-government. Fundamentally, what we are dealing with when talking about forms of self-government are the various institutional arrangements which can be put into place to enable the aboriginal peoples to make their own collective decisions.

The first step then is to identify what these institutional arrangements might be. This we try to do in chapters I to III. Our analysis will reveal that not only are many institutional arrangements possible, but that any national policy on aboriginal self-government would have to consider several different institutional forms to meet aboriginal demands for self-government. This has implications for what a right to self-government can be taken to mean.

The second step is to review how authority could be provided to aboriginal institutions. The last two chapters of this study focus on the ways in which aboriginal governments could be constituted and their authority recognized. The central controversy involved with establishing institutions of self-government for the aboriginal peoples remains the relationship these new authorities would have with existing governments. The controversy is over whether this authority should be exercised as delegated authority or should be constitutionally entrenched. We conclude that a "devolutionist technique" is a possible way out of the dilemma this question poses.





## 1 SELF-GOVERNING INSTITUTIONS FOR ABORIGINAL MINORITIES: THE INTERNATIONAL EXPERIENCE

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Self-government is often loosely used to designate any set of institutional arrangements which ensure popular participation in political and/or governmental (i.e., state) processes. A quick perusal of the international literature on the subject of aboriginal government discloses that the concept is often used in something of this sense.<sup>1</sup> Administrative and regulatory agencies controlled by aboriginal peoples (such as those established under the James Bay Agreement), representative bodies designed to articulate aboriginal interests and concerns to existing authorities (such as the Sami Parliament in Finland or Australia's National Aboriginal Council), and law-making authorities (such as is being proposed in Canadian aboriginal schemes for self-government) are all equally considered forms of self-government for the aboriginal peoples. Broadly speaking, any institutional arrangement designed to secure greater aboriginal participation in the public policy process is called "self-government".

## 1. INSTITUTIONAL INTEREST GROUPS

In most cases, participation has been limited to giving aboriginal peoples some sort of mechanism to express their interests to existing governments. This involves establishing institutions to represent the aboriginal peoples and to articulate their interests to established authorities. It organizes aboriginal peoples as an interest group. Special institutions are created to facilitate the articulation of aboriginal interests and concerns to state authorities. For this reason, this class of institutional arrangements might appropriately be labelled the INSTITUTIONAL INTEREST GROUP category.

The most famous examples of such bodies in the world today are the Sami Parliament in Finland and the proposed Sami Parliament in Norway. These bodies are intended to represent the Sami (Lapp) population within these nation states. In Finland, it is popularly elected, but has so far not been given any legislative power, and functions basically to represent aboriginal concerns to the national government.<sup>2</sup> In Sweden, the Samis have no Parliament but they do control a corporate association made up of reindeer herders and have a voice in the Swedish political system in this way. In Australia, the federal government has established the National Aboriginal Conference, which acts as the principal aboriginal organization.

in that country, but which, owing to the circumstances surrounding its creation, is not universally regarded as a legitimate spokesman of Australia's aboriginal population.

Canada already has bodies that perform the interest articulation functions which these other bodies are intended to perform. These are the status Indian associations established in each province since 1960 and their national manifestations (The Assembly of First Nations and the Coalition of First Nations); the provincial Métis and Non-Status Indian associations in each province and their national manifestations (the Native Council of Canada and the Métis National Council); and the regional associations of the Inuit in the Arctic, collectively represented at the national level by the Inuit Committee on National Issues.<sup>3</sup>

## 2. SPECIAL PURPOSE AND ADMINISTRATIVE BODIES

Special purpose bodies can be considered a distinct institutional category in their own right. Special purpose bodies are generally established for functional purposes and are usually given some form of administrative authority, something most interest groups have not. As administrative agencies they are recognized executive powers only. They involve aboriginal peoples in the executive and bureaucratic structures of the State, and are usually established as administrative or regulatory bodies in which aboriginal peoples participate.

Examples of special purpose bodies are the administrative agencies established pursuant to the Alaska and James Bay Agreements, and aboriginal participation in the federal government's Native Economic Development Fund.<sup>4</sup> Indian band councils, as presently constituted under the Indian Act, function as special purpose bodies for all practical purposes.

### 3. LAW-MAKING INSTITUTIONS

In Canada, self-government for the aboriginal peoples has usually been distinguished from interest group representation. It is considered to involve aboriginal control of governing bodies of some kind, which generally-speaking are law-making institutions.

There are several examples of aboriginal participation in law-making institutions throughout the world. In New Zealand, the Maori population is guaranteed representation in national law-making institutions (Parliament). In Greenland, home rule has been established for a population which is composed primarily of Inuit, which makes Greenland an important example of aboriginal control of legislative institutions. In the United States, court decisions have recognized a sovereign basis for aboriginal authority. Many tribes exercise at least some power to make laws as a result of either inherent sovereignty or under authority delegated by Congress.

Aboriginal participation in the law-making takes several different forms.

(1) participation in existing legislative assemblies

This is the pattern followed in New Zealand, and has also occasionally been suggested in Canada. For example, proposals have been made to guarantee aboriginal representation in the House of Commons and provincial legislatures -- through special constituency and franchise arrangements -- and in the Senate. The Yukon "one Government" proposal would also include measures of this type. This way of securing aboriginal participation has its limits. Although aboriginal peoples thereby acquire access to the most important law-making institutions, they usually form a very small contingent within such institutions which must, by their very nature, continue to represent the population as a whole.

(2) territorial government

Territorial governments have law-making institutions whose authority applies over a certain region or territory. Participation in territorial governments is principally a function of residency. They become an adequate vehicle for establishing self-government for aboriginal peoples wherever aboriginal peoples form the bulk or the majority of the

population of an identifiable territory. Aboriginal peoples can control the government by virtue of their demographic significance.

This manner of establishing self-government was followed in Greenland and is by no means peculiar to the aboriginal peoples. The province of Québec acts as the territorial government of the French Canadians in Canada, and many other countries, such as Switzerland and the Soviet Union have tried to deal with national minorities by establishing territorial governments of one kind or another.<sup>5</sup> Naturally, the boundaries of territorial governments must be drawn in such a way as to ensure the predominance of the target population within the territory for which legislative institutions are to be established. Proposals for regional governments in the Northwest Territories would provide aboriginal self-government through the establishment of territorial governments with distinct and limited jurisdictions within Canadian federalism.

### (3) local governments

Municipal or local governments share with other territorial forms of government the fact that their authority extends only over a certain area and that rights of participation and

representation are determined essentially on the basis of residency in the area concerned. But the powers of local governments are usually inferior to those held by regional governments -- they look after local needs only.

In the United States, one Indian tribe is effectively governed as a municipality, and in Canada, Saskatchewan has experimented with regional local government councils in the northern half of the province which are, to all intents and purposes, controlled by Métis and Non-Status Indians.<sup>6</sup> In Canada, it has sometimes been suggested that aboriginal governments could be established as municipal governments. Inuit communities in Québec have obtained self-governing institutions in this way.<sup>7</sup>

#### (4) aboriginal government

Aboriginal government involves establishing self-governing institutions specifically for an aboriginal community. In the United States, where such a form of government can be said to exist, the authority of aboriginal government is recognized to apply on a reserve, but the rights to participate in government are premised on membership in the community, not on residency in a particular territory. They are established as "ethnic" governments.

Governing institutions can take many forms, depending on the history of the aboriginal people concerned, and are often inspired from traditional patterns of authority. The scope of the jurisdiction recognized to aboriginal governments may also vary a great deal. In the United States, aboriginal governments really have very little autonomous jurisdiction and the jurisdiction they hold from Congress tends to enmesh them in the executive structure of the American state. However, many American tribes do have the right to determine their own membership, to constitute their own governments, to manage their own affairs (to the extent that it does not conflict with federal, and sometimes state, laws), and to adjudicate certain sorts of disputes within the aboriginal community. Congress has, moreover, recently granted these governments significant jurisdiction over child welfare matters within the aboriginal community. Indian lands are immune from many state laws and have special tax privileges. But by and large, the scope of powers that are recognized to aboriginal governments is less than that normally associated with territorial governments if for no other reason than the community is too small and often too poor to support full-fledged government. The example of the United States shows how recognition of aboriginal government is, by itself, no cure for the problems of aboriginal dependency.



(5) corporate models

It is possible to conceive of a form of aboriginal government which would not be attached to a land base. Corporate entities, such as professional or occupational associations, are given rule-making authority over their own members. Although such corporate bodies can be given law-making powers applying strictly to their own members, as a rule, it is the threat of loss of membership that gives force to what are otherwise non-legally enforceable corporate rules. Bar associations in the various provinces offer an example of corporate self-government. Membership in an aboriginal community is very different from membership in corporate or occupational entities, but such a model might be applied to aboriginal government off a land base. The Sami herdsman association in Sweden provides an example of the corporate model applying to an aboriginal people, and there is in Canada nothing to prevent the aboriginal peoples from constituting themselves on corporate lines.

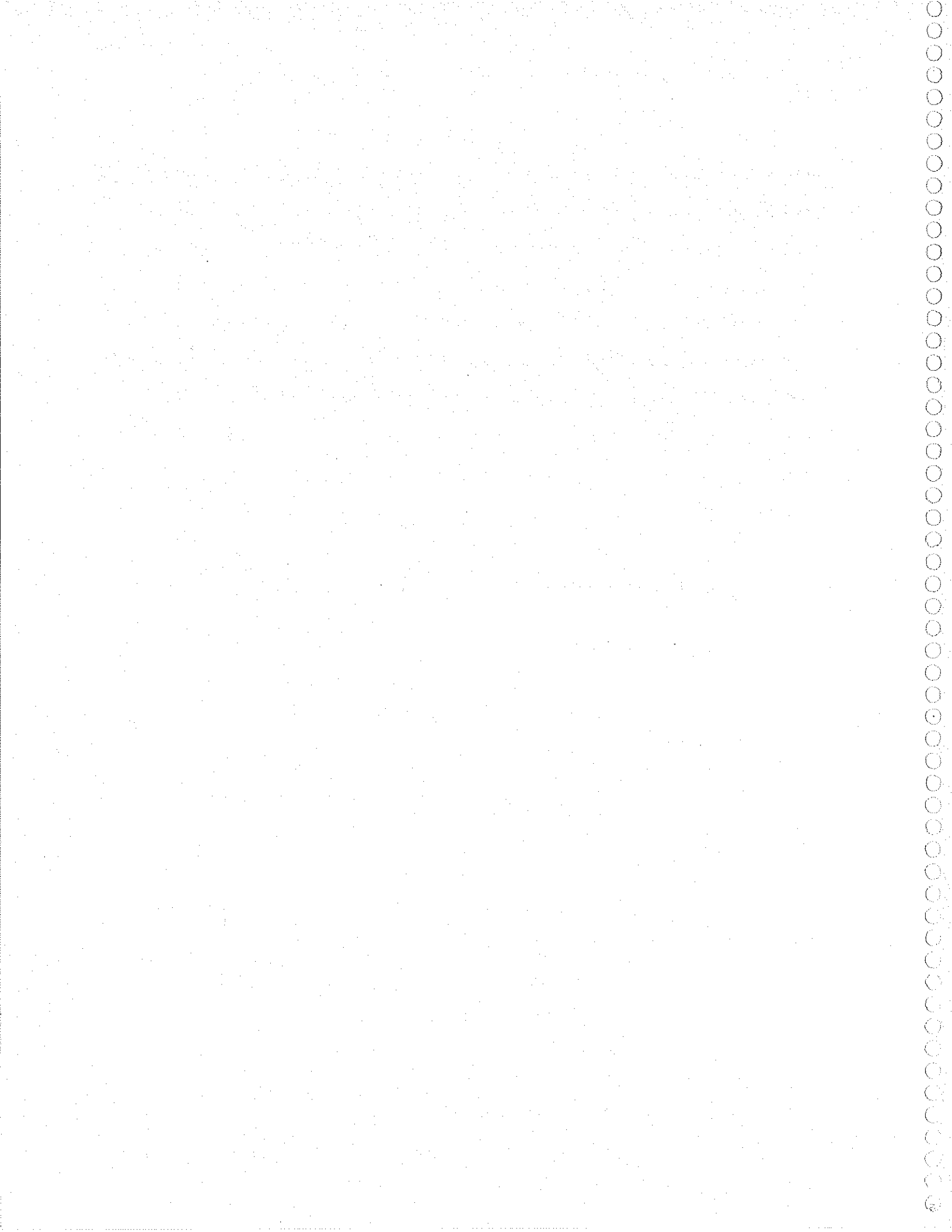
This review of the international experience demonstrates that a variety of institutional arrangements have been created to recognize self-government for the aboriginal peoples. If it teaches us anything it is that different nations have dealt with their aboriginal population in

different ways. Ultimately, Canada must do the same. The institutional arrangements used to provide self-government must reflect the particular realities of Canada's own aboriginal peoples. Nonetheless, the international experience is instructive on more than a few points.

It shows us that self-government can be broadly understood to refer to aboriginal participation in the policy-making process (interest groups); to delegation of administrative and regulatory authority to special purpose bodies upon which aboriginal peoples are represented; and to aboriginal participation in the law-making process. In Canada we have tended to associate self-government with the last form only. There is no reason why all three types of institutional arrangements should not be examined.

Furthermore, the international experience suggests two basic thrusts to policies on aboriginal self-government. One tries to enhance aboriginal representation and participation in the policy-making processes of the nation-state. All efforts to mobilize aboriginal peoples as an interest group, most administrative and regulatory bodies, and aboriginal representation in existing legislative institutions are, in the final analysis, intended to involve aboriginal peoples in the decision-making processes of the state. The other thrust is to enable aboriginal peoples to manage their own affairs. In Greenland, this was done through home rule. In the United States, it was accomplished through the recognition of a certain inherent sovereignty in aboriginal governments, through

delegation from Congress, and even through formation of municipal government. Once again, in developing Canada's policy on aboriginal self-government, it is important to remember that there are two thrusts to any policy on aboriginal self-government: enhancing aboriginal representation in the policy-making processes of the State, and enhanced autonomy for aboriginal peoples to manage their own affairs. While nation-states have tended to adopt one thrust or the other, they should not be viewed as mutually exclusive but as complementary. In the modern age, a comprehensive policy on self-government for the aboriginal peoples must incorporate both thrusts.



## 2 MODELS OF SELF-GOVERNMENT FOR ABORIGINAL PEOPLES

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The kinds of institutions that have been established throughout the world to provide self-government to the aboriginal peoples reflect significant differences in institutional arrangements. The most notable difference lies in the authority aboriginal institutions exercise. Are they created merely to represent aboriginal interests to existing authorities? Do they exercise administrative powers? Or are they government authorities in their own right? Most aboriginal institutions do not have any real authority and are advisory only (Finland, Australia), but there are a few examples (Greenland, the United States) where aboriginal peoples either control government institutions of their own, or, as in New Zealand, have secured participation in national legislative institutions. Thus, the first important variable involved with forms of self-government for the aboriginal peoples is the authority function -- the kind and degree of authority they are recognized within the political system.

These institutions also differ markedly in the degree of aboriginal participation they involve. This is the key factor in ascertaining the extent of aboriginal control of the institution in question. Many of the institutions under review have been established specifically for the aboriginal peoples and are in one way or another formally reserved to them. This is especially true of institutions which organize aboriginal peoples as an interest group. Administrative and special purpose bodies usually involve aboriginal peoples in the bureaucratic structures of the State and usually therefore involve participation from both aboriginal peoples and government officials. What "public" representation exists on these bodies is however reserved to aboriginal peoples. On the other hand, aboriginal participation in government institutions is not often reserved exclusively for the aboriginal peoples, except in the case of strictly aboriginal governments. Territorial governments are formally open to all residents and function as "public governments". Although it is possible to conceive of different degrees of aboriginal participation in government, generally speaking, the degree of aboriginal participation in governing institutions is an either/or proposition.

Most institutions tend to be established on some sort of territorial basis. The dimensions of the territory to which aboriginal institutions relate is the third noticeable difference in the forms which these institutions of self-government take. Governing or state institutions have a special tie to territory since governments are distinguished by the fact

that they extend their rule over a certain territory. Thus, rules made by a national government apply throughout the national territory, rules made by a regional government, throughout a given region, and rules made by a local government, only within the locality. The categories of national, regional and local are the most common measures of the territorial dimensions of government. More refined subdivisions are possible.

Aboriginal institutions which function principally as interest groups are not attached to territory in the same way governments are since they do not make rules applying over a territory. However, they often do reflect the political structure of the political system in which they are established. Institutions of this kind in Scandinavia and Australia are national in scope, and in Canada they tend to be as well, but strongly federalized. Like interest groups, corporate bodies do not have the ability to make rules applying over a territory, but, unlike most interest groups, they can exercise certain law-making authority over their members. They are more than an interest group but something less than a government. Special purpose bodies can be established on either a national, regional or local basis, but their functional or sectoral responsibility is their chief distinguishing feature, not attachment to territory.

These three functions -- the authority function, the participation function, and the dimension function -- account for most of the variation we see in aboriginal institutions around the world. They can be combined

in different ways to produce different forms of self-governing institutions for the aboriginal peoples. This is model building. Yet there are definite relationships between each of these functions in the real world which should not be forgotten. As a rule, the greater the dimensions of government, the greater its authority. Also, the greater the dimensions and the greater the authority of government, the less aboriginal participation there is, and the less it is possible to provide aboriginal representation on an exclusive basis. Exclusive aboriginal participation is most easily secured in interest group-like institutional arrangements, and at the local government level. These real world relationships, however, need not bind us in designing models of aboriginal government.

The intention here is to identify only the main models of self-government that are possible through different combinations of these three functions, and so we shall remain very general. We give three dimensions to the authority function, LAW-MAKING, ADMINISTRATIVE, and NIL. Law-making refers to institutions having legislative as well as executive power; administrative to institutions delegated executive powers only; and nil to the interest group situation. We give two dimensions to the participation function, EXCLUSIVE and PUBLIC. The one represents the case where participation is exclusively for aboriginal peoples, and the other the case where participation is open to the public. To simplify this analysis, exclusive refers both to a situation where only aboriginal peoples are allowed to participate in an institution, and the situation



where aboriginal peoples are the only groups allowed public representation with government officials on an administrative or special purpose body. We will use the standard categories for dimensions of government -- NATIONAL, REGIONAL and LOCAL -- as the measures of the dimensions function. But we will distinguish explicitly between institutions which have the ability to apply their rules over the territory referred to in the dimensions function, and those which do not and are merely organized on a territorial basis. A combination of these functions thus defined gives us at least 36 possible kinds of aboriginal institutions. But, if we eliminate those forms which contain internal contradictions or which are grossly irrelevant, we can reduce our sample to 15 models.

**Type I (National Aboriginal Government)**

- Law-making on the authority function
- Exclusive on the participation function
- National on the dimensions function
- Linked to territory

This combination would produce a national territorial government reserved exclusively for the aboriginal peoples, a model not likely to be taken seriously.

### Type II (Regional Aboriginal Government)

- Law-making on the authority function
- Exclusive on the participation function
- Regional on the dimensions function
- Linked to territory

This combination would produce regional governments reserved exclusively for aboriginal peoples. No proposals of this kind have yet been made, although the Nishga proposal could be interpreted in this way.

### Type III (Local Aboriginal Governments)

- Law-making on the authority function
- Exclusive on the participation function
- Local on the dimensions function
- Linked to territory

This combination would produce local governments reserved to aboriginal peoples. Most proposals for aboriginal government fall within this category. It should be noted that local governments generally do not have a high authority coefficient relative to other governments.

#### Type IV (Representation in National Governing Institutions)

- Law-making on the authority function
- Public on the participation function
- National on the dimensions function
- Linked to territory

This combination likely describes a situation where aboriginal peoples are secured representation in national governing institutions (e.g., representation in the House of Commons and the Senate).

#### Type V (Regional Government)

- Law-making on the authority function
- Public on the participation function
- Regional on the dimensions function
- Linked to territory

This configuration describes "public government" over a region which aboriginal people may or may not control depending on their demographic importance. It also represents a situation where aboriginal peoples are guaranteed representation in a

regional government such as a province or territorial government. Most proposals for aboriginal self-government made North of 60 fall within this category.

#### Type VI (Municipal Government)

- Law-making on the authority function
- Public on the participation function
- Local on the dimensions function
- Linked to territory

This configuration describes municipal or local government structures which the aboriginal peoples may or may not control depending on their demographic importance.

#### Type VII (National Aboriginal Special Purpose Bodies)

- Administrative on the authority function
- Exclusive on the participation function
- National on the dimensions function
- Linked to territory

This represents national exclusively-aboriginal institutions which do not act as governing authorities but which have

administrative responsibilities. National administrative bodies of this kind could be created for many different purposes.

Type VIII (Regional Aboriginal Special Purpose Bodies)

- Administrative on the authority function
- Exclusive on the participation function
- Regional on the dimensions function
- Linked to territory

This configuration includes administrative bodies reserved exclusively to aboriginal peoples on a regional basis. The institutions established pursuant to the James Bay Agreement may for the most part be considered examples of such institutions.<sup>8</sup>

Type IX (Band Council Government)

- Administrative on the authority function
- Exclusive on the participation function
- Local on the dimensions function
- Linked to territory

This configuration probably best describes present band council government.

Type X (National Corporate Government)

- Law-making on the authority function
- Exclusive on the participation function
- National on the dimensions function
- Not linked to territory

This would represent a situation where aboriginal peoples would have their own governing institutions without having any authority to apply rules over any particular territory. Compliance with corporate rules entitles one to the benefits of corporate membership.

Type XI (Regional Corporate Government)

- Law-making on the authority function
- Exclusive on the participation function
- Regional on the dimensions function
- Not linked to territory

This would represent a situation where aboriginal peoples organized corporate government on a regional basis.

Type XII (Local Corporate Government)

- Law-making on the authority function
- Exclusive on the participation function
- Local on the dimensions function
- Not linked to territory

Same as Type X and XI except the corporate organization of the aboriginal peoples concerned would exist as the local level only (e.g. city).

Type XIII (National Aboriginal Interest Groups)

- Nil on the authority function
- Exclusive on the participation function
- National on the dimensions function
- Not linked to territory

This identifies a case where aboriginal peoples are organized in a national body to represent their interests to governments. The Sami Parliament, Australia's National Aboriginal Council, and the aboriginal groups represented in constitutional talks in Canada are all examples of such bodies in existence today.

#### Type XIV (Regional Aboriginal Interests Groups)

- Nil on the authority function
- Exclusive on the participation function
- Regional on the dimensions function
- Not linked to territory

This might describe aboriginal interest groups at the provincial level.

#### Type XV (Local Aboriginal Interest Groups)

- Nil on the authority function
- Exclusive on the participation function
- Local on the dimensions function
- Not linked to territory

This represents aboriginal interest groups organized at the local or municipal level, or "locals" of such groups at the provincial level.

Not all possible institutional arrangements have been identified by this typology. Each function could be further refined to reveal a wider number of forms. However, these categories do generally represent the main



paths aboriginal institutions can take. Not all are relevant to discussions of aboriginal government in Canada. Type I, which would produce exclusively aboriginal government on a national basis, is probably out of the question, while Types XIII, XIV and XV, which all provide for aboriginal representation on non-authoritative bodies, are probably only of marginal interest. Variations II to XI -- local aboriginal governments, regional government, municipal government, national aboriginal special purpose bodies, regional aboriginal special purpose bodies, band council type government, aboriginal representation in national and regional governments, and even regional aboriginal government -- do represent possible avenues self-government for aboriginal peoples could take in the Canadian context. Variations X to XII, which suggest various forms of corporate government, are possible options for self-government off a land base. There is no reason why we could not experiment with all these forms at once to meet different situations across the country. However, the issue becomes that of choosing the form or forms to apply in any particular case, and of selecting the form or forms best suited to Canada.



### 3 PROPOSALS FOR ABORIGINAL SELF-GOVERNMENT IN CANADA

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Aboriginal peoples in Canada have made a number of proposals for self-government. The Inuit have asked for the creation of Nunavut in the Eastern Arctic, whose boundaries would be judiciously drawn to enable it to function as an Inuit-controlled territorial government.<sup>9</sup> This would divide the Northwest Territories and negotiations are proceeding on the best way to do this. A Western Arctic constitutional forum has been struck to negotiate with the Nunavut constitutional forum on this matter. The Dene have proposed the creation of Denendeh in the Mackenzie valley, which would again act as a territorial or "province-like" government.<sup>10</sup> The Inuit have also lobbied for sub-regional and municipal governments in Québec (Kativik) and in the Mackenzie delta area (WARM).<sup>11</sup> Proposals made to date by Indians on reserves in southern Canada and by most Métis representatives call for aboriginal self-government on a land base or reserve of some kind. They propose community or "ethnic" government on a land base reserved for the exclusive use of the aboriginal community concerned. A variety of other proposals have been made including a Nishga proposal for aboriginal

government over unsundered aboriginal lands, and a "One Government" proposal in the Yukon, which, while not an aboriginal proposal, is nonetheless designed to provide for aboriginal self-government.

These proposals fall into two broad categories. First, there are proposals made North of 60 which call for the creation of regional governments. This sort of proposal is not new. In 1869-70, Louis Riel and his Métis followers advocated the establishment of a regional government in the area where Métis then formed the majority of the population, and the province of Manitoba owes its creation to this Métis proposal for self-government. Today, similar proposals for regional governments -- albeit short of provincial government status -- are being made wherever aboriginal peoples constitute the majority or near majority of the population. Proposals made in the Northwest Territories suggest that regional governments would operate as "public governments" -- political rights would not be reserved exclusively to aboriginal peoples.

The second major category of aboriginal proposals are proposals for aboriginal governments on a land base reserved for the exclusive use of the particular aboriginal peoples concerned. The distinguishing characteristic of aboriginal governments is not, however, that they would be tied to a land base or reserve, but that political rights would be predicated on membership in the aboriginal community. It is membership in the aboriginal community that would give one the right to participate in the government of

that community. This makes it appropriate to call this model of self-government aboriginal government pure and simple, although the terms "ethnic government" or "community government" might also be used.

There is a clear trend in the proposals made by the aboriginal peoples. The main factor which explains the different forms which aboriginal proposals take is the relative weight of the aboriginal peoples in the population of a given region. Where aboriginal peoples form a majority of the population, they prefer to establish "public governments" over the region they occupy; but where they are a distinct minority, they want to organize a "community government" on a land base reserved for their exclusive use. The more perceptibly an aboriginal people feels its minority status, the greater the need to organize politically as a distinct minority.

However, the proportion of the population aboriginal peoples represent in the population of the area with which they identify varies a great deal. In some places, aboriginal peoples form the main permanent occupants of the region, but Euro-Canadians are also an important element in the region at any given point in time. A great part of this Euro-Canadian population is often made up of a transient "southern" labour force. Often too, the aboriginal peoples in these areas have either never relinquished their aboriginal title or still have some aboriginal rights to the land. These regions constitute an "intermediate" zone between southern Canada and the

Far North and proposals made by aboriginal peoples in these regions take on interesting variations, producing "regional government" proposals with strong "aboriginal government" overtones, and "aboriginal government" proposals with strong "regional government" overtones.

The Dene have presented a "regional government" proposal with strong "aboriginal government" overtones. For instance, they would deny voting rights to people who had resided less than ten years in their territory and would reserve key political institutions, such as the Senate of their new territorial government, exclusively for Dene.<sup>12</sup> They would thereby enshrine their political supremacy in the regional government of the Mackenzie Valley. Although they call their proposal "public government", the Dene are not prepared to open government to the general public in the region and this may make the Dene proposal a somewhat problematic reaction to "near majority" status. The Nishga of British Columbia have, on the other hand, produced an "aboriginal government" proposal with strong "regional government" overtones.<sup>13</sup> The Nishga have never voluntarily alienated their aboriginal title. They call for the recognition of aboriginal government with jurisdiction not only on their reserves but over 5000 square miles of unsurrendered aboriginal lands as well.

It offends basic principles of liberal-democracy to restrict participation in regional governments in the way being proposed by the Dene. If territorial governments have the right to apply their laws to all

residents of the territory, then all residents of the territory must have a right to a voice in that government. Liberal-democracy will tolerate minority representation in majority institutions, but it cannot justify rule by a minority over the majority.<sup>14</sup> Similarly, Nishga proposals to extend aboriginal governments over all their traditional lands ignores that the lands over which they claim aboriginal title is not reserved exclusively for their use and is occupied by other residents. We encounter difficulties the moment "aboriginal governments" are allowed to extend their authority to non-aboriginals. The Nishga proposal does however highlight the need to define the relationship aboriginal government will have to lands where aboriginal title remains unextinguished.

On the other extreme are the proposals made for a "One Government" system in the Yukon which would guarantee minority representation to Yukon Indians within the executive and legislative branches of the regional government in lieu of establishing a distinct aboriginal government in the territory.<sup>15</sup> The notion of making special provisions in territorial constitutions for the representation of aboriginal peoples is an interesting one, and is also found in the Dene proposal. However, the Yukon proposal has a thrust which is completely antithetical to aboriginal interests since it is being made not to supplement but rather to prevent the formation of a distinct aboriginal government in the Yukon.

The James Bay Agreement offers an alternative way of dealing with aboriginal demands for self-government in these "intermediate" regions. "Comprehensive land claims agreements" can be used to secure aboriginal participation in decision-making at the regional and sub-regional level. The James Bay Agreement provides for a number of regional boards and commissions to administer lands, to look after treaty entitlements, to stimulate economic development and to provide public services in the region concerned. Although these agencies are established through legislation, they are explicitly provided for in the comprehensive land claims agreement. In addition, Indians have reserves and status under the Indian Act, while the Inuit parties to the agreement have won municipal status for their communities under Québec legislation. Providing for aboriginal representation on regional boards and commissions as does the James Bay Agreement is one method of securing aboriginal participation in regional affairs.

These proposals clarify a great deal about what aboriginal peoples mean when they talk of self-government. The bottom line for all aboriginal proposals is control by an aboriginal minority of their own governing institutions. This is possible only if government is tailored to dimensions where the minority becomes a majority. The different forms being proposed for aboriginal self-government reflect this reality. But the threshold where an aboriginal minority becomes an effective majority is different in different regions of the country and this calls for different



forms of government in different areas. In dealing with aboriginal demands for self-government, Canada will have to develop a flexible policy which reflects the different situations prevailing in different parts of the country. The policy would have to be implemented region by region, and aboriginal people by aboriginal people. Any policy on aboriginal self-government should also remain conscious of the fact that in the last analysis the objective is to provide self-government for aboriginal minorities. Different structures and forms of self-government would have to be designed to deal with the objective situations of different aboriginal minorities across the country. At a very broad level, the policy would have to consider:

1. creating "public governments" in regions where aboriginal peoples form a majority of the population;
2. establishing special regional boards and commissions on which aboriginal peoples would sit, either on an exclusive or shared basis (e.g. James Bay Agreement);
3. providing for special aboriginal representation in national and regional governments (e.g., Yukon, Denendeh, etc.); and
4. recognition of aboriginal governments on a reserve or land base.

These ways of providing for self-government are not necessarily mutually exclusive, though they sometimes appear to be. Certainly, regional government is an adequate response to aboriginal demands for

self-government only under special circumstances. On the other hand, a potential for aboriginal government exists wherever lands have been set aside for the exclusive use of an aboriginal community. Even in the North, land claims agreements will set aside certain lands for the exclusive use of the aboriginal peoples of that area, and, though aboriginal proposals for self-government in the North ask for the constitution of regional "public" government, it is not impossible that aboriginal governments on a land base might be established there as well. There is, moreover, nothing to prevent aboriginal participation in regional governments, even if they have their own governments on a land base. In certain cases, regional governments, representation in regional or national institutions, and aboriginal self-government on a land base could all be used to respond to aboriginal demands for self-government.

Nor should it be thought that these four ways of providing self-government are all that exist. The international experience shows that other forms are possible. Moreover, no proposal for aboriginal self-government in Canada has yet adequately tackled the issue of the urban native population whose special situation might require special institutional arrangements.

But the question arises of knowing how such diversity can be accommodated within the framework of the Constitution. Aboriginal representatives have asked that a right to self-government be entrenched in

the Constitution. No one is very clear on what such a right would include. Would it apply strictly to aboriginal communities? Regional governments are, ideally, public governments and have nothing aboriginal about them. It is difficult to see how an aboriginal right to self-government could, in such a case, include the right to create "regional public governments". In any event, there seems to be only two roads to take in defining an aboriginal right to self-government. Either it is wide enough to encompass all the various proposals that have been made, or it must be narrowed down to refer to one particular form of self-government. Choices have to be made about what it is we want to express by an "aboriginal right to self-government". Broadly speaking the choices seem to be these:

(a) a right to self-government is a right to establish aboriginal, "ethnic" or "community" governments for distinct aboriginal communities.

An aboriginal right to self-government could be taken to refer narrowly to community or ethnic governments for aboriginal peoples. It would give a right to an aboriginal community to govern itself as a community. Constitutional entrenchment of this right would give aboriginal peoples the right to constitute what this study has called "aboriginal government". Most if not all of these governments would exist on a land base reserved for the exclusive use of the aboriginal peoples. For policy

purposes, aboriginal government is not sufficient to satisfy aboriginal aspirations for self-government entirely; other institutional arrangements would, in addition, have to be considered. But for constitutional purposes, attention would concentrate on creating distinct aboriginal authorities on reserves or a land base of some kind.

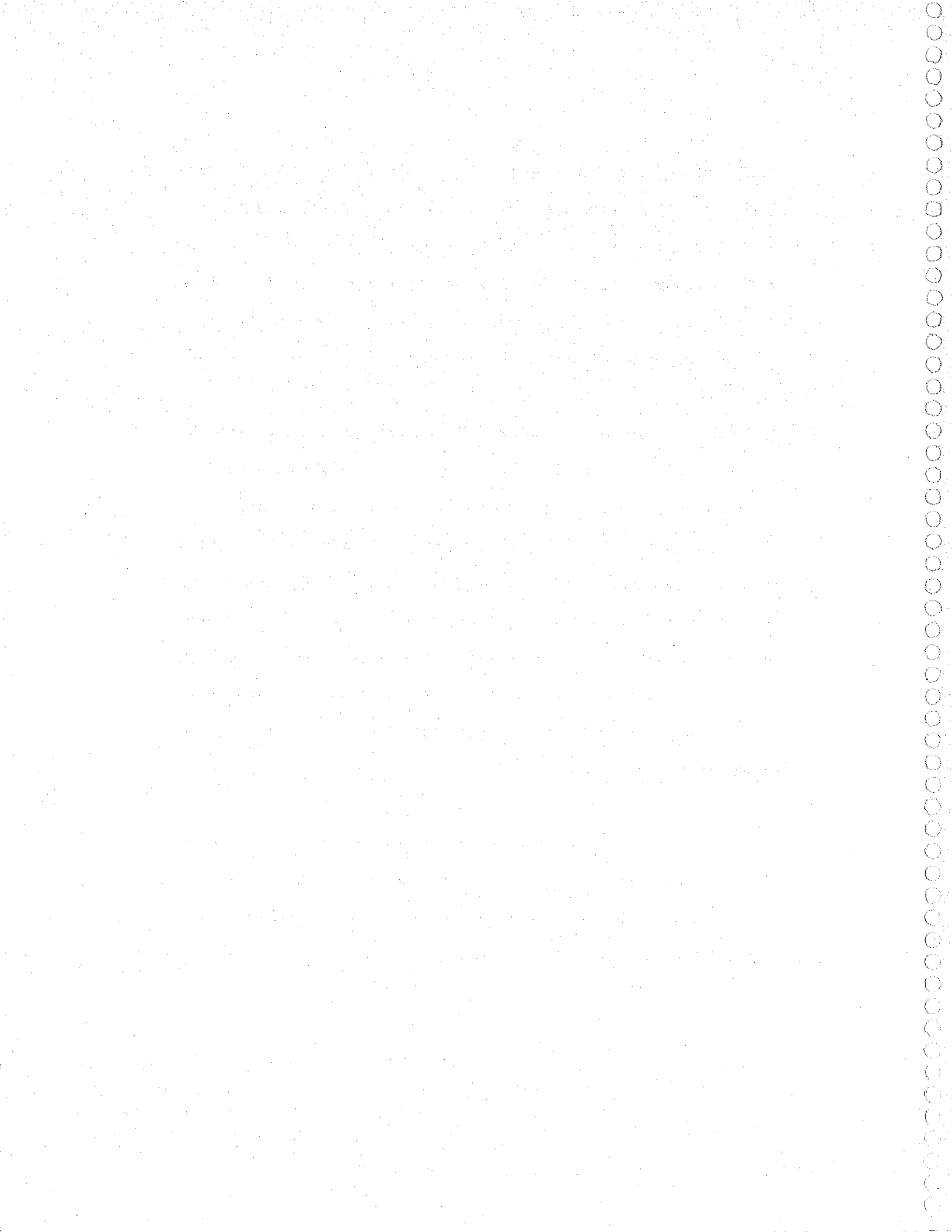
(b) an aboriginal right to self-government must be general enough to include all the types of proposals that are being made.

Constitutional recognition of a right to self-government would suggest that aboriginal peoples do have a right to govern themselves without suggesting that this right had to be exercised in any particular way. The right to self-government, if it is to include all aboriginal proposals, would have to allow for considerable flexibility in the means used to put it into effect. For instance, proposals for territorial governments would be implemented through appropriate federal legislation; treaties are adequate to create administrative boards and commissions on a regional basis and for financial arrangements with particular aboriginal peoples; and either constitutional or legislative means could be used to establish aboriginal government on a land base.

The point here is that a general right to self-government would have to be implemented through several alternative means, including legislative. This means that the right to self-government would have to be contingent on its being implemented. This option requires that we make a distinction between the right and its implementation.

The federal proposal of March 1984 adopts such a technique in recognizing an aboriginal right to self-government.<sup>16</sup> Unfortunately, it has the effect of restricting the implementation of self-government to legislative means alone when, as we shall see, other means might yet have to be considered. But only a proposal which makes a distinction between a right to self-government and the implementation of this right is likely to create a right to self-government that could encompass all the forms of government that are being proposed.

We turn in the next section to an examination of what it would take to implement self-government for the aboriginal peoples. In chapter 5, we examine how aboriginal authority could be established.



#### 4 THE IMPLEMENTATION OF ABORIGINAL GOVERNMENT

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It is generally conceded that there are three ways self-government could be implemented: through constitutional entrenchment, through legislation (federal or provincial, as the case may be), or pursuant to treaty provisions. In practice, treaty provisions must be implemented through legislation or become a matter of constitutional law by virtue of section 35 of the Constitution Act, 1982. So ultimately constitutional or legislative action are the only real alternatives. However, section 35(1) may create a constitutional obligation for governments to legislate in order to affirm treaty rights. Moreover treaties are a recognized and highly symbolic technique of securing aboriginal-Crown agreements. They continue to be an important instrument to consider in implementing a national aboriginal policy on self-government.

Different methods of implementing self-government are associated with each proposal for self-government. Proposals for regional government -- at least those made in the Northwest Territories -- assume that

self-government would take the form of "territorial government". Territorial governments are created under federal legislation and remain subordinate to Parliament. To provide for such governments in the Constitution would be equivalent to establishing them as provincial governments and the procedures for the creation of new provinces outlined in the new amending formula would apply in such a case. By and large, aboriginal proposals for self-government in the North do not call for the creation of new provinces, but for the establishment of territorial governments which would clearly be set up through federal legislation.

Aboriginal administrative and regulatory bodies could be provided for through treaty, through legislation, or in the Constitution, depending on the situation. However, treaties recommend themselves as the preferred technique, especially where aboriginal title has not yet been relinquished. Treaty provisions providing for regional institutions would have to be put into place through appropriate legislation, and where the treaty route was not available, aboriginal representation on regional boards and commissions could be provided for through legislation pure and simple. In any event, it is doubtful that the Constitution would be used to create regional administrative bodies.

Aboriginal representation in regional or national legislatures would have to be provided through appropriate legislation, in the case of territorial or provincial governments, and possibly through constitutional



amendment in the case of the federal government. The manner of implementation depends entirely on the constitution of the institution in which aboriginal peoples are to be guaranteed representation. But again constitutional amendment would not be called for in most cases.

Of all the forms of self-government proposed by the aboriginal peoples to date, only aboriginal governments on a land base truly represent a new form of authority within the Canadian political system. There are no clear guidelines for how such authorities would be constituted nor for how they would interrelate with other governments. There is no clear method of implementation associated with this form of government and either legislative or constitutional techniques could be used to establish these new authorities within Canadian federalism.

It is difficult to decide on what measures to use to establish aboriginal government without knowing what it is we are being asked to provide. Precisely, what do aboriginal peoples want these governments to do? No one has been very clear on this point as yet, but we can draw on the discussions to date to speculate on what self-governments might do. In examining what aboriginal government might do, we will ask, as we identify each task, how the matter can be dealt with, that is, what measures can be used to put what is being asked for into effect.

## 1. The Constitution or Reconstitution of Aboriginal Governments

The fact that aboriginal peoples are asking for recognition of a right to self-government testifies to the relative lack of autonomy they have had in the recent past. Whatever government they may have had in the past has long since been liquidated or become insignificant. (No offense intended: this is simply a statement of a fact.) Certain aboriginal peoples -- in particular the Indian peoples -- nonetheless consider their right to self-government an original right. It cannot be "created" for or "bestowed" upon them since it was given to them by the Creator. The most others can do is "recognize" this right.

The Indian position creates some problems. If governments are to transfer powers, they must be able to transfer to an identifiable entity in Canadian law. If governments are to recognize powers, they must be able to recognize those powers to a recognized authority in Canadian law. There is no avoiding the need to establish aboriginal governments in law. But at the moment, there are no recognized Indian governments anywhere. The most that exists are band council administrations and these have been created under the Indian Act. From a legal point of view, aboriginal peoples do not now have any recognized governing authorities for their communities, and, if self-government is to go very far, they would somehow have to be "constituted"; that is, established in law.

The word "constituted" implies an act of creation and this is not fair to the Indian argument. Indians did have governing authorities of their own before the white men arrived. The history of Indian-white relations shows that it took almost three centuries for white society to completely suppress autonomous Indian authority. What the Indians are asking for amounts to the "reconstitution" of aboriginal governments, and the restoration of their authority to make decisions for the common affairs of the aboriginal peoples.

The reconstitution of Indian governments is not, for practical purposes, all that different from the constitution of aboriginal government. It involves the establishment of governing authorities (institutions) for the aboriginal peoples concerned, and recognition of a jurisdiction to these authorities. In a later section we shall examine the various ways this could be done. The point to be made here is that aboriginal government must come to existence in law before we can imagine it doing anything at all.

## 2. Lands and Resources

One category of powers which occurs again and again in aboriginal proposals for self-government is the demand to control land and resources. This involves above all a demand to turn ownership of aboriginal lands over to the aboriginal peoples concerned although jurisdictional questions also

arise. In the case of most status Indians, aboriginal lands mean the lands reserved for their exclusive use i.e. Indian reserves. Where aboriginal title has not been alienated, complications arise. But full ownership of aboriginal lands by an aboriginal community could only really occur on a reserve or land base.

How would ownership of lands and resources on Indian reservations be turned over to aboriginal government? These lands have usually been provided pursuant to treaty provisions in which the Crown promises to set aside lands for the aboriginal peoples concerned in accordance with a formula specified in the treaty. But reserves themselves are created pursuant to legislation disposing of public lands. All existing Indian reservations are the property of the federal government and, legally speaking, reserves are merely a way in which the Crown disposes of its own property.

Given these circumstances, the transfer of ownership rights over any lands reserved exclusively for Indians could take place in at least three different ways. First, if aboriginal authority were already constituted, then the Parliament of Canada could transfer these Crown lands to that authority through simple legislation. It would thereby be alienating Crown lands and it is unlikely that it could easily recover ownership of those lands without having to have recourse to the expropriation power, or, under certain circumstances, the emergency power. A second way is to declare in

the Constitution that ownership of aboriginal lands will from now on be vested in aboriginal governments. Finally, the federal government could avoid transferring actual ownership of Crown lands to aboriginal governments but nonetheless delegate administrative powers over these lands to these governments, and ensure through appropriate legislation that all benefits from these lands accrue to the aboriginal peoples concerned. The measures used would depend on the situation and what we want to accomplish.

What applies to the federal government holds for provincial governments as well. They could transfer ownership of provincial Crown lands to aboriginal authorities, entrench aboriginal property rights to land in the Constitution, or simply delegate administrative responsibilities over public lands to aboriginal communities (e.g., Métis colonies in Alberta). Naturally, provinces would have to be involved in the creation of new reserves or in the extension of existing reserves South of 60°.

### 3. Membership

Membership issues are fundamental to aboriginal government since, with this form of government, membership in the aboriginal community defines the scope of political rights. Who would have the authority to determine who was and was not a member of an aboriginal community?

Presently, membership in Indian communities is defined by the Indian Act and is not defined at all in the case of the Inuit and the Métis, a situation which has created its own set of problems, at least for the Métis. Although the Indian Act applies only to Indians, it has created legal distinctions structuring the identification of virtually all of the aboriginal peoples. Not much can be done about membership matters without touching the Indian Act in a fundamental way. But the issue is whether in the future we should continue to have Parliament establish membership criteria for the Indians and perhaps other aboriginal peoples, or whether we should confide membership matters to the aboriginal peoples themselves.

This latter course of action raises many difficulties. What would be the basis of membership in an aboriginal community? Self identification and community acceptance? Who would settle disputes between self-identifying individuals and the community? On what basis would such adjudication be made? Once accepted, would the community have the right to expell members? Would membership be restricted to persons who lived on the land base, or would political rights be extended to aboriginal persons off the land base? What would happen to non-status Indians and especially to Indian women and their children who had lost their status under section 12(1)(b)?

These problems could perhaps best be settled at the time aboriginal governments are constituted or reconstituted as the case may be. Until this point, membership would continue to be defined by federal Act or not

at all. After that point, the membership rules and procedures adopted in the constitution of an aboriginal government would apply to that aboriginal community. This is at least one way of handling what could become a very troublesome situation.

#### 4. A Revenue Base for Aboriginal Government

Establishing a revenue base for aboriginal government is a major concern. Most aboriginal peoples have hopes that aboriginal governments will enhance their potential for economic development and prosperity. This involves providing aboriginal government with the ability to secure the economic and social development of the aboriginal peoples. Among the measures to be considered are the following:

- (a) management of treaty entitlements, trust funds, and other capital funds

These funds are often managed today by DIAND on behalf of different aboriginal peoples. Their management could be turned over to aboriginal governments through an Act of Parliament. This would provide many bands with an initial capital fund, but on a very uneven basis. Aboriginal peoples with no treaty entitlements or trust funds would want a capital fund of their own as well. None of this requires constitutional change.

(b) taxing power

Many proposals ask that aboriginal governments be allowed to tax. This is a very important issue which naturally raises questions of jurisdiction. However, it must be understood that not many tax powers would actually prove very lucrative to aboriginal governments. Their major potential revenue source is revenues from natural resources, and these are derived principally from ownership rights (e.g., royalties and leases). Moreover such revenues would be significant only to a minority of bands. Other possible sources of revenue are: revenues from licenses and fees, the property tax, the sales tax, and even corporation and income taxes. But applied on the scale of reserves, these taxes could not bring in much revenue unless they were prohibitively high. There comes a point where taxation is counterproductive, and, by and large, aboriginal peoples would be better off sharing more abundantly in the wealth they find about them than in taxing their reserves to death.

Revenue-sharing with senior governments is a more important route to follow for most aboriginal peoples. With a revenue-sharing agreement, aboriginal taxing authority need not be extensive and could be limited to the taxing authority of



local governments. (Naturally, the taxing authority of regional governments would be more extensive.) Taxation involves jurisdiction or authority to levy taxes and would have to be dealt with as a jurisdictional question.

(c) revenue-sharing

Revenue-sharing with senior governments would be the most important source of revenue for most aboriginal governments. Revenue-sharing could take several forms, including:

- a share in certain taxes collected by senior governments, such as corporate and personal income tax;
- transfer payments, such as equalization payments, designed to ensure that aboriginal governments can provide public services on a land base at reasonably comparable levels to services off a land base;
- conditional grants;
- service delivery agreements whereby aboriginal governments agree to provide services to aboriginal peoples on or off a reserve normally provided by other governments.

These financial arrangements would not likely be entrenched in the Constitution. But constitutional amendments might be used to commit governments to the principle of making certain payments to aboriginal governments. Manitoba's proposal to guarantee a form of equalization for aboriginal governments along the lines of section 36 of the Constitution Act 1982 is an

example of such a constitutional commitment. However, the terms of financial arrangements themselves would not be a suitable subject for constitutional entrenchment, if for no other reason than they would have to be frequently and periodically renegotiated.

(d) tax exemption

There is another aspect to the revenue issue which has jurisdictional significance. Aboriginal representatives have often suggested that aboriginal lands and the income of aboriginal peoples earned on a land base should not be taxed by other levels of government. This would place a constitutional limitation on how the jurisdiction of other governments applied to the aboriginal peoples. Tax exempt status may be claimed as an aboriginal right, and may therefore already be protected by section 35(1) of the Constitution Act, but, at the moment, it has its legal basis in the Indian Act. In any event, tax exemption raises questions of aboriginal rights and the constitutional protection of aboriginal rights.

Discussions of a revenue base for aboriginal government involve principally two things: turning capital funds and resource revenues over to aboriginal governments on a land base, and negotiating revenue-sharing

agreements with these governments. This does not raise division of powers issues. On the other hand, the power to impose taxes and the question of tax exempt status for Indian reserves do raise jurisdictional and constitutional issues. However, these matters may be less important in the long run for aboriginal governments than control of aboriginal lands and the negotiation of revenue-sharing agreements.

#### 5. Jurisdictional Matters

Questions of jurisdiction would have to be addressed no matter what means are used to establish aboriginal government. But there is much ambiguity in what powers aboriginal peoples want for their governments. Proposals made in the Northwest Territories call for "province-like" powers for regional governments in a divided territory. Indian representatives have suggested in constitutional negotiations that Indian governments too should be recognized authority similar to that of provincial governments. But the dimension of government involved in the two types of proposals is very different. It is unlikely that aboriginal governments on reserves can exercise anywhere near the authority that a territorial government could potentially exercise. We are not necessarily dealing therefore with recognizing the same powers to every form of government that is established to meet aboriginal demands for self-government.

Another difference between the two types of proposals is that proposals made in the Northwest Territories do not have to consider the provinces, since no provinces exist in that area, whereas proposals for aboriginal government made south of 60° must consider that any jurisdiction they exercise will directly impact not only on the federal government but on provincial governments as well. In many ways, it is a simpler matter to endow territorial governments with "province-like" jurisdiction, than it is to recognize any sort of jurisdiction at all to aboriginal governments where provinces already exist.

What specifically do aboriginal peoples in southern Canada want to control? The first priority would probably be land and resources. We have already seen how transfer of ownership of Crown lands to aboriginal governments would go a long way in satisfying this demand. But aboriginal governments would also want the authority to control developments on their land and this means recognizing aboriginal governments powers, certainly over land use, and perhaps also over environmental matters and wildlife resources. Jurisdiction over land use on a reserve would not be difficult to transfer to aboriginal governments, but jurisdiction over environmental and wildlife matters presents more problems since they clearly affect interests besides Indian or Métis. Ultimately, aboriginal participation in regional administrative boards and commissions set up for the purpose of environmental and wildlife regulation might be a more feasible method of dealing with aboriginal concerns in these policy areas.

There is no doubt that aboriginal peoples wish to protect their native identities. They want to foster the development of their native languages and customs, including in some cases the revival of ancient religious and customary practices. They want to ensure that their children will be brought up in their native languages and in such a way as to keep their native identities. But at the same time they want the benefits of the modern age for their people: good education, health, housing and other public services. It must be understood that they want powers not only to protect native identities, but also to enable them to act to improve social and other public services on reserves and among the aboriginal peoples generally. Aboriginal governments would want to exercise control over a number of social policy matters as it affects their people: education, child welfare, language and other cultural matters to name a few. But although aboriginal peoples would want to take control of certain facets of social policy, they could not hope to control all of it. They would want to continue to benefit from unemployment insurance, social assistance, and health care services that only the larger state can provide. A judicious sharing of responsibilities among governments -- including aboriginal governments -- seems the only approach to use in the social policy field.

The complexity of contemporary society makes it impossible to completely shield any social policy field from actions of other governments. The question that arises with all jurisdictional fields, but particularly social policy, is the interrelations aboriginal jurisdiction would have with other jurisdictions.

Jurisdiction can be delegated or originally held. If originally held, jurisdiction can be either exclusive or concurrent. We will assume for the sake of argument that all jurisdictions are original jurisdictions recognized in the Constitution. What happens in the event of a conflict of law? Naturally, one jurisdiction would have to be recognized as paramount over the other. In Canadian federalism, the general rule is that federal laws are paramount over provincial laws, although there are exceptions. A similar rule might be applied to the relationship of aboriginal jurisdictions to other jurisdictions. However, this rule could have several variations:

- federal and provincial laws could be paramount to aboriginal laws;
- federal laws alone could be paramount to aboriginal laws;
- aboriginal laws could be made paramount to both federal and provincial laws in specific policy fields.

With a paramountcy rule, there is no reason why aboriginal jurisdiction, in social policy areas at least, could not be concurrent.

There are other jurisdictional fields aboriginal governments might want to occupy. As we have seen, aboriginal peoples may also want to endow their governments with powers over "economic" matters. These include taxation, regulation of industrial and commercial activity and perhaps even labour standards on their land base. However, once again, there are economies of scale involved with regulation. As such, it is not always

sensible to decentralize regulatory authority, especially over the economy. Economic regulation would have to be left, for the most part, with senior governments. Giving aboriginal communities a legal identity, and providing them with lands and a capital fund of their own, would do as much to stimulate economic development on aboriginal lands as would the transfer of powers to regulate economic activity. However, some freedom to regulate economic activity on a reserve or land base is probably required of all aboriginal governments. The degree of authority would have to depend a great deal on the size and dimension of the government concerned.

Other jurisdictional demands include jurisdiction to establish aboriginal courts, to assume a public debt and to hire officials. Some of these jurisdictions cause more problems than others. There is an evident need to refine further the powers of aboriginal governments. This means negotiating questions of power. It bears repeating that these negotiations would be required no matter what means are used to establish self-government and no matter what form aboriginal self-government takes. They are necessary and they promise to be long and complex.

When we examine what aboriginal governments might do, we find the task of establishing aboriginal government would include the following:

- (1) agreeing on a manner of constituting aboriginal governments in Canadian law;

- (2) agreeing on a manner to determine aboriginal membership;
- (3) turning over ownership of lands and resources reserved exclusively to the aboriginal peoples to these aboriginal governments;
- (4) turning over trust funds and capital funds to aboriginal governments;
- (5) agreeing on revenue-sharing arrangements with aboriginal governments; and
- (6) defining the jurisdiction of aboriginal authorities.

These describe the steps which would have to be taken to implement aboriginal government on a land base. They present an enormous task. Can all of these tasks be completed before the constitutional talks terminate in 1987? To what extent must the Constitution be used to resolve these questions? In our view, the constitutional negotiations can do a great deal to resolve these questions, but they are unlikely to until one basic underlying question is resolved: what will be the relationship any aboriginal governments would have with existing federal and provincial governments.



## 5 THE RELATIONSHIP OF ABORIGINAL GOVERNMENT TO OTHER GOVERNMENTS

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Establishing aboriginal governments on a land base raises the spectre of a third order of government and poses starkly the entire question of the relationship such aboriginal authorities would have with existing federal and provincial authorities. In this section, we examine the alternative ways of defining a legal relationship between any future aboriginal government on a land base and senior governments.

To define the relationship between aboriginal governments and senior governments is to ask how autonomous aboriginal governments will be relative to other governments. Autonomy measures the degree one is subject to others or free to make one's own decisions. One can be subordinate to, co-ordinate with, or dominant over others. Complete autonomy is, formally speaking, reserved exclusively to the nation-states which make up the international community, although qualified forms of autonomy are possible. Sub-national governments all enjoy a qualified form of autonomy, and we must assume that this would be the case for aboriginal governments as well.

When we consider that many of Canada's aboriginal peoples -- especially the status Indians -- have been administered as wards of the state for a century or more, and that they have had their reserves and even their daily lives subject to bureaucratic administration for just as long, it becomes obvious that autonomy for the aboriginal peoples has been virtually non-existent. In the recent past, wardship characterized the relationship aboriginal peoples had with senior governments, in particular the federal government. Historically, "wardship" developed at about the time of Confederation (circa: 1860-70) and flows from policies the federal government put into place specifically for the Indian peoples. As "wards" of the federal government, all decisions affecting the aboriginal peoples directly -- or at least all major decisions -- were made by the federal government. By others, but supposedly also on their behalf. Hence the ambiguity of "wardship". It spelled a total lack of autonomy, but at the same time it implied a fundamental obligation on the part of the federal government to act in the best interest of the aboriginal peoples -- the "trust relationship".

The legal relationships associated with the wardship system give legislative responsibility for Indian affairs to the federal government. At Confederation, the federal government took responsibility for "Indians and lands reserved for Indians". This gave it control of a few "reservations" in Eastern and Central Canada, and general responsibility

for the protection and upkeep of Indians on reserves. The federal government promptly proceeded to place Indians elsewhere in Canada on reservations also. Elsewhere meant basically the West, whose vast territory was ceded to Canada in 1868-69, and whose major Indian tribes and nations were placed on reservations in advance of white settlement. It is an interesting fact that the federal government succeeded in setting aside lands for Indians only where it had control of public lands. It did not control public lands in most areas of British Columbia. In British Columbia, the provincial government established reserves for the Indian peoples -- albeit very much smaller ones -- through provincial legislation prior to Confederation and turned these over to the federal government when it joined Confederation in 1871. After 1871, the federal government had repeatedly to restrain British Columbia from abolishing the reserves provided through provincial legislation, and in 1924 arrived at an accommodation with the British Columbia government on the size of Indian reserves.<sup>17</sup>

Once on a reserve, the situation was very much the same across Canada. The social and economic conditions on reserves were such that the remnant of Canada's Indian population became dependent on the federal government: wards of the state. This was, at least, the view the federal government took of the situation when it passed the Indian Act in 1876. The Indian Act seeks to "protect" Indians on reserves until such time as they can be "enfranchised" into wider society. It carefully identifies the Indian

population for whom the federal government assumes wardship responsibility (status Indians). Although the Act has been changed several times over the years to reflect shifts in Indian policy, its basic thrust has always remained the same: to provide for the administration of Indians on reserves. For this purpose, the Indian Act does recognize a form of Indian government on reserves: traditional leadership and a form of Indian administration called a Band Council. Indian bands can choose either form of government, but not both, and the majority of bands have opted for band councils. However, the federal Minister of Indian Affairs (and through him, his department) reserves the authority to approve anything the Band Council does and to overrule it if need be.

Not all aboriginal peoples live on reserves, nor are they all subject to the Indian Act. The Inuit have never been the subject of special federal legislation, nor have they ever been placed on reserves. Some Indians are subject to the Indian Act but have never been given reserves, while others have lost their status under the Indian Act (non-status Indians). The federal government does not accept responsibility for the script Métis. These Métis and non-status Indians have perhaps suffered the worst fate of all. They do not have the protective benefits of the wardship system but suffer from all the conditions which made it necessary for the federal government to assume responsibility for the original Indian peoples in the first place.

By its actions since 1867, the federal government and its agents have abrogated the right of Indian governments to make all major decisions affecting their peoples. There is no delegation of authority to Indian peoples to manage their own affairs and no recognition of Indian decision-making procedures other than those authorized by the Minister. Wardship spells the complete submergence of any original Indian freedom to govern themselves. For aboriginal peoples falling outside the Indian Act, any original freedom to govern themselves was not so much submerged as simply denied or considered illegitimate, since these peoples were considered to have integrated into wider Canadian society.

The situation today has improved somewhat. Guardianship best represents the relationship most aboriginal peoples have with government today. Aboriginal peoples are allowed more scope to make decisions which under wardship would have been made directly by a government official and aboriginal representatives are involved in decision making processes of governments and their bureaucracies. The strengthening of band council government in recent years, the emergence of publicly-funded aboriginal organizations on a local, regional and national basis, and the involvement of aboriginal representatives in consultative processes such as the aboriginal constitutional negotiations have all contributed to increasing aboriginal participation in the administration of aboriginal affairs.

However, decisions made by aboriginal peoples continue to be subject to approval and can be overruled by the higher levels of the federal bureaucracy. Indians and other aboriginal peoples are allowed to make decisions on their own, but the federal government is there to make sure that the "right decision" is made. The legal relationship associated with guardianship is basically the same as that for wardship. A greater measure of autonomy is achieved not by changing this legal relationship in any fundamental way, but through changes in administrative procedures and practices. This may increase the autonomy of the aboriginal peoples from what it was under wardship, but it is a far cry from giving aboriginal peoples control over their own affairs. To accomplish this, we -- that is Canadian society and Canadian governments -- have to recognize a greater degree of aboriginal autonomy. We have to break with wardship; we have to break with guardianship; and we have to embrace the concept that aboriginal peoples do have a right to self-determination.

There is some controversy as to whether aboriginal autonomy depends at all upon the will of existing legislatures. Theoretically, this is a very good question. But we must approach the question from a practical point of view as well. It must be understood that, in today's circumstances, self-government would mean little unless it was recognized by the Canadian legal system. This is an objective condition confronting all aboriginal peoples. Rule-making on behalf of the community, which self-government implies, would have to be recognized in Canadian law, would hopefully

sometimes prevail over Canadian law, and would therefore have to be presented in terms recognizable in Canadian law. Aboriginal communities are forced to have to demand the authority to make rules recognized and enforceable within the Canadian legal system (i.e. law-making authority for their community governments). In Canada, such authority can stem from only two sources: from a sovereign Parliament or legislature, or from the Supreme Law of the land (the Constitution). Aboriginal government must ultimately be established either through legislative delegation or in the Constitution if it is to be established at all.

To establish aboriginal authorities under legislative delegation means that aboriginal governments would be established by and derive their authority from a senior government. Aboriginal governments would be subordinate to senior governments since senior governments would always retain the ultimate authority to rescind the delegation or alter the powers of aboriginal government. This may be less fearsome than it looks, but it does mean that aboriginal governments would always be considered a subordinate and dependent jurisdiction. To establish aboriginal authorities so that they are co-ordinate with existing authorities means that powers would be held in an original fashion. The Constitution provides the surest way of securing original jurisdiction. In any event, co-ordinate authorities can exist only if their authority is constitutionally recognized as original and non-subordinate. As such, it is really immaterial if this be done through explicit constitutional amendment or through judge-made law.

Essentially we have therefore to decide whether aboriginal authorities will legally be subordinate to or co-ordinate with existing levels of government.

#### 1. Delegation

Delegation is authority bestowing authority. Any authority can delegate its authority to another. The one limitation is that it cannot delegate authority it does not itself possess. To delegate legislative powers in Canada today would require an Act of Parliament or law of a provincial legislature. For the purposes of this sub-section, therefore, to delegate means to bestow authority through legislative enactment. The delegating legislature controls what it chooses to delegate and can always rescind or alter the delegation if need be.

Delegation would create a new relationship between aboriginal governments and other governments which would involve more than changes in administrative procedures and practices. It would involve the establishment of institutions of aboriginal government -- governing authorities that aboriginal peoples would control -- and it would result in the granting of certain powers to those governments. However, aboriginal governments would be established as subordinate jurisdictions, as authorities limited not only in their powers but subject as well to another authority.



As an ideal type, the delegation model suggests that both the institutions of aboriginal government and their powers would be established by another jurisdiction. However, variations may be possible where only the powers of aboriginal government would be delegated, but the institutions established in some original fashion. This would involve providing for the establishment of self-governing institutions for the aboriginal peoples in the Constitution, while making it clear that the powers to be exercised by those institutions would be defined through legislation.

Whatever the procedure used, the results are likely to be the same as far as changes in the legal relationship with other governments is concerned. New aboriginal authorities would be created with certain rights and freedoms and/or with certain powers. Although subordinate in law, these would be recognized as governing institutions which could not easily be suppressed. This would be the first effect. The second is that the basic relationship between aboriginal governments and other governments would now be shaped above all by the delegation procedure itself and the relationship which it implies: the gradual transfer of decision-making authority to aboriginal institutions through legislation.

There are two ways of understanding how delegation would affect the distribution of powers in Canadian federalism. Formally, there is, of course, absolutely no suggestion that the delegation model would alter the

existing distribution of legislative authority in any way. Aboriginal authority would be delegated authority. However, there are limits to delegation in Canadian federalism and it is not clear how those limits might affect the functioning of the delegation model. One line of argument suggests that either federal or provincial governments would be free to delegate powers to aboriginal government; another argues that only the government with clear responsibility for the aboriginal people in question would have the right to legislate specifically for them. Supreme Court judgements show that there is some problem with delegating powers to jurisdictions you have not created.<sup>18</sup> If this rule were strictly applied to aboriginal governments established through delegated legislation, provinces might not be able to delegate powers to aboriginal governments established pursuant to federal legislation; and the federal government might be prevented from delegating to local aboriginal governments established under provincial legislation. How serious a problem this would become remains to be seen. But since delegation relies on legislative tools, it naturally raises questions of legislative jurisdiction in relation to aboriginal peoples, and much depends on the interpretation that is given to the division of powers -- especially section 91(24).

## 2. Constitutional Entrenchment of Aboriginal Authority

An autonomous authority is not formally subject to another in making whatever decisions it is authorized to make. Aboriginal governments could never be fully autonomous entities because the scope of their jurisdiction

would, by definition, be limited. However, this does not prevent aboriginal governments from being autonomous over those matters for which it has recognized jurisdiction. There is only one way of securing this degree of autonomy from other governments. It is through a constitutional guarantee of the powers of aboriginal government.

Under this model, aboriginal governments would have their powers, rights and privileges secured in the Constitution. To establish aboriginal governments in the Constitution would require either a constitutional amendment authorizing aboriginal peoples to establish their own governments; or the elaboration of the structures of aboriginal government in the Constitution. The powers of aboriginal government could be defined in terms of the "rights and freedoms" of the aboriginal peoples or as a formal division of legislative powers. In the first instance, the Constitution would be amended to recognize collective rights of the aboriginal peoples -- such as a right to control their own membership, the right to educate their own children, to speak their own languages, to manage their collective property, and so forth. They would exercise these collective rights through their governments. Alternatively, the Constitution could spell out the law-making powers of aboriginal governments. The point is that aboriginal governments would be recognized as a co-ordinate jurisdiction in the Constitution. This would amount to creating not only a new form but a new order of government within the Canadian political system.

There are several problems with this approach. To begin with, constitutional entrenchment of a third order of government is not acceptable to senior governments. Second, the structure and jurisdiction of aboriginal self-government is unlikely to be agreed upon within the time frame of the constitutional negotiations. And third, the approach is not flexible enough to accommodate the varying needs of aboriginal communities. The constitutional approach is nonetheless the only approach which would guarantee fully autonomous jurisdiction for aboriginal governments and should therefore not be neglected.

### 3. Devolution

Devolution techniques situate themselves mid-way between delegation techniques -- which are unacceptable to many aboriginal peoples -- and constitutional entrenchment of aboriginal government, which is unacceptable to many governments. Devolution suggests that responsibility for managing their own affairs would be turned over to the aboriginal peoples. This implies an irrevocability to transfers of jurisdiction which is absent from the delegation model. There are several possible ways of trying to provide for such a devolution technique.

#### (a) constitutionalized devolution technique

One approach would, like delegation, involve a transfer of authority to aboriginal government from other governments, but once authority had been transferred to a certain aboriginal jurisdiction, that transfer would

be made irrevocable. Irrevocability does not necessarily mean that the delegation could never be changed. Rather, it suggests that changes could no longer be made by unilateral action of the delegating authority. Changes would require either:

- (a) the prior consent of the aboriginal peoples to any changes introduced by the delegating authority; or
- (b) action on the part of the aboriginal government itself, which alone is free to delegate its powers back to another government.

Devolution of this nature could not be achieved through the use of ordinary legislation. Irrevocability of legislation offends fundamental principles of Parliamentary government (one Parliament may not bind a future Parliament), and devolution itself would run across obstacles to legislative delegation in the Constitution. Those obstacles can be overcome, but they could only be overcome through constitutional change. The Supreme Law of the land would itself have to provide the authority for devolution and a procedure through which it could occur.

There are problems with developing a devolution mechanism in the Constitution. It requires that we take a procedure associated with subordinate jurisdiction and transform it, procedurally, into a technique

creating a coordinate jurisdiction. The task requires that we either change the nature of delegation or declare the relevant laws (Delegation Acts) part of the Constitution of Canada. The former procedure could most simply be achieved by stating quite clearly in the Constitution that Parliament or the provincial legislatures can delegate their powers to aboriginal governments but neither the delegations nor subsequent changes to the delegations can take place without the expressed consent of the aboriginal government involved. Alternatively, it would be possible to make each relevant delegation part of the Constitution by adding it in a Schedule to the Constitution Act, 1982. This would make the delegation part of the Constitution of Canada and enforceable as constitutional law.

(b) treaties

Treaties recommend themselves as one possible technique to devolve authority on aboriginal government. The treaty-making process involves a recognition of the existence of aboriginal authority but, until recently, treaties did not protect those authorities from the actions of other governments. Aboriginal authority was, as far as the law was concerned, entirely subordinate to the sovereignty of Parliament. However, treaty rights have now been given some degree of constitutional protection in section 35(1). We can only assume that the effect of section 35(1) is to protect treaty rights from legislative actions which deny them.

Treaties do not however provide exclusively for rights. They make many "promises" or commitments as well. These are commitments by the Crown to deliver in or for the future. Examples are treaty promises to set aside lands for the exclusive use of the aboriginal peoples and commitments to make annuity payments. In our system, actions by the Crown to fulfill treaty promises often require Parliamentary action. However, while section 35(1) will probably ensure that treaty rights prevail over most types of legislation, it is more difficult to determine whether section 35(1) creates a constitutional obligation on the Crown and ultimately on Parliament to keep treaty "promises". Courts can tell Parliament what it cannot do, but it is quite another thing for them to tell Parliament what it must do. It remains to be seen if section 35(1) creates any obligation on the Crown and on Parliament to fulfill treaty commitments.

In any event, only Parliament has the authority to enact the laws necessary to put most treaty promises into effect. Treaties do not therefore avoid the need to resort to techniques of legislative delegation. However, the utility of treaties as a devolution technique revolves around another point. If treaty commitments to establish institutions of self-government can only be implemented through legislation, does section 35 give that legislation a special constitutional status by virtue of its being legislation to recognize or affirm a treaty right? Are laws passed to put treaty commitments into effect subsequently given constitutional protection under section 35? If so, then these laws might be "constitutionalized" in such a way as to make it difficult or impossible

for Parliament to rescind delegated authority. Treaties would then become a devolution mechanism. If not, treaties per se are no alternative to legislative delegation.

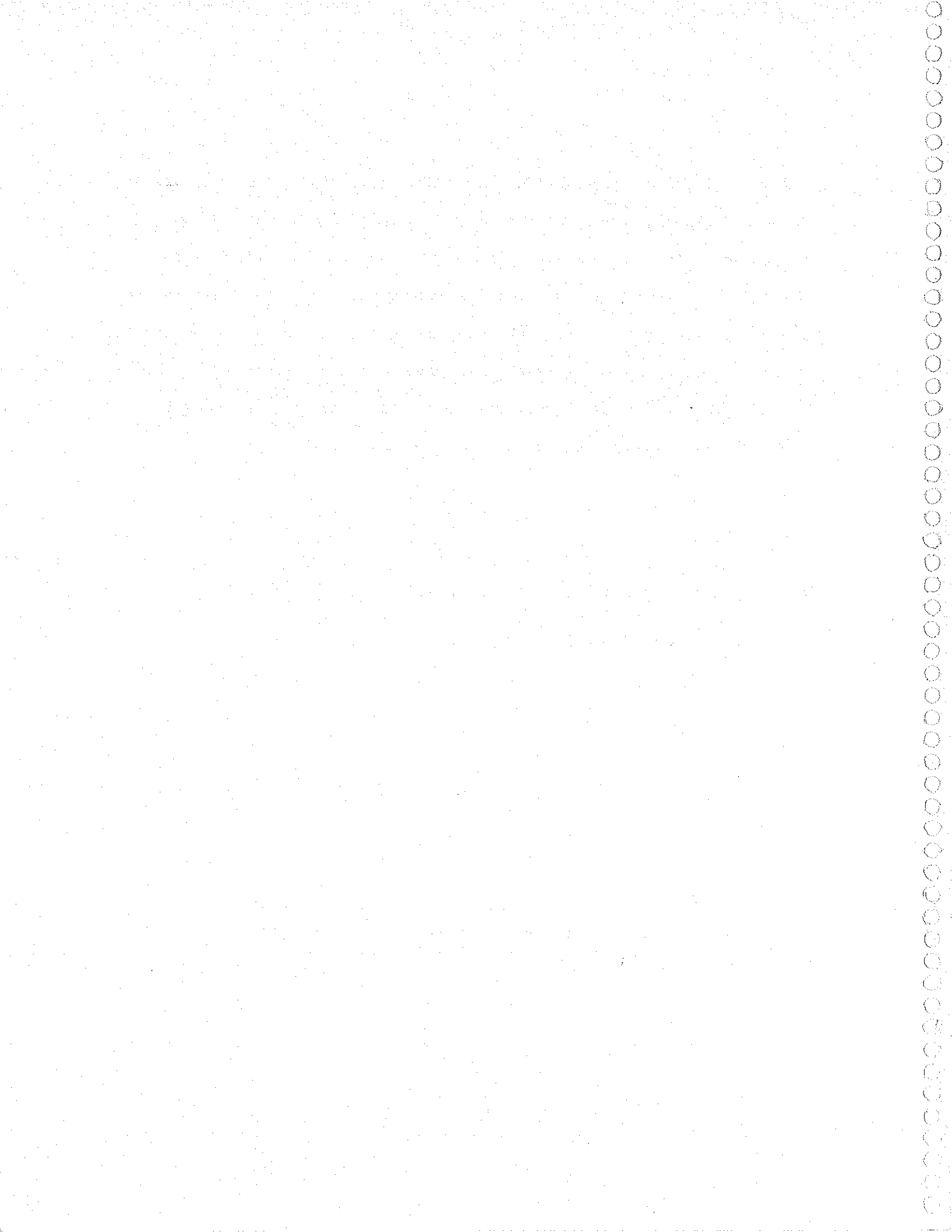
(c) recognition

The recognition of the constitution and powers of aboriginal governments, as opposed to the delegation of legislative authority to institutions created by statute, is a possible way of securing devolution of authority to aboriginal governments. Statutory recognition may be different than delegation of statutory authority. Recognition, like delegation, has the quality of a grant to the extent that powers do not exist in law unless "recognized" by Parliament. But while a delegated authority can always be taken back, it is doubtful that one could "unrecognize" the authority of aboriginal government simply by rescinding the recognition. Once recognized the powers of aboriginal governments would, as is the case with the alienation of property, no longer be the Crown's or Parliament's to take back.

This review of possible forms of autonomy for the aboriginal peoples has identified three basic models which future relationships between aboriginal authorities and existing authorities might take. The delegation model would have aboriginal government established through legislation and their powers defined through legislation. The devolution model would



involve a permanent turning over of authority to aboriginal governments. The constitutional model would create aboriginal government as a new order of government in Canadian federalism. Each would create institutions of aboriginal government and give them certain powers. All would increase the autonomy of aboriginal government from its current levels. What differs in each case is the degree to which aboriginal government could be considered formally subject to other governments. In the end, this depends entirely on the measures used to establish aboriginal authority.



## 6 CONCLUSION

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The first conclusion that we should draw from this study is that it is not a question of establishing just one form of government for all aboriginal peoples but several. Aboriginal demands for self-government are quite varied and depend fundamentally on the political and demographic circumstances in each region. What is required is a national policy which would be sensitive to this fact and which would make it possible to deal with aboriginal self-government in a number of different ways.

If we take a broad view of self-government, meeting aboriginal concerns about self-government would involve trying to ensure aboriginal representation at three levels: adequate interest group representation in the policy-making process; delegation of administrative powers to aboriginal peoples, especially at the regional level; and aboriginal participation in law-making bodies. At its very broadest level, any national policy should consider both how to increase aboriginal participation in the policy-making process and how to enhance the ability

of the aboriginal peoples to manage their own affairs. Our analysis suggests that the policy would have to consider:

- (a) the creation of regional governments in the territories;
- (b) the establishment of special regional boards and commissions in certain regions of Canada, especially in what we identified as the "intermediate zones";
- (c) aboriginal representation in legislative institutions at the provincial, territorial and national levels; and
- (d) the establishment of aboriginal governments on lands reserved for the exclusive use of the aboriginal peoples concerned.

In addition, chapter 2 outlined 15 different types of institutional arrangements that could be considered to provide aboriginal self-government, and most of these could be experimented with in Canada at some point.

The diversity of proposals for aboriginal self-government has implications for what right to self-government entrenched in the Constitution can mean. Either a right to self-government means something quite specific and relates to a particular form of self-government -- self-government for distinct aboriginal communities on a land base -- or it becomes a general right that can be implemented in a variety of ways and which therefore becomes contingent on its being implemented.

This study has examined the ways aboriginal self-government might be put into place. The measures used depend largely on the form of self-government desired. Regional governments in the territories are

established through federal legislation. Regional boards and commissions in the "intermediate zones" are perhaps best provided for in treaties, but could be formally established only through appropriate federal or provincial legislation. Aboriginal representation in existing legislative institutions is accomplished in whatever way the Constitution requires for the particular institution in question. Only "aboriginal government" represents a completely new form of government for which no particular measures exist.

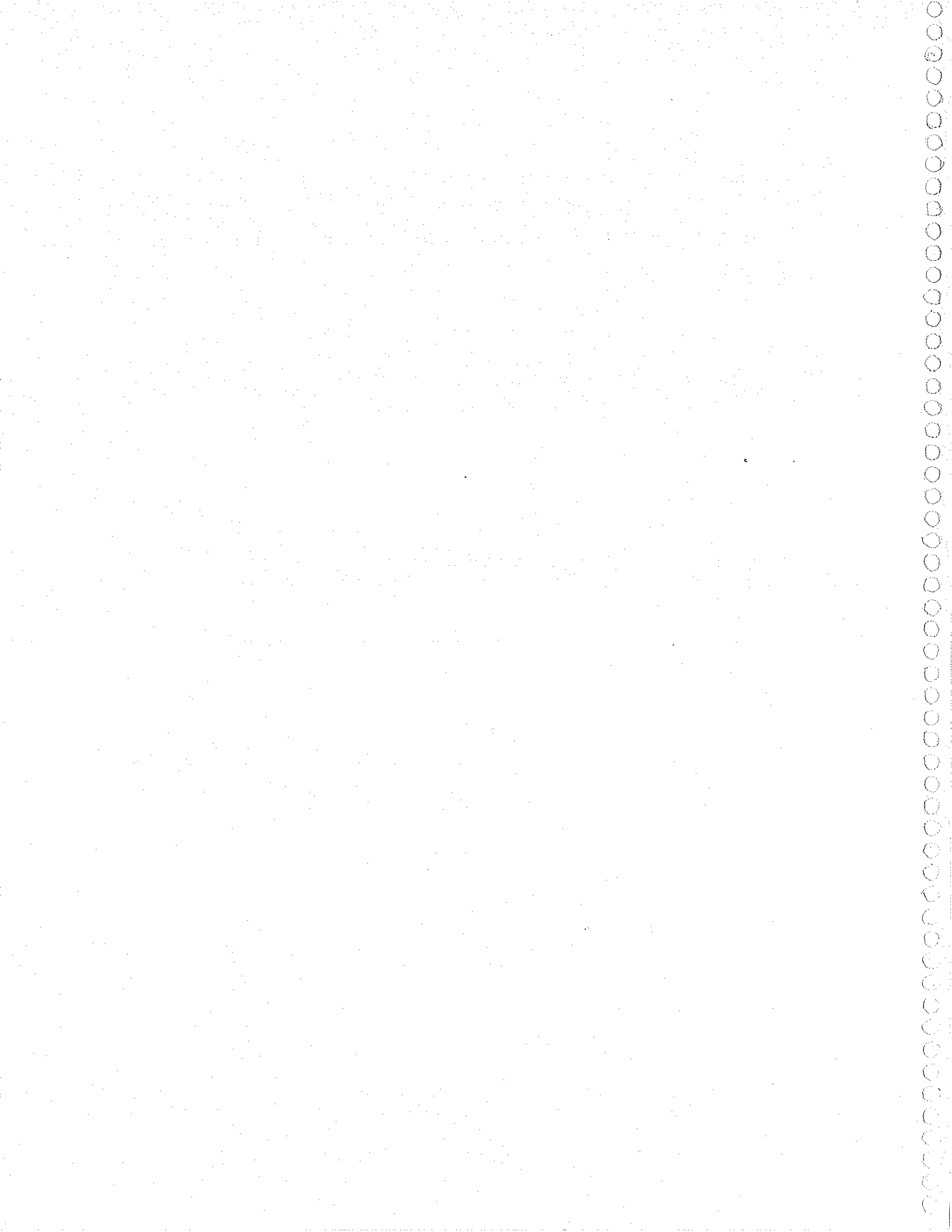
How would we establish these aboriginal governments? This study has examined, or at least speculated, on what would be involved in establishing aboriginal governments. The central issue remains how these governments would be provided with authority. This study has identified three possible ways of establishing aboriginal government -- through the Constitution, through treaty, or through legislation. Although treaties remain an important vehicle, ultimately aboriginal governments must be established either in the Constitution or through legislation. The former creates original, co-ordinate jurisdictions, and the latter formally dependent and subordinate jurisdictions. The problem is that neither of these options is acceptable to the parties at the table. Constitutional entrenchment of aboriginal government is unacceptable to many governments, while delegated jurisdiction offends the aboriginal position of inherent sovereignty. Therefore, a third conclusion that can be drawn from this study is that we have to develop a novel procedure to establish aboriginal governments on a

land base -- a procedure which this study has called a "devolution technique". We have identified three possible "devolution techniques", none of which are mutually exclusive, but each of which could go some way in meeting the aboriginal position of original sovereignty. Depending on the interpretation given to section 35(1), treaties are a possible devolution technique. Statutory recognition, as opposed to the statutory delegation, of the Constitution and powers of aboriginal governments might also provide an avenue to meet aboriginal concerns. However, nothing can replace the Constitution as a way of securing original jurisdiction.

In any event, the constitutional negotiations on aboriginal self-government should work on at least three things before 1987:

1. They must develop a National Policy on Self-Government for the Aboriginal Peoples which is regionally sensitive and which recognizes that a variety of institutional arrangements must be used to provide self-government.
2. They must decide whether an aboriginal right to self-government refers to a particular form of government (i.e., aboriginal government) or is broad enough to include all forms of government being proposed by the aboriginal peoples. If it is the latter, we must appreciate that a right to self-government, even if constitutionalized, is contingent on its being implemented through various means, including legislation. The federal proposal of March 1984 is a step in this direction.
3. They must agree on a manner of constituting aboriginal government in Canadian law which respects the aboriginal argument for original sovereignty, without necessarily entrenching a third order of government in Canadian federalism. Treaties and statutory recognition of aboriginal powers are perhaps the most appropriate techniques to use to accomplish this.

Each of these tasks can be achieved or well on the way to being achieved by 1987. All that remains is for the constitutional conferences to get down to work.





## NOTES

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1. Most of the information on the international situation used in this paper has been taken from an excellent discussion paper prepared by Wallis Smith of the Ontario Secretariat for Resources Development entitled *Aboriginal Self-Government: A Discussion Paper* (February 24, 1984).
2. The Sami Parliament in Finland is an elected body of 20 members which does not make laws but which has the right to advise the Finnish government on a wide variety of issues of concern to the Sami.
3. For a fairly accurate if somewhat unkind description of national aboriginal organizations in Canada, see Gaffney et. al., *Broken Promises*, chap. 1.
4. The Native Economic Development Fund was created in 1983 by the federal government to encourage the development of native control over small business. The fund is managed by a band of about 25 members, half of whom are representatives from the aboriginal peoples, with the remainder being members of the business community and government.
5. Switzerland has established cantons and half-cantons for its national minorities (e.g., Jura), while the Soviet Union has established republics or autonomous regions for many, if not all, of its national minorities.
6. During the Eisenhower Administration the U.S. government experimented with the idea of turning reserves into rural municipalities and passed legislation in 1954 allowing Indian communities to obtain self-government in this way on an optional basis. Only one Indian tribe -- the Menominee Indians of Wisconsin -- opted for this technique. In Saskatchewan, the NDP government of Allan Blakeney

established a Northern Saskatchewan Rural Municipality in the 1970s which provides a local government structure for the regions population which is composed primarily of Métis and non-status Indians.

7. The Government of Québec has amended its Municipal Affairs Act to establish Inuit communities as municipalities.
8. The James Bay Agreement provides for the creation of roughly 40 different regional bands and commissions.
9. See: Nunavut Constitutional Forum, Building Nunavut, 1983.
10. See: Dene Nation and Métis Association of the N.W.T., Public Government for the People of the North, 1982.
11. Kativik Regional Government has been created by Québec legislation, whereas the Western Arctic Regional Municipality was established by territorial ordinance.
12. See: Public Government for the People of the North, p. 17.
13. See: Nishga Tribal Council, The Nishga Position, July 1983.
14. For an alternative view, see Michael Asch in Home and Native Land who suggests that the Dene proposal does not offend principles of liberal democracy.
15. See: Government of Yukon, Report of the Special Committee on Indian Self-Government, May, 1983.
16. See: Government of Canada, Proposed 1984 Constitutional Accord on the Rights of the Aboriginal Peoples of Canada, First Ministers' Conference, March 8-9, 1984.
17. For a summary of the reserve situation in British Columbia see Peter Cumming and Neil Mickenberg, Native Rights in Canada, chap. 17, pp. 171-193.
18. A.G. N.S. v. A.G. Canada. (Nova Scotia Inter-delegation) (1951) S.C.R. 31.

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