

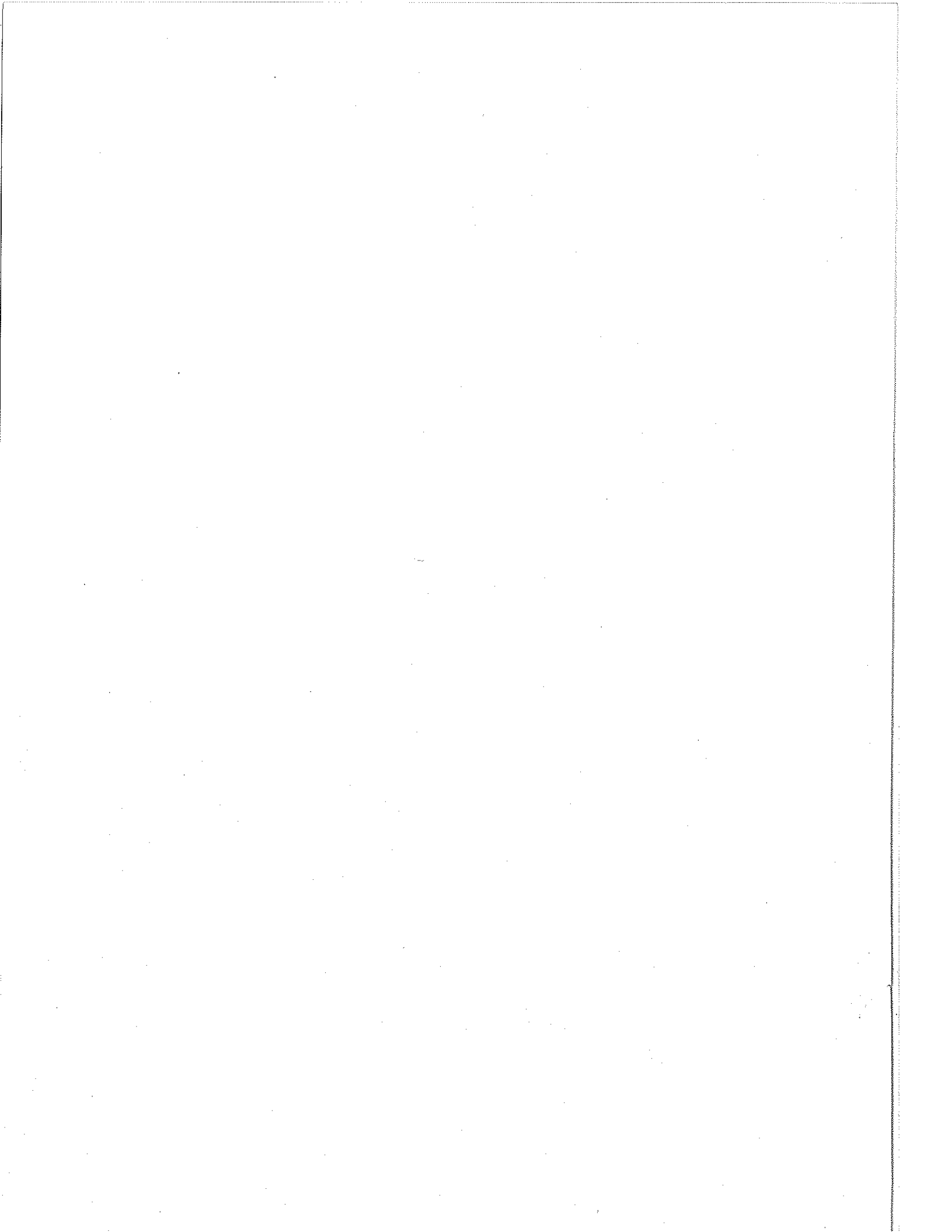
FIRST PRINCIPLES: CONSTITUTIONAL
REFORM WITH RESPECT TO THE ABORIGINAL
PEOPLES OF CANADA, 1982 - 1984

Bryan Schwartz

Institute of
Intergovernmental Relations
Kingston, Ontario

ISBN-0-88911-432-3

Second Printing 1986



CONTENTS

	PREFACE	v
	ACKNOWLEDGEMENTS	ix
	ABSTRACT	xi
I	INTRODUCTION	1
II	THE 1983 CONSTITUTIONAL CONFERENCE	9
III	THE MARCH '83 CONFERENCE	19
IV	STATEMENTS OF PRINCIPLES	31
V	THE CONSTITUTIONAL AMENDMENT WITH RESPECT TO ONGOING PROCESS	45
VI	CONSENT TO CONSTITUTIONAL AMENDMENTS	55
VII	CONSULTATION ON CONSTITUTIONAL AMENDMENTS WITH RESPECT TO ABORIGINAL RIGHTS MATTERS	63
VIII	MODERN LAND CLAIMS AGREEMENTS	75
IX	CREATION OF NEW PROVINCES	83
X	THE 1983-84 PROCESS AND CON- FERENCE	89
XI	FEDERAL-PROVINCIAL PROBLEMS AND ABORIGINAL PEOPLES	109
XII	FEDERAL RESPONSIBILITY FOR INDIANS	129

XIII	PROVINCIAL RESPONSIBILITY FOR INDIANS	153
XIV	FUNDING OF INDIAN FIRST NATIONS GOVERNMENTS	159
XV	FISCAL RESPONSIBILITY AND THE S.37 PROCESS	177
XVI	THE MÉTIS AND SECTION 91(24); POLICY ASPECTS	183
XVII	THE MÉTIS AND SECTION 91(24); LEGAL HISTORY	203
XVIII	ENTRENCHMENT OF JURISDICTION OF ABORIGINAL GOVERNMENTS IN THE CONSTITUTION OF CANADA	229
XIX	UNILATERAL FEDERAL ACTION TO AMEND THE CONSTITUTION OF CANADA	247
XX	ORDINARY LEGISLATION	259
XXI	THE TREATY MAKING PROCESS	273
	BIBLIOGRAPHY	287

PREFACE

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's project on Aboriginal Peoples and Constitutional Reform, which is subtitled "Aboriginal Self-Government: What Does It Mean?", is to shed some light on this question, by examining attitudes towards 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 formula 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 -- have 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 peoples, 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.

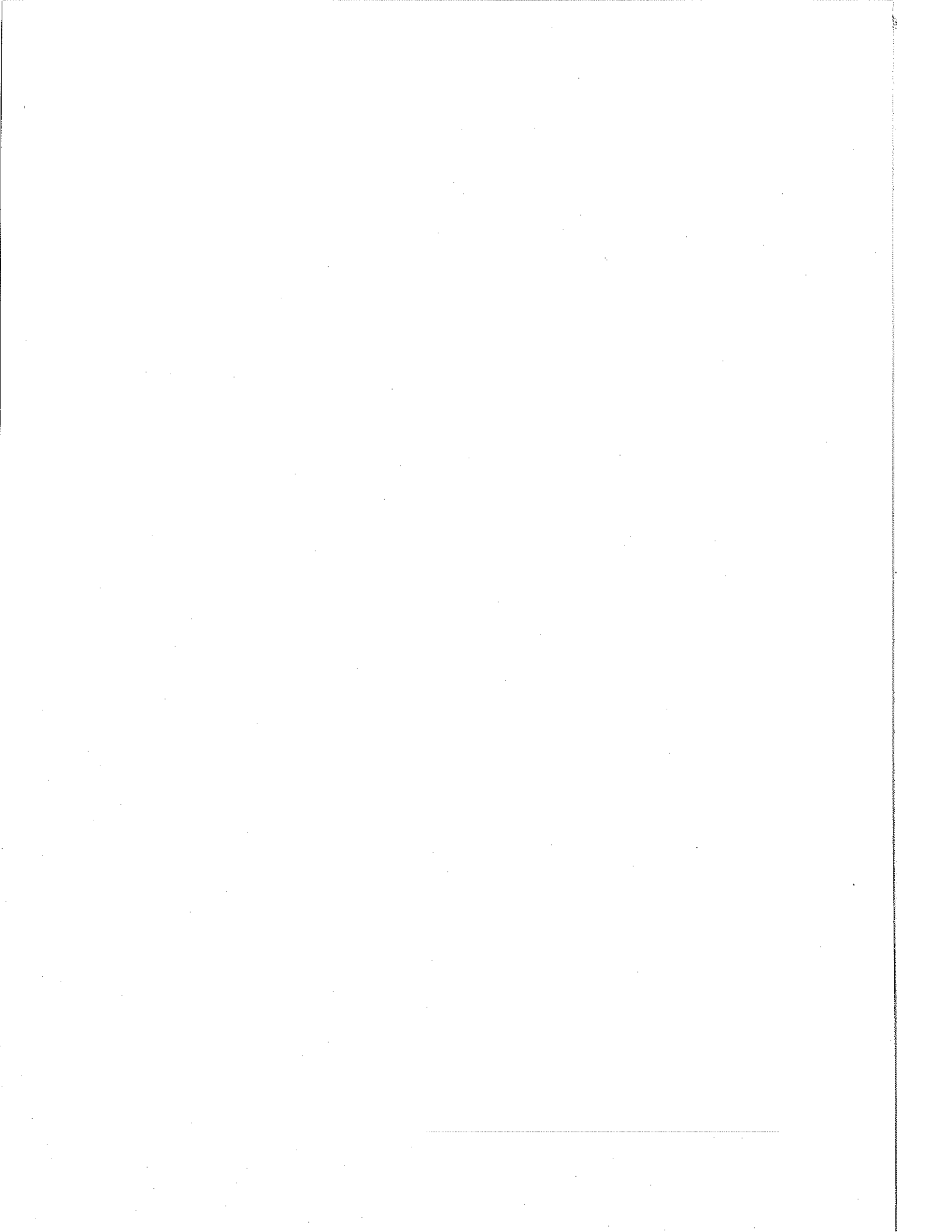
We are not alone in this viewpoint. The Institute has received support, encouragement and full cooperation from all parties to the negotiations -- federal, provincial and territorial governments, and aboriginal peoples organizations. I would also like to acknowledge the financial support which the Institute 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 is to identify and operationalize alternative models of self-government, drawing upon international experience, and relating that experience to the Canadian context. Bryan Schwartz's paper on "First Principles: Constitutional Reform with Respect to Aboriginal Peoples in

Canada 1982-1984" provides the context for this analysis. In a comprehensive yet concise review of over twenty chapters, Professor Schwartz examines the issues which came before the 1983 and 1984 First Ministers' Conferences on Constitutional Aboriginal Matters, including the evolution of these issues since Patriation of the constitution in 1982. He investigates, as well, the constitutional negotiation process itself, and provides some creative analysis and insightful observation concerning possibilities for future constitutional discussion.

Professor Bryan Schwartz is a member of the Faculty of Law at the University of Manitoba.

David C. Hawkes
Associate Director
Institute of Intergovernmental Relations
January 1985



ACKNOWLEDGEMENTS

For the last few years I have had the privilege of acting as legal consultant to the government of Manitoba on constitutional reform with respect to aboriginal peoples. In this capacity I have participated in or witnessed most of the intergovernmental meetings that have taken place. My understanding of the issues and processes is owed in great part to the many thoughtful and generous people, from almost every camp, who shared their knowledge and perceptions with me. Some of these people have gone out of their way to provide documentation, recollections or explanations that have assisted me in the preparation of this study; I owe a special debt of gratitude in this regard to Jim Wastasecoot, who is with the Native Affairs Secretariat of the Government of Manitoba; Jeff Richstone, Inuit Committee on National Issues, and Cheryl Crane, Department of the Attorney General of Saskatchewan.

Essential to the maintenance of my scholarly sanity throughout the writing of this monograph was my participation in 500 Club, the elite fungo fielding league in which I proudly hold the title of Founder, Commissioner and (cynics might not say coincidentally) Most Valuable Player. My thanks go to all the players, particularly my colleague Alvin Esau, who won the Golden Glove award.

Versions of the manuscript benefitted from the scrutiny of David Brown, Butch Nepon and David Phillips of the Faculty of Law, University of Manitoba; Sheilagh Dunn of the Queen's Institute of Intergovernmental Relations, and Sheldon Schwartz, who works on financial arrangements for heavy oil upgrader projects.

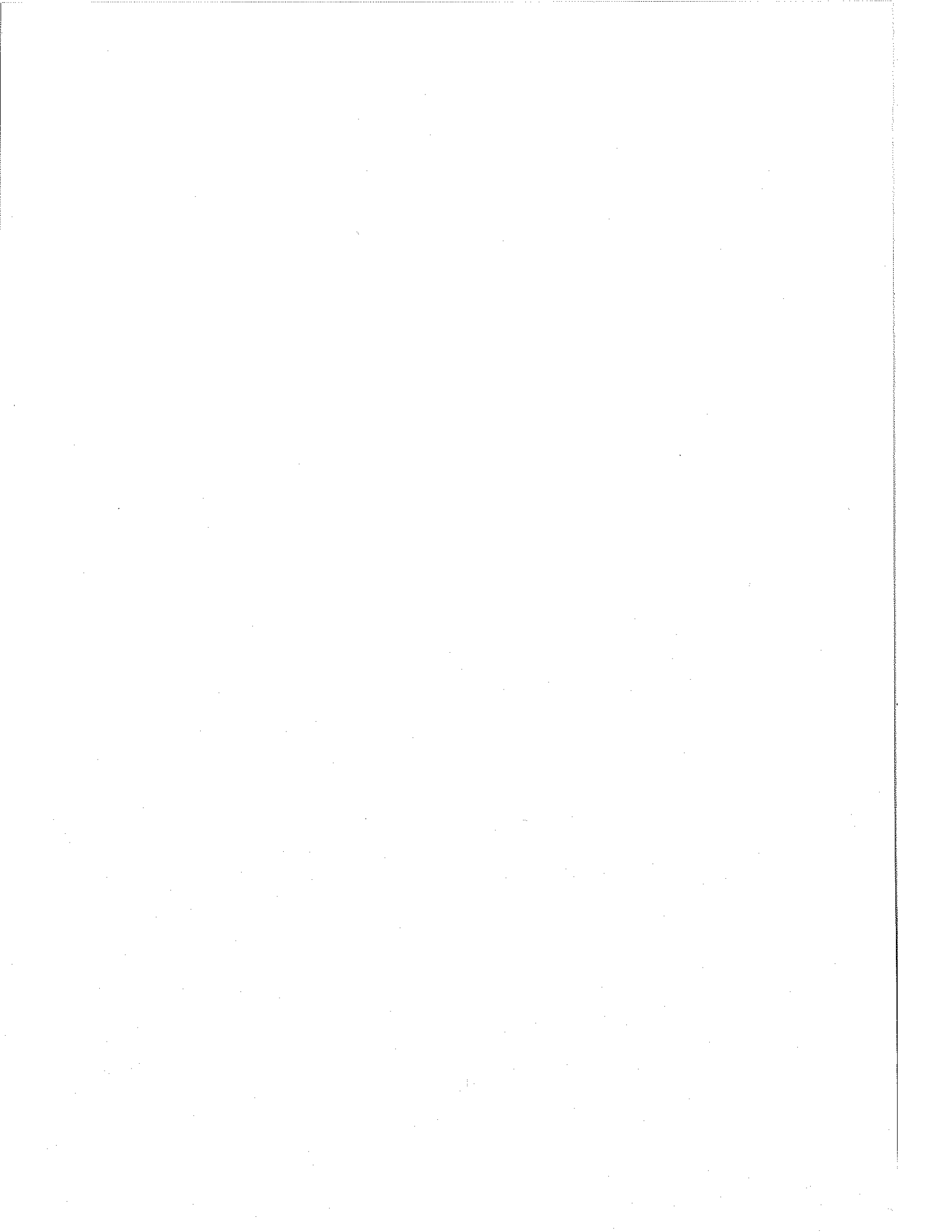
Denis Marshall and John Davis at the Faculty of Law library have been so helpful that I have decided, as a small token of my appreciation, to return their collection of books to them.

Finally, I would like to express my appreciation to David Hawkes for his encouragement along the way, and to Sue Frenette, for her patience and skill in typing every single one of the absolutely final versions of the text.

ABSTRACT

The subject of this study is constitutional reform with respect to aboriginal peoples in Canada, from Patriation in 1982 to the March '84 First Ministers' Conference. For each of the March '83 and March '84 First Ministers' Conferences, there is an account of the preparatory process and proceedings at the Conference itself, and then an in-depth exploration of some of the most important issues that were discussed. Most of the chapters are centered on particular proposals for reform that were advanced by participants in the process, but a few chapters - like those on federal and provincial responsibility for aboriginal peoples - discuss matters in a more general way. The aim throughout has been to analyze and evaluate both the legal and policy aspects of particular issues, and to suggest possibilities for future constitutional discussion and agreement.

Issues addressed in the study include: constitutional mechanisms for the establishment or recognition of aboriginal self-government; fiscal arrangements with respect to aboriginal self-government; the federal-provincial division of powers and responsibilities over aboriginal peoples in general and the Metis in particular; participatory rights of aboriginal peoples in constitutional reform processes that specially affect them; and the amendment on modern land claims agreements.



SOMMAIRE

Le sujet de cette étude est le processus de réforme constitutionnel en ce qui a trait aux peuples autochtones du Canada, à partir du rapatriement en 1982 de la constitution canadienne, jusqu'à la conférence des premiers ministres en mars 1984. En revoyant les conférences des premiers ministres qui ont eu lieu en mars 1983 et mars 1984, l'auteur examine le processus préparatoire, et des discours et débats de la conférence même, suivi d'une analyse détaillée des grandes questions qui y ont été discutées. La plupart des chapitres se concentrent sur les propositions de réforme qui ont été soumises par les participants, mais quelques chapitres - notamment ceux sur les responsabilités fédérales et provinciales envers les peuples autochtones - discutent de matières d'une façon un peu plus général. Le but principal a été d'analyser et d'évaluer les aspects autant légaux que politiques de certaines questions, et de suggérer certaines voies d'actions à prendre pour les discussions constitutionnelles qui continueront ainsi que de paver une certaine partie du chemin en direction d'un accord éventuel.

Les grands thèmes de l'étude qui suit inclus: le mécanisme constitutionnel nécessaire à l'établissement ou à la reconnaissance aux peuples autochtones du droit à leur propre gouvernement; les aspects fiscaux concernant ces gouverne-

ments autochtones éventuels; la division des pouvoirs et des responsabilités entre le gouvernement fédéral et les gouvernements provinciaux envers les peuples autochtones en général, et les métis en particulier; le droit aux peuples autochtones de participer dans le processus de réforme constitutionnel; et le amendement concernant les revendications territoriales.

I INTRODUCTION

"Academic" is often used as a pejorative for unrealistic. "Legal" is sometimes perceived as pettifogging, whereas "political" is substantive. "Scholarly" has connotations of tedious and timid. This study is an attempt by a legal academic to do a scholarly study. Some words of apology are therefore in order.

The constitutional reform process in Canada with respect to aboriginal peoples is itself "unrealistic" in a number of ways. Participants in the process often have little knowledge or experience of the day to day lives of aboriginal peoples. Doing the constitutional reform circuit - expensive hotels, abstract discussions in conference rooms with politicians from both aboriginal and non-aboriginal organizations - does not adequately complete your education. Developing a real understanding of life in one aboriginal community would require more time and patience than most officials can be expected to have. There are hundreds of distinct and distinctive aboriginal communities scattered all over the second largest country in the world. A decent respect for the limits of knowledge is an essential of the theory and practice of nation building. Acknowledgement that an individual is better acquainted with himself and his circumstances than even the wisest and most well

meaning of despots is one justification for political democracy and liberalism. That people in a province may know more about local matters than a central government is a reason for maintaining a federal system of government. That people in aboriginal communities may know more about what their problems and needs are is a ground for enhancing their political autonomy. It is also a ground for insisting that political and constitutional development of aboriginal self-government allow for local negotiations and developments, rather than moving along a single vector.

A second type of unreality, instinct in any constitutional reform process, is connected with our limited knowledge of the future. An acknowledgement of this limitation requires constitution builders to strike a balance between their concern for protecting strongly held values and allowing those in the future to adapt to changed circumstances in the light of experience and their own insights.

The unrealities of how it is now with others, and how it will be later for all of us, must be considered and creatively managed by the officials and politicians charged with constitutional reform with respect to aboriginal peoples. Their attempts to do so are hampered by a third and fourth type of unreality.

The third is that participants in constitutional reform are often inadequately concerned with, and informed about, the legal implications of what they are doing. It is not true that the people who apply constitutional prescriptions mechanically apply the words that are handed to them. When applying a constitutional text, they take into account its purposes and colour their interpretation with their own values and objectives. It is unrealistic to

suppose that judges can or do simply apply the law as it objectively exists. Language is always imprecise, new circumstances arise not contemplated by it. Nonetheless, the wording of constitutionalized documents exerts a major influence on the results. It is unrealistic to suppose that it does not.

Sometimes, an avoidance of legal analysis is a legitimate political decision. An aboriginal organization may feel, for example, that concrete legal reform cannot occur unless governments and the public first understand the world view of aboriginal people. They may prefer on occasion to attempt to convey the basic attitudes and sentiments of aboriginal people, rather than worry about the possible wording of a legal draft.

At times, however, decision makers have chosen, or been required by circumstances, to alter the supreme law of Canada without a proper appreciation of the legal implications. The amendment on sexual equality agreed to at the March '83 Conference may have substantially altered the constitutional status of all aboriginal and treaty rights in Canada - a fact of which many delegates must have been totally unaware. The amendment on modern land claims agreements may have created a mechanism whereby agreements on self-government can be constitutionally protected - again, a legal consequence that was probably little appreciated, and certainly not discussed. The frenetic process had a lot to do with the inadequate legal understanding. The final drafts of both amendments were not introduced until the final day of a two day First Ministers' Conference. The legal technicians of the various delegations did not have much time to analyze the proposals. Nor did they have the benefit of sustained discussions of the proposal at the table. Even if the technicians managed to figure out the major implications of the propo-

sals, they did not always have the time or opportunity to convey that understanding to senior political officials. Another obstacle to legal understanding of proposals has been that participants at both preparatory meetings and the First Ministers' Conferences have political postures to create and maintain. They may be more concerned with making a favourable impression on other delegations or the public than with dispassionately exploring legal complexities.

The last consideration raises the fourth type of unreality. In political, and not just legal matters, participants in the constitutional reform process with respect to aboriginal people do not regard themselves as free to thoroughly and candidly disclose their opinions and attitudes. Evasions and distortions are found in constitutional discussion no less than any other.

Academics have special advantages with respect to the third and fourth type of unreality. Whereas government officials have many urgent demands on their attention, academics can take the time to carefully and thoroughly analyze proposals that have been made, and consider possibilities for the future. Whereas government officials must be politically conscious of how much and what they say, academics can, if they choose, express their honest opinions on how they think things ought to turn out.

The agenda for this apologetic introduction includes the contrast that is sometimes perceived in constitutional reform between the legal (obscurantism, quibbling) and political (exciting, consequential) planes. The object of the constitutional reform process is the negotiation and production of changes to the supreme law of Canada. You might think that you can fully define your political position, negotiate its acceptance, with necessary concessions, at the

political level, and then send the lawyers off to soullessly translate the political accommodation into the dreary and repetitious language of their cult. It will be maintained at several points in this study that the foregoing model is not an adequate description of how constitution making is likely to ever work in practice.

There generally is instead a dialectic interaction of political and legal analysis. When a legal draft is suggested, it brings to the mind of a party to the negotiations policy concerns that had not previously occurred to it or been decided upon. The draft is modified, or another one substituted for it; further policy discussion takes place; the process is reiterated, until a stable solution is agreed upon. In the haste of the March '83 Conference, not much of a back and forth process took place. That absence was not caused by the success of the drafters in capturing a mature consensus on policy. Rather, the parties did not have a sufficient opportunity to analyze the proposals in order to know what their policy implications were.

The subject of this study is constitutional reform with respect to aboriginal peoples in Canada, from Patriation of the Canadian constitution in 1982 to the March '84 First Ministers' Conference. For each of the March '83 and March '84 First Ministers' Conferences, there is an account of the preparatory process and proceedings at the Conference itself, and then an in-depth exploration of some of the most important issues that were discussed. Most of the chapters are centered on particular proposals for reform that were advanced by participants in the process, but a few chapters - like those on federal and provincial responsibility for aboriginal peoples - discuss matters in a more general way. The aim throughout has been to analyze and evaluate

both the legal and policy aspects of particular issues, and to suggest possibilities for future constitutional discussion and agreement.

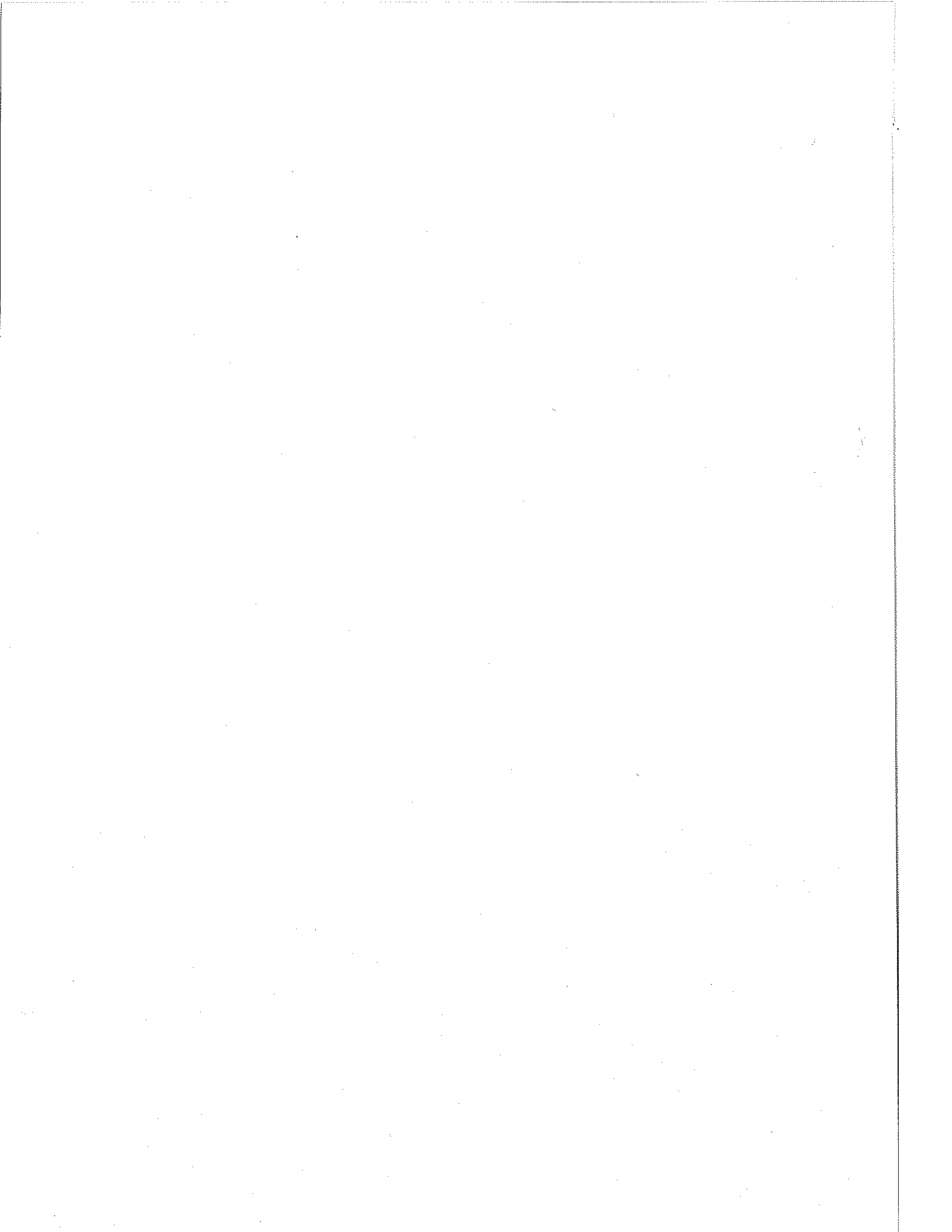
The last item on the agenda of apology is "scholarly." The discussion attempts to maintain scholarly standards of precision and accuracy. Although it does express preferences for certain alternatives, it does try to fairly characterize, elaborate and assess contrary options. The style of presentation, nonetheless, has been chosen with a view to making the discussion entirely comprehensible, even interesting, even enjoyable, to non-lawyers.

The researching and writing of this study began about a half year ago, and in the time since then, it has proved impossible to prepare for publication a discussion of all the subjects that merit attention. Among the subjects that warrant further study are:

- The nature of aboriginal rights;
- The legal structure of s.35 of the Constitution Act, 1982, including the meaning of the words "existing" and "recognized and affirmed;"
- Guaranteed representatives for aboriginal people in Parliament and in provincial and territorial legislatures;
- The amendment to the constitution concerning sexual equality with respect to aboriginal rights;
- The proposal by the Métis National Council for a Métis Registry;
- Whether the Canadian Charter of Rights and Freedoms ought to apply to aboriginal governments.

This study was prepared in conjunction with work on a doctoral thesis for Yale Law School, in the course of which I hope to express my views on some

of the subjects just listed. Some further scholarly legal publications by this academic may result.



II THE 1983 CONSTITUTIONAL CONFERENCE

THE LEAD UP

The November Accord of 1981 deleted from the federal constitutional package a section which "recognized and affirmed" the aboriginal and treaty rights of the "aboriginal peoples of Canada" (Sheppard and Valpy, 1982, 293-294, 307-308; Zlotkin, 1983, c.4; Romanow, Whyte, and Leeson, 1984). Intense last-minute lobbying by aboriginal organizations led to its restoration - with one serious qualification. The word "existing" was added. No one could know exactly what effect the Courts would give the word "existing." But then, nobody could know what the rest of the section meant in the first place. It is still unclear what "aboriginal rights" are; whether they include, for example, self-government as well as land use rights. The extent to which s.35 protects its contents from future legislative infringement is undetermined; "recognize and affirm" may mean anything from recognize at a merely symbolic level to guarantee in an absolutely infeasible way. "Existing" may not have altered the meaning of the section, or it may have imported every qualification on aboriginal rights on April 17, 1982 - including legislative supremacy (Slattery, 1982-83; McNeil, 1982; Lysyk, 1982). Sometimes the

context of an ambiguous legal phrase helps to determine its meaning. In section 35, each individual ambiguity contributes to the excrescence of interpretive possibilities.

In acknowledgement of the vagueness of s.35 and the feeling of aboriginal groups that their rights should be more fully specified and more firmly secured, section 37 was added to the proposed Constitution Act, 1982. It required that within a year of the coming into force of the new Constitution, there would be a First Ministers' Conference, the agenda of which would include "an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item."

In preparation for the March 1983 meeting, a series of officials and Ministerial meetings were held to agree upon an agenda for First Ministers, and possibly lay the groundwork for possible agreement by First Ministers. (The Constitutional authority to approve of constitutional amendments is vested in the House of Commons and Senate and provincial legislatures, so approval by First Ministers has, in itself, no legal effect; Constitution Act, 1982, s.38, 41). In October, 1983, an officials' level meeting was held in Winnipeg to begin preparations. The Assembly of First Nations, the organization representing status Indians, boycotted the meeting, and all subsequent ones prior to January 1983, on the grounds that constitutional reform should result from bilateral Indian-federal negotiations. It was the position of the AFN that the provinces have no legitimate role in Indian affairs; that bilateral

Indian federal talks could take place on the constitution, with the federal government duty bound to obtain provincial assent to any agreements reached; and that s.37 did not recognize the Indians as equal partners in constitutional reform, only as invitees of the other governments (Zlotkin, 1983, 53). Eventually, the AFN reversed itself and attended the meetings of spring 1983. The value of the meetings that were held in the absence of the AFN was diminished by the lack of input from this aboriginal organization, which has the largest membership and the most political influence. When the AFN finally did participate, it was necessary to return to many items that had already been discussed with the Inuit Committee on National Issues and the Native Council of Canada (which then represented both non-status Indians and Métis).

Québec representatives attended throughout in an ambiguous role; you might say that they began as interested observers and ended up as non voting participants. After the patriation of the Constitution in 1982 without its consent, the government of Québec took the position that it would not participate in federal-provincial meetings except for those concerned with economic matters. At the March First Ministers' Conference, Premier Lévesque stated three conditions for Québec recognition of the Constitution Act, 1982: that there be a constitutional guarantee of full compensation in all cases of a province's opting out of a constitutional amendment, that Québec's powers over language and culture be fully restored (if they are impaired by s.23 of the Canadian Charter of Rights and Freedoms, which guarantees minority language educational rights), and the recognition of not merely individual, but also collective rights in the constitution, including recognition of

"l'existence, l'identité d'une autre nation tout aussi distincte que n'importe quelle autre et qui est concentrée au Québec" (1983 FMC transcript, 48). According to Lévesque, while individual rights are, to a certain point, fundamental, a collection of individuals has a distinct reality and character which must be recognized. Whether aboriginal and treaty rights are collective or individual, and what is to be done when the interests of an individual conflict with those of his or her aboriginal collectivity, are fundamental issues in the s.37 constitutional reform process.

The talks leading up to the March '83 Conference consisted of the aboriginal groups presenting various extensive proposals for constitutional reform, often in the form of a draft aboriginal charter of rights. The federal government and provinces generally reacted by asking for more information and clarification. Occasionally they hinted, infrequently, they plainly said that a particular proposal was acceptable. Rarely did a government have a positive suggestion of its own. It can be argued that the syntax of the meeting implied an understanding of the s.37 process as follows: the constitutional status quo is presumptively acceptable to governments; aboriginal organizations have the burden of explaining and justifying changes to it; governments pass judgment on whether an aboriginal proposal is acceptable; acceptance of a proposal is a concession to aboriginal peoples at the expense of society generally. For those governments interested in damage control, as opposed to long term social or constitutional reform, the game was an easy one to play. A government can stall indefinitely and never incur the political damage of having to say "no" to anything aboriginal peoples demand. It need merely ask, ad infinitum, for more clarification. While it never hurts

governments to ask, there are political costs to aboriginal groups in answering. Doing so may require qualifications of the general rights they have claimed, thereby weakening its bargaining position; or it could require the contentious internal settling of an issue that was initially left ambiguous because of disagreement among different factions within the group.

The overall design of the '83-84 process of meetings was that officials level meetings would identify issues and options for ministerial meetings, which would in turn result in an agenda and a list of policy or drafting options for ministers. From the beginning of the s.37 process, however, a recurring set of problems has rendered officials' meetings of limited, and sometimes no utility. Government bureaucrats are at times not authorized to express opinions, or claim that they are not in order to avoid taking any potentially embarrassing positions. Some aboriginal organizations are composed of disparate, often conflicting factions. At officials level meetings, there is less incentive for the latter to work out a single, collective position. Representatives of various factions are often allowed to express themselves freely. At higher level meetings, by contrast, the political position a group takes may influence high level politicians on the other side, and whatever any delegation says cannot be easily disavowed in the future. Aboriginal organizations are therefore forced to determine and articulate with some precision what their positions actually are. Officials level meetings often involve the exchange of mutable and minority positions from aboriginal organizations and no opinions at all from governments. To the limited extent that they are edified, government officials tend not to pass on their new found enlightenment to their political superiors. Even with the best efforts, an official might

fail to distill from two or three days of rambling talks what is most informative or politically significant; conveying that essence to a harried Minister is not easily accomplished. It is particularly difficult for an official to discern and convey the subtleties of emotion and attitude embodied at a meeting; yet these may be just as important as the formal policy positions.

It was not until February, 1983 that some provinces and the federal government first disclosed that they were amenable to having a further series of constitutional conferences on aboriginal rights. During most of the preparatory process, the aboriginal organizations had no reason to be confident that the March 1983 conference would not be the last one to which they would be invited. In the absence of any guarantee that there would be any further federal-provincial talks on aboriginal rights, it was impossible for participants to arrive at a limited and manageable agenda. All the aboriginal groups could do was insist that the agenda include everything. They did and it did. The agenda for the First Ministers' Conference was that jointly proposed by the aboriginal groups at a Ministerial conference in February, 1983, and it encompassed every issue of possible constitutional concern to aboriginal peoples. Some of the issues were even stated several ways. Aboriginal self-government, for example, could have been discussed under item 1 in the context of "preamble," "particular rights of the aboriginal peoples," "statement of principles," item 3 as "self-government," item 5 as "resourcing of aboriginal governments."

Some of the repetition was a result of the unwillingness of aboriginal groups to risk prejudice to their legal or political positions. The Assembly of First Nations consistently claimed that it was prepared to discuss self-

government only in the context of "aboriginal rights." It did not want to discuss "self-government" as an independent item if that in any way suggested that there was not an inherent aboriginal right to self-government. The Métis National Council, on the other hand, did not want its claims to self-government ignored by governments which tend to the view that the Métis have no aboriginal rights at all.

Redundancy in the agenda was also caused by uncertainty over drafting format. Some of the provinces had proposed that a statement of non-binding principles be temporarily placed in the Constitution to guide further discussions. The aboriginal groups had presented long lists of binding constitutional rights. The federal government had drafted proposals on a few specific issues, including sexual equality in the enjoyment of aboriginal rights, the repeal of subsections 41(1)(e) and (f), and consultation with aboriginal organizations on amendments to certain parts of the Constitution. The aboriginal groups considered it appropriate for the agenda to include not only the whole range of issues, but the whole range of drafting approaches.

It is possible that if governments had reached a consensus well before the March '83 Conference to have further ones, a more focused agenda might have been developed for the benefit of First Ministers. There might have been more progress on substantive issues. Had governments agreed to further meetings early in the process, however, they would have denied themselves the favourable public relations effect of agreeing on further meetings at the March '83 First Ministers' Conference.

On March 7, 1983, the Métis organizations of the three Prairie provinces broke away from the Native Council of Canada (NCC) and formed the Métis

National Council (MNC). They brought an action in the Supreme Court of Ontario a few days later to enjoin the Prime Minister from convening the conference scheduled for March 15 and 16. The Native Council of Canada no longer represented the Métis people of Canada, they claimed, so the Prime Minister would be in default of his duty under s.37 to invite "representatives of the aboriginal peoples of Canada" unless the Métis National Council were invited. The NCC had, up until then, represented both the non-status Indians and Métis of Canada.

The distinction between the two groups is a contentious matter. It depends on how you define Métis. If a Métis is defined as a person of mixed Indian and non-Indian ancestry, then many non-status Indians across Canada qualify as Métis. Many Métis in Western Canada, however, adopt a nationalistic rather than a racial definition of Métis. They claim that the Métis were a distinct ethnic group which became conscious of and fully realized its own identity in Western Canada in the 19th century. The Métis nation, they say, was centered around the Red River settlement in Manitoba. A person is not a Métis simply because of mixed ancestry; rather, he must identify himself as a Métis, and be accepted as such by the successor community of the original Métis. The Métis National Council adopted the nationalistic conception in its legal presentation to the Supreme Court of Ontario.

As the Native Council of Canada, like all aboriginal organizations, was permitted two seats at the Conference table, an obvious compromise would have been to permit one speaker to represent the Métis and non-status Indians in Canada generally, and another to speak for the Prairie Métis. At one point there was such an agreement but it broke down because of strategic

and personal differences (AMNSIS v. Trudeau).

In the end, the application for an injunction was dropped after the federal government agreed to invite the MNC to the table. In doing so, the federal government risked creating a precedent for factions of a national aboriginal group to demand separate representation. In such cases, the federal government might end up embroiled in an internal dispute within an aboriginal organization; and if, over the objections of the umbrella organization, it recognized further factions, it would be adding to the unwieldiness of the bargaining process. Despite the risk, the federal government had little choice but to allow both organizations seats at the table. It could not in good conscience permit tens of thousands, perhaps hundreds of thousands, of people who identify themselves as Métis to be unrepresented at the Conference.

That the Native Council of Canada still represented about a fifth of Canada's Métis by the MNC's own definition might not, in itself, have justified its continuing presence at the table. The non-status Indians of Canada, however, had to be represented at the table, and the Assembly of First Nations could not be relied upon to do so. Non-status Indians cannot vote in the elections of the band governments that make up the AFN, and to some extent have conflicting interests with its members; the reinstatement and return to reserves of non-status Indians might be seen by some band members as a threat to their culture and material well-being. If a splinter group of the AFN ever tries to attain a separate seat at the table, the federal government can argue that the status/non-status distinction is a more important legal and political difference than that between, say, treaty and non-treaty status

Indians.

One defect in political representation at the s.37 conference was never raised by any of the participants. There are tens of thousands of status Indians living in Canadian cities; the numbers will steadily increase. There are unresolved but fundamental issues about their participation in city life, such as whether the federal government is fiscally responsible for providing them with social services (predictably, the federal and provincial governments disagree), and whether they should be allowed special status of any sort, including the privilege of running their own educational or social welfare systems. If and when Indian First Nations governments are created, the scope of their jurisdiction over off-reserve Indians will have to be determined. Yet there is no assurance that any of the present participants in the s.37 process will adequately express the concerns of the urban status Indians. The Assembly of First Nations is composed of band governments. Urban Indians who wish to participate in band politics face not only practical difficulties but legal restrictions - such as residency requirements in band elections. Urban status Indians who would lobby the AFN or other s.37 participants can face serious organizational difficulties, including the dispersal of Indians in some cities, and meagre and episodic funding from provincial and federal governments.

III THE MARCH '83 CONFERENCE

The March '83 Conference began with a prayer by a member of the Assembly of First Nations. This practice had become established during the series of preparatory meetings. When the Assembly of First Nations again instituted a prayer ceremony at the beginning of the second day, Prime Minister Trudeau asked with obvious irritation, "will you pray every morning in public?" (1983 FMC transcript, 174). When Dr. Ahenakew, National Chief of the Assembly of First Nations replied "yes, sir," Mr. Trudeau said "everyone should pray to his own God and we will have a moment of meditation." After the Indian prayer was through, Prime Minister Trudeau recited in French the Lord's Prayer. The Prime Minister who allowed "the supremacy of God" to be inserted into the preamble of the Canadian Charter of Rights and Freedoms is in a compromised position from which to defend secularism at public meetings. (People who live in stained glass houses...) Nonetheless, there was some justification for the Prime Minister's attitude. The pragmatic objection to the ceremony was that it was time consuming. The principled one was that it put the religious belief of some Indians in a privileged position; no one else at the meeting asked everyone else to stop everything and listen to one of their religious invocations. (It may be assumed that Prime Minister

Trudeau's mid-conference statement to an AFN leader, "Well, God bless you if you are going to deal with citizenship", was not meant in earnest.)

After the morning prayer of the first day, the Assembly of First Nations passed around a peace pipe. Photographs of the ceremony made front pages across the country. A (surely unintended) side-effect of the Indian ceremonies was that it encouraged public attention to focus on Indian issues, rather than all three aboriginal peoples equally. The Inuit Committee on National Issues took a business-like approach at both '83 and '84 Conferences; at the former, their opening speaker kept his remarks extremely brief in the interests of getting on with substantive discussions. The Métis National Council did not make any attempt at ceremonial displays until the end of the '84 Conference, when it presented a sash to the Prime Minister. In one respect, the Indian ceremonies benefitted all of the aboriginal groups involved. They attracted media attention, and helped engage the audience of the live television broadcasts. Drawing public attention to aboriginal issues is a vital use of s.37 conferences for aboriginal groups. One of the hardest obstacles to reform in any area is forcing a government to confront the issues. The public interest in aboriginal rights issues encourages governments to attend to them - and not only on the constitutional plane.

Most of the first day of the Conference was consumed by the opening statements of the seventeen participants. As the Prime Minister read his, the federal proposals on constitutional amendments were circulated. As mentioned earlier, the federal and several other governments had submitted draft proposals on a number of issues in February. Delegations were thus technically prepared for many of the federal proposals, and politically aware of how they

might fare. Even before the conference began, it was generally believed that there was a good chance of constitutional progress on entrenching further meetings, and on a few substantive issues. As will be seen in subsequent sections of this discussion, however, the federal proposal contained a number of significant novelties - including the "statement of principles" (a.k.a., among some of the delegates from aboriginal organizations, as the "bullets").

When open discussion began in the middle of the afternoon on the first day, it centered on the meaning of "aboriginal title," an issue on which the federal proposal said very little. The essential work of analyzing and refining the federal proposal took place that evening in a closed Ministerial level meeting. The meeting was conducted under intense pressure - it began at 8:00 in the evening and concluded at 10:35. The Minister of Justice proposed that the parties reach a "conceptual agreement," and that federal drafters work through the night to prepare a legal draft reflecting that agreement. All decisions were subject to the approval of First Ministers. Had the latter vetoed substantial parts of the agreement of the evening, there probably would not have been sufficient time to construct a new one. Agreement was reached at the backroom meeting on some major points. One was that there would be not only a constitutional amendment guaranteeing further meetings, but also a political accord that would govern the period before the amendment could come into force. At the suggestion of some provincial governments, as well as aboriginal organizations, the preamble to the federal draft on the ongoing process was dropped. There was general, although not universal agreement, that there should be a clause guaranteeing sexual equality with respect to rights of the aboriginal peoples. Several suggestions were made,

but no consensus reached, on drafting changes. One of the aboriginal organizations, with the support of a provincial government that had been lobbied beforehand, suggested that the clause be added to s.35 of the Constitution Act, 1982, rather than s.25, and that the rights be "guaranteed equally" rather than "apply equally." There was discussion of the legal implications of the changes, and it is probable that few participants fully appreciated them. The transfer to s.35 was effected in the federal draft of the next morning, and the word "guaranteed" added after the Ministerial drafting session of the next afternoon. The net effect of the changes may be to substantially bolster the legal protection given to all aboriginal rights and treaty rights by s.35(1).

The initial suggestion of the Minister of Justice that the federal officials work overnight to produce a legal draft based on the evening's discussion was carried out. It certainly facilitated progress that the single most powerful participant undertook to prepare a revised draft. Under the time constraints of the two-day conference, some expedient had to be used to crystallize the discussions. There were, on the other hand, serious risks implicit in the procedure. One was that the federal government would, in good faith, misperceive what had been agreed to. Another was that the drafting proposal would not benefit from the extensive and wide-awake reflection of many politicians and technicians, as opposed to that of a couple of federal lawyers who had already put in a very long day. One more was that it would be discovered that on a particular point, nothing had been agreed to - leaving the federal government free to make up whatever solution suited its purposes. The possibility was also left open that the federal government

would draft what had been agreed to "conceptually," and adopt legal phraseology that suited its own policy purposes but severely frustrated the aspirations of other participants. An apparently minor change in wording can have radical implications in terms of legal meaning, and ultimately a significant effect on the people's lives. Legal drafting can never be the faithful translation into an arcane language of what has been agreed to "conceptually." Instead, a dialectic process takes place. People have policy ideas. A legal expression of them is attempted. Out of a nebulous "conceptual agreement", there suddenly emerge disagreements that had not been perceived before, questions that had not been conceived before. Further discussions have to take place. Perhaps there will be concessions or novel alternatives developed at the policy level. Perhaps the disagreements or new concerns that have emerged will be ignored; others will be fogged over by making the language more vague. A new draft is attempted. And so it goes, until a stable solution is reached.

At the beginning of the First Ministers' session the next day, the federal draft Accord and amendments were distributed to delegations. Mr. MacGuigan provided an oral commentary on them. One of the "bullets" - statements in the preamble to the initial federal draft on ongoing process that aboriginal organizations had found objectionable - reappeared unchanged in the preamble to the political accord. It referred to the education of aboriginal children in their own languages "as well as within one of the official languages of Canada, in order that their children may be equipped to live in the cultural milieu of their choice." As there had been general agreement to drop the statement of principles the previous evening, there was no justification for

trying to slip in the philosophically portentous clause in the political accord. Mr. Watt of the Inuit Committee on National Issues (now a member of the Senate of Canada) objected to it almost immediately. Another aspect of the federal draft that might have been objected to, on procedural grounds, was its introduction of a clause on modern land claims agreement. Drafts of a clause had been submitted to preparatory conferences by the Inuit Committee on National Issues, and representatives of that organization had lobbied for it on a cross-Canada tour of governments they made just before the Conference. It had not, however, appeared in the federal draft of the previous day. At the end of the Ministerial meeting, Mr. Watt reminded the Minister of Justice about the ICNI's proposal on land claims agreement, and Mr. MacGuigan undertook to prepare a provision with respect to it. The provincial delegations had no comment on that undertaking one way or the other. The federal government can be faulted for not having distributed a modern land claims clause in its initial draft, but their last minute introduction was not without prior warning at the Ministerial meeting. The federal proposal was, for the most part, tolerably drafted and a substantively fair attempt to build on the previous evening's discussions.

The Attorney General of British Columbia, Mr. Williams, complained that on the previous evening, only amendments on sexual equality and ongoing process had been agreed to; "other than that nothing was agreed and I don't know where these words come from" (1983 FMC transcript, 197). The federal draft did, indeed, contain a number of deletions, additions and alterations compared to the previous draft that the provincial delegations could not have fully anticipated. The novelty was largely unavoidable, however, in light of

the vagueness of the previous evening's commitments. It had been agreed that there would be a political accord, but there had been little discussion of its details. Thus the seven-clause federal proposal was news to the provincial governments. There had been several suggestions that the sexual equality clause be moved from s.25 to s.35; it was, and the wording had been slightly altered in light of its new position. Some legal concerns had been expressed at the Ministerial meeting about the clause in the initial federal draft requiring consultation with aboriginal groups before certain amendments to the Constitution were made; it had been suggested that the clause was, in effect, an amendment to the amending formula, and as such, required unanimous provincial consent. The government of Québec had already made it clear it was not going to compromise its objections to the Constitution Act, 1982, by enacting any amending resolutions. There had not been express agreement that the clause would be dropped. Nonetheless it was.

Presented with a number of deletions, alterations and additions to the previous federal draft that they could not have fully anticipated, a number of delegations - the Inuit Committee on National Issues, Métis National Council, Canada, Alberta, Manitoba - responded to the Prime Minister's invitation for comments by proposing revisions of their own. Other delegations debated whether the federal draft had properly reflected the previous evening's discussion. After about an hour of this, the suggestion was made (by Premier Bennett) and accepted that there be another backroom meeting to work out the remaining difficulties. While the First Ministers' proceeded with the discussion of sexual equality, the Ministers and bureaucrats went to work on the revised federal draft. Some radically important drafting changes took

place with respect to the clause on sexual equality. The clause that emerged was:

s.35(4) Notwithstanding other provisions of this Act, the aboriginal and treaty rights referred in subsection (1) are guaranteed equally to male and female persons.

The ambiguity in s.35(4) is whether "guaranteed" refers simply to equality between men and women; or whether it also implies that aboriginal and treaty rights of subsection (1) are guaranteed. The latter implication would substantially strengthen the constitutional protection afforded by s.35(1). The latter section "recognizes and affirms" aboriginal treaty rights. It is not clear whether that phraseology makes rights as secure from legislative encroachment as when those rights are "guaranteed." (The human rights identified in the Canadian Charter of Rights and Freedoms are characterized as being "guaranteed"; Charter, s.1). I leave for another day a full account of the bizarre and largely underground battle over the draft s.35(4) continued at the March '83 Conference and the renewal of the struggle at the March '84 one. The draft amendment on modern land claims agreements was significantly reworded. There were substantial alterations to the political accord. The implications of these two changes will be analyzed in more detail shortly. It should be appreciated here, however, that a number of serious alterations were made to the package, elements of which could become part of the supreme law of the land, as a result of last-minute discussions which hardly anyone could have fully followed, understood and evaluated.

At a little before one o'clock, the Prime Minister said that documents were starting to emerge from the Ministerial meeting, and suggested the

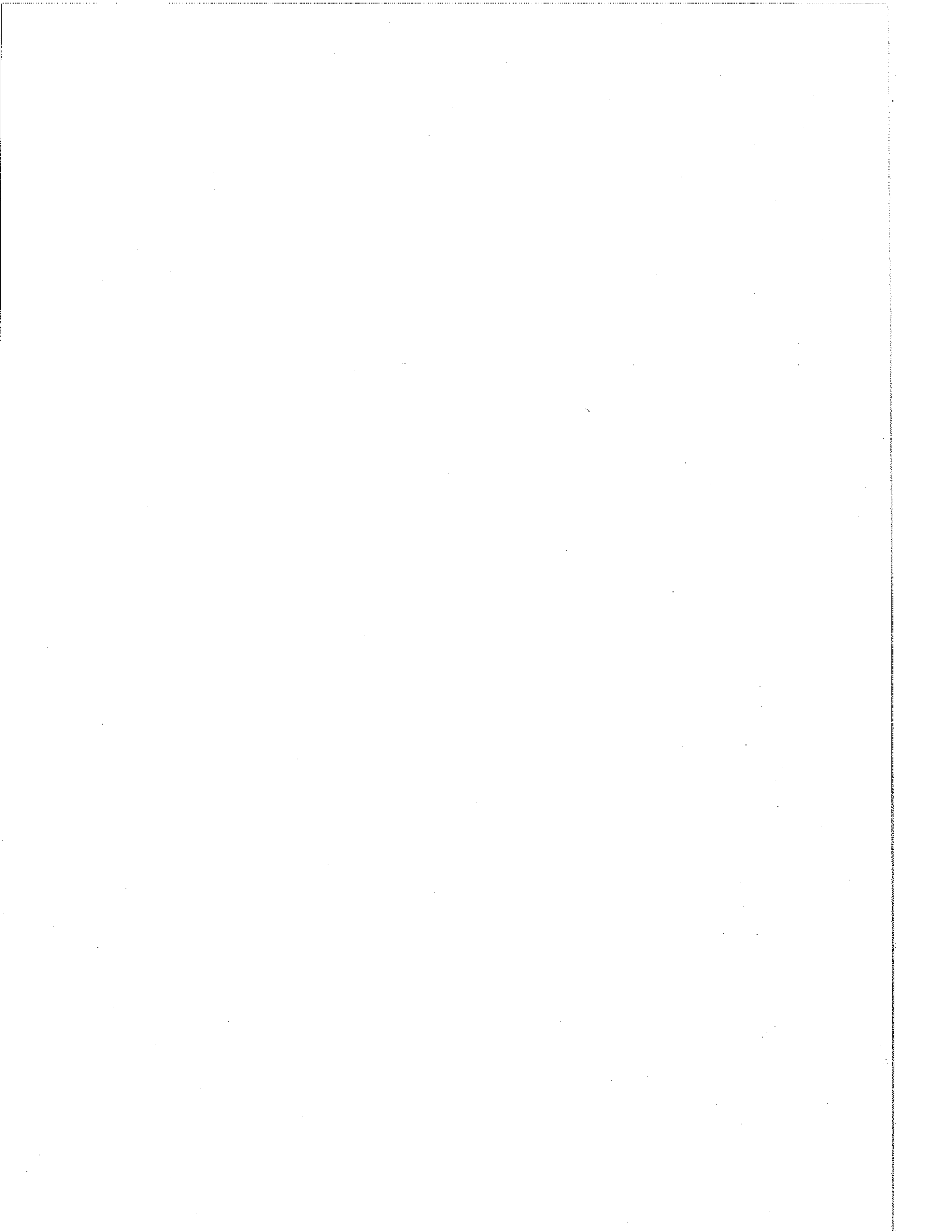
Conference recess at the hour to permit delegations to examine them. Although they were reminded of the recess proposal by the Prime Minister, speakers from the aboriginal organizations continued their contributions to the afternoon discussion until 4:30. Some delegates recall an intense anxiety that the aboriginal organizations might have been talking themselves out of an agreement. The prolongation of the discussion might have provided some Premiers with an excuse for not signing; they could say that they had not had sufficient opportunity to examine a document of such importance, and they had planes to catch. If the thought occurred to any of the Premiers, they did not act on it. The recess took place, the meeting resumed at about five o'clock. The Prime Minister announced that there were only twenty minutes left to comment and sign the accord. It actually took almost three times that long, but at the end of the day, seven premiers, two attorneys general and one Prime Minister committed their governments to the political accord, including its undertaking to press for constitutional amendments. Under "with the participation of," the four leaders of the four aboriginal organizations added their signatures.

What everyone signed, actually, was the political accord absent the constitutional amendments. The federal government said that delays with the French translation made it impossible to prepare the annex in time for general circulation. The procedure had serious implications, because the federal government slipped a new wording of the sexual equality clause into the constitutional amendment package. A member of one aboriginal organization tells me that the federal government did not even brief his leaders about the word change, let alone show them the revised text.

Despite the flaws in the process - the lack of technical preparation by many parties, the initial nonattendance of the Assembly of First Nations, Québec's refusal to recognize the new amending formula, the gratuitously objectionable parts of the federal draft, the frenetic atmosphere of the back-room Ministerial drafting sessions - the first year must be adjudged a considerable success. The amendment on modern land claims agreements was a significant step in defining and extending the scope of the constitutional protection given the rights of aboriginal peoples. The amendment on sexual equality did not resolve everyone's concern about discrimination against Indian women, but it did go a long way toward settling the issue. Had it not been enacted, even more time and attention might have been consumed by concerns over sexual equality the next year. An important, and by many participants, unintended effect of s.35(4) may turn out to be that it indirectly strengthens the constitutional protection given to all aboriginal and treaty rights by s.35(1); in the context of s.35(4), "recognize and affirm" may be construed as tantamount to "guaranteed." The constitutional guarantee of further meetings may result in some further progress on defining and securing the entrenched constitutional rights of aboriginal peoples. Its most valuable effect, however, may be in periodically attracting the attention of the public and their politicians to the concerns of aboriginal peoples. The resultant attention may encompass some highly consequential reform at the legislative level. In the end, the conditions of aboriginal peoples may be improved far more by ordinary legislation that develops in the light of the constitutional process than any alterations to the Constitution of Canada.

There were several respects in which the '83-84 process was not as

productive as it might have been. There was no agreement on a work plan for subsequent meetings. Ordinary citizens, politicians, and jurists were no better informed about the meaning of s.35(1) than they were when the process began; it was as unclear what interests were encompassed by "aboriginal and treaty rights," and how much protection they were afforded by s.35(1). Better preparation by the participants and forthrightness in stating their positions might have enabled them to better craft constitutional results, and more of them.



IV STATEMENTS OF PRINCIPLES

THE FEDERAL PROPOSAL

There was not enough technical preparation or political agreement at the March '83 First Ministers' Conference for many detailed constitutional amendments to emerge. A number of parties proposed that First Ministers agree on general principles to guide further negotiations. The format and legal effect of these proposals varied with the purposes of the proponent. What often looked like innocuous declarations of the incontrovertible actually had serious legal and political consequences.

The federal government proposed a long preamble for a section on further conferences. The least offensive part of a highly objectionable proposal was its presentation of aboriginal history. It is a minor slip to say that "the ancestors of the aboriginal peoples of Canada occupied it many centuries before the first settlers arrived on the Atlantic coast some four hundred years ago." Many of the ancestors of the Métis were European settlers, not indigenous people. Furthermore, many Indians have some European ancestry. Perhaps the use of "occupy" to refer to aboriginal people and "settlers" to refer to Europeans was understood as lacking in political significance. It

may be ungenerous to suppose that the drafters of the preamble had in mind the idea that aboriginal title is confined to a right to use the land, as opposed to owning the surface and minerals below. The statement in the third preambular paragraph that "aboriginal peoples by their own courage and determination, have successfully lived until this day in their own cultures and communities..." seems to deny that aboriginal people have suffered considerable hardship, much of it caused by the misguided, at times brutal policies of Imperial and Canadian governments. It is possible the phrase is merely the result of a hasty mistranslation of the French version, which says that the aboriginal peoples have succeeded in maintaining their own cultures. There are several other places in the preamble where the French version is factually, grammatically or rhetorically superior to the English one. (Perhaps the section was drafted in English, and as translators often do, the translators of this proposal omitted some of the dross.)

Difficult to stomach is the theology of the third paragraph. It is not clear whether "the Creator of all things" is the Constitution's own characterization of the deity, or the Constitution's description of what aboriginal peoples think of as the Supreme Being. If the former, why not use the less theologically contentious word God? That is what He's called in the preamble to the Charter of Rights and Freedoms. Many Christians would have trouble with the claim that God created all things. They would maintain that people made a lot of things, some good, some bad, in the exercise of the free will that God allows them. If the Constitution is describing the way aboriginal people view the Supreme Being, it overlooks that many of them were polytheists, and others have been or are mainstream Christians, some of whom

would just as soon call God "God." All of these objections might seem rather quibbling. But it will only seem that way if the nature of the God is viewed as unimportant. If that is the case, there is no point mentioning Him in the Constitution. If His Nature does matter, then He should be spoken of with care and respect. He should not be slovenly described in secular documents in order to achieve partisan political aims.

Perhaps the drafters of the "Creator of all things" section were encouraged by a triumph of theological vulgarity only a year earlier. In April 1981, the House of Commons and Senate added to the Charter of Rights and Freedoms a preamble which recognized that "Canada is founded upon principles that recognize the supremacy of God and the rule of law." As a statement of constitutional history, this is hard to believe. About the closest the Constitution Act, 1867 comes to recognizing the supremacy of God is that it requires Governors General and Lieutenant Governors to take oaths of office. The preamble of the Constitution Act, 1867 says that Canada is to have a Constitution "similar in principle to that of the United Kingdom." The cardinal doctrine of British constitutionalism was the supremacy of Parliament, not God. It is true that British constitutional law establishes the Queen as defender of the Anglican faith; there is nothing, however, to prevent Parliament from passing ordinary legislation to make the United Kingdom a strictly secular state. Furthermore, the Canadian constitution does not establish any religion as that of the state; s.93 of the Constitution protected the then existing school rights of all denominations, not merely those of High Church Protestants. What is more disturbing than its misstatement of the past, however, is the possibility that the "God clause" adversely affects the constitu-

tional future. The Court might rely upon it when construing section 2(a) of the Charter, which guarantees "freedom of conscience and religion;" they might hold that atheists and polytheists are entitled to less constitutional protection than those who believe in one Supreme Being. The historical and doctrinal infelicities of the "God clause" might be more forgivable if it had been authorized as an act of genuine faith - as opposed to an unprincipled concession by many of the Canadian politicians involved to a vocal faction of the electorate.

The "Creator of all things" clause in the federal preamble also claims that aboriginal peoples "held sacred their identity with the land, with the creatures that live upon it and in the rivers that traverse it, with the plant life that it supports, and with the seas that surround it." In his comprehensive ethnological study, Indians of Canada, Diamond Jenness wrote:

Spiritual forces akin to those in his own being caused the sun to rise and set, the storms to gather in the sky, the cataract to leap among the rocks, and the trees to bud in springtime. A mentality similar in kind to his animated the bird, the animal and the fish. The same reason, the same emotions that actuated all his movements, actuated also all that moved on earth, in water and in sky. Reason and emotions were present, it is true, in varying degrees, and accompanied by different powers, some greater and some less. But ultimately (although few if any Indians consciously reached this generalization) all life was one in kind and all things, potentially at least, possessed life.... Thus the Objibwa of lake Huron predicate a "soul" and a "shadow" even in rocks and stones (Jenness, 1932, 168).

A little later he cautions:

Although this theory of the universe supported the whole fabric of his religious life, it is doubtful whether he ever formulated it clearly in his mind, or expressed it in words, any more than the ordinary European comprehends or expresses all the philosophical ideas implied in Christian rites and ceremonies (Jenness, 1932, 169).

It appears from Jenness that there is some validity to the federal description of Indian belief. It also appears that one should avoid summarizing in a couple of phrases the web of articulated belief and inchoate sense that made up the religious views of a disparate group of peoples. Jenness, it should be noted, compares and contrasts the original beliefs of Indians with Christianity. A great many Indians did adopt Christianity, which, in almost all of its forms, maintains a sharp distinction between the essence of humankind and that of all other earthly entities. As the federal proposal refers to the way Indians "lived ... until this day" (presumably the authors meant "have lived", and did not contemplate that Indians would disappear with the promulgation of their amendment), the reference does little justice to an important part of religious development.

A preamble lacking in form might be partly redeemed by an exceptional grace of expression. The third paragraph of the federal draft is an execrable example of a failed attempt at eloquence. At the end of the paragraph, "it," stands for land and is used three times as the object of an active verb. "Their identity with the land, with the creatures that live upon it, and in the rivers that traverse it...and the seas that surround it." Just before the end, however, "it" is used as the subject of "supports", ("with the plant life that it supports"), thereby destroying the rhythm and parallelism of the sentence. The French version, as usual, is less grating.

The most important aspect of the federal preamble, however, was not its misleading account of history, frivolous theology, or clumsy rhetoric. In the listing of points to be considered in the ongoing process were a number of implications that were adverse to the constitutional views that had been

expressed by aboriginal persons. Having included in its preamble principles that had real legal substance, the federal government should have released a draft for delegations to study before the conference. It required some effort and care to discern the implications of the points in the first place, even more to assess their justice and legal merit.

The federal proposal identified four points for inclusion in an aboriginal charter of rights. The first was the identification of rights now recognized and affirmed in s.35, "and in particular, the rights of aboriginal peoples to the use and occupancy of land, and their rights to fish, hunt, trap and gather, based on traditional and continuing use and occupancy, and as recognized by treaty and land claims settlements." There are at least two significant implications to this paragraph. First, that aboriginal rights are confined to the use and occupancy of the land, and do not extend to matters such as political autonomy. Second, that the aboriginal land use rights that do exist are limited to using the land for traditional purposes, and do not include general ownership of land or the minerals below it. It could be argued that neither implication is really there, because the paragraph says "includes," and so cannot be taken as an exhaustive definition of aboriginal rights. A Court might, however, draw important inferences from the enumeration.

A second point that might be included in an aboriginal charter of rights, according to the federal draft, is the preservation and enhancement of traditional aboriginal cultures. The federal draft, however, insisted that aboriginal people must educate their children in French or English, as well as an aboriginal language, in order that the children "may be equipped to live in the cultural milieu of their choice." The larger implication is that aboriginal

people and the political and cultural autonomy of aboriginal people is limited by their duty to give their children the education and freedom to enter mainstream society. As a matter of political philosophy, I basically agree with that proposition. Some aboriginal groups may not; according to the Report of the Metis and Non-Status Indian Constitutional Review Commission, "Native people feel that education should be a means toward an end, their social development as a collectivity rather than as individuals" (p. 12).

Whoever is right, the balance between collective political rights of aboriginal peoples and the individual freedom of aboriginal persons is a question of first importance. It ought to be raised forthrightly and discussed thoroughly. The federal draft on self-government refers to "the institution of various forms of aboriginal government." It can be argued that aboriginal peoples have the inherent constitutional right to self-government, that this is one of the rights recognized in s.35, and that their right has been to some extent exercised in practice - whether by continuing traditional forms of government, or using the process sanctioned by provincial or federal law, such as Indian band governments. By mentioning self-government at a distance of a full paragraph from s.35 rights, and by using the word "institution" (suggesting there had been no aboriginal self-government before), the federal draft would have seriously undermined some important legal positions that aboriginal people may wish to maintain.

Section 54(1) of the federal proposal signalled a renewed federal commitment to constitutional tidiness. It said that the entire amendment on holding additional conferences, including the preamble, would be repealed after the last mandatory First Ministers' Conference was held. Think of the possible

consequences five or six years later. As the last First Ministers' Conference comes to a fruitless conclusion, the kind words about them in the constitution are by force of law torn from the constitution, never to reappear.

THE MÉTIS NATIONAL COUNCIL PROPOSAL

The Métis National Council submitted two major statements of Métis rights to the First Ministers' Conference. One of them, The "Revised Charter of Rights of the Métis People" was apparently intended to immediately create justiciable rights. Section 35.3 stated a number of "Collective Rights and Freedoms of the Métis Peoples of Canada," including "self government, which shall have jurisdiction over political, cultural, economic and social affairs and institutions deemed necessary to their survival and development as a distinct people." Section 35.4 said that the details of these rights should be spelled out in a schedule to the Constitution. What was to be done about the rights until they were spelled out through constitutional negotiations and amendments? Apparently, the details could be provided by "A Métis Peoples Court, a Court of Law and Equity which shall be the Court of final jurisdiction in regards to Métis Rights." Even if the final interpreter were to be the Supreme Court of Canada, the entrenchment of a justiciable set of principles would have been an enormous victory for the Métis.

Even if the Courts adopted a very narrow construction of the principles, whatever the Courts did allow the Métis would be immune from legislative override. The Constitution is the Supreme Law of Canada, and a construction of it by the Supreme Court cannot be overridden by ordinary legisla-

tion. Given the threat of an expansive interpretation of the principles by the Courts, moreover, governments would have some incentive to try to work them out through political negotiations. In Unfinished Business Professor Zlotkin argued that there are "serious problems" from the point of view of aboriginal interests in entrenching a statement of general principles (Zlotkin, 1983, 59-60). First of all, Zlotkin contended, the Courts have traditionally taken a "conservative approach" to native issues, so native people are better off trying to negotiate their rights. I would reply that even if Courts are "conservative" on native issues, they are much more likely to find in favour of aboriginal peoples if there is an entrenched statement of principles which endorses, at a general level, a broad range of native claims. Zlotkin also argued that a general statement of principles would be:

...rather ineffective without further discussions between governments and aboriginal peoples on questions of identification and definition of rights. For example, the negotiation of land claim settlements will continue, but governments have not shown the same willingness to renegotiate treaties with the Indians of southern Canada to find a mutually acceptable interpretation based on modern conditions (Zlotkin, 1983, 60).

Zlotkin's example undermines his point. A major reason why governments are anxious to negotiate land claims settlements is the risk of adverse Court decisions in the absence of an agreement; the case law on aboriginal rights is still very nebulous. Similarly, governments would have some incentive to negotiate the meaning of justiciable, but vague, constitutional statements of principle. Governments have little incentive to renegotiate the old treaties, because it is fairly clear what rights they confer. Indians are not going to consent to having those rights diminished, so why should a government be

eager to enter into discussion on how to revise them? It is not surprising that governments had expressed no interest in agreeing to a justiciable statement of principles at the March '83 Conference. The Native Council of Canada did not misperceive its own interests when, at the March '84 Constitutional Conference, it proposed that a statement of principles be entrenched into the constitution, to be nonjusticiable for a period to allow negotiations, and justiciable after that (1984 FMC transcript, 56).

The Métis National Council also proposed, as an alternative to its Statement of Rights, a Statement of Principles which it probably understood as nonjusticiable. The draft uses the "committed in principle" formula that has often been understood (possibly wrongly) as an effective legal formula for making a section of the constitution judicially unenforceable. The Statement of Principles was intended to guide further negotiations. It was politically unacceptable to governments. Even the province of Manitoba would have had trouble accepting the principle that Métis are entitled to "self-government as the Métis deem necessary for their survival and development as a distinct People."

THE MANITOBA PROPOSAL

The government of Manitoba submitted two major documents as suitable guides for further discussion. One was a "framework agreement." It would have parties agree to turn Part II into an aboriginal rights section with a certain basic structure: The word "existing" would be removed from s.35(1) and the word "guaranteed" would be added after the word affirmed. There

would be a definition of the term "Aboriginal Peoples," "an enforcement clause," a "clause relating to self-government," "a clause relating to fiscal responsibility" and so on. The framework agreement was generally agnostic on what the content of sections should be (the call for the removal of the word "existing" is an important exception) but did require that clauses be written.

It could be objected, with justification, that there is no point in agreeing to write a clause unless you have some idea of what policy it should embody; and that even if you do agree on policy, you might not be convinced that entrenchment, rather than ordinary legislation, is the best way to achieve it. More useful than a framework agreement along the lines proposed by Manitoba would have been a work plan, a detailed agreement by First Ministers on what should be discussed in the ongoing process, and in what order. Because a final agreement on the ongoing process itself was reached only on the second day of the March '83 Conference, however, First Ministers had no time to develop a work plan, and the catch-all agenda of the March '83 Conference was extended into the future.

Manitoba also proposed that parties agree to a "Statement of Principles" to provide a basis upon which "specific items might be subsequently defined as rights for inclusion in the Constitution of Canada". The Manitoba statement (which was concurred in by its provincial Indian and Métis organizations) differed from statements proposed by the national aboriginal organizations in that it acknowledged the need for balance between aboriginal claims and those of the public generally. It said, for example, that aboriginal rights include "land entitlements... which are not subject to arbitrary inter-

ference of appropriation." Implied is that some justifiable interferences with aboriginal land rights may be constitutionally necessary.

Some authorities on international negotiations have maintained that the most productive way for parties to proceed is "deductive" - first agree upon a solution at a very general level, "a formula," - then work out details. "[The deductive approach] is desirable... because a formula or framework of principles helps give structure and coherence to an agreement on details, helps facilitate the search for solutions on component items, and helps create a positive, creative image of negotiation rather than an image of concession and compromise" (Zartman and Berman, 1982, 93).

The opposite approach may be called "inductive." It involves working out agreements on small pieces of a problem, and then assembling them into an overall accord. "If the two parties have irreconcilably different perceptions or conceptions of the problem and are unable to harmonize them, they may nevertheless be able to agree on certain details even though they attach different meanings to them" (Zartman and Berman, 1982, 90).

After March '83, it might have appeared that the s.37 process was proceeding inductively. Agreement was reached on a small number of specific items, and provision made for further discussions. (Of course the points of agreement were immediately entrenched in the Constitution, rather than put on hold, pending the assembly of a comprehensive constitutional package.) In actual fact, March '83 did not establish that substantial progress could be made one piece at a time. The items agreed to there were among the few easily agreeable ones. A couple of easy issues may have remained - a remedies clause for aboriginal peoples' rights, along the lines of s.24 of the

Charter of Rights and Freedoms might be an example - but almost all of the outstanding issues after the March '83 First Ministers' Conference were far more intractable than ones already resolved.

Was there any merit in Manitoba's deductive proposal in the context of the aboriginal rights reform process? It would not have been helpful for the parties to try to agree on a comprehensive set of political principles at an early stage in the negotiations. Progress on more manageable issues would be stymied because of disagreement over the most intractable issues - disagreement that might continue indefinitely. As argued earlier, however, a realistic work plan for tackling the issues would have been useful. The Manitoba Statement of Principles did identify, comprehensively and with some precision, the major issues at stake, and might have been of help in formulating a work plan. As particular points came up for discussion under the work plan, the Manitoba principles might have been a source of ideas for either a statement of principle on particular issues or a draft legal text.

A final point about the "deductive" approach in the context of constitutional negotiations. The definition of the approach given above distinguishes the principle stage from the detail stage. It would be a mistake to suppose that the two stages can be sharply distinguished when what is being prepared is a constitutional text. It is rarely a question of the politicians agreeing on "the principle" and the lawyers performing the mechanical task of translating their agreement into legalese and jargon juridique. The drafting and criticism of an actual legal text raises issues of policy, sometimes very subtle, sometimes very fundamental, that may not have been recognized at an earlier stage in the discussions.



V THE CONSTITUTIONAL AMENDMENT WITH RESPECT TO ONGOING PROCESS

It is not easy to amend the Constitution of Canada. For most matters, the consent of the federal government and seven provinces with half the population is required (Constitution Act, 1982, S.38). If you do insert something in the Constitution, what you say will likely govern events you cannot foresee. The judgment you make now may count for more than the judgment of the people who are confronted with events beyond your anticipation. Yet it is they who must live with the consequences. Because of the insistence of some of the provinces, the Constitution Act, 1982 provides several avenues of escape from its own prescriptions; s.33 allows Legislatures to override many sections of the Canadian Charter of Rights and Freedoms, s.38(3) allows provinces to opt-out of amendments sanctioned by the new amending formula.

Because of a constitution's permanence and pre-eminence, matters stated in it often assume great importance. Conversely, if a matter is not of some gravity in the first place, no one is likely to go to the trouble and risk of having it constitutionally entrenched. Ordinarily, therefore, you expect to see in a constitution general statements of fundamental principle. You don't expect to find a requirement that several discussions must take place over the next few years, especially when the discussions need not reach any particular

conclusions.

A political agreement to have a specified number of additional conferences would not have given everyone sufficient assurance that they would take place. A political accord could not be enforced in the Courts, and a new federal or provincial government could argue that it is not bound by the non-legal commitments of its predecessors. An agreement by all but one of the provincial premiers and the Prime Minister would, however, have had considerable moral force.

A number of factors account for the entrenchment of further meetings. From the point of view of aboriginal groups, political promises were suspect. Less than two years earlier, in the November 1981 settlement, a backroom deal among federal and provincial governments deleted the clause in the proposed package which recognized and affirmed aboriginal rights. Another factor, already mentioned, is that the entrenchment of further meetings allowed everyone to claim that concrete constitutional progress had been made. A further influence was the massive amount of constitutional reform that had come into force less than a year earlier; a constitutional amendment did not seem as drastic a step as it ordinarily would have.

Public officials and special interest groups alike were rather accustomed to aiming at the constitutional entrenchment of their political programs. A few also seemed to think of the Constitution as an alternative to Hansard, constituency letters and gothic archways as a suitable repository for expressions of noble sentiment. (Recall the "Statement of Principles" proposals at the March '83 Conference, discussed in Chapter IV.) Finally, the March '83 meeting itself was constitutionally mandated. The entrenchment of meetings

that followed March '83 might have been perceived as less solemn occasions if they too were not constitutionally entrenched.

The federal proposal tabled at the March '83 Conference proposed two options for the ongoing process. One proposal was for three meetings, the first no later than 17 April 1984, the others no more than two and four years after that. The alternative suggestion was for two entrenched meetings, the first no later than 17 April, 1985, the other at most two years later. The technical difficulty with the first proposal was that under s.39(1) of the Constitution Act, 1982, a constitutional amendment can't take effect until at least a year after the first Canadian legislature (whether Parliament or provincial assembly) approves it. (The exception is if every provincial legislature expressly either approves it or dissents from it; but since the National Assembly of Québec did not recognize the legitimacy of the new amending formula at all, it would have done neither.) Thus even if Parliament or a legislature had immediately passed a resolution approving the entrenchment of more meetings, it could not have come into force until late March, 1984. Any constitutional meeting before then would lack a constitutional imprimatur. Yet it might have turned out that a meeting in, say, March 8-9 '84 was convenient. (In fact it did.) A further difficulty with relying on a constitutional entrenchment to mandate a meeting in 1984 was that provincial legislatures or Parliament might not get around to considering a resolution for months; in the meantime, uncertainty would hamper attempts to prepare for a conference. The parties to the March '83 political accord therefore provided that there would be another conference within a year; but this was left as a political undertaking.

The parties agreed as well to the second federal alternative - to constitutionally entrench further meetings in 1985 and 1987. It is fortunate that they chose this option over the first. Most of the productive activity in a series of governmental negotiations usually occurs just before the deadline. In the meantime, governments devote their attention to matters which need immediate decision. They may also entertain the hope that the problem will expire before the deadline - or the fear that the government will. Furthermore, parties to a negotiation do not want to make concessions early in the game; the other party may only ask for more. The first federal alternative set the deadline too far away. It also left too much discretion to the federal government in setting the precise time of the meetings.

The wording of the constitutional amendment that the parties agreed to make in the March '83 Accord differed in several respects from the original federal draft. (The wording changes were the result of in camera (that is, off camera) meetings of Ministers on the first evening and second morning of the First Ministers' Conference). The words "at least" were added to the new section 37.1, so that the meeting requirements there stipulated would be clearly understood as the minimum necessary. People have an unfortunate tendency to view compliance with what is constitutionally required as the most, rather than the least, that is to be expected of them. During the Patriation debate, Prime Minister Trudeau complained in a television interview that he had undertaken to end his efforts to unilaterally patriate the Constitution if he lost the decision in the Supreme Court of Canada, but the provinces did not promise to stop their efforts to block patriation if they lost. The argument relied on a nonexistent symmetry. The judicial declara-

tion that a course of political action is legally permissible does not mean that it is all right; the action might still be imprudent or, more seriously, it might be unjust. One of the dangers of entrenching a Bill of Rights is that the legislature and the electorate may start to view a Court's decision that something does not violate the Charter as meaning that it is not an affront to human rights. The wording of the Canadian Charter of Rights and Freedoms enhances this risk; the Court may sustain governmental action that prima facie violates the Charter because that action is "demonstrably justified in a free and democratic society." But the Court may merely be deferring to the judgment of a democratically elected legislature in a close case, rather than saying the legislature is right. To return to s.37, in the absence of the words "at least," it would have been almost certain that only two First Ministers' Conferences would be held on aboriginal rights. Their presence means that there is a significantly enhanced possibility that more than two will be held. Looking ahead, there is a real danger that when the new section 37 expires in 1987, participants will misunderstand its not being renewed as tantamount to saying that First Ministers are under no duty of any sort to discuss aboriginal rights any further. As a matter of political justice, however, they might still be.

The initial federal proposal would have kept the wording of the original s.37, which read "the conference convened...shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of [aboriginal] peoples to be included in the Constitution of Canada." The March '83 Accord contemplated a s.37 that merely said "each conference

convened shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada." The extra wording was dropped partly because some aboriginal group leaders were concerned that it would be exploited by Courts to deny the existence of rights under s.35. Courts might argue that the "identify and define" wording implied that rights under s.35 were not yet identified and defined, and so were not judicially recognizable or enforceable. The probability of the Courts taking such a position was small; but inasmuch as the "identify and define" wording did not assure that any concrete results would emerge from First Ministerial discussions, it did no harm to drop it, and might have done some good.

Before the First Ministers' Conference another possible interpretation of s.37 had caused concern to some provincial legal advisors. In Peters v. R. in Right of B.C. Minister of Lands, Parks and Housing, Dunsmore and Dunsmore (1983), 42 B.C.L.R. 373 (B.C.S.C), some Ohiat Indian Band members claimed that they had an aboriginal right to gather clams on a certain beach. A British Columbia Minister of Lands, Parks and Housing tentatively approved an application from the Dunsmores to use the beach for commercial clam production. The band members sought a judicial declaration that the Minister could not do this prior to the s.37 Conference on Aboriginal Rights. They submitted "in effect, that the conference must reach a conclusion on aboriginal rights, and that such conclusion, once published, will, without more, entrench in the constitution those rights identified and defined by it" (42 B.C.L.R. 373, 380). The Dunsmores tried to have the band's application for a declaration struck out before it was heard on the merits, on the grounds that it did not disclose an arguable case. Mr. Justice Esson of the

Supreme Court of British Columbia declined to do so. He held that the case raised untested questions of constitutional law, and the band members might alter their claim before trial to make it stronger; the claim was therefore not such an obviously unfounded one that it could be dismissed before it even came to trial. Some provincial legal advisors were concerned that if s.37 were renewed, acts of government would be challenged in the future on the same basis as the Clam case. But the risk was actually extremely small. Had the Clam case been heard on the merits, the band members would almost certainly have lost. Contrary to their claim, section 35 took effect on April 17, 1982, and Courts were immediately bound to construe and enforce it, regardless of whether it would be amended as a result of further discussions pursuant to section 37. Furthermore, section 37 did not require First Ministers to agree on anything; any agreement they did reach had no direct legal effect. Resolutions of Parliament and seven provinces are required to amend the Constitution, not political agreement by First Ministers.

Lest it be lost to the annals of form versus substance, there will now be a brief account of the "vanishing amendment" argument. At a ministerial meeting in February, 1983, when it was still uncertain that governments would agree on a formal political accord to ensure an ongoing process, the Attorney General of Manitoba suggested another method of ensuring further talks. The proposal was that the Prime Minister might end the March '83 Conference by finding it had not adequately discussed the issues, and adjourn it to a future date, which might be weeks or months later. The Prime Minister might do this with the consent of participants, or over the objection of a few. After all, s.37 mandated the Prime Minister to convene the Conference,

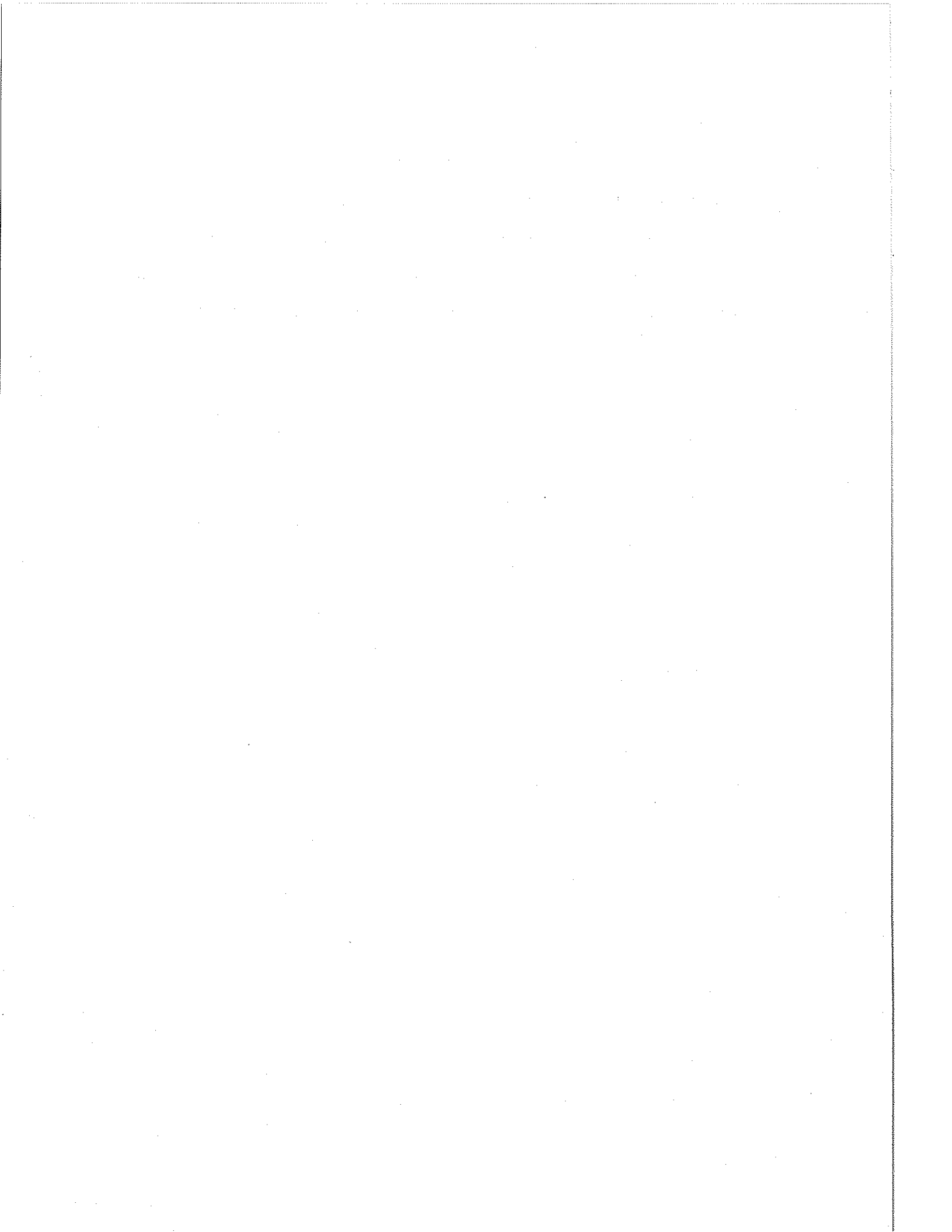
and he had some discretion over the timing and duration of the meeting. Some governments objected to the proposal of the Attorney General of Manitoba on legal grounds. According to section 54 of the Constitution Act, 1982:

Part IV [which consists of s.37] is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

Why repeal s.37 a year after the Constitution Act, 1982 comes into force? Because by then the First Ministers' Conference that s.37 mandates must have started, and there is no point in permanently cluttering the Constitution with a section which has already done its job. The repeal of s.37 was merely a matter of constitutional aesthetics. (Notice that s.54 itself could be deleted after it had discharged its function.) Some governments argued, however, that once s.37 was repealed, any meeting convened under it was no longer a s.37 meeting. Therefore the Prime Minister could not adjourn the March '83 meeting to a date later than April 17, 1983.

Suppose this argument is correct; then if the 1983 First Ministers' Conference had been scheduled for April 16-17, 1983, the first day of the meeting would have been constitutionally mandated by s.37, but the second day not. Yet s.37 only says when the Prime Minister must convene the meeting, not when he must end it. In my opinion, removal of s.37 from the Constitution as a matter of documentary tidiness did not mean it was immediately expunged from legal memory and denied any lingering legal effect. A valuable step in the constitutional advancement of aboriginal

peoples in Canada might have been blocked by a misunderstanding of an earlier concern with constitutional cosmetics. Some governments which raised the s.54 objection were probably using it as a pretext; they opposed adjournment for other reasons such as their desire to make the constitutional entrenchment of further meetings look more necessary, and therefore more of an achievement.



VI CONSENT TO CONSTITUTIONAL AMENDMENTS

There is no provision in Part V of the Constitution Act, 1982 (which deals with amendments) for participation by aboriginal peoples as such. The agreement of seven provincial legislatures and Parliament is sufficient to pass an amendment no matter how deleterious to aboriginal interest. On the other hand, the federal government can, by remaining passive, block any constitutional amendment which is favourable to aboriginal peoples' interests. Furthermore, a provincial government can "opt out" of the application of any constitutional amendment that "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province" (Constitution Act, 1982, s.38(2)). It might be argued that because the federal government has exclusive jurisdiction over Indians under s.91(24) of the Constitution Act, 1867, a province's rights and powers are not impaired by a constitutional amendment that better protects the rights of those aboriginal peoples included in s.91(24). Several judgments of the Supreme Court of Canada, however, support the view that provincial laws of general application may apply of their own force, even to Indians on reserves (Natural Parents v. Superintendent of Child Welfare (1975), 60 D.L.R. (3d) 148; Four B. Manufacturing v. Garment Workers of

America (1979), 102 D.L.R. (3d) 338). It would be possible for Parliament to use its s.91(24) power to expressly exclude the application of provincial laws to the extent that they violate rights of aboriginal peoples, and Parliament has in fact done so with respect to treaty rights; Indian Act, s.88.

From the point of view of aboriginal peoples, the amending formulae are rigged strongly in the favour of governments. The only say aboriginal groups were constitutionally assured in 1982 was that the Prime Minister would invite them to one First Ministers' Conference in 1983 at which their constitutional concerns would be discussed. There was no permanent guarantee of their even being consulted after that.

Several proposals were made by aboriginal organizations at the March '83 First Ministers' Conference on how their influence on constitutional amendment could be better protected. The most ambitious suggestions were those of the Assembly of First Nations. They submitted a draft section 42(3) of the Constitution which would have required that before governments approve any amendment affecting the rights of First Nations (including s.91(24) of the Constitution Act, 1867) the Prime Minister must first convene a constitutional conference to which the representatives of First Nations would be invited. No amendment could proceed without the consent of "the representative body of a First Nation." The phrase in quotes might refer to a national organization like the Assembly of First Nations if mandated to speak for a particular First Nation; but apparently the dissent of even one First Nation affected by an amendment would block its being approved. Under a proposed s.42(4) of the Constitution, a First Nation could also "opt out" of the application of any amendment prior to its coming into force. (A First Nation might go along

with an amendment for the benefit of other First Nations, but still not want an amendment to apply to itself. A First Nation might also change its mind between the time of the conference at which the amendment is first assented to and the time legislatures consider them.)

Granting a veto to each and every First Nation could result in the obstruction of amendments that most First Nations, let alone governments, favoured. At the March '83 Conference the Assembly of First Nations did not have a mandate to even speak for a number of Indian bands. Furthermore, there is no generally accepted constitutional definition of a First Nation; is it a band or a group of bands sharing a common culture and history? (The Penner Report on Indian self-government proposed that the negotiations on self-government start off with individual bands establishing governments; these governments could then agree on amalgamating the bands into large units (Penner Report, 53-55).)

Allowing a single First Nation to "opt out" of, rather than to veto, a constitutional amendment does have some points in its favour. It avoids the problem of whether a national aboriginal organization should be able to disregard the objections of a member in collectively agreeing to an amendment. The different Indian Nations in Canada often have little more in common in terms of language, culture and legal concerns than different countries in the European Common Market. "Opting out" is rhetorically more appealing than "veto." The former implies the nonobstructive withdrawal from the march of the majority; the latter implies standing in its way. If the "opting out" is sufficiently widespread, however, the distinction loses its validity. If many First Nations were to opt out of an amendment affecting aboriginal rights, the

practical effect might be that the amendment would not have any effect. The aboriginal and treaty rights of different aboriginal peoples depends largely on their different histories, and it would be quite possible for an amendment to potentially affect only some Indian bands, and no Inuit or Métis collectivities. In contrast, when a province "opts out" of a constitutional amendment, it will still be in force in at least seven other provinces, every one of which has very similar rights and privileges to the "opting out" province.

The fundamental question that must be addressed, whether in connection with a veto or with opting out, is the legitimacy of a minority group's blocking the constitutional will of the representatives of the preponderant majority of Canadians. It could be argued on behalf of aboriginal vetoes that according to international law the relative populations of sovereign states is irrelevant. A state cannot impose legal norms on another, no matter how tiny, without consent. The distinct cultural and political identity of different states prevents you from notionally lumping the populations of them into a single polity in which the majority rules. An adequate reply to the foregoing argument is that aboriginal collectivities in Canada are not in the same legal or moral position as sovereign states. Legally, they are no more than subordinate entities to sovereign legislatures. It is morally significant that members of aboriginal collectivities are free to participate on the same basis as everyone else in the political life of the general political community.

The deletion of aboriginal rights in the November 1981 Constitutional Accord might be cited as proof that aboriginal rights cannot be adequately trusted to the discretion of federal and provincial leaders. What follows that incident, however, must not be forgotten. Leaders of aboriginal groups

mounted an intense lobbying effort aimed at the re-insertion of the clause. Their appeal won support from many Canadians convinced of its moral validity. Some politicians were also influenced by the voting strength of aboriginal people. On November 17, an NDP government was elected in Manitoba, partly because of the strong support from Indian and Métis votes. The new Premier announced his support for the restoration of the aboriginal rights clause. On November 19 the Premier of Saskatchewan, who also had both a genuine concern for aboriginal peoples in his heart and a large number of Indian and Métis voters in his electorate, announced that he would go along with strengthening the clause on sexual equality if other Premiers would accept the re-insertion of the aboriginal rights clause. "The next day, at the same time as Indians were addressing the provincial Social Credit convention, Premier Bennett announced British Columbia's support for the section. Alberta's Peter Lougheed, after negotiations with the province's Métis organizations, announced support for a modified section 34, limited to "existing rights" (Sanders, 1983, 321). Even with the addition of the word "existing," the aboriginal organizations scored a considerable political victory in obtaining the re-insertion of what is now section 35. Aboriginal groups have in recent times won battles on other constitutional fronts. Vehement opposition from Indian organizations forced the federal government to withdraw its 1969 White Paper on Indians, which proposed the abolition of special status for Indians and turning the reserves into municipalities. The natives of the Northwest Territories succeeded in persuading the federal government to accept in principle the division of the Northwest Territories into a largely Dene territory west of the tree line, and a largely Inuit territory on the east

of it (Jull, 1983, 59).

Because any change to the amending formula requires the consent of the federal government and all ten provinces, Québec's nonrecognition of the Constitution Act, 1982 was of itself sufficient to block the granting of a veto or opting out power to aboriginal groups. The only government to express its support in principle for an aboriginal peoples' veto was Manitoba; the others were not called upon to commit themselves, but they almost all would have expressed opposition. Individual Canadian provinces do not have vetoes over constitutional reform, and it is difficult imagining any of them agreeing to put aboriginal peoples in a better position than they themselves are.

Even Manitoba did not go beyond accepting an aboriginal peoples' veto as a general idea. The working out of the specifics would involve the resolution of some extremely difficult points of principle, not just technical details. Among them:

(I) Would the veto holder be a national organization or its constituent parts?

(II) Could a single aboriginal group veto an amendment, or would the dissent of most or all of the aboriginal groups be required? The veto is often discussed in terms of a conflict between the interests of an aboriginal people and that of society at large. There are many cases, however, where the contest is between different aboriginal groups, or between different factions of the same aboriginal group. An example that raises the former is the Métis demand that s.91(24) be amended to expressly refer to the Métis. Some Indian groups may be opposed because the inclusion of the Métis would result in the diversion of resources that otherwise would have gone to Indians.

An example of a conflict within a group is the controversy over the reinstatement of Indians who have lost or been denied status because of s.12(1)(b) of the Indian Act. The section says that an Indian woman who marries a white man loses her status; in contrast, a white woman who marries an Indian man automatically acquires Indian status. To some status Indians, justice requires the redress of this state-sponsored sexual discrimination. Other Indians, however, might object to the restoration of status - because of the influx of people who may be especially assimilated into mainstream culture, the exacerbation of overcrowding on reserves, and the diminution of royalty and treaty payments due to Indians who have retained status all along. Some Indians believe that those who intermarried knowing the consequences should have to live with them, just as Indians who refrained from intermarrying do (Cardinal, 1977, 111; Sanders, 1984).

The veto issue is often seen in terms of conflict between the interests of aboriginal peoples and those of society as a whole. A veto in the hands of an aboriginal organization might at times, however, prevent a Canadian government from intervening to protect a minority faction of an aboriginal group from the majority of that group. The government might wish to protect that minority faction because of a disinterested concern for justice; it would not necessarily be a case of advancing the interests of the majority of the electorate at the expense of aboriginal peoples. (It may still be argued, however, that proper respect for the political autonomy of aboriginal collectivities means letting them work out the balance of majority and minority themselves in all cases. This position will be discussed in some depth later in this paper).

(III) What principles should guide the selection of leaders of veto-holding organizations? Should election standards be established, and polling supervised, by outside governmental organizations?

(IV) Precisely who are the constituents of the different aboriginal organizations? Is the Assembly of First Nations the sole legitimate representative of status Indians in Canadian cities, even though many of those Indians are not allowed to vote in band elections? The Métis National Council claims that there are no Métis other than those who trace their origin to a distinct people that came into its own in western Canada in the 19th century; the Native Council of Canada says there have been and are Métis across Canada; who is right?

When aboriginal groups have a consultative, rather than a vetoing role at constitutional conferences, the foregoing kinds of questions can often be left unresolved. Prime Minister Trudeau did not have to decide the last question, for example, prior to the last First Ministers' Conference; he invited both the MNC and the NCC, and thereby gave a chance for both sides of the questions to be presented. If aboriginal organizations were to be given legally binding powers, however, precise answers to some tough questions would have to be given.

VII CONSULTATION ON CONSTITUTIONAL AMENDMENTS WITH RESPECT TO ABORIGINAL RIGHTS MATTERS

The draft constitutional resolution that the Prime Minister released on the first day of the March '83 Constitutional Conference included a clause requiring that aboriginal groups be consulted before certain clauses of the constitution are amended. The draft s.35.1 said that "the government of Canada and the provincial governments are committed to the principle" of having a type of First Ministers' Conference before amending s.91(24) of the Constitution Act, 1867, or s.25 or Part IV of the Constitution Act, 1982. Why use the phrase "committed in principle?" Because the drafters believed that the phrase might overcome the fact that unanimous consent of the provinces is needed before the amending formula is changed. The thinking was as follows. If you say that governments are "committed in principle," the requirement will be understood as one merely binding in political morality, but not enforceable by an aggrieved aboriginal group in the ordinary Courts. If a requirement cannot be enforced in the Courts, it might not really count for the purposes of s.41(e) of the Constitution Act, 1982, the clause that requires unanimous consent to the amending formula; the consultation amendment could therefore succeed without the consent of Québec, or

indeed, two other provinces.

In my opinion, the federal proposal was misguided in two respects. First of all, as phrased, the amendment would have in fact been judicially enforceable. Secondly, even if it were drafted so as to be nonjusticiable, the unanimous consent of the provinces would still have been required before it could become law. In order to explain my position, it will be necessary to look more generally at the theory and practice of nonjusticiability. The inquiry will be useful beyond the present context, because proposals for nonjusticiable amendments to the constitution were frequent at the March '83 First Ministers' Conference, and a nonjusticiable proposal was the centrepiece of the federal government's March '84 First Ministers' Conference.

Because Courts have the last word on the construction of written constitutions, people often think that a norm is only part of the constitutional law of a state if it can be enforced by the Court. Courts are generally allowed the last word because of their impartiality; it is believed that it is better to have an impartial umpire of the federal-provincial division of powers under the Constitution Act, 1867, for example, than to let an interested party, such as the federal government, decide. Yet it is perfectly possible to allot the final power of adjudication over a constitutional norm to a body other than a Court. The long course of judicial decisions on the division of powers can cause us to forget that the framers of the Constitution Act, 1867 seemed to have provided for an alternative method of umpiring the division of powers. The federal executive was given (by s.90) the power to disallow provincial legislation and the Imperial executive (by s.56) the power to disallow federal legislation.

The federal power of disallowance was in fact used early in Confederation to suppress provincial legislation that was perceived as unconstitutional, although in other cases the objection was merely that the legislation was unwise (Forsey, 1974, 177-191; Hogg, 1977, 39; LaForest, 1965, 80-81). It may be that in some cases a non-judicial body is the best interpreter of a requirement of constitutional law, because that body has more expertise in the area, or has access to information that a Court does not. In The Crown v. Operation Dismantle (1984) 3 D.L.R. (4d) 193, the plaintiffs argued that the government's decision to allow cruise missile testing in Canada violated s.7 of the Canadian Charter of Rights and Freedoms. The section guarantees that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It was argued that because the defence decision was an exercise of the inherent power of the Crown (i.e., a royal prerogative power) it was immune from Charter review. Most judges of the federal Court of Appeal rejected this contention. Most, however, also held that the plaintiffs had no arguable case on the merits of s.7. Ryan J. took an interesting middle position. He refrained from deciding the last point. Instead, he held that whether cruise testing would ultimately be to the benefit or detriment of the personal security of Canadians involved a complex of military, diplomatic, technical, psychological and moral considerations - the evaluation of which was not manageable by a Court of law. The judgment of Ryan J. left open the possibility that the norm in s.7 applied to the government of Canada which was bound to make a good faith effort to apply it, even if a Court would not

second-guess its decision.

The last statement may seem a bit fanciful, because you'd expect Canadian governments to attempt to avoid irresponsibly endangering the physical survival of the population even without being told by the Constitution to do so.

Perhaps a more persuasive demonstration of how norms can be legally binding, but judicially unenforceable, is found in s.36 of the Constitution Act, 1982. Section 36 says:

36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to:

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

The convoluted language of s.36(1) was probably intended to make the subsection nonjusticiable, i.e., not subject to binding judicial interpretation. It is not clear that the language chosen accomplishes that goal. A Court might not accept that part of a document which describes itself as "the supreme law of Canada" (Constitution Act, 1982, s.52) has no legal effect. If it does

have a legal effect, the Court might then reason, the ordinary principle that Courts have the final say on what it means should apply. Nothing in the section expressly says that the final say in the matter lies with other branches of government. The Court might then lend a narrow construction to the opening section; perhaps interpreting it as a signal that the federal-provincial division of powers is not altered. Some day, therefore, someone in a community which lacks safe drinking water may win a judicial declaration that the province has failed to meet its duty to supply him with "essential public services."

It is likely, however, that the Courts will conclude that s.36(1) is non-justiciable. The Courts might support their interpretation of the language of s.36 with a number of jurisprudential considerations. American Courts, in the last few decades exceptionally activist, have deliberately refrained from entering into matters of wealth distribution and public service delivery; to do so, they have reasoned, would result in an excessive interference with the workings of majoritarian democracy. Canadian courts might be impressed with the anti-democratic objection, or at least believe that the framers of s.36 were. It is well known that the word "property" was deleted from the usual "life, liberty and property" formula when s.7 of the Charter was drafted, because of a fear that it would authorize the second-guessing of social welfare schemes engaged in by the U.S. Supreme Court in the beginning of the twentieth century (R. v. Holman (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.); Schwartz, 1983, 36). Courts might also attribute to the framers of s.36(1) the belief that Courts lack expertise in economic matters, or that economic issues require systematic understanding and reform, whereas courts can only

examine and respond to the narrow problems that particular lawsuits happen to raise. The nonjusticiability of s.36(1) does not mean it is not legally binding; only that governments and legislatures must authorize interpreters rather than the Courts. It might be argued once again, however, that s.36(1) is so vague and platitudinous that a government will always regard itself as complying with it.

Section 36(2), however, is not so bland that the federal government must perpetually be content to swallow it. Some federal government of the future may believe that it is better to encourage people to move to more prosperous regions of the country, rather than to subsidize their staying put; that the federal government should not obscure the effects of economic mismanagement by provincial governments; that the federal government should not incur the political costs of raising transfer payment money at the same time as provincial governments can improve their political standing by spending it; or that the federal spending power should be freely used to pressure provinces to comply with federal policies, even non-economic ones, such as encouraging official bilingualism - and that the power of the federal government is diminished if it is under a standing obligation to help out have-not provinces in any event. The federal government that has these beliefs will not be free to act upon them. Even if s.36(2) is not enforceable by Court action, the government will be legally bound to comply with it.

It is likely that the framers of s.36(2) intended it to be nonjusticiable. As with s.36(1), however, it is not clear that the language serves any such intention. Indeed, the argument for justiciability is stronger with s.36(2) than s.36(1). The former, unlike the latter, does not contain the "without

altering..." phrase, and that phrase does not grammatically extend into s.36(2). It could be argued that the jurisprudential reasons for making s.36(1) nonjusticiable apply with equal force to s.36(2) and therefore that the "without altering..." phrase should be assumed to extend to it; that it is excessively formalistic to let the period put an end to the effect of the "without altering..." phrase. A plausible reply to this, however, might point to several substantial differences between the subsections; subsection 36(2) is more narrow in its scope, so the anti-democratic object applies with less force; it is less platitudinous, so the possibility of its being breached is greater; it imposes a burden on one level of government for the benefit of others, rather than on a government for the benefit of its own electorate, so that the political costs of breaching it may be less. It could be argued that the word "principle" in subsection 36(2) implies that the norm is too vague and imprecise for judicial interpretation. To this it may be replied that there are many sections of the constitution that are imprecise; what does section 91(2) of the Constitution Act, 1867, mean when it gives the federal level of government power over "Trade and Commerce?" In the case of s.36(2), a Court could accept that the federal government has a certain amount of discretion to interpret this principle; but could not the Court also find in some egregious cases that the principle has clearly been unjustifiably violated?

I will now return to the starting point of this discussion - the federal proposal that governments commit themselves "in principle" to having a s.37 type of conference before amending certain sections of the constitution dealing with aboriginal peoples. The words "committed in principle" were probably intended by the federal drafters to establish the nonjusticiability of the

proposed amendment. It may have been thought that the "committed to the principle" language of s.36(2) of the Constitution Act, 1982, established a formula for making constitutional norms unenforceable. If s.36(2) is non-justiciable, however, it may be partly because of its conjunction with s.36(1), which contains a somewhat clearer formula for nonjusticiability ("without altering the legislative authority of Parliament or of the provincial legislatures, etc."). The federal proposal for an amendment on consultation does not appear in conjunction with any "without altering..." language. Furthermore, as has just been shown, s.36(2) may itself not be nonjusticiable. Looking at the federal proposal on consultation on its own terms, a Court might view "in principle" as indicating that the Prime Minister is to be allowed a broad discretion on which aboriginal organizations to invite, when the conference should be, what the format for discussions should be and so on. A Court might still be prepared to adjudge the constitution as having been violated, however, in egregious cases; for example, could a court not refuse to recognize an amendment concerning aboriginal rights if no conference were held at all? Or if no representatives of the Métis were invited? It would be surprising, indeed, if a Court did otherwise. In my opinion, the federal proposal on the constitution was enforceable by Court action. It therefore amounted to an amendment to the amending formula in s.38(2) of the Constitution Act, 1982, and as such clearly required unanimous provincial consent. Even if the federal proposed amendment had been nonjusticiable, however, it would still have imposed a legally binding restriction on the manner in which certain amendments to the constitution can be made. It would still have been an amendment to s.38(2) of the Constitution Act, 1982.

and would have required the unanimous consent of the provinces. Given that governments can be expected to comply with the law even if the Courts do not reproach them for doing otherwise, a nonjusticiable amendment to the amending formula will have practically the same effect as a justiciable amendment, and ought to require the same measure of governmental consent.

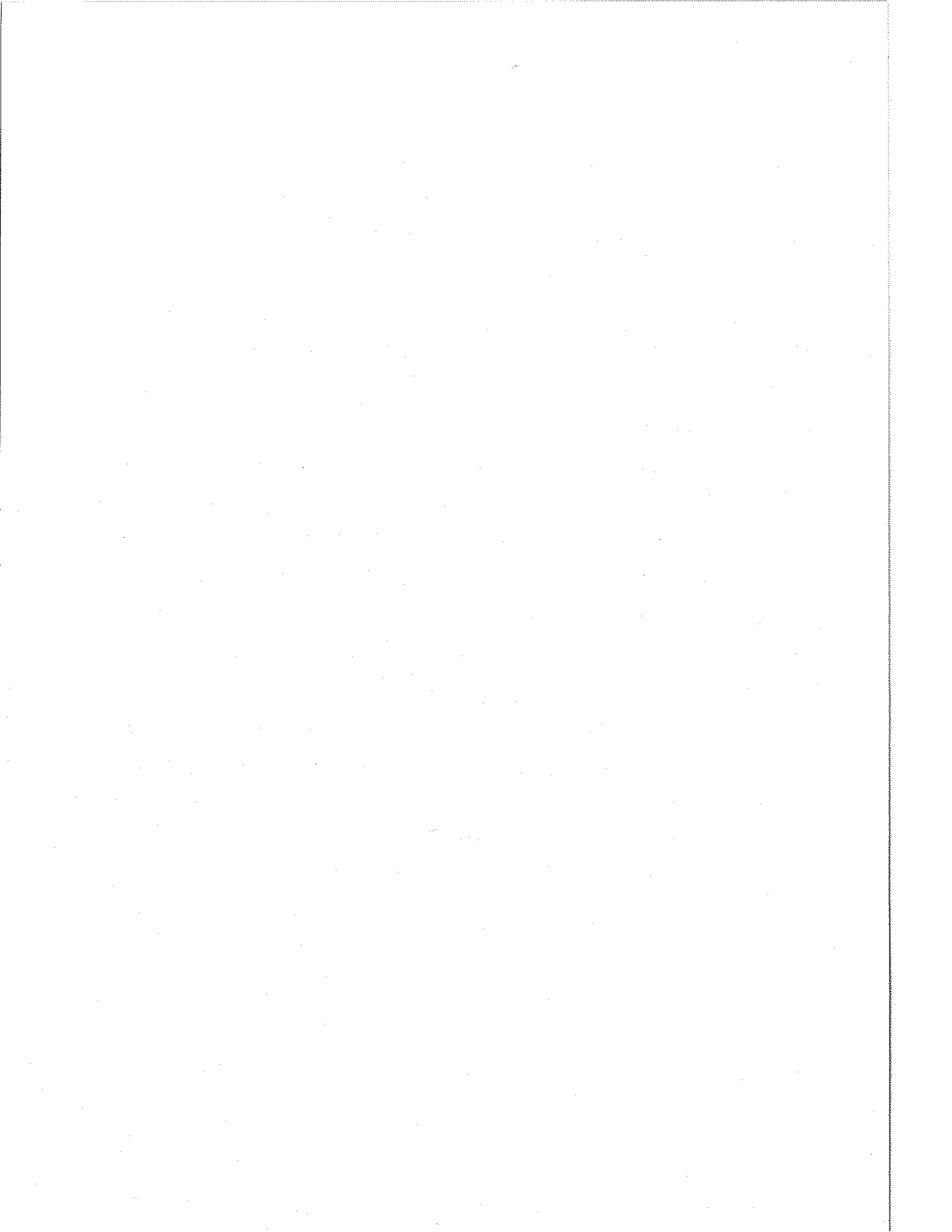
While no in-depth legal analyses were offered at the backroom ministerial meetings at the March '83 FMC, several delegations did express the view that the consultation clause would require unanimous consent, and these concerns were a major cause of the proposal's rejection. Before moving on, it is worth examining the difference between a nonjusticiable legal principle and a convention. The latter are norms created and interpreted by executive and legislative officials, rather than Courts. That a government must resign when it loses a vote of confidence in the House of Commons is a convention, but the opposition could not bring an action to enforce the resignation if the government continued in power. The Governor General might use his legal authority to ask another party to form a government, or to call an election, or he might leave it for the voters at the next election to determine the consequences of noncompliance with the convention. The distinction between conventions and legal norms was a central issue in the Patriation reference (Reference Re Amendment of the Constitution of Canada (1981), 128 D.L.R. (3d) 1). The Supreme Court of Canada in that case answered a number of reference questions (that is, requests for advisory opinions from federal or provincial governments) on whether a convention existed that required provincial consent before the federal government requested the British Parliament to amend the constitution of Canada on matters within provincial competence.

The federal government halted its unilateral patriation plans, and made one last try for a compromise agreement, in light of a majority Supreme Court of Canada decision that substantial provincial consent was required, by convention, though not by law. What difference did it make that the requirement was conventional, rather than legal? One difference was that the Courts would not have recognized the new constitution had it been brought about by illegal action, whereas the Courts would have respected the new legal state of affairs if it had been brought about by merely anti-conventional action. Another difference is that most observers regard it as a far more deplorable breach of political morality to break the law than a convention. Since political conventions are basically established by practice, they would be perpetually ensconced unless someone at some time contravened them. It is accepted that changed circumstances or ideas about political justice may require the development of new conventions. The federal government held open the possibility, even after the Supreme Court's ruling, that it might proceed unilaterally on Patriation of the constitution. It is very doubtful whether it would have threatened unilateral action had it been declared illegal, and not merely anti-conventional.

The violation of a nonjusticiable rule of constitutional law should be seen as equivalent in political morality to violating a justiciable rule of law, as opposed to contravening a convention. The fact that there is no impartial adjudicator to enforce the rule makes it more likely that it will in practice be violated. Most political officials, however, can be expected to make a good faith effort to abide by the supreme law of the land.

I have spoken about nonjusticiable principles as those that are not

subject to interpretation and enforcement by the Courts. In the United States, this definition is unproblematic, because American federal courts are constitutionally prohibited from giving advisory opinions; Article III, Constitution of the United States; see for example, Valley Forge College v. Americans United, 70 L.Ed. 2d 700 (1982). In Canada, however, reference cases are very common. The Patriation Reference established a precedent for the Supreme Court giving advisory opinions on a nonlegal matter - in that case, the content of a political convention. It is entirely possible that the Court will be prepared to give advisory opinions on the meaning of nonjusticiable sections of the constitution. The Court might, for example, answer a request from a province on whether a particular fiscal arrangement violated subsection 36(2) of the Constitution Act, 1982. (It will be assumed for present purposes that the subsection is in fact nonjusticiable.) Governments would not be bound to accept the Court's ruling on the meaning of a nonjusticiable section of the constitution, but would in practice find it politically difficult to maintain their own legal interpretation in light of a contrary opinion of the Supreme Court of Canada. Both the de jure and de facto differences between nonjusticiable and justiciable sections of the Canadian constitution may turn out to be minimal.



VIII MODERN LAND CLAIMS AGREEMENTS

It was the Inuit Committee on National Issues that first proposed, during the series of preparatory meetings, an amendment that would expressly characterize modern land claims as "treaties" for the purposes of s.35(1) of the Constitution Act, 1982. Inuit were involved in massive land claim negotiations in the Yukon and Northwest Territories, and some Inuit were already operating in Northern Quebec under the terms of the James Bay Agreement of 1975. Many of the nineteen sections of that agreement conclude with a statement that the section cannot be amended without the consent of the governments affected - including "the interested Native party." The agreement could not, of its own force, assure the Inuit or Cree subject to it that a legislature would not subsequently, in the exercise of its supremacy, violate or outright abrogate the agreement. There were some quasi-constitutional documents that might have protected the agreement to some extent. The Canadian Bill of Rights, Section 1(a) protects:

the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

There would be problems for a native group attempting to invalidate an

infringement of the agreement on the basis of section 1(a). It refers to the rights of the individual, and so might not apply to the rights of a collectivity (although I think protection of the former may require protection of the latter); violations of the agreement might not affect any interest enumerated in s.1(a); the clause may be essentially limited to requiring procedural fairness when rights are taken away, rather than prohibiting substantive unfairness. Even if a case could be made out, the Canadian Bill of Rights only applies to federal laws; and Parliament can override it by the simple expedient of stamping its legislation as "notwithstanding the Canadian Bill of Rights." There is a Québec Charter of Human Rights and Freedoms (R.S.Q. 1977, c.12), but it is very doubtful that it would protect the James Bay Agreement. Section 6 is less than reassuring in its pronouncement of everyone's right "to the peaceful enjoyment and free disposition of property, except to the extent provided by law", and the Legislature can override whatever protection the Québec Charter does afford by the expedient of expressly saying that it is doing so. Aboriginal persons now enjoy, no less than everyone else, the guarantees of the Canadian Charter of Rights and Freedoms. Unlike the Canadian Bill of Rights, however, the Canadian Charter does not expressly guarantee property rights (although they may be implicit in the guarantee of "security of the person" in s.7 of the Charter; see R. v. Fisherman's Wharf Ltd. (1982), 40 N.B.R. (2d) 42).

While the Charter is entrenched, in the sense that it cannot be revoked or amended except through the s.38 amending process (House of Commons and Senate plus two-thirds of the provinces with half the population), s.33 of the Charter permits Parliament or a provincial legislature to overcome many of its

specific guarantees by the traditional expedient of expressly admitting that it is doing so. Any particular override cannot have effect for more than five years, but there is nothing to keep Parliament or a legislature from reissuing the declaration over and over. The Canadian legal texts on universal human rights are too vague, too limited in scope, and too vulnerable to legislative override to ensure aboriginal groups that governments will duly honour the promises they make under land claims agreements.

Whether modern land claims agreements are constitutionally protected, therefore, depends primarily on the legal implications of s.35(1) of the Constitution Act, 1982. There were at least three causes for concern about whether it adequately protected the interests of aboriginal peoples.

(i) It was unclear whether "treaties" in s.35(1) included modern land claims agreements. Here's the argument for the negative. The older treaties were styled "treaties"; the modern land claims accords are almost always referred to as "settlements" or "agreements." The framers of s.35(1) chose a word associated with a particular period of aboriginal-Canadian relations. There are real differences in the nature of the old treaties and the modern land claims agreements. The former are fairly simple and concise; the latter tend to be massive documents containing all sorts of technical detail. The official publication of the James Bay Agreement by the Québec Government (English version) is 455 pages long. It is a real question whether it is wise to preclude governments from ever unilaterally varying any part of such a complex agreement. Another significant difference between the old treaties and the modern land claims agreements is their subject matter. Only the latter contain guarantees with respect to local self-government. Whether that

type of assurance should be constitutionally protected is debatable. The framers of s.35(1) would have had solid reasons for confining its scope to the simpler, more modest guarantees of the old treaties. The argument for the affirmative might go like this. Although there are some differences in form and substance between the old and new treaties, their essential character is the same. An aboriginal group permanently surrenders its claim to a traditional land base in return for monetary, proprietary or other types of compensation. Justice demands the enforcement of promises that have gained governments, and cost aboriginal groups, so much. Section 35(1) should be broadly construed to ensure that justice is done.

(ii) It was uncertain whether the "existing" treaty rights referred to in s.35(1) were only those surviving on April 17, 1982, or whether they also included treaty rights created from time to time thereafter. If the former interpretation was correct, then s.35(1) could protect the James Bay Agreement, but not the massive claims settlements that were being negotiated in the Yukon and Northwest Territories.

(iii) Even if (i) and (ii) were resolved in favour of aboriginal peoples, it would be unclear how much better off their legal position would be. Say that a particular land claims agreement is a s.35(1) treaty, what sort of constitutional protection does any treaty have under s.35(1)? Section 35(1) could have been understood as almost wholly ineffectual, as a strictly symbolic acknowledgement that certain rights exist; it could be understood as an unqualified guarantee that those rights will not be interfered with by legislatures; it could be understood as meaning something in between - perhaps that only justifiable interferences with the aboriginal and treaty rights are

legally valid.

The constitutional amendment that emerged from the March '83 Conference takes care of concerns (i) and (ii). It may have some effect on (iii); the prospect that contents of modern land claims agreements are s.35(1) treaties may worry some judges into adopting a more modest interpretation of the strength of the section in general. The amendment reads:

s.35(3) For greater certainty, in subsection (1), "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

The original Inuit Committee on National Issues draft had read:

s.35(3) For the purposes of this Part, treaty includes any claims settlement entered into before or after the coming into force of this Act.

The federal draft released on the morning of the second and final day of the March '83 First Ministers' Conference was worded a little differently:

35(3) For greater certainty, in subsection (1), "treaty rights" include rights that have been or may be acquired by way of land claims settlements.

The insertion of the word "land" restricted the potential scope of the section, but otherwise, the federal proposal probably had about the same effect as that of the Inuit Committee on National Issues. During the scramble at the Ministerial drafting session on the last day, the federal proposal was altered. Most importantly, the reference to rights that "have been ... acquired" was replaced by "rights that now exist." The former wording suggested that the protection of s.35(1) applied to rights under a treaty that

governments originally agreed to. Section 35(3) must be read in conjunction with the "existing" reference in s.35(1), so it is unlikely that s.35(3) would be judicially construed as reviving land claims agreements rights that had been completely annihilated by legislative action prior to April 17, 1982. The former language of s.35(3) might, however, have helped to persuade a judge that a land claims agreement right that was impaired by legislative action on April 17, 1982, but not totally negated, would be protected in its original unrestricted form. The revised wording - "rights that now exist" - does not seem to colour the meaning of "existing" in s.35(1) one way or the other. It should be appreciated that the change in the drafting of s.35(3) has implications that extend well beyond modern land claims agreements. The "for greater certainty" and "includes" phraseology of s.35(3) appears to tell us that s.35(3) is elucidating what s.35(1) meant all along. Whatever s.35(3) says about modern land claims agreements, therefore, likely holds for treaties in general.

The final wording of s.35(3) replaces "settlements" with "agreements." The word "agreement" was my idea. It had for many years been an aspiration of mine to be able to point to a section of the constitution with some pride of authorship. I would like to think that "agreement" was a purely enlightened contribution to the protection of the rights of aboriginal peoples; that I recommended the word because it would encompass a somewhat broader range of accords than would "settlement"; that it did not have the same negative connotation as "settlement" - of final renunciation by an aboriginal party. I would like to think all that, but I can't, because it isn't true. If memory serves, rather than self-serves in this case, I did have some of those

lofty considerations in mind in suggesting that the Manitoba delegation go along with the replacement of "settlement" by "agreement." But that alteration didn't happen in one step. It started off with one of the western delegations expressing the concern that the word "settlement" would encompass the scrip given to the Métis pursuant to the Manitoba Act, 1870 and the Dominion Lands Act, 1879. The Manitoba delegation suggested that concern could be accommodated by changing the wording to "settlement agreement." It was an aboriginal organization that suggested dropping the word "settlement" altogether.

It was contended earlier in this chapter that what s.35(3) tells us about land claims agreements holds for treaties in general. An aspect of s.35(3) common to all three drafts was that it encompassed rights under future land claims agreements. It thus removed the doubt - or maybe established for the first time - that in general, treaties entered into after April 17, 1982, receive whatever protection s.35(1) affords to its contents. Question: is an agreement on self-government a "treaty"? I have no recollection of anyone discussing this possibility at the March '83 Conference. In the fall of 1983 the Penner Report suggested that Indian First Nations governments be established by an agreement making process between the federal government and Indian governments. Could any of those agreements acquire the constitutional protection of s.35(3)? If the answer is yes, then by expanding the scope of s.35(1) to include post-April 17, 1982 agreements, s.35(3) may have provided a mechanism whereby Indian self-government in Canada can receive constitutional recognition and protection. Chapter XXI analyzes the legal position in some detail. For now, I will say only that the effect that s.35(3) may have

on the constitutional position of aboriginal self-government may be one of the most important outcomes of the March '83 Conference - even if that effect did not occur to many, or even any, of the participants.

IX CREATION OF NEW PROVINCES

It was proposed by the Northwest Territories that s.42(1)(f) of the Constitution Act, 1982 be repealed. The clause requires that the usual amending formula (consent of the House and Senate, and of at least two-thirds of the provinces containing at least 50% of the population) apply where a new province is to be established. Until 1982, it was possible for Parliament by ordinary legislation to establish new provinces out of territories forming part of the Dominion. The provinces of Saskatchewan and Alberta were established in this way, in 1905. If the Yukon and Northwest Territories (or any part of them) are to become provinces, they will have to obtain the formal approval of seven provincial legislatures. The Yukon and Northwest Territories have large percentages of native people. In 1982, in accordance with a referendum approving the measure, the federal government agreed in principle to divide the Northwest Territories into two jurisdictions (Jull, 1983). The southwest would be largely European, Indian and Métis in ethnic composition. The northeastern part of the Northwest Territories would consist almost entirely of Inuit. It will be called Nunavut.

That section 42(1)(f) was inserted into the Constitution Act, 1982, at the request of some of the provinces, gives the territorial governments some

grounds for concern about whether they will be able to obtain the necessary consent when the time comes. Provinces would not have requested the inclusion of 42(1)(f) if they had not seen a possible threat to their own interests. One cause for concern on the part of provinces when the Territories seek provincial status might be the resultant diminution of the revenue base of the federal government. The federal government is constitutionally duty bound, under s.36 of the Constitution Act, 1982, to "the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation." At the present time, the Northwest Territories and Yukon cost the federal government at least as much to run as it takes back in taxes and royalties. But perhaps the day will come when they become profitable assets in the hands of the federal government. If this were to happen, provincial status for the Territories would not necessarily reduce the revenue base of the federal government that much, because the federal government would retain its taxing power under s.91(3) of the Constitution Act, 1867 - a power the government has used to ensure that the rest of Canada benefits from resource development in Alberta. On the other hand, it is possible that an Arctic province would exercise its power over non-renewable resources in section 92A of the Constitution Act, 1867 to provide for slower resource development than the federal government would. A compromise that both Canada and the United States have used in connection with resource rich but population poor territory is to allow it to become a province or state, but allow the federal government to retain property ownership over much of the land. It was not until 1930 that ownership of natural

resources was transferred to the three Prairie provinces; Constitution Act, 1930.

Another concern on the part of some provinces might be the dilution of their ability to block unwanted constitutional change. Under s.38 of the Constitution Act, 1982, it takes the assent of two-thirds of the provinces with half the population of Canada to authorize most constitutional changes. The approval of a new province might well authorize an amendment that would otherwise have failed. The Territories have very small populations, however, and any province created out of them would do little to contribute to the necessary "fifty percent of the population" figure. Furthermore, s.38(2) of the Constitution Act, 1982 permits provinces to opt out of the application of unwanted constitutional change. Thus the admission of a new province would probably be seen as only a minor diminution of the constitutional voting power of existing provinces.

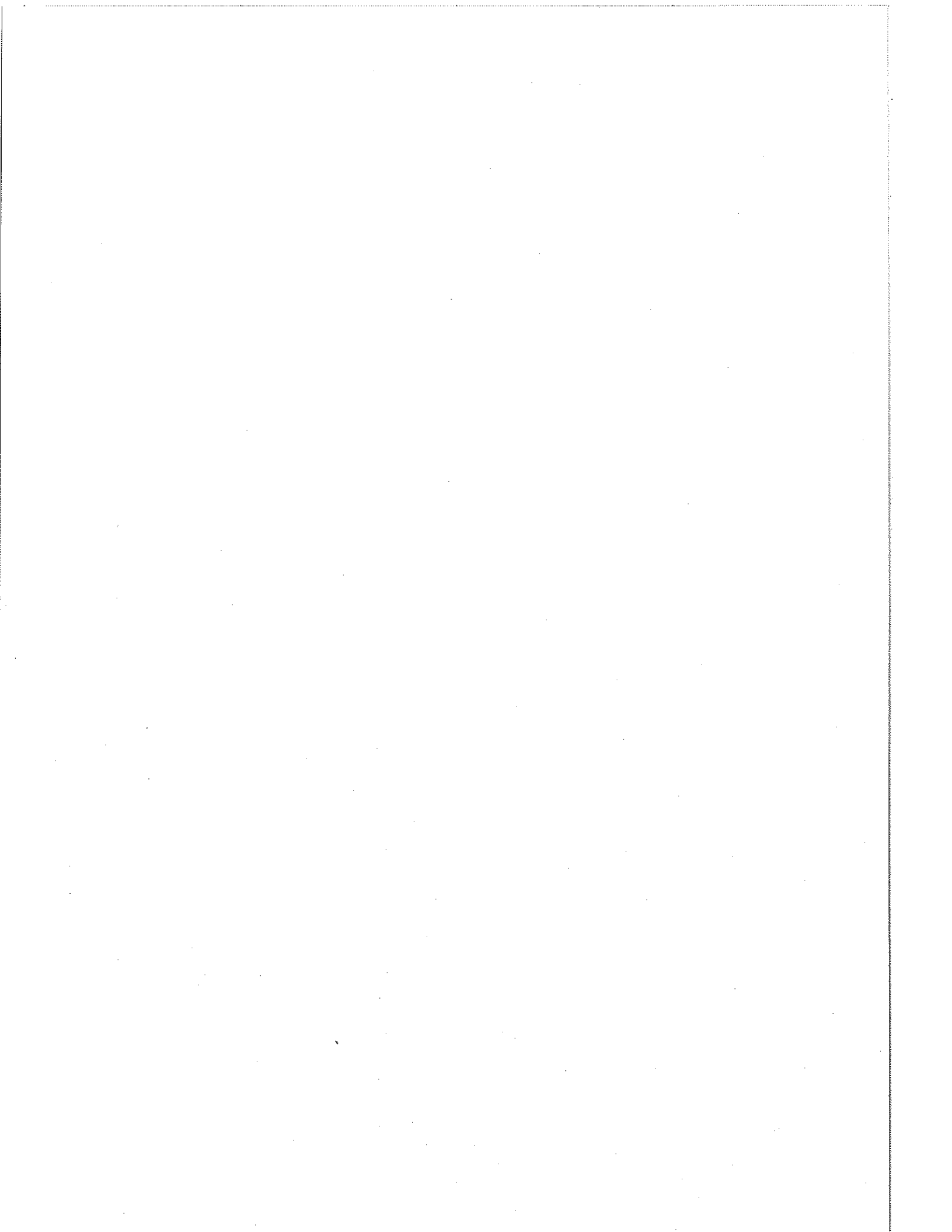
A related concern of the provinces might be that the addition of new provinces will reduce the power of existing provinces at nonconstitutional federal-provincial conferences. Given Kennan's law - that the difficulty of negotiations varies with the square of the number of participants - it will be 39.7% more difficult to obtain a consensus when there are twelve provinces rather than ten. This might enhance the federal ability to use lack of consensus as a justification for unilateral federal action. On the other hand, the federal government can always structure its proposals to ensure discord anyway. (It's a straightforward matter of combining a proposal of byzantine complexity with minimal opportunity for study). Provinces are not likely to be impressed by the analogy with discipleship enough to prefer being one of

twelve to being one of ten. Furthermore, the new provinces might be sufficiently dependent on federal subvention to generally behave as federal allies at conferences.

Should the Territories fear the reappearance of provincial dentism? (Dentism is to irredentism as patriation is to repatriation). In 1968, Premier W.A.C. Bennett proposed the extension of provincial boundaries northward to encompass the entire Arctic. When asked whether he would allow a referendum for Northerners on the proposal, Premier Bennett replied that none was held when British Columbia was added to Confederation - and if there had been one, B.C. probably wouldn't have joined (Globe & Mail, 14 Dec. 1968, p.1). Might the provinces one day reject an application by a northern Territory for provincehood, hoping that it will prefer annexation by a province to continued federal vassalage? Provinces realize that the people of the Territories would prefer limited autonomy under federal supervision to complete assimilation by a province. More importantly, the people of the Territories have made considerable progress in the last decade towards self-government, and it is now generally accepted that their wishes must be accorded some respect. Maybe not enough respect to oblige their desire for independent provincehood, but certainly enough to accept their distaste for annexation by an existing province.

It may have served a useful educational purpose for the Territories to remind the rest of Canada of the unusual obstacles they face to achieving provincehood. But there was no chance of success for the proposal to repeal s.42(1)(f) of the Constitution Act, 1982 and return control of admission of new provinces to Parliament. The refusal of Quebec to recognize the new

Constitution in itself would have blocked the repeal of s.42(1)(f), because amendments to Part V of the Constitution Act, 1982 (which deals with amendments) require unanimous provincial consent. Furthermore, the provinces, which had earlier insisted on the inclusion of s.42(1)(f), did not exhibit any desire to reverse themselves. The proposal to repeal s.42(1)(f) would have required the provinces to give carte blanche to the federal government with respect to the admission of northern Territories. It is much more likely that seven of them will agree to a particular proposal when the time comes than that all ten will agree to deny themselves any voice in the matter.



X THE 1983-84 PROCESS AND CONFERENCE

THE EARLY STAGES OF THE PREPARATORY PROCESS

Seven months passed after the March '83 Conference before another s.37 level meeting at an official level was held. It was not until a meeting on October 18 in Edmonton, which the federal invitation described as an "informal" meeting of officials, that the parties discussed an agenda for the 1983-84 First Ministers' Conference. In deference to the concerns of several delegations that the agenda be made more manageable than it had been the previous year, it was generally agreed that for 1983-84 "only" four items would be discussed:

1. Aboriginal self-government
 - Resourcing of self-government
 - Language and culture
2. Land base for the Metis
3. Treaty rights and Aboriginal title
4. Equality rights

The headings actually allowed for the discussion of almost every one of the subitems left over from the '83 First Ministers' Conference. Wine had been poured out of a dozen old bottles into four new vats. There was room in the

latter for some new concoctions to be added. Participants at the Edmonton meeting also discussed the combination of Deputy Ministerial and Ministerial level meetings that should be used in the preparatory process. The matter was left for further consideration at a Ministerial level meeting in Ottawa on November 2 and 3. The preparatory process might have been more productive if Ministerial level meetings had dominated lower level ones - both numerically and in terms of guiding the discussions. From the 1982-83 process, it could be expected that information and attitudes disclosed at officials level meetings would be inadequately transmitted up to higher echelons of government; that bureaucrats would cite their lack of authority to justify or rationalize their failure to substantively respond to aboriginal proposals; that some aboriginal organizations would be slack about working out a corporate position and ensuring that their speakers espoused it, rather than that of their own faction. At a meeting in Ottawa on November 2-3, 1984, it was nonetheless agreed that there would be working groups of officials formed for each of the agenda items.

The agenda headings from Edmonton were reworded slightly. When the subitems they contained were agreed upon, it was obvious that the agenda was no more limited than it had been the previous year. The new list:

1. Equality rights
2. Aboriginal Title and Aboriginal Rights, Treaties and Treaty Rights
 - (a) Aboriginal Title
 - (b) Aboriginal Rights
 - (c) Treaties
 - (d) Treaty Rights

- (e) Removal of "existing"
- (f) First Nations' Governments, including fiscal relations, jurisdiction, language, culture, education and religions.

3. Land and Resources

- (a) Metis Self-Identification
- (b) Metis Land Base
- (c) Metis Self-Government on Land Bases (including economic development, education, training, language and culture, services and resourcing of Metis government)
- (d) Resources on and off existing and future Metis lands
- (e) Existing Metis land base
- (f) Implementation

4. Aboriginal Self-Government

Metis Government outside Metis Lands:

- (a) Economic Development
- (b) Education and Training
- (c) Language and Culture
- (d) Services
- (e) Resourcing of Aboriginal Governments
- (f) Implementation

There was an understanding between a couple of the aboriginal organizations that the working groups would not take their focus from subject matter, but from the identity of the aboriginal organization which would play the lead role. The Assembly of First Nations concentrated their efforts on working group 2. Their representations were largely concerned with self-government,

which they maintained was an aboriginal right. Working group 3 was where the Metis National Council presented most of their expositions and proposals. By default, the Inuit Committee on National Issues and the Native Council of Canada were the most active aboriginal participants in working group 4.

Week-long sets of working group meetings were held in Winnipeg on November 14-18, 1983 and Ottawa, December 12-16. The chairman of each group (Ottawa bureaucrats, except for the Northwest Territorial public servant who chaired working group 3) supervised the preparation of summary reports for the benefit of Ministers. To finish off the discussions and assist the Chairman in preparing his report, an extra meeting of working group 3 was held in Edmonton on January 11-12. The summaries, some of which were admirably thorough and impartial, may have helped Ministers to appreciate the options outlined and proposals advanced at the officials level meeting. The upper limit of the usefulness of the summaries, of course, was defined by the productivity of the sessions on which they were based and the latter were subject to the predictable drawbacks of conferences at the officials level.

THE PENNER REPORT

In the middle of October, 1983, the Penner Report was released by the Special Committee (of the House of Commons) on Indian Self Government. It forcefully condemned the existing system of governing Indian communities. It cites and deplores the social, economic, educational and health conditions in which many Canadian Indians must live. The words of Chief David Ahenakew are quoted:

Current federal policies and institutions are operating to reinforce Indian poverty and dependence, rather than to promote self-sufficiency (Penner Report, 40).

The powers of band governments under the Indian Act are characterized as excessively circumscribed. Condemned also is the failure of the Indian Act to make any concessions to the diversity of Indian communities. Reproduced is the view of the Department of Indian Affairs and Northern Development that:

band governments are more like administrative arms of the Department of Indian Affairs than they are governments accountable to band members (Penner Report, 17).

The Penner Report acknowledges that the federal government spent large amounts of money on service delivery to Indian communities, and that in 1968 a decision was made to turn over administrative control to band governments. What actually happens, according to the Penner Report, is that band governments are required to devote inordinate amounts of time, money and energy to obtain funding for particular items in their budget at one end, and then justify the expenditures at the other. The effect is wasteful and demoralizing. There is a strongly held suspicion among Indians that the Department of Indian Affairs and Northern Development uses its control of funding to impose its own goals on Indian communities (Penner Report, 86). All this bureaucratic control is not only costly to Indian communities, but to the government itself; the accounting firm of Coopers & Lybrand concluded that one quarter of the funds that DIAND spent in 1981-82 on its Indian and Inuit Affairs Program went to departmental administration (Penner Report, 89). The key elements of the Penner Report's program for reform:

(i) Allow Indian bands to determine the constitutional structure of their own governments and form governments; each would decide whether to constitute a distinct Indian First Nation government or amalgamate in some way with certain other bands (Penner Report, recommendation 8).

(ii) The federal government would formally recognize an Indian First Nation government as long as the latter satisfied certain criteria, including:

- demonstrated support for the governmental structure by a majority of the people;
- an adequate system of accountability by the government to the community;
- a system for deciding who can belong to the community that is consistent with international standards of human rights (recommendation 11).

(iii) The general principle that should apply is that "full legislative and policy-making powers on matters affecting Indian people, and full control over the territory and resources within the boundaries of Indian lands, should be among the powers of Indian First Nations governments" (recommendation 20).

(iv) Parliament should authorize the federal government to enter into bilateral agreements with IFNG's whereby the exact scope of their law making authority would be determined (recommendation 21).

(v) The economic base of IFNG's would be expanded and made more secure by granting Indian communities full legal control over their lands to fully share in the revenues from the development of natural resources; and by settling their outstanding land claims (recommendations 24, 39, 40, 43).

(vi) While the Committee "hopes and expects" that the measures in (v) and "other long-term entrenched financial arrangements" would eventually provide IFNG's with adequate funding, the federal government should, in the interim, make transfer payments. These would be unconditional. Their quantum might be arrived at by having the federal government negotiate the subsidy the IFNG's would receive altogether. A formula based on population and need would determine what fraction of the total that any particular IFNG would be entitled to (recommendation 32).

The Penner Report's critique of existing arrangements often hit on the mark, and there is much that is attractive in the alternative that it sketches. The Report's usefulness as a program for reform is limited by its

approach; it often reads more like an advocate's brief for Indian political autonomy than a balanced appraisal of how that goal can and should be reconciled with the interests of the larger Canadian community. The latter will be concerned about direct threats to its material welfare, such as pollution and wildlife depletion caused by activities on the reserve; yet the Report one-sidedly recommends that:

On their own lands, Indian First Nation governments would have the power to regulate traditional pursuits such as hunting, fishing and trapping without outside interference. On lands covered by treaties or aboriginal claims, such powers would be exercised jointly with other governments (Penner Report, 66).

The Report does not acknowledge that federal and provincial governments must be concerned that the exemption of reserves from all sorts of regulatory schemes - fiscal, labour relations, and so on - might undermine their general effectiveness.

Because many members of Indian communities move to and remain in the cities of Canada, some Canadian governments might find that their self-interest urges them to impose certain educational standards on Indian First Nations governments. Other governments may pursue the same goal for principled, rather than self-regarding reasons; they might believe that the individual is primary and that he should be made aware of many possible ways of life and equipped with the knowledge to successfully travel many of them. The legitimacy of imposed schooling standards is not considered at all by the Penner Report. Nor is the appropriateness of insisting on other social standards of the larger Canadian community - such as universal access to free medical care or universal participation in the system of progressive income

taxation. Should the Canadian Charter of Rights and Freedoms, binding on other public authorities in Canada, apply to Indian First Nation governments? The Report does not say. It vaguely suggests that there be "some system of accountability by the government to the people concerned" (Penner Report, recommendation 11) which "might include... the protection of individual and collective rights" (Penner Report, 58).

The somewhat partial and advocatory nature of the Report may well have made it more, rather than less, effective as a proposal for reform. As written, the Report is easy to understand and hard to ignore. Had it been a more thorough judicious attempt to reconcile Indian political autonomy with the legitimate interests and concerns of the larger community, the main thrust of the report might have been obscured and its inspirational power diminished. The Report points governments in a direction in which they ought to move: it imparts to their journey some impetus. There will be plenty of people with philosophical, ideological or self-interested motivations for helping a government stop before it's gone too far.

If accommodation must be reached between Indian political autonomy and the interests of the larger community, how are its terms to be established? Almost a year after the Penner Report, the federal government introduced a draft "Act relating to self-government for Indian Nations" (Bill C-52; An Act relating to self-government for Indian nations, First Reading, June 29, 1984). It uses a variety of mechanisms. In some cases a substantive standard would be directly imposed by the legislation itself; section 28 requires that the laws of Indian nations conform to the Canadian Charter of Rights and Freedoms and international human rights covenants signed by the government

of Canada. While some heads of legislative authority are granted by s.16 to all Indian First Nation governments, others, enumerated in s.18, are left to bilateral negotiations between the Indian Nation and the federal government. Limitations may be attached to powers thereby granted. The federal government could, for example, insist on compliance with conservation laws as a condition of granting a First Nation legislative authority over the wildlife on its lands. Other limitations are left to the regulatory discretion of cabinet; s.3(1)(a) contemplates the promulgation of rules concerning the recognition of Indian First Nations that would supplement the general criteria stated by s.6; the law of a First Nation could be disallowed at any time by the federal Cabinet (s.31). Section 6(vii) makes it a condition of the recognition of an IFNG that its constitution:

(vii) identify or provide for an independent system for reviewing executive decisions of the government of the Indian Nation on grounds that they are illegal, unreasonable or unfair.

It would be prudent to wait until negotiations with Indian First Nations governments begin before the federal government decides whether and in what areas limitations ought to be imposed. Hearing the ambitions and supporting arguments of Indian First Nations will give a government a better understanding of what issues about limitations must be addressed and how these issues should be resolved. Both participatory democracy and the interests of First Nations would be served in many cases, however, by a decision at some point to lay before Parliament limitations on First Nations government that the federal government considers just and expedient. The constraints could be enacted as directly binding on First Nations governments, framed instead as

instructions to federal negotiations, or left in the form of a statement of government intentions. Any of these measures would facilitate public scrutiny and discussion. They would also assist First Nations. There can be no real doubt that the federal government will end up imposing, one way or another, certain limitations on Indian First Nations. It may assist a First Nation, in planning both its policy and political initiatives, to learn from an authoritative pronouncement that a constraint on its political autonomy exists, rather than infer the constraint from a lengthy series of negotiations with the federal government or decisions by the federal Cabinet. Public disclosure may also be more fair to First Nations; it will help assure them that like cases are treated alike. It will also help ensure them ample opportunity to criticize unwarranted constraints, and agitate for their modification or withdrawal.

Another forum that might be appropriate for developing guidelines on self-government agreements is the s.37 process. The principles might be embodied in a binding constitutional amendment; but a nonjusticiable amendment, or an altogether nonlegal political accord, is more likely to be the repository. Regular communication between bilateral negotiations (or trilateral - including the government of the province where the aboriginal community is situated) and the s.37 process might benefit both. Participants in the s.37 process could develop their understanding of the practical implications of self-government by learning how it is being implemented in particular communities. In return they might provide the negotiations with a formally expressed set of principles or suggestions, or at the very least, the odd bit of useful advice. Because the s.37 process involves First Ministers' meetings, its monitoring of the bilateral negotiations would bring to the latter public and

media attention which might stimulate their progress. A countervailing risk that must be considered is that the infusion of opinion and criticism from the fourteen or fifteen s.37 participants who would ordinarily not be involved could impede or disrupt local negotiations. The timing and detail of the reporting relationship would have to be modulated to strike a balance between edification and deadification.

THE 1984 MINISTERIAL MEETINGS AND FIRST MINISTERS' CONFERENCE: FOCUS ON SELF-GOVERNMENT

The release of the Penner Report helped to give the preparatory process - and ultimately the First Ministers' Conference - a central focus: aboriginal self-government. Pursuant to a standing rule of the House of Commons, the Committee requested that the government issue a response to the Report within 120 days of its release. The possibility was raised that the government would prepare draft legislation to implement the Report some time after that. The Penner Report recommended immediate legislative changes to establish bilateral negotiations, but it also called - without much precision - for the right of Indian peoples to self-government to be "expressly stated and entrenched in the Constitution of Canada." There was widespread interest in how the federal government would respond on the constitutional plane. The concentration of attention on self-government was facilitated by the working group meetings along organization lines, rather than subject. The Assembly of First Nations could speak to political autonomy in working group 2, the Métis National Council in working group 3, the Inuit Committee on National

Issues and the Native Council of Canada in groups 2, 3 and especially 4. It made a good deal of organizational sense to tackle self-government early in the s.37 process, because any political authority granted to aboriginal groups could be used by them to secure or advance their other interests - cultural, economic, conservational and so on.

Was it a downside of the focus on self-government that attention was diverted from issues that required early resolution if they were to be settled by political negotiations rather than legal adjudication - issues such as the meaning of "existing" and "recognized and affirmed" in s.35 of the Constitution Act, 1982? On January 11, 1983, a Saskatchewan provincial court judge ruled in R. v. Bear, [1983] 2 C.N.L.R. 123 that s.35 did not restore to treaties their original force if they had been restricted by statute on April 17, 1982. A more detailed ruling to the same effect was delivered by the Saskatchewan Court of Queen's Bench on July 22, 1983. For all anyone knew in the fall of 1983 and Spring of 1984 these cases were on the way to the Supreme Court of Canada, where a definitive ruling on the general implications of "existing" would be made. It is highly unlikely that agreement would have been made on defining the structure and content of s.35 even if there had not been a primary emphasis on self-government. The Assembly of First Nations attempted to convey a broad, conceptual understanding of aboriginal title, leaving it for later, perhaps, to attempt to negotiate precise legal formulae. The federal government and most of the provinces made no effort to propose policy directions, let alone drafting suggestions, for the clarification of s.35. The concentration of attention on self-government did not divert water from a river that was rushing forward.

At the Ministerial Meeting in Yellowknife, the Minister of Justice said that the government was willing to consider two approaches to the constitutional implementation of self-government. One alternative would be for s.37 participants to agree on a statement of principles that would guide those charged with organizing institutions of self-government for aboriginal peoples. These principles would not be legally binding, but would give direction to officials such as those involved in community based negotiations with respect to self-government agreements. The second alternative would be "accelerated negotiations." In between the 1984 and 1985 conferences, representative aboriginal communities would be chosen for intensive negotiations about and early implementation of self-government. The experience with these communities would be reported to the '85 Conference. Participants would then draw on what had been learned to determine what aspects of self-government should be entrenched in the Constitution.

The statement of principles proposal was not elaborated by the federal government at Yellowknife or at the subsequent preparatory meetings. The federal government did not release its reply to the Penner Report until March 5 - three days before the beginning of the First Ministers' Conference. If the act of publication did not lag far behind the completion of internal deliberations, the federal government was ill positioned in late January (and even February) of 1984 to propose general guidelines on self-government with respect to all three aboriginal peoples. If the Yellowknife meeting was early in the federal government's process of reflection, it was late in the lead-up process to the First Ministers' Conference; very late for the purposes of working out an adequately well-understood set of substantial guidelines on

self-government.

The considerable merit of establishing a process of communications between community based negotiations and the s.37 process has been discussed earlier in this chapter. If the federal Liberals had remained in power for the year after the March '84 conference; if the government had acted quickly after the Conference to select communities and establish ground rules for negotiations; if it had devoted a good deal of bureaucratic and political attention to them; if it had helped the communities obtain and pay for the necessary technical expertise; then, the "accelerated negotiations" proposal might have been a major contribution to the s.37 process and the development of aboriginal self-government in Canada. One year is not a long time for an experiment in self-government, but an intensive negotiating effort might have provided real edification to s.37 participants. The federal government, however, could not or did not supply the necessary assurances that all the above-cited "ifs" would become realities. It was generally (and correctly) believed that the governing party would not retain power after the next election. At preparatory meetings subsequent to Yellowknife the federal government did not supply the sort of detail about the proposal to create any confidence that even if it did remain in power, it would be able to implement its proposal with any promptness. "Accelerated negotiations" were seen by some aboriginal delegates as amounting to protracted delay; they wanted constitutional guarantees to emanate from the March '84 Conference, and did not want to see a failure to do so attributed to the need to await the results of an unpromising experiment.

An officials level meeting was held in Toronto on February 11, 1984, to

discuss the two options proposed by the federal government in Yellowknife. Two days later, again in Toronto, a final Ministerial level meeting was held to discuss the subject matter of working groups 3 and 4. The federal government proposed that one more working group meeting be held, to clarify the range of options available to First Ministers. This last preparatory meeting, in Victoria, was marked by the strong rejection of the "accelerated negotiations" proposal from most of the aboriginal organizations, and the inability of the federal government to satisfy requests from both the provinces and the aboriginal organizations that it specify what proposal it would lay before the First Ministers' Conference.

The centrepiece of the March '84 Conference turned out to be the federal government's draft constitutional amendment on aboriginal self-government. Was what was put on the table a nutritious and mild offering rejected by a finicky company, or was it shiny waxed fruit? Chapter XVIII will attempt an answer. The discussion of the first day focussed on federal responsibility for the Métis, a subject that will be examined in Chapters XVI and XVII.

It was apparent on the first afternoon that the federal government's proposal on self-government would not be generally accepted. The federal government took no initiative on arranging backroom meetings of officials and Ministers to work on draft amendments or an accord, but, at the end of the first afternoon, did go along with the suggestion of several delegations that they be held. There was some support among the provinces for proposals by Nova Scotia and Manitoba for a modest political accord, one that would principally serve to recognize the appropriateness of enhanced political authority for aboriginal peoples, and committing the parties to intensive study and

negotiation on that issue over the coming year. Some provinces, however, objected to the proposal on the grounds that a political accord was unnecessary, and that it might actually be deleterious to the process by prematurely narrowing the areas open for discussion. The aboriginal organizations were generally uninterested in a political accord that did not contain any constitutional amendments. They did not want to help give the Conference the aura of success where it had failed to produce any constitutional reform.

There was actually an amendment that seemed innocuous enough to have been agreed upon. It was advanced at the Conference by, among others, Manitoba, Nova Scotia and the Inuit Committee on National Issues. The Manitoba draft read:

s.35(5) Any person or group whose rights, as guaranteed by this Part, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. Any application may be brought by a representative aboriginal organization or governmental entity.

All three drafts drew on the analogy of s.24(1) of the Charter of Rights and Freedoms:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court consider appropriate and just in the circumstances.

Even without a remedies clause, an aboriginal person or group should generally be able to litigate a perceived infringement on his or their aboriginal or treaty rights. An action for a judicial declaration of rights would be possible, for example, even without an express remedies clause.

The inclusion of a clause would have confirmed that the substantive parts of s.35 are to be taken seriously by the Courts; the existence of a remedies clause would discourage judges from viewing s.35 as merely symbolic. Most participants at the March '84 Conference undoubtedly accepted that s.35 has at least some legal bite to it; had they considered a remedies clause on the merits, they would probably not have balked at its acceptance merely because the clause might have added a little to the legal credibility of s.35.

The last sentence of the Manitoba proposal - which is not contained in the Nova Scotia or Inuit Committee on National Issue drafts - might have troubled some delegations. It is not clear what a "representative aboriginal organization or governmental entity" means, although the Courts might not have had too much difficulty applying the phrase to a concrete case. The last line of the Manitoba proposal might have been objectionable to some provinces because it acknowledges aboriginal political units. That proposition should actually not have been particularly alarming to anyone, because there already are lots of aboriginal political units recognized in law - from band governments to the national organizations that are invited to s.37 Conferences. In any event, if the participants could have agreed to the even more innocuous Inuit Committee on National Issues or Nova Scotia drafts, Manitoba would surely not have objected.

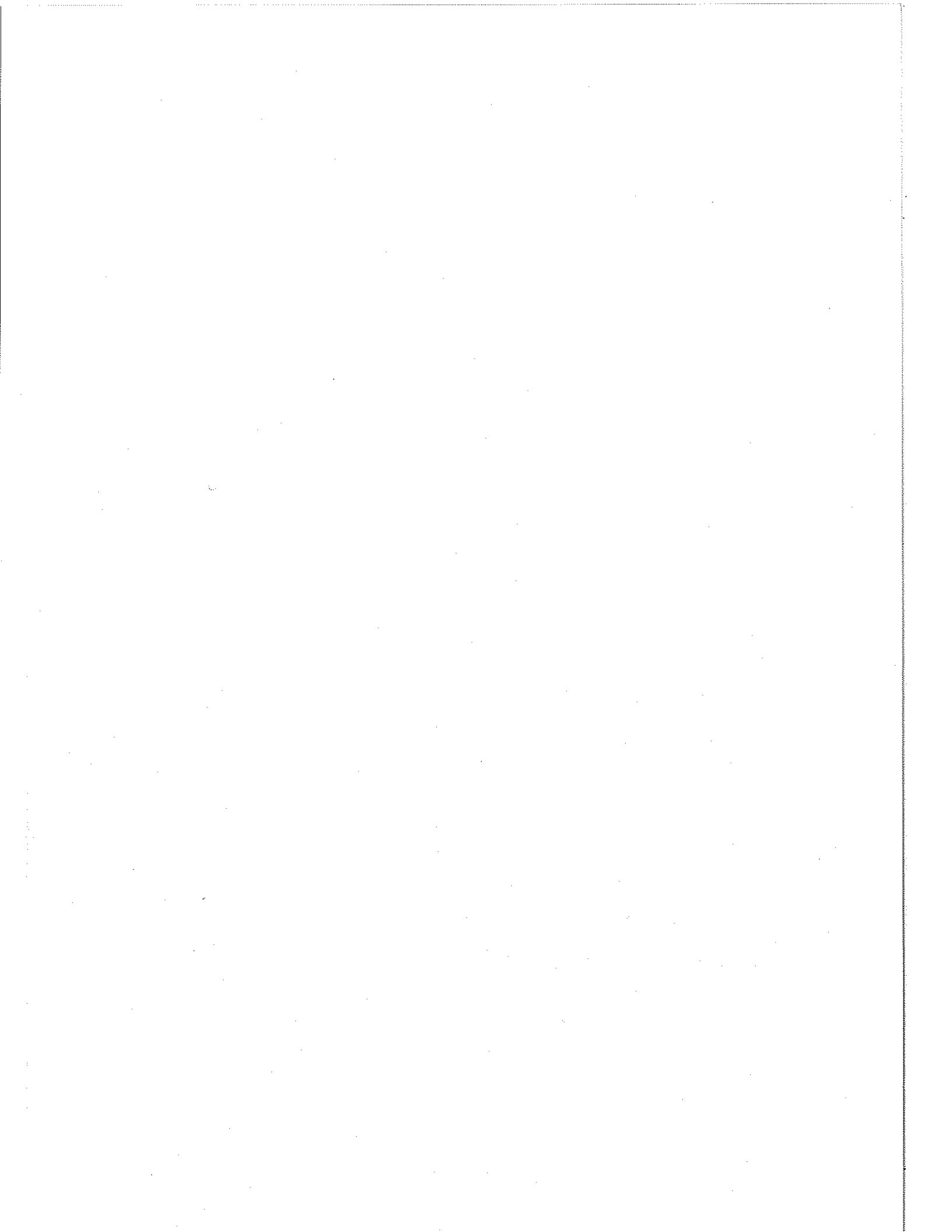
The main virtue of the agreement on the remedies clause, from the aboriginal peoples' point of view, would not have been legal but political. Had the March '84 Conference generated even a minor constitutional amendment, there would have been a bolstering of the political and psychological expectations that when First Ministers meet, they bring about concrete

constitutional reform. It may be that a desire to break those expectations had a role in the death (through apparent indifferences, rather than active opposition) of the remedies clause. The failure of the March '84 Conference to produce any concrete constitutional results may have been a turning point in the whole process. It will make it easier for those who are so minded to take the approach that the aim of the process is now to discuss options that will be finally accepted or disposed of at the 1987 Conference. The steady production of amendments along the way to the 1987 First Ministers' Conference might have ended up producing far greater constitutional gains than a final flurry of decisions.

Much of the second day of the Conference was spent on the discussion of whether the sexual equality clause agreed to at the previous First Ministers' Conference should be amended or replaced. The concern of some aboriginal organizations and governments - most notably, New Brunswick - was the clause slapped together at the end of the previous First Ministers' Conference was not broad enough in scope; that it did not speak to sexual equality with respect to the statutory rights of aboriginal peoples, but was confined in its application to aboriginal and treaty rights. A backroom Ministerial level meeting was called on the final afternoon to consider a revised clause. It may be recalled from Chapter III that s.35(4), the sexual equality clause agreed to at the March '83 First Ministers' Conference, may have had the side-effect of strengthening s.35(1), the section that generally recognizes and affirms aboriginal and treaty rights. Section 35(4) may imply that not only sexual equality is guaranteed, but that aboriginal and treaty rights are guaranteed. The federal government proposed at the final back-

room meeting a clause that would have expanded the scope of s.35(4), but removed the possible implication that aboriginal and treaty rights, as opposed to sexual equality, are constitutionally guaranteed. There appeared to be a real chance that a clause based on the federal draft would be accepted at the end of the March '84 Conference. There had been no outright dissents from the final version at the backroom meeting, and three of the four aboriginal organizations went along with it on the floor of the First Ministers' Session. Their acceptance of the amendment is attributable, among other things, to the limited opportunity for delegations to explore and explain to their membership the legal implications of the last minute proposal. The Assembly of First Nations, however, was alerted in time to the legal risks of the amendment, and gave them as the basis for their rejection of the clause when their opinion was solicited. Prime Minister Trudeau accepted their opposition to that particular draft as precluding its adoption. As mentioned in Chapter III, the little understood story of the drafting wars over s.35(4) warrants a much fuller treatment than can be provided here, and perhaps I shall attempt it another day.

The March '84 Conference thus ended without agreeing to an amendment that might have harmed the legal position of aboriginal peoples. It did not even come close to agreement on an amendment that might have enhanced their legal prospects. Nor was there any agreement on a work plan to facilitate concrete legal progress at future meetings.



XI FEDERAL-PROVINCIAL PROBLEMS AND ABORIGINAL PEOPLES

In 1968, Maclean's Magazine ran a contest in which readers were invited to submit their candidates for the national Canadian joke. The winning entry, submitted by a dozen different readers from places as far apart as Princeton, British Columbia and Dartmouth, Nova Scotia, went like this. A professor asks an international group of students to write an essay on elephants. The American writes on the economic uses of the elephants; the French student on its amorous life; the German on its military potential; the Canadian's essay is "Elephants: a federal or provincial responsibility?" (Maclean's, November, 1968, 111).

The federal-provincial division of powers and responsibilities is an issue that has arisen in many different contexts in the aboriginal rights process. The federal government's draft 1984 Accord included a commitment that "... Canadian governments would collaborate in a review of all aspects of [program delivery] to the aboriginal peoples..." One of these objectives would be the

clarification of the federal and provincial responsibility for programs and services provided to the aboriginal peoples of Canada, having regard to the existing and potential roles of aboriginal governments.

The Métis National Council pressed at the March '84 Conference the contention that the Métis should be expressly included under s.91(24) of the Constitution Act, 1867 (which now gives the federal level of government jurisdiction over Indians and lands reserved for the Indians). In a strange departure from their usual jurisdictional acquisitiveness, the federal government opposed the expansion of its legislative authority, and some of the provinces were agreeable. Manitoba's statement of principles called for a recognition of federal fiscal responsibility for all aboriginal peoples, including the Metis, thus distinguishing fiscal from legislative responsibility. A notable feature of the federal government's reply to the Penner Report, and its draft constitutional amendment on self-government at the March '84 FMC, is a rejection of the Penner Report's suggestion that the federal government oust the application of provincial law to Indians on reserves, and commence strictly bilateral negotiations with Indians. At first glance, it seems odd for a government led by Prime Minister Trudeau to be so solicitous of the role of provinces in Confederation. Federal-provincial concerns have been prominent not only in the substantive proposals that have emerged from the s.37 discussions, but in discussions over process. It will be recalled that the AFN initially refused to participate in preparatory meetings for the 1983 Conference, on the grounds that it wanted to deal bilaterally with the federal government.

Because it comes up in so many different contexts, I believe it would be useful to devote several sections of this study to the federal-provincial division of authority and responsibilities with respect to Indians. In the course of doing so, the questions raised in the previous paragraph will be addressed, and some of the apparently eccentric behaviour of governments

and aboriginal organizations explained.

In order to deal in an orderly fashion with the federal-provincial dimension of the section 37 process, it is helpful to distinguish among four different kinds of questions. First of all, there is legislative authority: can a government pass laws which regulate aboriginal peoples as such? That a government has jurisdiction over a subject matter does not oblige it to exercise that authority for the benefit of the group of people, or indeed, restrain it from doing them harm by passing repressive or destructive laws. Thus a second issue, distinct from legislative authority, is legislative responsibility. Indian organizations often argue that the federal government has a special "trust responsibility" towards Indians that obliges it to preserve and protect aboriginal lands and resources (Green, 1976-77). In contemporary federalism, many programs established and financed under provincial law are financed in large part by the federal government. A longstanding controversy in Canadian constitutional law is the extent to which the federal authority's funding of programs, conditionally or with strings attached, exceeds federal authority to directly legislate. Thus the third and fourth questions concerning federal-provincial relations and aboriginal peoples are those of fiscal authority and fiscal responsibility.

FISCAL RESPONSIBILITY

The question of fiscal authority can be disposed of straight away. The federal government often contributes financially with respect to activities that are not within its legislative jurisdiction. The constitutional question that has

been much discussed by academics, but very little by Courts, is whether there are any constitutional limits with respect to such grants. Some constitutional scholars have argued that there is no limit to the onerousness and detail of the conditions that the federal government may attach to its grants; that the federal government is free to give money to whomever it likes and on whatever terms it sees fit (Hogg, 1977, 71). In his academic days, Pierre Trudeau attacked the legality and propriety of federal grants to universities; according to Trudeau, the practice undermined the principle of democratic responsibility (federal governments are elected to do federal things) and undercuts the ability of provinces to set their own policies (because the federal government has to raise taxes for its spending, thereby making it financially or politically impossible for the province to raise its own taxes) (Trudeau, 1968, 79). The federal power to dispense money is supported by s.91(1A) of the Constitution Act, 1867, which gives Parliament authority over "The Public Debt and Property." One of the few cases commenting on the spending power, however, has insisted that that power be read against the heads of power allotted to the provinces; in the Unemployment Insurance Case, Lord Atkin said:

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied ... [But] it by no means follows that any legislation which disposes of [a fund] is necessarily within Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s.92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to .. encroach upon the classes of subject which are reserved to Provincial competence (A.G. Can. v. A.G. Ont. (Unemployment Insurance), [1937] A.C. 355, 366 (P.C.)).

My own view is that the federal spending power, if uncabined, could be used to seriously disrupt the balance of federal and provincial authority; that federal governments are tempted to make excessive use of the power, because special federal grants programs may maximize the gratitude governments receive and patronage they can dispense; and that the Courts ought to develop doctrines limiting the use of the power. The task will require imagination and subtlety, but is surely possible. Factors the Courts could take into account in determining whether a use of the federal spending power is appropriate include the intrusiveness and detail of the conditions attached to the spending and the extent to which provincial governments participate in the policy making and administrative processes connected with the spending. One factor that should weigh in favour of federal authority to spend is that the grant is related to a national economic strategy. Another favourable consideration should be that the spending is related to a national scheme of distributive justice; the federal government is given the general power to tax under s.91(3) of the Constitution Act, 1867, and the federal government should be able to accomplish that end by varying what it pays out as well as what it takes in.

Even if the Courts do constrain the federal spending power, however, it is very unlikely that they will do so in a way that would significantly hamper federal attempts to financially assist the economic and social development of aboriginal peoples. There are many levers of legislative authority that Parliament can use with respect to all aboriginal peoples, quite apart from the spending power - most obviously and importantly s.91(24) of the Constitution Act, 1867, ("Indians, and Lands Reserved for the Indians") - but also

taxation, banks, interprovincial undertakings, agriculture, trade and commerce. The case that should warrant the most concern is that of the Métis, who may not be within federal jurisdiction under s.91(24). Even if they are not, other heads of federal power and the federal spending power (even if somewhat limited) permit the federal government to carry out almost all of its financially benevolent aims.

FEDERAL AND PROVINCIAL LEGISLATIVE AUTHORITY

Section 91(24) of the Constitution Act, 1867, gives the Parliament of Canada exclusive legislative authority over "Indians, and Lands reserved for the Indians." Parliament has used this authority to pass an Indian Act which defines, creates a registry for, and regulates the activities of status Indians - those who are registered or entitled to be registered under the Indian Act. There are people who are Indian by ancestry, culture and self-conception but still do not have Indian status under federal law. Some people have lost their status by voluntary "enfranchisement" (see s.109 and 12(1)(a)(iii) of the Indian Act), others by operation of federal law; as has already been discussed, under s.12(1)(b) of the Indian Act an Indian woman who marries a non-status man automatically loses her own status. Conversely, it is possible to be non-Indian in almost every respect and still be a status Indian; for example, a white woman who marries a status Indian man automatically acquires status under s.11(1)(f) of the Indian Act. In some parts of Canada, almost all of the Indian bands are parties to treaties with the Crown, and the terms "status Indian" and "treaty Indians" are used by most people

interchangeably. Not all status Indians, however, are treaty Indians; most of the bands in British Columbia, for example, have never entered into treaties with the Crown, and yet the members of these bands are registered under the Indian Act.

Under the Indian Act Parliament has not encompassed all the people that Parliament could specially regulate under s.91(24) of the Constitution Act, 1867. There is no doubt, for example, that Parliament could have always maintained the status of Indian women who married white men. It has also been held by the Supreme Court of Canada, in a reference case, Re Eskimo, [1939] S.C.R. 104, that Inuit are subject to Parliament's authority under s.91(24). The Métis National Council and Native Council of Canada have both argued that Métis are, or at least should be, included under s.91(24) (see Chapters XVI and XVII).

The basic constitutional doctrine is that provincial laws of general application can apply to federal matters provided that they do not threaten to disrupt a federal activity and they do not conflict with any federal law in the area (Multiple Access Ltd. v. McCutcheon, (1982) 138 D.L.R. (3d) 1 (S.C.C.)). (If the federal law is intended by Parliament to be exhaustive of the governmental regulation of the field the provincial law would be viewed as conflicting.) Both the Courts and the academic commentators, however, should be skeptical of general constitutional doctrines that develop distinct approaches to different heads of federal power. Doctrines developed with respect to federal authority over "Banking, Incorporation of Banks, and the Issue of Paper Money" may have limited validity when applied to jurisdiction over "Indians, and Lands reserved for the Indians." This caution should be

kept in mind when considering the many questions still unsettled about the application of provincial laws to Indians.

The Supreme Court of Canada has settled a number of issues in a series of decisions which began about a decade ago. Chief Justice Laskin, in his dissenting opinion, took the view in Cardinal v. A.G. Alberta, [1974] S.C.R. 695, that Indian reserves are "enclaves" with their own social, economic and political structures, and as such, fall exclusively within federal legislative authority under s.91(24). The only way that the provincial laws may apply to them, he held, is by the operation of s.88 of the Indian Act, which says:

Subject to the terms of any treaty or any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

According to Laskin, s.88 "referentially incorporates" provincial laws, that is, a provincial law does not apply to Indians of its own force; rather, its terms become federal law and apply to Indians as such.

A number of Supreme Court of Canada judgments have contradicted the assertions of Mr. Justice Laskin. In Cardinal itself, Martland J. in his majority opinion rejected the enclave theory in terms; s.91(24) did not "define areas within a province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded" ([1974] S.C.R. 695, 703). According to him, "provincial legislation enacted under a heading of s.92 does not necessarily become invalid because it affects something which is subject to federal legislation" ([1974] S.C.R. 695, 703). The test for

Martland J. was whether the law was "in relation to" a s.92 subject matter ([1974] S.C.R. 703). Martland J. was able to dispose of the actual issue in the Cardinal case on the basis of s.12 of the Natural Resources Transfer Agreement (confirmed by the Constitution Act, 1930) that authorized the application of an Alberta provincial hunting law to the activities of an Indian on a reserve.

In Natural Parents v. Superintendent of Child Welfare (1975), 60 D.L.R. (3d) 148, the Supreme Court of Canada had to decide whether it was constitutionally valid for a Court, pursuant to the Adoption Act of British Columbia, to authorize the adoption of an Indian child by non-Indian parents. The child had been apprehended under the Protection of Children Act after it arrived in a hospital at seven weeks of age so injured and neglected that it was near death. For seven years after that, the foster parents who now wished to adopt the child had taken care of it. Chief Justice Laskin held that a law which could result in the adoption of an Indian child against the wishes of his natural parents "would be to touch 'Indian-ness,' to strike at a relationship integral to a matter outside of provincial competence" (60 D.L.R. (3d) 148, 154). The adoption order was nonetheless valid, according to Laskin C.J.C., because the British Columbia Act was referentially incorporated under s.88 of the Indian Act. It did not conflict with any provision of the Indian Act; s.10(4a) of the British Columbia Adoption Act said that an adoption order did not affect the Indian status of a child, and in this it agreed with subparagraph 11(1)(d)(ii) of the Indian Act, which gave status to "the legitimate child" of a status Indian - regardless, held Laskin C.J.C., of whether the child was subsequently adopted.

Martland J. found that the provincial law applied of its own force. Section 88 did not referentially incorporate provincially made laws; it simply declared that they applied of their own force. Martland J. then took the same approach as Laskin C.J.C. to hold that in the case before him the terms of the Adoption Act did not conflict with or address a matter already provided for by the Indian Act. Three judges (including Ritchie J. in a separate judgment) agreed with Martland J. on the effect of s.88. Beetz J. did not find it necessary to split the four-four tie on the s.88 issue. He did not even find it necessary to determine whether the child maintained his status. Whether it did or didn't, held Beetz J., was determined by the Indian Act; if it did, it was because the Indian Act held the loss of status to be the consequence of adoption, and not because of anything the provincial law said. Indeed, s.10(4a) of the Adoption Act was invalid, according to Beetz J., because the effect of status of adoption was not a matter for provincial law to determine one way or the other. Adoption was not a matter provided for by the Indian Act, and he held there was no possible conflict between the provincial law and the Indian Act, because the latter determined the effect of adoption on status. He could "not be persuaded that laws general in their application ought to be interpreted so as not to extend all their advantages to a child because he is an Indian" (60 D.L.R. (3d) 148, 173). Therefore, whatever view be taken of s.88, the adoption order was valid.

In Four B Manufacturing Ltd. v. United Garment Workers of America (1979) 102 D.L.R. (3d) 385, Beetz J. (concurrent with by six other judges) upheld the application of provincial labour relations laws to the shoe manufacturing operation on an Indian reserve. The business was owned by a pri-

vate corporation, the shareholders of which were Indians, and was heavily funded by the federal government. Nonetheless, held Beetz J., shoe manufacturing is not a federal type of activity, and so not subject to the federal Labour Relations Act. In response to the argument that not only did Indians, but Indians on a reserve, own the corporation, Beetz J. responded:

... this submission is an attempt to revive the enclave theory of the reserves in a modified version; provincial laws would not apply to Indians on reserves, although they might apply to others. The enclave theory has been rejected by this Court in Cardinal...and I see no reason to revive it even in a limited form. Section 91(24) of the British North America Act, 1867, assigns jurisdiction to Parliament over two distinct subject matters, Indians and lands reserved for the Indians, not Indians on lands reserved for the Indians. The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced because it is exercised over Indians on a reserve any more than it is weakened because it is exercised over Indians off a reserve. ... (102 D.L.R. (3d) 385, 398).

Once again Beetz J. refrained from deciding the precise implications of s.88; his judgment leaves no doubt, however, that the terms of provincial laws of general application could apply, to Indians, reserves, and Indians on reserves, without the assistance of federal incorporation. (It is not a merely scholastic question whether a provincial law which could have operated of its own force has been transformed by s.88 into federal law. The Canadian Bill of Rights applies only to federal law. The authority of federal officials to prosecute may depend on whether a law is federal or provincial). Laskin C.J.C. dissented. He was prepared to admit that there was authority in the case for holding that provincial laws could apply to Indians off reserves, and non-Indians on reserves but not to the activities of Indians on reserves.

The phrase "provincial laws of general application" has occurred repeatedly in the foregoing discussion. Some bewildering problems arise when a province attempts to single out Indians for special - including especially favourable - treatment. A province might wish to give Indians preferred treatment when they apply for admission to law school; the University of Manitoba sets aside several places for native students who would not be admitted under the usual competitive standards. These places are set aside quite apart from those available under the "special consideration" program, whereby any person lacking in formal qualifications can ask to be admitted on the basis of his unusual experience or potential. A province might wish to set aside places for Indians, or natives generally, in its public service, or legislatively require private employers to do so. In Manitoba, status Indians have requested that a special child welfare agency operated by status Indians be given jurisdiction over Indian children in the province but off reserves.

The case law in other areas suggests that a province can single out subjects of federal jurisdiction for special treatment, provided that its purpose in doing so is fundamentally rooted in provincial concerns. In Bank of Toronto v. Lambe (1887) 12 A.C. 575, for example, the Privy Council held that a Quebec statute could tax banks (over whom the federal government has jurisdiction under sections 91(15) and 91(16) of the Constitution Act, 1867). Other companies were taxed according to other criteria, which does not appear in any obvious way to have been any less onerous, but rather adapted to the different natures of the companies concerned. Railways were taxed on the basis of miles of railway worked, telegraph companies on the number of offices and so on. It could be fairly supposed that banks were singled out

because of their special characteristics for provincial tax purposes, and not because the province wanted to regulate banking activity, let alone interfere with it. The Privy Council found the legislation to be in relation to "Direct Taxation within the Province" (s.92(2) of the Constitution Act, 1867).

It is possible to argue that some passages in the series of cases mentioned imply that a province cannot single out Indians, whether for beneficial or detrimental purpose. In Four B Mr. Justice Beetz said a "similar reasoning [that provincial laws of general application apply to persons with respect to whom Parliament has exclusive legislative jurisdiction] must prevail with respect to the application of provincial laws to Indians, as long as such laws do not single out Indians nor purport to regulate them qua Indians" (102 D.L.R. (3d) 385, 398). Mr. Justice Beetz does not indicate that a province could single out Indians if it was doing so for their own benefit. The Four B case, however, did not involve "singling out," let alone singling out for special purposes; Mr. Justice Beetz's general statement, therefore, cannot be taken as authoritatively settling questions that never arose in the case itself, and which Mr. Justice Beetz may not have even considered. One commentator has flatly asserted that "a provincial law which is intended to benefit Indians (or more neutrally, does not have either the purpose or effect of impairing status) will be declared invalid if it purports to affect Indians specifically" (Hughes, 1983). The only support offered for this generalization is "dicta" in the Natural Parents case. The latter does not adequately support the general proposition. An attempt by a province to determine whether a person remains an "Indian" for the purposes of federal law is an especially serious interference with federal Indian policy. It hardly follows that all attempts by

a province to single out Indians for beneficial treatment are invalid. It should be noted that all the opinions in Natural Parents expressly observed that the provincial legislation extended rights to Indian children. A sensitivity to whether provincial legislation helps or hinders Indians may be a prominent feature of future Supreme Court rulings in the area under discussion.

It might be argued that whether legislation is good or bad for third parties should be irrelevant to the determination of whether it is within or outside provincial jurisdiction. As mentioned earlier, however, general constitutional doctrine with respect to federal undertakings, services and businesses is that provincial laws must not threaten to interfere with or dismember them. An example of a provincial law that singled out Indians in a way that interfered with their activities was s.49 of the Wildlife Act of Manitoba (R.S.M. 1970, C.W. 140), which purported to characterize a number of areas as "occupied Crown lands to which Indians do not have a right of access." Its purpose was obviously to preclude Indians from relying on their constitutional right to hunt on "unoccupied Crown lands to which Indians have a right of access," under paragraph 13 of the Manitoba Natural Resources Act. Dickson J. found in R. v. Sutherland [1980] 2 S.C.R. 451, that section 49 had "effect only against Indians and its sole purpose is to limit or obliterate a right Indians would otherwise enjoy" ([1980] 2 S.C.R. 451, 455). He had "no doubt" that it was unconstitutional. (He went on, however, to quote Mr. Justice Beetz's more general dictum in Four B, that provincial laws cannot single out or regulate Indians qua Indians). To say that a province cannot single out Indians for adverse treatment does not

necessarily imply that it can single them out for favourable treatment. The Courts may, however, take the view that s.91(24) cases should not be seen as more than simple, routine federal and provincial division of powers problems. They may find implicit in s.91(24) the constitutional value that Canada has some duty to protect and enhance the interests of Indian peoples, and that s.91(24) gives the federal government jurisdiction to permit the federal government to help them, and prevent local governments from harming them. In Re Eskimo Duff C.J. quoted this passage from the Senate Debates on the Constitution Act, 1867:

Resolved that upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provisions for the protection of the Indian Tribes, whose interest and well being are involved in the transfer ([1939] S.C.R. 104, 108).

With the foregoing in mind, Canadian courts may allow provinces considerable leeway to single out Indians for favourable treatment.

Now let us examine examples of provincial "singling out." One, mentioned earlier, is the University of Manitoba Law School's special admission program for native students. It would probably be constitutional for a university to include native students as one of a number of groups which receive special treatment. (Constitutional not only on a division of powers ground, but on human rights grounds; the guarantee of equality in s.15(1) of the Charter of Rights and Freedoms does not "Preclude...any law, program or activity that has as its subject the amelioration of disadvantaged groups." I would hope that the Courts will take "preclude" as meaning "does not necessarily prevent", and continue to exercise some scrutiny over affirmative

action programs on human rights grounds, and strike down those that are especially unfair to other individuals or groups. (The reference to "any law," however, may be taken by Courts as a practically absolute prohibition on evaluating the justice of programs intended to benefit disadvantaged groups.) It is probably not "singling out" native Canadians as a group when a province includes them as one of a number of groups selected for special treatment. But what if native Canadians constitute the only group singled out for special treatment? In some cases, that might still be permissible. If native-police relations are worse than those involving any other group in a city, a decision to hire extra native police officers is probably within provincial jurisdiction as a matter of the "administration of justice" (s.92(14) of the Constitution Act, 1867); the law can be viewed primarily as a matter of police policy, rather than native policy.

The University of Manitoba special admissions program is rather problematic, however, in that its purpose is not to deal with the legal underservicing of the native community, but to enhance the career prospects of native students regardless of what area of the law they will practice in. In essence, a decision has been made to give native students special treatment because of a special claim in political justice they are perceived as having by virtue of their aboriginality. It could be argued at this point that the Faculty of Law is dealing primarily with distributive justice to Indians, as aboriginal peoples, rather than the native aspect of legal services. It may weigh in favour of the validity of the program that it is addressed to natives generally, not just Indians; Métis students are also eligible for special consideration. If Métis are not Indians for the purposes of s.91(24), then their

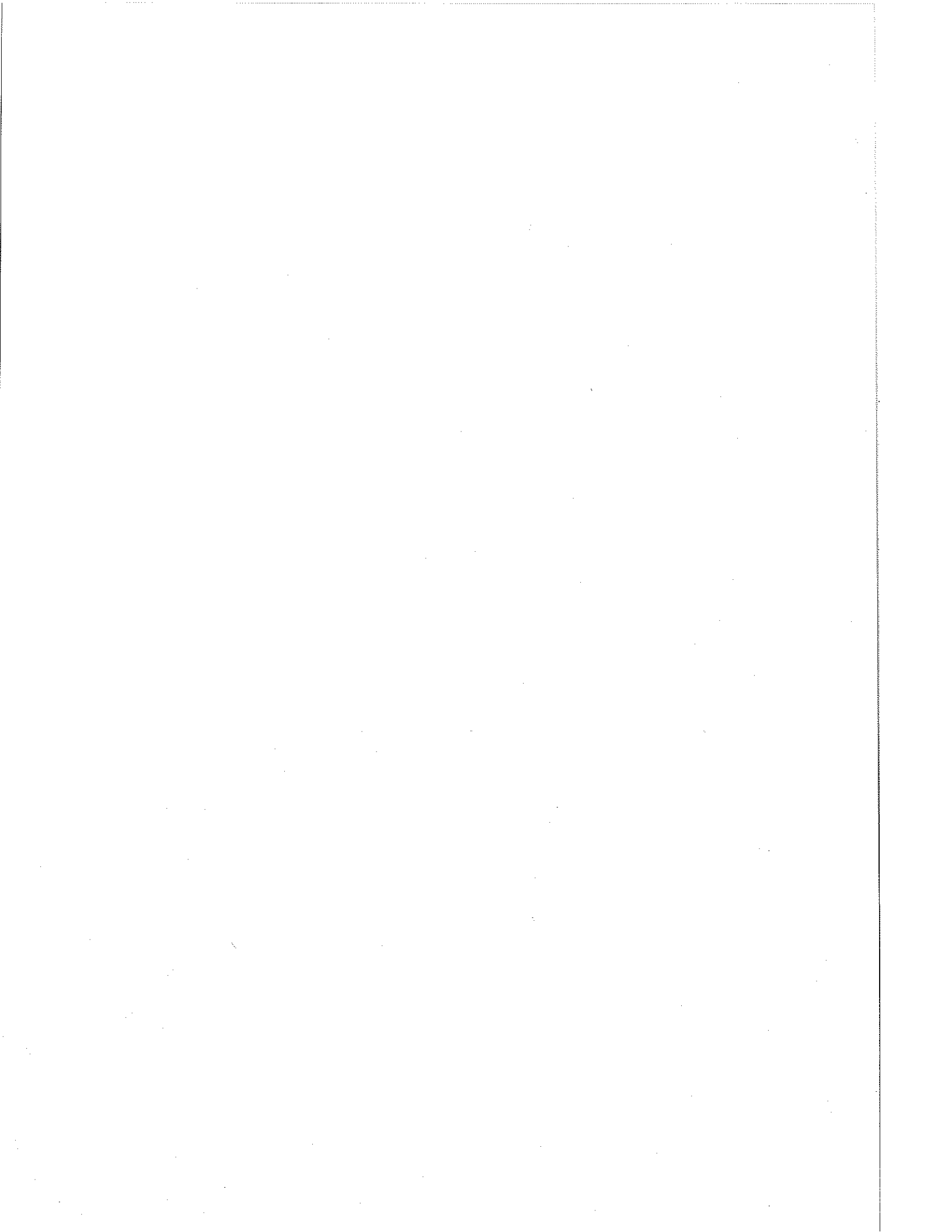
inclusion in the group singled out for special treatment may be sufficient to meet the objection that a province is legislating with respect to a matter within exclusive federal jurisdiction.

Another problem mentioned earlier is that of granting a status Indian operated child welfare service jurisdiction over status Indian children in the city. It can be argued with some merit that it could not be an infringement of exclusive jurisdiction over Indians to grant more autonomy to Indians; that provinces are prohibited from meddling in Indian affairs, not from leaving them to manage their own affairs. Against this it might be argued that the establishment and jurisdiction of Indian governments and agencies is a matter of Indian policy that should be left to Parliament alone. The case for federal jurisdiction is particularly strong where an Indian agency does not fit into a provincial scheme which accommodates other groups. On the general issue of the s.91-s.92 validity of provincial singling out, my view is that Courts should take a permissive attitude. It would not be wise to insist that Parliament intervene whenever adjustments are required to provincial regimes because of the special circumstances of aboriginal peoples. It would not be practical, for one thing, to expect Parliament to consider and act with respect to programs operated by ten different provincial governments. A blanket prohibition on provincial singling out could be used as an excuse for uninvited, as well as provincially requested, interventions by Parliament in programs better left to provincial management. It may not be desirable that a distant central government determine how the Regina police force adjusts to the social problems created by the influx of Indians off the reserves. One can imagine a scenario in which a federal government believes that Indians should be

treated on a basis of strict equality with other Canadians and finds it objectionable that provincial governments run reverse discrimination programs for Indians. In such a scenario, provincial action would effectively be undermining an overall federal strategy towards Indians. If the federal policy were officially declared in some form, even short of legislation, the Courts could rightly be less permissive with respect to the provincial singling out actions. Right now, however, the federal government is more enthusiastic than any of the provinces about giving special treatment to minority groups in general, and has accepted the principle that Indians should be allowed some special status. This present attitude is in contrast with that manifested in the 1969 federal White Paper on Indian policy, which was imbued with a sense that discrimination by governments only encourages invidious discrimination by other individuals, and that Indians should not have special status (White paper, 1969, 3).

Much of the discussion in this section has been about the extent to which provincial law can apply to Indians and lands reserved for the Indians. The obverse problem is the extent to which federal law which deals with Indians can intrude on provincial areas of jurisdiction. Suppose that the federal government required that law schools have special admissions programs for Indians; a province might then argue with some force that its jurisdiction over education was being invaded. (Is it possible that neither Parliament nor a provincial legislature could legislate on its own a certain measure with respect to Indians, because each would be invading the other's jurisdiction? Actually, yes. Sometimes Parliament and a provincial legislature must enact dovetailing pieces of legislation in order to achieve a regulatory

aim; The King v. Eastern Terminal Elevator Co.; [1925] S.C.R. 434.) In the last few decades, the Supreme Court of Canada has tended to find areas of activity to be within the reach of both federal and provincial governments, and many schemes intended for the benefit of First Nations may be found to be within the enacting power of both. A Court might fortify its decision to follow this trend by observing that inasmuch as the federal government is able to, and has, established special status and living conditions for Indians, it should be construed as having ample jurisdiction to assist Indians in integrating into and succeeding in society at large. The limits of federal jurisdiction over Indians in areas of provincial jurisdiction is not likely to be much controverted, however, because federal action with respect to Indians on their traditional land bases will probably focus on providing special social welfare assistance, or setting up autonomous Indian institutions, rather than directly intruding into provincial regulatory schemes or organizations.



XII FEDERAL RESPONSIBILITY FOR INDIANS

A leading study of the constitutional position of Canadian Indians observes that there is great flexibility for a province to legislate with respect to Indians and Indian lands where Parliament has not acted, and concludes with the assertion:

Accepting that constitutional "responsibility" for Indians is the correlative of legislative authority, there is little justification for the reluctance not infrequently expressed by provincial governments to undertake the same responsibility for ameliorating the condition of Indians and Indian settlements that these governments would assume for non-Indians and non-Indian communities (Lysyk, 1967, 553).

The passage is quoted because it provokes, without answering, just about all the relevant questions about federal and provincial responsibility for Indians. "Responsibility" is surrounded by scare quotes; does it refer to a merely political duty, a nonjusticiable legal one, or one enforceable in a Court? Is it generally true that "responsibility" is the correlative of "legislative authority?" Is it true in the case of s.91(24)? Is it lawful for a federal or provincial government to provide a lower level of services for Indians and Indian communities than it provides to other people? Could it be argued that the failure to provide equal services is a violation of "equality

before the law" contained in Canadian fundamental human rights documents, including the Bill of Rights and the Charter of Rights and Freedoms? Is it legitimate in any sense for a province to refrain from providing equal services to Indians or Indian communities on the basis that a province should not be bound to remedy a dereliction of federal duty? Can the dereliction of federal duty be used as a defence to charges that the province is denying Indians the equal protection or benefit of the law? There has been very little systematic study of these questions in the academic literature; discussion almost always focuses on the division of authority, rather than responsibility. (The essay about elephants by the Canadian student may have been entitled "Elephants - a federal or provincial responsibility" - but it was probably about whether Parliament or provincial legislatures can exercise authority over elephants, and completely indifferent to whether either level of government was bound to promote the elephants' well-being).

The first thing to be considered is whether under s.91(24) alone, Canadian governments and legislatures are under a legal obligation, justiciable or nonjusticiable, to use their heads of legislative authority to do good. With respect to their heads of legislative authority, Courts have taken the view that the principle of legislative supremacy applies. According to that principle, inherited from Great Britain, legislatures are competent to do whatever they please about whatever issue they care to address. The wisdom or justice of legislative action or inaction is not to be second-guessed by Courts. The latter are obliged to enforce the law as they find it. It was considered antidemocratic for nonelected Courts to second-guess legislatures. The principles of legislative supremacy arose in the aftermath of the English

Civil War, and may be viewed as partly reflecting a sense that civil order requires that somebody be unequivocally in charge of things, as well as reflecting an enhanced respect for democracy. English political thought at the time of the emergence of Parliament's supremacy was more concerned with liberty than with social equality. Locke's Two Treatises on Civil Government argued that no man should be deprived of his life, liberty or property; it did not insist that anyone should provide his brother with any of the above. The middle class won the English Civil War, and its principal contest was with excessively burdensome authority that characterized the Middle Ages, not with ensuring equal material welfare for all. The English Bill of Rights protected people from arbitrary governmental action; it did not assure them of any assistance. It is entirely consistent with the pattern just identified that English constitutional law was insistent on democratic control when taxes had to be raised; a principle of English constitutionalism, later adapted and inserted in Canada's own constitution, is that taxing bills must originate in the House of Commons rather than the Senate (Constitution Act, 1867, s.53). For a Court to order a legislature to provide for someone's welfare would be more offensive to classic English juridical thought than a Court's striking down legislation it considers unjust. The former action would be seen as more threatening to the democratic principle, because the scope for anti-democratic action is far greater if a Court can survey the social world and order things be set right than if the Court is confined to gainsaying what a legislature has done wrong. To sum up, a head of legislative authority under the Constitution Act, 1867 is, generally speaking, legal authorization to exercise power; it allows legislatures to do things to people, but does not

require them to do anything for people.

There is really no arguable case that Parliament has under s. 91(24) alone a special duty to promote the welfare of Indians that is directly enforceable in the Courts. Canadian Courts held in a number of cases prior to the coming into force of s.35 of the Constitution Act, 1982, that Parliament had the authority to pass laws which contravened treaties and interfered with aboriginal rights (Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, [1980] 1 F.C. 518 (F.C.T.D.); R. v. Derriksen (1977), 71 D.L.R. (3d) 1959 (S.C.C.)). Given that Courts would have enforced federal laws that violated the rights of aboriginal peoples, the Courts would certainly not have ordered Parliament to act to promote their social welfare. Parliament, and provincial legislatures as well, are now bound to respect aboriginal and treaty rights under s.35(1) of the Constitution Act, 1982; the diminution of their ability to violate positive rights of Indians, however, cannot be taken to imply the imposition of a Court enforceable duty to act for their welfare.

A fairly good case can be made that the federal government has a non-justiciable constitutional duty to protect the land and treaty rights of Indians, but the constitutional materials do not provide much support for the assertion that the federal government is bound to actively promote the social welfare of Indians through transfer payments and the delivery of programs and services. To begin with, it is a fair surmise that the original purpose of allowing federal legislative jurisdiction over Indians was to facilitate the protection of their rights in the face of local pressures. An important feature of the history of settler-Indian relations in the Anglo-Canadian world

is that central governments have been more inclined to protect Indian land and treaty rights than have local governments. The reasons are fairly obvious. Encroachment on Indian land and treaty rights may be highly advantageous to local settlers, who tend to be able to exert enormous pressure on local administrators. A central government may not even be politically responsible to local settlers (as in the case of England and the American colonies prior to 1776), or if it is, may feel their political demands as only a relatively small pressure among many. It is thus insulated from the political pressures that would prevent it from doing justice to Indians. At times, the more beneficent policy of central government has not been based on the dictates of political conscience, but on a different perception of self-interest; the English government may have been especially solicitous of Indian land rights to the point of passing the Royal Proclamation of 1763 not only because of its sense of justice, but also because unfair and fraudulent land deals with Indians in North America were causing unrest among Indians that threatened British military security on the continent. Still, a genuine concern for fair play towards Indians to some extent accounted for the relatively decent behavior that some central governments sometimes exhibited with respect to Indians.

It is consistent with the pattern just described that at the time of the American Revolution almost all of the Indian tribes allied with the Crown against the colonists. The Crown had increasingly acted as their protectors against encroachment by the colonists. After Independence, the new states agreed that the only way to prevent war with Indians caused by local land grabs was to give to Congress authority over commerce and treaty-making

with Indians; U.S. Constitution Art. 1, s. 8, cl. 3, Article II, s. 2. cl. 2 (Canby, 1981, 10). Given that historical pattern, it may be inferred that a major purpose in giving Parliament jurisdiction over Indians was to permit it to protect Indian land and treaty rights; MacDonald J.A. in his dissenting opinion in R. v. Morley, [1932] 2 W.W.R. 193, 218, stated that the "reservation of federal jurisdiction in respect of 'Indians and Lands reserved for the Indians' has a definite object in view, viz., safeguarding the rights and privileges of the wards of the Dominion at all times." Should s.91(24) be understood as merely permitting Parliament to protect Indians' treaty rights and lands, or does it go so far as to imply a nonjusticiable duty that it do so? A respectable case can be made for the latter. It can be argued that in granting the Parliament of Canada the power to legislate with respect to Indians, the Parliament of the United Kingdom may be assumed to have intended that its delegate would honour existing obligations and continue the British policy, expressed in the Proclamation of 1763, of protecting Indian lands from private encroachment, and having only the government acquire land, through agreements with Indian leaders and upon payment of substantial compensation.

Within six months of Confederation, in their formal request to Great Britain that it transfer Rupert's Land and the North-Western Territory to Canada, the House of Commons and Senate of Canada formally resolved that:

And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines (Schedule A of Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory

into the union, dated the 23rd day of June, 1870 [by the Schedule to Constitution Act, 1982, stated to be part of the Constitution of Canada and renamed the Rupert's Land and North-Western Territory Order.]

Two years later in a memorandum of agreement between the delegates of the Dominion of Canada and the Hudson's Bay Company concerning the transfer of Rupert's Land, the Speakers of the House of Commons and Senate of Canada undertook:

That upon the transference of the territories in question to the Canadian Government, it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer, and we authorize and empower the Governor in Council to arrange any details that may be necessary to carry out the terms and conditions of the above agreement [Memorandum in Schedule B of the Rupert's Land and North-Western Territory Order].

The existence of these two undertakings so soon after Confederation bolsters the case for reading s.91(24) as positing a nonjusticiable duty in Parliament to protect Indian lands and treaty rights (see Baker Lake v. Minister of Indian Affairs and Northern Development, [1980] 1 F.C. 518, 566 with respect to s.14 of the Rupert's Land and North-Western Territory Order). The undertakings themselves, incidentally, may well create justiciable rights for Indians in a large part of Canada. They are contained in Schedules A and B respectively of the Rupert's Land and Northwestern Territory Order, which the Constitution Act, 1982, has identified as part of the Constitution of Canada. The main text of the Order includes a preamble which says the transfer of the territories is "upon the terms and conditions expressed in certain Resolutions...contained in the schedule to this Order annexed, marked

B...and in the [1867] Address."

In 1871 Parliament was charged with the enforceable legal duty of taking proper care of Indian land interests in British Columbia; Article 13 of the British Columbia Terms of Union (also identified as part of the Constitution of Canada by the Constitution Act, 1982, s.52(2)), says:

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

In Jack v. The Queen (1979), 100 D.L.R. (3d) 193, Chief Justice Laskin said the word "policy" in the first part of the article 13 had the same scope as it did in the second - and the context in the second paragraph showed that "policy" referred solely to the reservation of land and its subsequent management. In a dissenting judgment, Dickson J. was prepared to find that "policy" in the first paragraph extended to "broad general policy as affecting Indians and lands reserved for their use" (100 D.L.R. (3d) 193, 199), and it was therefore possible to find that a federal fishing law was invalid because it was less accommodating of Indian interests than had been the policy in British Columbia prior to its admittance into Confederation. Even if you adopt the approach of Mr. Justice Dickson, however, you cannot extract from Article 13

a duty on the part of Parliament to provide social services for Indians; very few were provided to Indians in British Columbia prior to 1871.

In the United States, the special link between the United States federal government and the Indian tribes is sometimes described by politicians and Courts as a fiduciary or trust relationship. The idea is that while the United States has ultimate sovereignty over Indian lands, it should exercise this authority for the benefit of Indian peoples. The Courts have held, however, that it will defer to Congress' judgment as to how this responsibility should be discharged; "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed to be a political one, not subject to be controlled by the judicial department of the government"; Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). The passage just quoted is from a Supreme Court case in which Kiowa and Comanche Indians challenged the application of the federal "termination" policy to them. That policy (not unlike that of the Canadian White Paper on Indian Policy in 1969) was to end the special status of Indians, and turn over tribal lands to individual Indians to maintain or alienate as they chose. The Supreme Court held that Congress could carry out this policy notwithstanding the principle that Indians are "wards of the nation" (United States v. Kagama, 118 U.S. 375 (1886)), and despite the express prohibition in treaties with the tribes in question against Congress' ceding the lands without tribal consent. The American Courts have at times construed the statutory authority of the executive branch of the federal government in light of the trust relationship principle. A federal Court of Appeals found, for example, that the federal executive was by implication of the Trade and

Intercourse Act of 1790 a trustee of the land of the Passamoquoddy Indians of Maine, and thus obliged in 1972 to bring an action to recover the lands from the state of Maine, which had purchased them without federal authorization in 1794; Joint Tribal Council of Passamoquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975). (The main action eventually succeeded, and Congress had to pass a statute substituting a massive monetary payment for the actual return of the land.)

The only legal effect the Courts have given to the "trust relationship" is with respect to the executive management of Indian lands and assets:

Arguments have also been offered, and occasional attempts have been made to enforce a broader trust responsibility, in recognition of a federal fiduciary duty to preserve tribal autonomy or to contribute to the welfare of the tribes and their members. As yet such attempts have not met with success in the courts, but it is likely that pressure toward enforcement of these broader responsibilities will continue (Canby, 1981, 41).

To the extent that there is a nonjusticiable trust responsibility towards Indians, it has been construed in recent times by American Presidents as relating only to the management of Indian lands and assets, and not in terms of service delivery. In a message to Congress on July 8, 1970, President Nixon said that "The United States Government acts as a legal trustee for the land and water rights of American Indians" (Price, 1973, 325). A policy statement by President Reagan on January 24, 1983 refers to the "federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members" (Statement of the President on Indian Policy, Jan. 24, 1983, 3). The statement went on to cite as policy goals the enhancement of Indian self-government and economic self-sufficiency, the latter to be

accomplished in part through the investment of capital from the private economy. The policy statement makes Indian governments eligible for the sort of block funding that American states receive, but does not acknowledge any special duty of the federal government to deliver services to Indians.

The trust responsibility of Parliament and the federal executive implied by the Canadian Constitution appears to be no more extensive in scope than is the American federal government's duties under the U.S. Constitution. It has already been argued that the nonjusticiable legal duties relating to Indians implied by s.91(24) of the Constitution Act, 1867 relate principally to Indian lands and treaty obligations relating to those lands, as opposed to a more general duty to promote Indian welfare. (I do not doubt that Parliament has important responsibilities in this regard as a matter of political justice, but now I am addressing only the question of what s.91(24) can be taken to legally require.) The references to "Trusteeship" in Canadian constitutional documents do not establish any broader duty. Section 109 of the Constitution Act, 1867, says that Crown lands in the pre-Confederation colonies were to be owned by the new provinces "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." Even if the interests of Indians are considered as a s. 109 Trust, it is difficult to infer a trust relationship from s. 109 that extends much beyond that relating to land management. In St. Catherine's Milling and Lumber Company v. The Queen 1888, 14 A.C. 46, Lord Watson referred to the proprietary interests of Indians as coming within "interest other than that of the Province" rather than a Trust. In 1912, when Parliament, in the exercise of its authority under s. 3 of the Constitution Act, 1871 extended the

boundaries of Québec, it said that

the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament. (Quebec Boundaries Extension Act, 1912, S.C. 1912, c.45, s.2)

The initial trusteeship might be narrowly construed as relating only to the management of lands not yet expressly reserved to Indians. It is plausible, however, to take "trusteeship of Indians" as referring to duties to protect Indian people, as opposed to just their lands and assets. Even so, there is no indication that the responsibility extends to improving their social well-being. Indeed, the intent of the section was probably to preserve Parliamentary authority, rather than to acknowledge any affirmative duties on the part of Parliament.

Can the federal government of Canada be held liable in the Courts for mishandling of Indian lands? In R. v. Guerin, a band surrendered land to the federal government so that the latter could lease it out to a third party for the financial benefit of the band. The trial Court found the federal government had not fulfilled its trust duty to obtain the consent of the band to the actual terms of the lease that was made; 10 E.T.R. 61 and 127 D.L.R. (3d) 170 (supplementary reasons). Ten million dollars in damages were assessed, on the basis that the band would not have consented to the terms, and would eventually have obtained a better deal. The Federal Court of Appeal reversed the trial decision, holding that the federal government's duty was a nonjusticiable "political" trust responsibility, not a "legal" one; 143 D.L.R. (3d) 416. On November 1, 1984, the Supreme Court of Canada

restored the trial judgment. Chief Justice Dickson and Justice Wilson distinguished the "political trust" precedents on the basis, among others, that they involved legal responsibilities established by statute. The interest of aboriginal peoples in land is a right that pre-exists any statute. The federal government owed a legally enforceable fiduciary duty to the band, under a combination of common law and the relevant provisions of the Indian Act. Guerin is likely to be a very important step in the direction the American courts have gone - of holding the executive accountable to the Courts for its management of Indian lands and assets.

SERVICE DELIVERY AND EQUALITY BEFORE THE LAW

It appears that s.91(24) does not of its own force legally require the federal government to deliver adequate services to Indians. The federal government has, however, undertaken responsibility for service delivery to Indians on their traditional land bases. Where it fails to deliver services of roughly equal quality to those it provides to other people under federal jurisdiction, it is open to Indians to argue that they have been denied the equal protection of the law under the Canadian Bill of Rights, s.1(b) or the new Canadian Charter of Rights and Freedoms, s.15(1). Cases involving Indians and equality before the law have been central to the development of Canadian Bill of Rights jurisprudence. In Attorney General of Canada v. Lavell (1973), 38 D.L.R. (3d) 481, a majority of the Supreme Court of Canada upheld s.12(1)(b) of the Indian Act which removes the Indian status of an Indian woman who marries any man who is not a status Indian. To

fortify his conclusion, Ritchie J. adopted an extremely narrow construction of the scope of the "equality before the law" guarantee of s. 1(b) of the Canadian Bill of Rights - that it did not have the "egalitarian concept" implied by the Fourteenth Amendment to the American Constitution," and merely meant "the equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts" (38 D.L.R. (3d) 481, 495). In so holding, Ritchie J. contradicted his own reasoning in R. v. Drybones (1969), 9 D.L.R. (3d) 473, where he struck down a section of the Indian Act on the grounds that it was more extensive in its application and harsher in its penalties for intoxication by Indians than the counterpart Northwest Territorial Ordinance was with respect to non-Indians. After all, both the Indian Act and the relevant Northwest Territory Ordinance were enforced in ordinary Courts; it is not as though the latter were adjudicated upon and enforced by a special, noncurial forum. Only three judges concurred in Ritchie J.'s reasons for judgment in Lavell; the pivotal judge in the case, Pigeon J., concurred in the result on the general ground that the Canadian Bill of Rights should not be construed as intending to effect a virtual suppression of federal legislation over Indians.

Laskin J.'s dissenting opinion was just as categorical as Ritchie J.'s, but in the opposite direction. He held as "marginally relevant" American jurisprudence under equal protection - whereby the reasonableness of a legislative classification is assessed in terms of the importance of the legislative purpose involved and the necessity of its use in terms of that purpose. According to Laskin J.,

the Canadian Bill of Rights itself enumerates prohibited classifications which the judiciary is bound to respect; and, moreover, I doubt whether discrimination on account of sex, where as here it

has no biological or physiological rationale, could be sustained even if the direction against it was not as explicit as it is in the Canadian Bill of Rights (38 D.L.R. (3d) 481, 510).

In Attorney General of Canada and Rees v. Canard, [1975] 3 W.W.R. 1, the widow of an Indian who died without leaving a will contended that s.43 of the Indian Act was contrary to s.1(b) of the Canadian Bill of Rights. The section empowered the Minister of Indian Affairs and Northern Development to appoint the administrator for an Indian who was ordinarily resident on a reserve or Crown land. Under it, the superintendent in charge of the local Indian district was appointed. A few months later, a provincial surrogate Court in Manitoba, where the reserve was, purported to appoint Mrs. Canard as administratrix. The Manitoba Court of Appeal construed s.43 as not permitting the appointment of an Indian as administratrix, and so contrary to the Canadian Bill of Rights. Mr. Justice Beetz, in the majority judgment of the Supreme Court of Canada held that an Indian could be appointed, that it was not a denial of equal protection of the law to provide Indians with a different legal regime than the provinces did. He found that the authority of the Minister could be exercised in a judicial or quasi-judicial manner and would be subject to judicial review if discharged unlawfully. He continued:

The sections of the federal statute we are concerned with relate to the administration of a private estate a matter which, were it not that this estate is of a deceased Indian, would normally fall under provincial jurisdiction. Accordingly, in a case such as the present one, in order to determine whether the principle of equality before the law has been complied with in the administration of federal law (or, in other words, whether an Indian is not deprived of a right generally recognized to other Canadians) some reference to the standards of provincial laws and practices may be unavoidable, as there is no other basis for comparison except perhaps the ordinances of the Yukon and Northwest Territories, which, under the Canadian Bill of Rights, are laws of Canada.

It would be argued that a reference to such a variety of standards might entail complications and variations in the administration of the Indian Act across Canada, and, indeed, I do not wish to suggest that Parliament, in legislating on testamentary matters and causes with respect to Indians, or the Minister, in administering the Indian Act, are bound to follow all provincial enactments and practices over which they have no control in any event: this they might not be able to do, they might not find desirable to do and, in my view, they are not required to do in order to comply with the Canadian Bill of Rights. But there may well emerge from the variety of provincial laws on these matters a body of general rules common to all or to many provinces, which, for want of other criteria and as a sort of just gentium [law of the peoples - i.e., a common ground among different legal principles] is susceptible to provide general minimum standards to which reference can be made for the purpose of deciding how the principle of equality can be safeguarded ([1975] 3 W.W.R. 1, 33).

The imaginative suggestion at the end of the passage - of determining a minimum standard of acceptability for federal law by comparing it with the general run of provincial laws - could prove useful in assessing the adequacy of federal service delivery to reserves. In making the comparisons Courts could look at the level of federal expenditure and quality of services. The Courts would, of course, take into account any special logistical difficulties the federal government has in supplying services to Indian communities - e.g., the expense of shipping supplies and personnel to remote reserves.

The federal government should not be able to use defences against the charge of unequal treatment which rely on the special treaty entitlements of certain Indian bands. If a treaty guarantees (as does Treaty No. 3) that a school will be maintained on a reserve, that obligation should be in combination with s.15 - the school must be of roughly equal educational quality to that maintained for Canadians generally. To say that the treaty creates a special regime governing Indian-federal relations, and so saves the federal

government from charges of inequality, would be to turn a treaty entitlement into a detriment. Thus if a treaty implicitly exempts Indian property from taxation - and Indian organizations have argued that some of them do - then the federal government should not be able to hold the lack of fiscal contribution by Indians themselves as a defence to its own failure to provide adequate educational services. Section 25 of the Charter of Rights and Freedoms provides that the Charter guarantees should be construed as not derogating from aboriginal, treaty and other rights of aboriginal peoples of Canada.

The existence of treaty entitlements should never leave Indians in a worse position than Canadians generally. In some cases, however, it would be legitimate to, in effect, render irrelevant a treaty entitlement by putting Indians in the same position as other Canadians. If a clause in a treaty requires that the federal government maintain a "medicine chest" on a reserve, for example, it might be appropriate to put Indians in the same position, with respect to both benefits and burdens, as other Canadians under public health care schemes. The reasoning would be that a modern health care system offers far more extensive benefits, including access to highly trained physicians, than would the maintenance of a free supply of drugs. Therefore, the argument would go, it is fair to extract from Indians the same contributions as everyone else in the system; a very minor adjustment might be made in the premiums Indians pay to take into account their entitlement to free medicines. Or no adjustment at all might be made, on the grounds that the overall package is better than the treaty's guarantee, and Indians should not legitimately complain that Canadians generally enjoy the same position that they do. The medicine chest clause would be viewed as primarily a recogni-

tion of a humanitarian duty by the government rather than as part of the payment for land surrendered. On the other hand, governments must be careful to avoid what amounts to the unfair negation of treaty entitlements. If Indians receive treaty payments as a continuing payment for the land their ancestors surrendered to governments, a government cannot legitimately reduce its service delivery by the extent of these payments on the argument that the total package of treaty payments and services is equivalent to what Canadians generally receive by way of government assistance. To do so would be like denying family allowance payments to a contractor because he is already getting paid for construction work he has done on a government building. The extent to which Indians may be treated equally under social welfare and public services schemes depends on the language and purpose of particular treaty provisions. It may be justifiable, in certain cases, for governments to insist that Indians make the same sort of contribution by way of taxes to their local education systems as Canadians do generally.

An American precedent brought to mind by the foregoing, and germane to the discussion as a whole, is San Antonio Ind. School District v. Rodriguez, 411 U.S. 1. The state of Texas ran a school financing system not unlike that typical in Canada; the state made standard grants to local school districts, and the latter had discretion to impose property taxes to raise further revenue. The plaintiffs contended that the system denied them the equal protection of the law. The Supreme Court of the United States decided 5-4 that it did not. The majority opinion argued that the system did not on its face or in its effect discriminate against a class of people who required special constitutional protection. The children of the poor were not neces-

sarily found in areas with little taxable property. On the contrary, they were often clustered around commercial and industrial areas. The class discriminated against was simply people who happened to live in areas with low tax bases - and the benefit of allowing people local fiscal, and therefore, policy control over their schools outweighed the discrimination against this class. Furthermore, the majority contended, the deprivation of educational opportunity was not absolute - and the connection between money spent and learning instilled was an "unsettled and disputed question." The majority found no precedent for the contention that education was a "fundamental right," making the unequal distribution of it subject to strict scrutiny by the courts. ("Scrutiny" in American jurisprudence, involves examining two things: the importance of the state interest involved in a legislative classification or measure, and the exactitude with which the classification or measure serves the purpose. American Courts apply "strict scrutiny" when legislation is aimed at, or has a disproportionate impact upon, certain types of groups - such as racial or religious ones - or interferes with "fundamental rights.") The Court reiterated a policy it has followed ever since the New Deal of deferring to the democratically elected branches of government in matters of "social and economic legislation."

The dissenting opinion of Marshall J. argued that education is a matter of "fundamental importance", and its distribution entitled to "special judicial scrutiny" because of its close connection to the expressly guaranteed right to free speech under the First Amendment. The fact that the classification used was based on wealth also called for heightened judicial scrutiny. Local control over educational policy could be maintained using revenue raising tech-

niques which did not impair the educational opportunities of "vast numbers of Texas school children."

The San Antonio case could be distinguished from inadequate delivery of educational services to reserves on the basis that the latter involves the singling out for adverse treatment of an enclave consisting almost entirely of a racial minority. Discrimination on the basis of race calls for the highest level of scrutiny by American Courts, and we may expect similarly stringent examination from Canadian Courts - s.1 of the Canadian Bill of Rights, and s.15 of the Charter of Rights and Freedoms, both identify race in their lists of expressly prohibited classifications. (Because of s.28 of the Charter, however, it can be argued that sexual discrimination is even more suspicious under the Canadian Constitution than is racial discrimination.)

One attitude expressed in San Antonio that Canadian Courts might follow; however, might be the reluctance of the American Courts to meddle in matters of economic and social policy. In Morgentaler v. R. (1975) 53 D.L.R. (3d) 161, Chief Justice Laskin (dissenting), who at that time was usually far more enthusiastic than his colleagues were about using the Canadian Bill of Rights against legislation, rejected a contention that Canadian abortion laws were invalid because, among other things, there was not across Canada equal access to hospitals with committees empowered to approve the procedure. In earlier parts of his judgment, he had emphasized that the Canadian Bill of Rights is merely statutory, rather than a constitutional instrument, and that judicial review of the substantive content of legislation was foreign to Canadian constitutional tradition. He responded to the unequal access argument by saying that its acceptance

would mean too that the Court would have to come to some conclusion on what distribution would satisfy equality before the law, and that the Court would have to decide how large or small an area must be within which an acceptable distribution of physicians and hospitals must be found. This is a reach for equality by judicially unmanageable standards,... (53 D.L.R. (3d) 161, 175).

Laskin C.J.C.'s judgment does go on to observe that there was no denial of equality on the basis of a ground expressly prohibited by the Canadian Bill of Rights. This fact could, as with San Antonio, be used to limit the impact of Morgentaler on a case about service delivery to a reserve. Still, the judgment does indicate that even the most interventionist judges are liable to find that the Canadian Bill of Rights does not support their second-guessing legislatures in fairly complicated matters of social and economic policy. Service delivery to reserves might well be seen as falling within that category, and therefore outside of judicial interference.

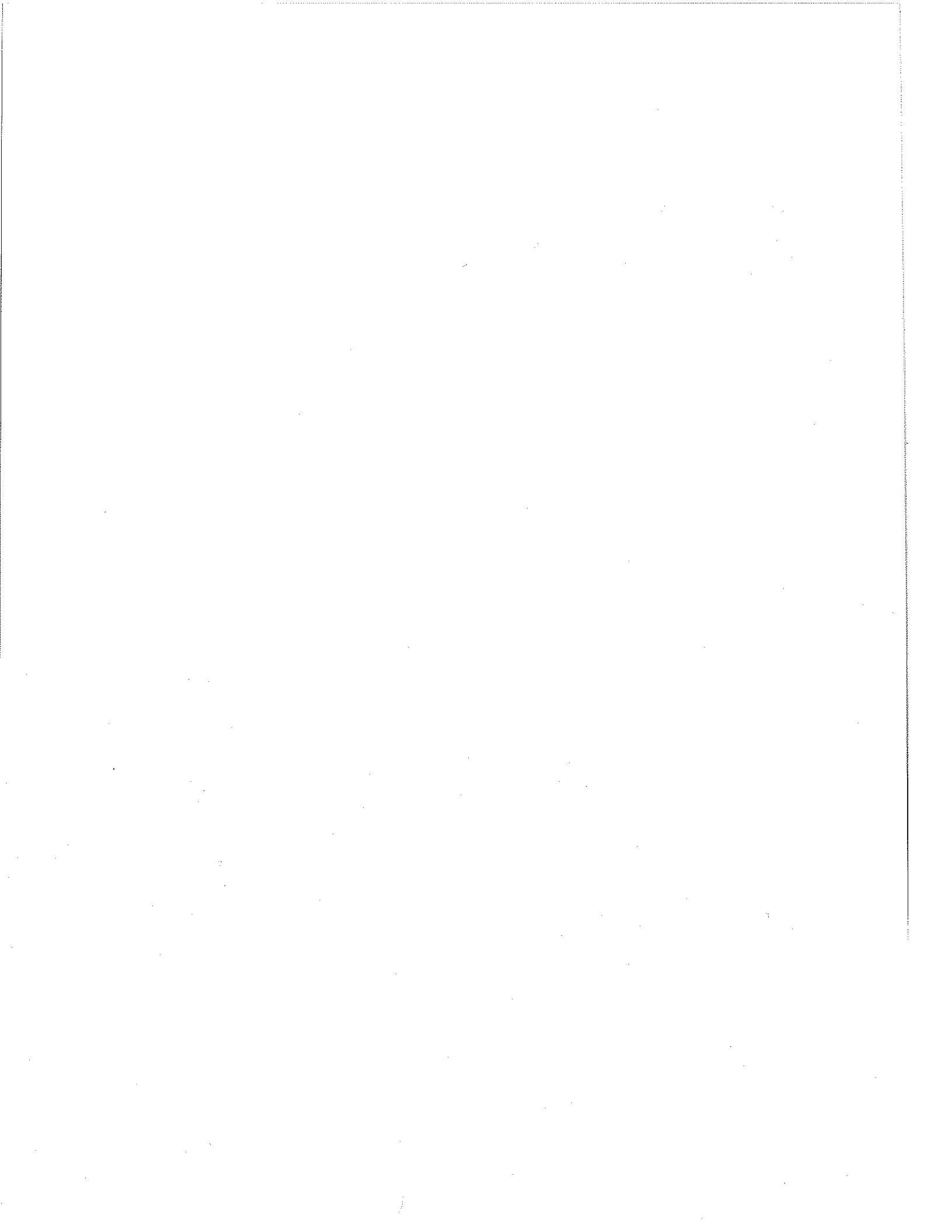
The Canadian Charter of Rights and Freedoms, however, is a constitutional guarantee of equality. That legislatures have been allowed, with respect to s.15 of the Charter only, three years to clean up their Acts before it comes into force shows that the section is intended to have some real force against discriminatory legislation. It surely cannot be construed as being merely directed against failures to subject everyone to the rule of law, the extravagantly inconsequential meaning Ritchie J. attributed the equality guarantee in s.2(b) of the Canadian Bill of Rights. Section 15 also forbids such a constricting construction; it speaks of the equal protection and of the equal benefit of the law. The ability of legislatures, under s.33 of the Charter, to override judicial determinations of invalidity by stamping their

legislation as "notwithstanding the Canadian Charter of Rights and Freedoms" should, if anything, encourage Courts to intervene against injustice. They know if they err badly in their appreciation of the facts or norms, the legislatures can always intervene before the heavens fall.

In applying the Charter against an inequality of service delivery to reserves, a Court could bolster its conclusion by referring to s.36 of the Constitution Act, 1982, the one which speaks about equal opportunity and transfer payments. A Court might point out that Indians cannot have "equal opportunities for the well-being of Canadians," in the words of s.36(1)(a), if they do not have equal educational opportunities; and that it would make sense that a federal government committed to the principle of making transfer payments to provinces so as to ensure "reasonably comparable levels of public services at reasonably comparable levels of taxation" should have to provide similar financial support for people under its own jurisdiction. The suggestion, in other words, is that the standards of justice in s.36 be used to colour the construction of s.15 of the Charter of Rights. A possible reply would be that s.36 is itself nonjusticiable, and the reason it is nonjusticiable is that Courts lack the expertise, tools and democratic mandate to interfere in matters of economic and social policy; and s.15 should be approached in the same spirit of restraint. I would agree that Courts should be sensitive to the limitations inherent in their structure and respectful of the democratic process. It would be ironic, however, if s.36, which was intended to enhance the duties of Canadian governments to provide opportunity and reduce inequality, were used to blunt the force of the equality guarantee.

It should not be forgotten, moreover, that s.36 may in fact be directly

judicially enforceable (see Chapter VII, page 66 et seq.); if so, it would provide additional legal support for Indians who perceive themselves as unfairly deprived of adequate social and public services.



XIII PROVINCIAL RESPONSIBILITY FOR INDIANS

It will be recalled that the provinces have no jurisdiction over Indians as such, but that laws primarily directed towards provincial subject matters may apply to Indians. In regulating a provincial subject matter, some special treatment for Indians may be permitted. Now, because of the express assignment of jurisdiction over Indians to the federal level of government by s.91(24) of the Constitution Act, 1867, it is generally agreed that whatever special "trust responsibility" there is for Indians is vested in the federal level of government. The fulfillment of treaty obligations is also, generally speaking, the obligation of the federal government. (Provinces may acquire some affirmative duties under certain modern land claims agreements; e.g. under the James Bay agreement.) Generally speaking, therefore, the legal duties of provinces to Indians must be found, if they exist at all, in the requirement of giving Indians the equal protection and benefit of provincial laws.

In Director of Child Welfare for Manitoba v. B., [1979] 6 W.W.R. 229 (Man. Prov. Ct.), Provincial Court Judge Garson vigorously affirmed the provincial duty to supply equal services to Indians. The issue in that case was whether a permanent guardianship order should be granted to the

Manitoba Director of Child Welfare with respect to two neglected Indian children living on a reserve. The order was granted over the objection of the mother. It was held on the evidence that she would not be able to look after them properly. The province was authorized to arrange a permanent adoption. In the course of giving judgment, Garson Prov. J. commented extensively on the federal-provincial battle over responsibility for child welfare services. A federal official had explained to him the federal view that child welfare was a provincial responsibility, while the province took the opposite view. Garson Prov. J. summarized the official's further testimony as follows:

To confuse the matter even further, the federal government partially recognizes the provincial contentions by contracting in special cases with the provinces to provide health, social and child care services for a particular reserve, and the federal government will provide the funds. In short, the federal government purchases the expertise and staff of the provinces to supply these services. The contract is generally referred to as a 'tri-partite agreement' between the two senior governments and a particular Indian reserve or reserves. But these arrangements are made upon an ad hoc basis. Only certain reserves in Manitoba benefit from these types of agreements. There is no province-wide policy or agreement encompassing all Indian reserves. When questioned as to the likelihood of such an arrangement or contract for services being instituted to cover the Little Grand Rapids Reserve, the witness replied:

'And in April 1977 the tri-partite negotiations began in earnest. And it's like two years later and nothing has been resolved in discussions yet.'

The stark reality of the present situation at Little Grand Rapids is that the treaty Indian is caught in a political, financial and legal limbo, with both senior governments attempting to disclaim responsibility for the delivery of social and child welfare services, with the not unsurprising result that the treaty Indian fails to get the services except in life-threatening situations. As above stated, the treaty Indian in Little Grand Rapids is being denied those services that all other Manitobans receive or are entitled to receive as of right and as a matter of course. Such a denial of services, for whatever reasons, can only be termed discriminatory to the treaty Indian ([1979] 6 W.W.R. 229, 237).

The Canadian Bill of Rights did not (and still does not) apply to provincial governments, Manitoba did not have its own Bill of Rights, and the Charter of Rights and Freedoms was still three years from coming into existence when Garson Prov. J. was considering the Director of Child Welfare case. He thus had to base his finding of illegality on common law doctrines of constitutional and administrative law. He found the applicable one to be that there is no power in the Crown (i.e., the executive branch of government) to dispense with or suspend the application of particular laws with respect to a particular group. Indeed, the Manitoba Court of Appeal had applied the principle against Indians the year before in R. v. Catagas (1978), 81 D.L.R. (3d) 396, when it held that government officials could not, without legislative authorization, suspend the application to Indians of the Migratory Birds Convention Act. It should be noticed that the principle Garson Prov. J. was relying upon is actually limited to discrimination by executive officials in their administration of laws of general application. The principle does not speak to the question of discrimination by legislatures in their passing of statutes. When s.15 of the Charter of Rights and Freedoms comes into force on April 17, 1985, it will apply to provinces. A powerful argument will thus be available that it is unconstitutional for legislatures to limit the availability of services to Indians at the statutory level. Could provinces defeat these arguments by citing federal responsibility?

When first presented with an equal protection case, a Court might declare that it is the duty of the province and federal level of government to provide Indians with equal services, whether they are on or off reserves. The Court would refrain from sorting out responsibilities as between the two

levels of governments. By doing so, the Court would avoid having to sort a tangle of economic, social and historical considerations that would go into determining constitutional responsibility. There is a constitutional precedent for federal and provincial governments being constitutionally bound to come to an agreement for the benefit of Indians. When the Natural Resources Transfer Agreement transferred control of Crown land to the western provinces, Indians in those provinces still had entitlements under treaties for allotments of land as payment for their surrender of their old land. It was provided in s.10 of the Manitoba Agreement (affirmed by the Constitution Act, 1930) that the province would have to transfer back:

such further areas as the ... Superintendent General of Indian Affairs may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the province ...
[emphasis added]

If forced to determine ultimate responsibility because of a failure of governments to agree, a Court might take a number of different paths. It has been argued earlier that the "trust responsibility" legally implicit in s.91(24) of the Constitution Act, 1867, is a narrow one, essentially confined to the proper management of Indian lands and assets, and not extending to service delivery. A Court might reason, however, that inasmuch as paramount legislative authority over Indians is vested in the federal level of government, so must paramount responsibility. Or it might distinguish between ultimate responsibility for Indians on their traditional land bases and Indians in the rest of a province. The former, it might be argued, are ultimately federal responsibility because the federal government has chosen to

establish for them special legal, political and economic regimes. Where Parliament has established a special social system, the Court might reason, it cannot pick and choose which parts of it the provinces must step in and handle. It is not fair to the provinces to require that they supply services when they have no control over the overall management of the areas. Without control, provinces have no ability to promote social and economic development on the reserve and thereby reduce the amount of external public support that is required. Nor can the province efficiently incorporate the reserves into its overall system of service delivery. The same court might hold, however, that Indians in urban centres should be considered a provincial responsibility, on the grounds that in the absence of Parliamentary intervention, responsibility over Indians should follow the division of powers apart from s.91(24). The Court might fortify its conclusion by pointing to the relative efficiency of placing Indians into the ordinary scheme of social programs. There are many other routes a Court could take, and a number of justifications in every case for following such a path.

Whichever way a Court went, it would be acting in a highly creative fashion; the text of the Constitution Act, 1867 provides only limited guidance. It would be far better if the complex of social, economic and political concerns connected with the provision of social services and assistance to Indians were solved by a simple, comprehensive agreement among federal, provincial governments and Indian organizations. The next section of this paper sketches a proposal in this regard.



XIV FUNDING OF INDIAN FIRST NATIONS GOVERNMENTS

THE PENNER REPORT

The Penner Report on Indian Self-Government proposed that the federal government use its s.91(24) power to oust the application of provincial laws to reserves, and then negotiate bilaterally with Indians on the form of local self-government and the appropriate funding arrangements; Penner Report, recommendations 12, 33, 34, 35. In its chapter on the Trust Relationship between Indians and the federal government, the Penner Report recommends:

The Committee asserts that the special relationship between the federal government and Indian First Nations must be renewed and enhanced by recognizing the right of First Nations to self-government and providing the resources to make this goal realizable. This will require that the duties and responsibilities of the federal government to Indian First Nations be defined in the constitution and in legislation and that they be legally enforceable (Penner Report, recommendation 49).

Thus the primary onus for providing funding or services to Indian governments would, under the Penner Report, be vested in the federal government. The duty would be directly enforceable. The Report is speaking, it should be remembered, to the relationship between Indians on traditional land bases and the federal government; neither here nor elsewhere does it have

much to say about Indians living in the cities.

The Penner Report argues that the best way to ensure the economic self-sufficiency of Indian First Nations governments would be to expand and assert their revenue base by granting them more land, settling outstanding land claims, and guaranteeing them a greater share of revenues from resources connected with their lands. At least as an interim measure, however, federal grants to Indians would have to continue. The Penner Report vigorously and persuasively denounces the existing system. The federal government has nominally given Indians more responsibility under it for managing their own affairs. Programs are supposed to be run by Indian band governments, rather than the federal bureaucracy. In practice, band governments have to devote a demoralizing amount of time and money to lobbying the government for funding of these programs, at one end, and then accounting for how they have been operated at the other. According to the Report:

The result of the situation is unfortunate. Indian leadership feel that they have taken over a lot of administrative work and problems formerly borne by the Department without being properly compensated, without being given any discretion or control, and without resultant savings in departmental administrative costs (Penner Report, 87).

In expanding on the last point, the Penner Report cites a study by an accounting firm which found that in 1981-82, one-quarter of the \$250,000,000 spent on the Indian and Inuit Affairs Program of the Department of Indian Affairs and Northern Development went to general department administration. The Report recommends that the present system be replaced with one whereby the federal government makes unconditional grants to Indian First Nations

governments. They would be accountable to their own people, rather than to the federal bureaucracy. In this way they would be able to exercise real control over policy, and an enormous waste of money and human energy inherent in the present system would be avoided. Indian governments would use their grant in any way they chose; they would determine, for example, how much is spent on health care, how much on education. According to the Report:

It can be assumed that Indian First Nation governments would provide many governmental services themselves. Alternatively, they could contract with a provincial government, a municipality, a private agency, a tribal council, or even the federal government. In the case of medical services, for example, Indian First Nations governments might find it more suitable to contract with an area medical facility. The essential principle is that each government would make its own decisions and agreements, applying its own values and standards, rather than having them imposed from the outside (Penner Report, 98).

Elsewhere in the Penner Report, it is proposed that Indian First Nation governments have the right to raise revenues for their own purposes; "some Indian First Nations might choose to exercise this power as an optional method to supplement its fiscal arrangements, to encourage and regulate development, and to ensure the economic well-being of the community" (Penner Report, 64).

The amount of federal funding, according to the Penner Report, should be determined by national-level negotiations between the federal government and designated representatives of First Nations. It would be extensive and time consuming for the federal government to try to negotiate separate fiscal arrangements with hundreds of different Indian First Nation governments. A

formula should, however, be agreed upon which disperses money to IFNG's not only on the basis of their population, but according to their need. A formula might be developed along the lines of the transfer payments formula for the provinces - which takes into account both numbers of persons in a province and a long list of revenue sources.

The Penner Report discusses two different lines of justifications for providing transfers to IFNG's. One is based on historical dealings. The Report quotes Indian witnesses as saying:

We ask you to consider the justice of our situation. In signing treaties, we have never surrendered our sovereignty or our resources. If we had controlled or even shared in the resource development of our area, we would not be in our present situation today.

The First Nations have already made a one-time-only contribution of resources to Canada sufficient to capitalize a fund for current payments (Penner Report, 97).

The appeal to history is open to challenge. Some might argue that the treaties specified what payment Indians were to be given for surrendering their lands, and they cannot claim to be paid again. There is no doubt that Canadians would be far less prosperous had not federal and provincial governments obtained the full ownership of Indian lands. It would not be fair accounting, however, to ignore the contribution non-Indian technology and market demand has made to the present value of these lands. It is far from obvious what standards of justice you would use in determining the relative contribution of Indian and non-Indians to Canada's present wealth. Even if the accounting norms were established, applying them would involve an examination of a massive amount of historical data, and unprovable guesses

about what-might-have-been-if. Again, there can be no doubt that Indians were not in a position to bargain freely with respect to the price they were paid for the lands they surrendered at the time of the treaties. They were not provided with independent legal advice, and in many cases they were made to know that if they did not agree upon a deal, the Canadian government would take their land anyway (Cumming and Mickenberg, 1972, 122). The circumstances of the treaties raise the strong suspicion that Indians were not paid a fair price. But it is, again, extremely difficult to look back at transactions made almost a century ago and say what a fair price would have been - or figure out what would have happened economically to Indians and non-Indians if a fair price had been paid.

The Penner Report cites a second justification for funding Indian First Nations governments. It is more simple and more sellable than the historical one. It is that:

Canada has a tradition of sharing the national wealth. For many years a system of federal equalization payments to those provinces whose revenues fall below the national average has been elaborated to permit poorer provincial governments to provide a minimum level of services. The principle of equalization payments has now been entrenched in the constitution (See section 36 to the Constitution Act, 1982, especially s.36(2)) (Penner Report, 97).

The appeal to a general Canadian principle of revenue sharing among governments involves no laborious appeal to history. It does not require that anyone acknowledge a debt to Indians over and above what is owed to everyone else. Instead, it calls for Canadians to give to Indian governments the same respect and concern as is shown other governments. Some might still argue that there should not be special Indian governments; but given that

there are going to be some, providing them with proper resources to do the tasks of government seems only fair.

The approach of the Penner Report has much to recommend it. If the federal government ties enough strings to the funds it grants Indian First Nations governments, the present system will, in effect, continue. The nominal increase in the legal authority of IFNG's will make no real difference. Some limits must, however, be placed on the general principle of letting Indian First Nations governments determine their own spending priorities. The federal government should continue to be able to attach, by conditionality of grants or by regulation, certain minimal standards for the operation of programs. Indian communities will continue to be part of the Canadian polity, and some ability of the larger community to impose its basic standards of justice will have to be conceded. A refusal to do so would weaken the moral force of the appeal to the general Canadian principle of equalization. The principle is based on a concern for distributive justice among Canadians generally; Indian communities cannot bank on that concern to obtain funding, and then expect Canadians to be indifferent to whether the funds are fairly spent among individuals within the Indian community. When the federal government provides provinces with funding for provincial health care schemes, it imposes the condition that everyone have equal access to health care, regardless of wealth. The federal government properly could, and probably will, extend that condition to health care schemes operated by Indian First Nations governments.

You might object that there is a leap of logic in the argument just presented. The argument, you might say, wrongly assumes that a federal

concern for economic equality among communities legitimately extends to a concern for equality within communities. Section 36(2) of the Constitution Act, 1982, talks about providing transfer payments to provinces, not to persons. My reply would be that the history of s.36, and a reading of its provisions as a whole, do not require that a sharp distinction be made between intercommunity and interpersonal sharing. At the time s.36(2) was agreed upon, Established Programs Financing, including the medicare fiscal system, was an accepted part of the federal-provincial payment arrangements (Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, 1977). This context suggests that "equalization payments" in s.36(2) should be construed as directing the federal government to fulfill its equalization duty only through unconditional transfers, as opposed to program grants with basic conditions. The phrase "reasonably comparable levels of service" in s.36(2), moreover, can be construed as referring to the distributive fairness of programs. Subsection 36(1) refers to the promotion of "equal opportunities for the well-being of Canadians" and providing "essential public services of reasonable quality to all Canadians." Parliament should be able to take these standards into account in discharging its duties to make transfer payments to provinces under subsection 36(2).

One of the standards of justice that the federal government should be able to impose is that everyone should have both the freedom and the education to choose his or her own path in life. I say this partly out of a preference for individual over collective self-determination, a preference that many people would, as an abstract matter, dispute. The empirical fact of the matter is, however, that many Indians will, because of economic pressure or

personal choice, end up living in Canadian cities (Krotz, 1980, 10). They should be equipped by their education to have a fair chance of achieving their goals in a highly competitive society. The federal government should, therefore, be able to impose basic education standards with respect to Indian communities as well. Detailed regulation should, of course, be avoided. Indians may have a much better idea of how to achieve stipulated educational goals than outside authorities. I should also hasten to say that it is very likely that most Indian governments would manage their programs in accordance with our general Canadian expectations even without a legal requirement that they do so.

Another point on which I would differ somewhat from the Penner Report concerns the role of internal taxation by Indian First Nations governments. The equalization payment formula in s.36 does refer to maintaining "reasonably comparable levels of public services at reasonably comparable levels of taxation." An appeal on behalf of Indian First Nation governments to the equalization principle must accept that with the benefit of the principle must come its implicit burdens. Indian First Nations governments will have to accept that unless a treaty justifies their exemption, they will be expected, like any other government, to raise a certain amount of their revenue by internal taxation. The Penner Report refers to the latter as an optional method whereby Indian governments can raise additional revenue; I would think it would have to be regarded as an integral part of any fiscal arrangements concerning IFNG's. It must also be regarded as essential to ensuring adequate accountability by an IFNG to their own people. That a government's revenue must, to some extent, be raised by taxation is one way of ensuring

* that its citizens are aware of how much money is being spent and concerned with whether it is being well spent.

A fiscal issue related to that in the previous paragraph is whether Indians should be subject to federal income tax. Section 87 of the Indian Act provides that:

Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to s.83, the following property is exempt from taxation, namely

- (a) the interest of an Indian or a band in reserve or surrendered lands; and
- (b) the personal property of an Indian or band situated on a reserve.

In Nowegijick v. The Queen (1983), 144 D.L.R. (3d) 193, however, the Supreme Court of Canada construed the exemption as extending to income earned on a reserve, even though it was obtained through an activity which did not centrally involve the possession or use of reserve property. The facts in the case were that a reserve based company conducted logging operations outside of the reserve. The Minister of National Revenue attempted to tax a resident of the reserve on the income he had earned as an employee of the company. The Supreme Court of Canada held that it could not. According to Dickson J., the situs of the salary was the Indian reserve. Furthermore, "a tax on income is in reality a tax on property itself." Therefore, the Minister of Revenue was wrongly attempting to tax an Indian in respect of personal property situated on a reserve.

There are some valid considerations in favour of exempting reserve lands from federal and provincial taxation. A great deal of reserve land was obtained by Indians in exchange for their surrender of other property to

governments; the latter should not be able to have their cake and eat some of it too by taking a share of the property they have assigned to Indians. It may be convenient to generally exempt reserve land from taxation, rather than going into the circumstances whereby each reserve was created.

A justification that might be offered for a wider exemption such as that provided by s.87, would be that if allowed to impose taxes, governments might impose especially harsh ones. That problem, however, could be precluded by allowing only non-discriminatory taxes of general application. The argument that provinces contribute very little to reserve service delivery and should therefore not be able to tax activities on them is sound - but can be met by an exemption from the part of the federally-administered income tax that goes to the province in which the reserve is situated. If and when the federal government ensures that Indian reserves are receiving essential public services roughly comparable to those enjoyed by other Canadians, however, there would appear to be no justification for completely exempting Indians from federal income taxation. If they are able to benefit equally from federal political and social rights, reserve residents should have to bear equal responsibilities. For many Indians the imposition of a federal income tax would not make that much financial difference. Some reserves, however, enjoy fairly high income levels; even on some of the poorer reserves, senior politicians and administrators are paid very well. It does not seem right that someone should be exempt from income tax for no other reason than his Indian status and reserve residence.

The federal government's reply to the Penner Report refused to accept some of its fundamentals with respect to fiscal responsibility. The govern-

ment accepted the principle of establishing Indian First Nations governments with powers to be determined through negotiation. Point 10 of the Reply said that "The Government acknowledges and accepts its special responsibilities for Indian people and Indian lands." Under the title "Improvements Under Existing Legislation" the federal government said that even without legislative changes it would be prepared, in accordance with the Penner Report, to "ease current administrative constraints in respect of program and service delivery." Under Point 10(ix), however, the federal government said that "to respect the need for diversity," it will leave funding arrangements to individual negotiations. The only principle it will acknowledge is one-time funding of Indian First Nations governments to negotiate their recognition and multi-year funding agreements. The Federal Reply thus acknowledges a general standard of fiscal responsibility, and leaves open the possibility of burdensome conditions being attached to federal transfers. Furthermore, the Federal Reply leaves open the possibility that Indian First Nations governments, like band governments at the present, will have to engage in time-consuming and complicated trilateral negotiations with both the federal government and the provinces. Under "General Framework Legislation" the Reply says cryptically

Any legislation must respect the provisions of the Constitution Acts 1867-1982, and thus, given current constitutional arrangements, not all powers envisioned by the Special Committee can be included in this framework legislation.

It is possible to imagine a number of constitutional concerns with respect to the Penner Report. The powers it would allow some Indian First Nations

governments might be so extensive as to overstep the bounds of permissible delegation of authority from Parliament. The Penner Report suggests that the compliance of Indian First Nations with the Charter of Rights and Freedoms be left to negotiations; the Reply may have regarded the application of some sections of the Charter as applicable to Indian First Nations governments, regardless of any federal attempt at waiver. But the most likely concern of the authors is the federal-provincial division of legislative authority. The Penner Report proposed that the federal government shield Indian First Nations governments from the application of provincial law. The Federal Reply, point 10(viii) stated:

The Indian First Nation governments could, then, exercise a wide area of jurisdiction in accordance with the negotiated agreements, and some federal and provincial laws would likely not apply as a result. It is important to note, however, that federal legislation in areas of national concern would continue to apply. Furthermore, provincial legislation would continue to apply provided it was not inconsistent with the Constitution Acts, 1867-1982, the framework legislation and the Indian First Nation Government's internal constitution and exercise of powers under the framework legislation.

It is constitutional for the federal government to use its exclusive authority under s.91(24) to oust the application of provincial law. The respect for provincial jurisdiction probably did not arise out of a perceived legal compulsion. Nor did it likely spring from a federal respect for provincial authority above and beyond what the law perceivedly required - not where the government concerned was the same one that was prepared to radically change the Constitution of Canada over the objection of eight provinces. It is possible the federal government simply thought it sound policy for some provincial laws to apply: those regulating highway safety, for

example, or those establishing occupational safety or school attendance standards. Another concern of the federal government, however, may have been to try to get the provinces to provide, and pay for, some programs and services on the reserve. A federal declaration that provincial laws generally do not apply to Indian communities would not exactly inspire provinces to take a more active role in providing for their social welfare. The Federal Reply does little to preclude a scenario in which Indian First Nations governments endlessly engage in negotiations with both the federal and provincial governments over what services and how much funding will be provided. In defence of the Federal Reply, it should be said that it invites the comments of provinces, and the federal government may not have wanted to commit itself clearly on the role of provinces prior to hearing from them. The federal government might not have wanted to commit itself to plenary responsibility for Indian communities until responsibility for Indians in the cities is sorted out, and that again would require extensive discussions with the provinces.

WHAT OUGHT TO BE DONE

If Indian First Nations governments are to succeed, they must be able to rely on a steady source of minimally conditional funding. The federal government ought to agree to the norm that Indian communities are entitled, at roughly comparable levels of taxation, to public services reasonably comparable to those available to other Canadians. "Public services" would include, among other things, social, health and educational programs. Those Indian First Nations governments that are ready and willing to assume management of

the programs themselves ought to receive sufficient funding to permit them to do so in a manner consistent with the equality of services norm. The equality principle might be embodied in the Constitution, in the form of a s.36 variant. Regardless of whether it is embodied in the Constitution, the equality principle should be expressed in the framework legislation authorizing the establishment of Indian First Nations governments.

The Penner Report's proposal that a standard formula be established, rather than leaving funding to be worked out in individual negotiations, should be followed. If the necessary accounting is possible, the formula should determine the overall package of direct service delivery or funding owing to every Indian community. The Indian First Nations government would be able to choose, without fear of cost to its people, the extent to which it will assume management of programs. It could use the funding to run the programs itself, or to pay private agencies or federal and provincial governments to run the programs. The waste and delay involved in trilateral negotiations would be avoided; with funding assured, Indian First Nations governments would be able to choose whether to allow federal or provincial service delivery according to the quality of the programs, rather than the willingness of levels of governments to provide them.

As part of a deal whereby the federal government assumes the equality of services norm and complete responsibility for financially supporting Indian governments, the provinces might make a number of concessions. They could agree to cooperate with Indian First Nations governments in working out agreements for the sale of provincial services to Indian communities. The provinces might also agree to accept the primary responsibility for Indians

who have left their traditional communities. In some areas it may be appropriate for an Indian First Nation government, or an association of them, to operate services in the cities. An example would be an Indian child welfare agency. In such a case, the province would be responsible for funding, since the Indian agency would be doing work that the province would otherwise have to do itself. The provinces might also agree that Indians in traditional communities should not be taken into account for the purposes of general equalization payments to the provinces. Since the provinces would not be fiscally responsible for the residents of those communities, they would not be able to receive equalization payments in respect of them. (A complaint that the federal government can make under the present system is that the provinces do, in effect, profit from the economic underdevelopment of Indian communities; their residents generally are below the Canadian average in generating sources of government revenue, and so raise the amount of money the province is entitled to receive under the equalization formula).

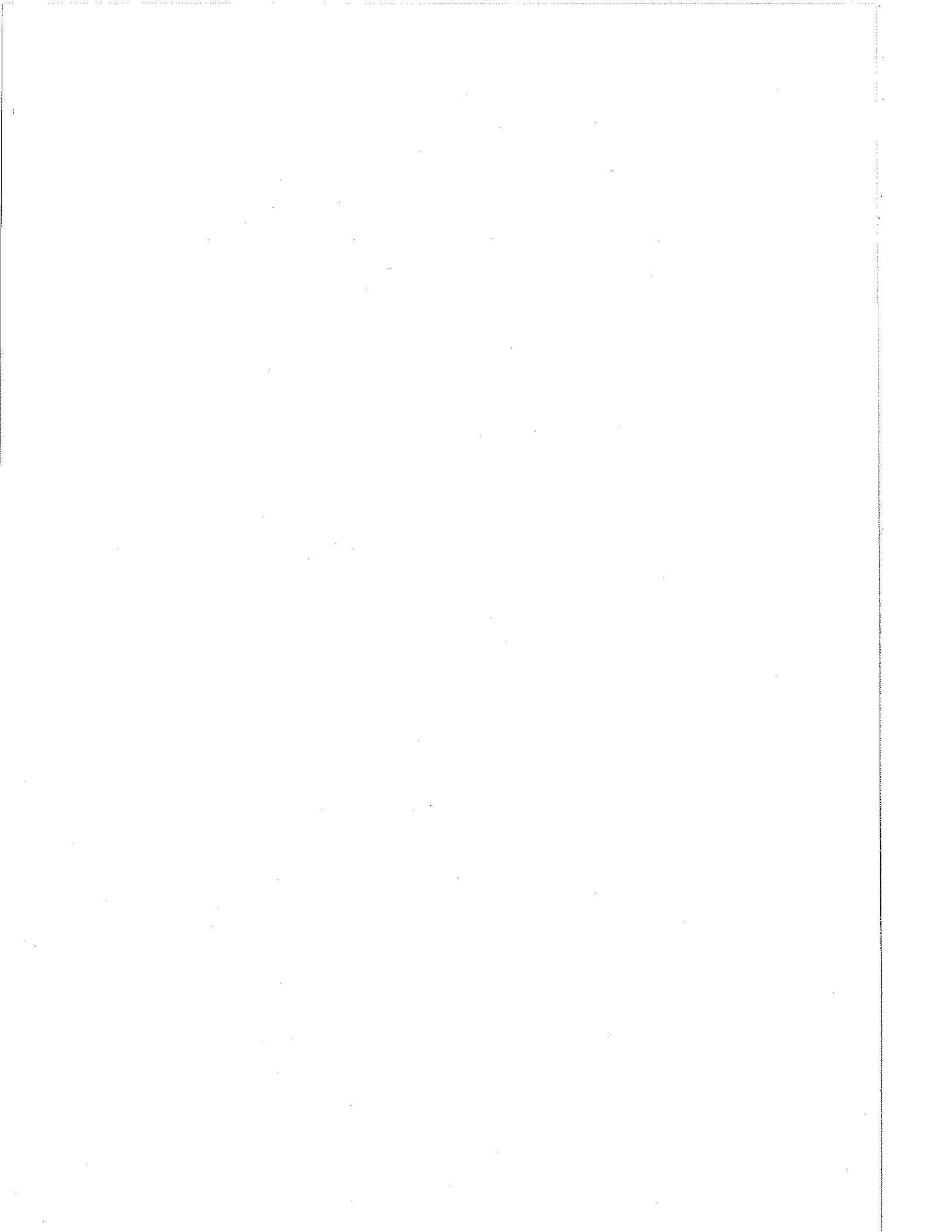
The sharp distinction between fiscal responsibility for Indians in their own communities and Indians in the cities has the advantage of simplicity. Plenty of constitutional and policy arguments can be made for setting the boundaries elsewhere; but that is not so much an objection to the sharp distinction as a reason for having it. Political and legal disputes over the federal-provincial division of responsibility could go on with respect to program after program.

The provinces would not be giving up all that much by observing the distinction. Provincial complaints about the failure of the federal government to take responsibility for Indians who have left traditional communities are not

likely to result in a substantial change of federal policy. The province of Manitoba has for years been sending the federal government bills for services it provides to Indians who have been off the reserve for less than a year. The federal government has never paid them.

The provinces might argue that the proposed distinction does nothing to discourage bad federal management of Indian communities, and indeed encourages it. If the federal government is responsible for Indians who leave reserves, it has financial incentive to ensure that Indians are adequately equipped to succeed in the cities. On the other hand, the federal government is put in the position of financially benefitting from an exodus from Indian communities (a federal responsibility under my proposal) to the cities (a provincial responsibility). The force of these objections is blunted by the fact that my proposal would require the federal government to accept sole responsibility for adequately funding Indian communities. The highest standard of economic assistance by the federal government, the avoidance of tri-lateral bickering, and the advent of Indian self-government might all contribute to the improved quality of public services in Indian communities. That in turn might result in fewer people leaving them. Those who do, moreover, might be educated in a way that better equips them to adapt to urban life in the cities. Furthermore, the federal government would continue to be responsible, under s.36 of the Constitution Act, 1982, for providing provinces with funds sufficient to permit them to provide reasonably comparable levels of services to their citizens. Have-not provinces would be able to point to their responsibilities to urban Indians in negotiations over transfer payments formulae. It would also be expected that urban Indians would benefit from

special programs for Indians in areas of federal legislative jurisdiction - e.g., the creation of a development bank for native peoples. They could continue to benefit as well under federal fiscal programs such as job creation grants and regional economic development.



XV FISCAL RESPONSIBILITY AND THE S.37 PROCESS

As early as December, 1982, at a working group meeting in Montreal, Manitoba proposed that the Constitution extend the equalization principle to aboriginal peoples. Paragraph (4) of the Statement of Principles that the government of Manitoba submitted to the March '83 Conference proposed recognition of a "special fiscal relationship" between aboriginal peoples and the federal government. Paragraph (5) again recommended that aboriginal governments be entitled to equalization payments so that they could provide services roughly comparable to those of other governments, but adapted to the "special social, cultural and economic needs" of aboriginal peoples. It is not clear from the Manitoba statement whether the federal government would be solely responsible for supplying the necessary financial support. One thing that is clear about the Manitoba Statement is that the federal government would have at least some fiscal responsibility for urban Indians and the Métis. The federal government has not, in principle or practice, acknowledged a substantial fiscal duty towards either group.

Inspired in part by the Manitoba proposals, the Inuit Committee on National Issues included a transfer payments clause in the draft Aboriginal Charter of Rights it presented at a Ministerial meeting in February 1983. Un-

like the Manitoba principles, however, the ICNI deleted the s.36 standard of reasonable comparability of services; Canadian governments are supposed to provide transfer payments sufficient to meet the economic, social and cultural needs of aboriginal peoples. Period. Another distinction from the Manitoba proposal was that the transfer payments norm was expressly made applicable to both the federal and provincial levels of government. No attempt was made to solve the federal-provincial division of responsibility problem.

Fiscal arrangements did not receive much attention at the March '83 First Ministers' Conference. The package of constitutional reforms submitted by the Assembly of First Nations included in the table of contents item 5.13, "Resourcing of First Nations Governments: Part III of the Constitution," but no proposed amendment was actually tabled. The draft Statement of Particular Rights of the First Nations included s. 13, "the right to exemption from direct or indirect taxation by other levels of government," and s. 15, "the right to fiscal relationships with other governments." It may in fact be that the only way to reach constitutional agreement on fiscal arrangements will be to find language that establishes some sort of equalization norm but dodges the federal-provincial issue.

The draft Statement of Rights of the Metis People submitted by the Metis National Council included, section 35.3(e), "fair and equitable compensation for Rights that have been infringed" and 35.3(f), "adequate fiscal arrangements to fulfill these Rights." The table of contents of the package of proposed amendments submitted by the Assembly of First Nations included the anticlimactic item "Resourcing of First Nations Governments: Part III of the Constitution (no amendment tabled)." Not much discussion of fiscal arrange-

ments took place, however, during the March '83 Conference. The federal government's four suggested guidelines for the ongoing process did not include any fiscal principles. On the morning of the second day of the Conference, both Manitoba and the Métis National Council suggested that a statement of fiscal principles be included in the political accord. There was essentially no follow-up discussion, however, either at the First Ministers' meeting or in the backroom Ministers' meeting of that afternoon. A couple of provinces attempted to make fiscal arrangements a separate item of discussion at the beginning of the 1983-84 talks, but the proposal failed. Some governments were concerned that its inclusion would overload the agenda, others figured that the issue would come up under "self-government" anyway. In the position paper it submitted to the Ministers' Meeting at Yellowknife in January 1984, Manitoba proposed that a commitment to adequate funding be among the amendments to the Constitution establishing the basic structure of aboriginal self-government.

The federal draft amendment on self-government at the March '84 Conference made no attempt to either establish a funding standard or to sort out federal-provincial responsibility. It spoke (paragraph 35.2.16) of the "right of aboriginal peoples to self-governing institutions that will meet the needs of their communities, subject to the nature, jurisdiction and powers of those institutions, and to the financing arrangements relating thereto, being identified and defined through negotiation with the government of Canada and provincial governments" (emphasis added). It is possible to argue that the norm of "meeting the needs of their communities" extends not only to the political structure of the communities, but to financing arrangements as well.

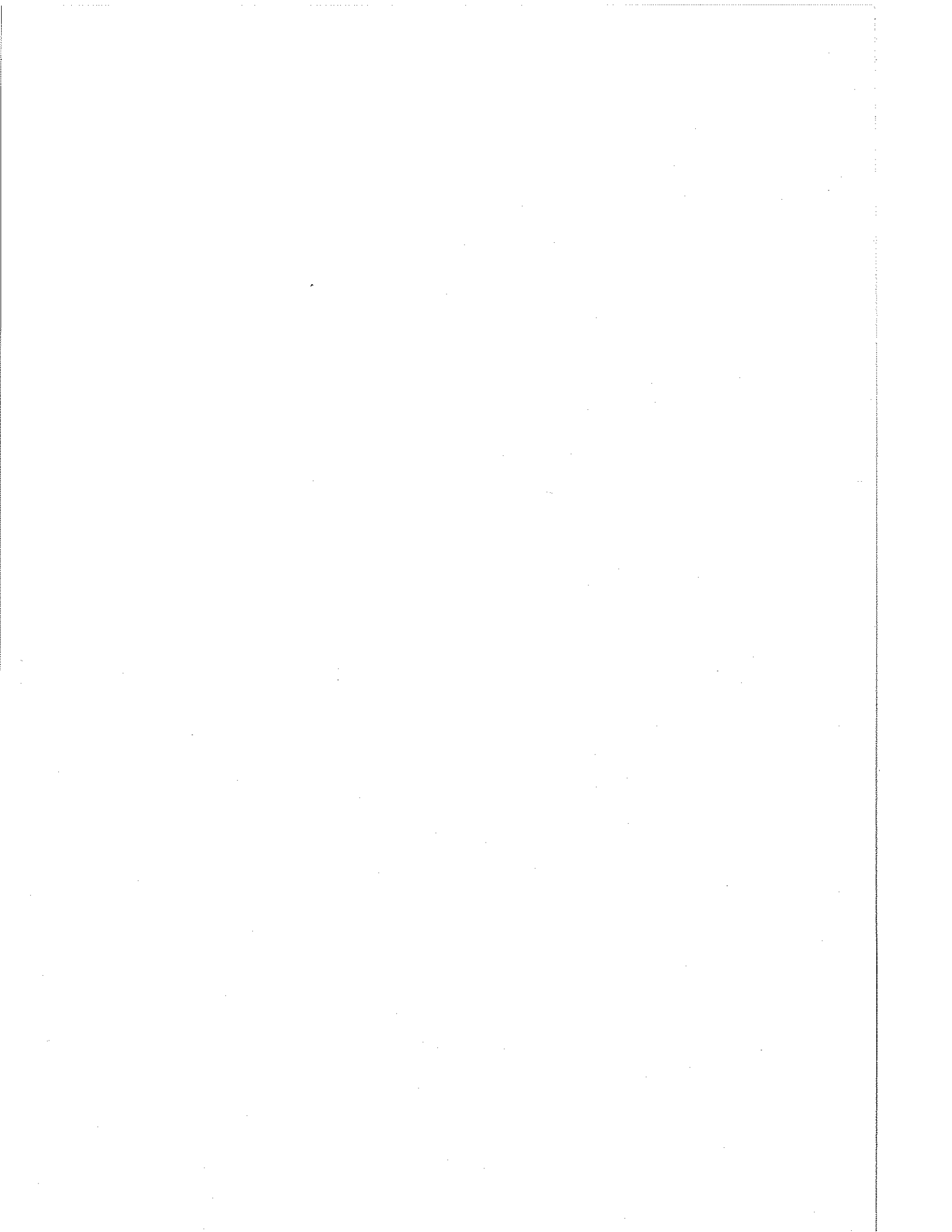
The section as a whole, however, uses language that may establish its non-justiciability. The primary interpreters, in other words, would have been political officials. The draft amendment of the federal government, like its Reply to the Penner Report, would do nothing to preclude aboriginal governments from being involved in continuing trilateral negotiations over the federal-provincial division of responsibility, the amount of support to be provided them, and the extent to which conditions may be attached to that support.

The federal government proposed that the political accord at the March '84 Conference include a commitment by governments to participate in a comprehensive study of all aspects of social, cultural, and economic programs for and services to the aboriginal peoples of Canada. Among the objects of the review would be, paragraph 3:

- (a) clarification of federal and provincial responsibilities for programs and services provided to the aboriginal people of Canada, having regard to the existing and potential roles of aboriginal governments;
- (c) assessment of financial provisions, including consideration of existing arrangements between the government of Canada and the provincial governments;
- (e) examination of programs and services to the aboriginal peoples of Canada, including the degree to which they are comparable with services received by other Canadians residing in similar communities.

The definition of the objects of the review seems to raise all the right questions. The proposal itself, however, did not win much support. Some of the provinces saw no need for a formal accord to conduct a policy study. Aboriginal groups wanted to focus attention on constitutional reform; as

presented by the federal government, the review study was a strictly political supplement to the federal government's constitutional proposal on self-government. It would be unfortunate if the federal proposal for a study were not in some form revived. In the aftermath of the rejection of its mealy-mouthed constitutional proposal, however, the federal government might be able to sell the proposal to aboriginal peoples as a step toward producing a satisfactory constitutional package. The provinces which object to constitutional reform might still be sold the proposal because of the prospect of improving and rationalizing nonconstitutionalized service delivery arrangements.



XVI THE MÉTIS AND SECTION 91(24); POLICY ASPECTS

THE MARCH '84 CONFERENCE

The relationship between the Métis and the federal government was a principal subject of discussion on the first afternoon of the March '84 First Ministers' Conference. At the previous First Ministers' Conference, items of special interest to the Métis had received little attention. The agenda for March '84 included four headings, and it was under the third one, "Land and Resources," that Métis identification and Métis land base issues were raised. At the final working group meeting in late February in Victoria, concern was expressed by representatives of the Métis, and some provinces as well, that the special concerns of the Métis would lose out once again - to the serial priority of the first two agenda headings, "Equality Rights" and "Aboriginal Rights and Treaty Rights," and to the political priority of the last agenda item, "Aboriginal Self-Government."

The Métis are at several disadvantages in having their concerns addressed at s.37 Conferences; they arguably have few or no aboriginal rights or treaty rights, and thus cannot take advantage of discussions of those; they are less numerous than the status Indians, and so have less elec-

toral strength; apart from the four thousand Métis who live in Metis Betterment Act settlements in Alberta, the Métis, unlike band Indians, cannot take advantage of the political structures established by law to assist in organizing themselves and obtaining funding. Unlike the Inuit and status Indians, the Métis do not have strong bilateral ties with the federal government, which chairs First Ministers' Conferences, and so cannot lobby as effectively as other aboriginal groups with respect to other meeting arrangements.

In his opening statement to the March '84 First Ministers' Conference, Prime Minister Trudeau expressly raised the issue of federal responsibility with respect to the Métis. He said that the federal view was that the Métis were not "Indians" under s.91(24), but that "the federal government accepts a measure of responsibility for them as disadvantaged peoples." He continued:

At this conference we must come to grips with the question of the complementarity and complementary responsibilities of the federal and provincial authorities and strive to resolve it in the interest of the Métis themselves (1984 FMC transcript, 19).

The Prime Minister suggested that self-government for the Métis might be achieved by delegating legislation to the provinces, with any necessary complementary legislation then being passed by Parliament.

Later in the morning, by linking it to the "Equality of Rights" item, Mr. Bruyere of the Native Council of Canada helped to ensure that s.91(24) would be discussed. In his opening statement he said:

We want a commitment that there shall be equality of treatment of the aboriginal groups not only as between sexes but as between the three aboriginal groups themselves (1984 FMC transcript, 48).

He went on to say:

What we need now is for the federal government with the concurrence of the provinces to unequivocally accept that section 91(24) reference in the Constitution Act, 1867, embraces all aboriginal peoples, not simply those covered by the narrow and unjust definitions of the Indian Act (1984 FMC transcript, 50).

The Métis National Council also protested the "unequal treatment of aboriginal peoples," in the sense that the federal government does not accept constitutional responsibility for the Métis.

That afternoon, after opening statements, Prime Minister Trudeau asked the Conference to advise him on how to proceed with the agenda items. He mentioned "Equality of Rights" first, and here he referred to Mr. Bruyere's statement about equality among aboriginal peoples. The matter would have to be discussed, said Prime Minister Trudeau. That afternoon, it was.

THE INCLUSION OF THE MÉTIS UNDER SECTION 91(24); POLICY CONSIDERATIONS

In the next chapter I will attempt a legal analysis of whether the Métis are "Indians" for the purposes of s.91(24). My conclusion is that the Red River Métis, the descendants of the distinct ethnic and political community that arose in western Canada in the 19th century, are not. Persons of mixed ancestry who identify themselves as Indians, and have strong cultural links with them, ought to be under federal jurisdiction pursuant to s.91(24). My evaluation is strongly based on my understanding of the historical and legal precedents. Like all legal assessments, however, it is also partly based on considerations of justice and policy. Federal legislative jurisdiction over the

Red River Métis is not necessary to the attainment of their goals. It is liable, on the contrary, to impede them.

I will try to substantiate the last claim by examining the specific aims that the Métis organizations have expressed during the s.37 process.

One objective has been the economic development of the Métis people. The federal government, it might be argued, is more likely than provinces are to provide the necessary economic assistance. For one thing, it can raise money more conveniently than the provinces can. It is not limited to direct taxes, as the provinces are, and can raise revenues by a variety of means that are sufficiently subtle to escape taxpayer resentment. A Métis living in a have-not province might be more optimistic about federal assistance because the federal government can draw on the revenue sources of the most prosperous regions of the country. Premier Hatfield cited the limited revenue base of the have-not provinces, including his, as a reason for placing all aboriginal peoples under federal responsibility (1984 FMC transcript, 172). It could also be argued that the federal government is more likely to have the will, and not simply the means, to assist. The argument might be elaborated as follows. If there are local sentiments against providing special assistance for aboriginal peoples, they will tend to be felt less acutely in Ottawa than by a provincial government. Furthermore, a central bureaucracy is more likely than a provincial one to actively promote programs for the benefit of aboriginal peoples. Bureaucracies in general are more likely to have a redistributive orientation than the general public, because hard minded, winner-take-all free enterprisers are more likely to choose private than public life. The federal bureaucracy is so massive that its operators tend to be more independent of

political control than are their provincial counterparts. Aboriginal groups may therefore expect to find a relatively reliable source of assistance among the federal bureaucrats. Finally, given the extensive financial assistance it provides to status Indians, the federal government could not in good conscience refuse to assist the Métis if they too were under federal jurisdiction.

In reply to the foregoing arguments, it should first of all be pointed out that there is no necessary connection between legislative jurisdiction and legislative responsibility. The federal government undoubtedly has legislative jurisdiction over a great many aboriginal persons for whom it does next to nothing. The federal government has chosen to establish a special regime for status Indians on reserves, but it does not provide much assistance to status Indians off the reserves, or to those Indians it has chosen to define as non-status. The federal government would not necessarily be shamed into providing Métis with a level of assistance equivalent to that it provides to status Indians. It could distinguish the case of status Indians on reserves by pointing to the special history of the federal relationship with them - including the establishment of a special regime under the Indian Act and the making of treaty commitments. The appeal to "equality among aboriginal peoples" must be received with caution. The individual rights in the Charter of Rights and Freedoms are largely based on the liberal belief in the political equality of individuals. Many of the rights of aboriginal peoples, by contrast, are based not on the intrinsic equality of individuals but on the special history of particular collectivities. Whether an Indian band has aboriginal rights or treaty rights depends on its particular history; a particular course of historical dealing may entitle a group to special treatment that others do

not enjoy. Indeed, s.25 of the Charter of Rights and Freedoms shields the rights of aboriginal peoples from the application of the Charter - including s.15, the equality norm. The inclusion of the Métis in the definition of "aboriginal peoples" under s.35 of the Constitution Act, 1982 did not necessarily establish them as having entitlements equal to those of the Inuit and Indians. All section 35 of the Constitution Act, 1982 does is recognize and affirm the aboriginal and treaty rights of the aboriginal peoples of Canada; if, in light of their distinct history, the Red River Métis have no aboriginal or treaty rights, their inclusion in s.35(2) does not have that much legal significance. The inclusion of the Métis in s.91(24) might similarly prove inconsequential. It would definitely empower Parliament to do things to the Métis people. It would not require it to do anything for them.

On the other hand, the present constitutional arrangements (assuming the Red River Métis are not included in s.91(24)) do not significantly inhibit the federal government from assisting the Métis with economic development. In many cases, federal assistance is authorized by an express head of federal authority; the federal authority over banking and interest would sustain inclusion of Métis in development bank and mortgage loans programs specially designed for them or for native people in general. Similarly, federal authority over agriculture would justify direct delivery of federal programs to Métis farmers. As mentioned earlier, I would question the constitutionality of direct program delivery to the Métis which cannot be related to a head of federal jurisdiction for many of the same reasons that Professor Trudeau condemned direct grants to provincial universities (Trudeau, 1968, 79). That is, I am generally concerned that directly delivered federal programs exces-

sively blur the lines of democratic and fiscal responsibility that Canadians should be able to rely on in electing and assessing the performance of their governments. They also tend to diminish the power and influence of the governments which should be more informed about, and responsive, to local needs. Nonetheless, most scholars have argued that the power of Ottawa to spend its money as it chooses is essentially unlimited; and the federal government has in some areas acted on this assumption for many years. The Department of Regional Industrial Economic Expansion, for example, provides hundreds of millions of dollars worth of grants, subsidies and programs with respect to projects that are not of national importance.

The transfer of legislative authority to Parliament might be worse than futile for the Red River Métis. It might hurt them. The provinces might disclaim responsibility for economic assistance and service delivery for the Métis, in the same way that provinces have excused themselves from helping Indian communities. The delay, confusion and waste that has too often attended trilateral negotiations with respect to service delivery on reserves might extend to federal-provincial-Métis arrangements.

If enhanced federal economic assistance is the goal, it can be advanced by constitutional amendments that directly impose federal fiscal responsibility, rather than establishing federal legislative authority. One possibility would be a constitutional amendment that requires the federal government to make transfer payments to aboriginal (not Indian, but aboriginal) governments sufficient to permit them to maintain reasonably comparable level of services at reasonably comparable levels of taxation. Such an amendment would be of limited utility to the Red River Métis, however, inasmuch as only about four

thousand of them, on Alberta Metis Betterment Act settlements, live on an exclusively Métis land base. It would be possible to frame an amendment that imposed direct federal fiscal responsibility to the non-ethnic regional governments of areas that have a predominantly Métis population. The federal government might, of course, view the implications of the last mentioned amendment as excessively costly; and some provincial governments might reject on principle the inclusion of non-aboriginal residents of a province in an almost exclusively federal fiscal regime.

Another possibility would be to put something in the Constitution like:

The federal government recognizes a special responsibility to assist provincial governments and Métis institutions in promoting the economic, social and political development of the Métis people.

Such a formulation would help the Métis to secure federal assistance for a broad range of programs, whether run by provincial institutions, including local governments, or by Métis governments or agencies. The word "assist" does imply that the federal responsibility is not exclusive. Provincial governments are not to use the amendment as an excuse for reducing their funding of programs that benefit the Métis. The formula proposed does not mention direct federal program delivery, and a reference to that might be added. It is not intended that the federal government exclude the Métis from general programs or special programs for native people, or refrain from designing programs specially for the Métis. A lot of confusion, duplication and delay might be avoided, however, and the cause of Métis self-government advanced, if the federal government channelled its economic assistance into programs run by provincial and Métis institutions.

The utility of such an amendment could be challenged with some force. It does not preclude trilateral disputes over who pays for what. It may also have very little practical effect. The Métis are concentrated in British Columbia, Ontario, Saskatchewan, Alberta, Manitoba and the Northwest Territories. The last mentioned is a federal responsibility as it is. The first four are usually "have" or break-even provinces. Only Manitoba is habitually a beneficiary of the transfer payments system. One can contemplate the federal government, with justification, being less than munificent in its interpretation of the fiscal responsibility norm when it comes to applying it to the wealthier provinces. The have-not provinces are already indirectly assisted in providing programs for Métis in that the economic problems of the Métis are reflected in the general transfer payment formulae. The Métis in have-not provinces, moreover, may benefit from regional economic development and other federal programs.

MÉTIS LAND BASE

The acquisition of land bases has been one of the primary demands of the Métis National Council during the s.37 process. Land bases, it has been argued, are necessary for Métis economic development and the institution of Métis self-government. During the March 8 discussion, Mr. Munro, the federal Minister of Indian Affairs and Northern Development, said in the course of his vigorous intervention:

In 1931 we transferred title to provincial Crown lands and we are still trying to negotiate with some provinces with respect to unfulfilled treaty land entitlements for treaty Indians under treaty.

I suppose if we are going to start now to go down the road of inclusion of all the Métis people that are under federal jurisdiction, the first thing we will have to do is look to the provinces to see how generous they are in terms of land and resources for the Métis people and if it takes even one-tenth as long as it is still taking to resolve the Indian question we may be at this an awful long time (1984 FMC transcript, 189).

The next afternoon, true to form, Prime Minister Trudeau did not echo Mr. Munro's pessimism about whether protracted negotiations would result in the provinces turning over lands to the federal government for the benefit of the Métis; instead, he made the transfer of land an unconditional condition of any transfer of jurisdiction:

If I remain Prime Minister long enough we would be prepared to consider a constitutional amendment saying that the Metis come under Section 91(24), but they would come with their lands which is a message to you and to the other Premiers... (1984 FMC transcript, 373).

Prime Minister Trudeau justified his stance by arguing that when the "Fathers and Mothers of Confederation" provided for Crown lands to be owned by the provinces, "what was withheld from those provincial lands [was] ... Indian lands." If the Métis are to be considered as Indians, "it is a matter of interpreting what of the Crown lands which went to the provinces in 1867 or since then really should not have come to the provinces because they should have stayed with the Indians" (1984 FMC transcript, 374).

The interpretive question stated by Prime Minister Trudeau is not as easy as he might have thought. The histories of Métis land and Indian land are radically different. There were practically no Red River Métis in Canada in 1867 (Census of Canada, 1871). When the province of Manitoba was

created by federal statute in 1870, the federal government retained ownership of Crown land (Manitoba Act, s.30). It provided for the recognition of existing individual land holdings by Manitoba residents, including the half-breeds. The federal government also allotted, "towards the extinguishment of the Indian title to the lands in the Province," 1,400,000 acres of land to the children of the half-breed residents of the new province. The regulations governing this transfer of land to individuals were to be made by the Governor-in-Council - in effect, the federal Cabinet. The allotments, consistent with those demanded by Riel, were to individuals, not the Métis nation as a collectivity. Before Alberta and Saskatchewan were admitted in 1905 - again without obtaining ownership of Crown lands - the federal government established a similar program of half-breed grants in the North-West Territories. By the time the Prairie provinces received ownership of half-breed land in 1930, Métis land claims were supposed to have been settled by federal legislation.

Métis political organizations have contended that through a series of unjust laws, and fraud and speculation by private citizens that was supported by governments, the Métis were unjustly denied the land they were supposed to have received (Sprague, 1979-80; Sprague, 1981; Sanders, 1979). A Métis organization has brought an action against the government of Manitoba for its alleged complicity in the land swindles. Inasmuch as the jurisdiction of actual management of the half-breed land grant programs in western Canada was federal, the federal government must be held primarily responsible for any abuses that occurred. If the Métis claim to a land base is based on historical legal injustice, it is, I would submit, primarily a federal responsibility to

right that wrong. The federal government does not need general legislative authority over Métis to do so. It could simply subsidize the Métis purchase of Crown lands from the province. It could subsidize the purchase of lands under provincial jurisdiction by individual Métis or Métis organizations. The Courts might well find that the continuing force of s.31 of the Manitoba Act gives the federal government the power to take other remedial measures, including the expropriation of provincial land in order to directly transfer it to individuals. Whether the federal government could expropriate provincial land in order to transfer it to Métis organizations is a more difficult question; it might be argued that the federal remedial power is limited to compensating individuals, as opposed to the Métis collectivity. The validity of that argument depends in part on whether the reference in s.31 of the Manitoba Act to the Indian title of the Métis refers to an aboriginal title they were recognized as having, or, as Sir John A. Macdonald later contended, was political rhetoric lacking in legal accuracy. With respect to the Métis in Alberta and Saskatchewan, the Courts might hold that the federal government has a continuing residual authority to remedy the wrongs it committed when it was still owner of the Crown lands there. To sum up, insofar as past legal injustice with respect to Red River Métis land grants supports their contemporary demands for a land base, the federal government ought to be held primarily responsible for providing them. It has considerable ability to do so even without having general legislative authority over the Métis under s.91(24) of the Constitution Act, 1867. If jurisdiction were transferred, the province would not be morally responsible for providing land on the basis of Prime Minister Trudeau's analogy to the history of Indian lands.

Métis representatives have often emphasized, during the s.37 process, the desirability of settling their demands through political discussion and accommodation, rather than legalistic debate or actual litigation. Their demand for land bases can be interpreted as a forward looking attempt to secure their economic and political development. A federal request that provincial land be delivered up onto the federal level along with jurisdiction over the Métis could be argued in terms of justice and convenience, rather than legal history. The federal argument could, for example, portray the surrender of land as payment for relief from their responsibility for social service delivery. Even if that principle were accepted however, interpreting it in acreage would require more than a few stabs at a pocket calculator. Whether negotiations over the transfer of provincial land turned on legal or political principles, they would be, as Mr. Munro said, difficult and protracted.

Upon the transfer of legislative authority over Métis, the federal government might have the legal authority to short-circuit negotiations for expropriating the provincial lands needed for a Métis land base. Parliament almost always provides for compensation when it expropriates; in the case of provincial Crown land, however, it might well be constitutionally bound to do so (Hogg, 1977, 397; LaForest, 1969, 149-155, 173). The judicial precedents on the last point are not clear, but the prohibition against the taxation of provincial property in s.125 of the Constitution Act, 1867, is a strong analogy for not permitting the expropriation of its property without compensation. It should be noted that Mr. Munro mentioned that the first thing to look at upon the transfer of legislative jurisdiction would be the generosity of the provinces in providing land. Paying for the land might be the last thing

the federal government would look at. Without any transfer of legislative authority, however, any federal government willing to spend a lot of money could probably obtain a land base for the Métis simply by subsidizing the purchase of provincial lands.

My conclusion would be that the transfer of legislative authority to the federal government, which does not own the Crown land in western Canada, would in general complicate and delay the efforts of the Métis to acquire further land bases.

A special concern must be the effect of a transfer of authority on the Metis Betterment Act settlements in Alberta. In his opening statement, Premier Lougheed mentioned that a joint committee of Métis and provincial representatives, chaired by Dr. Grant MacEwan, was studying revisions to the statute under which eight areas have been set aside for the exclusive use of Métis. Later in the afternoon, near the end of the open discussion on s.91(24), Premier Lougheed mused:

I believe I was unequivocal a year ago in saying that I always presumed that we in the province of Alberta had the primary responsibility for the Metis people and we have been doing our best to do that. Now, I am being informed that that wasn't our responsibility and that we shouldn't perhaps be looking at it that way. I then hear these arguments being presented, and I wonder if perhaps our Metis Betterment Act might be unconstitutional, so it has taken a very interesting twist and turn today I guess -- I don't want to be abrupt about it, but it certainly has taken an unusual turn (1984 FMC transcript, 203).

The MacEwan Report was issued on July 12, 1984. It proposed to replace the Metis Betterment Act with a Metis Settlements Act. The latter would explicitly grant each community complete and collective ownership of the surface

rights over its area. The powers of settlement governments would be roughly equal to those of a municipality. If these reforms are satisfactory to the Métis, it would be unfortunate if they were stalled or lost by a transfer of authority to the federal level of government.

Premier Lougheed's statement should also be pondered by those who would urge the Courts to construe the Métis as coming within the existing wording of the Constitution Act, 1867. Suppose the Court did so. A necessary corollary might be that the Metis Betterment Act is unconstitutional. It is not impossible that the Act would still be sustained on the grounds that it is primarily a local economic relief measure, rather than an attempt to recognize any special political or legal claim the Métis have as an aboriginal people. It is well documented that the Alberta government so considered the Act when it enacted it in 1940. A Court would, however, probably find the Act ultra vires on the basis that it singles out the Métis for eligibility in a comprehensive proprietary and political regime. It is not as though the province made special provision for the Métis as one limited aspect of its regulation of a provincial subject matter.

If the Metis Betterment Act were in fact ruled ultra vires, there might be a way for Parliament to come to a swift and effective rescue. It would ratify everything done and all rights acquired under the Metis Betterment Act since its would-be enactment by the province in 1940; then it would enact its terms as federal law, but substitute federal for provincial authorities at appropriate places. Serious complications might arise, however, with the course of action just sketched. Proprietary rights to land settlement and their revenues might be disputed among the province, federal government and

Métis. Subsurface rights are being litigated between the province and the Métis as it is. Parliament might find itself impaired in implementing the MacEwan proposals with respect to land rights, should ownership of the land remain with the provincial Crown. Serious delay by Parliament in making the rescue effort just sketched could result in the dismemberment of the settlement areas. For the settlement area Métis, a transitional period of legal chaos, leading to a new juridical era in which they are no better off than before; the prospect is not going to encourage judges to find the Métis generally included within s.91(24) of the Constitution Act, 1867.

MÉTIS SELF-GOVERNMENT AND SECTION 91(24)

Early in the preparatory meetings for the March '84 Conference, the Métis National Council reserved the right to address Working Group 4 meetings on the subject of Métis self-government outside of Métis land bases. Its subsequent submissions, however, were confined to Working Group 3, Land and Resources, and tied to proposals that the Métis be granted exclusive homelands. Does the absence of federal legislative authority over the Métis impede travel towards political autonomy over their homelands?

Consider the roads that might be taken. One would be the delegation of legislative authority by provincial legislatures and Parliament. Most of the powers a Métis government would likely need - Property and Civil Rights, Education, Local and Private Matters - are assigned to the provinces by sections 92 and 93 of the Constitution Act, 1867. The province could delegate them to Métis governments without even consulting the federal

government. (There may be constitutional limits on the extent to which either a province or Parliament can delegate but these will be discussed in Chapter XX). There may be a few types of jurisdiction suitable for a Metis government but outside the scope of a province. These could be directly delegated from Parliament to Métis governments. Provincially established agencies are often the recipients of adjudicatory, administrative or policy-making authority from Parliament. (Examples: provincial Crown Attorneys are authorized to prosecute Criminal Code offences: A.G. Canada v. Canadian National Transport Ltd. (1983), 3 D.L.R. (4d) 16; provincial agricultural products marketing boards are empowered to regulate interprovincial and international trade: P.E.I. Potato Marketing Board v. Willis, [1952] 2 S.C.R. 392.)

A second route whereby the Métis could achieve self-government over their land bases is by entrenching their authority in a new section of the Constitution. The existing division of authority does not make that prospect any more difficult to achieve.

A third possibility would be for the Métis to enter into agreements on self-government which amounted to "treaties" within the meaning of s.35(1) of the Constitution Act, 1982 (see Chapter XXI). Should the Métis be concerned that a province cannot enter treaties with an aboriginal group, that only the federal government can? The grounds for supporting this restriction would be that s.35 refers to "existing treaty and aboriginal rights," and what the framers had in mind in 1982 were treaties between the Imperial and federal Crowns and Indians. There were no treaties between provinces and aboriginal people, and it was not intended that a mechanism for creating

constitutionally protected rights be extended to provincial-aboriginal dealings. There are solid reasons to believe that s.35(3) of the Constitution Act, 1982, as amended, as a result of the March '83 Conference, makes treaty making by provinces possible if it was not before. Section 35(3) says that

For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

The basic idea of section 35(3) was proposed by the Inuit Committee on National Issues in an effort to ensure that the James Bay Agreements would receive whatever constitutional protection section 35(1) afforded. The parties to that agreement are the federal government, James Bay aboriginal peoples - and the province of Québec.

In conclusion, the status of the Red River Métis as provincial people would not impede their progress towards political autonomy or Métis land bases. The transfer of legislative authority to Parliament might in fact frustrate Métis efforts to obtain regional governments suited to their needs. Once legislative jurisdiction over them was transferred, a province might be less inclined to take any special measures on behalf of the Métis.

There is another form of Métis self-government that should be considered with respect to the transfer of legislative authority over the Metis to Parliament. The form would be the empowering of Métis agencies to deal with particular subject matters. During the discussion of March 8, Mr. Chartier of the Métis National Council expressed the concern that the Métis people not be fragmented by provincial legislation, and gave Métis child welfare as an example of an area where national legislation establishing Métis control might

be desirable (1984 FMC transcript, 188). It should not be forgotten, however, that the provinces will in any event retain control over child welfare for the general population. It would be necessary for the federal government to obtain the political and legal cooperation of all of the provinces concerned before it could establish a uniform regime of Métis control. On the other hand, if the political will were in fact there, and if the Métis remained a provincial responsibility, the western provinces could work with each other to coordinate their Métis child welfare schemes.

The Inuit in the James Bay Area and north of 60° have chosen not to aim at securing ethnic governments over exclusive Inuit territories. Instead, they have worked towards the establishment of powerful local governments in which the Inuit are a majority, but in which everyone has full and equal rights to participate in public life. It may well be that the Inuit approach is the best one for the Métis to pursue. (It is the one they adopted in 1870, when they sought entry in Confederation as equal citizens of a predominantly Métis province).

There are only about 4,000 Métis in settlement areas in Alberta. A much larger number live in mixed communities in rural or northern parts of western Canada. To establish exclusively Métis homelands for these people would require their leaving their present areas or removing the non-Métis from them. Both possibilities entail not only sizeable governmental expenditures, whether in land or compensation money; they involve the distasteful business of having the government pass binding judgments on the ethnic identity of people. They mean the disruption of communities in which people of all ethnic origins respect and co-operate. The special needs of the Métis might

be met by gerrymandering regional government boundaries to produce areas with high concentrations of Métis, and if necessary, by granting the local government unusually extensive powers with respect to educational and cultural matters. The acceptability to the Métis of non-ethnic regional governments would depend in part on the perceived likelihood of a large influx of non-Métis into the regions. It did not take long after the admission of Manitoba into Confederation for immigration to make the Métis a small fraction of the total population. It may well be that the risk is relatively small that non-Métis would swamp the Métis populations in the areas - usually rural, often northern - which could be drawn so as to make the Métis a preponderant majority.

My overall conclusion is that the economic and political development of the Métis would not be significantly advanced by including the Métis under s.91(24). In some ways, it might be impaired; provinces might become less willing to assist, trilateral jurisdictional and financial disputes might increase, and the special legislative programs already in place for the Métis in Alberta and elsewhere would be upset. The federal government does not lack the authority to extend greater economic assistance to the Métis. A constitutional amendment generally requiring the federal government to do so might prove useful to the Métis, but disputes over its interpretation and a slackening of provincial responsibility might diminish its effectiveness.

XVII THE MÉTIS AND SECTION 91(24): THE LEGAL HISTORY

This section will examine the arguments from legal history that the Métis already come within section 91(24) of the Constitution Act, 1867. Among the most important are that at the time of Confederation, the term "Indian" was generally understood as applicable to the Métis, and that a purpose of s.91(24) was to protect the land rights of Indians and this same purpose applies to the land rights of the Métis. In the course of the afternoon of March 8 of the 1984 First Ministers' Conference, Prime Minister Trudeau said that the federal opinion on the non-inclusion of the Métis in s.91(24) was based "on the judgments of the Supreme Court and the advice we received from our legal counsel as to what the Fathers of Confederation meant when they wrote in 1867 that the Indians were in section 91 of the BNA Act" (1984 FMC transcript, 149). Some comments here on the historical record should be useful because of the scarcity of academic studies in recent times on the historical side of the s.91(24) argument. The most extensive effort to make the case for inclusion of the Red River Métis is a student article by Clem Chartier in the 1978-79 volume of the Saskatchewan Law Review (Chartier, 1978-79). (Mr. Chartier later acted at the First Ministers' Conferences as one of the principal spokesmen for the Métis National Council.) His interpretation

of the historical evidence is that "half-breeds" were understood as being included in the generic term "Indians." My own interpretation of both pre and post-Confederation history is that persons of mixed ancestry who identify as Indians have often been considered as Indians for legal purposes, but that the Red River Métis have been referred to, and legally treated, as distinct from the Indians.

The Supreme Court of Canada precedent of principal relevance is Re Eskimo, [1939] S.C.R. 104. The Court had been asked by the federal government to give an advisory opinion on whether the Inuit of Northern Quebec were included in the term "Indians" as used in s.91(24) of the Constitution Act, 1867. (At the time the people were called Eskimos and the document the British North America Act.) The Court unanimously answered in the affirmative. Three concurring judgments were delivered, by Chief Justice Duff and his colleagues Cannon and Crockett. All three opinions were based on an examination of the historical use of terms, including "Indian," "Esquimaux" and "Sauvage," during the period up to and immediately after Confederation.

A historical source that all three judges relied upon was the 1857 Report of the Select Committee of the House of Commons. That document contains the evidence before and recommendations by the British Committee studying the future of the enormous part of North America then under the administration of the Hudson's Bay Company. At the time, the Company had rights under the Royal Charter to Rupert's Land - which included what is now Manitoba - the centre of the Métis people. Chief Justice Duff found:

It was quite clear from the material before us that this Report was

the principal source of information as regards the aborigines in those territories until some years after Confederation ([1939] S.C.R. 104, 109).

The Report contained a census and map which Chief Justice Duff describes as "evidence of the most authoritative character" on the use of the term "Indian." The "Aboriginal Map of North America denoting the Boundaries and Locations of Various Indian Tribes" includes the "Esquimaux" but makes no mention of half-breeds.

The summary of the census is as follows:

The Indian races shown in detail in the foregoing census may be classified as follows:

Thickwood Indians on the East side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet & c.)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indians in British Oregon and on the North-west Coast	<u>80,000</u>
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	<u>11,000</u>
Souls	158,000

(attached to the Report as Appendix, Number 2(c), Indian Population, at page 365)

The inclusion of the Esquimaux in the enumeration of "Indians" in the census and map was an important factor in the Court's conclusion that "Indian" in s.91(24) also encompassed the Inuit. The lumping together of half-breeds and whites must be given equal and opposite effect.

Chartier attempts to limit the significance of the census by contrasting it

with oral evidence given to the British Committee (Chartier, 1978-79, 44). With respect, it is my opinion that the transcript largely reinforces the evidence of the census that the half-breeds were understood as generally not coming under the term "Indian." Some examples. The testimony of Sir George Simpson (Governor of the Hudson's Bay territories), according to Chartier, "appears to treat both the half-breeds and Indians as belonging to the same group of people or race" (Chartier, 1978-79, 45). He quotes the following exchange:

1681. Mr. Roebuck.] In that census which you have given in, is there an account of the numbers of the half-breeds in the Red River Settlement. Yes; 8,000 is the whole population of Red River; that is the Indian and half-breed population.

1682. Can you give any notion of how many of those are half-breeds? - About 4,000 I think.

First of all, the exchange does distinguish between half-breeds and Indians, and is immediately followed by a series of questions by Mr. Roebuck specifically on half-breed education. Mr. Roebuck then asks, as separate batches of questions, about half-breed trading with the United States and then about Indian trading with the United States. Secondly, not much can be read into Governor Simpson's linking together half-breeds and Indians in his response to Q. 1681. At question 1462, he had been asked what the Red River population was, and had answered

The total population shown is 6,500; add the population of Portage la Prairie, Manitobah, and Pembina, making 1,500; making a total of 8,000.

Now the census list identifies the figures for all six posts in the Red River

Settlement as "including whites and half-breeds." What appears to have happened in exchange 1681, in other words, is that rather than answering the narrow question posed, Governor Simpson started off by recalling the entire population, including whites, of Red River. When pressed to be more precise about the half-breed population, he was able to make a separate estimate.

Another exchange in which the examiner (Mr. Gordon) and Governor Simpson use the terms "half-breed" and "Indian" to characterize different groups of people:

1054. The greater portion of your European servants, I presume, come from England or Scotland; they are not born of white parents in the country? - The greater portion of our white servants are Orkney men; there are a few Highlanders, and a few few Shetlanders; a large proportion of our servants are half-breeds.

1055. With your Indian servants what sort of contract do you enter into; how long is their term of service? - Merely for the trip; merely for the summer. They are sometimes employed as express bearers going with letters, and they are frequently employed as boatmen, mixed with the Company's servants and with the half-breeds.

Chartier argues that the following set of exchanges (herein marked with an asterisk) show "there really was no need to differentiate between the two - half-breeds and Indians":

* 1747. Mr. Grogan.] What privileges or rights do the native Indians possess strictly applicable to themselves? - They are perfectly at liberty to do what they please; we never restrain Indians.

* 1748. Is there any difference between their position and that of the half-breeds? - None at all. They hunt and fish, and live as they please. They look at us for their supplies, and we study their comfort and convenience as much as possible; we assist each other.

1749. Lord Stanley.] You exercise no authority whatever over the Indian tribes? - None at all.

1750. If any tribe were pleased now to live as the tribes did live before the country was opened up to Europeans; that is to say, not using any article of European manufacture or trade, it would be in their power to do so? - Perfectly so; we exercise no control over them.

1751. Mr. Bell.] Do you mean that, possessing the right of soil over the whole of Rupert's Land, you do not consider that you possess any jurisdiction over the inhabitants of the soil? - No, I am not aware that we do. We exercise none, whatever right we possess under our Charter.

* 1752. Then it is the case that you do not consider that the Indians are under your jurisdiction when any crimes are committed by the Indians upon the Whites? - They are under our jurisdiction when crimes are committed upon the Whites, but not when committed upon each other; we do not meddle with their wars.

With respect, questions 1747 and 1748 do not show that in general there was no need to differentiate half-breeds from Indians. They simply show that in one respect some half-breeds were in the same position as some Indians. The examiner, it should be noted, asked about the treatment of the two separately, using different terms. Compare the exchange with the following:

1050. Mr. Edward Ellice.] Is it not the fact that that is one of the districts into which spirits did not go at all? - No spiritous liquors have been sent northward of Cumberland to my knowledge since 1832.

1051. Either for the Company's servants or for the Indians? - Not for anybody; neither for officers, servants, nor Indians.

The equal treatment of Company servants and Indians with respect to the distribution of liquor hardly establishes that in general there was no need to distinguish the groups.

The "no need to distinguish" argument is inconsistent with a vital and

well founded claim of the Métis National Council - that a distinct Métis people evolved in the Red River area in the 19th century. The development of distinctive behaviour and ethnic self-consciousness among the half-breeds would have been a matter of which a Hudson's Bay Governor would be well aware. A number of historians have attributed the origin of Métis nationalism to the struggle between the North West Company and the Hudson's Bay Company, particularly over the establishment by the latter of the Selkirk colony (Howard, 1952, 36-37; Lussier, 1978, 20; A.S. Morton, 1978, 30; Stanley, 1978, 74). That settlement was supposed to be an efficient source of labour and supplies for the Hudson's Bay Company's fur trading operation, and was intended as well to bolster the Company's claim to proprietorship of Rupert's Land. The Canadian-based North West Company attempted to destroy it by inciting the half-breeds in the area to regard it as a threat to their own land rights. According to Dr. G.F.G. Stanley:

At the door of the North-West Company must be laid the responsibility for rousing the racial consciousness of the Metis. The Nor'Westers carefully fostered the idea of half-breed territorial rights and informed the credulous métis that the white settlers were interlopers who had come to steal the land from them (Stanley, 1960, 11).

The North West Company's attempts to destroy the colony ultimately failed, and it merged with the Hudson's Bay Company. Métis nationalism, however, remained alive. Governor Simpson wrote in 1835:

The Brûlés are becoming clamorous about their rights and privileges as Natives of the soil and it required all our most skillful management to maintain the peace of the Colony during the Holidays while rum was in circulation (A.S. Morton, 1978, 31).

An explanation that has been proposed for the use of the term "Bois Brûlés" to describe half-breeds is that the Ojibway Indians described them as "wissakodewinnii," meaning "half-burnt woodmen," because of their lighter complexions. "Bois brûlé" is an abridged French translation (Sealey, 1978, 7).)

In 1845, a group of Métis, describing themselves as "natives of this country, and half-breeds" submitted to the Governor of Red River Settlement, Alexander Christie (a Hudson's Bay Company appointee), a series of fourteen questions concerning the rights of half-breeds. The questions distinguished half-breeds from both Indians and other Europeans. Among them:

2. Has a native of this country (not an Indian) a right to hunt furs?
6. Can a half-breed receive any furs as a present from an Indian, a relative of his?
7. Can a half-breed hire any of his Indian relatives to hunt furs for him?
10. With regard to trading, or hunting furs, have the half-breeds, or natives of European origin, any rights or privileges over other Europeans? (Begg, 1894-95, vol. 1, 261).

The reply was that as British subjects, the half-breeds had the same rights - no fewer, but no more - as residents of the country who had been born in the British Isles. Nonetheless, the form of the questions indicates that the half-breeds had a strong sense of their distinct identity (Begg, 1894-95, vol. 1, 263).

In 1849, the Hudson's Bay Company again faced a challenge from a distinctively Métis group. It had charged four half-breeds, including Pierre

Guilleaum Sayer, with trading in violation of the Company's monopoly. A large group of "Armed Half Breeds," to quote the trial transcript, surrounded the court-house; the leader of the group, James Sinclair, said they came as "Delegates of the people." Sayer was actually convicted by the jury; Sinclair argued, however, that Sayer's belief in the legality of his conduct justified the Court in foregoing punishment. The prosecutor and the Court agreed. The event was, in the end, interpreted by the Métis as a vindication of their right to trade notwithstanding the Company's claim to a monopoly (Flanagan, 1979, 4).

The distinction between Indians and half-breeds was reflected in the constitutional law of the Council of Assiniboia. First recall the reply by Governor Christie in 1845 that the half-breeds were British subjects like any others. Contrast it with the report of the Law Amendment Committee to the Council of Assiniboia in 1851:

In addition to all the general restraints our local legislature lies under two special restrictions:

First. The Indian tribes do not stand on the same footing as British subjects. Our local legislature, for instance, does not appear to be competent to regulate their right of cutting of hay for themselves . . . Mr. Governor Christie's proclamation as to the date of beginning to cut hay was understood not to extend to the members of Indian tribes (Oliver, 1914, vol. 1, 371).

The 31 May, 1849 Minutes of the Council of Assiniboia recalls the "unlawful assemblages of the people" in connection with the Guilleaum Sayer case, and attributes the "excitement" to "a desire on the part of the Canadian and half-breed population to obtain the following objects, vidt.:-

4th. The infusion into the Council of Assiniboia of a certain

proportion of Canadian and half-breed members (Oliver, 1914, vol. 1, 352)."

The Council responded that it would bring the representation question to the attention of the Hudson's Bay company. In 1857, three half-breeds, Salomon Hamlin, Pascal Brèland and Francois Bruneau were appointed to the Council.

To sum up, by 1857 the Métis had a distinct history of military, economic, legal and political dealings with the Hudson's Bay Company. They had developed their identity in other ways, including the institution of the buffalo hunt and their military victory over the Sioux at the Battle of Grand Coteau in 1851 (W.L. Morton, 1978, 47). The distinctive cultures of the Métis and Indians were reflected in the different terminology used to describe them. There was, for many important purposes, a real need to distinguish between the two groups.

Chartier argues that exchange 1752, quoted above, "could be interpreted as saying that, as long as 'Indians,' which must include both the Indians and half-breeds, did not commit crimes upon the Whites the Hudson's Bay Company didn't interfere with their normal course of dealings" (Chartier, 1978-79, 46). The language of that exchange does permit that interpretation, but it far from compels it. Perhaps Governor Simpson was not thinking about the half-breeds at all. Question 1749, which Chartier does not quote, expressly asks about "Indian Tribes," and that is whom Governor Simpson may have had in mind when asked just a little later about "Indians." Another possible interpretation of exchange 1752 is that the half-breeds were treated for legal purposes as whites. It has already been argued that that in fact was the case.

Several exchanges from the testimony of Reverend David Anderson, the Bishop of Rupert's Land, are cited by Chartier. The exchanges marked with an asterisk, he argues, show that half-breeds are referred to "as part of the aboriginal population" (Chartier, 1978-79, 46).

4384. With regard to the half-caste population, will you have the kindness to tell the Committee your opinion in reference to that portion of the inhabitants of the Red River Settlement? - My own impression is favourable; that we must look to the half-caste population as the strength of the settlement of the country. The number of those of pure blood, the Scotch population, is comparatively only small, so that dependence must be on the half-caste population in a great measure; and they are those more immediately connected with my own church.

4385. Mr. Roebuck] Are you aware of any great settlement ever having been made by a half-caste population on the continent of America? - No, I have not.

4386. Are you at all aware of the fact the brown population dies out as the white population advances? - Such is said to be the general statement; but still, in our own case, as regards the Indian Settlement parish, it is the other way, the population is increasing.

4387. How large is the population in that parish which you now speak of? - It is one of four churches on the Red River; the Indian Settlement parish has a population of 650.

4388. Indians or half-breeds? - Indians.

4389. How many half-breeds are there? - They come in the adjoining parish, higher up on the Red River.

*4390. How many half-breeds have you in your diocese? - A very large number; perhaps 1,500 or 2,000 on the Red River.

*4391. So that taking them all together, adding the 2,000 half-breeds to the 600 full-blooded Indians, you have 2,660 inhabitants with the Indian blood in them. - Yes.

There are a number of exchanges in Reverend Davidson's testimony where half-breeds are included in a category with Indians. That does not

show that they were considered to be Indians. On the contrary, throughout the testimony of Reverend Davidson there are many examples of the Indians being distinguished from the half-breeds; exchange 4388 is one of them.

Another is:

4253. What are the number and character of the native agents? - I have two native ordained clergymen, that is to say, native Indian clergymen, and one who is a country-born clergyman, namely, born in the country, but not an Indian in the same sense as the other two.

Yet another is:

4423. Are there many who are clergymen of the Church of England? - Yes, there is the one whom I called a country-born clergyman, though not a native Indian clergyman.

4424. But has he Indian blood in his veins? - He has.

On many occasions - exchange 4384, for example - distinct lines of inquiry are made about half-breed and Indian. Chartier notes one instance where the umbrella term used is "Indian":

4394. So that in fact, in all parts of the territory of America in which the white man has appeared, the brown man has disappeared? - I am rather unwilling to believe it as regards one's own country, because I think that more of effort [sic] is made for the Indians. I am sure that the Indian effort is more successful in our country than in the States or in Canada.

4395. You are speaking of the Indian effort applying to 2,600 persons? - To the much larger number of 8,000 Indians, taking the whole territory.

It appears from exchange 4282 that Reverend Anderson's figure of 8,000 Indians refers to both Indians and half-breeds:

4282. Are you able to give the Committee any estimate of the total number of the members of the Church of England who you think are

to be found in Rupert's Land; I mean among the Indian or half-breed population? - I think taking those acted upon by Christianity, they would be about 8,000.

Let's follow the testimony there, because it actually includes another example, not cited by Chartier, of the use of "Indian" as an umbrella term including the half-breeds:

4283. Do you mean including all denominations of Christians? - No, even of our own Church.

4284. Taking all Christian sects into account, Roman-catholics and all, can you give the Committee any idea what, in your opinion, is the number of Christians altogether among the native population in Rupert's Land? - Perhaps about 6,000, added to the number which I have given.

4285. Do you mean of the native and half-breed population? - Yes.

4286. Are you speaking of the Red River only, or of the whole of Rupert's Land? - The whole of Rupert's Land. There are, perhaps, 8,000 of our own Church, and 6,000 besides, including Roman-catholics and all others; that would make 14,000.

4287. Do you believe that there are only 14,000 persons of Indian origin in the whole of Rupert's Land who profess Christianity? - I do not think there are much more.

4288. Including the Red River Settlement? - The number would not be much more; not more than 16,000, I think.

4289. I presume you mean to include in that answer the half-castes of the Red River, and in fact the whole of the Indian population, whether full blood or half-breed? - I do.

The two related examples of the use of the term "Indian" to cover half-breeds are exceptional. Usually other terms are used when both Indians and half-breeds are to be considered in an ensemble; in the passage just reproduced, "Indian or half-breed" (exchange 4282), "native" (exchange 4284), and "native and half-breed" (exchange 4285) all appear before "Indian

population" is finally used. It is significant that these other terms not only outnumber "Indian population," but precede it - the latter term is only used once it has been expressly established that it encompasses half-breeds. Reverend Anderson's initial exclusion of Roman Catholics from the flock of those "acted upon by Christianity" (exchange 4282) is an illustration that categorical terms can be employed in unusual ways.

From the testimony of Alexander Isbister, Chartier reproduces one instance in which "Indian" is applied to half-breeds; Isbister refers in exchange 2410 to his aim of improving the conditions of "the native and half-caste Indians in the Red River Settlement." Not reproduced is a latter reference to "extracts from a treaty between the United States government and the Indians and half-breeds occupying the upper part of the Red River valley" (exchange 2633). Nor are a number of questions and answers by various people in which the half-breeds are discussed as a distinct group. From the examination of John Ross, a member of the Parliament of Canada:

129. Mr. Gordon] Is it not practically found that a population consisting, as that of the Red River Settlement does, of a very great proportion of half-breeds and Indians, is more difficult to govern than one consisting entirely of whites? - I think so; all-half breeds are difficult to govern. I speak now particularly of the difficulty they created with the mining licenses.

Colonel John Crofton, who had been on duty at Red River, was asked about his journey there:

3186. Were there many persons with you, or were you a small party? - A part of the way I proceeded with Indians in the canoe and two half-breeds.

The discussion eventually turned to half-breed complaints about legal restrictions on trade. Some excerpts:

3232. Mr. Roebuck] When you were there, had you much communication with the half-breeds? - A good deal.

3246. Lord Stanley] You say the law forbids them to have any traffic with whom? - With the Americans, or Indians in furs.

My respectful conclusion is that the testimony in the 1857 Report generally supports, rather than contradicts, the usage of the census - that half-breeds are not comprehended by the term "Indian."

The appendices of the 1857 Report contained the texts of a couple of Hudson's Bay regulations and resolutions. Chartier contends that they are significant in that "this material does not use the term half-breed" only the term "Indian," and that their correct interpretation is that the latter term applied to the former. The Regulation for Promoting Moral and Religious Improvement begins:

Resolved, 1st. That for the moral and religious improvement of the servants, the more effectual civilization and the instruction of the families and Indians attached to the different establishments, the Sabbath be duly observed as a day of rest at all the Company's posts throughout the country, and Divine service be publicly read with becoming solemnity, at which all the servants and families resident be encouraged to attend, together any of the Indians who may be at hand, and whom it may be proper to invite.

As Chartier himself points out, many of the Hudson's Bay Company servants were half-breeds; thus many of them would have been covered by the reference to servants and families. It is possible, I would concede, that an independent half-breed in the vicinity of the post was supposed to be covered by

the reference to "Indian." It is also possible that the drafters were less than exhaustive in their consideration of the possibilities. (Even if Chartier's suggestion is accepted, a non-native European or American happening at the post would be excluded from the literal scope of the regulation). The drafters of an 1851 Hudson's Bay resolution on temperance, also cited by Chartier, seem to have been more meticulous:

Resolved, 42... that from and after this date, no spirituous liquor be issued from the Moose depot either to the Company's officers or servants, to strangers or to Indians...

INDIANS OF MIXED ANCESTRY

The half-breeds referred to in the preceding analysis of the 1857 Report are those who belonged to a group of people who developed a distinct culture, centered on the Red River Settlement area. Throughout this discussion, the term "Métis" will be reserved for that group of people and its successors. The conclusion just offered is that the 1857 Report suggests that the Métis were not understood as included in the term "Indians." In a little while, it will be argued that subsequent history supports the exclusion of the Métis from s.91(24). There were, however, many people, usually of mixed ancestry, who continued to closely associate with traditional Indian groups. Historical legal practice supports their inclusion within s.91(24). (Chartier's analysis does not observe the distinction just followed; many of its submissions - some of which I respectfully concur in - actually apply to the latter category of people).

An Act for the better protection of the Lands and Property of the

Indians in Lower Canada, Statutes of Canada 1850, 13 and 14 Vict. C.42., provided in section 5:

And for the purposes of determining any right of property, possession or occupation in or to any lands belonging or appropriated to any Tribe or Body of Indians in Lower Canada, Be it declared and enacted: That the following classes of persons are and shall be considered as Indians belonging to the Tribe or Body of Indians interested in such lands:

First. - All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.

Secondly. - All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.

Thirdly. - All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such; And

Fourthly. - All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.

An Act Respecting Civilization and Enfranchisement of certain Indians, Consolidated Statutes of Canada 1859, 22 Vict. C.9, provides in section 1 that:

In the following enactments, the term "Indian" means only Indians or persons of Indian blood or intermarried with Indians, acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown...

An Act Respecting Indians and Indian Lands, Consolidated Statutes of Lower Canada 1860, 3 Vict. C.14, provided in s.11 that:

For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes or bodies of Indians in Lower Canada, the following persons and classes of persons, and one other, shall be considered as Indians belonging to

the tribe or body of Indians interested in any such lands or immoveable property:

Firstly. All persons of Indian blood, reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and their descendants;

Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And

Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children or issue of such marriages, and their descendants.

For certain legislative purposes, then, persons of mixed or non-Indian ancestry who lived with a traditional Indian band were considered to be Indians. The term "Indian" was not, for legal purposes, strictly based on racial origin; it also depended on familial and cultural ties. The use of the word "Indian" in the Constitution Act, 1867, should be understood in this context. The Parliament of 1868 certainly did; An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands, Statutes of Canada 1868, 31 Vict. C.42, (s.15) used essentially the same definition of Indians as the province of Canada had in its 1850 statute - that is, one which included persons of mixed ancestry living among an Indian group, and women inter-married with one of its members.

POST-CONFEDERATION PRACTICE

The conclusion from the preceding discussion is that under the ordinary

and legal usages up to and including the time of Confederation, "Indian" did not include the Métis people. It might be countered, however, that the framers of s.91(24) of the Constitution Act, 1867, were not obliged to consider the Red River Métis, inasmuch as they were practically all living outside of the part of British North America that was about to be turned into a federation. Therefore, the argument would continue, subsequent history should be examined, and if practice and the underlying purposes of s.91(24) require, "Indian" should be given a broad construction so as to encompass the Métis. In reply, it will be shown that post-Confederation history in fact supports the exclusion of the Métis from s.91(24).

In 1868 the Hudson's Bay Company agreed to transfer Ruperts' Land to Canada. The inhabitants were not consulted. Louis Riel became a principal instigator and leader of the efforts by the people of the Red River area to determine and express their political demands in connection with the transfer. In early 1870 a Convention of Forty - half of them representing French-speaking Métis, half of them English-speaking Métis and white settlers - agreed on a List of Rights and approved the establishment of the Provisional Government. Riel was elected President, but (over his objections) the Convention chose to pursue territorial rather than provincial status. A few months later, the executive of the Provisional Government reversed that decision. The fourth and final List of Rights, presented to the federal government, requested provincial status. The final version of the list, like all previous versions, demanded that the local legislature have control over public lands. It did not say anything about Indian titles or half-breed land grants. When delegates of the Provisional Government negotiated the entry of

Manitoba into Confederation, Sir John A. Macdonald insisted on federal control over Crown lands. I have not been able to discern whose inspiration it was to do so, but Prime Minister Macdonald did agree, that in addition to guarantees for existing individual land holdings, 1,400,000 acres of land go to the benefit of half-breeds. Section 31 of the Manitoba Act, 1870 reads:

And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province to appropriate a portion of such ungranted lands, to the extent of one million, four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and then divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

The opening words of s.31, taken at face value, provide some support for the inclusion of the Métis within s.91(24). Having "Indian title," however, is not necessarily the same thing as being an Indian. It is necessary to examine the purposes of assigning jurisdiction over "Indians" to the federal level of government. The same s.31 that refers to the "Indian" title of half-breeds also contemplates extinguishing it. That done, there would be no need for Parliament to retain jurisdiction over the Métis and Métis lands. By contrast, federal practice towards Indians in Manitoba was to reserve lands for the use of Indian collectivities, with both land and people subject to continuing federal regulation. If you believe that the Métis come under s.91(24) then you also have to believe that at the time Manitoba was

admitted into Confederation, Parliament retained plenary legislative authority over 86% of the population. I have found no evidence in the records of the internal deliberations or negotiating positions of the Provisional Government that the scope of s.91(24) was considered a threat to the local self-government it was struggling to establish (W.L. Morton, 1965).

During the debates on the Manitoba Act, Mr. Wood expressed his concern about the care and guardianship of Indians, and asked whether the Dominion government would retain in its own hands the power of dealing with Indians to whom annuities were owed. Prime Minister Macdonald answered that:

. . . the reservation of 1,200,000 acres [sic] which it was proposed to place under the control of the Province, was not for the purpose of buying out the full blooded Indians and extinguishing their titles. There were very few such Indians remaining then in the Province, but such as there were they would be distinctly under the guardianship of the Dominion Government. The main representatives of the original tribes were their descendants, the half-breeds, and the best way of dealing with them was the same as United Empire loyalists had been dealt with, namely, giving small grants of land for them and their children (W.L. Morton, 1965, 199).

Macdonald makes no mention of the Métis remaining under Dominion guardianship.

The legal accuracy of the opening words of s.31 should now be examined. Macdonald's answer compares their situation to that of the United Empire Loyalists, who had been given land grants in Canada after the War of Independence. (Macdonald also made this comparison in his speech introducing the legislation; W.L. Morton, 1965, 168.) The United Empire Loyalists, of course, had no aboriginal claims. Sir Stafford Northcote, observing

the speech, called the reference to the United Empire Loyalists "very acceptable to the Ontario men." It seems that at that troubled time, Macdonald would characterize the grant in different ways depending on which political pressure group he wished to appeal to (W.L. Morton, 1965, 99). His subsequent actions and conduct strongly suggest that he never took the "Indian title" theory as an accurate statement of the legal state of affairs in 1870. In 1873, Parliament made a grant to the white Selkirk settlers very similar to that which had been made to the Métis. In 1885, Macdonald had this to say:

In [the Manitoba Act] it is provided that in order to secure the extinguishment of the Indian title 1,400,000 acres of land should be settled upon the families of the half-breeds living within the limits of the then Province. Whether they had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of that Province, in order, in fact to make a Province at all That phrase [extinguishment of the Indian title] was an incorrect one, because the half-breeds did not allow themselves to be Indians (Flanagan, 1983, 62).

The last sentence is supported by this excerpt from Alexander Mackenzie's speech to the House of Commons on the Manitoba Bill:

A certain portion [is] to be set aside to settle Indian claims and another portion to settle Indian claims that the half-breeds have. But these half-breeds were either Indians or not. They were not looked upon as Indians, some had been to Ottawa, and given evidence, and did not consider themselves Indians (W.L. Morton, 1965, 172).

Post-1870 legislative practice is consistent with the basic thesis offered here that the Métis are not "Indians" for the purposes of s.91(24), but that persons of mixed or non-Indian ancestry who live among and as Indians are. It has already been mentioned that in 1868 Parliament adopted, for the

purposes of property ownership, a definition of "Indian" that encompassed persons of part Indian descent who belonged to an Indian group and women who married Indians. The Indian Act, 1876 (An Act to Amend and Consolidate the Laws Respecting Indians, 1876, 39 Vict. c.18) defined "Indian," for the purposes of the Act, as including men of Indian blood reputed to belong to a band, their wives and children, and s.3(e) provided that:

no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted as Indian.

The Indian registration system of the 1951 Indian Act drew on previous definitions of Indian - which included persons of mixed or non-Indian ancestry - and excluded;

s.12(1)(a) a person who:

- (i) has received or has been allotted half-breed lands or money scrip,
- (ii) is a descendant of a person described in subparagraph (i).

The system used in Manitoba - granting individual land entitlements to half-breeds and reserves to Indian collectivities - was applied elsewhere. In 1879 the Dominion Lands Act An Act to Amend and Consolidate the Several Acts Respecting the Public Lands of the Dominion, 1879, 42 Vict. C.31, made provision for grants to half-breeds in the North-West Territories. Sometimes individuals were given the choice of whether to "take treaty" as Indians or scrip as half-breeds. The distinction between the Métis and persons of mixed ancestry who are Indians has never been precise. How a person is classified

depends on the purpose of the classification; among the criteria used may be genealogy, cultural affiliation, political ties - and self-identification. That some people were allowed to determine whether they would be "Indians" or "half-breeds" for legal purposes does not undermine the basic distinction between the two groups for the purposes of s.91(24). There are ample grounds in history and legal practice to uphold its general validity.

The implications of the Metis Betterment Act enacted by the provincial legislature of Alberta in 1940 have been explored in a previous chapter. To recall the conclusion of that discussion, it is difficult to reconcile the existence of the Act with federal jurisdiction over the Métis under s.91(24); judicial recognition of the latter would produce radical uncertainty about, and possibly serious harm to, the interests of settlement residents.

During the March 8 afternoon discussion at the 1984 First Ministers' Conference, Mr. Chartier submitted that:

The Supreme Court of Canada rendered a decision stating that the Eskimo people were in fact covered by the term [Indian] in a wide sense . . . They also stated in that case that the term "Indian" was meant to include all of the aboriginals within confederation and those aboriginees to enter into confederation. I would say that aboriginees and aboriginal people are the same people so that is the legal advice we have been given and that is the advice that has been put forward or taken by the native people or the Metis people over the past ten, fifteen, twenty years (1984, FMC transcript, 186-187).

The judgment of Cannon J. appears to be the one to which Mr. Chartier was alluding. The question the Court was asked was whether Eskimos were Indians; all of Cannon J.'s analysis is based on establishing that they were. He does not consider whether the Métis were "Indians." There is no evidence

that his use of the umbrella term "aborigines" was intended to cover the Métis as well. There is some evidence to the contrary. He notes that the precursor of s.91(24) in the Québec Resolutions of 1864 assigned to the federal government jurisdiction over "Indians and Lands Reserved for the Indians" (Re Eskimo, [1939] S.C.R. 104, 118). An official French translation was "Les Sauvages et les terres réservées pour les Sauvages." Cannon J. concludes that:

The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated with the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland ([1939] S.C.R. 104, 118).

The use of "sauvages" to describe Indians was grossly unfair and insulting - especially if the term was understood as equivalent to the English term "savage" rather than "uncivilized" - but attributable to the cultural differences between the Indians and Eskimos in traditional groups and the Europeans. It is difficult to imagine the epithet being applied to the half-breeds of the Red River area. They were Christian, partly European in ancestry, and spoke English or French, or both, often in addition to a native language. Many of them were no less literate or educated than the Europeans in western Canada. A lot of them worked as full time employees for the Hudson's Bay Company. They were governed by the same law as the Europeans; some of them served as magistrates, others as members of the Council of Assiniboia.

Late 19th and early 20th century definitions of "Indian" are examined in

the judgment of Cannon J. He points out that many, albeit not all of them, include Eskimos. None of them mentions half-breeds or Metis. The characterization of Métis as aboriginal people is etymologically dubious. The Metis are certainly indigenous to North America - they came into being as a distinct people on this continent. But they are not aboriginal in the same sense as the Indian and Inuit; they were not here from the beginning, but instead they developed when a large number of Europeans came to western Canada in connection with the fur trade.

Section 35(2) of the Constitution Act, 1982, says that "the aboriginal peoples" referred to in the Constitution Act, 1982 include "the Indian, Inuit and Metis people of Canada." On its own, the section confers no rights on the Métis. It may turn out that the Métis have very few entitlements under the other sections of the Act which do speak to the rights of aboriginal peoples. Section 35(1) recognizes and affirms "the aboriginal and treaty rights" of the aboriginal peoples of Canada. It may be that on April 17, 1982, the Métis had no aboriginal or treaty rights. In any event, the survival of the constitutionally protected Métis rights does not require Parliamentary, as opposed to judicial, authority. An expansive interpretation of s.91(24) is not justified by a necessity for Parliament to protect the newly assured rights of the Métis from local interference. The Courts can do that. Nor is it legitimate to combine the judgment of Cannon J. - "Indians are all aborigines" - with s.35(2) - "Métis are aboriginal peoples" - in order to conclude that Métis are s.91(24) Indians. As shown earlier, there is no evidence that Cannon J.'s definition of "aborigines" extended to the Métis, and some evidence that it did not.

XVIII ENTRENCHMENT OF JURISDICTION OF ABORIGINAL GOVERNMENTS IN THE CONSTITUTION OF CANADA

One way of constitutionally establishing aboriginal self-governments would be to specify their powers and immunities in a legally enforceable amendment to the Constitution of Canada. During the working group sessions, this approach received some attention, and was often referred to as the "section 93" approach - after the section of the Constitution Act, 1867 which defines the scope of, and constraints on, provincial powers over education. Some provincial delegations expressed the concern that the "section 93" approach would result in the creation of a third type of sovereign government in Canada, a state of affairs they considered unacceptable. The "Section 93" format, however, does not necessarily establish aboriginal governments as equal in authority to provinces. The section listing the powers of aboriginal governments might also include serious limitations. It might be provided that the federal government could disallow the legislation of aboriginal governments; and that provincial legislatures and Parliament could continue to legislate in areas assigned to aboriginal governments, with conflicts being resolved, in some cases, in favour of the former types of government. The formal "section 93" approach of listing the powers of aboriginal governments

does not necessarily produce the substantive result that they are equal in authority to provinces.

It is on the formal grounds alone, in fact, that the "section 93" approach, in its simple form, must be rejected as unworkable. A list of powers appropriate for Métis governments might be inapt for the Inuit or the Indians. Arrangements with respect to one Indian collectivity, moreover, might be totally inappropriate with respect to another. There are more than 570 bands in Canada; even if they were amalgamated into larger units based on common language and culture, the remaining collectivities would have different economic, constitutional and political histories and preferences. Furthermore, ethnic governments may not be desired by, or desirable, for many aboriginal groups; the Inuit have expressed a preference for public governments (regional, territorial, and eventually, in the Northwest Territories, provincial government) in areas defined to leave them as a majority of the population. A similar approach may be appropriate, in some cases, for the Métis. No definition of the nature and powers of aboriginal self-governments could possibly apply across the board.

The "section 93" approach is open to objection on another ground. It is that of permanence. It may be premature to entrench the scope of authority that aboriginal governments should exercise, better to experiment for a while. It is impossible to foresee all the problems - or all the benefits - that would arise when aboriginal communities are permitted to exercise a large measure of self-government. Canadians in the future should have the ability to act on the wisdom they gain through experience. Look back to 1951, when Parliament granted Indian self-governments a minimal amount of legislative

authority. At the time that must have seemed to a lot of people like a pretty good idea. Hardly anybody today thinks it is. Fortunately, s.81 of the Indian Act is not ensconced in the Constitution, and can be replaced by the ordinary process of legislation. A quarter of a century from now, Canadians may look back on a lot of our ideas about aboriginal self-government as naive, unenlightened, or just plain stupid. If we are not cautious, they may be faced with extremely cumbersome obstacles to correcting our mistakes.

The diversity objection to the "section 93" approach - that is, that one cloak of authority cannot properly fit all aboriginal groups - might be met by recharacterizing the list of powers as those which an aboriginal community can exercise if it wishes to do so. A group that perceived itself as unable or unwilling to assume the full ambit of powers could refrain from doing so. On the other hand, a group perceived by federal and provincial governments as incapable of exercising the maximum range of powers might choose to do so anyway. Provincial and federal governments looking at this "other hand" are likely to shake their heads at the whole arrangement. The next step in the recharacterization of the "section 93" approach, then, would be to portray the list of powers as those an aboriginal group may exercise if it wishes, provided federal and provincial governments consent. The consent would be irrevocable according to its terms. The legal mechanism just stated would not be much different from using the treaty making process to establish self-government. The list of powers would be no more than a compendium of things to be bargained about. As such, however, it might not be worth compiling. From the point of view of aboriginal peoples, the list of powers omitted from the list would be just as significant as those included. A Court

might well conclude that the former could not be exercised by aboriginal governments, regardless of whether other governments consented. Thus the compilation of the list would be viewed by aboriginal organizations as having serious negative implications. At the same time, it would not guarantee aboriginal governments any powers - only create possibilities. The counter-vailing advantage of a list would be that it would prevent future federal and provincial governments from consenting to the devolution of powers that they ought always to reserve for themselves. The list would also simplify future bilateral negotiations by making certain demands legally out of bounds.

LEGALLY UNENFORCEABLE STATEMENT OF PRINCIPLES

The federal government's proposal on self-government was a brilliant public relations stroke. It was utterly vacuous; it contained no ideas on what self-government would look like in practice, no commitment to adequately fund them, no clarification of the federal-provincial division of powers and responsibilities in dealing with them. It was designed to be legally unenforceable. It might have prejudiced constitutional gains that aboriginal peoples had already made. It would almost certainly have impeded their progress towards substantive constitutional assurances on self-government. Yet the impression created for the public was that the federal government had unveiled a bold new picture of aboriginal self-government; that aboriginal peoples, while dubious about some of the detail work, were, on the whole, pleased with what they saw; and that it was the provinces, the philistine, reactionary provinces, who prevented it from finding a permanent place in the

constitutional gallery. (A sample of the newspaper stories. Jeff Sallot in the Globe and Mail, page 1, 10 March '84. Headline: "Natives fail to win a new political deal." Paragraphs two and three:

Native leaders angrily denounced some provincial premiers as obstructionists with "red neck" views, warned that there would be growing militancy among their people, and urged the federal government to unilaterally recognize self-government rights in the Constitution. Federal officials said this was legally impossible.

Instead, Prime Minister Pierre Trudeau, presiding at his last constitutional conference, tried to salvage what he could by telling native leaders to "continue the fight."

Patricia Poirer, Le Droit, page 1, 9 March '84. Headline: "Trudeau propose, les provinces s'opposent." Opening paragraph:

La plupart des provinces ont accueilli froidement hier la proposition du premier ministre Pierre Trudeau d'enchasser dans la constitution le droit des autochones a des gouvernements autonomes.

Dan Smith, the Toronto Star, 9 March '84. Headline on page 1: "Natives must govern selves to end 'injustice' PM says." Headline on inside continuation of the article: "Provinces quash bid for rights deal." Opening paragraph:

Prime Minister Pierre Trudeau has opened a constitutional conference with a bold plea for native self-government, but negotiators worked into the night to save even a symbolic gesture for native rights.

Mr. Sallot's story does go on to quote the Prime Minister to the effect that the new section would be nonjusticiable; Ms. Poirer reports that native leaders objected to the unenforceability of the section; Mr. Smith cites the nonjusticiability of the proposal immediately before referring to provincial

objections. There was enough information in the stories for an especially informed and careful reader to discern that the federal proposal was severely limited in effect. The impression left with the general public by the stories just cited, however, would be that the provinces blocked a bold proposal by a federal government to constitutionally promote aboriginal self-government.)

PUBLIC RELATIONS

Part of the success of the federal proposal is attributable to the timing of its disclosure. At each preparatory meeting leading up to the March '84 First Ministers' Conference, both provincial and aboriginal delegations became increasingly insistent that the federal government reveal what its proposal would be. The first preparatory meeting had been held in September; five more followed; yet the federal proposal was not released until the opening morning of the Conference. The result was that there was little opportunity for its weaknesses to be understood by delegations and the media, and in turn explained to the public. Another was that there was no adequate opportunity for the proposal to be improved through negotiations. Mr. Jim Sinclair of the Métis National Council said at the end of the second day:

I would suggest that before we come back next year that any constitutional amendments or any constitutional changes that will be brought to this table will not be brought to this table the day of the conference, but will be brought to this table at least three months before the conference so people have a chance to go over it and discuss it and then entrench it in the constitution if we feel it is necessary (1984 FMC transcript, 368).

Premier Lougheed of Alberta picked up on the suggestion:

Perhaps three months is impractical, but I really think that as we move towards another conference the ministers could agree on a cut-off date and make exceptions to that . . . there should be a real effort made to have a cut-off date in terms of something that is considered to be constitutional amendments (1984 FMC transcript, 370).

Prime Minister Trudeau made a number of attempts to deflect the implied criticism of the lateness of his government's proposal. He pointed out that if the three month rule had been in force, the federal response could not have taken into account the Penner Report (1984 FMC transcript, 368). To be sure, the need to study, discuss and prepare a response to the Penner Report was a time consuming process for the federal government, and a legitimate reason for their delaying the preparation of a constitutional proposal. Nonetheless, the Penner Report was tabled in November, 1983; the federal government had plenty of time to prepare its constitutional position in conjunction with its response. The formal response to the Penner Report, incidentally, was released on March 5 - a full three days before the Conference was scheduled to begin. The federal government had its constitutional proposal ready in sufficient time to have it printed in large quantities. It might have at least distributed copies, under embargo, to provincial and aboriginal delegations a couple of days before the Conference. (The embargo would have been to maintain, in the public eye, the dramatic effect of the opening statement).

Mr. Trudeau also suggested that the federal government could not "force the pace" of the ongoing series of preparatory meetings, and that "we all hoped they would have moved faster and in different directions" (1984 FMC

transcript, 369). The excuse is not convincing. The federal government was under no obligation to wait until the last proposal had been tabled before it submitted its own; it was not the chief constitutional reform judge, bound to entertain submissions before delivering its authoritative opinion. Progress in the preparatory meetings might have been quicker and far more satisfactory had the federal government contributed its own ideas.

The final defence of Mr. Trudeau was "let us not think that support for constitutional change is not forthcoming because somehow delegations only saw our final text yesterday morning" (1984 FMC transcript, 371). Some of the premiers had said that they would be debasing the Constitution by trying to amend it every year. The Prime Minister concluded:

. . . if it is just a matter of saying we don't have time to go out of here at 5:00 with a constitutional accord, but if we give you another 15 days we can get it, we will give you 15 days or three weeks or whatever is needed. I just want to make that clear because I am afraid there is going to be some attempt to say it would have all worked out better if all of us had brought in our texts several weeks ago (1984 FMC transcript, 372).

Presumably constitutional conferences are held because things do "work better" if the parties can discuss ideas and examine and revise texts together. With seventeen delegations involved, the process of consultation and negotiation is impracticable without having joint discussions. At First Ministers' Conferences, the public attention encourages participants to work towards progress, or at least commit themselves to a position. It is true that the premiers would not have agreed to the federal proposal on self-government even if they had had time to study it in advance. In a few cases, that would have been because of dislike for any aboriginal self-government. Other

provinces, however, would have objected in good faith on the same basis that they expressed at the March 8 Conference - that they are not yet sure what "self-government" means, and the federal proposal does nothing to enlighten them. Some provinces and aboriginal organizations, having seen the inadequacies of the federal proposal, might have tried to prepare a more acceptable one. At the very least, the participants would have been far more able to communicate to the public their understanding of, and objections to, the federal proposal.

Minor changes in the wording of a constitutional text can have drastically different legal implications. The federal proposal on self-government contained almost two hundred words in each of the equally authoritative French and English versions. Granted, the proposal would probably have been unenforceable in the Courts; still, it would have the moral force of a binding legal obligation on federal and provincial governments. Even if the federal proposal had been acceptable to him in principle, a provincial premier still would have been justified in declining to agree at the March '84 Conference to recommend the adoption of its specific wording to his legislature. Words that will form part of the supreme law of Canada warrant sober and thorough examination.

THE SUBSTANCE OF THE PROPOSAL

This discussion has not yet included a detailed examination of the words of the federal proposal, and it is time that it did so. First of all, the opening words should be considered:

35.2 Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority;

(a) Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to ...

They include the complete formula for nonjusticiability that is used in s.36(1) of the Constitution Act, 1982, and part (Parliament and the legislatures are committed to) of the nonjusticiability formula of s.36(2). (See Chapter XVIII.) That unenforceability in the Courts was the intention of the federal government could not have been made more explicit by the Minister of Justice, Mr. MacGuigan, in his intervention during the afternoon, March 8 discussion. He said:

The proposals that I was finding fault with in the earlier preparatory sessions had to do with large-scale changes which could have been judicially interpreted and the results would have been unknown and, therefore, we really would have been evading our responsibility by passing it over to the courts, but what we are proposing with our constitutional amendment here is something which I believe ingeniously gets around the problems that we had with earlier suggestions for constitutional amendments. What we do here as the Prime Minister has said is to constitutionalize the principle. We would entrench because we would put something in the constitution that could only be amended ... by the minimum number of the federal government and the seven provinces, but what we would put in the constitution would not be judiciable. It would not be enforceable in a court against the governments and it would be the same kind of commitment that actually we made last year with respect to some of what we [the federal government] agreed to at that time, and perhaps an even better parallel is Part III of the Act of 1982, the equalization and regional disparity section of our constitution in which we made a political commitment, all us governments, to promote equal opportunities and a commitment respecting public services.

In fact, Prime Minister, the introductory words of our present amendment are drawn exactly from the introduction to section 36(1) and the kind of recital is in exactly the same kind of form as in Section 36(1)....

I suppose that there may be those who would argue what use is it if it can't be enforced in the courts.

Well, its use is a symbolic one. Its use is a commitment. It is a solemn political commitment on the part of the people....

So, therefore, I hope it will be appreciated in our overnight reflections that it is not going to be an albatross around the necks of the government, but on the other hand, it is a symbol of hope for the native peoples, and, therefore, we think we have suggested something that is acceptable to the governments within the parameters that we have heard them set out here today and previously and that it is also as the native peoples have suggested, something that is important from their point of view (1984 FMC transcript, 216).

The nonjusticiability of the self-government proposal was reinforced by the two subparagraphs on self-government. Subparagraph (b) proclaims:

The aboriginal peoples of Canada have the right to self-governing institutions that will meet the needs of their communities...

Forget the fact that the whole amendment is not enforceable in the Courts. Overlook the clumsy drafting; the English version should say "institutions of self-government," not "self-governing institutions" - it doesn't do aboriginal peoples much good to have institutions which are free from outside interference, but which have no authority over their communities. Disregard the difference in the French and English versions; the former speaks simply of "governmental institutions" - a better choice of words, since it would encompass public governments rather than exclusively ethnic ones. Most importantly, stop reading at the word "communities." Do all of that, and you have a brave declaration. Now read on:

subject to the nature, jurisdiction and powers of those institutions, and to the financing arrangements relating thereto, being identified and defined through negotiation with the government of Canada and the provincial governments.

Not much of a "right" after all; its content is to be determined entirely by negotiations. Are the provinces and federal government bound to agree to anything? The next subparagraph makes it clear that they are not; their only duty is to participate in the negotiations, and, if anything comes of them, implement the results through ordinary legislation. For all its grievous inadequacies, the federal proposal would have provided some encouragement to governments to seriously study, negotiate, and eventually implement aboriginal self-government. Mr. MacGuigan suggested a Rime of the Ancient Mariner metaphor for a justiciable amendment - an albatross around the necks of provincial governments; to use another maritime metaphor, the judicially unenforceable federal proposal might have been a light but persistent wind, slowly moving their ships of substate in the right direction.

In some respects, however, the federal proposal would have amounted to wind from the wrong direction. It would have threatened legal advances that aboriginal peoples had arguably already made. To begin with, the proposal would have made the aboriginal right to self-government entirely subject to the agreement of federal and provincial governments. The position of the Assembly of First Nations has consistently been that the right to self-government is already an entrenched, judicially enforceable constitutional right - as one of the "aboriginal rights" that was "recognized and affirmed" by the Constitution Act, 1982. Perhaps, however, the position of the Assembly of First Nations had so little chance of vindication in the Courts that it would have been wisely traded for the concrete (if nonjusticiable) recognition of self-government in the federal proposal.

There was another potentially retrogressive aspect of the federal propo-

sal. It is arguable that without the proposed federal amendment, bilateral agreements on self-government would be "treaties" for the purposes of s.35(1) of the Constitution Act, 1982. As such, they would be "recognized and affirmed" in the Constitution - and so probably immune, to some extent, from subsequent violation by governments and legislatures. The argument will be explored in more detail in Chapter XXI. In the meantime, it should be observed that the possibility is seriously threatened by the federal proposal. The agreements on self-government the federal proposal contemplates are to be implemented by ordinary legislation. There is no indication that this legislation would not be subject to modification or repeal by subsequent legislation. That is the ordinary state of affairs; subsequent statutes take priority over prior ones. If a government construed the federal proposal as allowing agreements to be breached by subsequent legislation, there might not be much that the innocent party to the agreement could do about it. The opening words of the federal proposal were intended by its authors to make the whole section nonjusticiable. A wronged aboriginal party might hope for an advisory opinion from a Court in its favour. But faced with the nonjusticiability language of the federal proposal, a Court might consider it improper to render even a non-binding interpretation of it. The Court might not, however, even be given the opportunity to decline to provide an opinion. The power to ask for advisory opinions has been confined by legislation to governments; and it would be difficult for an aboriginal group to persuade a government to ask for an advisory opinion which might benefit the former to the embarrassment of the latter.

Another risk of the federal proposal was that after it pushed the consti-

tutional development a certain distance, it would leave the voyagers becalmed. Attempts by aboriginal peoples to obtain a legally enforceable guarantee of self-government could be rejected by some governments on the basis that the matter had already been dealt with, and that the Constitution should not be trivialized by overfrequent amendment.

The response to the federal proposal at the opening session of the First Ministers' Conference was subdued. An examination of the transcript does not disclose much direct criticism of it, either by aboriginal groups or by the premiers. Part of the explanation is procedural. Most of the first day was spent in delivering prepared opening statements. No participant had much of an opportunity, before delivering his own opener, to study and prepare a reply to the federal proposal. Some of the aboriginal groups have to negotiate a consensus among their internal factions on what position they will take, and cannot rapidly declare their evaluation of a complicated proposal that speaks to their most fundamental concerns. Nonetheless, it was the aboriginal organizations who spoke immediately after the Prime Minister. The premiers had a little more time to prepare, and, in some cases, a little more freedom of independent action than aboriginal leaders. Still, their objections to the federal proposal were mostly implied, deducible only from the general statements in their opening remarks. Premier Buchanan spoke of the lack of a "clear and agreed definition" of self-government, and proposed a political accord whereby the parties to the s.37 process would work towards, among other things, increased authority and commensurate responsibility for aboriginal peoples with respect to their own affairs (1984 FMC transcript, 92). According to Premier Bennett "there was a good deal more preparatory work

to be done in respect of most of the issues on the agenda before a decision can be made" to add provisions to the Constitution (1984 FMC transcript, 106).

About the only attempt at textual analysis by any premier was that of Premier Hatfield - who "on the whole" supported the federal amendment, but took issue with some of its "caution words" (1984 FMC transcript, 96).

There were a couple of hours left for open discussion on March 8 after the conclusion of opening statements, but much of the time was spent on the inclusion of the Métis in s.91(24). Before the discussion moved to that subject, however, Dr. David Ahenakew of the Assembly of First Nations had a chance to respond to the substance of the federal proposal on self-government. He praised it as being "couched in terms that are more firm, more clear than we have ever heard before" (1984 FMC transcript, 150). He suggested, however, some improvements. Among them: the door should be left open for the recognition of a "distinct order of First Nations governments;" "it is necessary to talk about rights, not just needs;" there would have to be some talk about fiscal responsibility; a stronger statement was necessary on "federal responsibility for implementation of treaties" (1984 FMC transcript, 152). At the end of the day, the discussion returned briefly to self-government. Mr. George Erasmus expressed a similar view to that of Dr. Ahenakew; Mr. Zebedee Nungak of the Inuit Committee on National Issues said that he was "heartened and uplifted by some of the things that have been said today, not only by the federal government, but by other governments." He suggested a working session that evening to distill from the various positions taken that day "some of the more agreeable aspects" (1984 FMC trans-

cript, 218). The approach of two of the aboriginal organizations, then, was to welcome the federal proposal, and express their reservations about it as constructive suggestions for improvement. It was wise diplomacy. They were able to make it look like the provinces, rather than the aboriginal groups, were the obstructionists. They avoided creating the impression that aboriginal organizations are unlikely to be satisfied with anything but the most extreme proposals. One side-effect of the tactic, however, was that the federal government's proposal looked much more acceptable to aboriginal organizations than it actually was.

Mr. Trudeau did not propose a Ministerial level working group meeting that evening to work on draft amendments or a political accord. He did not detect "any wild enthusiasm" for doing so (1984 FMC transcript, 219). At the urging of several delegations, however, one was scheduled. In the course of that meeting, provincial delegations clearly demonstrated the ambiguity and ineffectuality of the federal proposal. The most thorough and forceful presentation was by the Nova Scotia delegation; that province had been instrumental in securing agreement to the political accord that had emerged the previous year, and has always expressed a genuine interest in making constitutional progress. The closed door discussion did nothing to illuminate understanding of the issues among the general public. The next morning Mr. MacGuigan summarized the results of the working group meeting - only three provinces, Ontario, New Brunswick and Manitoba, were in favour of the federal proposal. There was no summary of the reasons why the other provinces objected. Because of the preponderantly negative response of the provinces there would be no detailed discussion of the federal proposal in the

remainder of the Conference. A lesson for the impresario in charge of an act of limited talent: insist on good production values, hope the audience likes the opening, and if possible, pull it off the stage before the critics arrive.



XIX UNILATERAL FEDERAL ACTION TO AMEND THE CONSTITUTION OF CANADA

On the morning of March 9, after Justice Minister MacGuigan's report that only three provinces favoured the federal proposal on self-government, Mr. Harold Cardinal of the Assembly of First Nations made the following proposal:

We have taken the position consistently throughout the year, Mr. Prime Minister, that we value the special relationship that we have with the federal government, that we have with the Crown, that we have as a result of the constitutional recognition of our rights both treaty and aboriginal. We feel that the time has come for us to exercise what we perceived to be our special position in the constitution which is simply one that would allow the federal government to move with our concurrence, with our agreement, to introduce a resolution before the House with the intent of amending the constitution in line with its jurisdiction, in line with its responsibilities and in line with the agreements that we have by treaty and through other relationships, with or without the concurrence of the provincial governments (1984 FMC transcript, 231).

Later in the day, the Attorney General of Nova Scotia, Mr. Gerald Morris, expressed the belief of his government that the federal government cannot unilaterally amend the Constitution of Canada - except under s.44 of the Constitution Act, 1982, "in respect of those matters that deal exclusively with its own house" (1984 FMC transcript, 274).

What does "its own house" mean? The federal Parliament has exclusive

jurisdiction over Indians and Inuit under s.91(24) of the Constitution Act, 1867; could it use s.44 to amend the Constitution of Canada so as to establish Indian self-government for these peoples?

Section 44 of the Constitution Act, 1982, says:

Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Section 52 of the Constitution Act, 1982, provides a nonexhaustive definition of the Constitution of Canada. Included in the latter, according to s.52, is the long list of Acts referred to in the schedule of the Constitution Act, 1982 - among them, the Constitution Act, 1867. Why, then, couldn't Parliament amend s.91(24) of the Constitution Act, 1867 to read, say:

Indians and the Lands Reserved for the Indians; Parliament may, however, recognize the constitution of an Indian government; such constitutions shall be included in a schedule to this section.

The result would be that the constitution of an Indian Nation government would become explicit parts of the Constitution of Canada, hence, part of the supreme law of Canada (s.52 of the Constitution Act, 1982). No law inconsistent with these constitutions - including those enacted by Parliament itself - would be valid. Parliament could unilaterally amend its amendment to s.91(24) at any time, but until it did, the constitution of an Indian government would be solemnly recognized in the Constitution of Canada and be immune from ordinary political interference. Because of Parliament's paramount authority over Indians under s.91(24), the amendment to the federal Constitution would preclude any provincial legislation inconsistent with it.

The mechanism would not be as effective as an amendment to s.35 of the Constitution Act, 1982, in that the latter could not be repealed by Parliament alone; seven provinces would have to go along. Still, it would give solemn legal acknowledgement to the constitutions of Indian governments, and require Parliament to take the extra formal step of amending the Constitution Act, 1867 (as amended) before it could violate them.

It might be argued that the foregoing mechanism is of less utility than has just been portrayed; as long as Parliament expressly indicated its intention to amend the Constitution, Parliament could override the amended s.91(24); that is, Parliament would not have to go to the trouble of changing the text. It can even be argued that Parliament would not have to bother signalling any "constitutional" intent; any legislation inconsistent with the amended s.91(24) would implicitly be a constitutional amendment. I will not explore these possibilities any further, because there is a more basic objection to the unilateral federal amendment option. It is that Section 44 does not permit amendments to s.91(24) of the Constitution Act, 1867. It permits amendments to the way the House of Commons and Senate are organized, but not to how they discharge their powers. Thus the sort of amendment to s.91(24) tossed off earlier in this discussion is not constitutionally possible.

First and foremost, let's look at the legal history of s.44. Its predecessor was ensconced in the Constitution of Canada by the British North America (no. 2) Act, 1949, and unensconced by the Constitution Act, 1982. It was section 91(1) of the British North America Act (now called the Constitution Act, 1867) and gave the Queen-in-Parliament authority over:

1. The amendment from time to time of the Constitution of Canada,

except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such constitution is not opposed by the votes of more than one-third of the members of such House.

The Supreme Court of Canada cases on s.91(1) were somewhat contradictory in one important respect - whether "Canada" referred to the whole state, or merely the federal level of government. The Upper House Reference (Reference Re Legislative Authority of Parliament to Alter or Replace the Senate (1980), 102 D.L.R. (3d) 1), the last decided case on s.91(1), took the latter interpretation - and limited the application of the section even further. At issue was Parliament's authority to alter the method of appointing Senators, or outright abolish it. The Court observed that the amendments to the British North America Act passed under s.91(1) had all been of the "housekeeping" variety - on matters such as retirement age of Senators, the number of seats in the House of Commons, and the number of constituencies in the Northwest Territories. The Court concluded that:

In our opinion, the power given to the federal Parliament by s.91(1) was not intended to enable it to alter in any way the provisions of ss. 91 and 92 governing the exercise of legislative authority by the Parliament of Canada and the Legislatures of the Provinces. Section 91(1) is a particularization of the general legislative power of the Parliament of Canada. That power can be exercised only by the Queen by and with the advice and consent of the Senate and House of Commons. Section 91(1) cannot be construed to confer power to supplant the whole of the rest of the

section. It cannot be construed as permitting the transfer of the legislative powers enumerated in s.91 to some body or bodies other than those specifically designated in it ((1980), 102 D.L.R. (3d) 1, 13).

The first sentence may say more than was necessary to settle the question posed to the Court (in legal jargon, obiter dictum), therefore it is of limited authority. It was, nonetheless, the last case decided on s.91(1) before s.44 was framed, and it may be supposed that the drafters of the latter took it into account. The opinion of the Supreme Court, speaking as a collectivity, was that despite the broad language of s.91(1), the section did not permit amendments to the other provisions of sections 91 and 92. The phrasing of s.44 is even narrower. The reference is to the executive government of Canada, and the House of Commons and Senate. The phraseology is inconsistent with an intent to escape the limitations of the first sentence in the Supreme Court of Canada passage. It is consistent, however, with the only use to which s.91(1) had ever been put - to alter the internal organization of the institutions of the federal government.

You might try to support the historical argument with close textual analysis of the English version of s.44. Notice that it permits amendments to the "executive government of Canada or the Senate and House of Commons." Legislative power at the federal level, however, is vested by s.91 in the "Queen, by and with the Advice and Consent of the Senate and House of Commons" - that is, in the head of the executive government of Canada and the Senate and House of Commons. The contention, then, would be that s.44 contemplates alterations to either the executive branch or deliberative branch of the federal government, but not to the manner of their joint operation.

The "or" cannot really mean "and/or," the contention would continue, because the framers could not have intended "or" to mean the same thing as "and," and the "and" between "Senate" and "House of Commons" does mean "and/or."

We know this because many provisions of the Constitution of Canada apply only to one deliberative chamber, and it must have been intended that Parliament could unilaterally change these. The predecessor of s.44, s.91(1), was always used with respect to either the House of Commons or Senate, never both simultaneously. In my opinion, the foregoing line of reasoning establishes nothing. It is the sort of argument lawyers and judges use to justify conclusions they have reached on other grounds. It is entirely possible that the framers of s.44 never thought very hard about their chosen conjunctions. That they did not is strongly suggested by the equally authoritative French version of the section. It says:

Sous réserve des articles 41 et 42, le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat ou à la Chambre des communes.

The literal translation would be "in relation to the federal executive power, to the Senate or to the House of Commons." The grammatical structure is different from the English version; there is no indication whether "or" means "and/or." It could be that the English version was written first, and the translator had to change the grammatical structure in order to accommodate the fact that the proper noun for Senate is masculine (hence "au Sénat") whereas the proper noun for House of Commons is feminine ("à la Chambre des communes").

Another argument that will only be persuasive to the already persuaded is that in s.44 "executive government of Canada" means the Governor General on down, and hence does not mean the Queen; thus s.44 cannot be used to amend the Constitution in relation to the federal legislative process, which is vested in the Queen with the advice and consent of the House of Commons and Senate. A downright silly argument would be that s.44 cannot apply to the legislative process because that involves the Queen, and s.41(a) requires the consent of the House of Commons, Senate and all ten provincial legislatures to amend the Constitution in relation to "the office of the Queen...". If this contention were correct, no amendments to section 91 or 92 could be made by the ordinary amending formula - House of Commons, Senate, and two thirds of the provinces with half the population. What then would be the purpose of s.38(3), which allows provinces to "opt out" of amendments which derogate from their "legislative powers"?

The "housekeeping" theory does have strong support in the following consideration. It was generally understood in 1982 that the Charter of Rights and Freedoms was entrenched - that it could only be altered (except for the language rights provision) by the s.38 amending process. If s.44 is broadly construed, it would permit Parliament to unilaterally amend the Charter in relation to Parliament; to repeal, for example, section 32(1)(a):

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories...

Could not such an amendment be considered "in relation to the executive

government of Canada or the Senate and House of Commons?" Not on the "housekeeping theory." I grant that the argument just made does not absolutely preclude a broad construction of s.44. A theory of s.44 could be developed whereby Parliament can restrict its powers (and amend s.91 to do so) but not expand them (by altering the Charter). Notice, however, that the framers of s.44 did not bother to expressly exclude the Charter from the operation of the section. They did take the trouble to make s.44 subject to sections 41 and 42 - both of which require elaborate amending processes for a list of matters which essentially involve the organization and institutions of government. That is, s.44 is expressly excluded from operating with respect to certain "housekeeping matters"; the powerful implication is that it was only intended to deal with such matters in the first place.

It might be maintained that despite its history and related provisions, s.44 should be given a broad construction, because doing so allows for a very useful legal mechanism. Useful, in that it would permit Parliament to constrain its successors; ordinarily, later statutes have priority over earlier ones. The s.44 mechanism would enable one Parliament to require its successors to take an extra formal step before violating an important legal norm. Useful also in that it provides a form whereby the solemnity and importance of a legal principle can be signalled.

In response to the first assertion of utility, I would point out that there are other mechanisms whereby Parliament can limit the actions of its successors. The Canadian Bill of Rights, enacted by Parliament in 1960, established a human rights code for the federal level. Section 3 requires the Minister of Justice to examine every Bill or proposed regulation to determine

whether it is inconsistent with the purposes and provisions of the Canadian Bill of Rights. Section 2 provides that legislation must be construed and applied so as to be consistent with all of the Rights, unless the legislation is expressly declared to operate notwithstanding that statute. In R. v. Drybones, [1970] S.C.R. 282, the Supreme Court of Canada held inoperative a section of the Indian Act on the basis that it was repugnant to the equality provision of the Canadian Bill of Rights. If a Parliament wishes to ensure that agreements on self-government are treated with respect by law makers and appliers in the future, it can use "manner and form" requirements similar to those employed for the Canadian Bill of Rights. It could require that the Minister of Indian Affairs and Northern Development or a Minister of Indian First Nations Relations examine legislation to determine whether it will derogate from rights under Indian-government agreements. It could prescribe that Parliament expressly state its intention of contravening agreements on self-government as a condition of doing so.

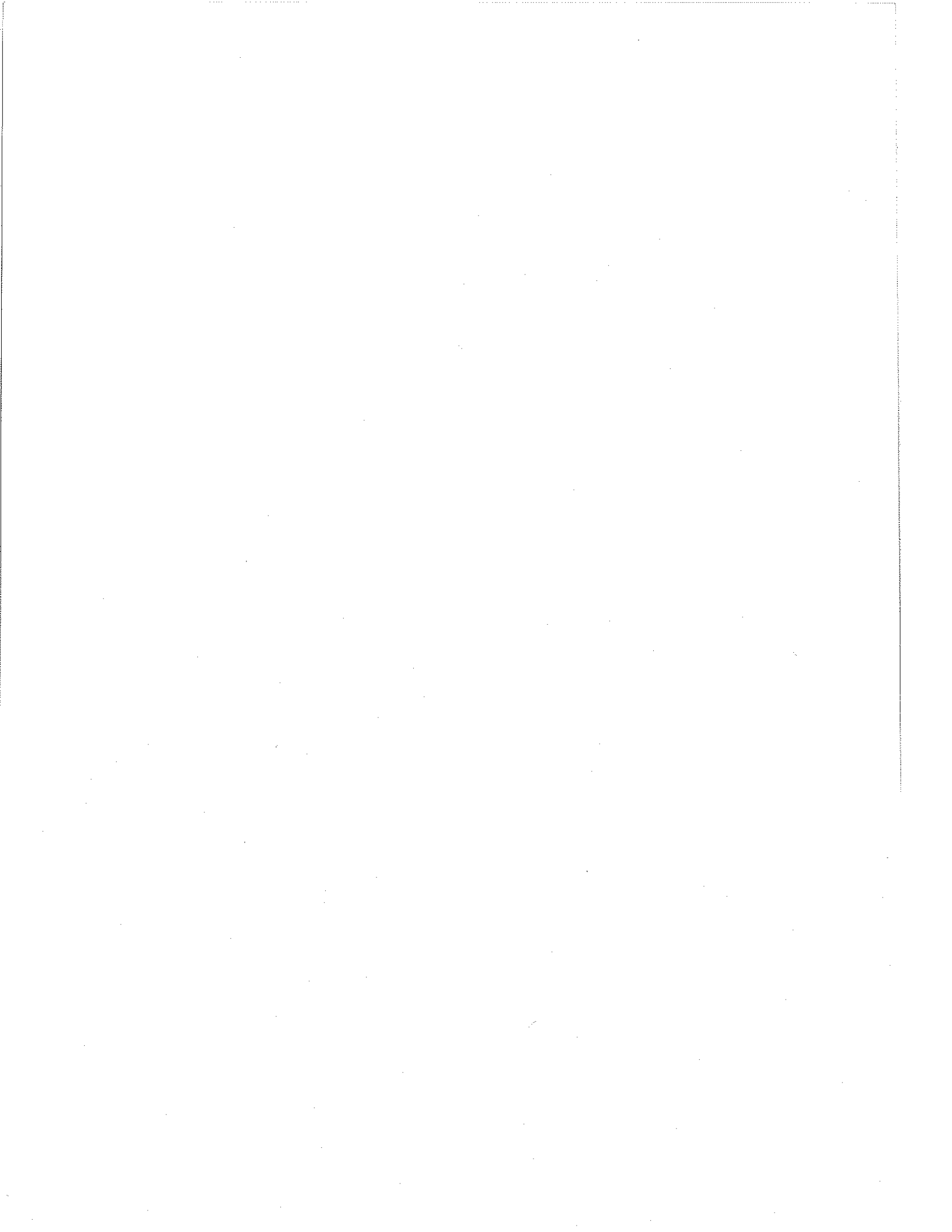
The second assertion of utility is answerable in a similar way. There are ways of expressing the special solemnity of a legal norm besides changing the text of the Constitution of Canada. The Penner Report recommends that Indian self-government be entrenched in the Constitution of Canada, but also suggests that "the Governor General should establish a register of Indian First Nation governments and that a formal ceremony mark the registration of each government" (Penner Report, 61). The foregoing analysis demonstrates that a broad construction of s.44 would not make available to Parliament a legal mechanism that is indispensable. The risks of creating that legal mechanism ought also to be considered.

Amendments under s.44 are repealable by the unilateral action of Parliament, and so are far less entrenched than amendments under the s.38 (House of Commons and Senate plus supermajority of provinces) mechanism; yet in a consolidated edition of the Constitution, they will look just the same. If the s.44 mechanism can be used for a broad variety of purposes, and in fact is, the public is apt to be left with a confused impression of what the Constitution is and what it means to amend it. (There is room here for flights of typographical and elocutional fancy. Editions of the Constitution are issued in which sections amendable by s.41 appear in thick black type; those amendable by s.38 in ordinary grey lettering; and those supremely vulnerable sections of the Constitution, amendable by unilateral federal action under s.44, in hollow characters sketched in thin and wavering lines of palest blue. In reading from the Constitution, its exponents could modulate the degree of assurance in their voices to reflect the relative permanences of the provision being voiced. Unfortunately, some provisions of the Constitution have aspects which can be amended in different ways, and no single typeface or voicing could do justice to them.)

The danger exists that the credibility of the Constitution as a whole would be undermined by excessively frequent amendments to it under a broadly read s.44. Political pressure groups and electoral parties are liable to see their principles at any given time as the most sacred and immutable. If there is an easy road to amendment - by Parliament's amending s.91 - a lot of norms may be placed in the Constitution. When social circumstances, perceptions of justice, or political power shifts, these norms will have to be displaced. Universality of social welfare programs, once a sacred principle of

Canadian politics, is now under question; perhaps scarce resources should not be diverted to those who are not in need of them. Nondiscrimination in public employment is under attack from those who favour mandatory affirmative action, or even quotas, based on ethnic affiliation or gender. Perhaps the risk just outlined is actually very small. Federal institutions - the Senate, boards and commissions, the federal courts - have often been misused, however, for partisan political purposes. (For example, by using openings on them to reward the party faithful, rather than appointing the most qualified persons available). The possible misuse of a constitutional mechanism is a factor that must be at least considered in deciding whether it should be created or recognized.

Apart from the exchange quoted at the beginning of this section, there has been practically no discussion in the s.37 process of unilateral federal amendment to the Constitution of Canada. If the legal analysis just offered is correct, nothing has been lost by this silence. I would hope, however, that other legal commentators will consider and report their views on whether the legal avenue exists. It should not remain untravelled merely because it was left off of everyone's map by oversight or mistake.



XX ORDINARY LEGISLATION

LEGAL IMPEDIMENTS TO THE ESTABLISHMENT OF ABORIGINAL SELF-GOVERNMENT

Some of the provinces have expressed the view during the s.37 process that it would be unwise, or at least premature, to establish self-government by amending the Constitution, that the process of ordinary legislation can reflect more subtly the diversity of aboriginal communities and embody more quickly new insights gained through experience. The tenants of this position ought, however, to consider the possibility that it does not necessarily lead to total quietism. It may be that some legislative measures to establish aboriginal self-government are not permitted by the existing law of the Constitution; and that constitutional reform is necessary to carry on certain kinds of non-constitutional reform.

One legal obstacle that might exist is the equality guarantee in s.15 of the Constitution Act, 1982. It comes into force on April 17, 1985. Any constraints it may impose can be overcome by using the legislative override section of the Charter, section 33. It gives effect to a legislative decision to expressly characterize a statute as operating notwithstanding the Charter. It is to be hoped, however, that legislatures will adopt the general policy of

using the override sparingly. Thus it is necessary to look more closely at whether they would ever have to. The text of s.15(1):

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

It is not clear what the opening phrase - "every individual is equal before and under the law" - adds to the rest of the paragraph. The French version - "La loi ne fait acception de personne et s'applique également à tous" - suggests that the opening phrase embodies the old principle of English constitutional law expounded by Dicey in the 19th century - that no person is above the law, that everyone is subject to the rules and jurisdiction of the ordinary courts (Dicey, 1965). The rest of the paragraph, by contrast, is intended to exclude legislation that adversely discriminates against certain social groups. It may be that whatever the original intent, the language of the rest of the paragraph takes care of the concern of the opening phrase. Be that as it may, let us assume that the paragraph as a whole does address two different sorts of problems. On the basis of the opening phrase, it could be argued that legislation on self-government is not permissible if it goes too far in establishing a special system of rules and courts for an aboriginal group. It could be argued on the basis of the rest of the paragraph that aboriginal self-government legislation would give to those belonging to an aboriginal community privileges which are denied to other people. The latter would thus be denied the equal benefit of the law. The converse argument could also be made: aboriginal self-government subjects members of aboriginal

communities to burdensome rules no one else must abide by, and so denies them the equal protection of the law.

One response that could be made to both arguments is that s.25 shields legislation on aboriginal self-government from the application of s.15. Section 25 says:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

A lot of things about s.25 are obscure. Does it speak only to rights that existed on April 17, 1982, when it came into force; or also to rights that come into being from time to time - including those created by legislation on self-government? Even if the former view is taken, it could be argued that one of the rights of Indians on April 17, 1982, was to special legislative treatment - otherwise s.91(24) of The Constitution Act, 1867, would have been of no force or effect. It could also be maintained that unless barred by a provincial human rights Act, the Métis had the right to special governmental regimes - and some of the Métis in Alberta in fact had one. Another uncertainty about s.25 is the scope to be given "construed"; unlike the Canadian Bill of Rights, it does not say "construed and applied"; the implication may be that in the case of a conflict that cannot be resolved by modifying the interpretations of the norms, the Charter prevails over the right of

an aboriginal group. The legalistic analysis of s.25 could be pursued at excruciating length; anyone who has followed it this far has suffered enough. A general assertion that can be made with some confidence is that s.25 will strongly discourage any Court from applying the egalitarian and individualistic norms of the Charter of Rights and Freedoms against self-government legislation.

The shielding effect of s.25 is only necessary if a valid attack can be mustered to begin with from the rest of the Charter of Rights and Freedoms. It may be that the Courts will construe s.15 as not raising even a prima facie case against regimes of aboriginal self-government. The Diceyan objection might be rejected in an appropriate case on the basis that the citizens and officials of a self-governing community continue to be subject to a substantial body of general law - including the Criminal Code and the Charter of Rights and Freedoms, or that the Court system of the aboriginal community continues to be subject to appeal or review by ordinary Canadian Courts. The social equality objection might be met by holding that different governmental arrangements for different groups do not necessarily mean that anyone has been denied the equal protection or benefit of the law. Equal respect for different special groups, it could be argued, does not necessarily mean equal treatment. It might entail varying the law to meet the varying requirements of different groups. You might try to support this construction by reference to s.15(2):

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) is not, in itself, a satisfactory defence for all aboriginal self-government legislation. Some of it will be based, at least in part, on the acceptance of the claim that regardless of whether they are "disadvantaged," aboriginal communities have a claim in political justice to maintain some measure of governmental and cultural autonomy. At the March '84 First Ministers' Conference, Mr. Jim Sinclair of the Métis National Council took exception to Prime Minister Trudeau's characterization of the Métis as a "disadvantaged people." According to Mr. Sinclair, the Métis were recognized in the Constitution as an aboriginal people, not as a disadvantaged people, as a people with a special political claim apart from any based on social disadvantage (1984 FMC transcript, 157). You might use s.15(2) as evidence that s.15(1) does not require equal treatment, but only equal respect, so that favourable legal treatment for aboriginal peoples should not be seen as discriminatory. My own view is that while the conclusion may be correct, s.15(2) does little to establish it. Section 15(2) merely says that formal legal equality should not stand in the way of rectifying inequality of actual conditions. It does not challenge the liberal ideal of a society in which everyone starts off with a fair stake, and freely competes and associates with everyone else on the basis of equality. Aboriginal self-government does challenge that ideal.

Even if a prima facie case can be made under s.15, it might be defeated by the application of s.1 of the Charter, which provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Thus even if aboriginal self-government legislation is discriminatory under s.15, it might be upheld as constitutionally valid because it is a just and necessary form of discrimination. If American equal protection jurisprudence is any guide, the Courts will determine whether there are valid purposes behind the discrimination and then, if there are any, the Courts will explore whether the purpose could be achieved by less discriminatory measures (Gunther, 1972).

The second line of inquiry might lead to judicial requirements for the refinement of a self-government scheme. So long as it had the support of the aboriginal group affected as well as that of a democratically elected legislature, however, a Court would be reluctant to take it upon itself to impugn the basic aims of an enactment on self-government.

To summarize, section 15 does present some cause for concern about whether aboriginal self-government can be achieved through ordinary legislation. The likelihood, however, is that the Courts would not find it to be a serious constraint. The uncertainty could be diminished by amending the Constitution - say by amending s.25 to expressly shield legislation on aboriginal self-government - but doing so should not be considered a priority of the s.37 agenda.

Another possible constraint on the legislative establishment of aboriginal self-government may be a limit on the extent to which Parliament and provincial legislatures can delegate law making authority to other entities. It was established in Hodge v. The Queen (1883), 9 A.C. 117, that the legal maxim delegatus non potest delegare - a delegate has no power to (further) delegate - has no application to Parliament or a legislature; they were not delegates of

the Imperial Parliament, but sovereign authorities over the matters assigned to them by the Constitution Act, 1867. In Hodge, the Privy Council upheld the authority of a provincial board to make liquor licensing regulations. A key passage is:

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail.... It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide ((1883), 9 A.C. 117, 132).

It should be noticed that the opinion cites the continuing power to undo what has been wrought. The point is important, because that power may not exist when aboriginal self-government is established by treaty that is constitutionally protected under s.35(1) of the Constitution Act, 1982. This problem will be further explored in the next chapter.

A wholesale delegation of legislative authority by Parliament to the Governor-in-Council (that is, the Governor General acting with the advice and consent of the federal cabinet) under the War Measures Act was upheld by the Supreme Court of Canada in Re George Edwin Gray (1918), 57 S.C.R. 150. Anglin J. held that short of "abdication," Parliament could delegate its powers as it saw fit. Chief Justice Fitzpatrick was more cautious, holding that Parliament could delegate its authority to the executive "within reasonable limits"; (1918), 57 S.C.R. 150, 157. He noted that the powers could be revoked by Parliament at any time. Duff J. made the same

observation in his judgment, and added that the authority devolved upon the Governor-in-Council was "strictly conditioned" in two respects: it was exercisable only during wartime, and only included measures deemed advisable by reason of war ((1918), 57 S.C.R. 150, 170). Idington J. outright dissented on the ground that "its entire powers [of Parliament] cannot be by a single stroke of the pen surrendered or transferred to anybody" ((1918), 57 S.C.R. 150, 165). The precedential effect of Gray is arguably limited by the fact that the delegation there was to the Governor-in-Council, a body which is, for practical purposes, directly responsible to Parliament. Perhaps Parliament has less freedom to delegate powers to a subordinate body not answerable to it. It should also be noted that Gray was decided during a wartime emergency. It is well settled that Parliament can invade areas of provincial jurisdiction during such times of crisis; its authority to delegate may also be greater.

The Initiative and Referendum Act of Manitoba permitted laws to be made or repealed by a direct vote of the people. The Privy Council found the alternative legislative process to be unconstitutional because it bypassed the Lieutenant-Governor's veto power. The Court added, however, this observation:

No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done in Hodge v. The Queen ...; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise (In re The Initiative and Referendum Act, [1919] A.C. 935, 945).

The judges of the Manitoba Court of Appeal had been less restrained, and expressly found that the British North America Act did not permit the establishment of an alternate process equal in authority to the legislature, and capable of negating the legislature's efforts or even destroying it; (1918) 27 Man. R. 1.

The legal possibility that the creation might destroy the creator would not exist with respect to self-government legislation. Furthermore, any delegation of authority to an aboriginal government would be confined to certain communities and areas, and involve less than the whole catalogue of federal powers. The most informative precedents would be those dealing with far more limited delegations of authority than the one at issue in the Manitoba case.

One possible analogy would be to Parliament's creation of institutions of self-government for the Yukon and Northwest Territories. Duff J. made much of the analogy in the Gray reference:

Our own Canadian constitutional history affords a striking instance of the "delegation" so called of legislative authority with which the devolution effected by the "War Measures Act" may usefully be contrasted. The North West Territories were, for many years, governed by a council exercising powers of legislation almost equal in extent to those enjoyed by the provinces.

The statute by which this was authorized, by which the machinery of responsible government, and what in substance was parliamentary government, was set up and maintained in that part of Canadian territory, was passed by the Parliament of Canada; and it was never doubted that this legislation was valid and effectual for these purposes under the authority conferred upon parliament by the Imperial Act of 1871

to make provision for the administration, peace, order and good government in any territory not for the time being included in any province.

That, of course, involved a degree of devolution far beyond anything attempted by the 'War Measures Act.' In the former case, while the legal authority remained unimpaired in parliament to legislate regarding the subjects over which jurisdiction had been granted, it was not intended that it should continue to be, and in fact it never was, exercised in the ordinary course; and the powers were conferred upon an elected body over which parliament was not intended to have, and never attempted to exercise, any sort of direct control. It was in a word strictly a grant (within limits) of local self government. In the case of the 'War Measures Act' there was not only no abandonment of legal authority, but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuation of its official existence [emphasis added] ((1918), 57 S.C.R. 150, 170).

The analogy between aboriginal self-government and Territorial self-government is somewhat problematic in that the Constitution Act, 1871 provides special support for Parliament's authority to establish the former. Section 2 of the statute (now inoperative by virtue of s.42(f) of the Constitution Act, 1982) said that Parliament could admit new provinces into Confederation and provide for the provincial constitutions. Section 4, quoted by Duff in the passage just reproduced, expressly allows Parliament to make provision for the "administration, peace, order and good government of any territory not for the time being included in any province." The formula for the general exercise of Parliament's authority in s.91 of the Constitution Act, 1867, does not include the word "administration." Its mention in Section 4 shows that the framers contemplated that Parliament could establish special governmental structures for a territory; the fact that under s.2 Parliament could create sovereign provinces strongly suggests that Parliament was entirely free under s.4 to grant a large measure of self-government to terri-

tories not yet ready for provincehood. There is no constitutional text expressly authorizing Parliament to establish self-government for Indian reserves.

In A.G. Nova Scotia v. A.G. Canada (Nova Scotia Interdelegation), [1951] S.C.R. 31, the Supreme Court of Canada struck down an attempt by the Nova Scotia legislature to authorize Parliament to pass laws with respect to certain types of Nova Scotia enterprises that come under provincial jurisdiction pursuant to s.92 of the Constitution Act, 1867. The case is once again of limited applicability to the self-government issue. A number of plausible objections to federal-provincial interdelegation have no application to aboriginal self-government. Among them: that interdelegation blurs the jurisdictional boundaries the Constitution Act, 1867 attempted to fix; that it confuses the accountability of federal and provincial governments to their electorates; it risks putting one sovereign legislature in a position of subordination to the delegating legislature; it poses a conflict of interest for the federal government, which cannot always do justice to both the national interest and that of a province which has entrusted it with authority over a local matter. There is a dictum of Rand J. in the Interdelegation case that at first glance seems relevant to aboriginal self-government:

Notwithstanding the plenary nature of the jurisdiction enjoyed by them, it was conceded that neither Parliament nor Legislature can either transfer its constitutional authority to the other or create a new legislative organ in a relation to it similar to that between either of these bodies and the Imperial Parliament [emphasis added] ([1951] S.C.R. 31, 47).

Rand J. apparently relied on this passage in the Privy Council's decision in The Queen v. Burah, about the power of the colonial Indian legislature to

delegate its authority:

Their Lordships agree that the [Indian legislature] could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the [Act establishing the Indian legislature] (1877) 3 A.C. 889, 905).

Two years after its decision in the Nova Scotia Interdelegation case, the Supreme Court held that Parliament and provincial legislatures could delegate powers over products marketing to one and the same provincially-constituted marketing board; Potato Marketing Board v. Willis, [1952] 2 S.C.R. 392. This precedent reduces the possibility that the Courts will attack delegations by both Parliament and a province to one aboriginal government.

My overall conclusion from the preceding survey is that the case law is inconclusive. My prediction and prescription would be that the Courts should allow governments almost unlimited scope to vest legislative authority in aboriginal governments by means of ordinary legislation. The continuing authority of Parliament and provincial legislatures to legislatively override a decision of an aboriginal government, or to modify or withdraw the delegation of authority, would be a strong factor in holding that there had not been a disruption in the basic scheme of authority and responsibility contemplated by the Constitution Act, 1867. (Some constitutional changes will obviously go beyond the scope of what is authorized by sections 44 and 45 of the Constitution Act, 1982; their predecessors were given a narrow reading in the Senate Reference (1980), 102 D.L.R. (3d) 1). It is possible that such a disruption would be found in the very unlikely case that an aboriginal community was authorized to cut itself almost entirely free from the criminal, regulatory

and social welfare laws applicable to the rest of the country. Like the "impediment" to self-government posed by s.15 of the Charter of Rights and Freedoms, the case law on the delegation of authority is unlikely in practice to interfere with the establishment of self-government by ordinary legislation. A constitutional amendment expressly stating the extent to which Parliament and provincial legislatures can delegate their authority to aboriginal governments would relieve some uncertainty; it is doubtful, though, whether it is worth attempting to draft and concur upon one at the s.37 process. The diversion of attention from other issues might be a cost disproportionate to any gain.



XXI THE TREATY MAKING PROCESS

In the afternoon, March 9 discussion at the '84 First Ministers' Conference, three of the four aboriginal organizations jointly submitted a proposal for a political accord. (The Métis National Council was apparently in agreement with the proposal, but reluctant to co-sign a document with the Native Council of Canada.) A crucial aspect of the joint submission was that First Ministers agree to submit to their legislatures the following constitutional amendment:

35.2(1) The government of Canada and the provincial governments, to the extent that each has jurisdiction, are committed to negotiating and concluding treaties with the aboriginal peoples for the specific implementation in the various regions of Canada of the rights of the aboriginal peoples, including self-government.

(2) Such treaties shall be treaties within the meaning of section 35(1).

(3) Subsections (1) and (2) shall apply to First Nations with Treaties, only to the extent so elected by them.

The key difference from the federal proposal was the characterization of the bilateral agreements on self-government as s.35(1) treaties. The goal was to secure for agreements on self-government whatever constitutional protection s.35(1) offers to its contents. By contrast, the federal proposal attempted to

make sure that agreements on self-government do not enjoy judicially enforceable constitutional safeguards.

In assessing the proposal of the aboriginal organizations the first order of business is to determine whether it was really necessary to their aims. It may be that s.35(1) of the Constitution Act, 1982, "clarified" by s.35(3) in 1984, already gives constitutional protection to agreements on self-government. To recall the relevant texts:

s.35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

s.35(3): For greater certainty, in subsection (1) "treaty rights" include rights that now exist by way of land claims agreements or may be so acquired.

A strong case can be made even without further constitutional amendment that Parliament and aboriginal governments can enter into constitutionally protected treaties on self-government. It would go something like this:

Section 35(3) establishes that "existing" in section 35(1) means such rights as existed on April 17, 1982 and rights that are created thereafter. Surely it is not only land claims agreements after April 17, 1982 that are protected. Notice that 35(3) refers to "land claims agreements"; some bilateral accords that are not expressly labelled as "treaties" obviously count as s.35(1) treaties. Some sort of test will have to be developed for what agreements on self-government count as "treaties"; perhaps the intention of both sides to create constitutionally binding obligations will be one of them. In any event, it makes no sense to say that all land claims agreements receive constitutional protection but no agreements on self-government do. The most important land claims agreement at the time s.35(3) was enacted was the James Bay agreement; and it included a number of promises by governments to attempt to secure passage of legislation on regional self-government (as requested by the Inuit) and ethnic local self-government (as requested by the Cree). It is beyond doubt that land claims agreements which come under s.35(3) receive some constitutional protection from s.35(1). Are we to say that agreements on self-government can only be constitutionally protected if they are part of a larger deal that

involves land claims? If that is the case, it makes all the difference in the constitutional world whether an aboriginal group manages to toss a provision about 1 square centimetre of disputed territory into its self-government deal. If it does, the agreement can be constitutionally recognized and affirmed by s.35(1); if it doesn't, the agreement is just an ordinary contract which is vulnerable to legislative override. The example establishes the irrationality of attempting to make a categorical distinction between land claims agreements and agreements on self-government. The correct view is that both types of agreement can count as s.35(1) treaties. Remember that to hold otherwise is to deprive both aboriginal peoples and governments of a constitutional mechanism they might wish to employ. To hold otherwise is to say that even if the federal government wants to enter into a constitutionally protected treaty on self-government alone, it cannot do so. The only way that the agreement on self-government alone could be constitutionally protected would be going through the cumbersome process of s.38(1) entrenchment. As there may be hundreds of agreements on self-government, and scores of these which the parties would want constitutionally protected, the s.38(1) route would obviously be unworkable. To sum up, holding that agreements on self-government cannot count as s.35(1) treaties requires an artificial yet crucial distinction between agreements that involve some dispute over land and those that don't; and it deprives both aboriginal peoples and public governments of a constitutional mechanism they might both find very useful.

A strong case can be made to the contrary, that agreements on self-government cannot be considered s.35(1) treaties. It would go something like this:

The "treaties" mentioned in s.35(1) were primarily intended to be the old self-styled treaties whereby Indians surrendered their land rights in return for reserve land entitlements and other social welfare benefits. They did not guarantee self-government. Contemporary agreements on self-government would be categorically different from these old treaties. To begin with their subject matter is essentially different from that of the old treaties. Unlike the old treaties, modern agreements on self-government would deal with the subject of political autonomy. They would do more than create rights for Indians against non-Indian governments. They would create rights for Indians as a collectivity against individual members of the collectivity; an agreement on self-government would authorize an Indian group to exercise a certain measure of control over individuals within that group.

What are the consequences of saying that agreements on self-government are s.35(1) treaties? In effect, that an agreement between the federal government and an Indian group will be immune from derogation by a subsequent legislature. Unless there are substantial limitations on the constitutional protection given by s.35(1), recognizing an agreement on self-government as a s.35(1) treaty is not substantially different from entrenching it in the Constitution. The only way to undo what has been done is to obtain the consent of the aboriginal group - which is not a significant difference, because almost all constitutional rights can be waived - or go through the cumbersome s.38 amending process. You end up with the remarkable result that a federal government could unilaterally set up an aboriginal group with powers exceeding even those of a province, and there would be no way to undo the result against an unwilling beneficiary except to obtain the consent of the House of Commons, Senate and two-thirds of the provinces. The sound and generally applicable principle of the Canadian Constitution is that it is equally hard to enact a constitutional provision on the one hand, and repeal or alter it on the other. This principle should apply to a subject-matter as important as the governmental arrangements under which a community will live.

There is a second major difference between the old treaties and agreements on self-government. The former were bargains; the aboriginal group permanently surrendered entitlements vital to their existence in return for the promises under the treaties. There would be no such cost with respect to agreements on self-government. They would not involve the surrender of entitlements aboriginal groups already have. The justification for permanently protecting the benefits of the agreement is far weaker where there is no permanent cost.

Now consider the effect s.35(3) has on s.35(1). The second major distinction between treaties and agreements on self-government still applies; under modern land claims agreements, aboriginal groups permanently surrender claims of fundamental importance in return for what is promised. Thus even if the distinction in subject-matter between the old treaties and modern treaties does not hold - because modern land claims agreements do include some provisions on self-government - there is still, in the element of exchange, a solid basis for excluding agreements on self-government from the scope of s.35(1).

As for the argument that the exclusion of agreements on self-government from s.35(1) is artificial because it could be overcome by tossing a minimal dispute over land into an accord that generally deals with self-government - the premise of the argument is wrong. The Courts would look at the substance of the agreement to see whether it involves a substantial and plausible dispute over land.

It may be argued that section 35(3) destroys the distinction in subject matter between treaties and agreements on self-government. The James Bay agreement shows that some arrangements on political autonomy may be part of a treaty that is protected by s.35(1). On a close examination of the James Bay treaty, however, it appears that only limited self-government is guaranteed. Both the regional public government promised the Inuit and local ethnic government promised the Cree have powers that do not much exceed that of an ordinary municipality; the citizens of both continue to be subject to ordinary federal and provincial law; and many important decisions of both types of government are subject to disallowance by either the government of Quebec or Canada. The James Bay precedent should not be taken as establishing the ability of governments to enter into constitutionally binding treaties on any degree of Aboriginal self-government. If section 35(3) does so expand s.35(1), then section 35(3) itself is - because it has the practical effect of creating an alternate route to major constitutional amendment - an amendment to the amending formulae. Changes to the amending formulae in the Constitution require the consent of all the provinces; and Quebec did not agree to s.35(3). There is no need, however, to go so far as declaring s.35(3) void. It can be read as allowing agreements on limited local self-government to receive the protection of s.35(3) as part of an agreement that has land claims as a principal subject.

In rebuttal to the case just made for limiting s.35(3), the following might be said:

It has been argued that giving constitutional protection to agreements on self-government would allow, in effect, the unilateral entrenchment of self-government agreements. This is said to be contrary to the general principle that it is equally hard to entrench and unentrench. That principle does not, however, always hold in the Canadian Constitution; under s.38(3), a province can unilaterally opt out of a new constitutional amendment; but if at any point it ever does opt in, it can never again escape the amendment without obtaining the usual s.38 consent - the House of Commons, Senate and two-thirds of the provinces with a majority of the population. There is good reason for allowing a lack of symmetry in the way that aboriginal rights are protected and derogated from. Aboriginal peoples are a small political minority of the population. It can be expected that governments answerable to the general public will not give away those parts of the shop that it ought to keep. By contrast, any time the governments of Canada and seven provinces (with half the population) find inconvenient a constitutional safeguard previously granted an aboriginal group, they can abolish it - despite the objections of the group affected. When

there is no symmetry with respect to political power, it is illogical to insist on symmetry in the process of constitutionalization.

One of the factors complicating the choice between the two positions is the uncertainty over what sort of constitutional protection s.35(1) actually gives. The more vulnerable s.35(1) treaties are to legislative override, the less persuasive is the argument that the treaty making process is a back-door route to constitutional amendment. Another complicating factor is the uncertainty over the contents of s.35(1). Suppose, contrary to what has been assumed above, that among the "aboriginal rights" s.35(1) mentions is self-government. An agreement on self-government might then be viewed as involving the permanent exchange of that inherent right for the rights expressly provided for in the agreement. The benefit of permanent exchange would be a strong ground for considering the agreements on self-government to be morally analogous to the old treaties, hence a "treaty" for the purposes of s.35(1).

Which of the two positions is stronger, I am not at all sure, although I tend towards the former. It may be a long time before the Courts have to decide. Governments may build enough "safety valves" - limits on the exercise of power by aboriginal governments in the form of standards and independent review mechanisms - into self-government agreements that no subsequent government finds it necessary to tamper with them. It would be helpful to clarify the issue now, however, because the parties to agreements on self-government will want to know what they are getting themselves into. If there is the possibility that the agreement will be unalterable without the consent of the aboriginal group, the federal government may try to put in a lot of

"safety valves" (or, if you prefer, "weasel tunnels") that they would otherwise forego. Their attempt to do so may complicate negotiations. If the intent to enter a constitutionally protected treaty is a key element in determining whether it is one, then the federal side may attempt to have the agreement disclaim that intention, while the aboriginal group tries to have it expressly recognized.

There are some respectable positions between the two poles defined earlier. You might adopt the first position, but insist on some strict conditions before an agreement on self-government can be validly considered a s.35(1) treaty. One condition you might stipulate is that since constitutionalizing an agreement has serious consequences, the parties should enter into it with full knowledge and consent; an agreement on self-government should not be recognized as a s.35(1) treaty unless the parties expressly or impliedly acknowledge it as such. Another condition would be that the aboriginal government cannot be given authority tantamount to that enjoyed by a province. If it were, the net effect of the transfer of authority and the constitutional protection provided by s.35(1) would be a substantial constitutional amendment. The amendment itself, you might say, might be a just and prudent one, but it ought not to be effected by Parliament alone. It would be odd, you could say, if the new Constitution required the s.38 amending process to be used for the admission of new provinces into Confederation - but permitted the federal level of government, on its own, to establish an equivalent order of government for a reserve. You could cite some of the case law on the excessive delegation of authority - the Manitoba Initiative and Referendum Act Reference, [1919] A.C. 935; The Nova Scotia Interdele-

gation case, [1918] S.C.R. 31; The Senate Reference (1980), 102 D.L.R. (3d) 1 - to support your contention that the Constitution contemplates that legislative authority should be vested in Parliament, and it cannot irrevocably devolve a substantial part of that authority to another order of government except by constitutional amendment.

An aspect of the controversy that must be considered is the federal-provincial relations one. It is well settled that under s.91(24) of the Constitution Act, 1867, the federal government became solely responsible for the obligations under the old treaties; see R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alta., [1982] Q.B. 892. Thus if s.35(1) stood alone, a powerful case could be made that provinces were not contemplated as eligible parties to s.35(1) agreements. With the addition of s.35(3), the more persuasive case at first glance is that provinces are indeed eligible. The reason? The province of Québec was a party to the James Bay agreement, and it was the outstanding precedent for a modern lands claim agreement when s.35(3) was framed. A complication that immediately arises, however, is that a province might enter into a bilateral agreement with an aboriginal group over a matter within concurrent federal and provincial jurisdiction - say, education on a reserve. If the agreement counts as a s.35(1) treaty, and if s.35(1) constitutionally protects its contents, then Parliament cannot undo what the province has done. In other words, Parliament's authority has been ousted without its consent. One way of avoiding this difficulty would be to say that provinces can enter into s.35(1) agreements with aboriginal groups only if the federal government is also a party to the treaty.

The preceding analysis suggests the opposite question. What happens if the federal government enters into a s.35(1) treaty and the results are offensive, or at least inconvenient, to the existing or a successor provincial government? 'Tough cookies,' might be your initial response; the federal government always has paramount authority over the provinces when it comes to Indians. Yes, but ordinarily a provincial government, or the unhappy federal electorate of a province, can, with some hope of success, urge a federal government to adjust its policies to accommodate provincial concerns. Once the moving pen hath signed a s.35 treaty, not all the piety nor wit of a provincial government can lure it back, nor all its tears wipe out a word of it - unless the aboriginal group and the federal government are moved to revise the text, or six other provinces and the federal government conspire to erase it. Provincial governments will have a number of concerns about the agreements. Most will have a genuine altruistic concern about the future of aboriginal peoples; they will also be concerned about the indirect effects of aboriginal self-government, in that many people educated and trained under it will eventually move to the cities, and they will want to ensure that their environmental interests are not adversely affected by reserve activities. The bilateral treaty making process may give them an inadequate opportunity to protect, or at least communicate, their interests.

The involvement in self-government negotiations of the province in which the community is located will often be essential to the success of the venture. The close co-operation of provincial governments - including a willingness to enter into contracts to provide services and expertise - will be less likely if they are not adequately involved in constitutional arrangements

concerning the aboriginal community. My suggestion would be that the s.37 process consider clarifying agreements on self-government by way of constitutional amendment.

The position that no constitutional mechanism should be recognized can be argued with some plausibility. It could be said that the mechanism is basically unnecessary; that governments can be expected to generally honour their agreements with aboriginal governments, just as they generally honour agreements on fundamental matters such as oil-pricing and fiscal transfers. Occasionally circumstances may require a government to alter an agreement over the objection of the aboriginal group concerned; but it is just as well to trust the fairness of a government than try in advance to stipulate the constitutional conditions under which an agreement may be abrogated. The latter option will require prolonged negotiations, and at best, result in a formula that is open to widely differing interpretations. The existence of the mechanism (that is, entering into constitutionally protected treaties on self-government) will consistently complicate and delay negotiations between governments and aboriginal groups. There will be disputes about whether the agreement ought to be self-styled as a treaty; the inescapability of the obligations will cause governments to insist on all sorts of "safety valves" they might ordinarily forego. The most important thing right now is to get on with the practical business of negotiating and implementing self-government for aboriginal peoples.

The contrary position could cite some advantages to creating the mechanism. It would enable aboriginal groups to enter into medium and long term agreements which will give security and certainty to their planning; they will

not have to worry that an unsympathetic future government will disrupt or destroy the political and fiscal arrangements they have with an existing government. The mechanism, in fact, could be seen as a one-way ratchet; it would permit progress—on self-government to be made under governments receptive to aboriginal concerns, and prevent hostile or indifferent governments from moving backwards. The constitutionalization of agreements would add an extra element of solemnity and dignity to them. It would enhance the confidence and pride aboriginal groups would have in the agreements that would, in effect, be their constitutions.

A prudent course of action might be to tie together the first round of bilateral negotiations on self-government and s.37 negotiations on whether they should be constitutionally protected. The federal, provincial and aboriginal governments involved in a particular negotiation or agreement could report to s.37 meetings (whether officials, Ministers, or even First Ministers) and thereby give all the s.37 participants a better appreciation of the practical problems of aboriginal self-government and the nature of the agreements that can be expected to emerge. At a s.37 First Ministers' meeting later than 1987 (the last one required by the 1984 amendment to the Constitution) an attempt could be made to determine whether the agreements ought to be constitutionally protected, and if so, by what mechanism.

One of the simplest constitutional amendments worth considering would stipulate that agreements on self-government are to be considered as s.35(1) treaties. It could be expressly added that provinces may enter into constitutionally protected agreements; the qualification might be made that an agreement cannot limit the purposes of Parliament unless the federal government is

also a party. To require the consent of the province before an agreement would be constitutionally protected would probably be unacceptable to aboriginal organizations. They would justifiably be concerned about some of the most unsympathetic provinces blocking an agreement that was acceptable to both the federal government and an aboriginal group. A suggestion worth considering, however, is that before an agreement receives constitutional protection as a treaty, it must first have been submitted for discussion to a s.37-style First Ministers' Conference. There are several advantages to this proposal. It would ensure that agreements received adequate public scrutiny and discussion before they became largely immune from alteration. On the other hand, the proposal would not enable a province or group of provinces to veto the agreement's inclusion under s.35(1). Section 37(1) participants not directly involved in the agreement might derive from the discussion some ideas they could implement themselves. The Prime Minister would be implicitly (or expressly) obliged to convene s.37-style conferences from time to time to consider the agreements - with the result that aboriginal issues would be sure of attracting the periodic attention of governments, the media and the public. Against the proposal just made, it would have to be considered whether the number and complexity of agreements would prevent their being intelligently considered by First Ministers.

It will be worthwhile to consider substantive as well as procedural constraints on the constitutionalizing of self-government agreements. It would be possible, for example, to stipulate that the agreements can only transfer authority over a specified range of subject matters; that they can have a maximum duration of only a certain number of years; that they must provide

for independent review of the group's fiscal affairs; or that they must provide for independent review of decisions on grounds of illegality or unreasonableness.

Whether or not self-government agreements are constitutionalized, it does seem highly desirable that they be an essential aspect of establishing a new type of political order for aboriginal communities. They will help to ensure that the superior understanding of aboriginal communities of their own circumstances and aspirations will be adequately reflected in the legal order that emerges. The agreement making process will also help to overcome some of the disputes over symbolism that would otherwise stall progress for many groups. One of the longest debates in the history of the Canadian Parliament was over the replacement of the Red Ensign flag by the Maple Leaf. Whether an aboriginal group is characterized as a protected independent state, a domestic dependent nation, a band or a municipality may not actually make a bit of difference in the distribution of power over it. But it may be a matter charged with significance for both the members of the community and the general Canadian public. The agreement making process is useful because it does not necessarily require either side to surrender their symbolism or accept the other's. An aboriginal group can, if it wishes, regard an agreement as an international treaty between two sovereign states. No Canadian Court will ever agree with it, but the group itself remains free to maintain its interpretation of the significance of the transaction. By contrast, if self-government is established by legislation alone, the exercise of authority by aboriginal governments may inescapably look like their acceptance of delegated authority from a superior power. There may be ways of drafting the legisla-

tion so as to some extent avoid this implication - for example, using the word "recognition," wherever possible, rather than "delegation" - but the process would not be as subject to diverse characterizations as would one that includes bilateral agreements. The agreement making mechanism might allow each party to say that the other has a bad theory - that works in practice.

REFERENCES

CHAPTER II

- Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (ss. 25, 35, and 37)," In, Canadian Charter of Rights and Freedoms: Commentary, Tarnopolsky and Beaudoin (eds.), 1982.
- McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Supreme Court L.R. 639.
- R. Sheppard and M. Valpy, The National Deal: The Fight for a Canadian Constitution, 1982.
- Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights in Canada" (1982-83), 8 Queen's L.J. 232.
- R. Romanow, J. Whyte and H. Leeson, Canada Notwithstanding: The Making of the Constitution 1976-1982, 1984.
- N. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, 1983.

Case List

Association of Métis and Nonstatus Indians of Saskatchewan et al v. Trudeau, unreported; cross examination of John Weinstein.

CHAPTER IV

D. Jenness, Indians of Canada, 1932.

Native People and the Constitution of Canada, The Report of the Métis and Non-Status Indian Constitutional Review Commission, 1981, H.W. Daniels, Commissioner.

W. Zartman and M. Berman, The Practical Negotiator, 1982.

N. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference, 1983.

CHAPTER VI

H. Cardinal, The Rebirth of Canada's Indians, 1977.

Indian Self-Government in Canada, Report of the Special Committee on Indian Self-Government, 1983 (Penner Report).

P. Jull, Nunavut, 1983 (prepared for the Nunavut Constitutional Forum).

Sanders, "The Indian Lobby," In, And No One Cheered, K. Banting and R. Simeon (eds.), 1983.

Sanders, "Indian Status: A Woman's Issue or an Indian Issue?", [1984] 3 C.N.L.R. 30.

CHAPTER VII

E. Forsey, Freedom and Order, 1974.

P. Hogg, Constitutional Law of Canada, 1977.

G. Laforest, Disallowance and Reservation of Provincial Legislation, 1965.

B. Schwartz, "The Charter and Due Process," In Panel Discussion, 1983 Pitblado Lectures.

CHAPTER VIII

Indian Self-Government in Canada, Report of the Special Committee on Indian Self-Government, 1983 (Penner Report).

CHAPTER IX

P. Jull, Nunavut, 1983 (prepared for the Nunavut Constitutional Forum).

CHAPTER X

Indian Self-Government in Canada, Report of the Special Committee on Indian Self-Government, 1983 (Penner Report).

CHAPTER XI

Green, "Trusteeship and Canada's Indians," 1976-77 3 Dal. L.J. 104.

P. Hogg, Constitutional Law of Canada, 1977.

Hughes, "Indians and Lands Reserved for the Indians: Off Limits to the Provinces?" (1983), 21 Osgoode Hall L.J. 82.

Response of the Government to the Report of the Special Committee on Indian Self-Government, 1984 (Reply to Penner Report).

Statement of the Government of Canada on Indian Policy, 1969 (White Paper).

Trudeau, "Federal Grants to Universities," in P. Trudeau, Federalism and the French Canadians, 1968.

CHAPTER XII

W. Canby, American Indian Law, 1981.

Lysyk, "The Unique Constitutional Position of the Canadian Indian," (1967), 45 Can. Bar Rev. 513.

M. Price, Law and the American Indian, Readings, Notes and Cases, 1973.

Statement by the President, Indian Policy; The White House, Office of the Press Secretary, January 24, 1983.

Statement of the Government of Canada on Indian Policy, 1969 (White Paper).

CHAPTER XIV

P. Cumming and N. Mickenberg, (eds.), Native Rights in Canada, 1972.

Indian Self-Government in Canada, Report of the Special Committee on Indian Self-Government, 1983 (Penner Report).

L. Krotz, Canada's Urban Indians, 1980.

CHAPTER XV

Response of the Government to the Report of the Special Committee on Indian Self-Government, 1984 (Reply to the Penner Report).

CHAPTER XVI

P. Hogg, Constitutional Law of Canada, 1977

G. LaForest, Natural Resources and Public Property under the Canadian Constitution, 1969

Report of the MacEwan Joint Métis-Government Committee to Review the Métis Betterment Act and Regulations, 1984.

Sanders, "Métis Claims in Western Canada," In The Forgotten People; Métis and Non-Status Indian Land Claims, H. Daniels (ed.), 1979

Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims 1870-1887" (1979-80), 10 Man. L.J. 415

Sprague, "Métis Land Claims," In Native People and the Constitution of Canada, The Report of the Métis and Non-Status Indian Constitutional Review Commission, 1981, H.W. Daniels, Commissioner.

P. Trudeau, Federalism and the French Canadians, 1968

CHAPTER XVII

A. Begg, History of the North-West, vol. 1, 1894-95.

Chartier, " 'Indian': An Analysis of the Term as used in Section 91(24) of the British North America Act, 1867" 1978-79, 43 Sask. L.R. 37.

T. Flanagan, Riel and the Rebellion 1885 Reconsidered, 1983.

CHAPTER XX

A.V. Dicey, The Law of the Constitution, 10th ed. 1965.

Gunther, "A Model for a Newer Equal Protection" (1972), 86 Harv. L.R. 1.

TRANSCRIPTS

1983 FMC Transcript

1984 FMC Transcript

T. Flanagan, Louis David Riel, 1979.

J. Howard, Strange Empire, 1952.

Lussier, "The Métis," In The Other Natives: The Métis, A. Lussier and D. Sealey (eds.), 1978.

A.S. Morton, "The New Nation, The Métis" In The Other Natives: The Métis, A. Lussier and D. Sealey (eds.), 1978.

W.L. Morton, Manitoba: The Birth of a Province, 1965.

W.L. Morton, "The Battle at the Grand Coteau, July 13 and 14, 1851," In The Other Natives: The Métis, A. Lussier and D. Sealey (eds.), 1978.

E. Oliver, The Canadian Northwest, its Early Development and Legislative Records, vol. I, 1914.

Sealey, "One Plus One Equals One" In The Other Natives: The Métis, A. Lussier and D. Sealey (eds.), 1978.

Stanley, "Confederation 1870 - A Métis Achievement," In The Other Natives: The Métis, A. Lussier and D. Sealey (eds.), 1978.

G.F.G. Stanley, The Birth of Western Canada, 1960.

British Parliamentary Papers

Report from the Select Committee on the Hudson's Bay Company, ordered by the House of Commons to be printed 31 July and 11 August, 1857. British Parliamentary Papers, Report from the Select Committee on Hudson's Bay Company, Session 1857, Colonies Canada, Vol. 3.

CHAPTER XVIII

Indian Self-Government in Canada, Report of the Special Committee on Indian Self-Government, 1983 (Penner Report).

CHAPTER XIX

Indian Self-Government in Canada, Report of The Special Committee on Indian Self-Government, 1983 (Penner Report).