

**Issues in Entrenching
Aboriginal Self-Government**

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and
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**Report on the Workshop Held
on February 16-18, 1987**

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David C. Hawkes and Evelyn J. Peters

INTRODUCTION

Just over five weeks before the 1987 First Ministers' Conference on Aboriginal Constitutional Matters, a workshop was held in Kingston, Ontario on "Issues in Entrenching Aboriginal Self-Government". The Workshop was subtitled "The Search for Accommodation", a reference to the constitutional negotiations which would come to a head at the First Ministers' Conference on March 26th and 27th in Ottawa.

The purpose of the workshop was to examine the concerns, particularly those of federal, provincial and territorial governments, regarding the entrenchment of the right to self-government for aboriginal peoples in the constitution. Issues of several types were identified - political, legal, financial, as well as basic values - and their prospects for resolution analyzed. The objective was to identify possible areas of consensus and conflict in the search for accommodation.

The workshop, held on February 16-18, 1987, was the third and final one of a series organized by the Institute of Intergovernmental Relations, and was part of the Institute's larger project on "Aboriginal Peoples and Constitutional Reform". Representatives from the media were invited to attend the workshop, in order to encourage greater public understanding of the issues. The workshop also sought to facilitate the policy process by providing a forum for officials from the parties to the negotiations, for scholars in the field, and for interested observers to freely discuss the issues. Addresses by panelists and comments by discussants were deemed to be public, while there was to be no attribution of remarks made during the ensuing discussions.

The format and agenda for the workshop were derived from a logic, which appeared effective, of beginning by placing the issues in their larger context (e.g., political environment, prospects for agreement); then exploring the values underlying the debate (e.g., can the Canadian federal system accommodate the drive for aboriginal self-government?); and then examining how this debate is reflected in legal and financial perspectives (and in terms of technical argument).

The workshop highlighted the final year of the overall project, and its focus on the search for a constitutional amendment. Background papers were prepared on a number of pertinent topics - issues of jurisdiction and policy co-ordination, legal and political inequities among aboriginal peoples, and the search for accommodation itself. Officials from the parties to the negotiations were involved in the design - and redesign of the workshop agenda, included in this report as Appendix A.

Participants invited to the workshop included officials from federal, provincial and territorial governments, representatives from national aboriginal peoples' organizations, scholars and students in the field, and members of the media. The timing of the workshop exposed both the dangers and opportunities of conducting research and holding conferences at the "cutting edge" of public policy. Events in the political arena twice affected the workshop. First, it was postponed because of a conflict with a meeting set for government ministers and aboriginal political leaders. After the workshop had been rescheduled and redesigned, meetings of ministers and officials were subsequently set which again caused a conflict. This, it would seem, is unavoidable. As a result, participation in the workshop, particularly from the parties to the negotiations, was lower than anticipated. A complete list of workshop participants is included in this report as Appendix B.

The report is organized in the following manner. The first two sections, on the political process and on public opinion, situate the issues in the wider context. The third section, on aboriginal self-government and the federation, examines the different fundamental values underlying the debate. Sections four, five and six explore the legal, financial and jurisdictional aspects of the arguments. Finally, in the conclusion, we discuss why the 1987 First Ministers' Conference on Aboriginal Constitutional Matters failed to reach agreement.

The organization of this report does not consistently follow the workshop agenda, or the order of the sessions. In some instances, the presentations have been moved, so that some comments made in one session are placed in another. In other instances, the sessions themselves have been rearranged. This was done to improve the flow of thought, and to make the report more lucid and readable.

Session I

A Self-Government Amendment and the Political Process

THE SEARCH FOR ACCOMMODATION*

David C. Hawkes

Introduction

The 1987 First Ministers' Conference on Aboriginal Constitutional Matters is the final one mandated by the *Constitution Act, 1982* (as amended). As such, it is seen by many observers as the last chance for aboriginal peoples in Canada to have their rights - particularly that of self-government - enshrined in our constitution. Make no mistake about it - stakes are high in these negotiations, emotions are running strong, and the pressure is on. Years of work by federal, provincial and territorial governments and aboriginal peoples' organizations hang in the balance, not to mention the hopes, fears and aspirations of Canada's indigenous peoples. The outcome of the conference will shape policy in the field for decades to come. The results could establish the framework for a new and just relationship among aboriginal and non-aboriginal Canadians. Or they could sow the seeds of greater injustice and its attendant social pathology. The apex, or pressure point, will be the 1987 First Ministers' Conference, to be held in the National Conference Centre in Ottawa on March 26th and 27th, 1987.

This morning I shall examine the search for accommodation, a search which will peak at that conference. What are the potential areas of consensus and conflict? What are the possibilities for agreement on the major issues?

In order to obtain information on these matters, I conducted interviews with officials from all but one of the seventeen parties to the negotiations (federal, provincial and territorial governments, Assembly of First Nations, Inuit Committee on National Issues, Native Council of Canada, and Métis National Council). Interviewees were told that the results of the interviews would be kept strictly confidential.

What is "Success"?

If parties to a negotiation have widely divergent perceptions of what a successful outcome might be, the likelihood of agreement is greatly diminished. A logical starting point, then, in the search for accommodation, is to explore what the different parties would define as a successful resolution to their negotiations.

*An expanded version of this paper was subsequently published as an Institute discussion paper under the same title.

Accordingly, the first question in the interview asked: "Generally speaking, what would you consider to be a successful conclusion to the section 37 process?". The vast majority defined success in terms of a constitutional resolution to the negotiations, although they differed substantially on the nature of a constitutional amendment. Officials from several provinces thought that a political accord, unrelated to the constitution, could be seen as a successful outcome, while one provincial official expressed the view that either a political accord or a constitutional amendment could be defined as such.

Of those parties who defined success in terms of a constitutional resolution, most made reference to the draft accord tabled by the federal government at the 1985 First Ministers' Conference on Aboriginal Constitutional Matters. Officials from several provinces and territories believed that the federal draft accord of 1985 would have to be enlarged in order to be deemed a success. The most frequently mentioned addition focussed on the need for a commitment to financing and resources for aboriginal self-government. Officials from the aboriginal peoples' organizations were also of this view. Unlike the government officials, however, they also included in their definition of success an ongoing process beyond 1987. From their perspective, a negotiation process would be required after the 1987 First Ministers' Conference, regardless of its outcome.

There were other elements of a successful conclusion mentioned, albeit much less frequently. These included such topics as: treaties, aboriginal rights in the areas of language and culture, equity of access to the right to aboriginal self-government, non-derogation of aboriginal rights, and the exclusion of the so-called "provincial veto".

What can we glean from this survey of the perceptions of the parties to the negotiations as to a successful conclusion to the section 37 process? First, success will be judged on whether or not there is a constitutional resolution to the negotiations. Second, if success is achieved, it will likely take a form - if not the precise content - similar to that of the federal draft accord of 1985. Third, such an accord may have to be enlarged to include a commitment to financing and resources for aboriginal self-government, as well as an ongoing process beyond 1987.

I turn now to the issues which must be resolved in order to achieve that success.

The Issues

When respondents were asked what questions have to be addressed, or issues resolved, in order to make the section 37 process a success, over

twenty issues were mentioned. Only the most frequently-mentioned are reported upon here.

(1) federal/provincial responsibility

The most frequently-mentioned problem was that of ill-defined and often conflicting views as to which order to government - federal or provincial - has responsibility for aboriginal peoples. The issue is multifaceted, touching on matters of jurisdiction, financing and access to programs and services. The federal government has jurisdiction with respect to "Indians and land reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*, and with respect to the Inuit (re: Eskimo case). The federal government has argued that this responsibility does not extend to Non-Status Indians and Métis, and only to a limited extent to Status Indians living off-reserve. In the latter case, the federal government appears to have chosen to interpret section 91(24) as "Indians on land reserved for the Indians." Provincial governments have argued that the federal government is responsible for all Indians, regardless of their status under the *Indian Act* (which they argue is merely federal legislation, and hence unrelated to matters of jurisdiction), and regardless of their residence (on- or off-reserve). No government, with the exception of Alberta, is willing to accept full responsibility for the Métis.

Financing is also involved since the order of government which has jurisdiction or legal authority with respect to an aboriginal peoples is also looked to for providing financial resources. Since aboriginal self-governments will require funds from federal and/or provincial governments, the question of which order of government is responsible is of considerable consequence.

The same is true of aboriginal peoples' access to federal and provincial government programs and services. The order of government responsible is accountable for providing the appropriate programs and services.

It is interesting to note that the most "popular" issue has little to do with aboriginal self-government *per se*, and much to do with federal-provincial jurisdiction and financing.

(2) adequate financing

The second most oft-mentioned issue was ensuring that there is adequate financing for aboriginal governments. Although clearly related to the first issue of which order(s) of government (have) the responsibility for providing financial resources, the second concern was that adequate

financing might not be made available to aboriginal governments. Aboriginal peoples' organizations are fearful that federal and provincial governments will see the self-government initiative as an opportunity to cap or even cut their expenditures in the field. They are also skeptical as to the willingness of federal and provincial governments to share their taxation powers, and to enter into revenue-sharing and fiscal arrangements. Federal and provincial governments are concerned that the other order of government will use the self-government initiative to trim their expenditures, leaving them with a greater financial burden.

(3) the right to self-government

The issue here is whether the right to aboriginal self-government is subject to agreements being negotiated with federal and/or provincial governments to exercise that right. Is the right contingent upon the successful negotiation of agreements, or does it stand alone? Or does the right stand alone, but its implementation depend upon negotiated agreements? Governments, for the most part, prefer that the right to aboriginal self-government flow from the constitution, and that it be implemented only through agreement. Aboriginal peoples view the right to self-government as an inherent and existing right, flowing from their original occupation of the land, and thus it should be free standing.

(4) role of the provinces/ "provincial veto"

Again, this issue has several dimensions. One concerns the role of provincial governments in negotiating self-government agreements with Status Indians and Inuit. Since the federal government has exclusive jurisdiction with respect to Status Indians and Inuit, should the provinces be involved in self-government negotiations affecting these peoples? Status Indians and Inuit want to be able to enter into bilateral self-government agreements with the federal government, while provincial governments are concerned that their absence from such negotiations might have unintended negative repercussions for them.

A second dimension has to do with the constitutional amending formula to be applied to the aboriginal self-government amendment. Would the consent of all provinces be required to have a self-government amendment entrenched in the *Constitution Act, 1982*, thus giving each provincial government a "veto"? Or would the general amending formula apply (federal government and seven provinces representing 50 per cent of the population)? Officials from aboriginal peoples' organizations favour the latter option, while government officials held various opinions.

(5) land base

At issue here is whether the right to self-government should include the right to a land base for all aboriginal peoples. This is of particular concern to Métis and Non-Status Indians and other landless aboriginal peoples, who are of the view that the right to a land base should be included. For some, the right to a land base need not necessarily involve the transfer of land - access to and revenues from resources, and long-term land leases may be considered, in addition to cash settlements *in lieu*. Government officials were noncommittal on these matters.

(6) commitment to negotiate

A major issue at the 1985 First Ministers' Conference on Aboriginal Constitutional Matters concerned the government commitment to negotiate aboriginal self-government agreements. The accord proposed by the federal government at the conference would have made aboriginal self-government rights subject to negotiated agreements, and included a commitment to negotiate such agreements in the constitutional amendment. A number of provincial governments opposed placing a commitment to negotiate in the constitution, fearing that the courts might intervene, either to force them to the negotiation table, or to rule on the manner in which self-government agreements are to be negotiated. These governments preferred to have the commitment to negotiate in a political accord, effectively making it non-justiciable (i.e. not legally binding).

The aboriginal peoples' organizations, the federal government, and several provinces were concerned that, should the commitment to negotiate not be constitutionalized, there would be little that aboriginal peoples could do to bring reluctant governments to the table. Since the draft accords tied the rights of self-government to the successful negotiation of agreements, one can understand that concern.

(7) jurisdiction of aboriginal governments

This is perhaps the vaguest and most far-reaching issue before the seventeen parties to the negotiations. At issue is what range of jurisdiction aboriginal governments will occupy, what fields of jurisdiction federal and provincial governments will vacate (e.g., from sections 91 and 92 of the constitution), and matters related to the gains and losses of government powers. Since each aboriginal government will wish to define its own sphere of jurisdiction, it is difficult to generalize concerning the potential impacts. Governments are anxious about the loss of jurisdiction which would accompany vacating and recognizing

fields of aboriginal self-government jurisdiction, and of aboriginal government powers impinging upon federal and provincial jurisdiction (e.g., who would have jurisdiction over education for aboriginal peoples living in Winnipeg?). Aboriginal peoples express the opposite concern - one of the federal and provincial governments intruding in their areas of jurisdiction, and of the possible reluctance of those governments to vacate fields of jurisdiction and to recognize aboriginal jurisdiction. Related to this are matters of policy coordination among federal, provincial and aboriginal governments.

(8) *Métis and 91(24)*

A much more distinct, albeit no more tractable jurisdictional issue relates to whether Métis peoples are, or should be under federal jurisdiction in section 91(24) of the *Constitution Act, 1867*. Indians with Status under the *Indian Act* and Inuit are now recognized as "Indians" for the purposes of 91(24) - "Indians and Lands reserved for the Indians". Now that the constitution defines "aboriginal peoples of Canada" to include Indian, Inuit and Métis peoples (section 35(2)), does or should the term "Indians" in 91(24) extend to Non-Status Indians and Métis as well?

Predictably, the federal government argues that 91(24) does not extend to Métis and Non-Status Indians. Some - although far from all - provincial governments argue that 91(24) now extends, or should be extended to encompass all aboriginal peoples. Only the government of Alberta claims exclusive jurisdiction over the Métis. Alberta is the only province to have a land base for some of the Métis people living there (the *Métis Betterment Act*, soon to be replaced by the *Métis Settlements Act*). If Métis fall within the ambit of 91(24), the legislation could be found to be unconstitutional.

The positions of aboriginal peoples' organizations on this issue have varied over time. To be under exclusive federal jurisdiction, as members of the Assembly of First Nations can attest, is a mixed blessing. The fact that a government can legislate and occupy a field does not necessarily mean that it will do so; and if it does, that it will do so wisely.

Forms of Constitutional Accommodation

The search for accommodation on these issues could yield many possible results and take an almost infinite variety of forms. These include a constitutional amendment, a political accord, an extension of the negotiation process, federal and provincial legislation, or some combination of the above. It is also possible, of course, that no accommodation will be reached, and that discussions will end.

Parties to a negotiation are unlikely to employ their complete strategy or to divulge their "bottom line" prematurely. So it is with the parties to the section 37 negotiations on aboriginal peoples and constitutional reform. No one wants to play their final hand in advance of the 1987 First Ministers' Conference.

In order to assist us in determining what the level of support might be for the various forms of constitutional accommodation, it is useful to recall the positions of the negotiating parties at the 1985 FMC. The 1985 federal draft accord drew support from the Governments of Ontario, Manitoba, New Brunswick, Newfoundland, Prince Edward Island, and the Northwest Territories. Of the aboriginal peoples' organizations, the Inuit Committee on National Issues (ICNI) and the Prairie Treaty Alliance (PTNA) supported the draft federal accord, while the Métis National Council (MNC) was generally supportive.

The Saskatchewan draft of 1985 drew support from the Government of Nova Scotia, and, with some conditions, grudging acceptance from the MNC and the Native Council of Canada (NCC). Only the Government of British Columbia supported its draft amendment.

Some changes in position appear to have taken place since 1985. It is the general view, among parties to the negotiations, that the Governments of Nova Scotia and the Yukon would now be prepared to support an accord along the lines of the 1985 federal draft, in addition to the MNC.

What support is there for the various forms of constitutional accommodation proposed to date?

(1) variations on the federal draft accord of 1985

The dynamics of the negotiation process indicate that some variation of the 1985 federal draft accord is a benchmark for any constitutional accommodation. The federal draft, as it now stands, could draw the support of six provinces, one short of the number required by the constitutional amending formula. However, in order to draw the support of aboriginal parties to the negotiations, some changes to the 1985 federal draft would be necessary.

The importance of support from the aboriginal peoples' organizations cannot be overstated. Government officials indicated that, for a constitutional accommodation to be acceptable, it must be supported by *all* of the aboriginal organizations at the table.

The crucial question, therefore, is *what* variation of the 1985 federal draft accord would be acceptable to the aboriginal peoples' organizations. It would appear, from the interviews conducted, that an accommodation will *not* founder on the right to self-government being subject to

negotiated agreements, provided that aboriginal peoples have some leverage in terms of bringing governments to the negotiation table in order to work out such agreements.

This underlines the importance of the linkage between the right to self-government and the commitment to negotiate. Eleven of the parties to the section 37 negotiations indicated that a constitutional accommodation would require some process beyond 1987. It is interesting to note, however, that almost no one wished to extend the current (section 37) process "as is". Many officials, from both governments and aboriginal peoples' organizations, appeared either to be "burned" or "burned out" by the current process. Some suggested, as a minimum, that another First Ministers Conference on the matter, to be held in three to five years, be included in the constitutional amendment. This would allow parties to the negotiations to review progress toward aboriginal self-government agreements, and give aboriginal peoples' organizations some leverage in bringing governments to the table. More will be said regarding the post-1987 FMC process later.

A second aspect of critical importance to the aboriginal peoples' organizations concerning the 1985 federal draft accord is the so-called "provincial veto". It is clear that the aboriginal people will not accept a constitutional amendment which requires the unanimous consent of every province. At issue here is whether entrenching the right to aboriginal self-government would amount to an amendment to the amending formula, thus requiring the unanimous consent of all eleven federal and provincial governments; or whether the general amending formula would apply.

A third concern of aboriginal peoples' organizations is adequate financing provisions for aboriginal self-government. Since this issue remains poorly defined, it is unclear whether it would have to form part of a constitutional amendment, or whether it could be dealt with in a political accord. At this point in time, it would appear that aboriginal peoples' organizations would prefer a constitutional amendment modelled along the lines of section 36.

What is clear, however, is that a political agreement alone - that is, unaccompanied by a constitutional accommodation - is simply a "non-starter".

(2) variations on the Saskatchewan draft accord of 1985

Support for a variation of the 1985 Saskatchewan draft amendment is weak, with only two or three provinces prepared to support it. Since it fails to link the right to self-government to a constitutional commitment

by governments to enter self-government agreement negotiations, it is unlikely to attract further support.

(3) likely positions of the "uncommitted" parties

The positions of a number of parties remain unknown, and several have yet to make basic policy decisions.

The Government of Quebec has steadfastly refused to participate in any constitutional amendment - on aboriginal rights or any other matter - until it is brought into the partial accord of 1981, and becomes a full partner in confederation. Since such a reconciliation is unlikely to occur before the 1987 FMC, one can anticipate that Quebec will remain outside the process, and withhold consent from any constitutional amendment. However, Quebec has indicated its willingness to consider a section 39 approach, presumably after it is brought within a renegotiated partial accord.

The Governments of Alberta and British Columbia, to date, have not indicated support for either the federal or Saskatchewan draft accords. However, since 1985 both provinces have acquired new premiers, and some officials speculated that this might give rise to a review of these governments' policies on such matters. Speculation was particularly rife with respect to the position of British Columbia. Several officials thought that Premier Van der Zalm, with his penchant for negotiation, reconciliation and accommodation, would not want to be isolated on this issue.

There is also speculation concerning the position of the Government of Saskatchewan. If it chose to support a version of the federal 1985 draft, this would almost ensure, as the seventh province, agreement on a constitutional amendment. It is unknown, however, whether Premier Devine's renewed mandate, based largely in rural Saskatchewan, bodes ill or well for such a possibility. It is obvious that Saskatchewan will receive considerable pressure to come "on side".

The position of the Assembly of First Nations is perhaps the most critical. Without their support, any form of constitutional accommodation is unlikely. Several officials were of the view that the right to self-government, subject to negotiated agreements, would not hold back the AFN from supporting an amendment, although a "provincial veto" most certainly would undo such a possibility.

The Search for Accommodation

It is now time to examine how the search for accommodation might end. This is no easy task, given the puzzle before us - the number of parties

to the negotiations, the issues before them, the range of positions across those issues, and the possible combinations and permutations which present themselves.

Let us return to the issues discussed earlier, and their prospects for accommodation.

(1) federal/provincial responsibility

The most promising approach here is to focus on principles of financing, from which might develop a fiscal and federal-provincial cost-sharing framework. However, it would appear that there is insufficient support to have such principles - yet to be elaborated - form part of a constitutional amendment. A more workable approach, at present, would be to have a general commitment in principle of federal and provincial governments to aboriginal government self-sufficiency, to share in the financing of aboriginal self-government, and to build a data base upon which to determine appropriate federal and provincial shares. These elements could be placed in a political accord.

(2) adequate financing

The section 36 approach seems to be the most promising on this front. However, it would appear that here, too, there is insufficient support to have such a principle entrenched in the constitution. This is not to say that progress could not be made on this issue. As part of a political accord, governments could commit themselves:

- a) to not "offloading" their existing expenditures on aboriginal peoples to the other levels of government;
- b) to maintaining the current (A base) expenditures on aboriginal peoples; and
- c) to additional, incremental funding for aboriginal selfgovernments, subject to individual self-government agreement negotiations; and
- d) to move toward long-term block funding arrangements with aboriginal peoples.

(3) the right to self-government

There is almost no support among governments for entrenching a freestanding right to aboriginal self-government in the constitution. It is possible, however, that agreement will be reached to entrench the right

to self-government if that right is subject to the negotiation of agreements, and if there is a constitutional commitment to enter into such negotiations. A variation on this theme would be a commitment to another FMC, in three to five years, replacing the government commitment to negotiate, in effect replacing a legal obligation with a political one.

A second approach, also capable of generating agreement, is the silent right, wherein parties agree to set aside the issue without prejudice, and agree to deem self-government agreements as treaties (and rights defined therein as treaty rights). A constitutional commitment to negotiate (or another FMC) would be required, in addition to the constitutional protection of rights defined in self-government agreements or treaties.

(4) role of the provinces/ "provincial veto"

With respect to the role of provincial and/or territorial governments in the negotiation of self-government agreements, particularly with Status Indians On-Reserve and Inuit in the NWT (where negotiations might otherwise be bilateral), the most workable approach would seem to be to allow these governments to monitor or otherwise involve themselves in the negotiations, at their request. Trilateral agreements, including provincial and/or territorial governments, are also possible in such instances. An understanding on this issue is unlikely to find its way into the constitution, but could be reflected in a political accord.

With respect to the "provincial veto" or unanimity aspect (with regard to constitutionally entrenching a self-government amendment), a number of accommodations are possible. Agreement could be reached to have the general amending formula apply, should the contingent right approach be adopted. If the silent right approach is followed, and self-government agreements are defined as treaties, the general amending formula would also be sufficient to entrench an amendment.

(5) land base

It is highly unlikely that the land base issue will be resolved at the 1987 FMC, despite its importance to Métis and Non-Status Indian people. However, agreement on one or two aspects is possible. First, governments could commit themselves to addressing the land base issue in individual self-government agreement negotiations. This commitment would most likely be reflected in a political accord. Second, governments could commit themselves to addressing the land base issue, at the national level, in a post-1987 negotiation process or at another

FMC. This commitment, in order to attract sufficient support, would have to form part of a constitutional amendment.

(6) commitment to negotiate

Agreement, if it is to be reached on this issue, will likely take one of two forms. Either would require constitutional change. The first could be to have governments commit themselves to enter into negotiations on self-government agreements, in a form of words similar to the 1985 federal draft accord. The second would involve a commitment by governments to at least one more FMC on aboriginal constitutional matters. The second option may not be supported by the aboriginal peoples' organizations at the table.

(7) jurisdiction of aboriginal governments

Issues of federal/provincial jurisdiction and intergovernmental policy coordination are most likely to be addressed in future, individual self-government agreement negotiations. Achievements at the 1987 FMC are apt to be very modest, with, at most, federal and provincial governments committing, through a political accord, to involve themselves in negotiations on jurisdiction.

(8) Métis and 91(24)

If any resolution is achieved on this issue, it will likely be to set it aside without prejudice. A non-derogation clause, forming part of a constitutional amendment, could have this effect.

Forms of Constitutional Accommodation

Given this analysis, what form of constitutional accommodation, if any, appears to be the most likely outcome at the 1987 FMC? We have surveyed the range of possible forms, and the likely support for each.

Several are very definitely "non-starters", including: the Saskatchewan draft accord of 1985, which placed the commitment to negotiate in a political accord; the B.C. 1985 draft amendment; and the idea of entrenching only the right to self-government, leaving the remaining items to a political accord.

This leaves only two possibilities - some variation of the 1985 federal draft accord, and the province-by-province (section 39) approach. In either case, each would likely be accompanied by a political accord and some agreement with respect to extending the negotiation process.

The preferred route for most parties to the negotiations is some variation of the 1985 federal draft accord. Several variations are capable of attracting sufficient support to meet the criteria of the general amending formula.

VARIATION I

The most comprehensive variation would involve five elements:

1. to recognize and affirm the right to aboriginal self-government, subject to agreements being negotiated;
2. to commit governments to enter into negotiations to secure such agreements;
3. to provide constitutional protection for the rights defined in those agreements (with the general constitutional amending formula applying);
4. to provide for an ongoing process involving at least one further FMC, which would include negotiations on aboriginal self-government and a land and resource base; and
5. a non-derogation clause, which would include setting aside without prejudice the Métis and 91(24) issue.

VARIATION II

This variation would drop the first element noted above, and remain silent on the right to self-government. In effect, this would set aside without prejudice the issue of whether the right to aboriginal self-government is inherent, existing, freestanding, contingent or delegated from other orders of government. Rights defined in self-government agreements would be deemed treaty rights, and protected under section 35(1).

VARIATION III

This version would drop elements 1 and 2 from Variation I. The constitutional commitment of governments to enter into self-government negotiations would be replaced by a political commitment, in that an on-going process, involving at least one further FMC, would allow public scrutiny of governments' progress toward concluding self-government agreements. The treaty right approach would also be employed here.

If insufficient support is garnered for any of these three variations of the 1985 federal draft accord, attention may shift to the province-by-province (section 39) approach, as a "fall back" strategy. For this to have any hope of success, support from all aboriginal peoples' organizations, the federal government, and a significant number of provincial governments (e.g., say, perhaps four or five of Manitoba, Ontario, N.B., N.S., Newfoundland, and P.E.I.?) would be required for either Variation I or II of the 1985 federal draft accord. With less support than this, a section 39 approach would lack credibility, and any reasonable chance of attracting enough provinces in order to have the amendment proclaimed.

Elements of a Political Accord

Whatever the form of constitutional accommodation, it will likely be accompanied by a political accord. Since the parties to the negotiations cannot agree to a constitutional resolution of all of the issues before them, some issues will likely be the subject of a political agreement, while others are apt to be the subject of further negotiations.

The following are potential elements of a political accord.

(1) financing

This is the most likely, and some would argue the most important subject for political agreement. A financing package in a political accord could include the following commitments:

- a general commitment or agreement in principle from federal and provincial governments to aboriginal government self-sufficiency, and to share in the financing of aboriginal self-government
- a specific commitment by federal, provincial, and territorial governments:
 - not to "offload" their expenditures on aboriginal peoples on other levels of government;
 - to maintain their current (A base) expenditures on aboriginal peoples;
 - to provide additional, incremental financing, subject to individual self-government agreement negotiations; and

- to move toward long-term block funding arrangements with aboriginal peoples.
- a specific commitment by all parties to the negotiations (federal, provincial and territorial governments and aboriginal peoples' organizations) to build a data base, upon which to make informed decisions regarding the financing of aboriginal self-government

(2) role of provinces and territories in negotiations

A clause in a political accord could allow provincial and territorial governments to monitor, participate, or "opt in" to certain types of self-government negotiations and subsequent agreements, at their request. This could apply to agreements being negotiated between the federal government and Status Indians or Inuit, and to agreements which affect more than one province and/or territory (e.g., inter-provincial self-government agreements).

(3) constitutional entrenchment of the self-government amendment

A clause in a political accord could confirm the understanding of federal and provincial governments that the general amending formula applies with regard to the constitutional entrenchment of the self-government amendment.

(4) land and resource base

In addition to, or in place of a constitutional commitment to address the issue of a land and resource base for currently landless aboriginal peoples in an ongoing national process, or at a future FMC, federal and provincial governments could commit themselves, in a political accord, to addressing land and resources in negotiations on individual self-government agreements.

(5) jurisdiction of aboriginal governments

Federal and provincial governments could commit themselves, in a political accord, to address matters of aboriginal government jurisdiction and responsibility in future negotiations on individual self-government agreements.

(6) the negotiation process

All parties to the negotiations could commit themselves, in a political accord, to a revised negotiation process. This could involve negotiations at two levels - the local/regional/provincial level, and the national level. Parties could agree to focus on negotiations at the local/regional/provincial level for, say, three years, before returning to the national level, and perhaps another FMC. This would enable parties to concentrate on negotiating individual self-government agreements, and to review progress toward such agreements at the national level at a targeted date.

I have already spoken for some time. Let me offer some concluding remarks.

Conclusion

A question which is often asked is what will happen if the 1987 First Ministers' Conference "fails"; that is, if no agreement is reached at all - not on a constitutional amendment, not on a political accord, and not on an ongoing process or another FMC.

Regardless of the reasons for asking the question, one outcome of total failure at the 1987 FMC would be an increased questioning of the credibility of political leadership in Canada, and a loss of legitimacy in the Canadian political system. If change cannot be achieved through existing political institutions, and if the policy-making processes themselves lose legitimacy in the eyes of aboriginal peoples, then the possibility of achieving a political accommodation evaporates. The implications of such a result are all too obvious.

This points, once again, to the need for an ongoing process beyond the 1987 FMC, regardless of its outcome. Without negotiation, there can be no accommodation; and the search for accommodation must continue.

THE POLITICS OF ABORIGINAL SELF-GOVERNMENT

Keith Penner, M.P.

As a member of Parliament, I find it difficult to disagree with the observation of Dalton Camp that "politics is largely made up of irrelevancies" (*Gentlemen, Players and Politicians*, p. 284). Chubby Power, a longtime member of Parliament and minister during the period 1917 to 1955, once said that "the political game is a great one to play. It is even exciting to watch."

For the aboriginal peoples of Canada, however, politics is neither an irrelevancy nor a game, but a battle for economic and cultural survival, for a redress of longstanding grievances, for fundamental justice, for the establishment of a new working relationship with the Government of Canada and for constitutional recognition of their inherent and inalienable right to be self-governing. Tony Penikett, Government Leader of the Yukon, has said:

For Canada each step towards constitutional recognition of our aboriginal people brings us closer to completing the circle of confederation.

It is true, as John W. Dafoe has stated that:

More than any country in the world, Canada is the result of political not economic forces.

Mr. Justice MacFarlane of the British Columbia Court of Appeal has put forth the view that questions of aboriginal title and rights are best dealt with in a political, rather than a legal forum. He said with reference to a judicial proceeding over which he presided:

This...is but a small part of the whole process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations.

I will now examine the politics of aboriginal self-government, from the perspective of reasonable exchange.

At a recent summit meeting of aboriginal leaders in Toronto, Georges Erasmus, National Chief of the Assembly of First Nations, cast serious doubt on the federal government's political will regarding constitutional recognition of aboriginal self-government. He said of the federal

government participants: "They don't believe there is going to be a successful conference" (at the end of March). He went on to say that he had become convinced of the federal government's failure scenario as a result of the January 1987 Ministers' meeting in Halifax. Of the federal government, he said:

(It) is not playing a leadership role. In former years, the federal government was a major and powerful ally of Native people. Now we have some of the provinces taking a leadership role.

Chief Erasmus did not say it, but he may well have called upon the words of an obscure 18th century writer who claimed (probably in a moment of exasperation):

Confound their politics.
Frustrate their knavish tricks.

There is a good deal of suspicion in the minds of aboriginal leaders that a pattern of municipal-type self-government structures, resting on a base of delegated authority, is the federal government's goal - part of a suspected "hidden agenda".

The Department of Indian Affairs, after wandering about in a public policy desert for decades, has now embraced Indian self-government and given itself, as a consequence, a fresh new lease on life. In a management memo to its regional directors, the Department says: "The federal government is dedicated to self-government for Indians within Canadian federation." It notes that a consensus has not emerged on how best to entrench a right to aboriginal self-government in the Canadian constitution. It might well have added "and we doubt it ever will". Now comes the operative part of the memo:

While these discussions are in progress, there are many practical and necessary steps which Indian people and the federal government [read Department of Indian Affairs] can take together to make self-government a reality. By doing so, we can make operational many examples of what self-government can mean.

What the Department of Indian Affairs has adopted is not aboriginal self-government *per se*, but merely its terminology or vocabulary. Their conception of self-government would have them playing a major role for years to come. To prove my point, I refer to a departmental management draft plan from March of last year. It states:

From the adoption of the federal government's present self-government policy to April 1, 1990, a minimum of 20 Indian bands and Inuit communities are expected to be under self-government regime.

At that rate, a newspaper reported, it would take the Department more than 100 years to impose its form of self-government upon aboriginal people.

As you know the Department now has an Assistant Deputy Minister for self-government. That same national management plan to which I earlier referred, says that:

His responsibility is to approve all national plans, strategies and operational documentation (eg. directives) specific to the sector. He will determine the resourcing levels and organizational structures.

Thus, it seems clear that the Department is using the phraseology of aboriginal self-government but denying its substance. Its aims are self-preservation and retaining as much control as possible.

What is happening now within the Department is exactly what the Special Committee on Indian Self-Government anticipated when it wrote in its report:

The past history of the federal-Indian relationship has left a legacy of distrust and suspicion that would seriously impair the capacity of the Department of Indian Affairs and Northern Development to act as the federal instrument for developing a new relationship. The Committee urges the establishment of a small new federal agency to signify the federal government's desire to begin a new stage of co-operative coexistence with the Indian First Nations of Canada. Indian people would welcome such a move. (p. 60)

The Departmental self-government policy has not ended the scepticism among aboriginal people about the Department's ability to manage a transition in the historic aboriginal/non-aboriginal relationship. Political promises or commitments for self-government can easily be scuttled at the bureaucratic level by a failure to comprehend actual needs and resources. A case in point is the Child Welfare Agreement in Manitoba. Signed in February 1982, the Canada-Manitoba Indian Child Welfare Agreement established the "broad framework by which Indian communities in southern and central Manitoba would acquire authority and responsibility for child welfare." The federal government, however,

has not transferred to the Indian child welfare agencies the resources that would allow for parity and a level of service equivalent to that provided by the province. If we compare a provincial agency with that of an Indian child welfare agency in Manitoba, we get the following alarming and startling statistics. A provincial child welfare agency, having a case load of 819, has 31 social workers, 7 supervisory staff, 4 accounting staff and 6 stenographers. The Indian Child Welfare Agency, with a case load of 1678 - that is twice the size of the provincial agency - has only 4 social workers, 1 supervisor, 1 accounting staff, and 2 stenographers. A real commitment to self-government must include the financial resources necessary in order to achieve comparability of programs and services for aboriginal peoples.

I turn now to the political prospects for success at the Constitutional Conference on Aboriginal Rights scheduled for March 26th and 27th. The federal government's proposal, simply stated, would recognize the right to aboriginal self-government in the constitution. This right would be within the context of the Canadian Confederation, and more importantly from the federal government's point of view, in accordance with, or subject to, negotiated agreements.

What do we actually have in this proposal? In my view it is not very much, if anything at all. In fact, if this proposal is incorporated as an amendment to section 35 - which I consider at the moment to be very strong - a full box, not an empty one - it will impose a section 37 process on aboriginal self-government, thereby weakening the right beyond repair. The federal proposal would place the scope of the negotiations and their financing into a companion political accord, which would accompany the self-government amendment. As these items would not be part of the constitution, the process would likely bog down even further.

Now just on the outside chance that anyone thinks some progress may result from the process which would be put in play by this proposal, the Government of Canada throws in a further and almost insurmountable barrier. The federal government believes that provincial governments have a legitimate role in negotiating and concluding self-government agreements. The federal proposal would stipulate in the constitution that any and all such agreements must be approved by the province in which the aboriginal community is located.

Let us contrast this federal proposal (which I describe simply as no more than the right to negotiate) with what aboriginal leaders have proposed. The Assembly of First Nations, for example, calls for a free-standing recognition of the right to self-government. Thus, section 35(1) which now says: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" would

be followed by a new (2) which would say: "For greater certainty, the rights referred to in subsection (1) include aboriginal title and the right to self government". The amendment would go on further to state:

The Government of Canada and, to the extent that provincial governments have jurisdiction, the provincial governments, shall negotiate with the several First Nations or tribes of Indian and other specific communities of aboriginal peoples in the various regions, agreements relating to:

a) self-government, lands and resources of the aboriginal peoples concerned;

and

b) economic and financial arrangements necessary for the effective exercise of self-determination by the aboriginal peoples.

Note that what is being enshrined with this proposal is not merely the "principle" of aboriginal self-government; neither is it just the "right to negotiate" self-government, nor is it only the "negotiated agreements" themselves. Rather, the right to self-government stands alone and by itself and it is drawn from the section 35 box.

Already the Assembly of First Nations has made a major compromise. It does not insist that the right to self-government be described in the constitution as inherent or inalienable. Although it will continue to assert that the right is not derivative, it does not demand that it be explicitly described as inherent in the constitution.

The emphasis here is upon negotiation as opposed to litigation as a means of achieving self-government. The question, however, of whether or not the commitment to negotiate should be enforceable has become an issue at the First Ministers' table. There are at least six possibilities as to where the commitment to negotiate could be placed:

1. in the constitutional provision itself, either as:

a) the 1985 federal proposal, the government of Canada and the provincial governments are committed to the extent that each has authority [to negotiate self-government agreements];

or;

- b) in principle along the lines of the commitment in principle relating to equalization payments (see 36(2));
 2. contained in a constitutional preamble (the preamble to the constitutional amendment would reflect the commitment to negotiate);
 3. contained in a political accord along the lines of the 1985 Saskatchewan proposal;
 4. contained in a binding and justiciable agreement;
 5. contained in a legislative enactment or other legislative instrument;
- or
6. contained in a unilateral declaration of governments.

The Government of Canada urges the aboriginal leaders to be sensitive to the legitimate apprehensions of certain provincial governments, who seek reassurance about where this process of negotiating self-government may lead. The Government of Canada says to the provinces that there is some risk (it does not specify exactly what this is), but says that its proposal will ensure that the provinces can continue to elaborate self-government arrangements with their aboriginal citizens. This seems to suggest that in the federal view all negotiating must be tripartite in nature. This is rejected by the Indian First Nations, except to the extent that the provinces have jurisdiction, in which case they may be involved.

The Assembly of First Nations is on the record as saying, respecting provincial involvement:

Yes, the provinces must become involved - not because the constitution says so, but because of the very way in which this country is structured. We can say that the constitution compels us to have the provinces participate and be involved every step of the way...but that is not the real reason, in our opinion. The real reason is because they have governments within the provinces or territories, therefore, they too must change their laws, their practices, to accommodate ours; and it must be done fairly.

To conclude, a brief reference to the provincial positions is needed. So far as it can be determined, four provinces are now "on side". They are: Manitoba, New Brunswick, Prince Edward Island and Ontario and, I am so advised, in that order. The aboriginal leaders are somewhat distressed

hat Ontario seems to have abandoned its lead role among the provinces. Mr. Scott, Attorney General for Ontario, however, counters by saying:

Why push the good guys even further? Get some of the bad guys on side. You need seven provinces having at least fifty percent of the total Canadian population.

Manitoba's position proceeds on the premise that Canada's aboriginal peoples were self-governing prior to European settlement, and that this indigenous right has never been extinguished either by conquest or consent. Accordingly, in Manitoba's view, the right to self-government is one of the existing aboriginal and treaty rights referred to (but not yet sufficiently guaranteed) in section 35(1) of the *Constitution Act, 1982*. Manitoba goes on to say that, while recognizing a distinct constitutional status for aboriginal governments, the right must be defined within the framework of the Canadian federation.

The province of Alberta will continue to take the position that it needs to see a better definition of self-government so as to know "what it is getting into". As well, it will not budge from its firmly-held view that any self-government must be delegated by one or other of the present levels of government.

British Columbia will come to the conference indicating that it is not "fussy" about amendments to the constitution of any kind. Now that the Sechelt people have a form of self-government, B.C. will cite this example to show that it has already accomplished something positive without the need of a constitutional amendment. British Columbia will argue that Sechelt is a model, something that Mr. Crombie, the former Indian Affairs Minister, was careful about. He said:

It is an example of the community-based approach to self-government which reflects the specific circumstances of the Sechelt Indian people. It is not a model for other communities.

In the House of Commons, I have tabled a motion which I would like to see debated and then voted for by the members. The motion, of course, is subject to: (1) the draw, for purposes of debate; and (2) decision of the private members' committee, for purposes of voting. The motion reads as follows:

That, in the opinion of this House, the *Constitution Act, 1982*, should be amended in order to recognize explicitly the right of Canada's aboriginal peoples to self-government, thereby making them partners in confederation, and that this House further urges

the governments of Canada, the provinces and the territories to acknowledge that self-government requires a viable economic base, and calls upon these governments to constitutionally commit themselves to negotiate with the aboriginal peoples an equitable sharing of lands and resources.

Since 1982, a United Nations Working Group on indigenous populations has met once a year in Geneva to formulate standards for the treatment of indigenous populations. In 1985, Madame Erica Daes, chairperson of this working group, spoke in Quebec City. She said that, in her opinion, the principle of the self-determination of peoples applied also to indigenous populations, although it did not include the right of secession.

Thomas R. Berger, in his report of the Alaska Native Review Commission, *Village Journey*, writes:

If governments continue in their efforts to force Native societies into molds that we have cast, I believe they will continue to fail. No tidy bureaucratic plan of action for Native people can have any chance of success unless it takes into account the determination of Native peoples to remain themselves. Their determination to retain their own cultures and their own lands does not mean that they wish to return to the past, it means they refuse to let their future be dictated by others.

My comments focus on the recognition of aboriginal self-government and the political will needed to bring this about. Aboriginal people have consistently stated that recognition must be the goal. Delegated powers such as presently exist in the *Indian Act* are not appropriate given that aboriginal peoples view section 35 of the Canadian Constitution as already containing a right to self-government. Canadian government cannot delegate to a people rights which the people already have. Aboriginal groups view the purpose of the constitutional talks as a process to define methods for the fuller exercise of these rights - not a process to create a right to self-government.

A fundamental difference exists because most Canadian governments (provincial and federal) do not share this view: rather, they see the primary need for legislation or agreements to define such rights. Their position, as of February 1987, appears to make aboriginal peoples' right to self-government contingent on such agreements being concluded. This position is untenable for aboriginal people.

One hopes resolution can be found for a meaningful amendment at the First Ministers' Conference in March. Agreement on recognition cannot be achieved without an understanding by Canadian government as to what self-government means and how it will be exercised by the aboriginal people. This necessarily involves an education process; responsibility falls on aboriginal leaders to explain their people's goals. This process is ongoing; however the task remains difficult because starting points for aboriginal and Canadian government leaders differ.

There are different approaches to government - a linear, analytic one of European thinking contrasting sharply with the aboriginal peoples' holistic view of the world, with government simply part of the larger whole centred on a spiritual relationship with the land and the environment. There is also a contrast between western society's priority for individual rights and the aboriginal peoples' dedication to communal rights. As a result, the Charter of Rights and Freedoms, seen as essential in Canadian society to protect against abuses of government, does not have the same imperative in aboriginal society, which has its own historical methods of securing fundamental freedoms and democratic rights. These and other value distinctions help explain why an understanding has been elusive.

This background makes it easier to understand how important it is for aboriginal people to have a clear recognition of their right to

self-government, together with the power to exercise these rights through institutions of their own design. A system of delegated power based on European approaches to government will not work. The long history in which the federal government, through the Department of Indian Affairs and the Secretary of State, set guidelines for programs and determined spending priorities for aboriginal peoples' communities, simply has not worked. The report of the Parliamentary Special Committee on Indian Self-Government in Canada, highlights many of the problems. Anyone who has worked with the present system quickly experiences frustration with its inadequacies. Yet there remains a reluctance by Canadian governments to make the constitutional change needed.

My experience has been mainly with Indian communities. Two glaring problems with band council powers under the Indian Act are the limited powers granted under the Act, and the disallowance right over by-laws retained by the federal government. The weakness of the powers are self-evident and require no elaboration. The disallowance problem is more subtle but no less serious because in many cases, where Indian governments utilize the limited powers available, their by-laws have been disallowed by the Minister.

A community where I work recently had five by-laws rejected, largely (in my view) because an unduly technical and restrictive approach was taken in their interpretation. The rejection of the conservation by-law, a product of many community consultations and careful study, was particularly hard to accept. The government's approach showed it did not understand the importance to Indian communities of having the right to protect the environment and animal life within their lands. Because the foundation of aboriginal peoples' belief centers on the human relationship with the land and the animals, fish, trees, and plants which live on the land, Indian regulation of conservation has tremendous significance. Environmental protection is not simply another policy competing for attention as often occurs in Canadian government. A fuller understanding by Canadian leaders would result in a more open approach to existing powers exercised by Indian governments. If the past proves any guide, constitutional agreement on self-government and the mechanisms for realigning jurisdiction will take several years to put in place. During this time a new approach to the federal use of disallowance power must be adopted.

The example of the conservation by-law did demonstrate something important. It showed the political will of the community to develop its own policy through systems of their own design. It showed the political leaders taking direction from people who elected them to pass laws necessary for the protection of the community's interest. This political will represents the basis of their movement to self-government.

Constitutional change will not magically create self-government. This can only come through internal political processes such as described above. The dispute concerning the conservation by-law remains unresolved. However, the community is confident it will find a way to enforce reasonable conservation policies adopted by it.

My final comments concern the political will of Canadian governments necessary to bring about constitutional change. The entrenchment of self-government recognition represents a statement of this will. Recognition becomes easier with understanding of aboriginal peoples' approach to self-government and respect for their concepts. The fear that self-government will lead to a break-up of Canada, or a bankruptcy of governments, or the total separation from existing Canadian government structures prevents understanding and is simply not justified. The fear of what self-government might do and cost often neglects to consider the cost, social and economic, resulting from inadequate and inefficient arrangements presently in place.

While there must be agreements to define structures, jurisdiction, and financial responsibilities, these must be made in the context of a recognized right to self-government. Only through such acknowledgement will Canadian governments be saying there is merit in aboriginal peoples' concept of government and social values; there is legitimacy in leaders chosen by aboriginal communities; there is dignity in aboriginal peoples' representatives negotiating the fine details of agreements. A constitutional recognition contingent on agreements does not achieve this. Agreements must be negotiated in the framework of a recognized right, not *vice versa*. They can only be reached in this way because recognition declares the political will and provides the mechanism to compel the parties to make arrangements required for self-government to operate. Such a constitutional change benefits everyone in Canada. Hopefully at the First Ministers' Conference next month the understanding and political will of all representatives present will come together to produce this change.

Session II

Public Opinion and Aboriginal Self-Government

POLITICAL OBSTACLES AND OPPORTUNITIES IN PUBLIC OPINION PERTAINING TO ABORIGINAL CONSTITUTIONAL REFORM: HIGHLIGHTS OF THE UNIVERSITY OF CALGARY NATIONAL SURVEY

J. Rick Ponting

Introduction and Methodology

The research reported here was funded by grants from the Social Sciences & Humanities Research Council of Canada, the Multiculturalism Directorate (Secretary of State), the University of Calgary, and by sales of the reports issuing from the study.

The research has its genesis in comments made at this conference two years ago concerning the absence of political will for change. The study is also a follow-up to a 1976 national survey conducted by Roger Gibbins and me.

The study has several purposes, some of which are academic while others are of a more practical nature. On the practical side, the purpose was to identify obstacles to change and opportunities for change as they exist in public opinion.

The sample is unusually large ($N = 1834$) and it permits us to have much confidence in the results. If samples of the same size were drawn, 19 times out of 20 we would find that the results would be within plus or minus two percentage points of those obtained here. We interviewed randomly selected respondents who are 18 years of age or more, living in the ten provinces; they had to be residents of Canada and non-aboriginals. Because it is a study of non-aboriginals' opinions on aboriginal issues, we excluded aboriginals.

Data collection was contracted out to Decima Research Limited. They conducted face-to-face in-home interviews of approximately 70 minutes duration. Our interviewers asked over 200 questions including about 60 of which were on Native issues. The remainder were on background variables or ideological correlates of opinions on Native issues.

I must say that much of what I've written in this report¹ and what I'm going to say today is based on the assumption that there is a desire to have a favourable public opinion behind the constitutional reform process. That assumption may be invalid, and I recognize that there are times when it may be very important for Native leaders to go against public opinion for various reasons, whether it be political reasons of their own or consciousness-raising amongst their people. I just want to stress

that I realize that the assumption on which I'm basing this talk is by no means always valid.

One of the main purposes of the study was to be a resource to the participants in the section 37 process. So with that by way of introduction, we move to some of the highlights of the findings.

Findings

The first finding deals with knowledge. There are several questions pertaining to knowledge about native issues and about seven or eight other questions that simply ask respondents to indicate their own degree of familiarity with particular events or phenomena pertaining to Native people. Examples are the visit of the Pope in the Northwest Territories (or the planned visit of the Pope) the Lyell Island controversy, the existence of the amendment to the Indian Act in 1985, the existence of an organization called the Assembly of First Nations, the existence of aboriginal rights in the Constitution, the existence of the First Ministers' Conference, etc.

We found a familiarity with the existence of aboriginal rights in the Constitution is low although a slight majority is aware of the First Ministers' Conferences. I would conclude from that, that the First Ministers' Conference truly has the potential for being a strategic communications opportunity.

A large minority, about 30 per cent, does not understand the term "aboriginal people" to mean what it says in the constitution. You would be surprised at what people think the term "aboriginal people" means. Some people say "foreigners", some say "immigrants", some use derogatory phrases like "the uncivilized people", some will refer to particular characteristics, some say "uneducated people", a large portion exclude Métis, (some explicitly so), and so on. To use the term "aboriginal" in an attempt to communicate with the Canadian mass public is to go over the heads of, or to otherwise evoke negative reactions from, a significantly large minority of the Canadian population.

Since I led off by talking about knowledge, I should add that knowledge and familiarity bear no consistent relationship to support for Native aspirations. When I use the terms "support for Native aspirations", I'm talking about Native aspirations as sort of a catch-all that catches the general thrust of numerous questions pertaining to self-government or special status.

The second main point I would like to make is that there is a core of approximately 30 per cent of the adult non-Native Canadian population that is supportive of special constitutional rights for Natives. Such supporters are particularly likely to have one or more of the following

characteristics: to be francophone, to identify with the NDP federally, to score low on an index of neo-conservatism, and to score high on an index of support for multi-culturalism.

That latter finding was a surprise to me. I recognize that there has been a long-standing position taken by numerous Native leaders to the effect that "we are not just another ethnic group". I think that has led to a lack of interest in the possibilities of coalition with multicultural groups. Yet it's very clear from my data that increased support for multiculturalism goes hand in hand with increased support for Native's aspirations.

The third general comment I would like to make pertains to generalized support. By a three to one margin, respondents are of the opinion that the government should put "more" or "much more" effort into protecting aboriginal rights. More specifically, one question asked respondents whether they think the government should put much more, or more, about what it is now, less, or much less effort into protecting Native rights in Canada. By a three to one margin respondents feel that governments should put "more" or "much more" effort into protecting Native rights. I would stress that in my personal interpretation, that is protecting existing Native rights as distinct from extended Native rights.

We start to move into a somewhat different ballpark when we talk about extending existing Native rights. The fourth general comment that I want to make is that in addition to this core of support, there is resistance out there as well. Resistance to Native's aspirations is highly variable. It tends, though, to be most pronounced in the three most western provinces; Manitoba definitely stands apart from the other western provinces in public opinion on these issues. So resistance to Natives' aspirations tends to be most concerted in the three most western provinces, and almost as much in the Atlantic provinces as well. (I should mention that in my regional breakdowns, I have lumped all of the Atlantic provinces together. This is because of the sample size not permitting me to make generalizations about individual Atlantic provinces, whereas in the rest of the country my sample size permits me to treat each province separately. Resistance to Natives' aspirations is also very pronounced among that 15 per cent of the Canadian population which scores high on the index of neo-conservatism. I really wish to stress that this conservatism, this neo-conservatism, whatever you want to call it, is by no means synonymous with support for the Progressive Conservative Party federally. Only 25 per cent of the Progressive Conservative Party identifiers score high on neo-conservatism and you'll find some NDP party identifiers (5 per cent) score high on it as well. Some Liberal Party supporters also score high on it. So, neo-conservatism or conservatism (I use the two interchangeably) are by

no means synonymous with support for the Progressive Conservative party.

Resistance to Natives' aspirations is deeply rooted in pervasive norms of equality in Canadian society. Mention of the word "special" in a question tends to turn the tide of opinion overwhelmingly against Natives by a margin of approximately 65 per cent to 25 to 30 per cent. My talk today deals with obstacles and opportunities in public opinion. Well, I think that the most significant potential obstacle is this pervasive norm of equality in Canadian society. It is demonstrated in the responses to several questions in the questionnaire. For instance, sometimes we would give respondents two statements and ask them to choose which of the two comes closer to their own view. In one question the statement is: "For crimes committed by Indians on Indian reserves, there should be special courts with Indian judges." And the other one is: "Crimes committed by Indians on Indian reserves should be handled in the same way as crimes committed elsewhere." There was 65 per cent support for the latter and 27 per cent for the former. There is an uncanny similarity in the response patterns of several other similar questions. Another indicator, of this norm of equality in Canadian society comes from a question where we asked respondents about different rights for different categories of Native people. The statement was as follows: "Which of the statements on card number 11 comes closer to your own view. 'Because of past and present differences our Constitution should provide Indians with different rights than Eskimos and Métis' or 'Our Constitution should recognize the same rights for all Native people in Canada regardless of past and present differences among them.'" There was 82 per cent support for the same rights for all aboriginal peoples. That suggests some practical implications with regards to the coalition amongst the Native organizations. But I'm using that question here as an indicator - another indicator amongst many - of this norm of equality.

Now, it seems to me that you can either treat that norm of equality as an obstacle or you can treat it as a resource. By the latter I mean trying to legitimize or justify various aspects of self-government and aboriginal rights in terms of how they are necessary in order for individual Indians or Métis or Inuit to achieve real equality with other individual Canadians.

Another resource that exists for the legitimizing arguments in favour of Natives' aspirations is the belief that the government has too much control over the lives of Indians. I gave respondents a question that said almost exactly that and asked them to indicate on a five point scale their degree of agreement or disagreement with that. (Incidentally, when I talk about degree of agreement or disagreement, it generally is a case of giving respondents a statement and they indicate their opinion on a five-point scale, ranging from strongly agree through neutral to strongly disagree.)

As I say, those agreeing that the government has too much control over the lives of Indians outnumbered those disagreeing by a margin of 2:1. The belief that I mentioned before, that the government should do more to protect Native rights, is yet another resource. A fourth resource is the belief that Native governments are as capable as, or more capable than, the federal government in meeting the needs of individual Natives. That, I would add, is distinct from impressions about financing, or opinions on the issue of management of the finances.

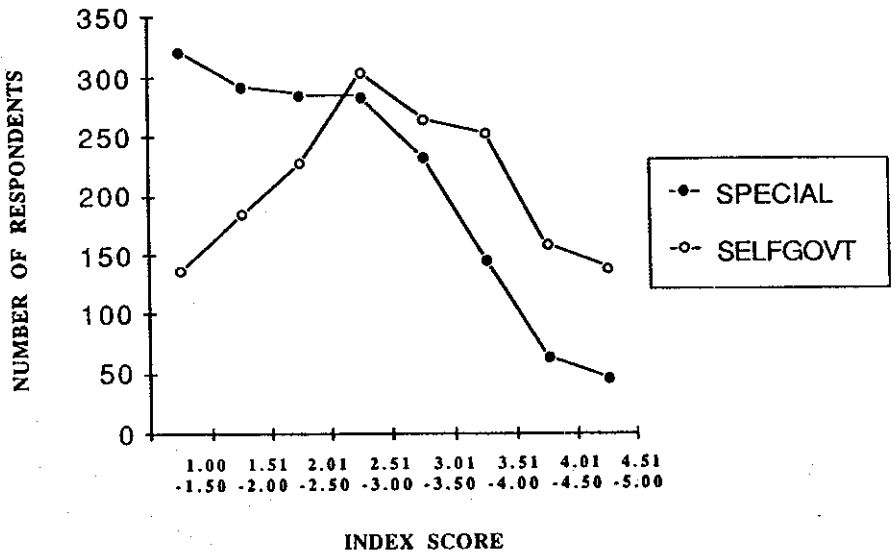
A fifth resource is Canadians' faith in education as a solution to Natives' problems. For instance, a question that I gave respondents asked them to complete a sentence, as follows: "One of the best things that the federal government could do for Indians in Canada is...." I haven't verified the coding of that yet but preliminary indications are that almost 10 per cent of respondents cited one or another aspect of education. (The most frequently cited response, mentioned by about one third of the sample, involved some form of empowerment, increased autonomy, or special status for Indians. However, the fact that this question was asked after numerous other questions on self-government might be inflating this answer slightly.) There is not a lot of differentiation in the minds of Canadians as to the three different types of Native peoples recognized in the constitution. So I think that self-government can be legitimized also in terms of how it is needed to implement meaningful education for individual Natives (rather than merely Indians).

An obstacle faced by those who advocate constitutional reform on aboriginal rights is any politician's public statements which lead the listener to draw the inference that Natives are getting special status or preferential treatment. If I were a hired consultant, my advice would be: at all costs, avoid the word "special" and continue to talk about self-government. This is the really striking message found in the results we got from four questions. I'll not go into the details of the statistical analysis because I'm sure they'd bore you. It revealed, though, that among a pool of seven questions these four stood out as all tapping the same thing - namely, some aspect of special status. The curve we got of the frequency distribution of these four questions taken together as an Index of Support for Special Status For Native People, is shown in Figure 1. There we observe that the mass of the sample is concentrated at that low end of the scale. But when we talk in terms of self-government we get a very different curve. Here four other questions have been used. Statistically, they all hang together nicely, which is to say they're all tapping one dimension - support for self-government. The curve for this Index of Support for Native Self-Government, shown also in Figure 1, much more closely approximates the so-called bell-curve or normal

curve, except for a small hump on the supportive side of the mid-point. These are drastically different shapes that we observe for these two curves.

Figure 1

DISTRIBUTION OF THE SAMPLE
ON THE INDEX OF SUPPORT FOR SPECIAL STATUS FOR NATIVES
AND ON THE INDEX OF SUPPORT FOR NATIVE SELF GOVERNMENT, 1986



STATISTICS	STATISTICS	
	SPECIAL	SELFGOVT
MEAN	2.56	3.11
MEDIAN	2.50	3.03
STD DEV	1.00	1.03
SKEWNESS	0.265	-0.081
KURTOSIS	-0.604	-0.723
MISSING CASES	164	170

I have always viewed, and still do view, self-government as a form of special status. Therefore I was quite surprised myself to see these two very different curves. Now, however, I realize that "self-government" does not evoke nearly as emotional a response from Canadians as does "special status" or the word "special" per se. Indeed, in the questions in the Index of Support for Special Status for Native People the word "special" doesn't even appear, but it was evident that these were very special arrangements to which the questions were referring. So, if Native politicians are concerned about non-Native public opinion, they should note that they are on much safer ground to talk about self-government than about special arrangements or even special needs.

Question from Floor: Did you ask what respondents understood by the term "self-government"?

No. On an earlier version of the questionnaire I did. However, because of cost considerations and considerations of complexity (and not wanting to alienate respondents with questions that are too difficult for them), I finally had to jettison that question.

While on the topic of the meaning evoked by certain words, I should mention that once we found out what a respondent understood the term "aboriginal people" to mean, the interviewer read a statement to each and every respondent pointing out that what we mean by the term aboriginal people or Native people in the rest of the interview is Canadian Indians, Métis, and Inuits/Eskimos.

Another resource that is available in public opinion is a receptivity to the notion of the distinctiveness of Native culture.

Question from Floor: Did you ask any questions about fishing, trapping and gathering?

Unfortunately, when I was seeking input to the questionnaire, no one drew to my attention the fact that I have questions on hunting but nothing on fishing. As I hear more about the B.C. situation I could just kick myself because it's such an obvious error of omission, but I made it.

Returning to the topic of public opinion as a political "resource", I should say that whenever I talk about this, that or another resource that exists out there, what I am doing is making generalizations that refer to very specific questions in my questionnaire. Sometimes in the discussion of any public opinion resource, I base my conclusions on several questions. I just don't want to bog things down with a discussion of percentages.

Related to Canadians' receptivity to the distinctiveness of Native culture is the very high value which Canadians place on environmental protection. The very first question which we asked was designed to put

all the rest of the study into context by finding out just how much importance Canadians give to this area of Native people. The question was as follows: "I'm going to give you a list of several problems facing Canada today. Please read the list and tell me which one you consider to be most important. Now, which one is second most important to you? Which ranks third in importance to you? etc." The items were: protecting the natural environment, reducing the national debt, reaching a free trade agreement with the United States, improving the social and economic situation of Canada's Native people, and improving the rights of women in Canada. (The order in which these were presented to respondents on these cards was different throughout the country, and I think within each region as well, although I'm not positive about that.) Attesting to what I'm saying about the very high priority Canadians place on the natural environment is the finding that in either their first priority choice or their second priority choice 67 per cent opt for "protecting the natural environment". An almost identical proportion treats as first or second priority "reducing the national debt". Then there's an enormous gulf, and lumped together at about 23 per cent are "reaching a free trade agreement with the U.S.", "improving the social and economic situation of Canada's Native people", and "improving the rights of women in Canada". Incidentally, those who chose improving the social and economic situation of Canada's Native people as their first priority numbered about 7 per cent. I have a vague recollection that I saw a somewhat similar but open-ended question in a survey that I found in the federal and public archives. The authors of that survey didn't give respondents a list but they just asked what are the most important issues to you? I think that in that survey Native people come up in the two to three per cent range. So that 7 per cent that we get here by giving respondents a list isn't all that different. That priority ranking, I think, says something about the ability to keep the issue on governments' agenda once the FMC of '87 is over, if there's not some further kind of commitment. The issue may benefit from a "cooling-off" period as some have suggested, but any kind of pressure is certainly going to diminish.

A couple of other resources to finish off the discussion of my findings. One is a faith in the sincerity of Native leaders in calling for self-government. We asked respondents if they thought that Native leaders calling for self-government are basically interested in promoting their own personal career, and the overwhelming response was "no", (again in a 5 point scale). So there's a faith in the sincerity of Native leaders calling for self-government.

There is also a readiness to give symbolic recognition to the importance of Natives to Canadian society. That was tapped by asking respondents their degree of approval or disapproval of a constitutional

preamble or introductory statement recognizing the importance of Natives to Canadian society. There was considerable support for that.

The final obstacle that I want to mention is the conservative ideology. To try to turn that into a resource, I think that one needs to do the kinds of things that the Prime Minister did at one point in his speech at the beginning of the 1985 FMC, where he talked about points of consistency between the conservative ideology on the one hand and the Native people's aspirations on the other hand. I think he referred to the fact that no one sector of society has as much red tape to face as Natives, and he talked about the desire of Natives to have smaller government, to reduce government expenditures, etc. (one could run into problems with that latter.)

To conclude, there are a couple of points I want to make. The first is that at a national level, there are no insurmountable public opinion barriers to meaningful constitutional reform pertaining to aboriginal rights. I repeat, no insurmountable public opinion barriers, except where special privilege or special treatment is perceived. Public opinion is either conducive to constitutional reform or permissive of it.

The second main conclusion is that these data cannot be used as a club to coerce reluctant governments into constitutional reform. The data do not compel constitutional reform; instead, to repeat the point above, they are conducive to it or permissive of it. For instance, only a slight plurality (38 per cent vs 34 per cent) agreed with the statement that provincial premiers who oppose entrenching the right to self-government in the constitution are harming Natives, and Canadians are evenly divided on whether the constitution should explicitly recognize Indians' right to self-government.² However, the federal government is very vulnerable to vociferous criticism over the next few months. Aboriginal leaders can work public opinion to put more pressure on governments between now and the FMC; however, over that short term a greater incentive for provincial governments to soften their stance is likely to come not from changes in public opinion, but rather from any willingness that the Prime Minister might have to call in (or create) political "I.O.U.s" with certain Premiers as part of an issue-linkage strategy.

Notes

1. J. Rick Ponting, *Profiles of Public Opinion on Canadian Natives & Native Issues: Module I - Constitutional Issues*, Calgary: Research Report #87-01, Research Unit for Public Policy Studies, Faculty of Social Sciences, The University of Calgary, 1987.
2. On another question a plurality (44 per cent) chose "more rights in the constitution" as the "thing needed most by Canadian Indians".

This choice was made from a list of three items presented to respondents. The other two items, along with the percentage of the sample choosing them, are "less control by government" (33 per cent) and "more money from government" (7 per cent).

Table 1

COMPONENTS OF THE INDEX OF SUPPORT FOR SPECIAL STATUS FOR NATIVES

More detail on these scale items is available in the tables of Modules 1 and 2.

SPSS LABEL	STATEMENT	PERCENT						TOTAL
		AS	AM	N	DM	DS	DK	
speclaws Q.76	If Parliament and the elected leaders of the Native people agreed that some Canadian laws would not apply in Native communities, it would be all right with me.	15	23	10	19	25	9	101
nsymschl Q.78	Native schools should not have to follow provincial guidelines on what is taught.	9	13	5	26	41	5	99
nsymprov Q.80	Native governments should have powers equivalent to those of provincial governments.	13	18	10	24	27	8	100
ctrlacct Q.82	Native governments should be responsible to elected Native politicians, rather than to Parliament, for the federal government money they receive.	11	17	15	19	25	13	100

NOTES:

1. For all of the above items an agreeing response was treated in the analyses as indicative of support for special status for Natives and a disagreeing response was treated as indicative of opposition to special status for Natives.
2. To receive a scale score and be included in analyses involving this scale, a respondent must have answered at least three of the four items. A respondent's scale score is his or her average score across the three or four component items answered.

Table 2

COMPONENTS OF THE INDEX OF SUPPORT FOR NATIVE SELF GOVERNMENT

More detail on these scale items is available in the tables of Modules 1 and 2.

SPSS LABEL		STATEMENT	PERCENT					TOTAL	
			AS	AM	N	DM	DS		DK
nsymaspr	Q.73	It is important to the future well-being of Canadian society that the aspirations of Native people for self-government be met.	17	25	17	19	14	9	101
nsymprem	Q.74	Those provincial premiers who oppose putting the right to Native self-government in the Constitution are harming Native people.	17	21	17	21	13	12	101
nsymldrs	Q.79	Most Native leaders who call for self-government for Native people are more interested in promoting their own personal career than in helping Native people.	13	17	16	23	18	13	100
isymcons	Q.95	The Constitution of Canada should specifically recognize the right of Indians to self-government.	18	23	13	21	19	7	101

NOTES:

1. For Q.79 an agreeing response was treated in the analyses as indicative of an antagonistic orientation toward self government and a disagreeing response was treated as supportive of self government. For the other three questions the respective interpretations were the reverse of those just cited.
2. To receive a scale score and be included in analyses involving this scale, a respondent must have answered at least three of the four items. Responses to Q's 73, 74, and 95 were recoded for consistency with Q.79 -- that is, so that responses indicative of support for self government would receive high scores while responses indicative of opposition to self government would receive low scores. A respondent's scale score is his or her average score across the three or four component items answered.

Appendix

TECHNICAL SPECIFICATIONS FOR SCALES USED IN ANALYSIS

	# of Items Max. Min.	# of Valid Cases	Possible Range	Mean (Before Collapsing)	Standard Deviation*	Cut Points & Freq. Distribution			Alpha
						Very Low	Mod. Low	Mod. High	
(Neo-)Conservatism "conserv"	6 4	1807	1.0 to 5.0	2.48	0.761	1.000 2.600 (58%)	2.601 3.250 (27%)	3.251 5.000 (15%)	.60
Familiarity with Native Affairs "familiar"	7 4	1800	1.0 to 3.0	1.62	0.472	1.000 1.499 (64%)	1.500 2.000 (37%)	2.001 3.000 (17%)	.77
Knowledge about Native Affairs "knowscale"	5 5	1831	3.0 to 7.0	4.36	1.208	3.0 (31%)	4.0 5.0 (49%)	6.0 7.0 (20%)	.43
Support for Multiculturalism "multicul"	4 3	1782	1.0 to 5.0	3.12	0.990	1.000 2.500 (32%)	2.501 3.500 (35%)	3.501 5.000 (34%)	.64
Status Concern (Status Anxiety) "statusanxi"	5 3	1823	1.0 to 5.0	3.30	0.845	1.000 2.500 (18%)	2.501 3.500 (40%)	3.501 5.000 (43%)	.63
Sympathy for the Underdog "underdg"	4 4	1831	4.0 to 8.0	6.01	1.276	4.0 5.0	6.0	7.0 8.0	.54
Support for Special Status for Natives "special"	4 3	1666	1.0 to 5.0	2.56	1.001	1.000 1.999 (26%)	2.000 2.999 (36%)	3.000 4.000 (23%)	.65
Support for Native Self-Government "selfgvc"	5 3	1661	1.0 to 5.0	3.11	1.026	1.000 1.999 (22%)	2.000 2.999 (29%)	3.001 4.000 (31%)	.74

*Standard deviation of a five point scale has the potential to be larger than the standard deviation of a three point scale. The standard deviations shown in this table were calculated on the scale distribution before they were collapsed into high, medium, and low categories.

Session III

Aboriginal Self-Government and the Federation

ABORIGINAL SELF-GOVERNMENT AND CANADIAN POLITICAL VALUES

Richard Simeon

I don't usually like to admit in advance my limitations, since they usually become evident in the presentation anyway. But today I feel that I must.

I cannot in any sense be considered an expert on the profound questions which the country, and this conference, must deal with as we consider how to define and implement aboriginal self-government in Canada. My reading in preparation for today only confirmed that fact to me, as I saw the bewildering complexity of issues, the vast variety of interests and positions, the huge range of possible alternatives for constitutionalizing self-government, the complex, and still not fully resolved, questions about process, and so on.

So, I will speak simply as one concerned non-aboriginal Canadian citizen, one whose chief interest is in the operation of our federal system. I will speak not of the interests of aboriginal groups, but of what the Macdonald Commission calls the "Canadian constitutional order." I want to offer some very tentative observations on some of the issues that are raised in the debate - for the character of the Canadian political system, the quality of our democracy, the meaning and nature of the multiple political communities within which we live, and the evolution of our constitutional system with its three existing "pillars" of parliamentary government, federalism and a constitutional charter of rights.

I do start with a number of premises which guide my own thinking. First, that whatever the difficulties in defining, entrenching and implementing it, I am fundamentally in agreement with the legitimacy and desirability of autonomy and self-government for aboriginal communities in Canada. I agree with Mr. Penner that this is part of the completion of the circle of Confederation.

Second, that while the larger Canadian community has legitimate interests at stake, and legitimate values to preserve, the presumption must be that it is the aboriginal peoples' conception of their needs and interests which must be the starting point. This, it seems to me is the real importance of the term "self-determination."

Third, that it is vital that the concept be explicitly recognized in the constitution, more directly than it is at the moment. But having said that, I also think we need to get the discussion of the real, practical, concrete moves towards self-government off the constitutional table as soon as possible. Indeed the constitutional framework is essential: to underline the legitimacy of the fundamental claim, to create a genuine obligation to

make progress, and to provide a means whereby agreements can be given permanence. But the constitutional process also has large costs. It puts a premium on the symbolic, the abstract, the issues around which compromise is most difficult. It seems to create, partly for that reason, an incentive for all sides to keep the debate going on and on, with no resolution. All parties seem to have an incentive to avoid bringing the debate to a conclusion.

Keeping the debate at the constitutional level means that we devote an inordinate amount of time to crossing the t's and dotting the i's in order to anticipate every possible eventuality which might end up before the courts. Moreover, the language of the debate seems to have become mired in a mind-numbing, legalistic detail conducted among a group of arcane specialists. This threatens to lose sight of the great principles and purposes, and to make it very hard to build public support for the goal of aboriginal self-government. There is a drastic need to simplify.

All this means that the constitutional process diverts an enormous amount of skill, talent, money and time both of governments and native leaders, to these negotiations, and away from the even more enormous task of the social, economic and cultural development of the aboriginal peoples, and the education of Canadians in support of greater economic and political justice for them.

Fourth, no doubt a great many non-aboriginal Canadians regard these discussions with a mixture of boredom, frustration and hostility. My own view is, rather, that we should - just as with the earlier debate over Quebec in the federation - regard them as a great privilege.

The issues raised here go to the very heart of the most fundamental questions about our political life - about the meaning and nature of democracy, community, rights; about our sense of justice and fairness, about coming to terms with our own past. They pose, in stark terms, profound questions about the relationship between the individual and the community. That relationship, as the recent American book *Habits of the Heart* so well demonstrates, is one that most North American societies are unable to deal with effectively. Few countries are asked to rethink these kinds of questions very often: the debate on aboriginal rights and self-government gives us that opportunity, for which we should be grateful.

I want to focus on the tensions between aboriginal self-government and some of the other basic values in our political culture. At one level, they are indeed profound; for some perhaps even irreconcilable. Stated as absolutes, as stark choices between either/or, that may be quite correct.

But in the real political life of countries - and especially of Canada - there are very few absolutes. We are for parliamentary government with

its assumption of majority rule. But we are also prepared to temper that first with federalism - since it limits the scope of authority for majorities at both the federal and provincial level - and more recently with the Charter of Rights and Freedoms. We are for provincial autonomy, but are willing to temper that with certain national norms in the area of individual rights, and we have a national, constitutional commitment to using the authority of the federal government to transfer wealth from richer to poorer regions. We are for individual rights, but have tempered them with constitutional procedures which allow at least some of them to be overridden in the name of majority rule.

And so on and on. In the real world, political values are seldom pure. They are a collection of "oughts" which continually get in each others way. The political process is all about how they are reconciled in practice. Absolutism in the defence of these kinds of values, despite Barry Goldwater's statement that "extremism in the defence of liberty is no vice," is untenable.

Moreover, all of Canadian history, perhaps especially its recent constitution-making process, demonstrates our ability to make these somewhat awkward compromises. They are awkward, in the sense that they seem to introduce inconsistencies and contradictions into our constitutional life. But when we realize that they represent attempts to balance different "goods" rather than unconscionable derogations from some pure value, we see them not as awkward and illegitimate, but rather as the simple conditions of a life together in a country like Canada.

It is this accommodating, indeed capacious character of what Alan Cairns calls the "living constitution", and especially the precedents that federalism provides, which makes me optimistic about an accommodation with respect to aboriginal self-government. I realize that given aboriginal leaders' frustrations with executive federalism, it is perhaps foolhardy to set federalism up as a helpful model. But my defence of federalist ideas here should not be seen as a defence of our current practices, but rather of the lessons implicit in the values that federalism tops - the legitimacy of multiple communities, the virtues of shared and divided authority, the hostility to homogeneous models, the advantages of small communities and decentralized power, and perhaps especially important in the present context, the stress on the idea of "covenant" among communities. The central point I want to make is that in this complex of ideas we can find a rationale for aboriginal self-government consistent with, rather than hostile to, many forms of aboriginal self-government.

But let us look at some of the tensions in more detail. Despite what I have just said, they are real, and difficult; and even if we could all agree on the need for balancing, we would still probably end up drawing the

lines in different places. In its largely unsympathetic discussion of aboriginal self-government, the Macdonald Commission raised a large number of practical issues concerning membership, financing, and the like, but its real concern was the potential effect on "the overall structure of Canadian government," on the "rights and obligations of Canadian citizenship." It stressed that any agreement must conform broadly with the institutional and constitutional structure of Canada, particularly with "Parliament, federalism and the Charter of Rights."

The implication was that constitutionalizing self-government would threaten all these. Perhaps, but this ignores the flexibility and openness of these very values: after all, one of its three pillars, the Charter, did not exist before very recently. The Commissioners were not very explicit about the perceived threats, so let's explore them a bit ourselves.

Liberalism: Individual Rights

The first, and most important tension is between individual rights and the rights of the community or collectivity. The overwhelming thrust of the Charter of Rights is to give primacy to the rights of individuals; and to see citizenship as an abstract, universal concept, in which each individual is the same as every other, taken out of an historical or social context. The Charter is hostile to any subordination of the individual to the collective interest; it is hostile to any differentiation of rights; it is hostile to the maintenance of distinctive cultural values.

Some see the growth of these liberal, individualist ideas as characteristic of the age. The American authors of *Habits of the Heart* see a kind of pathological dominance of the language of liberal individualism as denying us even the language or words with which to talk meaningfully about communities. Thus, the Charter has been seen not only as a *reflection* of the growth of such ideas, but also as a powerful stimulus to their extension - perhaps signalling a profound change in our view of the world, sweeping more community based ideas before it, including those embodied in aboriginal self-government.

But I think this is a very partial view - and most regrettable if it were to happen. In fact, the Charter itself contains many group rights even in its own text - for religious and linguistic groups, for aboriginal peoples, for some newly recognized groups as well. It is not only about individual rights. Moreover, the Charter embodies explicit provisions whereby individual rights may be overridden in the interests of the larger whole.

Nor is there much if any evidence, that our Canadian tendency to place a high value on group rights and the preservation of communities is fading. We have seen recently, just to mention a few examples: the expansion of Roman Catholic education in Ontario; the approaching

division of the Northwest Territories largely on ethnic lines; and the continued support of regional development. With respect to aboriginal peoples, I don't think anyone asserts anymore the individualist model which asserted that aboriginal peoples were to be treated no differently from other Canadians, which was reflected in the 1969 White Paper.

More generally, I think it is clear that the assertion that there is a fundamental dichotomy between individual and group rights is false. In fact, it is by virtue of our membership in a larger community, and through the protection of its institutions, that we have rights at all. Community is implicit in rights. Conversely, the only justification for community is that its strength and vitality is essential to the well-being, indeed the rights, of each of its members.

Thus I think that communitarian ideas remain strong in this country, and aboriginal self-government, reflecting one crucial conception of community and a profound sociological reality, therefore retains a broad legitimacy. Canadians do indeed bristle at "special status" - the idea that some have special rights and privileges denied to others - but it seems to me that culture also places a very high value on community preservation, self-development and the like. The point is strongly reinforced by Rick Ponting's data. As he shows, it is entirely possible to define and justify self-government in terms which would be rejected by the vast majority of non-aboriginal Canadians. But it is equally clear that in our political culture we have an ample repertoire of terms and concepts to define and justify it in ways likely to receive very wide support. Strategic considerations alone suggest the importance of emphasizing these supportive values and symbols.

Perhaps more important in the Canadian context, it is not so much the legitimacy of community identities *per se*, but rather the question of *which* communities are most important, and which claim primacy, that have most deeply divided us. During the constitutional debate, Prime Minister Trudeau asserted the primacy of the single national community, embodied in the federal government, over all the provincial communities. This of course clashed with the basic assumption of federalism, which asserts the equal legitimacy of provincial and national communities for different purposes. Some provinces, on the other hand, asserted an equally exclusive view of the primacy of the provincial community. These two views both clashed with the idea of Canada made up of two basic communities, based on language. The constitutional debate revolved around these conceptions, each becoming defined in more and more mutually exclusive terms.

But of course, the essential message of federalism is that it is a regime of multiple loyalties, each of which is legitimate; and its central political task is to balance, accommodate and compromise them.

Indeed, federalism itself would not survive if one image was to predominate.

Moreover, federalism assumes that there is no necessary conflict among these identities; they are complementary, indeed mutually supportive. This I think is the evidence from public opinion surveys. But it is also true in a larger sense: the Canadian national community is itself defined in large part by the existence of vibrant regional communities. These provincial and regional communities in turn derive much of their strength and vitality from their membership in the wider Canadian community.

No policy better expresses this sense of the complementarity of regional and national communities than equalization: it is a program of the national government using its authority to tax and spend for all Canadians, whose sole purpose is to ensure the effective autonomy of the poorer provinces. It is thus *both* an expression of centralization and decentralization. It shows that the country defines as a primary purpose the strengthening of provincial communities, and that one *condition* of strong provincial self-government lies in participation in the wider community.

So federalism gives us the key to reconciling multiple communities. Moreover, while it is federal and provincial communities which are built into our political structure, we have ample precedents for recognizing many other kinds of communities and identities, both in law and in the constitution, such as language and religious groups.

The key lesson for me is that we are indeed in a prison so long as we tend to see identities and communities as somehow in conflict with one another, when we see identities as exclusive or when we worry about *fragmented* identities. We are on much more fruitful ground when our starting point is the legitimacy, in fact desirability, of multiple loyalties, multiple communities, coexisting and strengthening each other. I think this is the lens through which we must look at aboriginal communities and their relationship with other Canadian communities, both provincial and national.

Majority Rule

Another fundamental political value in Canada with which aboriginal self-government may clash is the idea of majority rule. To the extent that aboriginal governments have real powers, not just delegated ones, they do indeed reduce the authority of the majorities represented by federal and provincial governments. Power is placed in the hands of a different majority - that of the aboriginal communities themselves.

True, this may create all sorts of practical difficulties: decisions by aboriginal governments may contradict or undermine those of other governments. As in the federal system, all sorts of intergovernmental agreements will be necessary. To the extent that there remain, as there must, extensive transfer payments to aboriginal governments, the same kinds of problems with accountability inherent in federal transfers to the provinces will arise. But again, I do not see the fundamental conflict. Or, more precisely, we must remember just how much we already temper and constrain majority rule in this country. We do so simply by the fact that we are federal: the constitution restrains both provincial and national majorities.

We now do so through the Charter. And we do so in other ways as well, such as the overrepresentation of the smallest provinces in the House of Commons and Senate. The most important current proposal for Senate reform would have a Senate with real power representing each province equally. We have not made majoritarianism, any more than our other central values, an absolute.

More generally, I think it is a truism that we cannot operate Canada successfully on the simple majority, 50 per cent plus one, winner take all model. That is a recipe for national breakup. We must always seek the largest possible coalitions.

Again the relevant model is federalism. I am not suggesting that aboriginal governments would be in all respects like provinces; much less that aboriginal governments automatically participate in the whole range of intergovernmental relationships. It is simply that federalism, through the division of powers, gives us the right lens. It allows us to ask: For what purposes and ends is it that the aboriginal majorities in each of their communities make policy and rule; and for what purposes is it that aboriginal peoples are part of the wider whole, with their interests represented through provincial and federal legislatures as all other citizens? What is the most appropriate division of labour? Federalism also provides us with a rich array of instruments - equalization, unconditional grants, Economic and Regional Development Agreements, etc., through which assistance can flow between orders of government. Finally, federalism legitimates the ideas of decentralized, small-scale government, of a locally based democracy as that which provides the most opportunities for citizen participation, for government responsiveness, for variety and experiment - again lessons easily extended to aboriginal self-government.

In arguing this way, I do not mean to say that there are not real difficulties here. Parliamentary sovereignty will be undermined a bit more than it already is. Federalism will be further complicated. The Charter's homogenizing, individualizing effect is likely to be tempered.

There remain massive uncertainties about the powers to be exercised by aboriginal governments; about the ambit of federal and provincial laws as they apply to aboriginal peoples; about the division of governmental authority with respect to those many aboriginals living in cities; about accountability, given continued (albeit hopefully diminished) fiscal dependency, and so on. Similarly, I do not mean to minimize the real, concrete conflicts of interest over land ownership, resources, the environment, and the like which are bound to remain.

My point today is simply that I do not see anything in the debate about aboriginal self-government which undermines my own sense of the fundamental values of Canada as a political community. On the contrary, my own conception of federalism, which welcomes and embraces cultural diversity and the positive contribution of multiple communities, combined with a strong sense of the need for sharing and redistribution, is enhanced rather than diminished by aboriginal self-government.

So to return to the Macdonald Commission's assertion that self-government must conform broadly to the institutional and constitutional structure of Canada, I would argue that it does; or, put differently, that nothing in the argument for self-government undermines my sense of the essential character of the Canadian political community, or of its already highly decentralized political structure.

I think we must put aside the either/or mentality which sees only the tensions, and look for the larger complementarities. For non-aboriginal citizens and politicians, the debate will go far more easily once we put aside the fear that self-government is somehow fundamentally unCanadian, and instead recognize that our constitutional order has been remarkably open to new conceptions, and provides a rich repertoire of instruments for making the accommodations. We must realize that despite fears of complicating our federal system through creating a "third order of government" and the like, aboriginal self-government is fundamentally consistent with the larger values and purposes of federalism, both in terms of community and democracy. Certainly it is easy to see threats to central values. But success will be found when we exercise the political will to see in aboriginal self-government not threat, but opportunity.

COMMENTS ON CONSTITUTIONAL INTERPRETATION*

Noel Lyon

I was troubled before 1981 with the drafting of the Charter of Rights and Freedoms - it was too detailed, too legalistic, and too focussed on individual rights. This trend has continued, indeed worsened, since then, especially as the legal interpretation of section 35 developed. Too much attention has been given to legal elaboration, and too little to historical context and intent. My essay is an attempt to look at the issues in another way.

Section 35 was a victim of the urgency of the patriation process. It was not elaborated adequately because we did not know very much about aboriginal peoples. Aboriginal peoples found themselves with a very general statement of their rights in the constitution. In such a situation, legalistic analysis seems inevitable.

The Charter, however, reflects the political traditions of the majority of Canadians. It should not have direct effect upon, or apply to aboriginal peoples, since it does not reflect their values. Aboriginal peoples should look to section 35 for their rights and freedoms. The task for us is to elaborate section 35 so as to reflect the equivalent rights and freedoms of aboriginal peoples. The very existence of separate legislation and institutions (e.g., *Indian Act*, Band Councils) already demonstrates that Canadian society saw aboriginal rights and community values as different.

It is only since 1982 that the issue of aboriginal self-government has become so controversial. Prior to then, "self-government" was under the *Indian Act*. It was only when aboriginal peoples wanted to free themselves from these controls - when they no longer wanted the majority to define what aboriginal rights are - that the debate was stirred up.

Key sections of the Charter, particularly sections 3, 4 and 5, constitutionally entrench our political culture. We must look at the underpinnings of those provisions and ask what are the corresponding rights of aboriginal peoples. Aboriginal self-government should be considered as entrenched by section 35, but legal thinking is not comfortable with that.

*These comments are from Professor Lyon's forthcoming article in the *Osgoode Hall Law Review*, entitled "An Essay on Constitutional Interpretation".

The Charter of Rights and Freedoms has no place in aboriginal culture. Freedom of religion, for example, is premised on the separation of church and state - a concept almost sacrilegious to aboriginal culture. In the dominant society, law and morality are separated. Morality is separated from almost every aspect of life. In aboriginal society, the community is used as a way of instilling morality: spirituality is integral to aboriginal culture. This has no correspondence with what happens among non-aboriginal peoples, who compartmentalize morality, and keep it separate from corporate or political affairs.

In a book by William Least Moon, entitled *Blue Highways* (about secondary highways in America), the author remembers a time when "men and words and deeds were connected". The recent debate on aboriginal self-government shows that political will is not connected to words. That connection is now required to address aboriginal self-government and the constitution.

SELF-GOVERNMENT AND THE CANADIAN POLITICAL SYSTEM

Leroy Little Bear

The theme of this workshop on aboriginal constitutional matters is "the search for accommodation". Why is this search for accommodation so difficult? In part it's because of the fundamentally different mind-sets of the participants, which means that the constitution and amendments to it are approached from different angles. This difference of mind-sets makes it difficult to be optimistic about the outcome of the First Ministers' Conference in five weeks time.

The Western World View vs. the Aboriginal World View

The Western way of thinking is linear and singular. It looks for one answer. It searches for the one true God, the one true wife. The Western view of time is a good example. Linear thinking leads to categorization, and time is divided into units of past, present and future. Time is seen as linear, like a river passing by, with the past behind and the future flowing toward you, and passing into the past.

Linear thinking is incorporated into language, and the English language is rich in nouns. Nouns are good for categorizing things, but this is a limited categorization which leads to either/or situations, and creates opposing concepts out of things which are not simple opposites. This kind of categorization has difficulty with something new because it is seen as something which has to be classified. For example, when we're young we're told that sex is bad. After some rites of passage we're told that sex is good. But many people have difficulty making the switch. Similarly, the Western way of thinking categorizes animate and inanimate objects. People and animals are animate. Maybe plants are too. But the inanimate category is larger and less important. By categorizing we can lose the connection between the two.

The aboriginal way of thinking is more holistic. It incorporates repetition rather than singularity. For example, the concept of time as Westerners see it doesn't apply. Time *is*, it doesn't pass. If you ask aboriginal people how long ago they say "a long time ago". There is no specific point in time. There are no different days. Each day is the same day repeated, not the start of something entirely new. For aboriginal people time is not something dynamic, not an important referent. In the English language though, time is an important reference point. Christmas Day is an example. If it is December 25th, what would I do

if I were a Christian? It wouldn't matter if I was on the moon, in Durban, South Africa, or in Inuvik. I would celebrate Christmas.

Aboriginal people, instead, relate to space as an organizing concept. Place and space are important referents - a microcosm in which aboriginal people are situated. For my people, the Blood Tribe of the Blackfoot, the Sun Dance is an important Celebration. It doesn't happen on a particular date. It doesn't happen on the same day every year. The Sun Dance happens when the people who are preparing for it are ready. But it always happens in the same place - the Bella Butte on the Blood Reserve. The Sun Dance can't happen in Durban, South Africa, or on the moon, because then it wouldn't be the Sun Dance.

Application of Western and Aboriginal World Views to Canadian Federalism

The clash of cultures repeats itself in constitutional considerations. Canadian federalism is composed of one central government with several regional governments. The *British North America Act* (now the *Constitution Act, 1867*) describes the powers shared by the provinces and the federal government. Western "either/or thinking" applied to the constitution only allows for two forms of government. The assumption in constitutional negotiations with aboriginal peoples is that all powers *can* be identified and divided, and that all powers *have* been identified and divided. The identification and division of powers between the provincial and federal governments is exhaustive.

Where is there room for constitutional accommodation then? In the Western way of thinking, there isn't. There is no room left for aboriginal government. This mind-set approaches aboriginal self-government as a technical concern. The provinces are worried that self-government introduces into the constitution a third order of government, and that this brings about a constitutional amendment which skirts section 35. This kind of approach regards some kind of legal loop-hole as the only way to accommodate aboriginal self-government. Somehow, aboriginal self-government has to be slipped into the constitution without changing the arrangements which already exist.

But when aboriginal peoples say they want entrenchment, they're looking at it from a very different mind-set. When aboriginal people talk about self-government, they're saying they want to be part of the whole, part of what makes up government in this country. When we look at the constitution in a non-technical way, constitutional law is about relationships between governments. If we look at constitutional talks in this way, aboriginal people are trying to bring about a new relationship. Legal barriers and technical complexities only hold when we're using the

old relationship as a basis for discussion. If we talk about a new relationship, then the view that aboriginal self-government has to be slipped in through a loop-hole no longer holds.

In the aboriginal view, self-government is a response to a relationship with the land. Vine Deloria has said that white people don't understand the North American land. Their society evolved out of a relationship with the land in Europe - it doesn't work in North America. Aboriginal culture evolved from the land. In the Western view, government is a means to an end. To aboriginal people, the relationship to the land is an end in itself. Aboriginal self-government has to address the relationship to the land.

Constitution Making

There are a number of contradictions in the way an aboriginal self-government amendment is being negotiated. The Western approach to constitution-making with respect to aboriginal self-government is to see that section of the constitution (section 35) as an empty box. Rather than seeing that section as a finished statement which reflects the values and beliefs of the people, it is seen as something that has to be legally interpreted. This kind of constitution-making is backward - "We don't know what the constitution says yet - it has to be filled with meanings and interpretations".

Aboriginal people view their rights in the constitution as a full box. If treaty rights are an empty box, then freedom of speech is as well. Why should we interpret one part of the constitution differently from another? Take another right - freedom of religion. What would happen if we said freedom of religion was subject to negotiated agreements. That wouldn't be palatable to very many people.

Parliamentary supremacy is an important value in the system of government in Canada. The Constitution, though, acts to constrain Parliament. It spells out fundamental rights which act as checks on the legislative process of Parliament. In the constitutional negotiations on aboriginal self-government however, the amending process means that a right is being transformed into a source of legislation. This is contradictory to the intention of spelling out rights in the constitution.

The strict interpretation of categories in the constitution is being used to create the problem of including something new, something which hasn't been accounted for. The only hope of progress at the constitutional negotiations is to recognize that there are some cases in Canadian federalism where everyone says: "We know what the rule is, but we will all agree to break the rule". This is the only way in which Western thinking will be able to accommodate the aboriginal mind-set.

We already have some examples where the Western approach has been broadened in this way. One of the hallmarks of Canadian government has been co-operative federalism, in which constitutional delineations have been by-passed in order to develop a more workable nation. The provincial incursion into Indian affairs also skirts the rules. In essence, given the federal government's responsibilities for Indians, provincial incursion is a *de facto* constitutional amendment.

In asking for the entrenchment of the right to self-government, aboriginal people are saying: "We want to be part of the whole". Legal obstacles essentially come down to saying: "No, you can't be accommodated". The choice for the First Ministers' Conference is simple - finding some accommodation from within, or, if not, finding some way of relating to each other from without.

Two themes that arise from this topic are the values that underlie aboriginal rights in our legal system, and the way that these values mirror concepts inherent in Canadian federalism.

Aboriginal rights in Canadian law are still somewhat uncertain and developing, but several basic points are now clear. These rights are collective rights, which derive legal force by common law recognition of the legitimacy of prior social occupancy and use of certain territories. The essence of the common law view of these rights is that they protect whatever it is that the organized society of aboriginal peoples did before coming into contact with whites. To date this has focussed on land use and occupancy, but it logically would include many other social activities, such as the determination of descent and family matters. And this, of course, is what is now being discussed under the rubric of self-government.

The values underlying aboriginal rights must be examined in order to interpret sections 25 and 35 of the *Constitution Act, 1982*. The Supreme Court of Canada has clearly stated that the rights contained in this document cannot be understood in a vacuum; we must determine the purpose for the right, and the underlying values it seeks to protect or promote. Despite the view of Mr. Justice Beetz (in the *Société Acadien* case) that there is a distinction between individual rights and collective rights guaranteed in the Charter, it is submitted that the same "purposive" approach is appropriate for the interpretation of both categories of rights. If this is correct, then this panel is discussing matters which are important to an understanding of aboriginal rights as well as self-government.

All forms of aboriginal self-government will involve a number of common things: boundary setting by the group, control over matters which are internal to the group, determination of relationships with external groups, and control over change brought about due to external forces. These types of power or authority are well-known in white society. At some level we are all involved in organizations which possess some or all of these powers (unions, churches etc.). At a broader level, these concerns are also found in states, and in Canada we deal with these problems by means of federalism and control over state authority by structural and legal devices. If federalism legitimizes multiple loyalties to different communities, and if these are mutually complementary (as Professor Simeon believes), then there exists a sufficient latitude or

flexibility in the political culture as it now exists to accommodate aboriginal self-government.

Federalism is premised on a belief in the importance of sharing power, and in Canada this is extended to include a high degree of tolerance for diversity (linguistic, cultural, religious). Thus far in our history this general tolerance has not extended to aboriginal peoples; today, however, aboriginal peoples have legitimized their cultures, languages and societies by acting - sometimes with consent and authority from an external source, sometimes without it. The values underlying aboriginal self-government are well entrenched in our legal culture already. All that remains is to make the commitment to changing the formal legal structure, and the political structures for the management of federalism, in order to accommodate the reality that aboriginal peoples are creating for themselves.

The aboriginal values underlying the move toward self-government have to do with our Native concept of how we relate to the land. In contrast with the western Christian ethic which states that man has domination over the earth and all that is in it, aboriginal peoples themselves as equal to all other life forms in nature. We do not regard humans as superior to animals but as brothers, placed on this planet to share equally in the wealth of our environment.

Four hundred years after whites came to North America, aboriginal peoples and whites are like two ships passing in the night - an aboriginal version of Hugh MacLennan's *Two Solitudes*. Why has communication been so difficult? It is largely because we have difficulty defining how we should share this land together.

In a profound way we are captives of our separate cultures - of our fundamentally different philosophies of how to live life on this land. The aboriginal view of the world is shared by all the aboriginal peoples in this room today, although we come from different places from coast to coast. This view of self-government ties timeless lives to a particular land. For the Kitimat, my people, self-government means fish. The people and the land are deeply linked: nutritionists have started to find out that when our people cannot get salmon, their health suffers.

Our self-governing institutions will reflect our concern about our ability to rely on the natural resources of our traditional lands - our concern over the health and regenerative capacity of the land we depend on. Self-government for the Kitimat means our ability to depend on the fish that come back each year in a cyclical pattern.

Now, when we go to make fishing laws, we find that we're invading a "full box" of laws organized by cabinet. Our fishing laws have become a political football, subject to disallowance according to the political power of other private interests. We're told that fish are a public resource. We don't view it that way. We have thirteen tiny rivers on our land. The fish that come back to those thirteen tiny creeks and rivers are Kitimat fish.

If the FMC fails, it may lead to real desperation in some areas. There are officers of the federal department of fisheries who are concerned about the possibility of bloodshed this summer on the Skeena river, between Indians who are exercising their aboriginal right to fish, and fisheries officers charged with protecting a public resource. The solution cannot be reached at the local level. What is required is political will "at

the top" to address the issue. Indian people are long in patience, but: "How close are we to the end of tolerance?". Nelson Mandela started off as a moderate and finally realized that power wasn't going to be given to blacks that way. I don't wish to be alarmist, but my generation is not going to be the end. If I were to fall dead tomorrow, there will be a line-up behind me. We are finally going to have to accept the idea that Indians have a right to live a life of dignity and they don't have that right now because they don't have the power.

The provincial and federal governments' approach to the issue of entrenching an aboriginal right to self-government is to ask: "How much self-government should we give the aboriginal peoples?". For the Kitimat the approach is different. Any discussion of what self-government means must be based on a fundamental respect that recognizes that we must be able to rely on our fish and on our land. Right now aboriginal people are dying because the leaders do not have the power to provide for their people and their land. As Canadians, we are finally going to have to accept that aboriginal people have a right to live in dignity, and to give them the powers over their land that allow them to do so.

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

Kelly Speck

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Session IV

Legal Obstacles to a Self-Government Amendment

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

John D. Whyte

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Session V

Financing Issues

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

Billy Diamond

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Role of the Provinces

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

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

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

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

Conclusion

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

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

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

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

THE ENGINE OF AGREEMENT: FINANCING ABORIGINAL SELF-GOVERNMENT

Robert Groves

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

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

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

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

The Context of an Amendment

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

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

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

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

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

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

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

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

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

The Aboriginal View

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

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

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

Provincial Views

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

The Federal View

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

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

A Side Note on the Amendment Package

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

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

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

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

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

Financing Options

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

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

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

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

An Aboriginal Equalization Clause

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

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

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

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

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

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

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

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

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

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

Cost-Sharing Options

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

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

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

Cost-Sharing Options

1. By Group:
 - a) on-reserve vs. off-reserve
 - b) by constitutional group: Inuit, Indian, Métis
 - c) Status vs. Non-Status

2. By Cost Category:
 - a) negotiation costs
 - b) institutional and infrastructure
 - c) basic programs and services
 - d) special developmental costs

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

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

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

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

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

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

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

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

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

Process Options

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

David C. Hawkes, Discussant

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

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

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

The major concerns of aboriginal peoples are as follows.

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

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

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

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

Session VI

Jurisdictional Issues

ISSUES OF JURISDICTION BETWEEN ABORIGINAL AND NON-ABORIGINAL GOVERNMENTS

Ian B. Cowie

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION - EXPLAINING THE FAILURE AND LEARNING FROM IT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix A

Workshop Agenda

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

Evening

Dinner - open (restaurants to be recommended)

Wednesday, February 18

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

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

PANEL:

John Whyte, Queen's

DISCUSSANTS:

William Pentney, University of Ottawa

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

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

Lunch - open

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

*Public Opinion and Aboriginal
Self-Government*

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

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

Key Financing Issues

PANEL:

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

AGENDA

Workshop on "Issues in Entrenching Aboriginal Self-Government"

Monday, February 16

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

Tuesday, February 17

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

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

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

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

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

PANEL:

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

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

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

DISCUSSANTS:

William Pentney, University of Ottawa

Vina Starr, UBC

Micha Menczer, Vancouver

DISCUSSANTS:

Ian Stewart, Queen's

Rick Ponting, University of Calgary

David Hawkes, Institute of

Intergovernmental Relations

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

4:30 p.m.

Workshop adjourns

Appendix B

List of Participants

PARTICIPANTS

PANELISTS & DISCUSSANTS

Ian Cowie
Ian B. Cowie and Associates
Management Consultants

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

Leroy Little Bear
Native Studies
University of Lethbridge

Noel Lyon
Faculty of Law
Queen's University

Micha Menczer
Vancouver

Keith Penner, M.P.
Cochrane - Superior

Professor William Pentney
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Public Policy Consultant

Kathy Lenore Brock
University of Toronto

Bernadette Hardaker
CBC

Murray Hogben
Whig Standard

Grand Chief Michael Mitchell
Mohawk Council of Akwesane

Grand Chief Joseph Norton
Mohawk Council of Kahnawake

Norm Prelypchin
Ministry of Attorney-General

Harvey Schachter
Editorial Department
The Whig Standard

Robert E. Simon
Tribal Director
Shuswap Nation Tribal Council

Kelly Speck
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Linda Stevenson
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Staff

David C. Hawkes
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Pauline Hawkes
Conference Coordinator

Peter Leslie
Institute Director

Evelyn J. Peters
Research Associate

List of Titles in Print

Aboriginal Peoples and Constitutional Reform

PHASE ONE

Background Papers (second printing)

1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services*, 1984. (\$12)
2. David A. Boisvert, *Forms of Aboriginal Self-Government*, 1985. (\$12)
3. NOT AVAILABLE
4. Bradford Morse, *Aboriginal Self-Government in Australia and Canada*, 1985. (\$12)
5. Douglas E. Sanders, *Aboriginal Self-Government in the United States*, 1985. (\$12)
6. Bryan P. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984*, 1985. (\$20)

Discussion Paper

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

PHASE TWO

Background Papers

7. David C. Hawkes, *Negotiating Aboriginal Self-Government, Developments Surrounding the 1985 First Ministers' Conference*, 1985. (\$5)
8. John Weinstein, *Aboriginal Self-Determination Off a Land Base*, 1986. (\$7)
9. Marc Malone, *Financing Aboriginal Self-Government in Canada*, 1986. (\$7)
10. Jerry Paquette, *Aboriginal Self-Government and Education in Canada*, 1986. (\$10)
11. Richard H. Bartlett, *Subjugation, Self-Management and Self-Government of Aboriginal Lands and Resources in Canada*, 1986. (\$10)

12. C.E.S. Franks, *Public Administration Questions Relating to Aboriginal Self-Government*, 1987. (\$10)
13. Ian B. Cowie, *Future Issues of Jurisdiction and Coordination Between Aboriginal and Non-Aboriginal Government*, 1987. (\$7)
14. Delia Opekokew, *The Political and Legal Inequities Among Aboriginal Peoples in Canada*, 1987. (\$7)
15. Evelyn J. Peters, *Aboriginal Self-Government Arrangements in Canada*, 1987. (\$7)
16. Bradford W. Morse, *Providing Land and Resources for Aboriginal Peoples*, 1987.

Position Papers

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

Workshop Report

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

Bibliography

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

Discussion Paper

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

Publications may be ordered from:
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