Aboriginal Peoples and Constitutional Reform

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RCAP NOTES

INTRODUCTION

The Terms of Reference of the Royal Commission on Aboriginal Peoples clearly contemplates the intervention of the Commission on matters of constitutional reform concerning aboriginal matters. In this regard we were invited to prepare a research paper on the desirability and nature of future aboriginal constitutional reform efforts. In accepting the invitation and embarking on the project, we understood that the primary focus of our work would be on matters of process rather than on the content of constitutional amendments.

We did our best to conduct a broad interview process including participants of the Charlottetown Accord process, the leaders of national aboriginal organizations, leaders of various provincial and/or regional aboriginal organizations, representatives from aboriginal communities, aboriginal advisors, federal and provincial government ministers and senior public servants.

We believe that the interview process and the project overall was aided by the fact that we assured all interviewees that anonymity would be maintained. Some of the interviewees were quick to advise that their responses and views expressed during the interviews did not necessarily reflect the views of the governments or organizations with which they were associated. Rather, there was a common understanding that it was the personal experience of the participants that informed their responses and views.

We would like to express our gratitude to the Royal Commission on Aboriginal Peoples for the opportunity to work on a project of this nature. We would also like to express our gratitude to the participants that kindly gave of their time to participate in the interview process despite the reality of constitutional fatigue and the significant period of time that had elapsed since the last round of constitutional meetings. Finally, we would like to thank Catherine Palmer, graduate student, who assisted in the interview process and in the preparation of the historical narrative in this paper.

Attached as an appendix is a copy of the project's Terms of Reference, including a list of the individuals interviewed and a copy of the Balfour Declaration, which is discussed as an example of an instrument and process of dealing with fundamental constitutional reform.

PART A. CANADIAN EXPERIENCE IN CONSTITUTIONAL

REFORM

HIGHLIGHTS: PRE-CONFEDERATION

Formal constitutional development in Canada began with the *Edict creating the Sovereign Council of Quebec* in 1663, whereby France established New France as a royal province and made provisions for a civil government. Following Canada's transfer to British rule, the Royal Proclamation was enacted in 1763.

The Royal Proclamation provides that all lands that had not been ceded to or purchased by Britain and that formed part of British North America were to be considered "hunting grounds" for the Indians and that the Indians should not be molested or disturbed in the territory reserved for them. The Crown reserved for itself the right to purchase "Indian lands" for settlement, and sought to prevent the "unjust Settlement and fraudulent Purchase" of these lands, ostensibly protecting the Indians from unscrupulous settlers.

Throughout the latter half of the 19th century, significant political changes were taking place in Canada which culminated in the British North America Act, 1867 later renamed the Constitution Act, 1867.

HIGHLIGHTS: 1867-1927

During the first thirty years of Confederation, the provinces made most of their constitutional gains through court litigation, rather than formal constitutional amendments. The Supreme Court of Canada was created by the federal Parliament in 1875, but the right of appeal to the highest court in the British Empire, the Judicial Committee of the Privy Council (JCPC), was retained in Canada until 1949.

Between 1880 and 1896 the JCPC decided eighteen cases involving 10 cases relating to the division of powers. In fifteen of these issues (75 percent), it decided in favour of the provinces. In these decisions, the committee reversed every major centralist doctrine of the Supreme Court.1

Thus, the JCPC was instrumental in shaping how federalism developed in Canada.

In 1906, the federal government called a federal-provincial conference to discuss a proposed change in financial subsidies to the provinces. All of the provincial governments except British Columbia agreed to the federal proposal. The House of Commons and Senate approved the proposed amendment to the constitution, and the British Parliament approved the section without the ratification of the provincial legislatures. In the future, all amendments affecting provincial interests would require provincial consent.

IMPERIAL RELATIONS: THE BALFOUR DECLARATION, 1926

The grant of responsible government by the United Kingdom to Canada through the Constitution Act, 1867 meant that the United Kingdom's power of intervention was gradually reduced.

At the start of the World War I the Imperial relationship between the United Kingdom and the Dominions still recognized the subordination of the Dominions to the United Kingdom.

As a result, in 1914 the Dominions found themselves at war without their consent. They were, however, under no obligation to take part in the War and the extent of their action was self-determined. Their inclusion in the decision-making process established a new conception of Dominion status under which the Dominions were regarded as partners rather than as subordinates, which had more dramatic implications at the conclusion of the War:

The efforts of the Dominions during the War led the United Kingdom to press for the representation of the Dominions at the Paris Peace Conference. They were, therefore, signatories to the Peace Treaties, they became original members of the League of Nations, they made their own treaties, and generally they acquired an international status.2

By 1926 the Dominions had essentially achieved equal status with the United Kingdom.

The Balfour Declaration of 1926 recognized the political independence of self-governing members of the British Commonwealth: Australia, Canada, Eire, New Zealand, and South Africa. The declaration was not a formal legal document, but it expressed a political understanding between all of the countries concerned.

The Balfour Declaration was passed into legal form by the Statute of Westminster in 1931 which held that the British government could not pass legislation affecting Canada without Canada's request, and that Canadian legislation could not be struck down on the grounds that it was contrary to British law. However, the Constitution Act, 1867 and its amendments were still subject to the doctrine of repugnancy, which meant that they could not be altered by Canadian federal or provincial legislative action, but only through a request by Canada to the United Kingdom Parliament.3

HIGHLIGHTS: 1927-1960

By the 1930s, Canada had achieved political independence in all areas except that Great Britain retained responsibility for amending Canada's constitution.

In November, 1927 Federal and provincial leaders met to discuss an amending formula. Although no agreement was reached, this conference is important because its format was similar to future constitutional conferences. Specifically, the federal government displayed its reluctance to change Canada's constitution without the full participation of provincial governments and it was the governments, rather than the people, that were involved in the decision-making process.4

The federal and provincial governments met again with no success in 1935, 1950, and throughout

the early 1960s to discuss the issue of an amending formula. Despite the lack of a domestic amending formula, Canada's constitution was amended nine times between 1930 and 1964.5 Most of these amendments received provincial as well as federal consent. However, during the 1940s the federal government unilaterally amended the constitution four times. The most notable example is the Newfoundland Act, 1949, which admitted the province into Confederation.

HIGHLIGHTS: THE FULTON-FAVREAU FORMULA

In 1964, federal and provincial governments met in Ottawa and unanimously agreed to a complex constitutional amending formula. In 1965, the federal government issued a paper that outlined the four major principles of this Fulton-Favreau formula. The first principle confirmed that the Parliament of the United Kingdom would act only upon a formal request from Canada. Second, Canada would not make any requests to the British Parliament until it received approval from its own Parliament. Third, the United Kingdom would not accept requests from provincial governments, and fourth, Canada would not request action from London on issues directly affecting federal-provincial relations until it had consulted with and received agreement from the provinces.

The Fulton-Favreau formula collapsed in January 1966 when Quebec withdrew its support and the federal government decided not to proceed without its consent.

1965-1971: ROUND ONE

The emergence of Quebec nationalism in the 1960s forced a review of federalism in Canada. Regional conflict, especially between the West and central Canada, increasingly took the form of constitutional challenge.6 These pressures led to an increase in constitutional negotiations. Between 1968 and 1971, it is estimated that the constitutional process spawned seven summit meetings of First Ministers, nine meetings of ministerial committees, fourteen meetings of continuing committees of officials, fifteen meetings of officials' subcommittees, plus innumerable informal interactions.7

Between February and June of 1971, a series of bilateral, closed door negotiations occurred between federal and provincial governments. The process was very much federally-driven, with the federal Justice Minister touring provincial capitals to try to attain agreement on constitutional issues.

On June 14, 1971 the First Ministers met in British Columbia and debated constitutional proposals. On June 17, they emerged with the text of the Victoria Charter, which included an amending formula ensuring the power of veto for both Quebec and Ontario.

On June 22, the Quebec Premier told the Prime Minister that he would reject the deal, leading to the dropping of the proposals. The political convention that Quebec's approval was necessary for major constitutional change was at that time fully in place.8

ABORIGINAL PEOPLES: SUBJECT-MATTER

The Constitution Act, 1867 established federal jurisdiction over "Indians and lands reserved for Indians" (section 91(24)). On the basis of this legislative authority, the Canadian Parliament passed its first consolidated Indian Act a few years later in 1876. The current Indian Act dates from 1951, and deals with a number of issues important to Indian communities and individuals.

Aboriginal peoples were not consulted during the negotiations leading up to the Constitution Act 1867. Nor was their consent acquired with respect to the Indian Act. Instead, the constitution was "entirely an imperial imposition". Aboriginal peoples were treated as subjects, rather than citizens, of the new dominion.9

The tradition of excluding aboriginal peoples from constitutional decision-making continued beyond the early years of Confederation well into the twentieth century.

Reform of Canada's constitution became an issue for Indian, Metis, and Inuit people in Canada during the 1970s. The interest in constitutional development was sparked in large part by the federal government's White Paper of 1969. The White Paper denied the validity of Indian land claims and suggested that the special status of Indians in Canadian society be ended.10 Aboriginal people rejected the White Paper proposals, and their vigorous fighting forced the federal government to withdraw its proposal within a year.

1971-1980: ROUND TWO

After the failure of the Victoria Charter, there was a general reluctance to reopen constitutional talks. The election of the Parti Quebecois in 1976 spawned another round of constitutional talks, and there was a "virtual explosion of conferences, seminars and publications on constitutional issues."11

In November of 1979, the Quebec government issued its position on "sovereignty association", and in the spring of 1980, it held a referendum on the issue, an idea which was rejected by the majority. At the very least, the referendum forced a new round of constitutional talks centred around the federal government's promise to "renew federalism".

Aboriginal people began making progress in the political arena in the late 1970s. During this time, national organizations representing Indians, Inuit, Metis, and non-status Indians were established. These groups were involved in the process that eventually led to the entrenchment of existing aboriginal and treaty rights in the Constitution Act, 1982.

In 1978, the federal government introduced its draft Constitutional Amendment Bill outlining its proposal to unilaterally change the structure of central government institutions. In the following months, several constitutional conferences were held, and a Continuing Committee of Ministers on the Constitution was established to co-ordinate efforts for constitutional change. Aboriginal

people were not included in any of these deliberations.

In 1978, the National Indian Brotherhood (the precursor to the Assembly of First Nations, representing status Indians) formulated two specific demands in response to the constitutional initiatives of the federal government. First, it stated that any constitutional reform must include the entrenchment of aboriginal and treaty rights. Second, the National Indian Brotherhood (NIB) demanded that Indian people must be involved in the process of constitutional reform. The NIB stated that if its demands were not met, that it would ask the United Kingdom Parliament to block patriation of the constitution.12

Partly as a response to this demand, representatives of the three national aboriginal organizations were invited to attend the First Ministers' meeting in October of 1978 as observers. These three aboriginal organizations were: (i) The Native Council of Canada (representing Metis and non-status Indians);

(ii) The Inuit Committee on National Issues (representing the Inuit); and

(iii) The National Indian Brotherhood (representing status Indians).

The October 1978 First Ministers' meeting was open to the public through television. The role that aboriginal organizations played at the Conference, therefore, was one in which all Canadians had access to. This did not satisfy aboriginal demands to be included in constitutional discussions as full and equal partners. In February of 1979, the three national aboriginal organizations were again invited to send observers to the First Ministers' meeting. Aboriginal representatives continued to assert that they were being left out of the constitutional process.

In July of 1979 over 200 Indians made the trip to England. Although they were not able to meet with either the Queen, the Prime Minister, or Cabinet, they did meet with the leader of the Opposition, members of the House of Commons and House of Lords, various High Commissioners, and a senior official in the Foreign Office.13 These meetings allowed the aboriginal people to gain considerable support in England for their position.

ROUND THREE: 1980-1982

Immediately after the Quebec referendum, the federal government called a First Ministers' Conference to establish a timetable for constitutional negotiations. The federal government stated that if agreement on constitutional reform was not reached in a reasonable time, that it would seek to unilaterally patriate the Constitution.

Ministers and officials met in intense negotiations over the summer, with a number of issues on the table, including patriation, a Charter of Rights and Freedoms, and the division of powers. Negotiations culminated in a First Ministers' Conference in Ottawa in September, 1980. Five days of negotiations ended when the federal government rejected a proposal put together by the premiers.

After the failure of the Conference, the federal government asserted that it did not need support from the provincial governments to proceed with constitutional change. It announced that it would begin the unilateral patriation of the constitution. Only two provinces Ontario and New Brunswick supported the federal position. The other eight challenged Ottawa in the superior courts of these provinces. The "Gang of Eight", as they came to be known, devised their own constitutional package protecting provincial rights. They also lobbied the British Parliament which eventually issued a parliamentary committee report concluding that federal unilateral action would be unconstitutional.

Although no federal government before 1980 had threatened unilateralism to the extent proposed at this time, there were some precedents such as the admission of Newfoundland into Confederation, the adoption of the limited federal amending formula in 1949, and the elimination of appeals to the JCPC.

The federal government introduced a Resolution to Parliament on its proposed unilateral action and constitutional package, and debate lasted into the spring of 1981. A Special Joint Committee of the Senate and the House of Commons was convened and held public hearings for several months. Civil rights groups, women's organizations, and several aboriginal groups spoke critically of the Resolution, but their criticism was focused on the content of the proposal, rather than the process of unilateral action. The federal government was able to adopt many of the suggestions made to the Committee, and therefore garnered more support for the reform proposal.

Meanwhile, the eight provinces opposed to unilateral action were relying increasingly upon the judiciary to stop the proposed federal action. The issue was heard by the Supreme Court of Canada which ruled by a majority of seven to two that technically it was legal for Parliament to unilaterally patriate the constitution. However, another majority of the court (made up of six justices) held that in terms of convention the unwritten laws of the constitution it was necessary to obtain a "substantial degree" of provincial consent. Convention and law, the majority argued, were both equally necessary to establish constitutionality. The court also held that while convention required "substantial consent" of the provinces, it did not require unanimity.

Five weeks after the Supreme Court decision, another First Ministers' conference was held. On November 4, 1981, after four days of negotiations, an Accord between the federal government and nine provincial governments was reached. The proposed deal included patriation, a domestic amending formula, a Charter of Rights and Freedoms, linguistic rights, and the strengthening of provincial control over natural resources.

Quebec did not sign the Accord, and later, the Government of Quebec tried to assert in the courts that its consent was necessary for constitutional change. The Quebec government argued that Quebec had a veto under the unpatriated amending process. This was partly based on the fact that both the Fulton-Favreau and Victoria agreements had been dropped after Quebec had

withdrawn its support. The British Parliament did not respond to Quebec's plea to delay the passage until the Courts decided on whether Quebec consent was necessary. On April 7, 1982 just ten days before the Constitution Act, 1982 came into force the Quebec Court of Appeal gave its decision that Quebec did not have a veto. On December 6, 1982 the Supreme Court of Canada upheld the Court of Appeal's decision.

Two important changes were made to the 1981 constitutional package after it had been negotiated: the equality rights sections were added to the proposed Charter of Rights and Freedoms, and the aboriginal rights sections were added. Both of these changes were made as a result of widespread public support, and were not a part of the intergovernmental process.

ABORIGINAL PEOPLES: "OTHER"

When the First Ministers' met in June of 1980, and agreed on a strategy to amend the constitution and to work over the summer on twelve issues regarding constitutional reform Aboriginal issues were not one of these twelve items. Instead Aboriginal issues were listed under the "other" category which consisted of issues that were to be put off until the "second stage" of negotiations. Aboriginal representatives met with the CCMC one time before its scheduled presentation at the First Ministers' meeting in September of 1980.

In October, the federal government submitted a Resolution to Parliament outlining its intention to unilaterally patriate the constitution. The federal Resolution contained only two sections that had specific relevance for aboriginal peoples: a general clause allowed affirmative action programs; and another provision protected "the rights and freedoms that pertain to the aboriginal peoples of Canada" from the Charter of Rights and Freedoms.

Generally, the national aboriginal organizations did not work together on constitutional matters. An NIB executive council resolution of September 1980 opposed cooperation with the Native Council of Canada. On occasion the national aboriginal organizations did cooperate on a common strategy. In October 1980 their presidents held a joint press conference in London, England and in November 1980 the organizations made a joint submission to the British Foreign Affairs Committee and their staff worked to develop common constitutional positions on a definition of "aboriginal peoples," the entrenchment of aboriginal and treaty rights, the recognition of aboriginal self-government, the requirement of aboriginal consent to constitutional amendment.14

In January of 1981, the federal government and the leaders of the three national aboriginal organizations agreed to insert a section into the Charter of Rights and Freedoms that would protect aboriginal and treaty rights. This was to be inserted as section 34(1) of the proposed Charter. As well, section 25 - protecting aboriginal rights from the equality section of the Charter - was strengthened. Finally, a new subsection requiring a future First Ministers' conference on aboriginal issues was agreed to.

Thus, certain of the demands of the aboriginal organizations were met. Aboriginal and treaty rights were recognized, for the first time the Metis were explicitly recognized as aboriginal peoples, and there was a guarantee of future involvement in the constitutional process. But other aboriginal demands were not met. The bill contained no requirement for aboriginal consent to constitutional change directly affecting them. Furthermore, the bill did not recognize the right of aboriginal peoples to determine their own form of government.15

When the amendment recognizing aboriginal and treaty rights was announced, the leaders of the three national aboriginal organizations publicly supported the changes and stated that they would support unilateral patriation. However, the N.I.B., citing the omission of a consent clause and of a provision on self-government and the N.C.C., citing that their support had been conditional on an aboriginal consent clause, withdrew their support. Only the I.C.N.I. maintained its support, although it continued to demand an aboriginal consent clause.16

After the September 28, 1981 Supreme Court decision on the federal unilateral strategy, aboriginal leaders began to organize a strategy for the First Ministers' meeting on the constitution that was scheduled for November. The national aboriginal organizations, especially the I.C.N.I., were afraid that the provisions that had been agreed to in January would be bargained away if they did not attend the meeting. When First Ministers emerged from their meeting in November, they had indeed dropped the sections applying to aboriginal people.

The aboriginal groups did not accept this elimination of their rights. Once again they launched an intensive lobbying campaign in Ottawa. The Aboriginal Rights Coalition was formed by the ICNI, the NCC, the Native Women's Association of Canada, and certain status Indian groups. The NIB was bound by an earlier decision not to work formally with other groups; therefore, the NIB and most of its members refrained from joining the ARC, although they and the coalition held common positions on the issues and worked together informally.17

It is not clear which provinces were responsible for instigating the removal of the aboriginal rights sections from the resolution. The aboriginal organizations began pressuring the nine Provincial Premiers that had agreed to the November Accord. One by one each Premier agreed to support adding an aboriginal section to the Accord. As the last Premier to drop his opposition to the aboriginal rights section Premier Lougheed, after discussions with the Metis Association of Alberta, and after a large demonstration in front of the Alberta legislature, proposed that the aboriginal and treaty rights section be reintroduced with the addition of the word "existing" so that only "existing aboriginal and treaty rights" would be recognized and affirmed.18

This change caused the aboriginal organizations to revoke their support for the package. In the end, only the Metis Association of Alberta supported the entire package. The other aboriginal organizations began lobbying the British Parliament to block the passage of the Accord.

The efforts in England met with some success: in the House of Commons, a total of thirty hours

were devoted to debate on the Canada Bill over several days, and of these twenty-seven hours were on Indian matters. Approximately 90 percent of the time was exclusively spent on Indians.19

HIGHLIGHTS: 1982-1987

By virtue of Section 37(1) of the Constitution Act 1982, the federal government was required to convene a First Ministers' Conference on aboriginal issues. This conference took place in March of 1983. Four invited delegations representing aboriginal peoples attended. These organizations were: (i) The Assembly of First Nations (successor to the National Indian Brotherhood); (ii) The Native Council of Canada - representing off-reserve aboriginal people; (iii) The Metis National Council; and (iv) the Inuit Taparisat of Canada.

Prior to this meeting there was a threat of an injunction. On March 7, 1983, the Metis organizations of the three Prairie provinces broke away from the NCC and formed the Metis National Council (MNC). They brought an action in the Supreme Court of Ontario a few days later to enjoin the Prime Minister from convening the conference scheduled for March 15 and 16. The NCC no longer represented the Metis people of Canada, they claimed, so the prime minister would be in default of his duty under s. 37 to invite "representatives" of the aboriginal peoples of Canada unless the MNC were invited. The NCC had up until then, represented both the non-status Indians and Metis of Canada.

In the end, the application for an injunction was dropped after the federal government agreed to invite the MNC to the table. In doing so, the federal government risked creating a precedent for factions of a national aboriginal group to demand separate representation. In such cases, the federal government might end up embroiled in an internal dispute within an aboriginal organization; and if, over the objections of the umbrella organization, it recognized further factions, it would be adding to the unwieldiness of the bargaining process. Despite the risk, the federal government had little choice but to allow both organizations seats at the table. It could not in good conscience permit tens of thousands of people who identify themselves as Metis to be unrepresented at the conference.20

The First Ministers' Conference produced the following agreement between the federal government, nine provincial governments (Quebec only attended as an observer), and aboriginal representatives:

(i) The constitutional recognition of treaty rights included those already in existence as well as those that may be acquired through future land-claims agreements - section 35(3);

(ii) A guarantee that existing aboriginal and treaty rights will apply equally to male and female persons - section 35(4);

(iii) An agreement that at least three constitutional conferences would be held before April 17, 1987. The first meeting to be held was in the nature of a political undertaking. The agenda of

these conferences would include constitutional matters directly affecting aboriginal peoples of Canada. Aboriginal peoples would be invited to participate in these discussions, as would representatives from the Yukon and Northwest Territories - section 37.1;

(iv) An agreement to the principle that before any further amendment to constitutional provisions dealing with aboriginal peoples are made, aboriginal leaders must be consulted in a conference with First Ministers - section 35.1.

These agreements were proclaimed on June 21, 1984 as the Constitution Amendment Proclamation, 1983.

Three additional First Minsters Conferences on aboriginal matters were held after the 1983 meeting. These conferences were held in 1984, 1985, and 1987, and the focus at the meetings was the aboriginal right to self-government. Two conflicting views on this issue emerged at the meetings.

On the one hand, the federal government and some provinces were willing to entrench a right of aboriginal self-government, but only if the right was contingent upon negotiations. This means that the right to self-government would have legal effect only when individual communities negotiated agreements with the governments concerned. On the other hand, aboriginal representatives argued for an "inherent" right to self-government, one that was not dependent on negotiations.

At the 1984 Conference, the federal government proposed self-government legislation that would have committed governments to the establishment of institutions of self-government in accordance with federal and provincial legislation. Aboriginal peoples rejected the proposal.

At the FMC in April of 1985, the federal government tabled another proposal regarding self-government. The proposal was to entrench the right to self-government in the constitution, but only on the condition that self-government be defined first through tri-partite negotiations. Such a definition would have to be approved by the Parliament of Canada as well as each Provincial Legislature. This proposal was accepted by the Metis and Inuit representatives, but was rejected by the Indian representatives at the meeting.

The final First Ministers' Conference before the Meech Lake negotiations was held in March of 1987. At this conference, the federal government again tabled a proposal to recognize the aboriginal right to self-government, again requiring that the powers of aboriginal governments be worked out through tripartite negotiated agreements. Indian representatives once again rejected the federal proposal, and instead argued for recognition of aboriginal governments as the "third order of government", equal in jurisdiction to the other two levels of government. No agreements on the issue were reached at these conferences.

MEECH LAKE: ROUND FOUR

The "Quebec round" began in May of 1986 in Montreal when a group of academics, government officials, journalists, and business representatives met to discuss the future of Quebec within Canada. It was at this meeting that Quebec revealed its five conditions for accepting the 1982 deal. These were: (i) that Quebec would be recognized as a distinct society; (ii) that Quebec's role would be strengthened in the field of immigration; (iii) that Quebec would have a role in the selection of judges to the Supreme Court of Canada; (iv) that Quebec would be able to opt out of federal spending programs in areas of exclusive provincial jurisdiction without fiscal penalty; and (v) that Quebec would recover its veto on constitutional matters affecting the province's interests.

Following the meeting in Montreal, provincial Premiers met in Edmonton in the summer of 1986. The Premiers issued a memo stating that their priority was to bring about Quebec's full and active participation in the Canadian constitution. A series of bilateral negotiations followed the Edmonton meeting, and a major constitutional conference was held in March of 1987. On the last day of April 1987, the Prime Minister of Canada invited the First Ministers to Meech Lake to discuss the constitution. After several hours of intense negotiations, the first ministers emerged with an agreement on a number of issues.

Basically, the first ministers had agreed to "provincialize" Quebec demands.21 Most of Quebec's five conditions were extended to all of the provinces; the only section that could not be provincialized was the distinct society clause for Quebec.

First ministers agreed to meet again on June 2 to put the finishing touches on the Accord. First Ministers met in Ottawa on that day for sixteen hours in private discussions, and on June 3, they emerged with the final version of the Meech Lake Accord. They also unanimously approved a companion "political accord" that committed them to put the proposed amendments before their respective legislatures as soon as possible, and no later than June, 1990.

While only two components of the Meech Lake Accord -the Supreme Court and the amending formula proposals - required unanimous consent, the First Ministers insisted on making the deal one package, an "all-or-nothing" deal. Therefore, the entire package required unanimous consent.

The ratification process was often coupled with open public hearings. A federal Joint Committee of the Senate and House of Commons held hearings throughout the summer of 1987, and in September, the House had voted in favour of the Accord. By the middle of 1988, eight provincial legislatures had ratified the Accord; only Manitoba and New Brunswick had not. Then, on April 6, 1990, Newfoundland rescinded its support for the Meech Lake Accord.

The Prime Minister invited provincial Premiers to one more First Ministers' constitutional conference. The conference began on June 3, 1990 in Ottawa.

On Saturday June 9 the First Ministers announced that they had agreed on conditions that would

enable hold-out provinces to ratify the Meech Lake Accord. It was agreed that each government would proceed with a whole new set of constitutional initiatives immediately following legislative ratification of the Meech Lake proposals. These initiatives were as follows:

(i) a House of Commons Committee would conduct public hearings on what should go into a Canada clause which would outline the defining features of the Canadian community;

(ii) a Commission of equal delegations from provinces and members from Parliament and the territories would conduct hearings and develop proposals on an elected Senate;

(iii) constitutional meetings with aboriginal representatives would continue;

(iv) amendments would be adopted to strengthen the sexual equality rights and minority language rights in the Charter; and

(v) further reviews of the amending formula would be undertaken.22

However, two provinces - Manitoba and Newfoundland - did not ratify the Accord. In Manitoba, the Premier asked the Legislature on June 12 for unanimous consent to consider the Meech Lake proposals without the normal two days' notice. Elijah Harper, the lone aboriginal MLA, recorded the only 'no' vote, and the following week, he opposed any circumvention of the rules of the legislation concerning hearings on the Accord. With 3,500 names submitted to speak on the issue, the hearings would have continued on past the June 23rd deadline. In Newfoundland, the Legislature adjourned on June 22 without voting on the Meech Lake Accord.

There was strong opposition from aboriginal people to both the content and process of the Meech Lake Accord. This anger was compounded by the fact that the "apparent ambiguities and imprecisions that had stood in the way of constitutional recognition of aboriginal self-government did not prevent acceptance of the equally elusive distinct society concept."23

Strong aboriginal opposition to the Accord contributed significantly to its eventual demise. The Meech Lake Accord would have required unanimous consent from all eleven Canadian governments for the entrenchment of aboriginal self-government. Aboriginal groups believed that this requirement would have effectively "closed the door" on any potential amendments concerning aboriginal peoples.

CANADA ROUND: ROUND FIVE

In the same week that the Meech Lake Accord failed, Quebec announced that it would form a broad-based commission to consult Quebec people on possible constitutional strategies. The Belanger-Campeau Commission was established by the Quebec National Assembly on September 4, 1990, and it was composed of 36 members representing large segments of Quebec society (no aboriginal representatives were on the Committee). At the same time, the Quebec Liberal Party established the Allaire Commission, to examine constitutional matters. In January,

1991 the Allaire Commission released its report, and a month later the Belanger Campeau Commission released its final report.

In May of 1991, the Quebec National Assembly passed Bill 150 outlining a two-track process for constitutional reform. One track committed the Quebec government to holding a referendum on the sovereignty of Quebec between June 8 and 22, 1992, or between October 12 and 28, 1992. If a majority of Quebecer's voted "yes" in the referendum, the Government of Quebec would have one year to declare sovereignty. The second track set up a legislative committee to examine any offer of a new constitutional partnership made by the Canadian government. The Bill stipulated that Quebec would only consider a proposal that was formally binding on the Government of Canada and the Provinces.

While the Quebec government was outlining its constitutional strategy, the federal government was initiating its own consultative processes in the winter of 1990. In November, 1990 the federal government established "A Citizens' Forum on Canada's Future", otherwise known as the "Spicer Commission". The Spicer Commission engaged 400,000 Canadians in discussions, but "far from resolving Canada's constitutional debate, the Citizens' Forum demonstrated just how difficult a consensual resolution would be".24 In December of 1990, the federal government established the Beaudion-Edwards Committee to review the constitutional amending process. Submissions to the committee tended generally to reject the idea of the traditional First Ministerial methods of amending the constitution.

In its Throne Speech in May of 1991, the federal government announced its constitutional process. Over the summer, the federal cabinet would develop a set of constitutional proposals and then submit them to a Joint Parliamentary Committee for review. The Parliamentary committee would consult with Canadians on the federal government's proposals, and submit a report to Parliament on their deliberations. The Committee would meet with provincial legislative committees and aboriginal groups.

By the fall of 1991, similar committees had been developed all across Canada. In Quebec, as noted above, a legislative committee had been set up to respond to proposals from the rest of Canada. New Brunswick and Newfoundland appointed similar committees composed of both legislators and citizens. Manitoba, Ontario, Prince Edward Island, and the two northern territories, appointed committees composed of elected legislators. Alberta and British Columbia established executive task forces followed by legislative committees. Nova Scotia and Saskatchewan established committees composed entirely of citizens outside the legislature.25

On September 24, 1991, the federal government released its constitutional proposals, revealed in a publication entitled "Shaping Canada's Future Together". The federal package contained 28 recommendations in all. Some of the proposals did not require constitutional amendments - such as the proposal to reduce party discipline in the House of Commons, and the proposal to allow regional inputs for appointments to the Bank of Canada board of directors. Two of the proposed amendments required unanimity: entrenching the Supreme Court's composition, and changes to

the constitution amending formula. The two unanimity items were separate from the rest of the package, so that if not approved, it would not harm the rest of the package. The other recommendations required the approval of the House of Commons plus seven provinces with at least fifty percent of the population. The package encompassed all five of Quebec's original demands, although the distinct society clause was confined to the Charter.

The federal recommendations were submitted to a joint parliamentary committee chaired by Quebec Senator Claude Castonguay, and Manitoba MP Dorothy Dobbie. The so-called "Unity Committee" was composed of thirty members, and was given until the end of February, 1992 to make its recommendations on the federal package.

The Unity Committee travelled across Canada to meet with Canadians, but by November, the national tour was forced to close when no one attended a meeting scheduled in Manitoba. At the end of November, Quebec Senator Claude Castonguay retired from the committee and was replaced by Quebec Senator Gerald Beaudoin.

The Beaudoin-Dobbie Committee resumed its regular public hearings in January of 1992. In addition to the regular meetings, five regional conferences were scheduled, each focusing on different aspects of the package. The first conference, held in Halifax, focused on the division of powers; the second, held in Calgary, focused on Senate and other institutional reform; the third, held in Montreal, centred on the issue of economic union. the fourth was held in Toronto, and focused on Canadian identity and the Canada clause; and the last conference, held in Vancouver, was dedicated to compiling the positions that had emerged from earlier conferences.

The Committee tabled a 125-page report entitled "A Renewed Canada" in Parliament in February, 1992. These proposals were to form the basis of the upcoming negotiations with the provinces, territories and aboriginal peoples, which were scheduled to begin in March, 1992.

The process that resulted in the Charlottetown Accord had three stages.26 The first stage lasted from March 12 to June 12, and was a series of multilateral discussions between the federal government (represented by the Minister of Constitutional Affairs), provincial and territorial governments (Quebec did not attend), and four national aboriginal organizations, for a total of sixteen delegations. Each delegation was allowed to have two representatives at the table.

The multilateral discussions occurred in various cities and took place on two levels. The first level was composed of technicians who developed proposals for the Ministers. The development of the these proposals went to four working groups, each responsible for different issues. Working Group One discussed the Canada clause and the amending formula. Working Group Two discussed Senate and other institutional reform. Working Group Three discussed aboriginal issues, and Working Group Four discussed the division of powers. The first stage ended when ministers were unable to reach agreement on Senate reform.

The second stage occurred from June 29 - July 2, and resolved the impasse on Senate reform.

The agreement that resulted from these negotiations came to be known as the "Pearson Accord". First Ministers attended these meetings, with the exception of the federal government which was represented by the Minister of Constitutional Affairs, and the Province of Quebec, which did not attend. The four aboriginal organizations were also involved in this stage.

The third stage of the Charlottetown process was a series of First Ministers' conferences beginning in late July and early August. Quebec participated in this stage of negotiations, as did the Prime Minister. The First Ministers met on August 4, 1992 to discuss the Pearson Accord. Quebec rejected the idea of an equal senate, but agreed to attend another conference on August 10. It was agreed at this meeting to hold another First Ministers Conference including Aboriginal and Territorial leaders.

Four days of negotiations ensued in Ottawa from August 18-21, and agreement was reached on some sixty clauses. The Accord proposed constitutional amendments on an array of issues, including senate reform, aboriginal self-government, the division of powers, and the amending formula. A meeting was held on August 28 to finalize the agreements.

On June 3, 1992, the federal government had passed Bill C-81 which enabled it to hold a referendum on the Charlottetown Accord. Two provinces - British Columbia and Alberta - were legislatively bound to hold referendums before their legislatures could consider any constitutional amendment proposals. Quebec was bound to have a constitutional referendum by October 26, 1992.

On October 26, 1992, nearly 14 million Canadians - 75 percent of eligible voters - voted in Canada's first country-wide referendum on constitutional matters. Fifty-four percent of the voters rejected the accord.

In total, the multilateral process that led to the Charlottetown Accord involved approximately 200 people. In this respect, the process was broader and more public than traditional Canadian constitutional processes. However, in many ways it was an elite process that was simply coupled with a process of popular ratification.

ABORIGINAL PEOPLES: INCLUSION

The federal government's constitutional proposals, released in September of 1991, contained 28 proposals, four of which dealt with aboriginal issues. The four proposals pertaining to aboriginal people were:

(1) The government affirmed its commitment "to ensuring that aboriginal peoples participate in current constitutional deliberations".

(2) The government proposed an amendment to the Constitution to "entrench a general justiciable right to aboriginal self-government within the Canadian federation and subject to the Charter of Rights and Freedoms, with the nature of the right described so as to facilitate

interpretation of that right by the courts". The enforceability of the right would be delayed for ten years.

(3) The government proposed the entrenchment of a constitutional process to "address aboriginal matters that are not dealt with in the current constitutional deliberations and to monitor progress made in the negotiation of self-government agreements".

(4) The government proposed that aboriginal representation be guaranteed in a reformed Senate.27

These proposals, as promised by the federal government in its Throne Speech, were sent to the Joint Parliamentary committee for review. This committee held meetings throughout Canada and conducted five regional conferences, each focusing on different areas of the constitution, none of which focused on aboriginal issues.

The Committee's Report, entitle A Renewed Canada, was released in February, 1992, and called for changes in every component of the federal package, to reflect the consultations with Canadians.

With respect to aboriginal rights, the Committee recommended a clause to make it clear that existing aboriginal rights includes the inherent right of self-government.28 The Committee also recommended that a process for negotiating these rights be worked out between federal, provincial, territorial governments and aboriginal peoples. There was no suggestion in the proposal that these negotiations would make the right contingent. The committee also recommended that no changes be made to the constitution affecting aboriginal rights without their consent.

After the release of the Beaudoin-Dobbie Report, negotiations were scheduled to begin in March. These negotiations had three stages, as outlined in Part A of this report.

In the first stage of negotiations, aboriginal peoples were involved as full participants. The multilateral discussions that occurred from March 12 to June 12, 1992 were between the federal and provincial governments, the territorial governments, and four national aboriginal organizations.

A public meeting on aboriginal issues, which was to have been part of the Beaudoin-Dobbie process, was held in Ottawa on the weekend following the launch of the multilateral process. The Native Women's Association of Canada (NWAC) attended this meeting to protest their exclusion from the multilateral process.

NWAC continued to protest their exclusion, through demonstrations, lobbying, correspondence, and media outlets. More importantly, NWAC made an unsuccessful attempt to use the courts to gain direct and separate participation in the multilateral process. In the Supreme Court of Canada decision, dated October 27, 1994, the court summarized the NWAC position as follows:

During the constitutional reform discussions which eventually led to the Charlottetown Accord, a parallel process of consultation took place within the Aboriginal community of Canada. The federal government provided $10 million to fund participation of four national aboriginal organizations: the Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Metis National Council (MNC), and the Inuit Tapirisat of Canada (ITC). The Native Women's Association of Canada (NWAC) was specifically not included in the funding but a portion of the funds advanced was earmarked for women's issues. As a result, AFN and NCC each paid $130,000 to NWAC and further $300,000 was later received directly from the federal government. The four national Aboriginal organizations were invited to participate in a multilateral process of constitutional discussions regarding the Beaudoin-Dobbie Committee Report. The purpose of these meetings was to prepare constitutional amendments that could be presented to Canada as a consensus package. NWAC was concerned that their exclusion from direct funding for constitutional matters and from direct participation in the discussions threatened the equality of Aboriginal women and, in particular, that the proposals advanced for constitutional amendment would not include the requirement that the Canadian Charter of Rights and Freedoms be made applicable to any form of Aboriginal self-government which might be negotiated. This fear was based on NWAC's perception that the national Aboriginal organizations are male-dominated so that there was little likelihood that the male majority would adopt the pro-charter view of NWAC. In response to a letter from NWAC, the Minister responsible for Constitutional Affairs indicated that the national organizations represent both men and women and encouraged NWAC to work within the Aboriginal communities to ensure its views are heard and represented. Despite the fact that it participated in the parallel process set up by the four national Aboriginal organizations, NWAC remained fearful that it would be unsuccessful at putting forward its pro-Charter view and commenced proceedings against the federal government seeking an order against any further disbursements of funds to the four Aboriginal organizations until NWAC was provided with equal funding as well as the right to participate in the constitutional review process on the same terms as the four recipient groups. They alleged that by funding male-dominated groups and failing to provide equal funding to NWAC, the federal government violated their freedom of expression and right to equality.29

The Supreme Court of Canada determined that the Charter did not place a positive obligation on the part of the federal government to fund or consult anyone. Furthermore, the Court determined that there was a lack of evidence to support NWAC's contention that the four funded groups were less representative of the viewpoint of women with respect to the Charter or that the funded groups advocate a male-dominated form of self-government.

The first stage of multilateral meetings ended on June 12, 1992 when the parties were unable to reach agreement on Senate reform. The second stage of negotiations consisted of a series of meetings aimed at resolving this issue. These meetings were attended by First Ministers of all of the provinces except Quebec (which did not attend), the federal Minister of Constitutional Affairs, and the four aboriginal organizations. Agreement was reached on July 2, 1992.

The final stage of negotiations was distinct from the first two stages in three ways. First, the Province of Quebec attended these meetings, second, the Prime Minister of Canada - rather than the Minister of Constitutional Affairs - led the federal delegation, and third, the aboriginal organizations were not included in all of the meetings.

Aboriginal representatives were not invited to the series of First Ministers' meetings in late July and early August. Aboriginal groups protested their exclusion from these meetings, and were included in the final negotiations that occurred in Ottawa between August 18-21, and the meeting in Charlottetown on August 28 to formalize the agreement.

The final meetings in Ottawa and Charlottetown produced sixty proposed amendments to the constitution. Section IV of the Charlottetown Accord dealt with the rights of First Peoples in Canada. Some of these provisions are described below:

- The aboriginal inherent right to self-government within Canada was recognized, and it was recognized that aboriginal governments would constitute one of three orders of government in Canada. (Section 41, Status Report).
- Justiciability of the inherent right to self-government was to be delayed for five years. (Section 42, Status Report). It was also agreed that the Charter of Rights and Freedoms would apply to aboriginal governments, and that these governments would have access to the notwithstanding clause of the Charter. (Section 43, Status Report)
- A clause committing federal and provincial governments to negotiate with First Nations in "good faith". Section 46 stated that the commitment to negotiate "does not make the right of self-government contingent on negotiations in any way". Section 45 stipulated that self-government negotiations would be initiated by aboriginal peoples.
- Other provisions relating to aboriginal peoples included a commitment from the federal government that it would interpret treaties in a "just, broad and liberal" manner. The provinces were also committed to participate in this treaty process when invited by the Government of Canada and the Aboriginal peoples concerned. (Section 48, Status Report)
- It was agreed that matters dealing with financing of Aboriginal governments should be dealt with in a political accord. (Section 50, Status Report)
- Four future First Ministers on Aboriginal constitutional matters beginning no later than 1996, and following every two years thereafter. (Section 53, Status Report)
- A clause clarifying that Metis people are included in section 91(24) of the Constitution Act, 1867. (Section 54, Status Report)

In the October 26th referendum, polling stations on reserves, the AFN constituency, recorded a 60 per cent majority against the Accord. However, through differing methods of ratification, the constituencies of the other aboriginal organizations supported the Accord.

PART B. THE CHARLOTTETOWN ACCORD

The constitutional process that produced the Charlottetown Accord was the first time since Confederation that Aboriginal peoples were included in a major overall effort at constitutional restructuring of the Canadian federation. Our examination of the Charlottetown experience is designed to ascertain how the participants in this exercise, both Aboriginal and non-Aboriginal, assess this attempt to resolve Aboriginal constitutional issues as part of an overall settlement of constitutional issues.

GENERAL ASSESSMENT

There was a marked difference between non-Aboriginal and Aboriginal participants in their assessment of the Charlottetown Accord effort at constitutional reform. Those who were associated with federal, provincial and territorial government teams generally were very positive about the experience. The multi-lateral, intergovernmental negotiating process was one with which they were familiar and comfortable. It was, indeed, "their process". They were pleased and somewhat surprised to find how feasible it was to weave first peoples' issues and negotiators into this process.

For the Aboriginal participants, on the other hand, the process was not of their choosing. Most agreed to participate largely out of feeling that they could not afford to stay out. The "Canada Round" which led to Charlottetown seemed to be the only constitutional game in town - the only forum in which non-Aboriginal leaders would negotiate fundamental constitutional issues with Aboriginal peoples. Though they thought it was good to be "at the table" and not excluded as they had been from the Meech Lake Accord and earlier intergovernmental conferences, none of the Aboriginal participants felt any sense of proprietorship about this process.

Beyond this common sense of grudging necessity, we found considerable variation among Aboriginal leaders in the degree to which they disapproved of dealing with the constitutional future of their people in such a pan-Canadian, pan-Aboriginal forum. Metis Nation leaders were the most positive about the process. They seemed to have had more "control of the pen" in the drafting of proposals relating to their people. In other words proposals for amendments and/or drafting of same were not federal or provincial government driven. They did not have a sense of being coerced into abandoning a traditional treaty process. At the other end of the spectrum, were AFN members. Most of the AFN chiefs we interviewed were alienated by the process and very anxious about implications of a number of the substantive clauses included in the final text. In between were members of the ITC and NCC delegations. Though they too had qualms about different features of the process and concerns about compromises they had to make, they found it easier to pursue their constitutional objectives within the Charlottetown framework. In part, this reflects the fact that the organizations they represented are less confederal in structure than the AFN.

The confederal nature of the AFN was evident in the reluctance of many of its members to accept pan-Indian negotiations, let alone pan-Aboriginal negotiations, as an acceptable vehicle for

negotiating their relationship with Canada. Representatives of the Mikmaq tribal society were particularly emphatic in rejecting the legitimacy of constitutional negotiations in which they were not separately represented as a nation. They reminded us of their 1991 submission on this point to the United Nations Human Rights Committee.

The basis of the Mikmaq complaint was that they had sought an invitation to attend the constitutional conferences on aboriginal matters so that they could represent their own interests and that Canada refused to permit separate Mikmaq representation at the constitutional conferences. The Mikmaq argued that the refusal infringed their right to take part in the conduct of public affairs, directly or through freely chosen representatives, in violation of article 25 (a) of the International Covenant on Civil and Political Rights.

The Mikmaq were not successful in their complaint as the Committee decided that article 25 did not mean that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. In the view of the Committee the participation and representation at the constitutional conferences had not been subjected to unreasonable restrictions.30

Despite the views of the Human Rights Committee it would be difficult to say that the Mikmaq and a number of other first nations had fully consented to the Charlottetown process or previous constitutional processes.

The opposition to the Charlottetown framework conveyed to us by many of the first nations' Chiefs is based on a fundamental constitutional philosophy that is not readily reconciled with a process in which they are considered to be representing only a constituent part of a sovereign Canadian nation. These Aboriginal leaders hold strongly to the belief that true recognition of their inherent right to self-government means that their nationhood must be taken seriously by Canada. Reciprocal respect for nationhood requires nation-to-nation, treaty-like negotiations. From this perspective, constitutional arrangements should be worked out through the reviewing and renewing of treaty relationships.

Some AFN chiefs went further and expressed concern about the very idea of having the legal status of their nation defined in the constitution of anther nation such as Canada - even if that Constitution contains clauses entrenching their inherent right and respect for treaties. Participation in such a project could imply acceptance of the Constitution of Canada as the "supreme law" for Aboriginal First Nations. For these First Nations leaders, such an implication suggested that their own constitutions henceforth would be subordinate to and derivative of the Constitution of Canada. They had difficulty reconciling this implication of the Charlottetown project with their conception of the inherent nature of their people's right to self-government.

Another significant source of Aboriginal opposition to the Charlottetown Accord was the Native Women's Association of Canada. That opposition is a matter of public record as discusses earlier in this paper.

Having summarized the general position of participants in the Charlottetown Accord, we will turn now to a more detailed account of how the Aboriginal and non-Aboriginal leaders assessed the process that produced the Charlottetown Accord and the substantive provisions of that Accord. The purpose here is not to "rehash" Charlottetown but to derive from the participants' appraisals ideas that might be useful in approaching future constitutional negotiations.

PROCESS CONCERNS

The Charlottetown process proceeded through three basic stages: public discussions, multilateral negotiations and the referendum. We will consider each of these in turn.

PUBLIC DISCUSSIONS

There was broad agreement on all sides that the five televised public conferences sponsored by the Beaudoin-Dobbie parliamentary committee in the early weeks of 1992 contributed little by way of working out or clarifying the constitutional matters relating to Aboriginal peoples which were dealt with in the multilateral negotiations that followed. The principal contribution of these conferences, it was stressed, was to show that there was strong support right across the country among non-Aboriginal Canadians for dealing with Aboriginal issues in this constitutional round. A number of provincial government representatives told us that this display of support made their political leaders feel more confident that there was sufficient public support to proceed with constitutional recognition of the Aboriginal peoples' right to self-government.

Quite apart from the series of public conferences and consultations sponsored by the federal parliament and government, all of the Aboriginal organizations carried out their own "parallel process" of constitutional review within their own communities. While these discussions in the parallel Aboriginal process were important in giving Aboriginal leaders a sense of their peoples' fundamental constitutional aspirations, they were not connected to the multilateral negotiations that followed. There was no provision in that negotiating process for keeping Aboriginal communities appraised of the detailed proposals emerging in those negotiations.

THE MULTILATERAL NEGOTIATIONS

The Aboriginal participants in the multilateral negotiations pointed to one particular advantage of negotiating Aboriginal issues in this forum: the bargaining leverage that such a large agenda provided. Compared with the four conferences from 1983 to 1987 devoted solely to negotiating Aboriginal issues, these negotiations created more bargaining possibilities. This time, with many other items on the table, there were more opportunities for trade-offs. Non-Aboriginal governments realizing that they would need the support of Aboriginal delegations for their own constitutional priorities were more inclined to make concessions to Aboriginal positions. Furthermore, certain provincial delegations were championing the aboriginal agenda which they considered essential to their overall support of other reforms.

For these negotiating opportunities to be realized there had to be full Aboriginal participation in all phases of the multilateral agenda. From all accounts such full participation seems to have occurred. Not only were Aboriginal representatives deeply involved in Working Group 3 on Aboriginal issues, but they also participated actively in the three other Working Groups. Nor did the Aboriginal negotiating teams experience any disadvantage in terms of their negotiating resources - technical expertise, research etc. Indeed, a representative of one of the smaller provinces remarked that Aboriginal organizations were much better supported and prepared for these negotiations than his own province.

The exceptional circumstance of having three NDP provincial governments involved in this set of constitutional negotiations was clearly an important factor in contributing to the full participation of Aboriginal organizations. Participants on both the Aboriginal and non-Aboriginal sides acknowledged this point. The presence of non-Aboriginal leaders with an exceptional commitment to ensuring full consideration of the Aboriginal peoples' agenda was also stressed. Ontario's Premier Bob Rae and the federal Constitutional Affairs Minister, Joe Clark, were most often mentioned in this regard. There was also much respect expressed for the leadership and communication skills of the AFN's National Chief, Ovide Mercredi.

In the negotiations generally, and in Working Group 3 in particular, it would appear that discussion was open and unrestricted. All interests and proposals could be brought to the table. Within the negotiating room, as one of the provincial government participants put it, "an interpretative community" around Aboriginal constitutional issues developed. The fact that Working Group 3 was focused exclusively on aboriginal issues, that federal and provincial representatives in this Working Group were knowledgeable about these issues and that many of the Working Group 3 participants had experience from previous constitutional discussions about the same issues generated knowledgeable and informed negotiations.

These are all rather positive points about the multilateral negotiating process. But there were some very real negative features. Chief among these was the detachment of the negotiators from the communities to which they are accountable. While this was a problem for all participants, it was especially emphasized by Aboriginal representatives. Once they engaged in the negotiating process there was virtually no opportunity to check back with the communities their organizations spoke for on the issues and alternatives that faced them. This meant that they had to take positions on crucial issues that would be presented to their communities for the first time in the referendum campaign on a take-it-or-leave-it basis.

Some of the Aboriginal participants talked to us about the need to train Aboriginal people to serve as communicators with Aboriginal communities during constitutional negotiations. The idea would be to have a team of persons from different communities well versed in the issues being discussed. They would provide a two-way channel of communication between the negotiators and Aboriginal communities.

More openness would also have helped in keeping communities informed of what was going on at the negotiating table. As it was, the negotiating process was throughout almost completely closed to media scrutiny. On this point, there was much more support for openness among Aboriginal participants. Nonetheless, some of the provincial and territorial government representatives think now it would have been better to have opened up the negotiating process - especially if it is to be followed by a referendum. One very experienced provincial delegate said that nothing he had heard in the closed meetings could not have been said in public, and that in any case negotiators will arrange to meet privately whenever they wish to. Opening up the bargaining process would mitigate against participants who agree to compromises in closed negotiations later attacking them in public.

Finally, there was great resentment about the time constraints imposed on the negotiations. The fact that the deadline arose from Quebec's commitment to have a constitutional referendum in October 1992 did not sit well with Aboriginal leaders who saw it as yet another indication of the subordination of their constitutional agenda to Quebec's. On the other hand, a number of the non-Aboriginal participants expressed the view that the Quebec deadline imposed a discipline on the negotiations without which they may not have reached any conclusion.

From the Aboriginal perspective the most objectionable phase of the multilateral process were the last minute negotiations undertaken in the third week of August, 1992 to bring Premier Bourassa and Premier Wells on side. It was at this point that significant and uncertain limits were imposed on the scope of the inherent right that were most problematic for all of the Aboriginal organizations. Negotiation of these limitations was carried out in a rush without time for careful consideration. On the other hand, experienced negotiators on the non-Aboriginal side are convinced that without these limits, several provinces - notably Quebec and Newfoundland - would never have agreed to recognize the inherent right.

THE REFERENDUM

Attitudes to the October referendum varied considerably among the participants. Most positive were those associated with provinces or territories - Alberta, British Columbia, Newfoundland, the NWT and Quebec - who had passed legislation or made public commitments to consult their electorates on significant constitutional change. Other governments felt that given these commitments, a referendum had to be held throughout the country. However, in drafting the Charlottetown package with its sixty clauses and long list of unresolved issues there seems to have been no thought given to the possibility that the package would have to be directly approved by the public in a referendum. It was simply too much to expect that the public was going to fully understand the terms of the deal.

None of the non-Aboriginal representatives thought that the Aboriginal sections of the Charlottetown package were a major source of the negative vote in their constituencies. However, some of those associated with western provinces reported a good deal of unease among

their constituents both as to the cost of implementing Aboriginal self-government and to its implications for municipalities with large Aboriginal populations.

On the Aboriginal side, again there was much concern about the lack of time to prepare communities for the referendum. The ITC and MNC with smaller, more compact constituencies found it somewhat easier to educate their communities on the constitutional package. They reported quite high majorities in favour of the Accord among their peoples. A number of AFN representatives stressed how unfair it was to ask their people to approve a complex package of proposals of vital concern to their future that they were hearing about for the first time and with little real chance for discussion within their communities.

An even more fundamental concern to Aboriginal leaders was the assumption they detected in the non-Aboriginal community that approval of the package by majorities in all of the provinces would make the constitutional changes binding on the Aboriginal peoples. Here it should be noted that a number of provinces acknowledged that even had the referendum produced a positive result it would still have been necessary to have referendums or some other ratification process in Aboriginal communities.

SUBSTANTIVE ISSUES

Again we must record very different levels of approval on the part of Aboriginal and non-Aboriginal participants for the substance of the Aboriginal sections of the Charlottetown Accord.

For the provinces and Ottawa, recognition of the Aboriginal peoples' inherent right may have been a moral imperative, but living up to that imperative was a risky proposition. Generally, what they liked about Part IV, the First Peoples component of the Charlottetown Accord, was that framing constitutional recognition of the right with some limiting clauses and flexible procedures for implementation minimized the risks of recognition.

As one provincial government participant told us, "all the essential elements were there" to make it possible for his government to accept the inherent right. These elements he listed as, implementation by consensual agreements, the "within Canada" qualification, limits on the scope of the right flowing from the contextual clause and the p.o.g.g. clause, and the provision for arbitral mechanisms. A number of provincial governments were most apprehensive about the fiscal provisions of Part IV. They were worried about the extent to which implementation of the inherent right would lead to fiscal off-loading by the federal government.

On the Aboriginal side, at least it could be said that the Aboriginal sections of the Accord provided comprehensive coverage of Aboriginal peoples. There were sections addressing the concerns of First Nations with and without treaties, Metis and Inuit people. This very effort at comprehensiveness resulted in a relatively lengthy statement of First Peoples' constitutional position which for many Aboriginal peoples lacked focus and clarity. It seems to have been most

successful in producing proposals that express the constitutional aspirations of the Metis Nation. Indeed, a number of First Nations representatives reported that among their people there was some feeling that the constitutional proposals had gone too far in accommodating the Metis, especially with regard to section 91(24). As one such person put it "they (the Metis) wanted into 91(24), while we wanted out."

The principal concerns of Aboriginal participants were with the qualifications attached to the inherent right. The very clauses which were introduced to frame and limit that right in order to make it palatable to non-Aboriginal governments were a major source of anxiety to Aboriginal leaders. In this regard, the federal and provincial p.o.g.g. limitation on the inherent right in Section 47 of the Accord was most frequently cited. The concern here was not just with the uncertainty of this provision but with the fact that the meaning of this uncertain clause (and others like it) would be resolved by non-Aboriginal judges. In being asked to accept this situation, Aboriginal representatives felt they were being asked to assume great risks for their peoples in order to minimize the risks for non-Aboriginal people. Some also feel that the p.o.g.g. clause should have been the only constitutional limit on the inherent right and that the jurisdiction to be exercised by Aboriginal governments should not otherwise be negotiable.

Another clause that was frequently cited as a major source of concern was Section 44 ruling out "new Aboriginal rights to land". First Nation leaders of peoples without an adequate land base were very worried as to how this clause would affect their peoples' interests. Like the p.o.g.g. limitation in Section 47, this section is pointed to as a last minute concession to Quebec and not the product of a thorough negotiation involving all of the interested parties.

Opinion among Aboriginal leaders was more divided on the "within Canada" qualification of the inherent right. That qualification was acknowledged by many as a necessary condition for the federal government's willingness to constitutionally recognize the right. But a number of Aboriginal leaders voiced strong concerns about it. In their view, this phrase is inconsistent with their people's view of their own sovereignty. They are also apprehensive about it undermining their efforts in the United Nations and other international bodies.

GAINS AND LOSSES

There can be no doubt that the Charlottetown Accord experience entailed some real gains for Aboriginal peoples. The most important gain must surely be the political recognition by the contemporary generation of non-Aboriginal Canadians of the Aboriginal peoples' inherent right to self-government. Granted this right did not become encrusted explicitly in the hard law of the Constitution of Canada, nevertheless, it became widely enough acknowledged by non-Aboriginal leaders and their governments to make it difficult for the right to be denied or ignored again by Canadians.

We say difficult but not impossible - for following the defeat of the Charlottetown Accord in the referendum the federal government refused to continue its recognition of the right. That situation

would appear to be overcome by the election of a new government a year later on a platform that included recognition of the inherent right. This very outcome provides some evidence of the extent to which recognition of the Aboriginal peoples' inherent right to self-government, within the Canadian constitutional framework, has become accepted in the mainstream of Canadian politics.

Along with this general gain in public education and political recognition of the Aboriginal peoples' most fundamental right, the Charlottetown experience was a significant learning experience for both Aboriginal organizations and non-Aboriginal governments. Leaders on all sides have a much better idea now of what is involved in negotiating agreements giving practical effect to the inherent right. There is a fairly wide understanding of the elements that must go into such agreements, even if there is not a consensus on either the appropriate formulation of these elements or the appropriate negotiating forum. If negotiations to implement the right are resumed fairly soon, there may at least be some wheels that will not have to be reinvented.

For Aboriginal peoples one further gain from the Charlottetown exercise is a strengthening of their right to participate in the shaping of Canada's constitution. According to Section 35.1 of the Constitution Act, 1982, Aboriginal peoples have the right to participate in discussions of constitutional proposals relating to Section 91(24) of the Constitution Act, 1867 or to Sections 25 and 35 of the Constitution Act, 1982. As a result of wide-spread objections to the exclusion of Aboriginal peoples from the Meech Lake negotiations and wide-spread support for their inclusion in the Charlottetown Accord negotiations, this very limited recognition of the Aboriginal peoples right to participate in Canadian constitution making has been strengthened. At the very least the principle incorporated in Section 60 of the Charlottetown Accord that "There should be Aboriginal consent to future constitutional amendments that directly refer to Aboriginal peoples" has become a convention of the constitution. Beyond this, it would be difficult ever again to exclude Aboriginal peoples from the negotiation and approval of constitutional changes affecting the basic structure of the Canadian federation.

The principal loss from Charlottetown, is one of momentum - momentum to resume the effort of working out a mutually acceptable relationship between First Peoples and Canada. The Charlottetown Accord would by no means have solved all the problems in this relationship but it would have functioned as an empowering instrument in ensuring that these problems were addressed with some sense of urgency. After the defeat of the Accord, throughout the country there was a general turning away from efforts at constitutional reform. The constitution became that awful "c word".

As a result Aboriginal peoples have not been able to resume their struggle to exercise their right to self-government by negotiating a Canada-wide agreement at the constitutional table.

So, for Aboriginal Peoples, the Charlottetown Accord may represent a major lost opportunity. Some of the participants in the Charlottetown process believe that some provinces, above all Quebec, only went as far as they did in the Charlottetown Accord in recognizing Aboriginal

peoples' self-government right because they were desperate to make a constitutional deal. Without the atmosphere of a constitutional crisis in which non-Aboriginal governments are extremely anxious to settle their constitutional differences, governments that are very reluctant to place constitutional restrictions on the power they exercise over Aboriginal peoples will have no strong incentive to return to the constitutional table and negotiate the Aboriginal Peoples' constitutional agenda.

FUTURE CONSTITUTIONAL OPTIONS

After the Canada Round and the defeat of the Charlottetown Accord in the referendum of October 26, 1992, a deep sense of constitutional fatigue has been felt throughout the country. Some of the issues dealt with in Charlottetown are being addressed but strictly by non-constitutional means. This is certainly true of the Aboriginal issues on the Charlottetown agenda. A broad spectrum of policy issues relating to Aboriginal peoples, as well as structural questions of governance, are being discussed, negotiated and in some cases acted upon without attempting to resolve issues at the constitutional level. The only arena in which constitutional issues relating to Aboriginal peoples are presently being actively addressed is the courts.

Opinion is divided among both Aboriginal and non-Aboriginal leaders as to whether sufficient progress can be made in implementing the inherent right to self-government and resolving other issues of vital concern to Aboriginal peoples without any further action at the constitutional level. That question will be in the foreground in our review of the alternative constitutional instruments for dealing with the relationship of Aboriginal peoples to Canada. In this review, we will discuss the degree of support among representatives of Aboriginal organizations and non-Aboriginal governments for each alternative, as well as the legal and political feasibility of the alternatives. As will become evident from our discussion, the alternatives we review are by no means mutually exclusive.

MACRO CONSTITUTIONAL CHANGE

By macro constitutional change we mean attempts to carry out a large-scale restructuring of Canada's constitution through the negotiation and ratification of a package of constitutional changes. Meech Lake and the Charlottetown Accord were the most recent abortive attempts at macro constitutional change. We did not find any Aboriginal group or non-Aboriginal government eager to resume dealing with Aboriginal constitutional issues in the context of another macro constitutional effort. However, despite this lack of relish for a resumption of the big constitutional game, it is important to bear in mind the point made by many of the Charlottetown participants - namely, that it is only in the context of a major constitutional crisis that some of the provinces will ever be willing to constitutionally limit the powers they exercise over Aboriginal peoples.

There are two circumstances that may very well lead to further macro constitutional efforts in the near future. Both situations will have extremely important implications for Aboriginal peoples.

The first is that the Parti Quebecois will, again, hold a referendum on Quebec sovereignty. At the present time, there are few analysts of Quebec politics who would not assign at least a 50% probability of the PQ winning some form of Quebec sovereignty support in such a referendum.

If the Quebec secessionists win support for their sovereignty aspirations constitutional negotiations on the restructuring of Canada will have to occur - despite the distaste for such negotiations on the part of a great many Canadians. The only alternatives are to give the Quebec secessionists everything they claim, or to settle matters by force. Constitutional negotiations are surely the better way and the more likely way of handling the situation.

Aboriginal peoples will have a vital stake in these negotiations. Members of Quebec First Nations and Quebec members of the ITC have made it very clear that they do not for a moment concede that a majority vote of Quebeckers can settle their constitutional future. Chiefs of First Nations with people and land within Quebec's borders have publicly expressed their determination not to permit Quebec's claim to sovereignty to abrogate their own nations' sovereign rights. They see themselves on a collision course with Quebec sovereignists. At the very least they expect the Government of Canada on the basis of its fiduciary obligation to protect Aboriginal peoples in Quebec from being forced against their will to become part of a sovereign Quebec state.

Aboriginal peoples outside of Quebec will also have a deep interest in constitutional negotiations which are likely to follow in the wake of a separatist victory in a Quebec referendum. Such negotiations will be dealing not only with a new relationship between a Quebec state and Canada but with restructuring the Canadian federation. Again, as with the Canada Round and the Charlottetown Accord, these negotiations will not be the forum of choice for Aboriginal peoples. Still, they will be negotiations in which Aboriginal peoples will have to participate in order to protect their interests. They might also be used to advance their interests.

Inclusion of Aboriginal peoples in constitutional negotiations following a sovereignist victory in the Quebec referendum would not only be a moral and political imperative, but might also be found to be a legal imperative under Canadian constitutional law. Such negotiations are likely to have a very important impact on treaty and other rights recognized and affirmed in Section 35 of the Constitution Act, 1982. The question of the unfinished business recognized in the former Section 37 is also likely to be raised.

The second situation which may bring about another round of macro constitutional politics is the constitutional conference which Section 49 of the Constitution Act, 1982 requires the Prime Minister to call no later than April 1997. The object of this conference is Part V of the Constitution Act, 1982 which sets out the rules for amending the Constitution of Canada. These rules embody fundamental assumptions about the structure of the Canadian federation and the constitutional status of its components. Consideration of the amending procedure could lead to the discussion of a wider agenda of possible constitutional amendments.

On a narrow reading of Section 49, Aboriginal peoples could be excluded from the conference that section mandates. If no amendments to Section 91(24) of the 1987 constitution or to Sections 25 and 35 are on the agenda, there appears to be no legal obligation to invite representatives of Aboriginal peoples to participate. The exclusion of Aboriginal peoples from such a conference even though legal would be very contentious politically. At the very least, a number of Aboriginal organizations will wish to use this occasion to secure a stronger role for Aboriginal peoples in the constitutional amending process.

On the Aboriginal side there is considerable support for a strategy of accepting for the present the hostile political climate for constitutional politics but to build a stronger foundation for a Charlottetown-type constitutional amendment as part of the 15 year constitutional review in 1997. The idea is to make as much progress as is possible now on various components of the Charlottetown Accord such as self-government, land, economic development and treaty agreements, then see what can be done in 1997 to obtain a constitutional amendment guaranteeing and extending the progress that has been made.

Another issue that might be included on the 1997 constitutional agenda is Aboriginal participation in Canadian governance. The Charlottetown Accord contained clauses concerning Aboriginal peoples relations with the Supreme Court of Canada and representation in the federal Parliament. While we found no satisfaction with the capacity of existing institutional arrangements to give due consideration to the interests of Aboriginal peoples in Canadian policy-making neither did we find any consensus among Aboriginal organizations on the appropriate remedy. Indeed, we found some organizations, particularly the MNC favouring representation in existing institutions and others, especially among the AFN membership, favouring separate institutions. Whatever institutional arrangements are in the end favoured their adoption will almost certainly require a section 38 constitutional amendment. Clearly, a great deal of work must be done on this matter if it is to be addressed in the 1997 constitutional review.

It is possible that the constitutional conference to review Part V will be a pro forma affair with nothing significant on the agenda. Much depends on the Quebec referendum. A victory by the separatists in that referendum will surely pre-empt such a conference. If, on the other hand, federalists win the referendum there may be little interest in returning to the constitutional table - unless the federalist side makes a commitment in the referendum campaign to pursue constitutional reforms within Confederation. In this case, the conference on the amending formula could be an important event, and a major opportunity for Aboriginal peoples to secure explicit constitutional recognition of their political and economic rights and status in Canada.

A SINGLE CONSTITUTIONAL AMENDMENT

By a single constitutional amendment we have in mind an amendment of the same nature as the 1983 amendment to section 35 of the Constitution Act, 1982. This would be an amendment

under section 38 and would require ratification by the House of Commons and the legislatures of seven provinces representing 50% of the population. Assuming that such an amendment related to section 35, at the very least, the participation of Aboriginal organizations in the discussion of such an amendment is a legal requirement. But, in our view, Canadian constitutional practice has now moved beyond that requirement to require the consent of Aboriginal peoples to constitutional amendments directly affecting their rights.

There is considerable support for such an amendment among Aboriginal representatives. This support was particularly evident on the part of AFN and ITC leaders. The constitutional amendment they seek would be designed to entrench the Aboriginal peoples' inherent right to self-government. Those who seek such an amendment believe it is the only way Aboriginal peoples can obtain the leverage they need to exercise their self-government right. Informal recognition of the right based on good-will, they argue, will not be enough. A formal amendment of the Constitution of Canada is the only way to ensure that the self-government right is appropriately recognized and protected from encroachment by non-Aboriginal governments. It is also contended that a formal constitutional amendment explicitly recognizing the self-government right is the leverage needed to move the federal and provincial governments into serious efforts to implement the right. The representative of one provincial government that has never been more than luke warm about recognizing the inherent right told us he was convinced that only when the right is entrenched by a constitutional amendment would his government take the right seriously and have public support to commit land and resources to implement the right.

Aboriginal leaders who continue to seek a constitutional amendment are well aware that within First Nations communities there is another point of view that regards acceptance of a definition of Aboriginal peoples' status in the Constitution of Canada as tantamount to subordinating the sovereignty of First Nations' to Canada's sovereignty. But those who would avoid this kind of First Nations co-option into the Canadian nation-state, it is pointed out, appear to accept the legitimacy of the Canadian state's authority when they resort to Canadian courts to defend and test their traditional rights. A constitutional amendment spelling out Aboriginal rights in terms that are more consonant with the inherent right to self-government than is the language of many treaties would provide a much stronger legal basis for defending this right in Canadian courts.

In the absence of a constitutional amendment, the most authoritative statements on the Aboriginal peoples' right to self-government will come from Canadian courts - above all the Supreme Court of Canada. Thus far the treatment of this issue by Canadian judges, particularly in the Delgamuukw case, has been far from reassuring to Aboriginal people. The Supreme Court of Canada has granted leave in this case. Closing down activity at the constitutional table leaves the field clear to the Supreme Court to be the primary constitutional law-maker with respect to the Aboriginal peoples' right to self-government. A Supreme Court of Canada decision that denies the right all together or strictly restricts its scope may, politically, be very difficult to overcome by a constitutional amendment.

There is concern that the Supreme Court might limit the scope of the Aboriginal self-government

right to traditional areas of governance in Aboriginal communities as recognized in Anglo-American common law. This conception of the right would fall short of a full right to self-determination. ITC representatives, in particular, emphasized this point. Their preference is for a constitutional amendment that would frame the Aboriginal peoples' inherent right to self-government in modern human rights terms rather than traditional common law terms.

While a strong case can be made out for a constitutional amendment clarifying and entrenching the inherent right and a process for implementing it, at the present time the federal government and the provinces are not interested in working towards such an amendment. The federal government and the Quebec government are particularly adamant about not returning to the constitutional table to work on the First Peoples agenda or, for that matter, any other constitutional issue. Most, if not all, provincial governments would attend a constitutional conference on Aboriginal rights were one to be called. However, it is clear that few would go with a strong commitment to making such a conference a success. On both the Aboriginal and non-Aboriginal sides there are unhappy memories of the abortive conferences held under Section 37. There is no reason to think that a Section 37 type conference would be significantly more successful now. Indeed, the general view is that without other issues on the table in a national unity crisis atmosphere it would be impossible to obtain support for what was agreed to with respect to Aboriginal peoples in the Charlottetown Accord. So we conclude that in the present political environment, a section 38, stand-alone, amendment explicitly entrenching the inherent right to self-government for all Aboriginal peoples is not politically feasible.

Is this situation likely to change? We think there is no likelihood of either the federal or Quebec governments changing their position on this question until the Quebec referendum. As we observed in the previous section, in the event of a PQ win the referendum, the Aboriginal peoples' rights will be dealt with constitutionally not on their own but in the context of macro constitutional restructuring. In the event that the sovereignty option is defeated in the Quebec referendum, it may be possible to return to the constitutional table to deal with the Aboriginal issue but it certainly will not be easy. The prevailing mood in Canada after the defeat of the Quebec sovereignists might be to stay away from any kind of constitutional politics for quite some time.

One circumstance that might possibly alter that mood, and was mentioned to us by a representative of one province, is a strong Royal Commission recommendation in favour of a constitutional amendment on the Aboriginal peoples' inherent right to self-government.

SECTION 43 AMENDMENTS

Under Section 43 of the Constitution Act, 1982, the Constitution can be amended "in relation to any provision that applies to one or more, but not all, provinces" by the federal Parliament and the legislatures of the provinces concerned. This section has been used to amend constitutional provisions concerning denominational schools in Newfoundland and bilingualism in New Brunswick. Section 43 has been mentioned as a possible way of entrenching tripartite agreements

on Aboriginal self-government reached on a regional or provincial basis. This type of constitutional amendment does have the attraction of being easier to achieve than a section 38 amendment.

There are doubts however as to whether Section 43 would apply to an amendment concerning Aboriginal self-government in one or more provinces. Such an amendment would likely be in relation to section 35 of the Constitution Act, 1982, or possibly to the division of legislative powers in the Constitution Act, 1867. In neither case would such an amendment be literally to existing provisions of the Constitution that apply to one or more, but not all, provinces. Although there may be constitutional experts who take a less literal and wider view of Section 43, the important point is that the federal government considers that this section is not available for an Aboriginal rights amendment applying to one province or group of provinces, but not all provinces. For this reason the federal government would not co-operate with Alberta in entrenching Alberta's Metis Settlement Act by a Section 43 amendment.

Altogether aside from this legal difficulty, there is an important consideration of principle that weighs against the use of Section 43 in this context. It would be difficult to square a Section 43 amendment with the principle of consistency which the Royal Commission itself has said should be a guiding principle in implementing the Aboriginal right to self-government. A Section 43 amendment would mean that the constitutional protection of Aboriginal peoples' self-government right would vary across the provinces. Representatives of several provinces expressed reservations about Section 43 on this ground.

Given the legal doubts, the federal government's unwillingness to use this section in the Aboriginal context, the concern about consistency and, we should add, the lack of any marked interest on the part of Aboriginal organizations in this type of amendment, we consider a Section 43 amendment in relation to Aboriginal rights to be a non-starter.

AMENDMENTS OF PROVINCIAL CONSTITUTIONS

Under Section 45 of the Constitution Act, 1982, a province can, subject to a number of exceptions, make laws amending the constitution of the province. Saskatchewan Metis may have had such an amendment in mind when they told the Royal Commission that they intended to seek an amendment to the Saskatchewan Act on their right to self-government. However, we encountered no other Aboriginal organization interested in this type of constitutional amendment.

Given that the federal Parliament has exclusive jurisdiction in relation to Indians and Lands reserved for Indians, it is doubtful that there is much scope for provincial legislation under Section 45 relating to Aboriginal peoples. Besides, most First Nations and Aboriginal organizations in establishing and developing their constitutional relationship with Canada wish to deal primarily with the Government of Canada. We should add that a constitutional amendment based on Section 45 would be very shallow entrenchment as it would be subject to unilateral change by a simple majority of the provincial legislative assembly. Even symbolically such

amendments are of little value, given that provincial constitutions in Canada have much less status than state constitutions in Australia and the United States.

Amendments of provincial constitutions under Section 45 might be used to complement other forms of constitutional action in relation to Aboriginal peoples, but they can not serve as the primary vehicle for making constitutional progress in this area.

SECTION 35 TREATIES

Among First Nations, treaties as recognized under Section 35 of the Constitution Act, 1982 are the most widely supported instrument for defining and regulating Aboriginal peoples' relationship with Canada. For most of those who are members of the AFN and for many associated with the NCC, treaties form an integral part of their sense of identity and relationship with Canada. Some of these, for example the Mikmaq in Nova Scotia and some First Nations in Saskatchewan and Alberta, want to recover the exercise of their self-government right by implementing their understanding of the original treaty relationship. Others, some with treaties and some without, would like either to "renovate" existing treaties or negotiate new treaties. The latter in many cases would be comprehensive land claims agreements that include and give full Section 35 status to self-government arrangements.

Among Aboriginal representatives, we found no support at all for a pan-Canadian, pan-Aboriginal "treaty" such as that envisioned by Premier Ghiz a few years ago. Such a treaty is incompatible with the "nation-to-nation" relationship which First Nations wish to maintain with Canada. They simply do not see themselves as part of a Canadian Aboriginal or Indian nation. Designating a Canada-wide agreement as a "treaty" threatens their own sense of national identity.

Nonetheless, although Aboriginal support for a Canada-wide treaty is lacking, there is considerable interest in federal government initiatives that might strengthen the treaty process throughout the country. One suggestion is a Declaration by the federal government which, rather like the Proclamation of 1763, would commit Canada to honouring existing treaties as they were originally negotiated and understood, and to conducting Canada's relationship with Aboriginal peoples through treaty-like agreements based on mutual consent. Such a Declaration or Proclamation would not itself be a treaty nor a formal constitutional amendment. But it could carry great weight and might soon attain the status of a constitutional convention. We will return to this possibility in the next session of this report.

Within the AFN there is also some interest in working towards a constitutional amendment that would give treaty-making a firmer constitutional foundation. Such an amendment would recognize the sanctity of treaties - old and new - as the fundamental basis for regulating Aboriginal and non-Aboriginal relations. Treaties would then be negotiated or "renovated" on a nation-by-nation basis. Those who suggested such an amendment emphasized the importance of non-derogation clauses to ensure that the amendment would be without prejudice to established treaty rights or to additional rights that might be available in the future.

At present the federal government is not willing to give Section 35 treaty status to agreements on Aboriginal self-government. Under this policy land claims and self-government are on separate tracks. In the Agreement Between the Inuit of the Nunavut Settlement Area and Canada, that part of the agreement which deals with (non-ethnic) self-government (under Article 4) is separated from the rest of agreement and specifically designated as not "intended to be a land claims agreement or treaty right within the meaning of Section 35 of the Constitution Act, 1982.

So long as the federal policy is in place this process of implementing the inherent right to self-government through provincial or regional tripartite agreements could not produce agreements that give Section 35 treaty status to self-government arrangements. Furthermore, it was evident from our interviews that some provincial governments are by no means fully committed to a treaty process that has constitutional significance. But it is the federal government's refusal to confer constitutional treaty status on the process that is the most serious obstacle to participation for many on the Aboriginal side, especially First Nations. It is not just that this refusal means that the agreements on self-government will lack any constitutional entrenchment but that the federal government is seen thereby to be manoeuvring Aboriginal peoples into having their future relationship with Canada determined through a process that is essentially province-driven and administrative in nature.

The federal government's position on this matter, as it was explained to us by officials, is not carved in stone. It is not necessarily part of its general policy of abjuring constitutional politics. It is based more on a strategy of proceeding carefully through a process of consultation and careful consideration before changing policy and undertaking to negotiate agreements on self-government with Section 35 treaty (or land claims agreements) status. And there are several matters that need to be settled before a policy that is both coherent and consistent could be adopted.

Two key questions must be addressed: which agreements are to be given treaty status, and which Aboriginal societies or organizations are to be parties to these treaties? There are already a myriad of agreements that federal government, provinces and territories have entered into on many aspects of governance. Are all these agreements, no matter how limited in importance to be embraced by treaty negotiations? What about sectoral agreements relating to a policy field, such as policing or education, in a province or region? Are these to be incorporated in a treaty process? If so, with whom, with which Aboriginal groups or authorities?

This second question of which units of Aboriginal society should be parties to a contemporary treaty process is under active consideration among First Nations. The units created by the Indian Act are regarded by many as inappropriate for a treaty process. Not only are many of them extremely small but in many cases they have been arbitrarily imposed on Aboriginal peoples and have tended to fragment historic nations. As a result, to have historic First Nations, either on their own or in alliances, as the parties to present day treaties with Canada would not be an easy policy to apply in all parts of the country. In some areas it is a policy that could be applied

immediately, while in others it would take a good deal of restructuring and reorganization of Aboriginal political communities. While it is clear that this is a matter that Aboriginal peoples must settle themselves, it is also clear that until it is settled, at least in principle, it will be difficult, if not impossible, for First Nations to implement their self-government right through a Section 35 treaty process.

These questions concerning the Section 35 treaty process are well worth addressing and addressing soon. For Section 35 treaties and land claims agreements appear from our study to be the most accessible means of obtaining explicit constitutional articulation and protection of the Aboriginal peoples' inherent right to self-government. The scope of the self-government right obtained through a treaty process might well be wider than that which the Supreme Court finds to be implicit in Section 35. A treaty process also has the potential of providing a more balanced and equitable negotiating forum for Aboriginal peoples than a place at the traditional Canadian constitutional table. The British Columbia Treaty Commission shows the very positive role that provincial and territorial governments can play in such a process. But the Agreement establishing that process shows how crucial federal involvement and leadership will be to make such a process one through which Aboriginal peoples in all parts of Canada can implement their self-government right.

CONSTITUTIONAL CONVENTIONS AND OTHER LESS FORMAL CONSTITUTIONAL INSTRUMENTS

The rules and principles of a constitution are not confined to those set out in a country's formal, written Constitution. Many significant elements of Canada's constitutional system are based on judicial decisions, statutes, orders-in-council and, least formal of all, constitutional conventions. The Royal Commission's commentary, Partners in Confederation, has shown the extent to which common law judicial decisions have provided a legal basis for the Aboriginal right of self-government in Canada. It is possible through ordinary legislation to make further provision for the recognition and implementation of that right. The public statements of political and governmental leaders can also give rise to constitutional conventions concerning the inherent right.

Canada's constitution was founded upon the British model of government, which relies on unwritten constitutional conventions for its basis. The written components are contained in Canada's Constitution Acts, 1867-1992 and attached schedules. The unwritten elements are not defined in any single document, but are composed of conventions that have developed throughout the years. Conventions have been defined as "customs, practices, maxims or precepts which are not recognized or enforced by the Courts and which make up a body, not of laws, but, of constitutional or political ethics".31 Conventions are rules that determine how discretionary powers of the Crown will be exercised.32

There are a number of examples of conventions in Canada. Some examples are illustrated below:

(1) The Constitution Act, 1867 confers extensive powers on the Governor General, but a convention stipulates that the Governor General will act only on the advice of cabinet.

(2) A fundamental aspect of Canada's constitution is the principle of responsible government, which is not found anywhere in Canada's written Constitution. Responsible government is a system whereby members of cabinet are responsible to the elected House for their actions.

(3) The Constitution Act, 1867 allows the Queen and the Governor General the right to withhold Royal assent from a bill that has been enacted by both Houses of Parliament. But a convention stipulates that Royal assent shall not be withheld.

(4) The Constitution Act, 1867 did not provide a means to domestically amend Canada's constitution, and prior to 1982, Great Britain was formally responsible for enacting amendments. However, as Canada became increasingly independent, two basic principles regarding constitutional amendments emerged. First, the British Parliament would not amend the Canadian Constitution without a request from the Canadian House of Commons and Senate. Second, the Canadian Government would not request an amendment to the constitution which significantly affected federal-provincial relations unless it had the consent of the provinces.

Conventions are fundamental rules of Canada's constitution, but they are not enforceable in the courts. Nonetheless, it is recognized that if a convention is disobeyed by an official, it is common to describe the official's act or omission as "unconstitutional". However, such "unconstitutionality" springs merely from a breach of convention; no breach of the law has occurred and no legal remedy will be available".33

In the Patriation Reference case (1981), the Supreme Court of Canada was asked on a reference whether there was a convention requiring that the consent of the provinces be required before Parliament asked the United Kingdom to enact an amendment that would affect the powers of the provinces. The Supreme Court was also asked whether there was a legal requirement for provincial consent.

The Supreme Court ruled in this case that there was no legal requirement for provincial consent to the constitutional proposals. However, a majority of the court went on to rule that there was a convention requiring the federal government to obtain a "substantial degree" of provincial consent for matters affecting provincial powers. In the Quebec Veto Reference (1982), the Supreme Court decided that Quebec's consent was not necessary to make up "substantial degree" of consent.

To define conventions in the Quebec Veto case, the Supreme Court invoked the following test: 'We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule'.34

Law and convention are "closely interlocked" - conventions do not exist in a legal vacuum. They regulate the way in which legal powers shall be exercised. Their purpose is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period... They bring outdated legal powers into conformity with current notions of government".35

While all of these less formal constitutional instruments are available, before commenting on them in more detail, it is important to make the general point that we found very little enthusiasm among representatives of Aboriginal organizations for them. The reason for this boils down to two words: trust and status. Aboriginal peoples do not have enough trust in the good faith of non-Aboriginal governments to rely on informal means of securing their rights. Related to this is the question of status. In Canada as in virtually every other constitutional democracy in the western world, with the exceptions of the United Kingdom and Israel, the formal, written Constitution has come to be regarded as having a paramount importance, as the one set of rules and principles that effectively binds government. Aboriginal organizations are sceptical of anything short of entrenched constitutional law having enough legal and political status to effectively secure their self-government right.

It can be argued that a constitutional convention recognizing the Aboriginal peoples' inherent right to self-government has already been established through the Charlottetown process and its aftermath. In its decision in the Patriation Reference, the Supreme Court of Canada laid down a three-fold test for establishing whether a rule or practice has become a constitutional convention: precedents, evidence that the relevant political actors felt bound by the rule, and a principled reason for the rule. The Court adopted the view of the English constitutional authority, Sir Ivor Jennings, that of these three, it was the third, the principle or reason for the rule, that was most important: "a single precedent with a good reason may be enough to establish the rule"36. While in the past there have been many precedents of non-recognition of the Aboriginal peoples' self-government right, more recently there have been precedents of recognition. And there is certainly a strong human rights rationale for recognizing the inherent right. Whether the agreement of federal, provincial and territorial governments to include the right in the Charlottetown Accord and the recognition of the right expressed by ministers of these governments at the multilateral meeting on February 1, 1994, constitute evidence that relevant political actors feel bound to observe the rule, remains to be seen. Logically such public recognition of an inherent right - a right that inheres in the people themselves - should be binding unless it was made in bad faith or the governments have changed their minds about this fundamental moral and metaphysical question.

A proclamation or declaration by the federal government formally recognizing the inherent right and inaugurating a process agreed to by Aboriginal organizations, provinces and territories, for implementing that right could, as was suggested above, be an effective way of launching a Section 35 treaty process. Such a declaration could well be regarded as giving the status of a constitutional convention not only to recognition of the right but to an implementation process.

Granted such a statement would not have the status of a formal constitutional amendment nor be enforceable in the courts, still it would provide political momentum for moving ahead with the establishment of Aboriginal self-government and a measure of political protection against governments subsequently backing away from the process.

Already at the provincial and territorial levels there are agreements in place - political accords - between First Nations and non-Aboriginal governments that can be regarded as having the weight of constitutional conventions. While these are useful first steps towards establishing a new, mutually agreed upon, relationship between Aboriginal peoples and Canada, they have severe limitations. Where such an accord recognizes the inherent self-government right and includes a commitment to implement the right, as is the case with the Ontario Statement of Political Relationship, the federal government is not a party to the agreement. Where the federal government is a party, as is the case with British Columbia's Treaty Commission Agreement, the agreement contains no recognition of the inherent self-government right nor a commitment to implement it.

Despite the limitations of these provincial agreements, in form and methodology, they might well be regarded as prototypes for a Canada accord on Aboriginal self-government along the lines we have referred to above. Such a statement or accord must have three essential features: i) it should be consented to by the Aboriginal peoples and non-Aboriginal governments that will be affected by it, ii) it must recognise the inherent right and lay out a process for implementing the right, and iii) it must make a commitment to give Section 35 treaty status to what are agreed to be the essential elements of self-government agreements. A fourth feature that such an accord might well have is variability in the implementation processes agreed to for the Inuit, Metis and First Nations.

Though such an accord, in principle, should be intended to apply to all Canadian jurisdictions and all Aboriginal peoples, it need not be agreed to at the beginning by all who, in the end, might opt into it. Freedom from the rigidities of the formal constitutional amending process should be taken advantage of in negotiating and executing an informal political accord. A proclamation or declaration of the federal government supported by several of the major Aboriginal organizations and a number of provinces and territories would, in our view, be viable and legitimate so long as it was open to other groups and jurisdictions to opt in later.

Political accords of this kind are not without precedent in Canada's constitutional history. A notable example is the Balfour Declaration of 1926 which inaugurated the British Commonwealth of Nations. Through that Declaration, Great Britain, Canada and four other self-governing Dominions (Australia, Eire, New Zealand and South Africa) recognized one another as "autonomous communities" within the Commonwealth of Nations. Of course there are major differences between the nature of the parties and the relationship established through that accord and the circumstances pertaining to a possible Canadian Accord with Aboriginal peoples. But, still it may have features that are indicative of the potential usefulness of this type of informal constitutional agreement as a means of inaugurating a new relationship between

Aboriginal peoples and Canada. Although the Balfour Declaration had only the status of a constitutional convention, still it established the principle on which subsequently more formal constitutional changes were based. Also, although at first it applied to only six nations, it provided the framework for a relationship which in time became the basis for a much larger community of nations. Is it unreasonable to think that a such a constitutional instrument could not play a similar role in the decolonization of Canada's relations with its Aboriginal peoples and the building of a Canadian Commonwealth.

We will conclude this section with a brief comment on the salience of two other less formal constitutional instruments: statutes and judicial decisions. We were reminded by government officials of the possibility of providing for Aboriginal self-government through ordinary legislation. It was pointed out that it might be possible to improve on earlier legislation in this field by, among other things, recognizing the inherent right in the preamble and including clauses stipulating that any changes in the legislation would require the consent of the Aboriginal people affected. Even with these and other improvements, we very much doubt that an ordinary statute would be accepted by more than a few "Indian" communities as a satisfactory basis for establishing their relationship with Canada. The "Indian" experience with ordinary legislation vis a vis the Indian Act has been negative. In recent years proposals by the federal government to implement changes to the existing legal regime through alternative legislation such as the proposed Chartered Land Act has met with considerable opposition.

The Inuit and Metis peoples have not had the Indian Act experience which means that ordinary legislation may be a viable option in such communities.

If that relationship in the future is to be truly based on consent, for most Aboriginal peoples, it will have to be established through an instrument more consonant with a sharing of sovereign powers.

If ordinary legislation is out as the basis for a long term relationship, judicial decisions, on the other hand, may very much be in. By default, in the absence of any other constitutional action, judicial decisions will occupy the field. While the political constitutional engine sleeps, the judicial process hums along and will continue to churn out opinions defining the meaning and scope of Aboriginal rights. We heard from no one on either the Aboriginal or non-Aboriginal side for whom judicial decision-making is the instrument of choice. Nonetheless, the judiciary will become, in effect, the instrument of decision if there is no agreement to initiate an alternative constitutional process.

PART C. CONCLUSIONS

From our study of the past experience of Aboriginal peoples in Canada's constitutional process and of future possibilities, we derive the following conclusions:

1) The absence of any constitutional action at the political level means that the judiciary will play the primary role in determining the legal status and scope of the Aboriginal peoples' inherent right to self-government. Litigation is not the instrument of choice in constitution-making with respect to self-government for either Aboriginal organizations or non-Aboriginal governments (or likely for the judges). Given the non-Aboriginal composition of the judiciary and its treatment of the Aboriginal right to self-government, Aboriginal peoples are more at risk than non-Aboriginal Canadians in having their constitutional fate determined in the courts. Therefore, it is important now to try to establish an alternative constitutional process.

2) The best alternative constitutional process is one that aims at implementing the Aboriginal peoples' inherent right to self-government through Section 35 treaties or land claim agreements. This process is most viable politically, most consonant with Canadian and Aboriginal tradition, and has the greatest potential for reaching constitutional agreements that are genuinely consensual.

3) While provincial and territorial governments should participate in a Section 35 process, such a process must be led by the federal government. To do this, the federal government will have to change its policy of not giving Section 35 status to agreements concerning self-government. Two matters that must be settled before this policy change can be made are: 1) the scope and nature of what should be covered by agreements on self-government that have Section 35 status, and 2) which organizations, groups or nations on the Aboriginal side are to be the parties to these treaties.

4) A Canada wide Section 35 treaty process could be launched most effectively through a federal government proclamation recognizing the Aboriginal peoples' inherent right to self-government and inaugurating a process agreed to by Aboriginal peoples, provinces and territories, for implementing the right. Such a statement could have the status of a constitutional convention and serve a role in the decolonization of Canada's relations with its Aboriginal peoples similar to that played by the Balfour Declaration of 1926 in the birth of the British Commonwealth. Such a Declaration, though intended in the long term to apply throughout the country, need not at the beginning have the agreement of all Aboriginal peoples, provinces and territories.

5) From a political perspective, the possibility of resolving Aboriginal constitutional issues through the formal amendment process is much greater in the context of an effort at macro constitutional restructuring than in negotiations concerned solely with the Aboriginal agenda. The possibility of returning to efforts at macro constitutional reform depend very much on political developments in Quebec. If the Quebec sovereignists win the referendum, there will very likely be an intensive period of constitutional negotiations concerning the restructuring of the Canadian federation. Aboriginal peoples will have a very big stake in these negotiations and should participate actively in them. Alternatively, if the Parti Quebecois lose the referendum, there may be an opportunity to deal with the concerns of Aboriginal peoples in the 15 year

constitutional review that must take place no later than April 1997. That review will likely be a pro forma event if the Quebec federalists and the federal government do not wish to resume serious constitutional politics.

6) If either of these possibilities materialize, Aboriginal peoples and non-Aboriginal jurisdictions would be better prepared than they were for the Charlottetown Accord - in terms of both process and substance - if a Section 35 constitutional process has been launched and achieved some results by then.

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APPENDIX 1

ABORIGINAL PEOPLES AND CONSTITUTIONAL REFORM

Statement of Work

The objective of the research project is to ascertain and analyze the views of Aboriginal and non-Aboriginal governments and organizations on whether and how there should be further efforts to secure constitutional changes relating to Aboriginal self-government and treaty implementation.

The research project will be conducted and presented as follows:

1. A historical overview of Canada's practices and procedures relating to constitutional reform and the involvement of Aboriginal peoples in constitutional reform:

   a. a description of the Canadian experience in constitutional reform;

   b. a discussion of the "constitutional convention" concept;

   c. a description of the involvement of Aboriginal peoples in constitutional reform; and

   d. What is a "treaty".

2. A description of the views ascertained from participants in the negotiations that produced the Charlottetown Accord and the critics of the participants concerning:

   a. the substance and process of the Charlottetown Accord as it related to Aboriginal issues;

   b. the desirability and feasibility of further efforts to secure Aboriginal self-government and treaty implementation by constitutional change;

   c. the most favoured means of securing constitutional change. (among the possibilities to be considered: part of a large constitutional package; a single set of amendments affecting all Aboriginal peoples; a s. 43 amendment; one or more new treaties; rectification of existing treaties; land claim agreements.).

3. An analysis of the various constitutional options advocated in Part 2 in terms of their

legal and political feasibility.

Questions for Interviews

1. **On the Past**

i) What do you think of the Canada Round and the Charlottetown Accord as a process for reaching an agreement on constitutional matters with Aboriginal peoples?

In particular what did you think of the:

- discussions in public forums preceding the multilateral negotiations?
- the representation and role of Aboriginal peoples in the multilateral negotiations?
- the referendum as the method of ratifying the Charlottetown Accord?

ii) What do you think of the substance of the Charlottetown Accord?

In particular what do you think of the:

- provisions relating directly to Aboriginal peoples?
- other provisions of the Accord?

2. **On the Present**

i) What activity is your organization currently engaged in with regard to constitutional change or treaty implementation?

ii) What progress are you making?

3. **On the Future**

i) How important do you think it is for Aboriginal peoples to achieve constitutional reform?

ii) If you think constitutional change is important, should it be obtained through:

a) an amendment to the Constitution Act?

b) treaty implementation?

c) a new treaty?

d) some combination of the above?

iii) If you favour some kind of constitutional package, what form should it take?

a) part of a big constitutional package like Charlottetown?

b) a stand alone amendment applying to all Aboriginal Peoples?

c) an amendment applying to one Aboriginal people or group of peoples?

iv) What negotiating and ratifying process should apply to the kind of constitutional amendments you favour?

v) If you favour treaty implementation, what negotiating and ratifying process do you favour?

vi) If you favour a new treaty applying to all Aboriginal peoples in Canada, how should it be negotiated and ratified?

vii) If you favour a new treaty or treaties applying to specific Aboriginal peoples, how should these be negotiated and ratified?

viii) if self-government arrangements are included in land claims negotiations, should they be included in what is covered by section 35 of the Constitutional Act?

ix) If a majority of Quebecers were to vote in a referendum for some form of Quebec sovereignty, what should be the role of Aboriginal peoples in subsequent negotiations?

Aboriginal Peoples Interview List

1. Nation Chief Ovide Mercredi

   Assembly of First Nations

2. Chief Joe Norton

   Mohawk Council of Kahnawake

3. Kevin Christmas

   Union of Nova Scotia Indians

4. Chief Phil Fontaine

   Assembly of Manitoba Chiefs

5. Chief Joe Miskokomon

Union of Ontario Indians

6. David Joe

   Council of Yukon Indians

7. Ken Young

   AFN Manitoba Vice-Chief

8. Rene Tennasco

   River Desert (Maniwaki) First Nation

9. Lyndsay Cyr

   Federation of Saskatchewan Indian Nations

10. Gordon Peters

    AFN Ontario Vice-Chief

11. Chief Saul Terry

    Union of British Columbia Indian Chiefs

12. Marc Leclair

    Metis National Council

13. Ron George

    Native Council of Canada

14. Chesley Anderson

    Inuit Tapirisat of Canada

Governments Interview List

1. Scott Serson

   Marc Lafreniere

   Fred Caron

   Government of Canada

2. Murray Coolican

   Government of Ontario

3. Ray Hawko

   Government of Newfoundland

4. M. Rasmussen

   Brent Cotter

   Government of Saskatchewan

5. S. Iverson

   Government of the Northwest Territories

6. Paul Lordon

   Government of New Brunswick

7. Joe Ghiz

   Government of Prince Edward Island

8. Alan Clark

   Government of Nova Scotia

9. Mark Krasnik

   Government of British Columbia

10. Andre Maltais

    Government of Quebec