

# NEGOTIATING ABORIGINAL SELF-GOVERNMENT

Developments Surrounding the 1985  
First Ministers' Conference

*David C. Hawkes*

Institute of  
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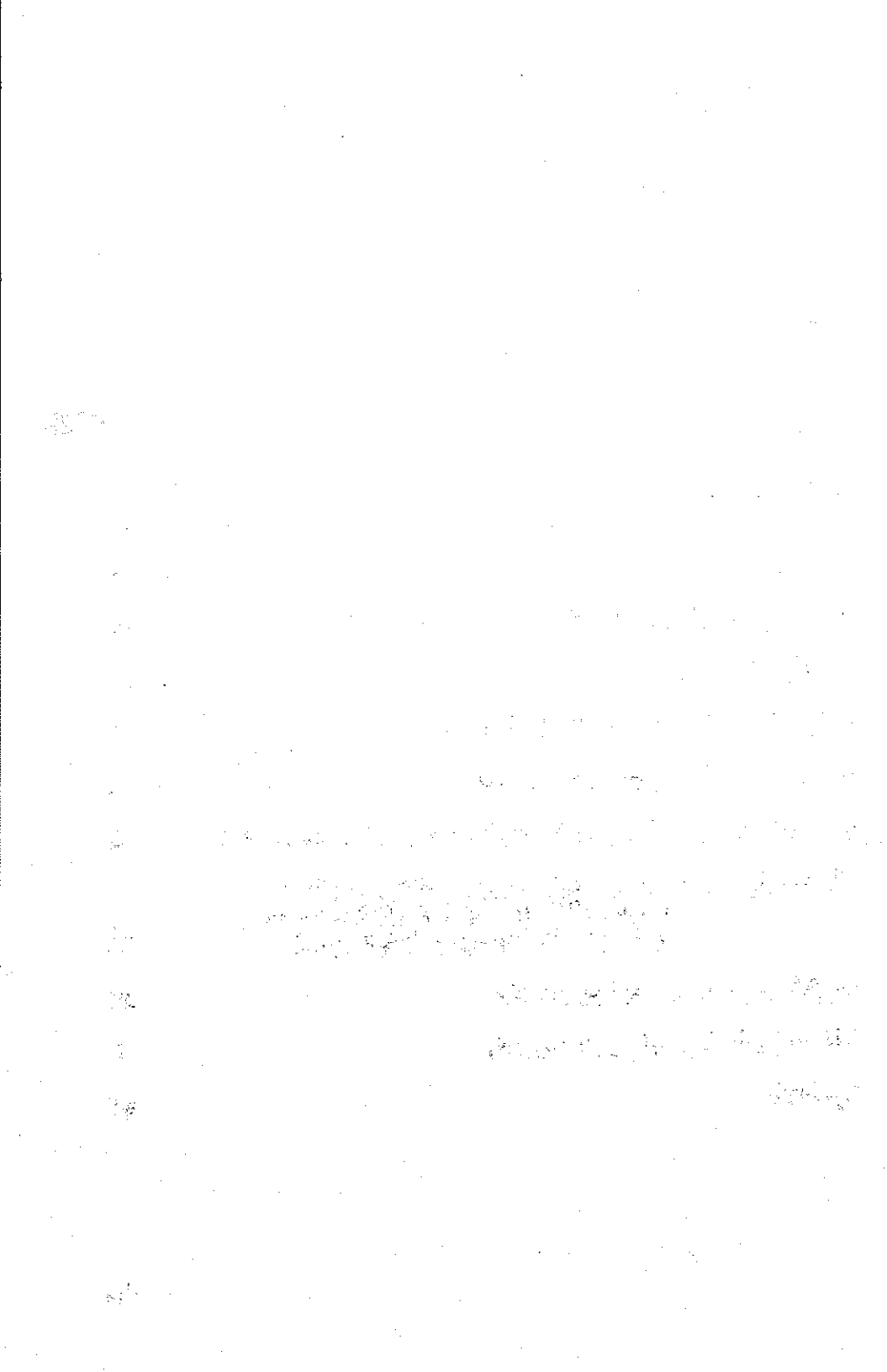
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## CONTENTS

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PREFACE	v
ACKNOWLEDGEMENTS	ix
ABSTRACT	xi
CHAPTER 1 - INTRODUCTION	1
CHAPTER 2 - BACKGROUND	5
CHAPTER 3 - THE NEW FEDERAL GOVERNMENT	13
CHAPTER 4 - THE 1985 FIRST MINISTERS' CONFERENCE ON ABORIGINAL CONSTITUTIONAL MATTERS	19
CHAPTER 5 - ANTICLIMAX	35
CHAPTER 6 - CONCLUSION	41
NOTES	45



## PREFACE

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Section 37 of the *Constitution Act, 1982* (as amended) requires the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." Discussion leading up to and during the First Ministers' Conferences on Aboriginal Constitutional Matters quickly focused on the task of making constitutional provisions for aboriginal self-government. Many involved in the process openly questioned the meaning of "aboriginal self-government".

In view of the importance of this subject, in May of 1984 the Institute of Intergovernmental Relations launched a research project on "Aboriginal Peoples and Constitutional Reform". Phase One of the project responded to concerns that emerged at the outset of the constitutional negotiating process. As indicated by its title, "Aboriginal Self-Government: What Does It Mean?", Phase One examined various models, forms and proposals for aboriginal self-government. This included an exploration of the citizenship rights of aboriginal peoples, the experience of aboriginal self-government in other nations, and a review of Canadian developments over the past few years. The results of these investigations were compared to the positions taken by parties to the constitutional negotiations, in an effort to

identify areas of emerging conflict and consensus. These findings were elaborated in five Background Papers, a Discussion Paper and a Workshop, which was held two months prior to the 1985 First Ministers' Conference (FMC).

The Institute received financial support for Phase One of the project from the Donner Canadian Foundation, the Canadian Studies program (Secretary of State) of the Government of Canada, the Government of Ontario, the Government of Alberta, the Government of Quebec, the Government of New Brunswick, and the Government of Yukon.

At the 1985 FMC, a situation developed that radically altered the constitutional negotiating process. Rather than entrench the right to aboriginal self-government in the constitution, and then negotiate individual self-government agreements (the "top-down" approach), many governments indicated their intention to negotiate individual agreements, and then consider their entrenchment in the constitution (the "bottom-up" approach). Negotiations will proceed on a bilateral or trilateral basis, at the local, regional and/or provincial/territorial levels. In large part, these negotiations will be concerned with involving aboriginal peoples in the design and administration of public services previously supplied by federal, provincial and territorial governments.

The "bottom-up" approach is now the key element in the process of constitutional reform as it relates to aboriginal peoples in Canada. Phase Two of the project is entitled "Aboriginal Self-Government: Can It Be Implemented?", and responds to concerns now emerging in the negotiations. This phase of the Institute's project therefore will focus initially on arrangements for the design and administration of public services by and to aboriginal peoples. The research will examine the practical problems in designing mechanisms and making arrangements for implementing self-government agreements.

As the 1987 FMC approaches, attention will gradually shift from negotiations on a bilateral or trilateral basis to the multilateral constitutional forum (the FMC). The 1987 FMC may consider the constitutional entrenchment of individual agreements previously negotiated, or it may revert to attempts to implement a "top-down" process for defining and entrenching aboriginal rights in the constitution, especially those relating to aboriginal self-government. The research agenda in the second year of Phase Two anticipates this shift in preoccupation, with the focus turning to the search for a constitutional accommodation in 1987. If this search is to be successful, it will be necessary first to inquire into, and then to resolve or assuage a number of genuine concerns about aboriginal self-government and its implications for federal, provincial and territorial governments. Research in this part of the project will explore these concerns.

This background paper, examining the negotiations surrounding the 1985 First Ministers' Conference on Aboriginal Constitutional Matters, is the first publication in Phase Two of the project. The paper reviews negotiations and positions taken on issues of aboriginal self-government by the parties to the constitutional negotiations during the period of September 1984 to June 1985. Providing an analysis and update of substantive issues and changes in the negotiating process, the paper is a basic building block for Phase Two of the research.

A condensed version of this paper is included in a recent publication of the Institute of Intergovernmental Relations, entitled *Canada: The State of the Federation 1985*.

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



## ABSTRACT

The period of September 1984 to June 1985 represented a critical period in constitutional negotiations on aboriginal self-government. It witnessed both the first test of a new federal government on this issue, and the end of an era in negotiations on aboriginal peoples and constitutional reform. Positions, proposals and counter-proposals are traced throughout the period, as parties to the negotiations searched for a balance between the benefit of reaching intergovernmental agreement, and the cost of diluting the protection of aboriginal rights. Some concluding observations are made on the outcome of the negotiations, and on their likely impact on future developments.

## Sommaire

*La période de septembre 1984 à juin 1985 représentait une étape importante dans les négociations constitutionnelles relatives à l'autonomie gouvernementale autochtone. Elle fut marquée par deux faits: la fin d'une ère dans les négociations relatives aux peuples autochtones et à la réforme constitutionnelle ainsi que la première mise à l'épreuve d'un nouveau gouvernement fédéral confronté par ce problème. Cette étude examine comment les positions, les propositions et les contrepropositions ont évolué au cours de cette période alors que les participants aux négociations cherchaient un juste milieu entre les avantages d'un accord intergouvernemental et le prix à payer en termes d'une protection moindre des droits des autochtones. Quelques observations sont faites, en conclusion, sur l'issue des négociations et leur effet probable sur l'évolution de la situation.*



## 1 INTRODUCTION

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Each spring for the past three years, the Canadian public has witnessed two full days of televised discussion and debate as the Prime Minister, the provincial Premiers, leaders of the territorial governments, and representatives of national aboriginal organizations met in Ottawa to discuss constitutional reform. These discussions were mandated by the proclamation of the *Constitution Act, 1982*, and its subsequent amendment in 1983. Although initial discussions addressed a wide range of issues, such as aboriginal rights in the areas of land, resources, self-determination, fiscal relations, language, culture, education, law, economic development, health and social services, recent deliberations have focused on one agenda item - "aboriginal self-government". Not only does this term include many of the issues noted above, it also encapsulates the aspirations of Canada's aboriginal peoples. For them, these negotiations represent an opportunity to at least partially reverse hundreds of years of oppressive government policies and neglect, and to improve their intolerable socio-economic condition. Only through greater self-determination do they believe that this can come about.

This paper examines recent negotiations on aboriginal self-government, concentrating analysis on developments which have occurred since the election of the Progressive Conservative federal government in September 1984. Throughout the analysis, the positions of the various parties to the negotiations are tracked, proposals and counter-proposals are explained, a sense of the debate and the negotiating strategies is imparted, and the outcomes of the negotiations are examined.

The period under examination, from September 1984 to June 1985, was critical to aboriginal self-government negotiations (and more generally to constitutional reform as it relates to aboriginal peoples) for several reasons. It was the first test of the new federal government whose views on these issues were largely unknown. The opportunity existed, had the new government wished to take advantage of it, to alter radically federal policy in this field. Secondly, this period represented, in retrospect, the end of an era or phase in negotiations on aboriginal peoples and constitutional reform. This phase which began in the late 1970s was marked by discussions regarding the entrenchment of aboriginal rights in the constitution, and by numerous multilateral ministerial meetings and First Ministers' Conferences focusing on constitutional reform. With respect to aboriginal self-government, it represented a "top-down" approach to the issue - first, recognition of the right to aboriginal self-government in the constitution, and then negotiation of its form and substance.

The approach adopted at the June 1985 meeting of government Ministers and aboriginal leaders, perhaps by default, was quite different. It began a new phase, which will be marked by bilateral (federal or provincial government and aboriginal people) and trilateral (federal and provincial governments and aboriginal people) negotiations on the form and substance of aboriginal self-government at the local, regional and provincial/territorial levels. Discussions of constitutional reform may not loom large. Rather, they are likely to focus on more practical matters such as how aboriginal

peoples can effectively design and administer public services for their people in the fields of education, economic development, and the like, and how aboriginal self-government is to be financed. This represents a shift to a "bottom-up" approach to the issue - negotiation of the form and substance of aboriginal self-government, and then consideration of its entrenchment or protection in the constitution.

The developments of this period also illustrate a more general phenomenon in intergovernmental relations, one particularly evident in the negotiations on aboriginal self-government. This might be termed the "ratchetting up" of the lowest common denominator. Intergovernmental negotiations, by their very nature, tend to be slow and incremental. In part, this is a function of the number of parties to the negotiations. In the case of the negotiations on aboriginal constitutional matters, 17 parties have been involved (the federal government, 10 provincial governments, two territorial governments, and four aboriginal peoples' organizations). While progress has been less than dramatic, the lowest common denominator, or the least which all governments are prepared to accept with respect to this issue, has risen significantly since negotiations began in 1983.

Throughout the negotiations, there has been an implicit trade-off between reaching federal-provincial agreement and protecting aboriginal rights, between the benefit of reaching agreement at the cost of diluting the protection and recognition of rights. In terms of the intergovernmental negotiations, we will examine the costs incurred in ratchetting up the lowest common denominator, and whether these costs are inherent in such negotiations.

The paper begins with a brief review of the background to the current negotiations. This is followed by an exploration of the preparatory Ministerial meetings and the 1985 First Ministers' Conference (FMC) on Aboriginal Constitutional Matters. The follow-up Ministerial meeting to the FMC is then analyzed, and the

paper concludes with some observations on the outcomes of the negotiations and on what lies ahead.



## 2 BACKGROUND

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Section 35(2) of the *Constitution Act, 1982*, identifies Indian, Inuit and Metis as the "aboriginal peoples of Canada". Representing Indian peoples in the negotiations is the Assembly of First Nations, while the Inuit are represented by the Inuit Committee on National Issues. The Metis are represented by two organizations: the Metis National Council (which defines "Metis" as the descendants of persons of mixed Indian and European parentage, who formed an historic Metis nation in western Canada), and the Native Council of Canada (which defines "Metis" more broadly: those persons of partial Indian ancestry, regardless of place of residence within Canada).

The proposals of aboriginal peoples for self-government cover a wide variety of possibilities. Most are based on the assumption that self-government exists on a land base, although others have advocated proposals which do not make this assumption, such as guaranteed representation for aboriginal peoples in the federal Parliament and in provincial and territorial legislatures. The issue of land for those aboriginal peoples without a land base may prove difficult to resolve. There appear to be three critical elements to those proposals which do assume a land base:

1. whether the government is public (based on territory) or ethnic (based on ethnicity);
2. whether the government is regional or local/community in scope; and
3. the amount of power exercised by the government, be it autonomous (with legislative powers), semi-autonomous (with mixed powers), or dependent (with administrative powers).

These elements give some indication of the issues to be resolved, and why their resolution will not be an easy task. Especially difficult is the question of which powers and resources are to be assumed by aboriginal governments, perhaps at the expense of federal and provincial governments.

Although the resolution of such issues will be difficult, there is some impetus upon governments, aside from the pressure of public opinion and ethical considerations, to negotiate a political settlement. Should they fail to do so, the aboriginal peoples might take the matter to the courts. If self-government was determined by the courts to be an existing aboriginal right, the costs (both in terms of power and finances) of the court remedy to federal and provincial governments could be greater than that negotiated in the political arena.

Consultations have not always been directed toward such issues. Although the 1984 and 1985 First Ministers' Conferences on Aboriginal Constitutional Matters focused attention on aboriginal self-government, negotiations on aboriginal peoples and constitutional reform began some time earlier.

By the mid and late 1970s, aboriginal peoples' organizations were advocating the constitutional protection of their rights as indigenous people. The first concrete recognition of the issue was contained in the federal government White Paper on the Constitution, entitled *A Time for Action*, and its legislative companion, Bill C-60, which were tabled in 1978. Bill C-60 contained a provision which attempted to shield certain aboriginal

rights from the general application of the Charter of Rights, to which all Canadians would be subject. By December 1979, the three national aboriginal organizations at that time - the National Indian Brotherhood, the Native Council of Canada (the sole national organization then representing Metis), and the Inuit Tapirisat of Canada - were meeting with the federal-provincial Continuing Committee of Ministers on the Constitution (CCMC) to discuss the participation of aboriginal peoples in the constitutional reform process.

When the First Ministers' Conference in 1980 failed to reach unanimous agreement on amending the constitution, the federal government decided to proceed with patriation unilaterally. The federal constitutional resolution of October 1980 barely touched on the concerns of aboriginal peoples, much less offered any protection of their rights. National aboriginal peoples' organizations lobbied, as did eight provincial governments, both in Ottawa and in London, England, against unilateral patriation.

Unilateral patriation was stopped in its tracks in September 1981 with the Supreme Court decision concerning the federal constitutional resolution (Reference Re: The Amendment of the Constitution of Canada). The Supreme Court ruled that, by constitutional convention, a substantial measure of provincial consent was required on matters affecting federal-provincial relations before such a constitutional amendment could be forwarded to Westminster. It was back to the bargaining table.

At the ensuing First Ministers' Conference in November 1981, a constitutional accord was finally reached. The accord was partial, and remains so, since Quebec did not sign the agreement. During the negotiations, a section of the federal constitutional package which "recognized and affirmed" the "aboriginal and treaty rights of the aboriginal peoples of Canada" was deleted, at the request of several provinces, as was the sexual equality clause. Intense lobbying on the part of aboriginal peoples, women and several governments led

to their restoration one month later, but with one important addition. The word "existing" was placed before "aboriginal and treaty rights", leaving open the question of what rights then existed.

Patriation was completed with the proclamation of the *Constitution Act, 1982* on the 17th of April. Three sections of the Act relate directly to aboriginal peoples. Section 25 guarantees that The Canadian Charter of Rights and Freedoms will not "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."

Section 35 states that:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Section 37 provided for the convening of a First Ministers' Conference on Aboriginal Constitutional Matters by April 17th, 1983, and for the participation of aboriginal peoples' representatives and delegates from the Northwest Territories and the Yukon in those discussions.

That conference was held in March 1983, and in retrospect, it was a great success. The parties to the negotiations signed an accord covering four topics: a process for negotiating the definition of aboriginal rights; sexual equality of aboriginal peoples; consultation on constitutional amendments affecting aboriginal peoples; and the protection of future and existing land claims settlements. The result was the first amendment to the

new constitution. Section 25(b) was amended to read "(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired". Two new sub-sections were added to section 35: the first included existing and future land claims agreements in the definition of "treaty rights"; the second guaranteed aboriginal and treaty rights equally to male and female persons. Section 35 was amended to provide for a First Ministers' Conference to be convened, including representatives of the aboriginal peoples of Canada, before any amendment can be made to the constitution which directly affects aboriginal peoples. And a new part was added to section 37, dealing with constitutional conferences. At least three more First Ministers' Conferences on Aboriginal Constitutional Matters would be held: in 1984, 1985 and 1987.

In a separate but very much related initiative, a House of Commons Special Committee on Indian Self-Government had been struck in December, 1982. Its report, entitled *Indian Self-Government in Canada*, and popularly known as the Penner Report after Committee Chairman Keith Penner, had a dramatic effect on aboriginal constitutional negotiations when it was tabled in November 1983. Although national aboriginal peoples' organizations were increasingly looking toward self-government as a means of both protecting and exercising aboriginal rights, the Penner Report brought aboriginal self-government to the forefront of constitutional negotiations. It also focused public attention on the status Indian peoples of Canada, some would argue at the expense of other aboriginal peoples.

The Penner Report recommended the recognition of Indian First Nations governments with substantial legislative powers through an Act of Parliament, in addition to entrenching the right of Indian people to self-government in the constitution. The result would be that Indian people would determine their own form of government, establish criteria for the self-identification of membership in Indian communities, and exercise jurisdiction in such fields as resources, social services,

taxation and education. Block funding would be provided by the federal government.<sup>1</sup>

The federal government's response to the Penner Report was made public on March 5th, 1984, a mere three days before the 1984 First Ministers' Conference on Aboriginal Constitutional Matters. The federal response, as later articulated in Bill C-52, an Act relating to self-government for Indian Nations, did not capture the spirit of the Committee's recommendations. For example, sections of the proposed legislation dealt with the "Breakdown of Indian Nations Governments", and enabled the federal Minister to appoint an administrator to carry out the essential functions of an Indian Nation government if, in his opinion, it was unable to do so. Indian opposition to the bill was swift and strong. Bill C-52 died on the Order Paper with the dissolution of Parliament in 1984, and no amended version of it has since been introduced.<sup>2</sup>

The effect of the Penner Report and the federal response was to further focus the attention of the 1984 Conference on one agenda item - aboriginal self-government. On the first day of the Conference, the federal government tabled, to everyone's surprise, a draft constitutional amendment on aboriginal self-government. It is not surprising, given the lack of preparatory work, that the federal proposal met with stiff opposition. Some even suspected that the motives of the federal government were directed more toward good public relations than achieving constitutional reform.

The 1984 First Ministers' Conference on Aboriginal Constitutional Matters was a failure of colossal proportions. No agreement was reached on either a constitutional amendment respecting aboriginal self-government, or on a work plan for achieving agreement. The Conference ended in suspicion and innuendo, with many First Ministers asking what aboriginal self-government "meant", and many aboriginal leaders demanding its constitutional entrenchment. The

process of constitutional reform as it relates to aboriginal peoples was in serious trouble.





### 3 THE NEW FEDERAL GOVERNMENT

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The election of a national Progressive Conservative government in September 1984 caused further disquiet. Would aboriginal peoples and constitutional reform remain a priority for the federal government? Would the new federal government take a less progressive position vis-à-vis aboriginal self-government?

The first test came at a Ministers' meeting on Aboriginal Constitutional Matters, held in Ottawa on December 17th and 18th. To the obvious surprise of some provincial government ministers, the new government was even stronger and more supportive of aboriginal self-government than was the former administration. Justice Minister John Crosbie, the lead federal minister on aboriginal peoples and constitutional reform, tabled a document outlining five general constitutional options regarding aboriginal self-government. The approach he advocated was to recognize the general rights of aboriginal peoples in the constitution, and to give content to these rights through subsequent negotiation. This was the "top-down" approach.

The approach would work as follows. At the 1985 First Ministers' Conference on Aboriginal Constitutional Matters, agreement would be reached to:

- (a) entrench in the constitution; or
- (b) sign a political accord

for a process of recognizing the right(s) of aboriginal peoples (to self-government), the identification and elaboration of these rights being subject to the negotiating process outlined below. A negotiating process would be instituted at the regional or community level, of a trilateral (federal-provincial-aboriginal) or bilateral (federal-aboriginal) nature, to reach agreements on specific rights to be identified and elaborated, such as the form, structure and powers of aboriginal self-government. These agreements would then be brought to the multilateral level (First Ministers' Conference) for ratification, after which they would be protected under section 35 of the *Constitution Act, 1982*, as are treaties and modern land claims agreements.

Some of the provincial governments, notably Ontario, were pressing for a political agreement or accord at the 1985 Conference outside of the constitutional framework, on the premise that it would be difficult to obtain agreement among the requisite number of provinces for a more substantive constitutional amendment in 1985. Ontario saw an accord encompassing three elements:

- (1) a statement of principles to guide the process;
- (2) a statement of objectives which would focus discussions in terms of expected results on specific issues; and
- (3) a workplan which recognizes the desirability of regional, tripartite discussions focusing on the issue of institutions of aboriginal self-government as they relate to each of the aboriginal peoples of Canada.

The more realistic objectives for the 1985 Conference, as Ontario saw them in 1984, were to strengthen the political process and to clarify federal-provincial legislative and financial responsibilities for aboriginal peoples.

Another preparatory meeting of government ministers and aboriginal leaders was held in Toronto on March 11th and 12th, 1985, less than a month before the 1985 First Ministers' Conference on Aboriginal Constitutional Matters. The federal government tabled a "Comprehensive Draft Accord" for consideration at the First Ministers' Conference. The proposed accord contained two options with respect to aboriginal self-government: "Option A" was an elaboration of the federal proposal made in December for constitutional amendments relating to self-government institutions for aboriginal peoples. It also contained the text of a draft amendment to clarify the sexual equality clause as it applies to aboriginal peoples.

"Option B" was not a federal proposal at all, but an attempt to consolidate the views of various provincial governments on a non-constitutional (i.e., political) approach, as was put forward by Ontario in December. It described a possible political accord covering such matters as the negotiating process for achieving agreement on aboriginal self-government, the objectives and subject matter of the discussions, the consultation process, the reporting relationship (back to the First Ministers), and constitutional and legislative measures to be taken should agreement be reached. Other elements of the "Comprehensive Draft Accord" dealt with federal-provincial cooperation on non-constitutional matters affecting aboriginal peoples (e.g., social and economic programs and services), statistical data respecting aboriginal peoples, and preparations for the 1987 First Ministers' Conference. On the last item, two optional workplans and timetables were proposed.

A small explosion of counter-proposals followed the presentation of the federal "Comprehensive Draft Accord". Premier Hatfield of New Brunswick tabled a proposed constitutional amendment on aboriginal self-government, similar in some ways to the federal proposal. Ontario altered its position somewhat from the December meeting, much to the delight of aboriginal leaders present. Ontario advocated entrenchment of the

right to aboriginal self-government within the framework of the Canadian federation in 1985, agreed in principle to the proposed federal constitutional amendment, but also argued that the amendment should be accompanied by a political accord, which would provide the framework necessary for specific negotiations. Ontario also took the opportunity to admonish its sister provinces for their fears about what the wording of any constitutional amendment may mean, suggesting that responsible governments should not use this as a reason for inaction.

Saskatchewan proposed a "Statement of Commitments and Objectives" which it advocated be adopted at the 1985 Conference. The statement would guide ongoing discussions leading to the 1987 Conference, but the commitments were for discussions only.

Nova Scotia proposed a rather broad accord which included, among other objectives: government of their own (aboriginal peoples) affairs; preservation and enhancement of aboriginal cultures, languages and traditions; and the provision of public services for aboriginal peoples comparable to those available to other Canadians, in addition to special economic and social initiatives for aboriginal peoples.<sup>3</sup> Appended to the proposed Nova Scotia accord were draft amendments to the constitution under section 35. The first provided for the constitutional protection of aboriginal self-government agreements; the second for the guarantee of equality of aboriginal peoples; and the third for affirmative action measures for aboriginal peoples.

For the information of other governments, Quebec tabled a Motion for the recognition of aboriginal rights in Quebec,<sup>4</sup> which was to be debated in the National Assembly during the following week. (It was subsequently passed.) Not having signed the 1981 accord which led to the *Constitution Act, 1982*, Quebec has been unable to accept any proposals requiring its amendment. Quebec's participation at these constitutional meetings has been for the stated purpose of representing the interests of aboriginal peoples in Quebec. The Motion, first

introduced in December 1984, would commit the Government of Quebec to a wide range of measures vis-à-vis aboriginal peoples. The Motion recognized the existence of Indian and Inuit nations in Quebec, and existing aboriginal rights and those set forth in The James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement. It also deemed these agreements and all future agreements and accords of the same nature to have the effect of treaties. The Motion urged the Government aboriginal nations, agreements guaranteeing them:

- (a) the right to self-government within Quebec;
- (b) the right to their own language, culture and traditions;
- (c) the right to own and control their land;
- (d) the right to hunt, fish, trap, harvest and participate in wildlife management; and
- (e) the right to participate in, and benefit from, the economic development of Quebec.

It also declared that aboriginal rights apply equally to men and women, and proposed that a permanent parliamentary forum be established to enable the aboriginal peoples to express their rights, needs and aspirations.

When the Ministers' meeting ended on the afternoon of March 12th, the stage was set for the 1985 First Ministers' Conference. The federal government, supported by Ontario, New Brunswick, Manitoba and the Northwest Territories, were advocating the constitutional entrenchment of the right to self-government for aboriginal peoples within the Canadian federation, with that right to be given effect through a series of negotiated agreements at the local and regional levels.

It was recognized that Quebec was in a difficult situation. It had to demonstrate its commitment to a workable Canadian federalism, while at the same time retain its bargaining position for the negotiation of

Quebec's entry into the partial accord, a very much larger constitutional issue for the Quebec government.

The Governments of Saskatchewan and Nova Scotia had altered their positions on aboriginal self-government somewhat at the March meeting. Although they preferred a political accord, both went on record as not being opposed, in principle, to entrenching the right of aboriginal self-government in the constitution. Increasingly isolated were the two governments most vocally opposed to entrenchment - Alberta and British Columbia. Other governments at the table, Newfoundland, Prince Edward Island and the Yukon, remained silent.

The federal government was preoccupied with various methods of "counting up to seven", a reference to the constitutional amending formula, whereby a constitutional amendment requires the support of seven provinces with 50 per cent of the population. Various constitutional texts were circulated in the following three weeks with a view to gaining the support of the requisite seven provinces. At two meetings of officials held during this period, the Governments of Prince Edward Island and Newfoundland indicated that they might be willing to support the federal government's draft accord. Thus, the turnkey provinces in the negotiations became Saskatchewan and Nova Scotia. Pressure was placed on them to "come on side".

#### 4 THE 1985 FIRST MINISTERS' CONFERENCE ON ABORIGINAL CONSTITUTIONAL MATTERS

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In the months leading up to the 1985 conference, there was a widespread feeling that the Conference must not be a failure, or be seen to be a failure. This was prompted, in part, by unpleasant memories of the 1984 Conference, which was widely criticized by the media and aboriginal peoples as a failure, and which raised questions about the true motives of governments at the table. Also at stake was the reputation of the new federal government as a conciliator of federal-provincial tensions. A new "window of opportunity" had been created in intergovernmental relations with the election of the Mulroney government. The new era of federal-provincial cooperation, embodying a fresh spirit of goodwill, must not be allowed to crash on the shoals of constitutional reform as it relates to aboriginal peoples.

Prime Minister Mulroney opened the Conference on the morning of April 2nd with a plea for national reconciliation. Building on the goodwill demonstrated at the First Ministers' Conference on the Economy, held in Regina on St. Valentine's Day, and at the National Economic Conference, involving labour and business leaders, held in Ottawa in March, the Prime Minister

implored parties to the negotiations to search for consensus. He noted the contributions which provincial and territorial governments and aboriginal peoples had made to moving discussions forward. He promised no surprises, and no pressure tactics. He proposed that this Conference be a turning point, an historic step. The key to success, the Prime Minister said, is self-government for aboriginal peoples within the Canadian federation. But it is only a vehicle, he added, through which aboriginal people can realize their aspirations, and gain greater control over their lives.

The objective of the Conference, in the view of the Prime Minister, was the protection of the principle of aboriginal self-government in the constitution.<sup>5</sup> Self-government would be given definition, or form and substance, through subsequent negotiations,<sup>6</sup> at the community or local level.

"Self-Government for the Aboriginal Peoples" was only the first of four agenda items for the Conference. The others were: sexual equality rights, a mandate for continuing discussions, and the nature of an accord. However, it was clear from the outset that self-government would dominate the agenda.

At the close of his opening remarks, the Prime Minister tabled a "Proposed 1985 Accord Relating to the Aboriginal Peoples of Canada", which he had made available to the other parties to the negotiations the day before. It was a further refinement of the "Comprehensive Draft Accord" introduced by the federal government at the Ministers' meeting in March. With respect to aboriginal self-government, it proposed that the constitution be amended to recognize and affirm the rights of the aboriginal peoples of Canada to self-government within the Canadian federation, *where those rights are set out in negotiated agreements*, and to commit governments to participate in negotiations directed toward concluding agreements with aboriginal people relating to self-government.<sup>7</sup> These agreements would receive constitutional protection under section



35(2) of the *Constitution Act, 1982*, as do treaties and land claims agreements. The relevant portions of the proposed amendment were:

#### 35.01

- (1) The rights of the aboriginal peoples of Canada to self-government, within the context of the Canadian federation, that are set out in agreements in accordance with section 35.02 are hereby recognized and affirmed.
- (2) The government of Canada and the provincial governments are committed, to the extent that each has authority, to
  - (a) participating in negotiations directed toward concluding, with representatives of aboriginal peoples living in particular communities or regions, agreements relating to self-government that are appropriate to the particular circumstances of those people; and
  - (b) discussing with representatives of aboriginal people from each province and from the Yukon Territory and Northwest Territories the timing, nature and scope of the negotiations referred to in paragraph (a).

#### 35.02

The rights of the aboriginal peoples of Canada to self-government may, for the purposes of subsection 35.01(1), be set out in agreements concluded pursuant to paragraph 35.01(2)(a) with representatives of aboriginal people that

- (a) include a declaration to the effect that subsection 35.01(1) applies to these rights; and
- (b) are approved by an Act of Parliament and Acts of the legislatures of any provinces in which those aboriginal people live.

The negotiations referred to would include consideration of the type of government (e.g., ethnic, public), the issue of a land base, determination of membership, the nature and powers of the institutions of self-government, fiscal arrangements, and so forth.

The "Proposed 1985 Accord" tabled by the Prime Minister also addressed other matters. It proposed that the constitution be further amended to clarify the provisions relating to equality rights for aboriginal men and women. It also proposed provisions relating to preparations for the next constitutional conference, and to statistical data on aboriginal peoples. With regard to preparation for the next conference, it proposed that Ministerial meetings (including representatives of aboriginal peoples) be convened at least twice a year for up to two years, so that at least four Ministerial meetings would be held before the next conference.

The responses of aboriginal leaders, following the Prime Ministers' opening statement, were mixed. David Ahenakew of the Assembly of First Nations spoke of the inherent and distinct right to self-government of the First Nations, from time immemorial.<sup>8</sup> The first step, he said, was the constitutional entrenchment of that right. Details could be negotiated later. The Inuit Committee on National Issues (ICNI) was confident that agreement was within reach. They advocated an approach similar to that of the federal government - constitutional recognition of the right to self-government, a mechanism for negotiating agreements to establish and implement self-government, and the constitutional protection of these agreements.

The Native Council of Canada (NCC) opened by thanking the federal government for making its position available in advance of the conference, so that there were no surprises. However, said spokesmen, it does not go far enough. The NCC argued that three objectives were required by their constituency: a secure land base; the recognition of the equality of all aboriginal peoples under section 91(24) of the *Constitution Act, 1982*; and the

right to self-government for aboriginal peoples, whether they have a land base or not, entrenched in the constitution. This right must *not* be subject to negotiation, or implementation by ratification of provincial legislatures. Moreover, self-government agreements negotiated with federal and provincial governments should be automatically entrenched in the constitution as soon as they are concluded. The NCC also reiterated the need for aboriginal peoples, particularly those residing in urban communities, to have guaranteed representation in Parliament and legislatures. Spokesmen advised the Prime Minister not to dwell on the sexual equality agenda item, but to focus on self-government. They further advocated that a First Ministers' Conference be held in 1986, in addition to the one planned for 1987.<sup>9</sup> Where, they asked in conclusion, is the unfettered right to aboriginal self-government in the federal proposal?

The Metis National Council also gave its conditions for support of an accord. In addition to entrenching the right to self-government, the Metis had to secure a land base.

Provincial and territorial governments then made their opening statements. Ontario Premier Frank Miller saw the potential for compromise at the conference. He favoured a constitutional approach, combined with detailed tripartite negotiations. The aboriginal right to self-government within the Canadian federation would become operative *only* through negotiated agreements. The right would be defined through agreement. The Ontario Premier also proposed that a non-derogation clause be included in a constitutional amendment relating to self-government, so that any self-government agreement would not adversely affect aboriginal rights now in section 35.<sup>10</sup>

Quebec Premier René Lévesque stated, at the outset, that his government does not recognize the *Constitution Act, 1982*, and that Quebec's participation results solely from the urging of Quebec's aboriginal nations. He then tabled two documents, both of which had been tabled

earlier at the Ministerial meeting in March. The first was the Resolution adopted by the Quebec National Assembly on March 20th, recognizing certain aboriginal rights, which has been described previously. The second was a "government-to-government" agreement with the Kahnawake Mohawks respecting the construction and operation of a hospital in the Kahnawake Territory.<sup>11</sup> The Quebec Premier indicated his government's desire to pursue its own course of action vis-à-vis the rights of aboriginal peoples, while remaining associated with the present (section 37) process.

In Manitoba's view, the right to aboriginal self-government is already included in section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the existing rights of Canada's aboriginal peoples. However, in order to remove any uncertainty, Premier Pawley argued that the right to self-government be separately identified and entrenched in the constitution. The Premier closed by announcing his support in principle for the federal proposal.<sup>12</sup>

By this time, the Prime Minister had informed the Conference that, in a letter from Premier Peckford, the Government of Newfoundland had relayed its support of the proposed federal accord. Premier Peckford was unable to attend the Conference because it was election day in Newfoundland. His endorsement was an important development, since it was the first time that Newfoundland had indicated its support for the constitutional entrenchment of the right to aboriginal self-government. It provided the federal government with needed impetus for the proposed accord.

Momentum continued to gather with Premier Buchanan's opening statement. Nova Scotia, he said, was here to listen, and was impressed with the progress made, as illustrated in the federal proposal. He was willing to negotiate, and to be convinced.<sup>13</sup>

New Brunswick Premier Richard Hatfield spoke strongly of the need to act now, this week, to give

constitutional recognition to the right to self-government. Negotiations regarding implementation could then begin. New Brunswick supported the federal proposal. Premier Lee of Prince Edward Island rejected a sovereign third order of government, and spoke of the necessity of having a clear idea before leaping to conclusions. He was prepared to support the federal proposal, since, in his view, it overcame these problems.<sup>14</sup>

Saskatchewan Premier Grant Devine observed that there was still disagreement on the meaning of aboriginal self-government, and that we must know what it is before we "cast it in stone". This was similar to his position in 1984. Although there had been some progress, Saskatchewan still had some concerns with regard to the federal proposal. There was unease about the nature of an undefined commitment to negotiate self-government agreements, and concern that courts could intervene in the way in which that commitment is acted upon. Premier Devine concluded his opening remarks by indicating his willingness to negotiate over the next two days.<sup>15</sup>

Premier Bennett of British Columbia also saw the possibility of a compromise, but viewed the federal proposal as falling short of a minimal level of definition required of aboriginal self-government. We must "define then sign", he said. British Columbia favoured a "bottom-up" approach to one of entrenching ill-defined rights. Although he did not object to one or more forms of self-governing institutions being entrenched, they must first be defined. Premier Bennett also indicated his willingness to negotiate over the next two days.<sup>16</sup>

Alberta Premier Peter Lougheed was less optimistic. He could not see agreement on a constitutional amendment emerging from the Conference. The federal proposal presented legal problems, related to the justiciability of the clauses proposed for entrenchment in the constitution. He also rejected a third order of sovereign government, and spoke of renewing a bilateral federal government-Indian approach, in keeping with section 91(24) of the *Constitution Act, 1982*.

Nor did the Government of Yukon support the federal proposal. It was of the view that the definition of aboriginal self-government must precede its entrenchment. Moreover, the Yukon was concerned that constitutional negotiations would adversely affect a land claims settlement in the Territory.<sup>17</sup>

Perhaps the most lucid opening statement was that of Richard Nerysoo, Government Leader of the Northwest Territories. The Conference, he remarked, was about constitutional change, about nation building. He spoke of the constitution as a living tree, which must grow and adapt to keep pace. A branch of that tree was cut off by former constitutional architects who decided that aboriginal peoples would be excluded from the Canadian federation. This Conference presented an opportunity to graft that branch back on the tree.<sup>18</sup> The N.W.T. supported the federal proposal to do so.

When the Conference adjourned for lunch on the first day, all parties to the negotiations had publicly stated their positions. In support of the federal proposal were the Governments of Ontario, New Brunswick, Manitoba, Prince Edward Island, Newfoundland and the Northwest Territories. Quebec chose to abstain. Nova Scotia and Saskatchewan were mild in their opposition and indicated that, with some revisions, they might be convinced to support the proposal. Opposition from Alberta, British Columbia and the Yukon was stronger.

Of the national aboriginal organizations, the Inuit Committee on National Issues (ICNI) and the Metis National Council (MNC) were generally supportive. The Assembly of First Nations (AFN) and Native Council of Canada (NCC) were opposed, but willing to negotiate.

It was clear that the federal government did not enjoy the support of seven provinces with 50 per cent of the population. Only five provinces had indicated their support. More cajoling and convincing remained to be done. When the Conference reconvened in the afternoon of the first day, the Prime Minister set out to do just

that. He pressed hard for the federal proposal, calling for "simple dignity" for aboriginal peoples, and for self-reliance rather than dependency. Premier Hatfield also pressed hard, calling for equality for aboriginal peoples, and for governments to exercise leadership.

The Prairie Treaty Nations Alliance (PTNA) was allowed by the AFN to speak during the afternoon. The PTNA, which later split from the AFN, was formed to enable Prairie Treaty Indians to address their distinct concerns. The PTNA was worried that constitutional changes would affect treaty rights adversely. PTNA spokesmen said that they view self-government as a treaty right, which should be pursued in bilateral discussions with the federal government. They were opposed to provincial involvement in the process, as it affects treaty Indian people. The PTNA had tried, unsuccessfully, to obtain separate and official representation at the Conference, as the MNC had done in 1982. PTNA members were actively lobbying to be officially represented at the next meeting.

As the afternoon wore on, the debate became more heated. Near the end, MNC spokesman Fred House and British Columbia Premier Bill Bennett were involved in an unpleasant exchange. The spirit of goodwill and co-operation was visibly dissipating. At that time, the Prime Minister suggested that the Conference break for the afternoon. An evening meeting of aboriginal leaders and government Ministers and advisors was charged with attempting to find an accommodation.

Reports filtering out that evening suggested that the Ministers' private meeting with aboriginal leaders was even more acrimonious than those discussions held in public in the late afternoon. No compromise solution was reached, and emotions were running high.

When the Prime Minister reconvened the Conference on the morning of the second day, he began by asking all parties to avoid making inflammatory statements, and instead to search for an honourable compromise. He then

asked his Minister of Indian Affairs and Northern Development, David Crombie, who had been somewhat removed from the heat of the debate, to make yet another effort to draft a compromise accord on self-government, taking into consideration the views expressed during the previous evening. He was to report back to the Conference as soon as he had completed his task. In the meantime, discussions would proceed on agenda items two and three, sexual equality and a mandate for continuing negotiations.

In introducing the equality item, the Prime Minister stated that the Conference would address sexual equality only, and not equality among aboriginal peoples (i.e., equal rights for Indian, Inuit and Metis peoples). With a view to clearing up the matter once and for all, the Prime Minister referred to the various proposed amendments under consideration, which he had tabled the previous day.<sup>19</sup> Most parties were in agreement that the matter be clarified. The Prime Minister announced that Employment and Immigration Minister Flora MacDonald would chair a meeting of government Ministers and aboriginal leaders on the subject, to be convened that morning. For reasons which are not yet clear, the meeting never took place.

On the subject of continuing negotiations, the Prime Minister spoke of the need "to do our homework", and spoke to the federal proposal of two ministerial meetings per year in advance of the 1987 First Ministers' Conference (FMC). On the issue of an FMC in 1986, the Prime Minister proposed that this be determined at a later date. Alberta adopted a similar position. Premier Lougheed also suggested that the Prairie Treaty Nations Alliance (PTNA) be invited to all future conferences. Manitoba had no objection to the PTNA attending future conferences, while other governments offered no response.

A number of parties supported an FMC in '86, including New Brunswick, the Northwest Territories, the ICNI and the NCC. The ICNI noted, however, that the



ongoing process depends upon reaching agreement on aboriginal self-government. There must be something to be ongoing about. The NCC also added a caveat: national aboriginal organizations must be involved in negotiations at the local level.

Finally, at three o'clock in the afternoon, David Crombie emerged with the final federal attempt at a proposed accord. The newly-proposed accord incorporated several important changes. Gone was the constitutional commitment of governments to participate in negotiations leading to aboriginal self-government agreements, a crucial element to the aboriginal peoples. Included was a non-derogation clause to protect the rights of the aboriginal peoples of Canada.<sup>20</sup> In other respects, the newly-proposed accord was similar to that tabled a day earlier by the Prime Minister.

Reaction to the federal accord was structured by the Prime Minister so that provincial governments would respond first. During a few, well-timed coffee breaks, the Prime Minister had spoken privately to provincial and aboriginal leaders, in an attempt to lever their support for the latest federal proposal. Aboriginal leaders wanted to hear the reactions of provincial governments before giving their own responses.

In order to demonstrate that momentum was building for the new accord, the Prime Minister first called upon Saskatchewan and Nova Scotia to respond. They had been mildest in their opposition to the initial federal proposal, and had indicated their willingness to be convinced, should some revisions be made, to support it.

The new accord incorporated changes that were suggested by Saskatchewan during the evening meeting the night before. "Where agreements between the aboriginal people and the federal and provincial governments are concluded and ratified by [Parliament and] legislatures, the rights to self-government of aboriginal people are recognized and affirmed....The change that we recommended to the federal proposal",

said Premier Devine, 'was to move the commitment to participate in negotiations out of the constitutional amendment and place it into the attached political accord. Governments will participate in negotiations directed toward concluding agreements that could result in the constitutional protection for the agreed upon rights."<sup>2</sup> This would have the effect of removing the possibility of court challenges on the way in which self-government agreements are negotiated. Based on these changes, Saskatchewan decided to support the new accord.

Premier Buchanan of Nova Scotia echoed this view, voiced his support, and argued that the agreement should be concluded today. Newfoundland also expressed support.

Premier Miller of Ontario, to the obvious surprise of the Prime Minister, said that while he was generally supportive, he would hold his final decision until he had heard the views of the aboriginal leaders. Ontario was not about to support a proposal which the aboriginal peoples could not accept. Manitoba and Prince Edward Island articulated positions allied with Ontario. Premier Hatfield of New Brunswick, in a similar vein, said that while the accord was not "good enough", it was better than nothing.

British Columbia Premier Bennett expressed concern that the accord could lead to sovereign aboriginal governments. He then tabled a proposal which would further weaken the latest draft accord.<sup>22</sup> He asked his Minister of Intergovernmental Relations, Garde Gardom, to speak to the British Columbia proposal. Mr. Gardom went on at some length quoting from AFN documents concerning sovereignty and aboriginal title. He concluded by stating that the notion of delegated powers is repugnant to aboriginal peoples.

Premier Lougheed said that he would not sign an accord that day, but would get back to the Prime Minister at a later date. Treaty Indians, he observed, were not at the negotiating table. The PTNA had expressed th

view that self-government is a treaty right. The Premier wanted to talk to the PTNA before giving his response. He also wanted to obtain legal advice, and restated his view that there are only two sovereign orders of government in Canada.

Neither could the Northwest Territories support the draft accord, but for quite different reasons. The proposal did not go far enough.

It was time to hear the reaction of the aboriginal peoples' organizations. The Assembly of First Nations stated that it could not accept the proposal. What was required was the immediate constitutional recognition of the right to self-government, with negotiated self-government agreements later entrenched in the constitution. In the latest federal draft, there was no constitutional commitment for governments to negotiate, or to "constitutionalize" self-government agreements. Moreover, the federal proposal would allow provinces to veto bilateral agreements between Indian Nations and the federal government. In an insightful analysis, AFN Northern Vice-President George Erasmus observed that the federal proposal appeared to be aimed more at achieving federal-provincial consensus than at entrenching aboriginal self-government in the constitution.

The AFN thought that the federal proposal, if accepted, would erode Indian rights. In its view, self-government is an inherent (albeit undefined) right in section 35(1). The proposed accord was non-binding and non-justiciable. In any case, delegated authority was not enough. The AFN concluded by saying it would reconsider its participation in the section 37 process, with a view to going back to a bilateral (Indian Nation-federal government) process.

The Prairie Treaty Nations Alliance, in response to Premier Lougheed's earlier statements, said that it would strongly support the accord, if a bilateral (federal government-Treaty Nations) process were added to it.

In private discussion, the Prime Minister had given Metis National Council leader Jim Sinclair an undertaking that he would meet with Metis and non-status Indian people to discuss their particular concerns. In a separate meeting with leaders from the Native Council of Canada, the Prime Minister agreed that these discussions would include the issue of a land base. Based on these assurances, the MNC and the NCC supported the proposed federal accord.

The Inuit Committee on National Issues equivocated, stating that it could not "say yes" without consulting Inuit people. The political commitment to negotiate, it suggested, should be in the constitution. There were also concerns that the accord might alter section 91(24), and affect federal responsibility for the Inuit.

As the afternoon drew to a close, it became apparent that consensus had not been achieved. Although the new accord enjoyed the support of seven provinces, this support rested upon the unwritten proviso that the accord also be acceptable to aboriginal peoples. Only the MNC and the NCC supported it. The AFN had rejected it and the ICNI, although critical, needed more time to consider its position. The accord had been "watered down" in order to secure adequate provincial support, and in doing so, adequate aboriginal support had been lost.

The Prime Minister was in an awkward position. If he pressed hard on the accord in the face of opposition from both the AFN and the ICNI, support from Ontario, Prince Edward Island, Manitoba and New Brunswick would likely be withdrawn. The Prime Minister announced that he would not proceed unilaterally. Instead, decisions would be held in abeyance for some six weeks, until a meeting of Ministers and aboriginal leaders was convened. This would allow time for the ICNI to consult its constituents, Premier Lougheed to consult the PTNA and seek legal advice, and the AFN and the British Columbia government to reconsider their positions. The Prime

Minister then abruptly adjourned the Conference, shocking most participants.

At the reception held immediately following the Conference, delegates from all parties were wondering aloud at what had happened. Nothing concrete had emerged from the meeting, even on the agenda items of sexual equality and a mandate for continuing discussions, on which there appeared to be widespread consensus. The Conference had not succeeded, but neither had it failed. It had simply put off the decisions. The wisdom of the Prime Minister's judgement in this regard was openly debated. Should he have forced the issue, getting the signatures of at least some parties, or would this have forced some provinces to back away from the proposed accord? Was the six week delay a clever negotiating tactic of a seasoned mediator, during which time a consensus could be forged? Or was it a foolish mistake, which would allow time for provinces, out of the glare of television lights, to reconsider their support and draft numerous amendments to the federal proposal, possibly to water it down even further? Alternatively, could it have been a shrewd political tactic, designed to avoid involving the Prime Minister in a "failed" First Ministers' Conference?

Although a "saleable package" acceptable to all parties had not emerged, the Conference did not end in acrimony, as did the 1984 FMC. Perhaps it was a sign of maturation and understanding, but delegates seemed to understand why their colleagues on "the other side" of an issue took the position they did. Inuit delegates understood why Metis leaders felt that they had to agree to the proposed accord. Metis delegates understood why the Indian leaders could not agree. And Indian delegates understood the Inuit decision to consult their people.

Moreover, there had been some movement by provincial governments on the issue of aboriginal self-government. The Governments of Newfoundland and Prince Edward Island had supported the initial federal draft accord, while the Governments of Nova Scotia and

Saskatchewan had supported the final "Saskatchewan draft" (which did not "constitutionalize" the negotiation process). It would be difficult for these governments to "back down" from their publicly-stated positions. Pressure, in fact, would be felt in exactly the opposite direction, to yield just a little more in the interests of achieving accommodation.

During the next two months, arms were to be twisted and the aboriginal body politic consulted. The only obligation on the part of governments beyond the May Ministers' meeting was one further FMC, to be held before April 17th, 1987. A great deal was at stake for the aboriginal peoples.

## 5 ANTICLIMAX

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The follow-up meeting of federal, provincial and territorial government Ministers and aboriginal leaders was not held in late May, as originally proposed, but on June 5th and 6th. The mood prior to the meeting was not optimistic. A Memorandum to Cabinet from Deputy Prime Minister Eric Nielsen, summarizing the Report of the Ministerial Task Force on Native Programs, had been leaked to the public. The Report was part of the larger Ministerial Task Force on Program Review, popularly known as the Nielsen Task Force. Among other changes, the Memorandum recommended significant cuts to native programs. Although the Prime Minister publicly repudiated media reports on the issue, and stated that there would be no cuts to native programs, suspicion remained. Aside from this event, very little had changed during the intervening two months between the end of the First Ministers' Conference and the beginning of the Ministerial meeting. The stark setting of a Toronto airport hotel, and a meeting devoid of any social function such as a reception, somehow seemed appropriate. Expectations were low, and they were to be met fully.

Federal Justice Minister John Crosbie, who chaired the meeting, picked up on the morning of June 5th where the First Ministers' Conference (FMC) had left off. The

same four items were on the agenda, he noted, and the same two proposed accords – the initial federal draft, and the "Saskatchewan draft" (the one under discussion at the close of the FMC) – were on the table. The latter had a new non-derogation clause.

Mr. Crosbie began by asking parties whether they had altered their respective positions on aboriginal self-government during the interregnum. The Inuit Committee on National Issues responded first. The ICNI had used the two-month interval to consult its constituents on the "Saskatchewan draft". ICNI Co-Chairperson Zebedee Nungak announced that the ICNI could not support it, and that a political accord was not enough. The commitment to negotiate self-government agreements must be in the constitution. Moreover, the ICNI also felt that there should be a mutual right to ratify aboriginal self-government agreements (approval by aboriginal peoples and federal and/or respective provincial governments). In addition, it had some concerns regarding a multi-lateral ratification process (involving all provinces) for self-government agreements, which it referred to as the "provincial veto". Under such conditions, for example, provincial governments could "veto" federal-aboriginal government agreements in the Northwest Territories, federal-Indian Nation agreements on Indian reserves, or tripartite (federal-provincial-aboriginal) agreements in a particular province.

The political situation of the Yukon government had changed as well, the result of a territorial general election on May 13th. Tony Penikett, Government Leader of the newly-elected NDP minority territorial government, indicated that while his new administration had not yet formed detailed policy positions on these issues, he was willing to discuss aboriginal self-government with both aboriginal and non-aboriginal people in the Yukon. The "one-government" approach of the former administration would be unlikely to survive a policy review by the new NDP government. Mr. Penikett also used the occasion to announce that his government would deal with



aboriginal constitutional issues before addressing province-hood for the Yukon.

The Government of Alberta had also taken the opportunity, during the two month interim, to consult the Prairie Treaty Nations Alliance, and to seek legal advice on the "Saskatchewan draft". The PTNA wished to enter into bilateral negotiations with the Government of Canada, flowing from the special relationship between treaty Indians and the federal government, to entrench treaty rights (including the right to self-government) in the constitution. Milt Pahl, the Alberta Minister responsible for Native Affairs, indicated that his government would respect the wishes of the PTNA in this regard. On legal grounds which he did not elaborate, however, Alberta could not support the "Saskatchewan draft".

On the issue of aboriginal self-government, Alberta was heading in a different direction. The Alberta Minister tabled at the meeting, *A Resolution Concerning an Amendment to the Alberta Act*, which would grant title in fee simple for Metis Settlement lands to Settlement Metis peoples.<sup>23</sup> This would be accomplished through section 43 of the *Constitution Act, 1982*, which requires the consent of the Alberta Legislature and the Canadian Parliament. The land would be held communally by Metis Settlement Associations or appropriate Metis corporate entities, but would not include ownership of sub-surface minerals. In addition, the land would continue to be subject to the legislative authority of the Province of Alberta. The Metis would determine fair and democratic criteria for membership in settlement associations, and for the allocation of settlement lands to individuals. The Metis would also be responsible for devising democratic governing bodies for managing the land and governing Metis settlements. The resolution was debated and approved in the Alberta Legislature on June 3rd, 1985.

The Government of Alberta is going to negotiate "self-government" with Settlement Metis on a bilateral basis, outside the section 37 process and, for the most

part, outside the constitutional framework. It was left unsaid how non-Settlement Metis would be affected. It became evident as the meeting progressed that this was the "shape of things to come" in other jurisdictions as well - bilateral or trilateral negotiations outside the constitutional framework.

During the afternoon discussion on self-government, both Ontario and British Columbia indicated that they would be commencing discussions with Metis and Indians respectively, on matters within the provincial sphere of jurisdiction. In British Columbia, negotiations are about to begin with the Sechelt Indian Band concerning enhanced municipal government powers, including taxation. The Government of British Columbia is advocating the negotiation of self-government models to be implemented by federal and/or provincial legislation. In the case of self-government agreements with Indian bands, these could then become treaties, and protected under section 35 of the *Constitution Act, 1982*.

As the afternoon wore on, it became obvious that no constitutional agreement on aboriginal self-government was in the offing. Mr. Crosbie turned to the second agenda item - sexual equality rights for aboriginal people - and to the six alternative amendments which were tabled at the FMC two months earlier. After a short discussion, it was decided to refer the matter to a meeting of officials, to be held immediately following the close of the afternoon session. Officials, without a mandate to negotiate, merely restated their governments' positions. Not unexpectedly, no agreement could be reached among the parties at the officials' meeting on a constitutional amendment.

Day two of the Ministers' meeting began on a more ominous note than had day one. Justice Minister Crosbie announced that the evening meeting of officials had failed to reach an agreement with respect to a constitutional amendment regarding sexual equality. Since ministers were unlikely to make much progress on the issue, the Chairman suggested that the meeting address the next

agenda item - the next steps in the section 37 process between 1985 and 1987 or, as he put it, "Where do we go from here?"

Reference was made to the federal proposal on this matter tabled at the FMC, on which there was no disagreement. Two annual Ministerial meetings would be held before the 1987 First Ministers' Conference. The first of these, the Chairman speculated, might take place early in 1986, and would have as one of its agenda items the Assembly of First Nations' Draft Composite Amendments to the constitution.<sup>24</sup> The AFN had tabled the draft amendments at the Ministerial meeting in December 1984, and was annoyed that they had not yet been discussed. If enough progress were made, a further FMC could be called in 1986, although it was generally acknowledged that this was an unlikely development. In the meantime, self-government negotiations would be led, on the federal side, by Indian Affairs and Northern Development Minister David Crombie.

In describing these negotiations, Mr. Crombie said that they would be community-led, community-based (i.e., local), tailored to individual circumstances, and that they would take place at a practical level and at a measured pace. Meetings had already been held in Ontario and British Columbia, and others were scheduled.

In addition, meetings were to be held between the Prime Minister and the Metis (MNC and NCC), and between the Prime Minister and the PTNA. These were tentatively scheduled for the fall.

The follow-up meeting, as it adjourned, lived up to its advanced billing. Widely-held expectations that no progress would be made were completely fulfilled. The meeting was an anticlimax to the First Ministers' Conference held some two months earlier. At the same time, however, disappointment was not great. No one had expected a breakthrough. The process would continue over the next two years, but in a venue largely outside

the National Conference Centre in Ottawa. Negotiations on aboriginal self-government would be taking place at the local, regional, territorial and provincial levels. The "bottom-up" approach - that of implementing self-government prior to entrenching it in the constitution - would now be given its acid test.

## 6 CONCLUSION

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The outcomes of negotiations to date on aboriginal self-government, pursuant to the section 37 process, are being interpreted in widely different ways. While they have been less than a smashing success, few would consider them a failure. The new "window of opportunity", as it is called, in intergovernmental relations, imbued with a fresh spirit of federal-provincial cooperation, has not closed. The new federal government has been vigorously tested on the issue of aboriginal self-government and, from the perspective of most observers, appears to have risen to the occasion.

Progress since 1982 has been significant. In that year, the concept of aboriginal self-government was the subject of much ridicule, both within governments and the non-aboriginal population at large. Today, negotiations are underway regarding how to give it form and substance - "how to do it". There has occurred a gradual ratchetting up of the lowest common denominator, of the minimal government response to the proposals by aboriginal peoples for self-government. The "Saskatchewan draft" accord is now the lowest common denominator.<sup>25</sup> Although the proposed accord represented substantial movement on the issue, securing the support of the federal government, seven provincial governments and

two national aboriginal peoples' organizations, it was not enough to achieve an accommodation. The cost of reaching agreement among the requisite number of federal and provincial governments – the "watering down" of the accord, and diluting the protection of aboriginal rights – was too high. While sufficient provincial government support had been won, adequate aboriginal support had been lost. The support of three or four of the seven provincial governments, it will be recalled, depended upon greater – if not unanimous – support from the four aboriginal peoples' organizations at the table.

That there will be costs involved in reaching an accommodation on this issue should be obvious. Such costs are inherent in intergovernmental negotiations, and they will be borne by all sides, by all parties to the negotiations. What is crucial in reaching an accommodation is finding the appropriate balance, so that the participants feel that the costs involved are shared in a reasonably equitable manner. The search for that balance and that accommodation will be an enduring theme between now and the First Ministers' Conference in 1987.

Some of the cost considerations, while significant, have been kept far from the public eye. There is fear in some quarters about a possible "white backlash", should some proposals concerning aboriginal self-government, such as the prospect of additional lands for aboriginal peoples, go ahead. There is fear on the part of some governments that the courts will intervene to determine the character, the powers, and the costs of aboriginal self-government, rather than having these issues settled in the political arena. Even if a political accommodation on self-government could be reached, governments would remain concerned about the financial costs involved.

Aboriginal political leaders have fears as well. For many of them, their political careers are tied to a "successful" resolution of the self-government issue. There is often a fine line between achieving a "successful" resolution and "selling out" their aboriginal

birthright. In terms of reaching an accommodation, how far can they go before they are repudiated by their own people? Moreover, for many aboriginal peoples, self-government is a new and untried experiment. Fear of the unknown and fear of failure are also present. At the same time, the social costs of not acting, of the status-quo, are all too well known.

Another outcome of negotiations to date has been the shift in approach noted earlier, from top-down to bottom-up. Bilateral and trilateral negotiations on aboriginal self-government will be taking place outside of the constitutional framework. A number of provincial governments, including British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec, have already indicated their intentions in this regard. These negotiations will not be viewed without suspicion. The opinion has been expressed that national aboriginal leaders are putting forward unrealistic proposals and making exaggerated claims, and that governments would do better to negotiate more limited agreements for the delivery of services at the local or perhaps regional level. Such a strategy of "going directly to the people" would be reminiscent of former Prime Minister Trudeau's "New Federalism", and his 1981 proposal for a referendum as part of a constitutional amending formula. Instead of bypassing provincial governments, this tactic would entail going around the national aboriginal organizations and leaders, and dealing directly with aboriginal people at the local level.

It is too early to know if such suspicion is warranted. For now, the future of aboriginal self-government negotiations is focused at the local level, and outside the constitutional framework. The next year will tell whether the move to a bottom-up approach was a wise one, or whether participants should have "stayed the course" in terms of searching for a constitutional amendment.

During the coming year, consultations will take place with Metis peoples on the issue of a land base, with the Assembly of First Nations on their draft composite

constitutional amendments, with the Prairie Treaty Nations Alliance on self-government through the treaty process, and with a large number of aboriginal people on self-government at the community or local level.

The significance of this agenda to the next (and perhaps final) First Ministers' Conference on Aboriginal Constitutional Matters in 1987 is not clear. Should self-government agreements be successfully negotiated these could be given constitutional protection in 1987. Should the bottom-up approach fail, however, discussion would likely return to the issue of entrenching the right or principle of aboriginal self-government in the constitution. It is possible, of course, that agreement on this may not be forthcoming either.

The prospect of achieving a constitutional agreement at or before the 1987 FMC is uncertain. Trepidation prevents us from answering the question: "What if nothing happens?"



## NOTES

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1. David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?* (Kingston: Institute of Intergovernmental Relations, 1985), pp. 54-55.
2. *Ibid.*
3. Nova Scotia, *1985 Accord Respecting Matters Affecting the Aboriginal Peoples of Canada*, Toronto, 11-12 March 1985, CICS Document 830-173/010.
4. Government Motion 49, Quebec National Assembly, Fifth Session, Thirty-Second Legislature, 18 December 1984.
5. *Notes for an Opening Statement by the Right Honourable Brian Mulroney, Prime Minister of Canada*, First Ministers' Conference, The Rights of Aboriginal Peoples, Ottawa, 2-3 April 1985, p. 6.
6. Canada, *Self-Government for the Aboriginal Peoples: Lead Statement*, Ottawa, 2-3 April 1985, CICS Document 800-20/009.
7. The Prime Minister of Canada, *Proposed 1985 Accord Relating to the Aboriginal Peoples of Canada*, First Ministers' Conference, The Rights of Aboriginal Peoples, Ottawa, 2-3 April 1985, pp. 1-2 [emphasis added].
8. Assembly of First Nations, *Speaking Notes for National Chief*, First Ministers' Conference on Aborigi-

- nal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/019.
9. Native Council of Canada, *Opening Remarks*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/018.
  10. *Opening Statement by The Honourable Frank S. Miller, Premier of Ontario*, The First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2 April 1985, CICS Document 800-20/006 [emphasis added].
  11. *Opening Statement by Premier René Lévesque*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/014. The Resolution was tabled as CICS Document 800-20/025, the agreement as CICS Document 800-20/024.
  12. Manitoba, *Opening Remarks by Honourable Howard Pawley, Q.C., Premier of Manitoba*, First Ministers' Conference on Aboriginal Constitutional Issues, Ottawa, 2 April 1985, CICS Document 800-20/020.
  13. *Opening Remarks by the Hon. John M. Buchanan, Premier of Nova Scotia*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/032.
  14. Prince Edward Island, *Opening Statement by Honourable James M. Lee*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, CICS Document 800-20/031.
  15. Saskatchewan, *Notes for Opening Remarks by The Honourable Grant Devine*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/030.
  16. *Opening Remarks by The Honourable William R. Bennett, Premier of British Columbia, to the First Ministers' Conference on Aboriginal Constitutional Matters*, Ottawa, 2 April 1985, CICS Document 800-20/021.
  17. *Notes for Opening Remarks of The Honourable Willard L. Phelps, Government Leader of the Yukon Territory*, First Ministers' Conference on Aboriginal

Constitutional Matters, Ottawa, 2 April 1985, CICS Document 800-20/034.

18. *Notes for the Address by the Honourable Richard Nerysoo, Government Leader, Northwest Territories*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/023.
19. Canada, *Proposed Equality Rights Amendments Currently Under Consideration*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/008.
20. Canada, *Proposed 1985 Accord Relating to the Aboriginal Peoples of Canada*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/041.  
Self-government agreements would not derogate from existing aboriginal rights recognized in section 35 of the *Constitution Act, 1982*.
21. Saskatchewan, *Speaking Notes: The Saskatchewan Proposal*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/043, p. 2 [emphasis added].
22. *British Columbia Proposal*, First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/035.
23. Alberta, *A Resolution Concerning an Amendment to the Alberta Act*, Federal-Provincial Conference of Ministers on Aboriginal Constitutional Matters, Toronto, 5-6 June 1985, CICS Document 830-188/009.  
To hold in "fee simple" means to have as absolute property, and is the most common form of property ownership in Canada (e.g., farmers and homeowners).  
In 1938, the Government of Alberta set aside certain unoccupied Crown lands for Metis people. There are currently eight Metis Settlements, located in northern Alberta, comprising 1.28 million acres of land. It is estimated that 4,000 Metis live on these settlements.
24. Assembly of First Nations, *AFN's Draft Composite Amendments (Revised 13 December 1984)*, Federal-Provincial Meeting of Ministers on Aboriginal Consti-

tutional Matters, Ottawa, 17-18 December 1984, CICS Document 830-160/008.

The AFN Draft Composite Amendments to the constitution appear far-reaching, compared with discussions to date in First Ministers' Conferences. Included, for example, are the recognition and guarantee of "sovereign title", "the ownership of and jurisdiction over all land and resources within the traditional territories of each First Nation", the provision of "fiscal resources to First Nation Governments", and the commitment of governments to negotiate treaties with those First Nations now without treaties.

25. The Government of Alberta, as indicated earlier does not support the "Saskatchewan draft" and hence, is not included in the lowest common denominator.