ABORIGINAL SELF-GOVERNMENT
What Does It Mean?

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Discussion Paper

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DEDICATION

This discussion paper is dedicated to the memories of Art Carriere and Morley Wood, whose short lives were devoted to enhancing those of Canada's aboriginal peoples.

CONTENTS

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 of Intergovernmental Relations' research project on Aboriginal Peoples and Constitutional Reform, subtitled "Aboriginal Self-Government: What Does It Mean?", is to shed some light on this question by examining attitudes toward the principle of aboriginal self-government and by examining alternative concepts and models of aboriginal self-government.

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

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

Diverse and conceivably conflicting views cannot be accommodated without a clear understanding and shared perceptions of what is at issue. Phase One of the project, including this discussion paper, 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 elaborate different models of self-government, relating international experience to the Canadian situation. This discussion paper pursues that objective, drawing upon the research prepared for this project, some of which is reported in the companion background papers. Throughout the analysis, the positions of parties to the constitutional negotiations are brought to bear in an attempt to identify areas of emerging conflict and consensus. Constraints and opportunities are also identified with regard to the negotiation and establishment of aboriginal self-government.

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David C. Hawkes

ABSTRACT

Aboriginal self-government has become the central focus of recent discussions on constitutional aboriginal matters. Proposals for self-government advanced by aboriginal peoples vary substantially, as do the expectations of the aboriginal organizations and governments at the negotiating table. The absence of a clear definition of self-government has hampered these negotiations, as has the assumption that a single model can be applied to all aboriginal groups. In an attempt to clarify the meaning and purpose of aboriginal self-government, several models are developed which could meet the aspirations and needs of different aboriginal peoples. The political process for negotiation and the legal instruments for establishing aboriginal self-governments are also examined, with some concluding observations made on the future of constitutional reform in this area.

Sommaire

L'autonomie gouvernementale autochtone est devenue un point central des dernières discussions concernant la constitution et d'autres problèmes autochtones. Les différentes propositions de l'autonomie gouvernementale soumises par les peuples autochtones varient considérablement, tout comme les espérances des organisations autochtones et des gouvernements à la table des conférences. Le défaut d'une définition claire de l'autonomie gouvernementale a entravé ces négociations, de même que l'hypothèse qu'un modèle unique puisse être applicable à tous les peuples autochtones. En tâchant d'éclaircir le sens et la raison d'être de l'autonomie gouvernementale autochtone, plusieurs modèles capables de satisfaire les espérances et les besoins des différents peuples autochtones ont été développés. Le processus politique de négociations et les instruments légaux visant à établir les gouvernements autochtones sont également examinés, suivis d'observations finales concernant le futur de la réforme constitutionnelle à ce sujet.

1 INTRODUCTION

After hundreds of years of oppressive government policies and actions toward the native peoples of Canada, an opportunity now exists for non-aboriginal Canadians, through their federal, provincial and territorial governments, to right some of the past wrongs and injustices. This chance is presented in section 37 of the **Constitution Act, 1982**, which provides for a series of conferences among these governments and aboriginal peoples on aboriginal rights and related constitutional matters. It is not often in the life of a nation that such an opportunity presents itself, and all Canadians -- aboriginal and non-aboriginal alike -- must hope that it will not be squandered. This discussion paper, and the background papers which form a part of this series, are written in the hope that they might, in some small way, assist in the realization of that opportunity.

At the First Ministers' Conference on Constitutional Aboriginal Matters of 1984, discussions regarding aboriginal rights and their entrenchment in the constitution focused primarily on one agenda item --

aboriginal self-government. The term "aboriginal self-government" includes many of the issues that have been discussed during negotiations over the past few years, such as land, resources, self-determination, fiscal relations, language, culture and economic development. The term "self-government" is not only a useful way of organizing research in this field; it also encapsulates the aspirations of Canada's aboriginal peoples.

Nonetheless, it is evident that the participants in recent constitutional discussions are not agreed on the meaning of "aboriginal self-government". Accordingly, this paper examines various concepts of aboriginal self-government, comparing them both to experience in other nations and to the positions of parties to the negotiations on constitutional aboriginal matters.

The paper is organized in the following manner. Chapter Two provides the context for our discussion by situating it in the broader framework of aboriginality, aboriginal rights, aboriginal title and the principle of aboriginal self-government. Chapter Three provides an analysis of various approaches to aboriginal self-government, including models and structures of self-government; it focuses on citizenship/membership, government powers, fiscal and economic relations, and government structure. Chapter Four examines the political processes and legal instruments that may be used in negotiating and implementing aboriginal self-government. The

conclusion, Chapter Five, looks at "where we go from here" and offers some suggestions concerning the process of establishing aboriginal self-government.

Two major sources of information are drawn upon in each chapter. One is the relevant international experience, or "lessons from outside" that may usefully be brought to bear on the subject at hand. The second is the positions of the seventeen parties to the negotiations (federal government, 10 provincial governments, two territorial governments, four aboriginal peoples' organizations). Throughout the analysis, the advantages and disadvantages of various approaches, models, structures, processes and instruments relating to aboriginal self-government are noted. Interesting avenues, narrow lanes, and dead-end streets are identified. For while aboriginal self-government presents a number of problems to be resolved, it also presents a number of opportunities to be realized.

Information for this discussion paper was obtained in several ways. Background papers were prepared on several crucial aspects of the question: the citizenship rights of aboriginal peoples, various forms of aboriginal self-government, fiscal arrangements, relevant experience in Australia and the United States of America, and the issues that have come before the First Ministers' Conferences on Constitutional Aboriginal Matters over the last two years. The positions on issues surrounding aboriginal self-government taken by Indian, Inuit and Métis organizations, as well as

those taken thus far by federal, provincial and territorial governments, were researched within the Institute. Documentary analysis of verbatim transcripts of First Ministers' Conferences and of Working Group reports were used to build a "profile" of each party to the negotiations across a wide range of issues. These profiles were then checked and elaborated, through interviews with officials in most governments and all four aboriginal peoples' organizations (Assembly of First Nations, Inuit Committee on National Issues, Native Council of Canada and Métis National Council) involved in the negotiations. The positions of each party to the negotiations were checked with that government/organization to ensure accuracy. Cooperation was enhanced by the understanding that no party's positions on any specific issue would be identified in this discussion paper, beyond that which had been made public already.

Information also came from public and private documents provided to the Institute by governments and aboriginal peoples' organizations. We are greatly indebted to the actors involved in the constitutional negotiation process for their generous cooperation. Finally, the Institute conducted a limited literature review focusing on the international experience outside Australia and the U.S.A., and more generally on the background in Canada. As a result of this review, a bibliography on aboriginal self-government is well advanced.

A major purpose of this discussion paper is to animate a Workshop on Aboriginal Self-Government, to be held at Queen's University on February 6 and 7, 1985. The workshop will involve officials from aboriginal peoples' organizations and federal, provincial and territorial governments party to the constitutional negotiations, as well as project researchers and experts in the field. It is designed to provide an opportunity for participants to discuss issues surrounding aboriginal self-government, to explore the various forms it might take, and to examine both potential problem areas and areas of opportunity.

2 THE CONTEXT

Who are aboriginal peoples, and what are their rights? What is aboriginal title, and from where is the principle of aboriginal self-government derived? Without addressing these questions, it seems pointless to go on to examine different approaches, models and implications of aboriginal self-government.

Aboriginality, as defined by the Concise Oxford Dictionary, means "indigenous, existing in a land at the dawn of history, or before the arrival of colonists". According to this definition, Indian and Inuit are clearly aboriginal peoples. If not existing in Canada at the dawn of history, they certainly were resident before the arrival of French and British colonists. The Métis, according to this definition, may not be identified as aboriginal peoples since they developed after the arrival of colonists. The term "Métis" tends to be defined in two ways, narrowly and

broadly. The narrow definition denotes the descendants of a people who formed an historic Métis nation in western Canada in the late nineteenth century, a cultural and biological grouping of persons of mixed Indian and European parentage. The Métis people first resided in the Red River Valley of Assiniboia, or what is now Manitoba, where from 1820-1870 they practised farming, trapped, developed common customs and folkways, traded and prospered, and eventually formed a provisional government under Louis Riel. The "Métis homeland" is a defined geographic area in western Canada, and today's Métis are descendants of this historic Métis nation. The broader definition does not impose this national and geographic limitation. The Métis people are found, as they have been since the arrival of European colonists, in all regions of Canada. As the European settlers spread, so too did the Métis. Métis existed in Acadia long before they did in western Canada. Today "Métis" denotes those of partial Indian ancestry, regardless of place of residence within Canada.

The Métis, however defined, may not qualify as aboriginal people according to the Concise Oxford Dictionary, but they certainly do in terms of the Canadian constitution. Section 35(2) of the **Constitution Act, 1982** identifies Indian, Inuit and Métis as the "aboriginal peoples of Canada".

The relationship of aboriginality to the term "Indian" in the Canadian constitution is less clear. In Section 91(24) of the **Constitution Act,**

1867, the federal government is allocated jurisdiction for "Indians, and Land reserved for the Indians". But how was "Indian" defined in 1867 when the section was written? Was it to apply to all aboriginal peoples or only to status Indians, later defined by the **Indian Act**, a piece of federal legislation first passed in 1876? Status Indians are persons registered or entitled to be registered under the **Indian Act**, and include most Treaty Indians (descendants of those Indians who signed treaties with the Crown). However, since not all of Canada is covered by treaty, as is the case of British Columbia, not all registered or status Indians are Treaty Indians.

Non-status Indians are Indian people and their descendants who have lost their entitlement to be registered under the **Indian Act** (as when an Indian woman marries a non-Indian man), or have renounced their right to be registered as a status Indian. (When Indians wished to vote in Canadian elections prior to 1960, they had to renounce their status in order to become enfranchised.) Hence, Treaty Indians can also be non-status Indians.

Does section 91(24) apply to Inuit? This question was answered in 1939 by the Supreme Court of Canada, when it determined that "Indians and land reserved for the Indians" applied to Inuit as well (re: Eskimo case).

Does section 91(24) apply to Métis? This question has yet to be answered definitively. It was largely assumed, prior to 1982, that the

terms of Section 91(24) did not apply to Métis, and that they were thus a "provincial responsibility". However, it was also widely questioned, prior to 1982, whether Métis were an aboriginal people. The inclusion of Métis in section 35(2) of the **Constitution Act, 1982** only serves to highlight the question of whether Métis were meant to be included in Section 91(24), **or whether they now should be so included.**

The Inuit Committee on National Issues, the Native Council of Canada, and the Métis National Council think that Section 91(24) includes all aboriginal peoples, including Métis. The Assembly of First Nations (AFN) has not commented on the aspirations and positions of other aboriginal peoples' organizations involved in the negotiations, and thus, has taken no position on this matter.

Most governments have yet to formulate a position on whether Métis are, or should be included in Section 91(24). Four think that it should be read to include Métis, while two do not. Although this is a matter of judicial interpretation, the decision, like that which defined Métis as an aboriginal people, may be essentially a political one.

In defining the terms "Indian" and "aboriginal peoples", one option is to allow for some degree of self-selection, as is done in Australia and the United States. To be considered an Aboriginal in Australia, a person must be of Aboriginal descent, identify oneself as an Aboriginal, and be

accepted by other Aboriginal people as an Aboriginal (Morse, p. 13). This relatively clear and simple approach is in stark contrast to the Canadian experience in this area, and could prove useful.

> The three part definition of aboriginality in use in many parts of Australia has much to offer us in addressing the present debate regarding repatriation of non-status Indians versus First Nations' rights to control their own membership, the proper definition of Métis, and the regulation of eligibility for entitlement under comprehensive claims settlement. The Australian model focusses upon ancestry (thereby excluding non-indigenous spouses) without engaging in blood quantum dividing lines. To this is added an element of freedom of choice in that an individual must decide on his or her own whether to assert aboriginality. Finally, the community has its say in determining whether or not an individual will be recognized as Aboriginal. (Morse, pp. 107-108)

In the United States, the ability to determine tribal membership is one of the most fundamental powers of inherent tribal sovereignty.

Once rules or procedures have been adopted for identifying "the aboriginal peoples of Canada", another question arises. What rights accrue to a person as a result of his or her aboriginality? A "long list", albeit incomplete, includes rights in the following areas:

- land, resources and environment
- collective self-determination or self-government
- citizenship/membership in aboriginal nations/communities
- economic development, employment and training

- hunting, trapping, fishing, harvesting, gathering
- customary law and enforcement
- language, culture, religion
- fiscal relations/arrangements
- education
- health and social services

Section 35(1) of the **Constitution Act, 1982** recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. Some view section 35(1) as a "full box" of aboriginal rights, needing no specification. Others think that the box contains something, but are not sure of the contents. In this case, rights need to be specified. Still others believe that section 35(1) is an "empty box", into which specific aboriginal rights can be placed, should there be agreement to do so. Aboriginal peoples' organizations view section 35 as a "full box" of rights, including those enumerated in this "long list", and perhaps others. Governments, on the other hand, tend to view section 35 as neither a full nor an empty box, but simply as a statement of the **status quo** with respect to Canadian jurisprudence on aboriginal rights. Most view the section 37 process (the series of First Ministers' Conferences on Constitutional Aboriginal Matters) as a political means through which additional aboriginal rights could be identified and recognized.

Aboriginal rights affirmed in Canadian law form a "short list", which includes:

- limited hunting, trapping, fishing, harvesting and gathering rights, and
- limited cultural and religious rights.

One objective of the section 37 process, then, is to determine which rights from the "long list" can be added to the "short list", and recognized in the Canadian constitution at this time.

There is also the relationship of **aboriginal rights** to that of **aboriginal title.** Aboriginal title is a concept of European jurisprudence which purports to describe the relationship of aboriginal people to their traditional lands. It is often defined in terms of the "traditional use and occupancy" of the land, and the right to take the fruits or benefits it. In legal terminology, this is known as a usufructuary right. However, it is also defined as the collective ownership and use of land and resources -- quite a different matter. Others argue against applying European legal terms to the relationship of indigenous peoples to their homeland, saying "We don't own the land, the land owns us."

Even more confusing is the argument as to whether aboriginal title flows from aboriginal rights, whether rights flow from title, or whether

they are one and the same. It is common, yet somehow odd, to assume that all aboriginal rights are based on the relationship of aboriginal peoples to their land (that is, that rights flow from title). Surely there is more to aboriginality than the relationship to the land. The relationship to the land certainly influences political, social, economic, religious and cultural institutions and rights, but it seems strange to assert that it encompasses them as well.

Some have argued that aboriginal title and aboriginal rights are one and the same, pointing out that the courts have used the terms interchangeably. The strength of this argument must be tempered by the matters that have been brought before the courts with respect to aboriginal rights. For the most part, court cases have focused on the usufructuary relationship of aboriginal peoples to the land, that of traditional use and occupancy. Since the courts can only pronounce judgements on matters brought before them, and since many of the rights claimed by aboriginal peoples have not been the subject of litigation, it is questionable whether aboriginal title and aboriginal rights can be said to be identical. The application of European jurisprudence to concepts of aboriginal rights has often not been very instructive.

In Australia, the governments and courts have refused to acknowledge aboriginal title. The effect of this view, argues Morse, "has been that

Aboriginal lands are set aside solely as **ex gratia** acts of the Crown. They have never had the required mandate of treaty commitments nor the stature of retained aboriginal title or the Australian equivalent of the Royal Proclamation of 1763" (Morse, p. 34).

It is further argued that since aboriginal title has been extinguished (through treaty or scrip) across most of Canada, so too have aboriginal rights. That aboriginal rights have been permanently extinguished is another common, yet somewhat odd assumption. Title to land, as in "fee simple", can certainly be permanently extinguished through purchase or other means. So too can aboriginal title to land, through the treaty-making process. What seems odd, however, is the assumption that aboriginal rights -- legal, political, linguistic, and so forth -- have been permanently extinguished. Such rights can be extinguished by force, through conquest, but this was not the Canadian experience. They can also be extinguished through mutual consent. Aboriginal peoples did not consent to the permanent extinguishment of their rights. Such rights, it is also argued, can be extinguished to the extent that they are inconsistent or incompatible with existing federal and provincial legislation. The legal force of this assertion is considerably weaker.

A parallel might be drawn here between the group or ethnic rights of aboriginal peoples and those of French Canadians. It has long been argued that collective rights are inconsistent with the principles of liberal

democracy, yet in many nations, including Canada, individual and group rights coexist (Belgium, Switzerland, Austria, Netherlands). Our federal system attempts to balance the forces of individualism and pluralism, of advancing the will of the majority while protecting the rights of the minority. It may be that basic rights cannot be extinguished through acts of Parliament and provincial legislatures. A 1979 Supreme Court of Canada decision with respect to French language rights in Manitoba (the Forest case) clearly supports this assumption insofar as language rights are concerned. Of course, French language rights had constitutional protection through the 1870 **Manitoba Act**, whereas aboriginal rights only received constitutional "recognition" in 1982.

Basic rights, including aboriginal rights, can be suppressed. In fact, the suppression of aboriginal peoples and their rights has been the norm -- not the exception -- worldwide. Although aboriginal rights have been suppressed for a long time, it is difficult to sustain an argument that they have been permanently extinguished.

In the United States, Indian tribes' right to self-government derives from what the U.S. Supreme Court has called the doctrine of "retained sovereignty." Nineteenth century judicial decisions and practice characterized tribes as "independent nations," "domestic dependent nations," distinct political societies capable of managing their own affairs and governing themselves, and political communities holding

exclusive authority within their territorial boundaries (Sanders, p. 8, 9). The **Indian Reorganization Act** of 1934 stated that an Indian tribe on a reservation "shall have the right to organize for its common welfare." The 1975 **Indian Self-Determination and Education Assistance Act** declared Congress' conclusion that "the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress on Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government" (p. 42). In January 1983, President Reagan spoke of sovereign Indian nations and of the Indian-United States relationship as that of "government to government." Restoring responsibilities and resources to Indian tribes was based on Reagan's more general philosophy of the New Federalism that these powers should be in the hands of the governments closest to the people served.

In practice, however, Sanders finds that in the U.S.A. the theory of Indian sovereignty and self-government has suffered dramatically. First, the federal level of government holds a "sweeping jurisdiction" over Indian affairs. He observes that "while the retained sovereignty of the tribes is outside the Unites States constitution, nevertheless it is not 'entrenched' or protected from the legislative power of Congress. Congress has a 'general' power to alter unilaterally relations with the tribes" (p. 49). Second, the history of Indian law and policy reveals that Indian self-government was constantly battered, limited and weakened. The removal

program of the 1800s tried to displace Indian tribes from the east onto unsettled land in the west. The allotment policy of the same period was designed to "break up the communal nature of the Indian reservations by alloting title to specific tracts to individual Indian families" (p. 11). The "Indian New Deal" actually perpetuated a paternalistic relationship between the federal government and Indian tribes and imposed constitutional uniformity on forms of self-government. Even the **Alaska Native Claims Settlement Act** of 1971 was designed to end native aboriginal rights in return for almost $1 billion in compensation and large areas of land to be held by native-owned corporations.

In looking at the actual conduct of Indian self-government in the United States, Sanders finds that tribes possess the ability to determine membership, that there is a system of tribal courts, and that civil jurisdiction covers marriage, divorce, child welfare, estates, taxation, licensing, real property, and commercial transactions. Although these powers are now being defined through the courts, they are recognized as sovereign inherent powers. However, he warns that tribes lack the sound financial base that would make self-government a reality.

The principle of aboriginal sovereignty has not been recognized by the governments or courts in Australia. While Aboriginal peoples in that country are claiming sovereign status, Morse observes that "Aboriginal governments have neither a special basis in sovereignty nor in The

Constitution of Australia to claim the right of self-government. Those governing structures that do exist derive their status from regular legislation" (Morse, p. 81).

Aboriginal rights are founded upon the claim of indigenous or original sovereignty. When European colonists arrived in what is now Canada, aboriginal peoples had a land base over which they exercised control through systems of government. International law recognizes this and goes on to say that aboriginal rights persist in spite of general legislation passed by colonial governments. According to this doctrine, specific legislation or instruments (such as treaties) are required to extinguish specific aboriginal rights (such as title).

The aboriginal peoples' organizations involved in the constitutional negotiations are not so confused on the extinguishment issue. The AFN has called on the federal government to renounce its policy of extinguishment of aboriginal rights. The Native Council of Canada, like the AFN, believes that aboriginal title has not, and cannot be extinguished because it is inalienable. The Métis National Council believes that Métis have aboriginal title, and that it has not been extinguished. The Inuit Committee on National Issues (ICNI) acknowledges that some on-shore land rights have been extinguished through the **James Bay Settlement Act**, although the ICNI would like to renegotiate that agreement.

It is interesting to note that the 1983 Report of the House of Commons Special Committee on Indian Self-Government also recommended the elimination of the doctrine of extinguishment. Instead, the Committee recommended that settlement agreements should be limited to only those matters specifically negotiated.

The positions of governments on this issue are diverse. Most believe that aboriginal title has been extinguished where treaties apply. Treaties have not been made in British Columbia, Yukon, N.W.T., Newfoundland and Labrador. Some governments view the matter of aboriginal title to be different from that of aboriginal rights. Hence, not all aboriginal rights have been extinguished. A few believe that aboriginal title has **not** been extinguished as a result of the treaty process. A few have taken no positions on these matters.

After reviewing aboriginality, aboriginal rights and aboriginal title, it remains for us to discuss the principle of aboriginal self-government. According to its definition, aboriginal self-government can incorporate some or all of the aboriginal rights in the "long list" presented on pages 10 and 11. The right to aboriginal self-government evolves from original government, or indigenous self-determination. Aboriginal peoples in Canada believe that in order to continue to survive and develop as distinct nations or peoples, they require a land base and self-government. Only in this way can they achieve self-determination. Although the next chapter

will examine various approaches to self-government, it is appropriate at this point to examine the principle of aboriginal self-government.

Throughout the First Ministers Conference on Constitutional Aboriginal Matters in March of 1984, aboriginal peoples' organizations were calling for self-government. Most governments said in response that they could not entrench the right to aboriginal self-government in the constitution without knowing what it meant. What was left untested was each government's position on the principle of self-government. We now turn to this issue.

During the course of our research, each of the parties to the negotiations (federal, provincial and territorial governments, and aboriginal peoples' oganizations) was asked if aboriginal self-government was a legitimate objective of aboriginal peoples in Canada. Naturally enough, representatives from aboriginal peoples' organizations answered in the affirmative. As well, of the thirteen governments, six answered "Yes". Six others expressed support in principle for greater aboriginal self-determination, autonomy, control and authority over internal affairs, although not necessarily self-government, while one expressed no position. No government said that aboriginal self-government was **not** a legitimate objective of aboriginal peoples in Canada.

Caveats did abound, however. Of those governments that answered in the affirmative, most added "within the framework of Canadian federalism". Of those who supported greater aboriginal self-determination, all made a point that this does not include full independence or sovereignty for aboriginal peoples. A few expressed the view that greater self-determination is not related to any aboriginal rights.

All four aboriginal peoples' organizations -- the Assembly of First Nations, the Inuit Committee on National Issues, the Native Council of Canada, and the Métis National Council -- view self-government as an inherent right, and all of them advocate self-government within the Canadian political system. Concerns, if there are any, about sovereign aboriginal nation-states breaking away from Canada, can thus be dispelled.

This is not to underestimate the range of approaches, models, structures and powers being advocated by aboriginal peoples. The range is great, but then so too are the aspirations and needs of aboriginal peoples. The practice of imposing a common system such as band government, claims Noel Lyon, "has been superseded by a constitutional right of each native group to work out its own arrangement for self-government.... The authority for the emerging system of native self-government comes from within a residual sovereignty and is legally anchored in S. 35 of the **Constitution Act, 1982**" (Lyon, p. 8). In this regard, aboriginal peoples

are no more homogeneous than non-aboriginal Canadians, and perhaps even less so. It could be argued quite convincingly that non-aboriginal Canadians, sharing European norms, values and institutions, have much more in common than Inuit, Mohawk, Dene, Cree, Micmac, Nishga and Métis peoples. Some aboriginal groups advocate a public form of government, others an ethnic form; some focus on the community, others at the tribal or regional level; some propose "remedies" unrelated to self-government **per se** (for example, guaranteed representation in Parliament and legislatures), while others reject such approaches.

What is clear is that no single approach or model will meet the needs or aspirations of all aboriginal peoples. A "universal formula" is doomed to failure. As Lyon put it, "The model of self-government we seek must be fairly comprehensive, capable of responding to each particular community and to the basic needs of its members. It is up to each community to determine for itself the form of government, the process for establishing it and the priorities and levels of service" (pp. 4, 5). This should not lead to a sense of exasperation on the part of governments. Recognizing diversity while promoting harmony has long been the strong suit of Canadian federalism. The special needs of Québec, the West, Atlantic Canada and the North have all been addressed, with varying degrees of success, in Canadian politics. What is required at this time is to extend that spirit of accommodation to meet the special needs of Canada's aboriginal peoples. It is to those special needs, in terms of aboriginal self-government, that we now turn.

3 FORMS OF ABORIGINAL SELF-GOVERNMENT

In this chapter, we examine the various forms which aboriginal self-government might take. The proposals of aboriginal peoples for self-government cover a wide variety of possibilities, and vary greatly in their degree of development. One common element in all of these proposals is an assumption that self-government exists on a land base. No form of self-government has been put forward without a land base, which could be designated as such in any conventional sense of that term. For aboriginal peoples eager to attain self-government but lacking a land base, such as Métis and non-status Indians, the procurement of this is a necessary first step. Self-government, in all of its various forms, must have as a starting point some land base on which to govern.

This is not to say that proposals which do not assume a land base have not been advanced. Guaranteed representation in the federal Parliament and in provincial and territorial legislatures falls into this category, as do

special purpose advisory bodies to government. These remedies may enable aboriginal peoples to gain more control and authority over their internal affairs, but they do not constitute self-government. These proposals are briefly examined at the end of this chapter.

An examination of the various approaches, models, structures and types of aboriginal self-government is a complex undertaking. This chapter sets out to accomplish that task by integrating a conceptual review of the possible forms of aboriginal self-government with the proposals for self-government put forward by aboriginal peoples. First, we examine the key elements of aboriginal self-government. Then we develop a three-dimensional conceptual framework or cube which describes the possible types of aboriginal self-government. After discarding logically or practically unworkable types from the cube, six models of self-government are retained. We then examine each of these six models, including their relationship to proposed and existing forms of aboriginal self-government, and their relationship to relevant experience in other nations. For each model, we review the structure, powers, fiscal relations, and examine the issue of determining membership/citizenship.

It should be noted that all proposed forms of self-government have come from aboriginal peoples, and that no government has published its own proposal. However, some of the models do resemble measures already established by some provincial governments. These have been described where appropriate.

The Key Elements of Aboriginal Self-Government

From a review of both the national and international literature concerning aboriginal self-government, and from a review of the various proposals and positions put forward by aboriginal peoples' organizations with respect to aboriginal self-government, there appear to be three critical elements to the definition of self-government. These are:

1. whether the government is public or ethnic;
2. whether the government is local, regional or national in scope; and
3. the amount of power exercised by the government.

Within each of these key elements, two or three options present themselves. We now examine each of these in turn.

1. Public versus Ethnic Government

There are only two options to this dimension of aboriginal self-government -- government based on ethnicity, and government based on territory.

(a) Government based on ethnicity

This is government for a community, in the broader sense of that term, where membership or citizenship is determined by some sort of ethnic

criteria. As a result, a single integrated land mass is not essential. Moreover, mere residence on land under the jurisdiction of an ethnic government would not necessarily entitle one to the citizenship rights and government services (for example, the right to vote and attend public school) provided by the government. Generally, such government would have the power to determine citizenship or membership in the community.

(b) Government based on territory

This is public government, where everyone residing in a particular geographic area or state is under the jurisdiction of that government. Canadian provinces and municipalities are examples of this type of government.

2. Scope of Government

There are three clear options with respect to the scope of aboriginal self-government -- national, regional, and community and/or local.

(a) National

Aboriginal self-government could operate at the national level. It need not encompass all regions of the country, but it would include all peoples of a particular community. For example, a government of all Métis would be a national ethnic government. There is a difference between a national government as the term is used here and a national organization created by the federation of local or regional governments. In a national government as perceived here, the locus of decision-making is at the national level. In the latter case, powers are delegated up to the national organization from the lower levels.

(b) Regional

Regional government assumes a large block of land or a region within Canada. The regions may correspond to provinces, to areas within provinces, to traditional tribal areas, or possibly, to groups of provinces. They might also cut across provincial boundaries while not encompassing all parts of contiguous provinces. The scope of regional government falls between that of nation and that of community.

(c) Community and/or local

Community or local government assumes a small block of land, with the main locus of decision-making at the local level. This sort of government allows for the greatest diversity of approaches to aboriginal self-government within Canada. It would be possible, under this option, for community governments to join together for some purposes, on either a temporary or a more permanent basis.

3. Government Powers

In examining the powers to be exercised by aboriginal governments, two distinct aspects must be considered. One aspect refers to the distribution of powers between aboriginal governments and other Canadian governments. Whether a government is autonomous or dependent is a reflection of this relationship. The other aspect is concerned with the types of powers that a government exercises, which might be legislative, administrative, or a combination of both.

More than the others, this element represents a continuum containing an almost infinite number of "degrees of power" and relationships to other governments. As a result, each of the three categories described below covers a portion of that continuum. The categories themselves are somewhat arbitrary. Nonetheless it is useful to distinguish three options. The powers of aboriginal governments may be legislative in character, autonomously exercised; they may be a mixture of legislative and administrative powers, only semi-autonomously exercised; and they may be purely administrative, expressing political dependence.

(a) Autonomous/legislative powers

This option describes a government with significant autonomy in decision-making capacity, coupled with a reasonably extensive list of subjects over which it would have legislative jurisdiction. Resources for such a government would be obtained either from its own revenue-raising capacity or from transfer payments negotiated with the federal and/or provincial governments.

(b) Semi-autonomous/mixed powers

In this option, the government has a narrower range of legislative powers than that described above. The government has some legislative competence, in addition to some powers recognized by some other level(s) of government.

(c) Dependent/administrative powers

This option describes a government without any legislative powers. All of its powers would be delegated from another level of government,

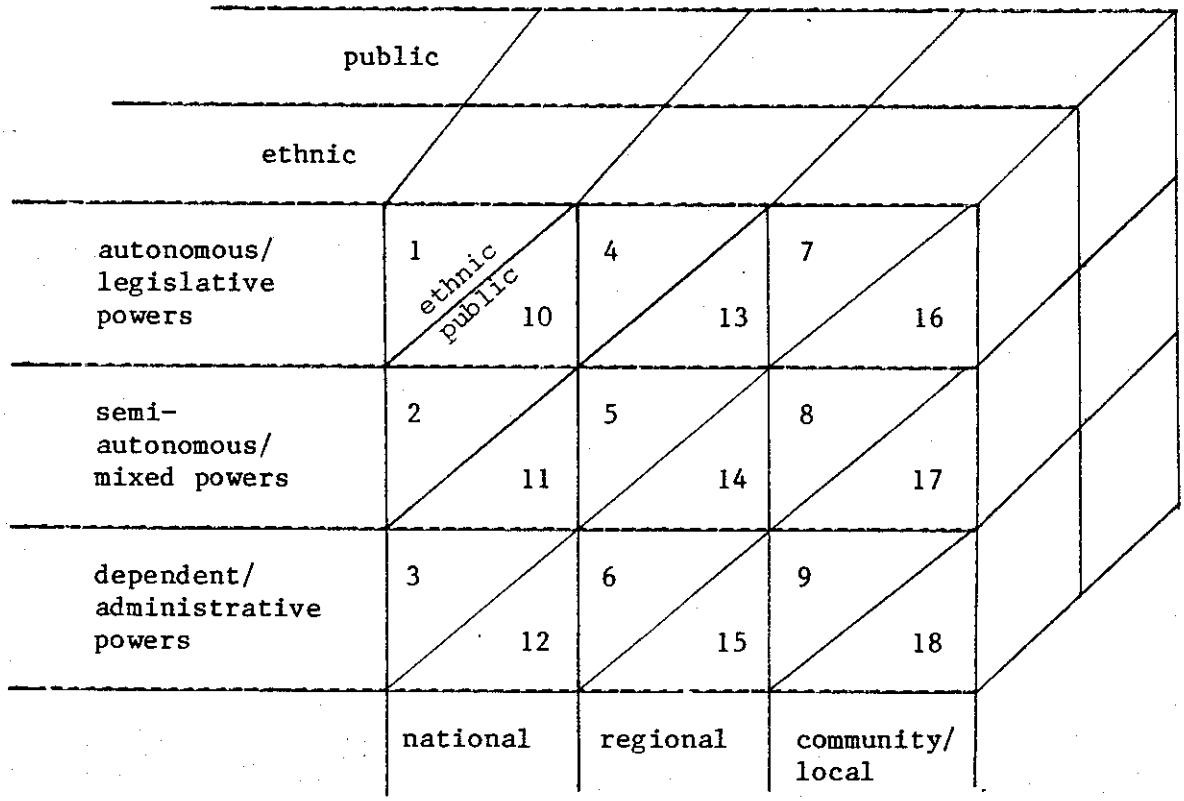
perhaps in a narrow range of competences. Its functions are primarily administrative, with funding for the services it provides coming in the form of conditional grants.

The Aboriginal Self-Government Cube

When all of the options from the three key elements of aboriginal self-government are integrated, a cube containing 18 cells is created.

Figure 3:1

The Aboriginal Self-Government Cube



This three-dimensional framework illustrates the various types of aboriginal self-government that are theoretically possible, given our three key elements. There follows a brief description of the type of government each of these cells would produce.

THE EIGHTEEN CELLS

1. Ethnic, national government having autonomous/legislative powers.
- a national aboriginal government (such as one growing out of the Assembly of First Nations) having substantial power and autonomy over a community that was not geographically contiguous.

2. Ethnic, national government having semi-autonomous/mixed powers.
- similar to the government in Cell #1, with fewer legislative powers.

3. Ethnic, national government having dependent/administrative powers.
- a national aboriginal organization, primarily as the administrator of federal government services.

4. Ethnic, regional government having autonomous/legislative powers.
- rather autonomous government with significant legislative powers, existing where one nation or tribe of aboriginal peoples has either a large integrated land base, or parcels of land within a particular region.

5. Ethnic, regional government having semi-autonomous/mixed powers.
- tribal government, as outlined in Cell #4, but having a more limited range of powers.

6. Ethnic, regional government having dependent/administrative powers.
- tribal government that performs primarily administrative functions.

7. Ethnic, community/local government having autonomous/legislative powers.
- local government having substantial autonomy and a wide range of legislative powers.
- "First nations governments", as proposed by the AFN.

8. Ethnic, community/local government having semi-autonomous/mixed powers.
- local government, similar to that described in Cell #7, but with less autonomy and fewer legislative powers.

9. Ethnic, community/local government having dependent/administrative powers.
- local aboriginal government, having limited powers and performing mostly administrative functions.
- includes existing band governments.

10. Public, national government having autonomous/legislative powers.
- the federal government is an example of public, national government

11. Public, national government having semi-autonomous/mixed powers.

12. Public, national government having dependent/administrative powers.

13. Public, regional government having autonomous/legislative powers.
- public government in a large area, most likely where aboriginal peoples comprise a majority, or at least a significant minority, of the population, having legislative powers and a large degree of autonomy.
- includes provincial governments, Greenland.

14. Public, regional government having semi-autonomous/mixed powers.
- similar to government in Cell #13, with less autonomy.
- includes territorial governments in Canada.

15. Public, regional government having dependent/administrative powers.
- public government in a region within a province, performing primarily administrative functions.
- regional government as it exists in Ontario is an example.

16. Public, community/local government having autonomous/ legislative powers.
- essentially, a "city-state" type of government.

17. Public, community/local government having semi-autonomous/ mixed powers.
- essentially, a "super municipality", having greater powers than an ordinary municipality.

18. Public, community/local government having dependent/ administrative powers.
- local public government with powers delegated from another level of government.
- includes municipal government.

Models of Aboriginal Self-Government

From this brief description of the 18 cells in the aboriginal self-government "cube", certain ones can be eliminated as unrealistic options. The others form the basis for a series of models which can be discussed in greater detail. Certain of these cells are similar enough to be grouped together to form a single model. The derivation of these models is thus based on an analysis of each of the cells.

Aboriginal Self-Government at the National Level

It is possible to conceive of a national aboriginal government, but its development is highly unlikely. It is difficult to imagine such a government having much power. The only national ethnic option that would conceivably be workable is that found in cell 3, where the aboriginal government has rather limited powers, exercising primarily an administrative function.

Presumably such a government would have responsibilities in such areas as culture, language and primary education. In a way, it would be similar to the current practice of native organizations receiving funds from the federal and provincial governments to promote and enhance aboriginal culture and traditions. This form of government is not being proposed by any of the aboriginal peoples' organizations, and does not constitute self-government as it is described in this paper.

A public national government in Canada (Cells #10-12), in addition to the federal government, is logically non-sensical. However, also in this category is the notion of the federal government doubling as aboriginal government. The federal government could be required, perhaps constitutionally, to obtain the consent of aboriginal peoples before enacting legislation that affects them, or before enacting legislation that

affects the north, as is the case in Finland. There the Lapp Parliament must be consulted on socioeconomic and political developments in the Lapp Area of Finland. An alternative way of having the federal government act as aboriginal government is through the guaranteed representation of aboriginal peoples in the House of Commons and the Senate. (These possibilities, although not examples of aboriginal self-government, are discussed at the end of this chapter under proposals which do not assume a land base.)

Aboriginal Self-Government at the Regional Level

Regional ethnic government might be workable where a single tribe or nation has a large integrated territory, as proposed by the Nishga Indians. Autonomous or semi-autonomous powers would be required for this form of government, since government of a large territory with dependent powers would more likely be a public government. Hence, "Model A" is a regional ethnic government with autonomous or semi-autonomous powers (cells 4 and 5).

Regional public government is a realistic option for an area where aboriginal peoples comprise a majority, or at least a significant proportion of the population. There are two distinct models here. The first is a large territorial government with at least some legislative powers: "Model B", which encompasses cells 13 and 14. The second is a

regional government with administrative powers delegated to it by a provincial government: "Model C" (cell 15).

Figure 3:2

REGIONAL GOVERNMENT

Power

	Autonomous	Semi-Autonomous	Dependent
ETHNIC	A		
PUBLIC	B		C

Aboriginal Self-Government at the Community/Local Level

Three distinct models of local ethnic government are feasible, each distinguished by a different degree of power and autonomy. "Model D" is local ethnic government with substantial autonomy (cell 7), and is similar to the "First Nations" governments proposed by the Assembly of First Nations. In fact, this is the preferred option of three of the four national aboriginal peoples' organizations (the ICNI prefers a regional form of government). "Model E" is local ethnic government with a mixture of legislative and administrative powers (cell 8). Indian band government with enhanced or substantially increased powers might be an example. "Model F" is local ethnic government with delegated powers in a limited

range of competences (cell 9). Existing Indian band governments are examples of this form of government.

It is possible to conceive of autonomous or semi-autonomous aboriginal community governments of the public type, but their establishment is very unlikely. This leaves only public local government with administrative powers (cell 18), a form of municipal government. This is essentially a public form of band government, and cannot be viewed as a serious model of aboriginal self-government.

Figure 3:3

LOCAL/COMMUNITY GOVERNMENT

	Power		
	Autonomous	Semi-Autonomous	Dependent
ETHNIC	D	E	F
PUBLIC			

Hence, six models of aboriginal self-government have been developed. None is national in scope, three are regional, and three are local. Following is a description of each model, beginning with the forms of regional government.

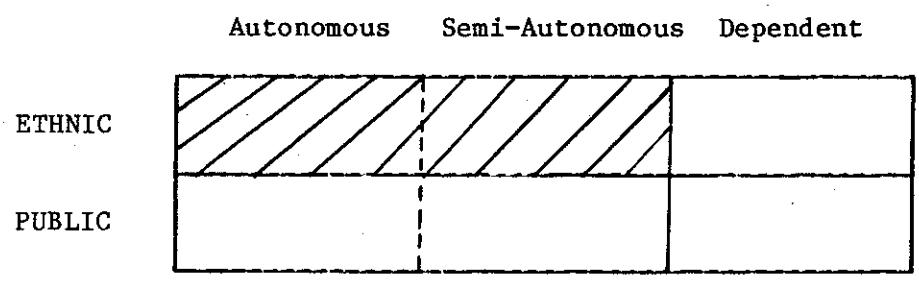
REGIONAL GOVERNMENT

Model A

Model A is regional ethnic government with autonomous or semi-autonomous powers, at least some of which would be legislative rather than merely administrative.

Figure 3:4

REGIONAL GOVERNMENT



Aboriginal self-government of the Model A variety is most likely to be established where an aboriginal nation or tribe has a reasonably integrated land mass. This could occur where one tribe or nation has various communities and land holdings within a given region or province, such as is proposed by the Nishga Indians in British Columbia, or where such tribes or nations with land and communities form a federation or otherwise unite, as with the Six Nations Confederacy in Ontario and Québec.

Each aboriginal nation or tribe would want to have control over matters of aboriginal citizenship, and hence this model would be viewed as preferable to a public form of government. Persons opting for aboriginal citizenship, and accepted as such by the community, might cease to come under the jurisdiction of provincial governments, or lose their provincial "citizenship" or residency. Citizens would then vote for and receive services from the aboriginal regional government and the federal government, but not the provincial government.

The regional aboriginal government would have legislative power under many heads, giving it substantial autonomy. These would include powers over land, resources and environment; economic development and training; education, health and social services; language and culture; and direct taxation and fiscal arrangements.

Funding for these governments would be provided from a variety of sources, including transfer and equalization payments from the federal government, shared-cost programs, and the imposition of certain taxes. Federal government programs and services would be available to citizens of aboriginal regional governments. Furthermore, aboriginal governments could enter into agreements with provincial governments for the delivery of certain programs or services.

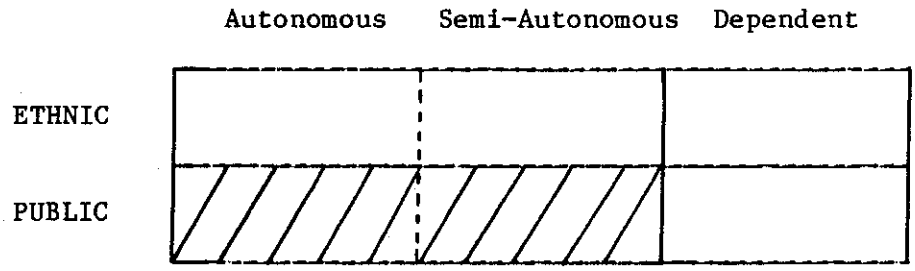
The proposal for self-government by the Nishga Indians of British Columbia is one example of this model. The territory claimed by the Nishga tribe encompasses 5,750 square miles. According to their proposal, the Nishga people have owned, used and occupied their land in northwestern British Columbia since time immemorial. The Nishga are a nation of peoples, and as such, citizenship is something which only the Nishga people themselves can determine. Their proposal is for rather autonomous government and control within the Canadian constitutional framework. The Nishga Indians want to control development so that it is consistent with their culture, economic interests and long-term survival. Asserting full aboriginal title over their lands, the Nishga claim full rights to their own resources. Through their current involvement in comprehensive claims negotiations, the Nishga are seeking control over health, education, social services, and public order, and are asserting the right to self-government.

Model B

Model B is regional public government with autonomous or semi-autonomous powers, some of which are legislative.

Figure 3:5

REGIONAL GOVERNMENT



The only public forms of government to serve as models for aboriginal self-government are regional in scope. National aboriginal government of any sort has been eliminated as a viable option. Local government as a means of establishing aboriginal self-government is generally perceived as being ethnic government, which is more easily established on smaller, integrated land bases.

For regional public government to be a viable model for aboriginal peoples, a large territory with a substantial aboriginal population is a basic requirement. Since by definition, participation in a public government is not based upon any ethnic criteria, aboriginal self-government of the Model B variety would be feasible for aboriginal peoples only where they constitute a majority, or at least a significant component of the population. Moreover, it is likely that despite being

"public" government, rather strict residency criteria would be established for participation in such governments, particularly in the north, in addition to the implementation of processes and institutions designed to ensure a permanent and powerful role for aboriginal peoples in the governmental process. Such is the case in the proposals for Nunavut (now part of the Northwest Territories) by the Inuit, and for Denendeh by the Dene Indians. The residency requirements in each of these proposals is three years in the case of Nunavut, and ten years for Denendeh.

The Government of Nunavut would have a special role in protecting the heritage of all Inuit. Moreover, it is recommended that Inuktitut be an official language of Nunavut. (In Greenland, it is the language of the government and daily life). In establishing a Nunavut assembly, it has been recommended that the smaller communities, where the Inuit traditions and culture are strongest, have relatively stronger representation than new and rapidly growing centres.

In the proposed structure of government for Denendeh, there are special guarantees for the Dene. A bicameral legislature would be established, with a Denendeh Senate composed only of Dene. The number of members and the way they are selected would be determined by the Dene. The Senate could exercise its veto power if it determined that legislation adversely affected aboriginal rights as defined in the final claims

settlement. Furthermore, it has been proposed that the Dene be guaranteed at least 30 per cent of the seats in the national assembly.

A Model B government would have some legislative and some administrative powers, although the amount of autonomy held by a regional government of this sort could vary. It could be quite autonomous, more so than the Governments of Yukon and the Northwest Territories, and have a large slate of legislative powers. Or, it may have legislative powers in only a few key areas of special regional concern, with other powers delegated and of a more administrative nature. The Inuit Committee on National Issues has advocated a high degree of autonomy for Inuit regional governments, with powers in such areas as land, resources, environment, language, economic development, and education. Funding for regional public government would come from a combination of specific conditional grants, transfer payments and some direct taxation. A "block grant" form of payment from the federal to the aboriginal government is favoured by the ICNI.

A Model B type of aboriginal self-government is being proposed by the Inuit, specifically for the area of Nunavut, and by the Dene for the area of Denendeh in the Mackenzie Valley. Both of these proposals are for government which is much closer to the autonomous end of the "power" continuum.

Denendeh covers the area traditionally used and occupied by the Dene in the western part of the N.W.T. In the proposal for "province-like" government, the Denendeh government would have basic constitutional powers over: institutions of government, administration of justice, health and welfare, local trade and commerce, natural resources, education, family relations, local transportation, and local community development. In addition, the government would be able to exercise power in these areas of federal responsibility: navigation and fisheries, family relations (including marriage), communications, and labour and employment.

The Dene proposal provides for a local level of government, with local community assemblies, and powers delegated from the regional "provincial" level.

Certain of the land within Denendeh would be exclusive Dene lands, with the Dene having exclusive ownership, use, control, occupancy and resource ownership. The rest of the land, with the exception of private property, would be owned and managed by the Government of Denendeh. Ten per cent of all resource revenues collected by governments would be paid into a Dene Heritage Fund. Revenue raised from the sale of non-renewable resources would be distributed first, to cover the costs of government in Denendeh, second, to pay the Government of Canada for direct federal assistance going into Denendeh, and, third, to be split 50/50 between the Governments of Canada and Denendeh.

The creation of Nunavut is based on a proposed political division of the Northwest Territories. Nunuvut would be the area north of the tree line, which has a population largely composed of Inuit. The proposals for the creation of a Nunavut government are less clearly defined and more flexible than those for Denendeh. It is clear, however, that the new government would have greater legislative powers and autonomy than do the current territorial governments. The Inuit envision an evolutionary process toward provincial status.

The Nunavut government would have all the social policy powers of any Canadian province, including health services, housing, manpower, labour relations and social services. Regarding land ownership, the Nunavut Constitutional Forum recommended that the federal government hold title for Nunavut lands and resources, but extend beneficial use and enjoyment to a Nunavut government; and that responsibility for minerals and mining be transferred over time to a Nunavut government.

The Inuit propose the creation of a Nunavut assembly, an executive committee or cabinet, a Public Service Commission, and an independent judiciary. It was expected that a Nunavut government would conduct normal "government to government" working relations with federal, provincial, and other territorial governments in Canada.

In a somewhat similar vein, the Yukon government has put forward a proposal for "one government" in the Yukon territory. The Yukon government is negotiating special self-government measures for Yukon Indian people in the context of the Council of Yukon Indians comprehensive claim. Under the proposed settlement, Yukon Indian people would have guaranteed control over their own internal affairs and special guaranteed participation in Yukon government fields of particular interest to them. This would affect many areas within both federal and territorial jurisdiction. In essence, this is a variation of the "citizen plus" approach. Yukon Indians would enjoy the rights, privileges and access to services available to all Yukoners, plus special political rights because of their status as aboriginal peoples. In recognition of the large proportion of its population which is aboriginal (about one-third), the Yukon government would institute special safeguards to ensure that aboriginal peoples are part of the policy-making process.

The paradigm for Model B is Greenland. Greenland was a Danish colony when, in 1782, Denmark decided to quarantine Greenland Inuit from outside contact in order to preserve their natural society. In the 1850s, elected councils of Greenlanders were instituted, and Greenland law codified, so that social stability and responsibility could be returned to Greenlanders. Local self-government boards were responsible for distributing social assistance, for civil and criminal law administration, and for inheritance.

In 1908, the boards were abolished in favour of smaller, elected municipal councils. No Danish resident could run for office without special permission from the governor. In 1925, the franchise was extended to Danes and all other non-aboriginal peoples who met a two year residency requirement. Municipal chairmen formed district councils, which supervised the judiciary, inter-municipal affairs, education, the local government budget, health care, and social services. Funding for the governmental structures came from a 20 per cent tax on the purchase of Greenland products, and a two per cent income tax on government employees. As a result of the 1950 Royal Commission on the future development of Greenland, it was determined that Greenland should not be expected to be financially self-sufficient. Accordingly, Danish government funding was provided for educational and health systems, for electrification and mechanized fishing, and for community infrastructure. In 1952, the Greenland Council endorsed annexation by Denmark as an integral part of Danish territory, and subsequently Greenland was allotted two members in the Danish Parliament.

Home rule came for Greenland in 1979, when the Danish Parliament delegated, as a result of mutual agreement, a broad range of powers over taxation, housing, labour, business, conservation and local government. Denmark retains exclusive jurisdiction in the fields of foreign policy and banking, while others, such as resources, are jointly administered. Social problems did emerge, as the indigenous Inuit culture was not impervious to European values. Nevertheless, the example of post-1979 Greenland as a Model B aboriginal government should not be lost.

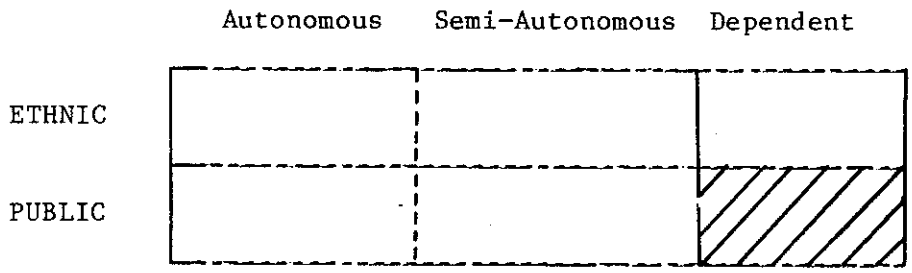
Model C

Model C is regional public government with delegated powers, most of which are administrative.

Figure 3:6

REGIONAL GOVERNMENT

Power



This model basically describes a regional level of government with certain powers coming from another level of government. As such, it would probably not affect the federal and provincial division of powers. Most, if not all, of the powers which would be affected fall within the purview of the provinces. Model "C" could serve the purposes of aboriginal peoples in a situation where a provincial government delegates responsibility for certain services to a regional level of government, in a region which is predominantly populated by aboriginal peoples. Powers to be delegated would probably include responsibility for matters such as language, culture, primary education and social services. Funding would be primarily

in the form of conditional grants from provincial governments, although special development funds could also be established.

We offer three examples of this model, each varying in the level and scope of power exercised by the regional government. The first is from Québec. Upon completion of the James Bay and Northern Québec Agreement, the Québec government established the Kativik Regional Government in 1978 for the municipalities and unorganized territories north of the 55th parallel which are outside the Cree lands. This regional body acts as the local governing authority for this area which is occupied primarily by Inuit. It is empowered to pass ordinances, and has limited powers related to non-aboriginal hunting, trapping and fishing on lands reserved for aboriginal use.

The Kativik Regional Government also plays an administrative role on behalf of the provincial government, in fields such as health, social services, and police, and has extensive advisory functions with respect to education, justice, environmental concerns and economic development.

The "DNS experiment" in northern Saskatchewan is also an example of this model of government. In the 1970s, the Government of Saskatchewan established a Department of Northern Saskatchewan (DNS) and a Northern Administrative District (NAD) in northern Saskatchewan, where the major component of the population is Métis and Indian. A Northern Municipal

Council (NMC) was elected in the NAD, with powers beyond those of municipalities to the south. For example, a committee of the NMC advised the Minister of Northern Saskatchewan on applications to a DNS loan fund for economic development. Local Community Authorities and Local Advisory Committees were established in Métis communities. The NMC also had input to decisions respecting resource management and environmental protection in the NAD. The "DNS experiment" ended in 1982.

If it were expanded to include other policy fields, the recent agreement providing for the devolution of administrative powers over family welfare services in northern Ontario could be considered as an example here. On August 22, 1984, a memorandum of agreement was signed between the Government of Ontario and the Nishnawbe Aski Nation, which stipulated that the provision of child welfare services for Indian people in northern Ontario be gradually transferred to Indian people. A few months later, on October 16, legislation was introduced to enable the Tikinagan Child and Family Services Corporation to be operating as a fully independent agency by April of 1989. It would administer services over a large geographic district occupied primarily by native people. Powers are to be delegated, and limited to those relating to child welfare services.

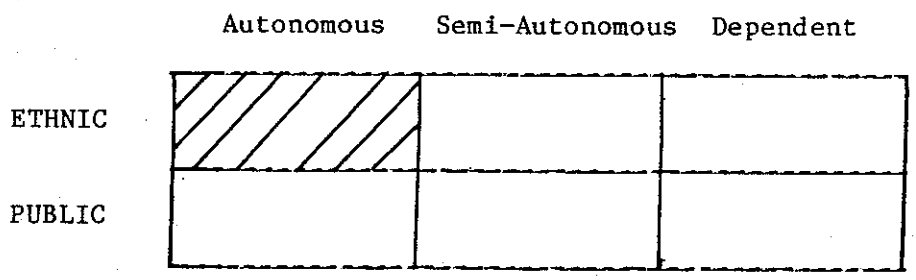
LOCAL/COMMUNITY GOVERNMENT

Model D

Model D is local ethnic government with autonomous powers, which are legislative.

Figure 3:7

LOCAL/COMMUNITY GOVERNMENT



Variations of this model are being proposed by the Assembly of First Nations, the Métis National Council and the Native Council of Canada. These governments would be virtually autonomous in their areas of jurisdiction. Such governments could choose to delegate certain powers to a regional level or to a national confederation of communities for some purposes, such as the negotiation of fiscal arrangements or the establishment of government services. However such arrangements would be voluntary, with decisions made at the local level. Since significant

legislative powers are entrusted to a local level of government, this model provides for the greatest flexibility and variation in structure among aboriginal self-governments.

The AFN, the MNC and the NCC all assert that citizenship or membership in such governments must be defined by the aboriginal communities themselves. All advocate the use of detailed rules, consistently applied, with an appeal procedure for the definition of aboriginal citizenship.

Most propose a full slate of legislative powers, which should be explicitly entrenched in the constitution, as opposed to delegated by Parliament or provincial legislatures. The full slate includes: land, resources and environment; collective self-determination or self-government; citizenship/membership in aboriginal communities; economic development, employment and training; hunting, trapping, fishing, harvesting and gathering; customary law and enforcement; language, culture and religion; fiscal relations and taxation of resources; education; and health and social services.

Model D governments would be entitled to a share in the fiscal arrangements made between federal and provincial governments. Sufficient fiscal resources must be available to enable these aboriginal governments to supply services at a level comparable to that available across Canada (section 36 of the **Constitution Act, 1982**, the equalization and regional

disparities clause). Therefore, adequate provisions would have to be made for equalization payments and cost-sharing arrangements. Funds could also be provided via transfer payments, preferably in the form of block grants, or through a combination of cash payments and tax transfers. Such governments could also have revenue-raising capacity, including the levying of certain taxes in such areas as resource taxation.

It is conceivable that local aboriginal governments would be directly linked to the federal government. This would be logical for Inuit and Indian communities, being a federal responsibility under section 91(24), and possibly even for Métis communities, depending on whether they are now (or in future are brought) within the purview of this section.

According to the Assembly of First Nations, First Nations governments would not necessarily correspond to current Indian band parameters, as these are merely creatures of the federal government's **Indian Act**. Rather, they would be composed of large groups of Indian people.

This model most closely approximates that recommended in the Report of the House of Commons Special Committee on Indian Self-Government, popularly known as the Penner Report. The 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. Indian First Nations

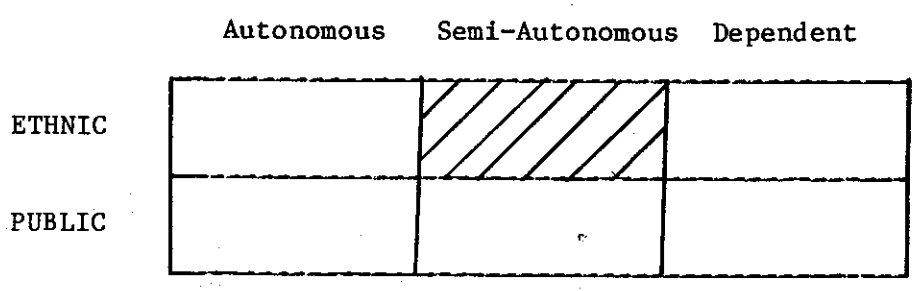
governments would apply for recognition, develop explicit criteria for self-identification of membership, and establish an appeal procedure for membership disputes. Block funding would be provided by the federal government. The federal government's response to the Report, as represented in Bill C-52, an Act relating to self-government for Indian Nations, did not capture the spirit of the Committee's recommendations. For example, section 26 of the bill dealt with the "Breakdown of Indian Nation Governments", while section 27 enabled the federal Minister to appoint an administrator to carry out the essential functions of an Indian Nation government if, in his opinion, it is unable to do so. Bill C-52 died on the Order Paper with the dissolution of the last Parliament in 1984.

Model E

Model E is local ethnic government with semi-autonomous powers, some of which are legislative.

Figure 3:8

LOCAL/COMMUNITY GOVERNMENT



In this model, certain powers would be legislative while others, of a more administrative nature, would be recognized by federal and/or provincial governments. This model can be compared to an enhanced form of Indian band government, with substantially greater powers than those which now exist for Indians under the current system. This model could also apply to Métis and non-status Indians in the event that land bases could be procured. Such a possibility exists in Alberta with respect to the Métis settlements.

As with Model D, membership or citizenship would be based on some ethnic determination of "aboriginality" together with community acceptance. Again, this would have to be determined by the aboriginal people themselves in the particular community, rather than by the federal or provincial government.

Funding for aboriginal self-government of the Model E variety would probably come from a combination of sources, including transfer payments, cost-sharing arrangements, specific conditional grants, and limited forms of taxation. Fiscal arrangements such as EPF and block grants would be less likely sources.

An example of this approach from the province of Québec concerns the aboriginal peoples of James Bay. After the James Bay and Northern Québec

Agreement was reached in November 1975, and given effect two years later, it remained for some form of aboriginal government to be established. The **Cree-Naskapi (of Québec) Act** (Bill C-46), passed in June 1984, enables eight Cree bands and one Naskapi band within a 1300 square mile area in northern Québec to be the local governments in these communities.

The Act came after trilateral negotiations among the federal and Québec governments and the James Bay Cree and Naskapi. A funding arrangement was worked out whereby the federal government would pay to the aboriginal peoples an annual sum of money. (In the first year, this was estimated to be $11 million.)

The Act grants to the bands powers more extensive than those given to a municipality. According to section 45 of the Act, the powers include: administration of band affairs; regulation of buildings; health and hygiene; public order and safety; protection of the environment, including natural resources; taxation for local purposes, other than by means of an income tax; roads and traffic; operation of businesses, and parks and recreation.

Perhaps the most important powers concern the administration of land. The band has exclusive rights to the uses and benefits of the lands, although outright ownership and mineral rights are retained by the province. It will have exclusive right to forestry resources, subject to provincial approval.

Membership criteria for establishing political participation in Indian government is based upon a provision proposed by the Cree and Naskapi (thereby abandoning the criteria outlined in the federal Indian Act).

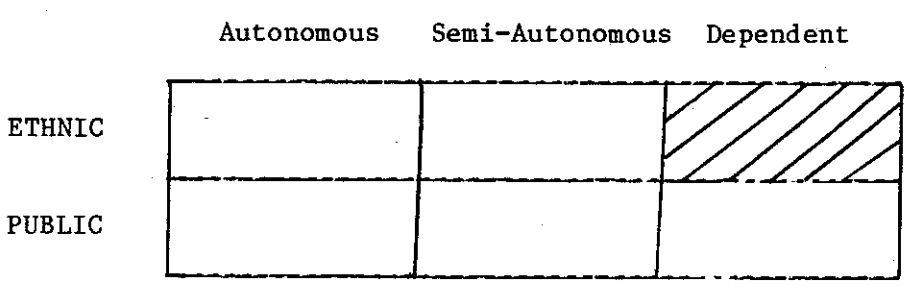
Another example from Québec suggests that the provincial government, through a series of intergovernmental agreements (Québec government -- aboriginal government), might be following a course which could lead to the establishment of Model E aboriginal self-governments. An intergovernmental agreement reached between the Kahnawake Mohawks and the Government of Québec on April 24, 1984 provides for the provision of funds by the provincial government for the building of a hospital plus an annual operating budget. Certain conditions regarding services and public tendering must be met. Included in that intergovernmental agreement is a clause recognizing the right of aboriginal nations to have and control institutions in such areas as culture, education and health.

Model F

Model F is local ethnic government with dependent powers, primarily of an administrative nature.

Figure 3:9

LOCAL/COMMUNITY GOVERNMENT



Existing Indian band governments are examples of the Model F form of aboriginal self-government. As such, Model F cannot be a serious model of self-government for aboriginal peoples. It is presented here for purposes of comparison. Although it exists only for status Indians, it could be applicable to Métis and non-status Indians in the event that land bases could be procured.

In this model, government powers would be essentially administrative, and confined to such areas as culture, education and language. The local government would have responsibility for administering a variety of local services to the community, which would be funded for the most part through conditional grants. In the case of Indians, powers would be delegated by the federal government. In the case of Métis, powers would be delegated by the federal government if it is deemed that Métis come within the purview of section 91(24) and if land bases are procured for them by the federal government. Otherwise, powers could be delegated from the provincial

governments in a fashion similar to that which exists in Alberta under the **Métis Betterment Act.** In this case, the burden of providing the land base would fall upon the provincial government.

It is useful at this point to review how the proposals of aboriginal peoples and the examples noted in this chapter relate to the six models of aboriginal self-government. This is depicted below.

Figure 3:10

Relationship of Models of Aboriginal Self-Government to Aboriginal Proposals and Existing Arrangements

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="3">Power</td></tr>
<tr><td>Autonomous</td><td>Semi-Autonomous</td><td>Dependent</td></tr>
<tr><td rowspan="2">Regional</td><td>Ethnic</td><td colspan="2">Model A
Nishga proposal</td><td></td></tr>
<tr><td>Public</td><td colspan="2">Model B
Nunavut proposal
Denendeh proposal
Yukon proposal
Greenland</td><td>Model C
Kativik Regional Government
DNS Experiment
Nishnawbe Aski Nation agreement (Ontario)</td></tr>
<tr><td rowspan="2">Local</td><td>Ethnic</td><td>Model D
AFN proposals
NCC proposals
MNC proposals
Penner Report recommendations</td><td>Model E
James Bay and Northern Québec Agreement (Québec)</td><td>Model F
Existing Indian band governments</td></tr>
<tr><td>Public</td><td colspan="2"></td><td></td></tr>
</table>

This review provides a convenient base from which to summarize the positions of the parties to the constitutional negotiations -- federal, provincial and territorial governments and aboriginal peoples' organizations -- on these six models.

SUMMARY OF POSITIONS

It would be a bit too simplistic to say that aboriginal peoples advocate either Models A or D -- depending on whether they live in the north or the southern part of the country -- and that governments tend to see self-government as developing along the lines of Models C or F. Nevertheless, there is a kernel of truth to this statement, although it would need to be qualified by various caveats and exceptions.

Some points need to be underlined. On this, as on virtually all other issues dealing with aboriginal matters, the provincial governments do not speak **en masse**. Certain of the provinces are much more amenable than others toward granting self-government closer to the Models of A and D. (In the latter case, Model E could possibly be a compromise position.)

One problem is that no government has a very clear idea of what it is willing to accept in terms of aboriginal self-government. In fact, most governments have little or no idea.

As for the aboriginal groups, they have developed their notions of self-government with varying degrees of detail and clarity. Furthermore, it is difficult to know to what extent the aboriginal proposals are simply bargaining positions and how much they would be willing to negotiate.

One final point to be made is that some of these models could develop only after a lengthy evolutionary process. In fact, some of the models could possibly serve as precursors to models that grant greater autonomy to aboriginal governments.

The process by which these might be attained is the subject of the next chapter. Before taking up this subject, however, we will look briefly at some proposals which do not presuppose a land base.

Proposals Not Assuming a Land Base

At the outset of this chapter several proposals were identified which, while not constituting aboriginal self-government, would nonetheless go some way to increasing aboriginal self-determination.

Early in the section 37 constitutional negotiation process, and to some extent before it, the idea of guaranteed representation for aboriginal peoples in the House of Commons and provincial legislatures gained some

currency. The idea has since been expanded to include the Senate, territorial legislatures and some government bodies, although its popularity appears to have diminished somewhat.

Guaranteed representation is an integral part of the Native Council of Canada proposal for a two-tier government structure designed to serve the interests of both aboriginal individuals and collectivities. The first tier would be exclusively aboriginal, and would encompass communities in a structure similar to that of band governments at the aboriginal individual level, at the regional, provincial or territorial level, and at the national level. The second tier would play an integration function, and provide for aboriginal participation in non-aboriginal governing structures. This would include guaranteed seats in the House of Commons and Senate, provincial legislatures, and municipal councils. The NCC supports the idea of guaranteed representation for all aboriginal people, although it believes that there should be distinct representation for each group of aboriginal peoples. The distribution of the aboriginal block of seats would be determined by establishing an aboriginal electoral roll. Aboriginal people could choose to be on the aboriginal electoral roll or the general electoral roll, but not both. A census would be taken to determine the size of each aboriginal population, and to determine the proportion of seats to be set aside for each group. Pending the census results, five per cent of the seats would be set aside for aboriginal peoples.

The Métis National Council, the Inuit Committee on National Issues, and the Government of the Northwest Territories have also advocated guaranteed representation for aboriginal peoples. The MNC has put forward one option of having aboriginal Members of Parliament and legislatures selected through indirect election by Métis self-governments. The Assembly of First Nations is opposed to guaranteed representation, and views it as an unacceptable alternative to First Nations Government. It is worth noting that the Report of the House of Commons Special Committee on Indian Self-Government did not support guaranteed representation in Parliament for Indian peoples either.

Most governments have no formal position on the matter of guaranteed representation for aboriginal peoples, and note that the issue seems to be near the bottom of the constitutional agenda. It is their perception that aboriginal peoples' organizations have "backed off" the issue. Three governments are opposed to the idea, while two support it.

Between 1840 and 1860, New Zealand experimented with a number of policies designed to improve race relations. Among them was guaranteed representation for New Zealand's indigenous peoples, the Maoris. During the race wars, the Maoris were given four seats in Parliament, with Maori candidates to be elected directly by Maori voters. Maori Members of Parliament were to assume all of the authority, rights and responsibilities

of their non-aboriginal colleagues. Maori people still elect four Members of Parliament through this system of guaranteed representation, although their effectiveness is openly questioned. They appear to wield little influence in the parliamentary process.

The implementation of guaranteed representation for aboriginal peoples would not be without problems. Agreement would have to be reached on criteria for identifying the aboriginal people of Canada. Without an aboriginal census, it would be difficult to determine the number of aboriginal people, and the number of seats to be allotted to each group. The method of election and the determination of electoral boundaries would require resolution. So too would the government agencies, boards and tribunals that would be subject to guaranteed representation. There is also the fear that guaranteed representation for one "ethnic group", aboriginal peoples, would generate similar demands from other groups. Finally, there would undoubtedly be some problems with regard to the acceptance of aboriginal MPs or MLAs, elected through guaranteed representation, by their non-aboriginal colleagues. Non-aboriginal Members, having achieved their station through the "rough and tumble" of the conventional electoral process, would be unlikely to view the special (read "privileged") aboriginal Members as political equals.

Proposals have also been put forward for the creation of special purpose aboriginal advisory bodies to government, designed to increase the

involvement of aboriginal peoples in the political process. These proposals have often been advanced in the context of "remedies" for aboriginal peoples without a land base -- Métis and non-status Indians, or those who have migrated to urban areas, which include off-reserve treaty Indians as well. Special purpose bodies of aboriginal peoples, or councils controlled by aboriginal peoples are not new. Provincial associations of aboriginal peoples, such as the Federation of Saskatchewan Indian Nations, the Ontario Métis and Non-Status Indian Association, and Alberta Native Women, have been active for a long time. They have served as political representatives of aboriginal peoples before non-aboriginal governments, as sounding boards and policy advisors to governments on aboriginal policy matters, and as delivery agents of government services to aboriginal peoples. The service delivery function is most often performed by local organizations (often "locals" of provincial aboriginal organizations), and includes programs in such fields as housing, training, life skills, alcohol addiction treatment, and economic development.

Perhaps the most notable example from the international context of an aboriginal advisory body to government is that of the Sami (Lapp) Parliament in Finland, although there the Sami have a homeland (the Lapp Area). A 20 delegate Sami Parliament was elected in 1972 to advise the President on a range of matters affecting the Lapp Area, including resource management, education, hydroelectric developments, recreation and the environment. Although it has no legislative powers, the Parliament does

name representatives to government boards, and must be consulted on socioeconomic and political developments in the Lapp Area. It should be noted, however, that this has not led to the recognition of aboriginal rights, nor attracted much attention to Sami land claims on the part of the Finnish government.

In Australia, the National Aboriginal Congress was established in the late 1970s in order to improve aboriginal representation to government. The Congress was composed of 46 members from 46 electoral districts, elected at large to state branches. Each branch, of four to ten members, elected their own chairman and delegates to the National Aboriginal Conference. Each branch had its own secretariat, and each Congress member was a full-time, government-paid employee. The Commonwealth government retained control of the Congress constitution, which defined its composition, structure and powers. In part because of its lack of accountability to Aboriginals, and in part owing to the absence of an independent financial base, the legitimacy of the National Aboriginal Congress was seriously eroded. The emergence of Aboriginal Land Trusts, with significant powers over Aboriginal lands, further eroded Congress legitimacy.

To the extent that such advisory bodies or councils of aboriginal peoples can influence government policy on aboriginal matters, through input to the decision-making processes concerning legislation and

programming, they could improve the status quo. A cautionary note is in order, however. The advisory and dependent status of such bodies can render the advice and its consideration less serious.

4 PROCESS AND INSTRUMENTS -- THE NEGOTIATION AND ESTABLISHMENT OF ABORIGINAL SELF-GOVERNMENT

Controversy surrounds not only the substance of aboriginal self-government -- what is to be done -- but also the process -- how it is to be done. In this chapter we examine issues involved in the latter question, the political processes and instruments for negotiating and establishing aboriginal self-government.

INSTRUMENTS

A variety of instruments exists through which aboriginal self-government could be established, and there are variations within each instrument. The most common are listed below in point form, with the variations noted.

Figure 4:1

Methods Available for Establishing Aboriginal Self-Government

Instrument	Variations
1. Constitutional entrenchment	a) of a third order of government, with powers enumerated in a new section of the Constitution b) of individual self-government charters c) of the right to self-government
2. Treaties	a) modern land claims settlements b) renegotiation of existing treaties
3. Recognition of powers	a) by the federal government b) by the provincial governments
4. Legislation	a) at the federal level b) at the provincial level
5. Intergovernmental agreements	a) with the federal government b) with provincial governments
6. Administrative arrangements	a) with the federal government b) with provincial and municipal governments

These various means of establishing self-government range from the most secure to the more flexible in relation to their vulnerability to amendment. The first two instruments -- constitutional entrenchment and treaties -- are by definition protected by the constitution; in some

instances, the third instrument, the recognition of powers, would be entrenched in the constitution. In theory, the arrangements under any of the remaining three methods could be afforded similar protection under the constitution. A special constitutional amending formula, which would require the consent of the aboriginal peoples involved, could be devised for any matters directly affecting aboriginal peoples. One further point concerns the negotiating process and the timing of entrenchment. Aboriginal self-government could be established from the "top down" -- entrench the principle first, then negotiate the form and substance. Alternatively, the "bottom up" approach could be adopted whereby powers, structures and services would be negotiated -- perhaps incrementally -- followed by entrenchment.

Constitutional Entrenchment

The most secure and comprehensive basis for aboriginal self-government is the constitutional entrenchment of a third order of government. Equally secure but less comprehensive is the entrenchment of individual self-government charters. Negotiations over powers and jurisdiction would necessarily precede entrenchment. If only the right to self-government were entrenched in the constitution, negotiations about form and substance would follow. Entrenchment of the right to self-government could coincide with any of the other instruments, or alternatively precede negotiations leading to a third order of government or individual self-government charters.

The timing of entrenchment and the form it takes relate directly to the debate over whether aboriginal self-government should be established from the "top down" or from the "bottom up". The latter approach underlay the proposal made by the federal government in Yellowknife in January, 1984 for community "trial" negotiations. Most provincial governments, although uncommitted, were also partial to the "bottom up" approach, since a gradual implementation, with working aboriginal governments "on the ground", might ease some of the anxiety in the non-aboriginal population on this issue.

For some of the same reasons (incremental change, uncertainty of entrenchment), most aboriginal peoples' organizations opposed the "bottom up" approach, believing that it would inhibit the establishment of the principle of aboriginal self-government, fragment the Section 37 process, and break down into local claims negotiations, with aboriginal peoples being "detailed to death". Besides, they argued, enough processes were already in place -- the First Ministers' Conferences and the federal commitment to establishing Indian self-government.

Only the Métis National Council supported community consultation in principle, and then with several qualifications. The consultative mechanism would have to be tripartite in nature (involving federal and provincial governments and the Métis people), and it would be preferable to have separate regional negotiations.

All four aboriginal peoples' organizations support the entrenchment of the right or principle of aboriginal self-government in the constitution. All but the Inuit advocate the entrenchment of a third order of government, with powers enumerated in a new section of the constitution. Although this is their first option, most aboriginal organizations think it to be an unlikely development, given government attitudes on the matter. This is a thoroughly accurate assessment on the part of aboriginal peoples. During the course of our research, each one of the thirteen governments at the negotiating table ruled out an entrenched third order of government. They were somewhat more favourably inclined to entrenching the right or principle of aboriginal self-government in the constitution. Six favoured entrenching "some sort of principle" on aboriginal self-government/ autonomy/self-determination. The remaining seven were fairly evenly split between having no position on the issue, because of the need to clarify "self-government", and questioning the need for entrenching the principle in the constitution.

There has not been much support to date from any of the 17 parties for entrenching individual self-government charters in the constitution. However, this might be viewed as the final step in the treaty-making process, which we examine next.

Treaties

Treaties offer the most secure basis for aboriginal self-government next to the constitutional entrenchment of a third order of government. Under section 35(1), existing and future treaty rights are recognized and affirmed in the constitution. If the treaty instrument were used, negotiations would have to precede the signing of treaties, which would then be recognized under section 35. It is unclear whether recognizing and affirming such treaties amounts to a constitutional guarantee. Treaties could take the form of modern land claims settlements, incorporating aboriginal self-government, or the renegotiation of existing treaties, also incorporating self-government provisions. The former could apply to all aboriginal peoples now without treaty; the latter would be limited to Treaty Indians and those aboriginal peoples now subject to modern treaties (e.g. James Bay Agreement).

All four aboriginal peoples' organizations support a process of treaty-making or land claims settlements for achieving self-government. This is entirely consistent with first entrenching the right or principle of aboriginal self-government in the constitution. The treaty-making process might involve only the federal government, or both federal and provincial governments. Certainly the Assembly of First Nations views it as a bilateral process involving only the federal government. In the

North, current land claims negotiations involve both territorial and federal governments.

Negotiations with Métis will ultimately depend, if they proceed at all, upon resolving whether Métis are or should be included under section 91(24). Regardless of the outcome, a trilateral land claims/treaty process, or one involving only Métis and provincial governments would ensue. This is a highly unlikely development, since all federal and provincial governments take either the position that Métis people have no land rights (any earlier rights having been extinguished through scrip), or have taken no position on the matter.

Only the two territorial governments take the position that Métis have land rights, and that Métis are entitled to land claims settlements. Métis are part of the Dene-Métis claim in the Mackenzie Valley in the Northwest Territories, and of the Council of Yukon Indians claim in the Yukon. Moreover, both territorial governments believe that all aboriginal peoples with valid, unresolved traditional claims -- including Métis, Inuit, status and non-status Indians -- are entitled to land claims settlements, and that there should be no inequality among groups of aboriginal peoples. Since Métis are entitled to land, claimable in each province, land claims negotiations in provinces should proceed on a trilateral basis among Métis peoples, federal and provincial governments.

Provincial governments perceive treaties or land claims settlements with Indian and Inuit peoples as a purely federal matter. However, the federal government has not demonstrated much interest in re-opening existing treaties, unless claims of fraudulence, inaccuracy or lack of valid consent on the part of Indian peoples can be proven.

The treaty or land claims instrument is clearly one that is favoured by all four aboriginal peoples' organizations. Just as clearly, most provincial governments have not considered it, do not understand it, or view it as a matter of concern to only the federal government. Given the support for this instrument on the part of aboriginal peoples, it behoves governments to carefully reconsider their positions. It would appear that this instrument will be used in the North where it seems very well suited. A cautionary note should be made, however. Care should be taken that national constitutional process and instruments adopted south of 60° respect the ongoing land claims processes north of 60°. An attempt to apply "universal" negotiating processes or legal instruments is ill-advised. Different needs, situations and aspirations require different approaches and processes.

Recognition of Powers

The recognition of powers presents a sort of "middle ground" in terms of aboriginal self-government. "Recognition of powers" is used rather than

"delegation of powers" for two reasons. First, aboriginal peoples find the term "delegation of powers" to be offensive because, in their view, it places them in the position of a supplicant before federal and provincial governments. Second, the term implies that aboriginal people have no right to self-government. It seems needlessly provocative to continue to use the phrase.

Powers of aboriginal self-government could be recognized by the federal government, by the provincial governments, or by both orders of government. The instrument could be used in a number of ways. Recognized powers could be "at the pleasure" of recognizing governments, without resorting to constitutional entrenchment. This would be less secure, as these powers would lack the protection afforded those which require a constitutional amendment to be changed. Recognized powers could also be referentially incorporated in the constitution. While this is similar to the entrenchment of a third order of government, only those federal and provincial governments that chose to recognize certain powers of aboriginal governments would be constitutionally required to do so. Aboriginal government powers would be irrevocable in the sense that they could not be unilaterally revoked by the recognizing government. Furthermore, it would be possible for a federal or provincial government to recognize powers only with respect to certain aboriginal governments. This could be accomplished by negotiating an accord between an aboriginal government and the federal and/or provincial governments, and referentially entrenching the agreement in the constitution.

Whether constitutionally protected or not, powers could be recognized incrementally or in a package following a period of negotiations. Again, the recognition instrument is quite consistent with first entrenching a right or principle of aboriginal self-government in the constitution.

Aboriginal peoples' organizations are less enamoured of the recognition instrument than with the others discussed above. Although the Assembly of First Nations favours explicit entrenchment of powers in the constitution, it has not ruled out the possibility of federal legislation recognizing Indian self-government. The Inuit Committee on National Issues favours only the treaty process. The Native Council of Canada maintains that any recognition of powers would have to be constitutionally entrenched. The Métis National Council has proposed two options with respect to the recognition instrument. The first, and preferred option would be to entrench the right to Métis self-government in the constitution, with jurisdictional powers and responsibilities established through legislative recognition by federal and provincial governments. The second option would be to include a right to self-government in the constitution, with the definition and specification of this right left to detailed negotiations.

Although aboriginal peoples' organizations find the recognition instrument less appealing than others -- especially if powers are

recognized "at the pleasure" of governments -- some governments are more favourably inclined. However, of those governments, several would prefer that the recognition instrument be left unrelated to any constitutional instrument, such as the entrenchment of the right or principle of self-government. Most governments have yet to take a position on the recognition of powers as an appropriate legal instrument for implementing aboriginal self-government. The absence of fixed positions on this instrument on the part of governments, coupled with a decidedly lukewarm consideration of it by aboriginal peoples' organizations, suggest that an accommodation could come to focus on the recognition of powers approach, coupled with the constitutional recognition of the principle of aboriginal self-government.

Legislation

Aboriginal self-government could be implemented through legislation at either the federal level, the provincial level, or at both levels. As it relates to Métis, this would depend, once again, on whether they were included in section 91(24) and thus came under federal jurisdiction. The federal government under Prime Minister Trudeau introduced in 1984 Bill C-52 which addressed Indian self-government, and which died on the order paper. Some provincial governments have expressed the view that it is quite within their jurisdiction to legislate for Métis self-government, if they so choose.

The relationship of aboriginal self-government to federal or provincial governments under such an arrangement would be very similar to that of local or regional governments to provincial governments. Legislatures or Parliament would have ultimate authority with respect to aboriginal self-government, including the power to revoke it. In this sense, the legislation instrument is different from the recognition instrument in that powers are essentially delegated.

No aboriginal peoples' organization advocates establishing self-government only in legislation without the principle or right to self-government being entrenched in the constitution. The reasons are obvious. If protected only by legislation, aboriginal self-government is subject to the "whims" of the majority non-aboriginal population, as represented through Parliament and provincial legislatures. Given the track record of Canadian governments in the field of native affairs, one can understand this apprehension. Moreover, employing the legislative instrument alone would create a disturbing silence on the right to aboriginal self-government in the constitution. Not only would the right to self-government not be guaranteed in the constitution, it might also not be recognized and affirmed, depending on the interpretation of the "existing rights" clause in section 35(1).

Although most governments have taken no position on whether self-government is an existing right under section 35(1), at least two have stated that they do not think this is so. Others have argued for a non-constitutional (and thus presumably legislative) instrument to implement aboriginal self-government. In summary, the legislative instrument is more appealing to governments, but less so to aboriginal peoples' organizations unless, as indicated earlier, it is tied to recognition of the principle of self-government in the constitution.

Intergovernmental Agreements

Aboriginal self-government could be implemented through intergovernmental agreements, with either the federal government, the provincial governments, or with both orders of government. Government-to-government agreements (federal-aboriginal or provincial-aboriginal) need not address aboriginal or constitutional rights, but simply give legal status to political accords or agreements. Self-government could be established incrementally through a series of agreements across policy sectors, or as the result of a simple omnibus or general "umbrella" agreement. Negotiations would necessarily precede intergovernmental agreements, although administrative arrangements could be negotiated pursuant to a general umbrella agreement.

In order to enter into intergovernmental agreements, aboriginal self-governments would require some status in law. They would require incorporation pursuant to new or existing federal and/or provincial legislation. This could be accomplished through existing business, companies, corporations or societies acts, or through existing municipal legislation. An expess prior agreement, perhaps through a constitutional accord, might also be a necessary precondition.

Intergovernmental agreements provide perhaps the least secure basis for aboriginal self-government. Were this instrument to be employed, aboriginal self-government would be protected by neither the constitution, Parliament nor provincial legislatures. Protection would be afforded only by federal and provincial executive branches, by Cabinets, through an order-in-council or other mechanism enforceable through the courts, should governments breach the agreements.

The intergovernmental agreement instrument has received virtually no attention in the constitutional negotiations to date. Only one or two governments have given the approach any considerations, although they view the instrument in a positive light. None of the aboriginal peoples' organizations has considered the intergovernmental agreement mechanism, perhaps because the Accord-like status of such agreements has not been explored. Without this protection, one might predict their responses. Without constitutional recognition or protection, or protection from

Parliament and provincial legislatures, aboriginal self-government would depend on the enlightened views of federal and provincial cabinets, and more likely upon the views of the minister responsible for aboriginal self-government agreements. Such an approach is unlikely to gain much currency among aboriginal peoples.

Administrative Arrangements

"Aboriginal self-government" could be established through a series of administrative arrangements with federal, provincial and municipal governments. These arrangements would involve aboriginal peoples, through various forms of organization, delivering government services. Quotation marks are used because this instrument does not implement self-government in any conventional sense of that term. It is better known as "contracting out" or "third party delivery" of services to aboriginal peoples by organizations of aboriginal peoples.

To a large extent, this approach is already in place in the prairie provinces, Ontario and Québec, and on Indian reservations. In the course of our research, it was found that those governments that have adopted this approach are prepared to extend, or are anxious to extend it to other areas, programs and services. More interesting, however, was the finding that several provincial governments which do not follow this approach are now willing to have "aboriginal governments" act as agents of the provincial government in the delivery of services.

Aboriginal peoples rightly argue that administrative arrangements for the delivery of government services are a separate matter from that of aboriginal self-government. Although an improvement over direct government delivery, third party delivery of services to aboriginal people by aboriginal people is no substitute for self-government. It is not enough for the aboriginal peoples' organizations or for most governments involved in the section 37 process. In a sense, administrative arrangements such as these represent the **status quo** in terms of relations between aboriginal peoples and Canadian governments, a **status quo** which most parties to the negotiations reject as unacceptable.

POLITICAL PROCESSES

The political processes for negotiating aboriginal self-government, most notably the section 37 process, have not escaped critical review on the part of those involved in the negotiations. As part of the research, each party to the negotiations was asked what is wrong with the process and how it might be improved.

The section 37 process is fraught with the difficulties one might expect in a series of negotiations involving 17 parties. It is expansive, unwieldy, with many people involved. Each party, in varying degrees, is torn by internal strife. The political will of negotiating parties ebbs

and flows. The nature of the discussions is often adversarial. This is the "pith and substance" of intergovernmental negotiations, and should come as no surprise to any student of Canadian federalism.

However, there are difficulties in the section 37 process which are in many ways unique. The gap between the perceptions and expectations of aboriginal peoples and Canadian governments may be unprecedented. The profound differences in values and perspectives between aboriginal tribal and traditional views and European-Canadian views cannot be understated. Not only are the "mind sets" foreign to one another, but so too are the languages and concepts.

The absence of shared perceptions as to what the process is designed to achieve was dramatically revealed in comments made regarding the Working Groups established after the 1983 Conference to assist in preparations for the 1984 First Ministers' Conference. Aboriginal peoples came to the Working Group sessions to negotiate; government officials came to listen and learn. Aboriginal peoples came with "instructions" from the political level; government officials did not. Officials from aboriginal organizations went back to their political leaders to check positions on various issues; government officials did not elaborate positions on many issues since, in most cases, policy was not yet formed. It is only natural, in light of this lack of mutual understanding, that the Working Groups were judged a failure by both aboriginal peoples and governments.

There are other problems that are unique to this negotiation process as well. Indian organizations in several parts of the country refuse to speak to provincial governments. This is the case in parts of Western Canada, Atlantic Canada and Québec. Negotiations on aboriginal self-government are not assisted by this very literal "failure to communicate". The terms of reference for this series of negotiations is perhaps less clear than any other before it. The federal government is, in some ways, in a conflict of interest situation, as both a protector and a prosecutor of aboriginal rights.

Although there was a common chorus among parties to the negotiations on the problems inherent in the section 37 process, the parties were very much out of tune in terms of how to improve it. Some advocated a "workable" system of committees, on which not all governments nor aboriginal peoples groups would be represented. Others suggested limiting the number of delegates in each party at meetings and conferences. Some proposed more well-defined terms of reference. Others suggested working from the bottom up, with examples, trials and various models of aboriginal self-government before considering constitutional entrenchment. Some wished to entrench principles or reach a political accord first. Some thought that governments should meet first without aboriginal groups present; others (including some governments) disagreed.

Some thought that negotiations should proceed with each aboriginal organization on specific agreements. Others advocated a regional or provincial approach, rather than a national one. Some thought that the focus should be on clarifying federal and provincial jurisdiction vis-à-vis aboriginal matters before addressing self-government. Others advocated an independent chairman -- not the federal government -- for the working groups, ministerial and First Ministers' meetings. Some supported the re-establishment of the Continuing Committee of Ministers on the Constitution (CCMC), which had existed in the 1978-81 period. Others suggested a regional or provincial process parallel to the national one. Some advocated a bilateral process while others still favoured a trilateral one. Some wished to end the Working Group process, others wished to continue it. Some wished to disaggregate the aboriginal peoples into their constituent parts (Indian, Inuit and Métis) for purposes of negotiation; others did not. And so it went.

It must be recognized, however, that the section 37 process is not the only one concerned with aboriginal self-government. It is assumed that negotiations must continue between the federal government and the Assembly of First Nations regarding a successor to Bill C-52, legislation designed to establish Indian self-government. Trilateral negotiations continue in the Yukon and Northwest Territories on land claims settlements, which include provisions for Indian, Inuit and Métis self-government. There is reason to believe that these negotiations will continue -- and should continue -- in addition to the section 37 process.

This review of the problems of and prescriptions for the section 37 process might lead one to assume that no common ground can be found for improving the situation. This may indeed be the case. Yet during the research, there seemed to be emerging at least the kernel of a consensus on the process. All 17 parties to the negotiations are now rethinking the political process. And perhaps unknown to one another, their thinking is along similar lines. Many are considering a set of parallel negotiations at the regional or provincial level to supplement and feed into the national process. Maritime premiers are to meet with leaders of Métis and non-status Indians. A number of provincial governments have advocated trilateral meetings at the provincial level in order to address better the particular situations of both their province and the aboriginal peoples living within it. Aboriginal peoples' organizations have been considering separate regional processes for the various native groups, in recognition of the diversity of the groups and their needs and aspirations (not to mention agendas).

Perhaps it is unrealistic to assume that a national process alone can address the concerns of federal, provincial and territorial governments, of Indian, Inuit and Métis peoples, of Northerners and Southerners, of the prairies and the Maritimes.

There is also an emerging consensus that the national process needs to be strengthened. Intermittent First Ministers' Conferences are unlikely to drive negotiations along at a rapid pace. Several provincial governments and aboriginal peoples' organizations are considering the re-establishment of the CCMC (Continuing Committee of Ministers on the Constitution), with the participation of aboriginal peoples organizations, in order to promote more vigorous negotiations at the national level. It would be possible to integrate both a provincial/regional process and a CCMC process with the existing section 37 national First Ministers process.

These kernels of consensus may not germinate at the forthcoming First Ministers' Conference on Aboriginal Constitutional Matters, but they deserve the careful scrutiny of all parties to the negotiations. All have agreed that the process must be improved, and without a workable process, agreement on the substance is unlikely to emerge.

5 WHERE DO WE GO FROM HERE?

It seems appropriate in the concluding chapter of this discussion paper to look to the future of constitutional negotiations with respect to aboriginal self-government in Canada. Two time frames are employed in this analysis of what may lie ahead. First, we examine what might be accomplished at the 1985 First Ministers' Conference on Constitutional Aboriginal Matters, scheduled to take place in Ottawa on April 2 and 3. Second, we examine what might occur in the longer term.

The 1985 First Ministers' Conference

A great paradox exists in the few months remaining before the First Ministers' Conference on Constitutional Aboriginal Matters. Everyone agrees that the Conference must not be a failure, or be seen by Canadians to be a failure. There is a widespread feeling of a new "window of opportunity" in intergovernmental relations, of a spirit of goodwill which

must not be squandered. A newly elected federal government under Prime Minister Brian Mulroney has talked of a new era of federal-provincial cooperation. Both federal and provincial governments have indicated their willingness to accommodate across a wide range of issues. The stage is set for an agreement in April; a "saleable package" acceptable to all parties will emerge.

Yet no one knows what that package might contain. Worse yet, few governments appear to be actively working toward that end. Something will happen, but no one knows what. Thus the paradox -- goodwill abounds, but there is little idea of how to translate it into action.

The new federal government has had little time to master the complexities of the issues involved in the process, let alone formulate policies on them. However, the aboriginal peoples are unlikely to allow the federal government to regard the 1985 First Ministers' Conference as yet another "learning experience". The Conference must be a success.

Given the freshness of the federal government and the short lead time before the Conference, little agreement on the substance of aboriginal self-government can be expected. Hence, if there is to be any agreement, it will likely emerge with respect to process. This could occur in at least two areas -- the instrument for establishing aboriginal self-government, and the section 37 process for negotiating aboriginal self-government.

With regard to the former, it is possible that an agreement could be reached at the April Conference to entrench in the constitution a means whereby the powers of aboriginal self-government would be recognized, without prejudice to what those powers might be, and without prejudice to what form(s) aboriginal self-government might take, these being subject to a new negotiating process outlined below. There is already some discussion of devices for recognizing the rights of aboriginal peoples, through either constitutional entrenchment or a political accord, with the identification and elaboration of these rights subject to further negotiations. The "recognizing powers without prejudice" formula would have the effect of showing progress on the matter of aboriginal self-government, and of re-energizing the political wills of federal, provincial and territorial governments. It would not address the specific powers, forms or structure of self-government, leaving that to further negotiations between 1985 and 1987, when the last First Ministers' Conference under section 37 is scheduled to take place. Such a formula may be "saleable" to both governments and aboriginal peoples organizations, since it does not foreclose options of any parties to the negotiations.

It is also possible that an agreement could be reached at the April Conference, through a political accord, to strengthen the section 37 political process for negotiating self-government. Such an agreement could

stand alone, or be a companion agreement to that on "recognizing powers without prejudice." An accord on the political process could have two elements:

1. the creation of a trilateral negotiating process at the regional or community level to parallel and inform the national (section 37) process; and

2. the re-establishment of the CCMC (Continuing Committee of Ministers on the Constitution) with the participation of aboriginal peoples at the national level.

Either or both of these measures would serve to enhance the process of negotiation, and demonstrate the goodwill of all parties. More intensive negotiation should improve the pace of progress, a pace which must be increased if governments are to make tangible gains by their self-imposed deadline of 1987.

Furthermore, a political accord creating a process of trilateral negotiations at the regional or community level could be a companion agreement to entrenching in the constitution a means for recognizing the powers of aboriginal governments "without prejudice", and subject to further negotiations. The further negotiations would become those agreed

to in the political accord. Between 1985 and 1987, negotiations could proceed at the regional or community level with respect to aboriginal self-government powers, forms and structures. The agreements reached as a result of these negotiations could then be brought before the 1987 First Ministers' Conference for ratification, after which they would be protected under section 35 of the **Constitution Act, 1982**, as is the case with modern land claims agreements.

The Longer Term

The very real possibility exists that no agreements will be reached at the 1985 First Ministers' Conference. What is likely to be the future of the section 37 process should this happen? Each of the parties to the negotiations was asked this question. Most thought this to be an unlikely outcome, believing that at the very least a political accord to continue the process would emerge. If it does not, some spoke of a possible First Ministers' Conference in 1986, with more intensive negotiations between 1985 and 1987. At least one aboriginal peoples' organization stated that it would walk out of the section 37 process if nothing happened at the 1985 Conference. The possibility would increase that negotiations would break down altogether. Aboriginal peoples are already skeptical about the political wills of governments around the negotiating table. Some would regard another failed conference as the final straw, and would counsel their national organizations to pull out of further negotiations. Failure

in 1985 would send a strong signal to aboriginal peoples that not much could be expected to occur in 1987.

It is possible, of course, that other initiatives could arise if no agreement is reached at the 1985 Conference. It will be recalled that Senator Charlie Watt proposed, in April of 1984, the establishment of a Special Senate Committee on problems and issues facing Aboriginal Peoples of Canada (**Hansard**, April 5, pp. 430, 431). The Committee's proposed mandate included the examination of models of self-government. Were such a committee to be struck and hold hearings across the country, it could provide significant impetus to the constitutional negotiations on aboriginal self-government.

Parties to the negotiations were also asked this question: what if nothing happens by 1987? Some thought that, in this event, the section 37 process would be constitutionally extended beyond 1987. Some thought that section 37-type conferences should be held every five years in any event. Others thought the extension of the section 37 First Ministers' Conferences beyond 1987 to be unlikely, although they did not rule out trilateral meetings at the ministerial level. The overwhelming response, however, was that **something** will happen.

The grounds for such unshakeable conviction are strong. Aboriginal peoples will not be deterred if their struggle for self-determination is

set back a year or two. In a struggle hundreds of years old, the section 37 process represents a short, albeit crucial, time. But time is important. In the opening paragraph of this paper it was noted that an opportunity exists at this time, through the section 37 process, to right some of the past wrongs and injustices of hundreds of years of oppressive government policies and actions toward the aboriginal peoples of Canada. It is not often in the life of a nation that such a chance presents itself, nor when the eyes of the nation are focused on our indigenous people. True failure would be to squander this opportunity, rather than cheer in its realization.

The drive of aboriginal peoples for self-government will not be snuffed out. Failure would merely strengthen their resolve. Demands on governments to recognize aboriginal rights to self-government will not decrease, but increase. Public opinion and support for aboriginal peoples will not fall away, but will grow. It will be supported by world opinion, as aboriginal peoples from all continents demand an end to the supression of their rights. It is only a matter of time.

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