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GUARANTEED REPRESENTATION OF ABORIGINAL PEOPLES IN  
INSTITUTIONS OF PUBLIC GOVERNMENT

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prepared for:  
Legislative Assembly Special Committee  
on Constitutional Development

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GUARANTEED REPRESENTATION OF ABORIGINAL PEOPLES IN  
INSTITUTIONS OF PUBLIC GOVERNMENT

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## EXECUTIVE SUMMARY

*Who? What for? Why? These are some basic questions raised in this discussion paper on representation in the Western N.W.T.*

*The subject is important, and doubly so as land claims settlements cannot provide a substitute for guaranteed native participation in public government.*

*The subject is complex, because of the composite demographic and ethnic make-up of the Western N.W.T. Unlike Inuit in Nunavut, aboriginal peoples do not constitute a demographic majority, but, they do form a majority in most communities.*

*Discussion is tentative, in view of the boundary issue. And also because the soundest institutional arrangements evolve over time. Constitutions, to persevere, must be modified.*

*It is also controversial to a degree. For example, the impact of party politics in a Western N.W.T. could disrupt refined arrangements for aboriginal representation and, perhaps, lead to ethnic contentions. (Pages 1-2).*

### What is on the Table? (Pages 14-15)

*This section is designed to show both the growing sophistication of proposals for native representation in the North and the Western N.W.T., and growing discontent in respect of existing arrangements.*

*A cursory presentation is made with regard to Dene Nation proposals on representation, those of the Metis people and the Nunavut Constitutional Forum, suggestions made by COPE respecting WARM and ideas set forward by Mr. Drury's former Officer.*

*In addition, recommendations of the Western Constitutional Forum, of the present G.N.W.T. and of aboriginal delegations engaged in national constitutional talks receive attention.*

*Considerable progress in aboriginal representation has already been achieved. Many difficulties lie ahead, including the design and practicability of future public institutions.*

Some Basic Guidelines (Pages 27-55)

Representative government provides a basic tool for aboriginal self-government **and** for sharing internal sovereignty. Many tend to criticize representational government for its aristocratic origins, its alleged irrelevance in relation to the class struggle, and, in the British tradition, its bizarre electoral results. Aboriginal leaders dislike its adversarial and artificial politics. Modern executive government and the recourse to referenda have tended to erode the role of representatives.

But representative government may be bad government; there are worse models. It can be adjusted to Cabinet government and to plebiscites, Law-making remains the highest manifestation of a common will to live together in the same polity. Refusal to contemplate participation in common government institutions can lead to, and has resulted in "ghetto" mentalities. Native leaders, hence, wisely reject a wigwam complex, while Canadians are gradually realizing open government could ameliorate the role of their representatives. (Pages 27-33)

Public government and ethnic representation are not incompatible. Canadians have long equated maturity to living with complexity, as shown by the survival of the French Canadian nation within common institutional networks. Indeed, there was no particular reason to grant representation to the **francophone** minority, yet, such a decision was taken. Various international examples pertaining to representation of different peoples in a common Cabinet and a common first chamber are outlined. Inter-ethnic compromise covers such areas as second chamber representation and language use.

There are limits to structuring government along ethnic lines. No system is perfect in the absence of common values, eg. Cyprus or Lebanon. In addition, when ethnic groups become block "delegations" for their peoples, the effectiveness of representative government declines dramatically. (Pages 33-42)

Guaranteed representation of aboriginal peoples can be based on firm Canadian and International traditions of flexibility. The Canadian electoral map and representation in legislative and executive branches have been based on a series of special "deals" concerning P.E.I., the anglophone minority in Quebec, the **N.W.T.** prior to 1905, Newfoundland and other regions. Abroad, the British, the Swiss, France and other nations, build representation on the concept of regional asymmetry. (Pages 43-46)

Some parameters are required to assess proposals for guaranteed representation. If the Western NWT jurisdiction is overly decentralized to community or regional governments, aboriginal leaders would entertain little interest in representation when they have nothing to do, and are seen as such. A bicameral solution for the Western **N.W.T.** has to be weighed against declining interest in second chambers, and their marked ineffectiveness in Canada itself. If adequate representation is obtained for natives in a lower chamber or commons, what emphasis should be applied to second chamber prospects? (Pages 46-49)

Finally, no sophisticated, complex representation scheme will flourish in the absence of a common consensus and sharing of values. Guaranteed representation is a necessary, but not a sufficient condition, for political stability. There are sorry international examples to prove this rule. The North is facing a tough development dilemma. Representatives will have to work together to achieve reform if their institutions are to subsist and to escape from the "boom and bust" inferno. They will have to be seen to work for all citizens, including the most disadvantaged. (Pages 50-55)

#### Representation in Legislative Institutions

A broad perspective is suggested. Indeed, institutions of public government are inter-dependent: modify one body and another mechanism will be affected; representation in one institution is not sufficient. (Pages 63-64)

Representation in a first chamber is essential. Various options are presented, on the basis that no system is perfect in the absolute. Very serious consideration is given to residency requirements of 2 years or more, a guaranteed percentage share of seats for aboriginal representatives and/or regional representation as opposed to "rep by pop" rules and the possibility of employing proportional representation techniques. Party politics could have a corrosive effect on any arrangement. (Pages 65-73)

If a second chamber is required, there would be few problems in respect of large aboriginal representation and flexible election/appointment techniques. (Pages 74-78) An aboriginal chamber within a chamber is proposed to initiate and control legislation affecting native rights, and would be composed of all aboriginal representatives in one or both chambers. While a product of aboriginal representation per se, the aboriginal chamber would require a critical mass to function. (Pages 79-80)

Guaranteed aboriginal representation in a future Western N.W.T. amending process is strongly recommended. Such participation could take the form of Legislative control and/or semi-direct government votes. (Pages 80-84)

Aboriginal peoples should also participate in government through recourse to referenda. The limits to semi-direct government at the Western N.W.T. level should be carefully defined, as referenda are blunt instruments to be used deftly, to avoid representatives' apathy and ethnic divisions. On constitutional issues, the results should be submitted to a double qualification: demographic and regional. (Pages 84-87)

We reject out of hand the concept of an advisory aboriginal assembly which some might be tempted to advance to avoid other options. (Pages 87-88). Language is an important lever for representation in government. If the Western N.W.T. is prepared to seriously embark on programmed for the revitalization of aboriginal languages, these tongues should be affirmed "official languages" of the Western N.W.T. Services would be supplied in the "where numbers warrant" criterion. Problems in this regard should not be ignored: when official languages surpass the number of 3,



administrative confusion ensues. (Pages 89-91)

#### Representation in the Executive Branch

A crucial area, because Cabinet government means government by the Cabinet, and because intergovernmental relations in Canada are conducted by a few members of the executive.

A number of recommendations, partially derived from comparative international experiments, are set forward to ensure guaranteed aboriginal representation in Cabinet, including a set percentage of ministerial positions, special regional representation and the creation of several "Aboriginal" departments. Party politics could constitute a major variable in this regard. (Pages 99-103) It is suggested that the head of the Western N.W.T. executive be alternately chosen from the native and non-native populations as the position of Commissioner evolves towards a more provincial mould. (Page 104)

Guaranteed representation in the public service is no joke, despite aboriginal indifference at times and various disparaging visions of mandarins at work. A loyal, competent and non-partisan public service, reflecting the values and aspirations of all residents, is a necessary condition for viable Western N.W.T. government. Moderate but increasing quotas, along with linguistic competence as an "important" criteria for appointment, are discussed. (Pages 105-111) Aboriginal representation on public boards and agencies, providing they can be contained in number in the name of effective administration, is important because of the legislative and judicial role of these curious institutions. Special emphasis is placed on parity in the event of regulations affecting the implementation of future land claims settlements. (Pages 111-112)

Open government, with the exceptions concerning Cabinet matters and intergovernmental affairs, should be applied to foster greater aboriginal representation and participation in public service. (Pages 113-114) It is recommended that a Western N.W.T. constitution affirm the interest of its residents in international affairs, particularly relations with aboriginal peoples, in cooperation with the federal government. (Pages 115-116)

#### Representation in Community/Regional Government

On the assumption that community government will not become the prime locus for guaranteed aboriginal representation in the current process, and for good reasons, it is recommended that the composition of community governments take into account the implications of land claims settlements in the sense of a guaranteed representation of natives. Election/appointment methods should be left to community assemblies, as well as the local language of work and administration.

If and where necessary, the establishment of regional institutions should be allocated to community governments concerned. (Pages 120-125)

Administration of Justice

*This is a very delicate subject, and requires more exploration and reflection. The question of alternate legal systems, of aboriginal representation therein, of codification of customary law, are discussed in the light of the important civil law precedent. No explicit recommendation is expressed. (Pages 127-130)*

*In conclusion, two priority lists for W.C.F. attention are defined. The first list pertains to a lower chamber, Cabinet representation, the existence of a second chamber, an aboriginal chamber within a larger institutional framework and the public service. The second list contains issues pertaining to a future amending process, referenda, language options and open government.*

*This represents in itself an exciting venture. As William the Silent noted, to act requires little hope, to persevere little success. Projects which today appear incongruous may cement the necessary myths of tomorrow which will cement the union of different peoples in the Western N.W.T. (Pages 132-133)*

*"The three distinct peoples - Indians, Inuit and Metis - each played their own part in Canada's history, a part that entitles them today to a place of their own within Canadian society and within our own federal system of government."*

*Prime Minister Pierre Elliott Trudeau*<sup>1</sup>

## INTRODUCTION

*The above statement both reflects the importance of Aboriginal participation in organs of government, and highlights the crucial problem of guaranteed representation in the Western N.W.T. where indigenous peoples count for almost half of the resident population. Full and effective representation of Dene, Metis and - perhaps - Inuit in Western political bodies flows from an historical fact outlined in the single most important study on the North since Confederation:*

*"They (the aboriginal peoples) were here and had their own languages, cultures, and histories before the arrival of the French and the English".*

*Given this general context, it has to be accepted that: "The Western N.W.T. should be addressed in its own right to find a form of government suitable to the Western Arctic"<sup>3</sup> in view of progress on Nunavut government to the East following the 1982 plebiscite on division. The Western Constitutional Forum has identified guaranteed representation of Indigenous peoples as a prime component of such a government building process.*

*Before examining the possible mechanics and rationale for representational modes, several questions could be raised. Among these: are land claims settlements a substitute for participation in public government? Why is the complexity of the Western N.W.T. ethnic make-up a source of flexibility in establishing representational devices? What type of sovereignty is being discussed when considering law making and*

implementation? What impact would "party" politics exert on future functioning of Western N.W.T. institutions?

Along with these questions, Western Constitutional Forum members will be aware of the implications of their search for a viable and representative public government network. What institutions is an issue linked to who partakes in public deliberations, with whom and on what terms? Why this or that arrangement? This is to say that work on guaranteed Aboriginal representation corresponds to the essence of constitution-building and to a future Western Arctic political process.

#### The Importance of Participation in Public Government

It has been suggested that land claims settlements might in the future constitute an alternative to public government institutions with full Aboriginal participation and input.<sup>5</sup> Indeed, it has been the federal policy to discern claims processes and discussions on self-government.

In our opinion, land claims agreements constitute a necessary but insufficient tool when ensuring the foundations for Aboriginal self-government. They cannot provide a substitute for Indian, Inuit or Metis representation in general government institutions.

The first reason for this assertion is quite simple. In the common law tradition, a "right" is a discretionary claim subjected to litigation and court review when **threatened**.<sup>b</sup> A right is a right if judges say so, and if political mores and realities allow them to say so. Hence, in the Canadian federalist traditions, collective rights are often better protected through participation in local,<sup>7</sup> provincial and federal institutions than in special, ad hoc, accords.' French Canada has survived not because of the existence of "collective rights", but because francophones elected the government of Quebec and dispatched three Prime Ministers to Ottawa since Confederation.

At the national level, Canadians can be justly proud that the Canada Act (1982) affirms existing aboriginal **rights**.<sup>8</sup> However, this constitutional declaration launches Aboriginal peoples and other Canadians onto "a sea of uncertainty" which will keep lawyers and other legal luminaries occupied for **years**.<sup>9</sup> And, Indians in the South can attest to the fact that such basic aboriginal rights as hunting and fishing for self-consumption purposes have been **consistently** encroached by federal and provincial legislation since Confederation.<sup>10</sup> The sinister Restigouche affair of 1981 comes to mind as a recent example.

The second reason for avoiding reliance upon the land claims route springs from recent experience. Until recently, the 1975 James Bay and Northern Quebec Convention provided the only illustration for assessing the advantages of a comprehensive land claims settlement. It is significant that the Convention makes no provision for guaranteed **Inuit** or Cree representation in Parliament and the Quebec National Assembly where decisions have been taken to override terms of the 1975 accord. Those provisions establishing "regional and municipal government", such as the Kativik Regional Government have been actually **emptied** of substance through lack of Quebec and Ottawa funding and cooperation.<sup>11</sup> A Quebec sociologist recently compared the 1975 agreement to a possible future Canada-Quebec "**entente**" confining **francophone** Quebecois to reserves: Ottawa would take over Quebec; in return, Quebecois would acquire surface ownership rights on Category I lands around their towns, while on certain limited Category 11 **lands** they would be able to practice such "**traditional** activities" as bingo, civil law litigation, singing and so on.<sup>12</sup>

The 1971 Alaska Native Claims Settlement Act, "essentially an economic one, largely divorced from the political system",<sup>13</sup> supplies a further important insight into the limits of useful land claims agreements. A representative involved in the drafting of the original bill had this to say about the private, corporate route applied to native claims: "The Alaska native claims law is only one small law compared to all the others. **..it** can be amended and changed".<sup>14</sup> In a northern setting, according to outside observers, "the evaluation of the validity of the capitalist approach employed by the framers of ANCSA to achieve fundamental native goals

is... problematic".<sup>15</sup> High resource-related income **only** accrued to the North Slope Borough as a result of incorporation as the only native-controlled borough in the U.S. as of 1972.<sup>16</sup>

A third reason for caution originated in sad international efforts to ensure the protection of collective international rights. Many international minorities have been oppressed despite the 1948 International Declaration of Human Rights because the right to self-determination was confined to "colonial" situations, in relation to frontiers artificially drawn by foreign powers, eg. **Biafra**.<sup>17</sup> Prior to the second world war, various countries party to international treaties protecting minority rights had suppressed minority activities and established ghettos: in 1934, a Polish representative announced, in front of the League of Nations, his country's policy was "to get **rid** of" the Jewish community.<sup>18</sup>

Do the above qualifications signify that future representational modes should ignore the substance and implications of future land claims settlements affecting **Inuit, Dene and Metis** in the N.W.T.? The answer to this question is: no.

The existence of rights certainly presents greater value for a national group than the absence of rights. For instance, the Sami (Laps) of Norway have been greatly hampered by the absence of constitutional rights, if only to preserve their reindeer industry, in their struggle against the **Alta** dam project in Northern Norway around **Kautokeino**.<sup>19</sup> It is essential that Aboriginal parties to a land claims agreement in the Western Arctic participate, as a matter of course, in public regulatory bodies concerning wildlife, land use and natural resource development. So obvious is this assumption that the office of the special representative on constitutional development of the **N.W.T.** fully condoned such representation.<sup>20</sup>

Hence, it can be said that future Western **N.W.T.** constitutional provisions would focus on compatibility between **public** government functions and land claims responsibilities. However, as the **Inuit** have recognized in their Nunavut **Constitutional** Forum May 1983 constitutional document, "Nunavut is public government".<sup>21</sup>

Representation: The Complex Western Arctic Ethnic Structure

The **Nunavut** Constitutional Forum, concerning mainly communities in the Eastern Arctic, has not had to face the issue of guaranteed aboriginal representation in public government bodies to the extent the Western Forum has had to confront the problem of guarantees.<sup>22</sup> **Inuit**, in the area covered by the **Nunavut** project, account for 75-80% of the permanent population.

The situation in the area encompassed by the Western Constitutional Forum is somewhat different.

The Aboriginal peoples constitute a demographic minority in "Denendeh". Dene Nation residents, combined with Metis, still cannot provide a majority in constituency terms. Dene constituencies only correspond to 5 ridings in the present **N.W.T.** Assembly as compared to 7 for "non-native" ridings.<sup>23</sup> In addition, the Dene nation itself is divided in turn into different linguistic groups, from the **Loucheux**, Hare, Dogrib to the **Nahanni** and Cree peoples.<sup>24</sup> Existing federal administrative responsibilities are heavily concentrated in municipalities largely inhabited by non-native Canadians and others: Yellowknife, Fort Smith, **Inuvik**, etc.<sup>25</sup>

On the other hand, the Aboriginal peoples clearly occupy most communities, and most geographic regions, of the Western Arctic.<sup>26</sup> This is of the utmost importance when considering future representation in a Western government institutional system.

Finally, when assessing future mechanisms for guaranteed representation, it is important to stress the concept of permanent residency. **Inuit**, Dene and the Metis tend to consider the Western Arctic in relation to lasting residency aspirations: their country is a homeland, neither a periphery nor a homeland.<sup>27</sup> The "white" population fluctuations are largely subjected to Southern-induced "boom and bust" cycles, a fact which explains in part the lower than expected population growth in recent years. Recession depresses

commodity exploration and worker mobility.<sup>28</sup>

In sum, the question of "who is a Northerner?" Pertains both to Permanent commitment to the North (the Dene can hardly "return" to Europe) and to wild and unpredictable demographic fluctuations. This implies that:

- (a) residency requirements for voting purposes correspond to underlying social evolutions;
- (b) so-called "demographic" comparisons must be related to Western Arctic geographic realities.

#### The Boundary Question and Further Division

Any consideration of representational models for the Western N.W.T. is, in practice, affected by the future borders of a new Western N.W.T. area. The Dene Nation proposal differs in this respect widely from federal proposals set forth in 1963 and more recent **Inuit Tapirisat** of Canada proposals.<sup>28</sup> Agreement on this point had not been reached as of the spring of 1983.

The issue has been further complicated by COPE's January 1983 commitment to the Nunavut Constitutional Forum, and its involvement in the past with the Western Constitutional, Forum.<sup>29</sup> The question of a "federal reserve" or "federal reserves" in either the Eastern or Western Arctic provides an additional complicating factor that has yet to be fully aired.<sup>30</sup>

Hence, it is impossible, at this date, to supply precise geographic projections of what a future Western N.W.T. representational system would look like. However, it would be both dangerous and premature to assume that the boundary issue precludes very serious consideration of the principles and options of such a system. It would be sad if the frontier problem blocked constitution building in **Nunavut** or the Western N. W. T. .

It is also an assumption that the Western N.W.T. should be viewed as a whole. Further division of this region is excluded from our assessment of representation in following chapters.



### The Sovereignty Dimension

A basic assumption inherent in later analysis and proposals pertains to the notion that Aboriginal peoples of the **N.W.T.** can achieve self-government and self-determination within the Canadian constitutional framework, and through participation in instruments of territorial government. This approach therefore excludes the concept of full international sovereignty.

Aboriginal peoples of the existing **N.W.T.** have clearly opted for public government within the Canadian political family. They have also **expressed** their determination to participate in the economic development process. Propaganda accusing the Dene nation of being communists, as noted **Georges Erasmus**, "ludicrous".<sup>31</sup>

### The Evolutionary Nature of Future Arrangements

For any political system to survive, it has to evolve. In this **regard**, there will be a need to revise in the future certain aspects or methods of representational government in the Western **N.W.T.** Constitutional change should not be so difficult as to prevent evolution, but not so easy as to prevent careful examination of the implications of such evolution.

It is therefore essential that Aboriginal peoples of the Western **N.W.T.** fully participate in a future amending process of the regional constitution.

### The Impact of Party Politics

Political parties, of varying ideological bents, constitute the vehicle for representation in Western Democracies. In territories where several peoples reside, partisan divisions, depending on circumstance, can **lead** to under-representation of a people, or to its exclusion from the instruments of government and administration.

Examples of the impact of party politics on ethnic or regional representation in central institutions of government include:

- (i) Inadequate participation of Western Canada in federal central institutions in recent years because of its identification with the federal Conservative and **N.D.P.** parties.<sup>32</sup>
- (ii) In turn, inadequate French Canadian representation in government during the short Conservative interlude during 1979-80.
- (iii) The collapse of national Belgian parties into "ethnic" sub-parties over the past two decades. For instance, the Socialist party now is divided into Flemish and **Francophone** wings, while the Christian Democrats have split into the CVP (Flemish) and PSC (**Francophone**) factions. This party disintegration applies great strain on the integrity of national institutions, and hampers inter-ethnic accommodation.<sup>33</sup>
- (iv) Anglophone federalist opinion supporting the provincial Liberal Party has resulted, since 1976, in the absence of English-Canadian Cabinet ministers in Quebec.

Naturally, instances of multi-ethnic political parties abound. If the Liberal Party of Canada has retained power for most of the 20th century, this success flows from internal power-sharing between English and French Canadians. Contrary to Belgium's recent partisan practice, Swiss national parties have managed to present a balanced reflection of the federation's different ethnic make-up, which in turn has fostered adequate representation of the French and Italian minorities at the Cabinet level.<sup>34</sup>

However, the prospect of different peoples establishing different political parties leads to the certainty of serious conflict over time. It is not implausible to envisage a "European" majority party dominating Western **N.W.T.** politics if guaranteed representation for Aboriginal peoples is not viewed in a broad context. A "White" vs. "Dene" party contest would result in disintegration of the polity over time.

Some thoughtful Canadians reject the concept that the national electoral system should cement the electoral division of the country into East and West, into "ONTBECTIC vs. BRALTASAMAN".<sup>35</sup> Some circles, including the Pepin Robarts Commission in 1979, have suggested that federal MPs be elected according to a semi-proportional system, some directly, and some in relation to proportional representation.<sup>36</sup>

If national party politics and the federal electoral system have led to such proposals, it can be easily imagined that similar problems will surface in a Western N.W.T. A French expression wills that it is better to prevent than to cure. Such is the intent of Western Constitutional Forum deliberations.

In short, the issue of aboriginal representation is situated at the core of future public government prospects in the Western N.W.T., and is related to other issues. This should provoke little surprise, as representation of native peoples constitutes a fundamental aboriginal right. It has been recognized as such by the Prime Minister of Canada.<sup>37</sup>

During the course of this paper, several basic questions will be addressed:

- (i) what major proposals have been advanced in the North concerning guaranteed representation? What are the implications thereof?
- (ii) What are some principles to be applied to assessment of various institutional options?
- (iii) What models should be considered to ensure aboriginal representation in the Legislative Branch of a future Western N.W.T. government?
- (iv) What options are available to ensure similar participation in the Executive branch?

(v) *How can aboriginal representation be fostered through local and regional government?*

(vi) *What about the judicial process?*

1. Canada, Opening Statement, Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples, Ottawa, March 15, 1983, p. 12.
2. T. BERGER: "Northern Frontier, Northern Homeland", Report 1: Ottawa, 1977, p. 173.
3. Statement by the Hon. James Wah Shee, Yellowknife, N.W.T. Information Communique 81-234, October 19, 1981, p. 3.
4. Western Constitutional Forum, "Denendeh: The Path to Public Government", Yellowknife, 1983, p. 3.
5. This distinction was indirectly recommended by C.M. Drury ("Constitutional Development in the Northwest Territories", Ottawa: M.S.S., January 1980, Pp. 15-27.) in an otherwise extremely relevant report as the Special Representative opted to avoid the issue of division of the N.W.T..
6. R.W.M. DIAS, "Jurisprudence", London: Butterworth's, 1976, Pp. 33-65.
7. R. WESTLAND, "Rights and Policies in the Canadian Setting", O.S.R.: background paper (unclassified), Ottawa, 9, 5 p.
8. Part II of the Constitution Act 1981 states at Section 35(1) "The existing aboriginal and treaty rights of the aboriginal peoples are hereby recognized and affirmed."
9. Lawyer D. Rosenbloom quoted by the "Gazette", Montreal, December 12, 1981, p. 53.
10. P.A. CUMMING & N.H. MICKENBERG, "Native Rights in Canada", Toronto: General Publishing, 1977, Pp. 207-226; D. SANDERS, "Indigenous People in the Constitution of Canada", Vancouver, September 8, 1980, p. 30 **passim**.
11. Section 9 to 13 of the James Bay and Northern Quebec Convention which runs for over 1000 pages.
12. Interview of R. Savard, "Perspective", Montreal, April 14, 1979.
13. D. BAKER, "The Alaska Native Claims Settlement", Kingston: Queen's IGR Institute Eastern Arctic Study, February 1982, P. vi; McBEATH & MOREHOUSE, "Alaska Native Self-Government", Ottawa: DIAND, February 1979, Pp. 101-139.
14. Mr. Don Wright quoted in "The Globe and Mail", April 9, 1982.
15. Baker, **op.cit.**, P. 48.

16. *Ibid.*, P. vii.
17. J.P. HUMPHREY, "The World Revolution and Human Rights", A.E. Gotlieb Ed., "Human Rights, Federalism and Minorities", Toronto: C. I.I.A., 1970, Pp. 147-/9.
18. L. C. GREEN, "Protection of Minorities in the League of Nations and the United Nations", *ibid.*, Pp. 180-210.
19. P. JULL, "Norway's Parallel with Canada", the Globe and Mail, May 4, 1981, p. 7.
20. O. S. R., "Special Status and the Native Peoples in the N.W.T.", Special Background Paper B, Ottawa, 1979, 14 p.
21. Nunavut Constitutional Forum, "Building Nunavut" - A Discussion paper Containing Proposals for the Arctic, May 1983, P.1.
22. *Ibid.* Pp. 12-13: special regional representation is recommended without ethnic considerations.
23. N.W.T. Bureau of Statistics, "Plebiscite on the Division of the N.W.T.", Yellowknife, May 1982, 13 P.
24. N.W.T. Information, "Dene of the Northwest Territories", Yellowknife, undated, 4 P;.
25. C.M. Drury, "Constitutional Development. ." *op.cit.*, Map 6 (appendix).
26. M. DEVINE Ed., "N.W.T. Data Book", Yellowknife: Outcrop Publications, 1982, Pp. 85-215 for the demographic breakdown of some 60+ existing N.W.T. communities; also information from the Western Constitutional Forum, March 28, 1983 - "whites" form a minority in 3/4 of communities covered by the Western Constitutional Forum mandate.
27. R.M. BONE, "Population Change in the Northwest Territories", Journal of Canadian Studies, summer 1981. P. 84.
28. *Ibid.*, P. 82: Canada and the N.W.T. Bureau of Statistics estimated a population drop for the territory of some 1-2% between 1977 and 1980.
28. N.W.T. Legislative Assembly: Special Committee on the Impact of Division, "Report on the Impact of Division of the Northwest Territories", Yellowknife, November 12, 1981, Exhibit 1: Boundary Proposals.
29. N.W.T. Information, "Cope Commits to NCF", Yellowknife, January 15, 1983, 4 P.

30. *It is interesting to note that the problem of special "federal lands" was side-stepped in major statements on division made by the Hon. John Munro in Yellowknife on November 26, 1982, and May 11, 1983. It will surface in future talks with the federal government.*
31. *Quoted by the "National Geographic", "Peoples of the Arctic", Washington D.C., February 1983, P. 183.*
32. *J. WEARING, "The L Shaped Party: the Liberal Party of Canada 1958-80", McGraw Hill Ryerson, 1981, P. 188; the Regional Decline of a National Party: Liberals on the Prairies", University of Toronto Press, 1981, 188 P.*
33. *M. MALONE, "Le Double Visage de la Francophonie", L'Univers Politique, Paris: Richelieu, 1969, P. 388 passim; M. COVELL, "Agreeing to Disagree: Elite Bargaining and the Revision of the Belgian Constitution", Canadian Political Science Review, September 1982, Pp. 451-470.*
34. *D. SEILER, "Civages regionaux et science politique: application d'un schema d'analyse aux cas de la Suisse et de la Belgique", Canadian Political Science Review, September 1977, Pp. 447-477. ; G. CODDING, "The Federal Government of Switzerland", Boston: Houghton & Mifflin, 1965, P.88.*
35. *M. J. ADAMS, Report Magazine, Montreal, April 1980, P. 35.*
36. *Commission on National Unity, "A Future Together", Ottawa, January 1979, P. 105; W.P. IRVINE, "Does Canada Need a New Electoral System?", Kingston: Institute of Intergovernmental Relations, 1979, P. 99.*
37. *In a major declaration to a conference of First Nations in Ottawa on April 29, Mr. Trudeau urged governments and aboriginal peoples embark on a joint process to define aboriginal rights, the substance of native self-government, methods to ensure better federal and provincial services to the native peoples, and, native representation in the legislative process.*

CHAPTER 1 :

BACKGROUND - PROPOSALS FOR ABORIGINAL REPRESENTATION

Various bodies have made proposals for future representation of aboriginal peoples in public government in the past. Other developments will affect such representational configurations.

Proposals and recent events reveal deep discontent respecting present government organization in the NWT. They also reflect increasing sophistication and confidence on the part of aboriginal representatives.

This chapter will also highlight the difficulties inherent in guaranteed representation schemes, both because of the diversity of perspectives on the part of peoples concerned, and because of the pressures of time with boom and bust development looming on the Arctic horizon. The head of the Dene Nation noted, after observing the possibility of a sudden influx of 20,000 (non-aboriginal) workers in the Mackenzie Delta for oil and gas exploitation purposes, that "this is one place we can learn from our mistakes."<sup>1</sup> - the mistakes of native and non-native peoples.

It is essential to note that representatives of the aboriginal peoples **have** achieved great practical progress in terms of representation at the NWT level over the past two decades. The territorial Council used to be fully appointed. As of 1983, aboriginal MLAs accounted for a majority of the NWT Assembly.<sup>2</sup> However, if "Inuit" constituencies are excluded, there were only five "Dene" constituencies as opposed to seven non-native constituencies in the Western NWT. The creation of the federal Nunatsiag riding (covering the Eastern Arctic and segments of the West) in time for the 1979 federal elections also marked a step forward as it established the first "aboriginal" riding in Canada, and as the Inuk M.P. has since worked for the protection of aboriginal interests directly in Ottawa.



It is particularly noteworthy, respecting the creation of the **Nunatsiag** riding, that the revised Northwest Territories Representation Act as of 1975 emphasized the consideration of "any community or diversity of interests" of the inhabitants of various regions" in the design of constituency boundaries.<sup>3</sup>

Increasing aboriginal participation in the legislative and executive branches of the existing NWT territorial government induced a much more progressive philosophy in respect of aboriginal representation in public government. The Special Legislative Committee on Unity of the NWT, created in 1979, stressed that aboriginal leaders "cannot give their consent to government as it now exists in the Northwest Territories."<sup>4</sup> In 1980, the NWT Legislative Assembly recommended the principle of a plebiscite on division and the creation of a constitutional committee to include aboriginal members.<sup>5</sup> In 1981, the Special Committee on the Impact of Division of the Northwest Territories, while noting the costs of splitting the territory into two polities, took political and **social** costs of continuing status quo into account in a balanced assessment.<sup>6</sup>

Despite this impressive record of progress, much would remain to be done in the existing NWT framework. Aboriginal Canadians remain under-represented in such essential organs as Cabinet, the public service and the judiciary.

This is to say that proposals for native representation should be viewed in a very evolutionary light. Among such positions, we would discern:

- i. those of the Dene Nation;
- ii. Metis people positions;
- iii. projects presented by **NWT Inuit**;
- iv. special designs set out by COPE in the Western Arctic;
- v. certain propositions considered by the Office of the Special Representative on Constitutional Development;
- vi. discussions within the Western Constitutional Forum;
- vii. suggestions presented by the present Government of the NWT; and

viii. the provisional outcome of national constitutional talks on the rights of aboriginal peoples.

### 1.1 Dene Nation Proposals on Representation

The Dene Nation Assembly approved a plan as of 1976-77 calling for division of the NWT and the establishment of Dene Lands. New institutions of government would reflect a Dene **consensual** approach to government, while all residents would participate in public matters. A "Metro" council would gather the representatives of the new territories in central decision-making **fora**.

In March 1979, the Dene Nation Executive released a discussion paper emphasizing the basic aboriginal right to form institutions of self-government. Based on the principle of **aboriginal** self-determination, a Dene Parliament would be universally elected.<sup>8</sup>

The Dene philosophy of the time was summarized by George Erasmus:

"Our system is based on a decision-making process involving the entire population rather than on delegating powers to a few elected representatives. In respect of affairs common to the three **new** territories, the three governments would delegate representatives to a second **level** of "Metro" government, **designed** in relation to existing Toronto metropolitan government practices."

In addition:

"We're saying that we want to set up a government in the tradition of the **Dene**. That it would be a system of government which would allow for both Dene and **non-Dene**. Anyone living up here who had residential requirements would have full rights; they could vote, run for office, etc."<sup>10</sup>

In 1981, the Dene Nation, in cooperation with the NWT Metis Association, presented a major proposal for public government in the Western NWT, "the Denendeh Proposal".

A Denendeh government would be composed of a Senate, a Denendeh Assembly and Community Assemblies. The Assembly, deliberating upon "provincial" type matters and serving as a link to community bodies, would be composed of local chiefs and elected community representatives. The Dene would dispose of at least 30% of Assembly seats. The Denendeh Senate, the composition of which would be determined if only to include strong Dene representation, would be in a position to reject any Assembly or community legislation adversely affecting aboriginal rights.<sup>11</sup> Community Assemblies, curbed by local referendum possibilities, would dispose of special powers in the areas of natural resources, certain social services, finances and local operations.

The Dene recognize full rights of participation in public government to other Canadians, providing they satisfy a ten-year residency requirement.<sup>12</sup>

The Denendeh proposal includes emphasis on a Charter of Founding Principles which would affirm native languages, **along** with English, as official languages of the "province-territory."<sup>13</sup> In addition, it stresses jurisdiction over provincial-type powers along with special **powers** in domains such as communications, family relations and ties with other aboriginal peoples.<sup>14</sup>

## 1.2 Metis People Proposals

In 1977, the Metis Association of the NWT, in a land claims document, suggested division of the existing NWT. A Mackenzie corridor Senate would be comprised of community delegates and would be endowed with a veto over federal land and resource decisions affecting aboriginal interests.<sup>15</sup>

In 1981, the Metis Association of the NWT endorsed the principle of publishing the **Denendeh** public government proposition referred to in the section immediately above. However, the Metis considered the document to be destined to serve as a discussion paper rather than as an expression of firm policy.<sup>16</sup>

It should be noted that national representatives of the Metis, during talks initiated in November 1982, strongly urged the adoption of a constitutional amendment specifying "guaranteed (aboriginal) representation in all legislative assemblies". While other native delegations at constitutional discussions also applied emphasis to the issue of representation, the **Metis** especially highlighted the issue, along with the concept of a Metis land base.

### 1.3 Nunavut and Representation

The configuration of Western NWT institutions will depend in part on concepts applied in **Nunavut**. Constitution building in **Nunavut** will provide a basic reference point for progress in the West."

**NWT Inuit** opted for political development, through simultaneous recourse to land claims negotiation and **Inuit** self-government in public institutions. As the **Inuit** constitute a strong majority of permanent residents in the Eastern and Central Arctic, the problem of guaranteed representation has attracted less attention than in the Western NWT, where aboriginal peoples are a minority.

During the course of 1982-83, the **Nunavut** Constitutional Forum conducted research and consultations with a view to presenting a coherent constitutional package for a new territory. With respect to issues of representation, the **NCF**, inter alia, suggests:

(a) A **Nunavut** Assembly be comprised of 25 members;

- (b) That the first assembly consist of four members from the four Nunavut regions plus nine members elected on the basis of population;
- (c) that the future assembly examine the **problem of** representational balance between smaller and larger communities;<sup>19</sup>
- (d) that the NCF and the Western **Constitutional** Forum jointly review the notion of residency requirements;<sup>19</sup>
- (e) and, that Inuktitut, along with French and English, be affirmed as an official language at all levels of Nunavut government.<sup>20</sup>

#### 1.4 Proposals for the Western Arctic

On October 31, 1978, the **Committee** for Original Peoples Entitlement (COPE) and the Government of Canada signed an agreement in principle settling claims put forward by the **Inuvialuit**. As respects representation, **Inuvialuit** would participate in several public wildlife management and land use committees. In addition, the agreement affirmed the value of a Western Arctic Regional Municipality (WARM) which would reflect the aspirations and values of the **Inuit** in the Western Arctic. Interestingly, this agreement in principle has yet to be accepted by the federal Cabinet.

#### 1.5 Considerations Examined by the Office of the Special Representative

While the Special Representative did not address all aspects of the problem of division in the 1979 report on constitutional development in the NWT, Mr. Drury stressed **devolution** of power to **community** levels of government (in respect of land use management, social programming and education) as a tool for greater aboriginal representation in organs of public government. Such **devolution** would be accompanied by provisions **for the** use of aboriginal languages at the community level of administration.<sup>21</sup>

The Office of the Special Representative conducted a series of studies and reflections as concerns greater native representation in government. Among options considered were:

formal recognition of municipal government local working languages;  
advisory committees comprised of community representatives to advise  
the GNWT on resource and related management;  
the recognition of different languages at the territorial plane;  
and guaranteed aboriginal representation on key land use and economic  
development committees.<sup>22</sup>

While the Drury report attracted strong criticism from aboriginal circles,  
doubtless because of the option to avoid the division issue, several  
recommendations and analyses coincide with concerns about representation.

### 1.6 Western Constitutional Forum Progress

The Western Constitutional Forum was established in 1982 to consider  
constitutional development in the Western NWT based on work conducted by  
Dene, Metis, NWT Assembly and government representatives, and COPE. This  
event marks dramatic recent reconciliation between natives and non-natives  
in the area. Indeed, the Eighth Council took a strong stand against the  
Dene Nation. As of 1980, **the** Ninth Council officially supported speedy  
resolution of land claims.<sup>23</sup>

As of January 1982, the WCF held a conference in Yellowknife where Dene **and**  
Metis exposed their constitutional proposals, including guarantees for  
native representation in future fora. One issue which attracted particular  
attention pertained to residency requirements. While Mr. Erasmus asserted  
that a six-month residency requirement was too short, other participants  
stressed the old issue of "no taxation without representation" and the  
impact of the 1981 Constitution Bill mobility clause.<sup>24</sup>

A further gathering, in September 1982, which included WCF members and  
private representatives, reached a consensus on several important issues.  
Among conclusions: a residency requirement greater than one year; a  
certain number of guaranteed seats for aboriginal peoples in a future  
Western assembly; and, sensitivity to community government needs.<sup>25</sup>

### 1.7 Proposals Set Forth by the GNWT

As noted in previous sections, the NWT Assembly and Executive have played an active role in assessing the advantages of **div**ision, and in furthering aboriginal interests since 1979.

During national constitutional talks in 1982-83, the GNWT strongly supported entrenchment of aboriginal rights and the concept of an ongoing constitutional process. It affirmed that constitutional amendments affecting aboriginal rights would require the consent of native organizations. It also insisted on the principle of guaranteed aboriginal representation in Parliament and legislative assemblies. As regards aboriginal seats, "voting for these seats" according to Minister G. Braden, "could be by a separate roll composed of aboriginal voters, as is the case in several countries."<sup>26</sup> The territorial government also suggested guaranteed seats in the Senate - at least one seat for each province and territory.

The GNWT also promoted the notion of repeal of sections 42(1)(e) and (f). The former section of the Constitutional Bill (1981) provides that in order for a province to extend its boundaries into a territory, an amendment to the constitution must be made in accordance with the amending **f**ormula presented in section 38(1) - agreement of the federal government and seven provinces accounting for 50% of the national population. Aboriginal peoples of the NWT do not wish to come under the jurisdiction of an existing province: the right to self-government would be infringed. The latter section provides that the creation of new provinces would be affected under the section 38(1) national amending formula. It makes achieving provincial status for **Nunavut** or Denendeh quite difficult.

Territorial representatives suggested that territorial consent would be required in case of boundary changes. A territory could initiate amendments to create a province.

It should be noted that on March 16, 1983, governments, aboriginal representatives and the territories **agreed to** review the question of repealing/amending sections 42(1)(e) and (f).<sup>27</sup>

#### 1.8 Aboriginal Representation and the Constitutional Process

Due to intensive and astute aboriginal presentations, the Constitutional Act (1982) affirmed existing aboriginal rights and specified future definition of such rights.<sup>28</sup>

In the period covering November 1982 to March 1983, government and aboriginal representatives met to discuss the definition and elaboration of aboriginal rights. They did not submit the issue of guaranteed aboriginal representation in different branches of public government to intensive scrutiny, although the topic was examined from time to time. Interest, for example, was expressed concerning New Zealand arrangements for the **Maoris**. On the other hand, delegations expended time and energy on the important problem of aboriginal participation in the national amending process as it affected native rights. It was suggested that guaranteed aboriginal representation in legislative bodies would provide an instrument for native consent to constitutional **changes** relating to aboriginal rights.

During the constitutional conference of March 15-16, 1983, the guaranteed representation item was not directly addressed. Delegations did discuss aboriginal self-government on the second day.

However, the 1983 constitutional accord on aboriginal rights signified a major step forward in ensuring the principle of guaranteed aboriginal representation in public government:

- (i) governments have been committed to **discussions** on aboriginal self-government with aboriginal representatives.<sup>29</sup>
- (ii) aboriginal peoples obtained guaranteed participation at the constitutional level when governments agreed to at least three more constitutional conferences within five years;<sup>30</sup>



- ( i i i ) the same peoples were parties to the 1983 accord: the 1983 agreement stipulates that it was signed "with the participation of. . ." the four major national aboriginal organizations;<sup>31</sup>
- (iv) for the first time, the NWT signed a national constitutional accord; territorial participation in future conferences is affirmed.<sup>32</sup> Of the twelve governments participating at the conference, the NWT executive were the only elected by an aboriginal majority;
- (v) land claims agreements were assimilated with "treaty rights" (under S. 35 of the Constitution Act),<sup>33</sup> an important point when considering participation of land claims beneficiaries in public land use and wildlife committees;
- (vi) aboriginal peoples gained the right to participate in discussions pertaining to amendments affecting aboriginal rights:

"The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of Section 91 of the Constitution Act (1867), to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada, and,

(b) the Prime Minister of Canada will invite representatives of the aboriginal **peoples of** Canada to participate in discussions on that item."<sup>34</sup>

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This chapter reveals the astounding achievements of aboriginal peoples of the North in furthering their objective of participation in government in recent years. A decade ago, people would have dismissed any prospect of such progress in so short a time.

However, many problems and opportunities subsist. As **would be** clear from a perusal of proposals for aboriginal participation in government above, or other proposals, many questions remain:

should a Dene Senate be established?

what about residency requirements in face of non-native reservations?

should Western NWT natives rely on national constitutional progress when many Indian organizations to the South equate Indian government with reserve government?<sup>35</sup>

just how many seats **should** be guaranteed for native representatives in a future assembly?

should "regional representation" of smaller communities be used to balance demographic "rep by pop" systems?

what should be done to ensure aboriginal representation in Cabinet or a future Western NWT public service?

Like most relevant questions, these hit back at the reader and cause withdrawal. The next chapter is designed to provide elements of a general perspective on guaranteed aboriginal representation in the Western NWT. In the absence of certain overall principles, the debate on aboriginal representation could bog down and be directed towards arcane mathematical calculations or abstruse debate about mechanics.

1. G. Erasmus quoted by the "National Geographic", *op.cit.*, P. 183.
2. NWT Bureau of Statistics, "Plebiscite on the Division of the Northwest Territories : Voter Choice, Participation and Eligibility", Yellowknife, May 1982, p. 3.
3. S.C. 1974 Ch. 28 S. 7(3).
4. Special Committee on Unity, "Report to the Third Session of the Ninth Assembly", Frobisher Bay, October 22, **0, p. 3.**
5. NWT Information communique, "Recommendations of the Legislative Assembly of the NWT on the Question of the Division of the Territories", Yellowknife, December 15, 1980, Pp. 1-6.
6. "Report of the Special Committee on the Impact of the Division...", *op.cit.*, P.1.
7. C.M. DRURY, "Constitutional Development in the NWT", Ottawa: O.S.R., 1979, P.19.
8. Dene Nation, "Recognition of the Dene Nation through Dene Government", Ottawa, March **15, 1979, n.p.**
9. Interview to "Le Devoir", Montreal, March 20, 1979, P. 5 (author's translation).
10. Interview to "Indian News", Ottawa, October, 1979, n.p.
11. Dene Nation and Metis Association of the NWT, "Public Government for the People of the North", Yellowknife, November 9, 1981, P. 17.
12. *Ibid.*, P.5.
13. *Ibid.*, P. 9
14. *Ibid.*, Pp. 7-9.
15. Metis Association of the NWT, "A discussion Paper in Respect of the Outstanding Native Claims in the Mackenzie District", and "Our Land, Our Culture, Our Future", Yellowknife, 1977.
16. Source: Western Constitutional Forum, June 8, 1983.
17. A series of general introductions to the Nunavut project are provided by: Inuit Tapirisat of Canada, "Political Development in Nunavut", Igloolik, September 3, 1979, **37 P.**; P. JULL "Nunavut", "Northern Perspectives", Ottawa: CARC, March 1982, 8' P.; & D. PATTERSON, "Nunavut", Nunavut Constitutional Forum, March 10, 1983, 64 P.

18. Nunavut Constitutional Forum, "Building Nunavut - A Discussion paper Containing proposals for an Arctic Constitution", May 1983, P.11.
19. *Ibid.*, P.12. ,
20. *Ibid.*, P.14.
20. *Ibid.*, P.21.
21. "Constitutional Development...", *op.cit.*, Pp. 43-47.
22. O. S. R., "Special Status and the Native Peoples in the Northwest Territories", Background Papers A & B (unclassified), Ottawa, 1979, 4 & 14 P.
23. "News of the North", March 14, 1980, P. A12.
24. R. CAIRNS & R. DESARMIA, "Western Arctic Constitutional Conference", North/Nord, Ottawa, Spring 1982, P. 3.
25. "**Denendeh:** the Path to Public Government", *op.cit.*, P. 4.
26. George Braden quoted by "The Hub", February 10, 1983.
27. Federal Draft, "1983 Constitutional Accord on Aboriginal Rights", First Ministers conference on **aboriginal Constitutional Matters**, Ottawa, March 16, 1983, Document 800-17-041 (revised).
28. Section 35(1) reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." As stated earlier, guaranteed representation constitutes an aboriginal right. Section 37(2) stated that first ministers would meet with aboriginal representatives to discuss constitutional matters prior to April 1983.
29. "1983 Constitutional Accord...", *op.cit.*, article 2 referring to item 4 of the March 15, 1983, agenda.
30. *Ibid.* Part IV 1: Constitutional Conferences, Sections 37(1) & (2) - proclamation amending the constitution of Canada, P. 2.
31. *Ibid.*, P. 5 of the **Constitut**ional Accord.
32. *Ibid.*, Section 37(3) of the proclamation, P. 2.
33. *Ibid.*, new Section 35(3), P 1 of the **proclamat**ion.
34. *Ibid.*, new Section 35(1), **P.2** of the proclamation.
35. Whereas Saskatchewan contains some 70 reserves, there is only one reserve in the NWT.

CHAPTER 11 :

**GUIDELINES FOR GUARANTEED REPRESENTATION**

*Some general principles are required to assess different options for guaranteed representation for aboriginal peoples in the Western NWT. This chapter is designed to provide discussion points for overall guidelines in the process of such an examination.*

*In particular, the following questions will be asked:*

- is representative government an outdated concept?*
- does public government exclude ethnic considerations?*
- how much flexibility can be applied to representational models?*
- what are the parameters of representative government?*
- can representational schemes function in the absence of a basic consensus relating to development?*

11.1 IS REPRESENTATIVE GOVERNMENT AN OUTDATED CONCEPT?

*Representative government, a system developed since the 18th century, has come under heavy attack this century. When considering guarantees for the native populations, the question of the overall relevance of such guarantees naturally arises.*

**i. The Critique of Representative Government**

*Criticism of representative government, as practised in Canada and other states, derives from a variety of sources.*

### Aristocratic Government

The French philosopher, **Montesquieu**, urged adoption of representative government in **the** 18th century as an alternative to direct government because the people were ill-educated to manage their own affairs. He wrote:

"Representatives are fully equipped to discuss public affairs. ..**the** people is not qualified for such **discussion**, a fact which constitutes a major disadvantage in democracy."<sup>1</sup>

### The Evolution of Modern Government

The term "cabinet government" used to describe the British system adopted by Canada signifies precisely government by Cabinet. The average Canadian back-bencher disposes of far fewer prerogatives and resources than an American congressman.

The development of executive, the proliferation of bureaucracies and boards all contribute to a lessening of **influence** on the part of assembly representatives in Canada and elsewhere.<sup>2</sup>

### Criticism from the Left

Orthodox **marxists** consider elections a sham as they mask genuine social conflict between capitalists and the proletariat. The revised Soviet Constitution of 1977 affirms power belongs to the people. As a result, through the Communist Party, delegates to both Chambers at the national **level** are submitted to the "imperative mandate" mode, i.e., they can be recalled if **electors** consider their votes incompatible with their ideological mandate.<sup>3</sup>

It is noteworthy however that the Communist **Party** of the Soviet Union does not include all citizens of the U. S. S. R.<sup>4</sup> Also worthy of note is the fact that Western communist parties participate in what they view as "bourgeois" institutions: as of June 1983 for example, the French

government counted four Communist ministers in a strongly anti-Soviet administration.

#### Direct and Semi-Direct Government

Various systems for the direct expression of popular preferences outside the representative system have been developed over time.

Direct government, a historical accident, assumes people directly govern themselves, the highest application of the democratic concept. The problem is that citizens can hardly meet every time a decision has to be made. However, direct government still exists in several Swiss Cantons (**Glaris, Appenzell and Unterwalden**) where Landsgemeinde gather each year in these tiny territories to appoint officials and vote laws.<sup>5</sup>

Semi-direct government is based on citizens accepting the principle of representative government, but retaining final decision-making powers on crucial matters through recourse to referenda.

Referenda can be decided by government authorities or, in certain cases, through a popular initiative mechanism. The effects on representatives are clear: their influence is diminished.<sup>6</sup>

#### Electoral Distortions

The question of whether representative government actually represents public opinion and preferences in a pluralist society depends in part on the electoral system in place.

Canada has embraced the British "first past the poll" system. This usually leads to a concentration of parties, "two main parties", and to majority government.<sup>7</sup> But the system is viewed as "unfair" by many observers, because it can result, as is the case in Canada, in whole peoples or regions being excluded from executive branch prerogatives. In Britain, the June 9, 1983 election saw the Tory party gain over 60%

of all seats with 43% of the popular vote.

Proportional representation reflects voter pluralism to a greater extent than riding by riding polls. Critics of this system, in Canada and elsewhere, claim P.R. leads to weak, coalition governments.

### Aboriginal Concerns

There is little doubt that Western concepts of representative government, and its Canadian variation, hardly coincide with traditional aboriginal modes of government.

As one observer notes rather dramatically:

"But where we (i.e. Europeans) tend to think of political leadership as a highly unitary concept - that is, a concept that features a sovereign institution or **individual** with the ultimate power to make final decisions on all aspects of social and political **life** - the native concept is both diffuse and functional." <sup>8</sup>

Native leaders operate on the principle of building a consensus over time, without the abrupt overt confrontation characterizing traditional European parliamentary politics. <sup>9</sup> In the aboriginal context, confrontation is not necessarily sought.

It is thus hardly surprising that the Dene Nation called for a public government "that will reflect the Dene **style** and form of political organization" based in part on "consensus". <sup>10</sup> More bluntly, a Dene Nation leader remarked some time ago:

"Our system is founded upon decision-making after consensus has been reached among all concerned, and not upon a decision-making process based **on** delegation of powers to a few elected representatives." <sup>11</sup>



ii. A Balanced Perspective

There is every reason to question traditional assumptions concerning representative government. **Montesquieu's** assertion that citizens could not govern themselves except implicitly through an elite no longer presents much validity except in a technical sense, i.e., it would be difficult to ensure a permanent assembly of tens of thousands of western NWT citizens 365 days a year.<sup>12</sup> It is also true that representatives can rarely "speak with accuracy" on the spot in expressing his/her electors' views.<sup>13</sup>

However, it is our contention that representative government constitutes a flexible animal and that this system can be adjusted to the needs and aspirations of all residents of the Western NWT.

First, in composite political systems, whether vast or peopled by different ethnic groups, a law defined by Georges **Scelle** wills that regions/peoples dispose of a right to "**participation**" in central institutions and the right to "autonomy".<sup>14</sup> Transposed to the Western NWT setting, this would mean native citizens would share power at the **centre** and manage their affairs at home.

Should participation take the form of diplomatic discussions or tasks involving "coordination and criticism" as described by **Friedrich?**<sup>15</sup> Representative government constitutes an ideal tool to allow native legislators, as a minority in the Western NWT as a whole, to coordinate and criticize as need be.

Indeed, Aboriginal peoples possess both collective and individual rights. As members of a collectivity recognized in the Canadian constitution, they demand a right to guaranteed representation in common institutions of public government. Natives also possess individual rights in the Canadian tradition;

they can choose between this or that social and political option, whether set forth by an aboriginal leader or a non-native candidate.<sup>16</sup> Dene nation members and other natives would have the opportunity to doubly participate in the legislative process: as aboriginal persons and as Canadians.

Let there be no doubt that the future work of a Western NWT legislative body will be essential. The making of laws represents the most natural and important manifestation of a collective will in a common polity.<sup>17</sup>

This leads to a second point. If aboriginal peoples of the Western NWT reject the representative government alternative, they could possibly foster a "ghetto **mentality**" with "separate development" or apartheid implications.<sup>18</sup> The South African example largely shows the disadvantages of separate development routes, especially when aboriginal peoples form a social or demographic minority. French Canadians have flourished as a minority in Canada because they have fully participated in central legislative activities in Ottawa. They refused the "wigwam complex" brilliantly depicted by Trudeau.<sup>19</sup> Quebec has provided the Prime Minister of Canada for a third of the country's history and national Liberal and Conservative leaders. as of June 1983 both come from Quebec.

Third, traditional representative government can be adjusted to forms of direct or semi-direct government.

A first flexible route is decentralization, the division of powers between different orders of government. The Canadian political system has increasingly focused on referenda and plebiscites as a means to ensure participation, eg. the 1982 plebiscite on division in the NWT.

In addition, there is no particular reason why a Western NWT government should endorse the excessively secretive modes of government implemented in the South. Canada's federal Official Secrets Act, modelled on British precedents, provides no incentive for participation in the North. In Scandinavia, however, official public information acts, as well as in the U.S., ensure easy, open and informal conduct of public deliberations.

The Canadian mode of political representation may not appear ideal to Dene and other aboriginal nations. But, while it does provide a tried system of government, it also has shown its flexibility and further presents native organizations with definite scope for political expression. To paraphrase Churchill, 'representative government is not ideal'. However other options in the Western NWT appear worse.

It is suggested that:

- (i) guaranteed representation within Canadian political tradition constitutes an important leverage for aboriginal peoples;
- (ii) representative government can, within limits, be adjusted to meet the needs and aspirations of aboriginal peoples in the western NWT.

## 11.2 PUBLIC GOVERNMENT AND THE ETHNIC DIMENSION

The Canadian majority at times ignored the explosive implications of conflicts linked to linguistic cleavages whereas cultural differences <sup>20</sup> supply the main cause for collapse of contemporary federations.

Nevertheless, Canadians and other peoples have had to come to grips with devising methods for the sharing of power in common institutions at the national and other levels. This process reflects the reality that the only way to respond to diversity is through diversity. Some may complain

arrangements for representation are "awkward", "cumbersome", even "undemocratic". But as Freud noted, maturity is learning to live with ambiguity.

Guaranteed representation for different people at the centre constitutes an essential mechanism to ensure these peoples can identify with government, "their" government. This is especially the case if representation is viewed in a broad perspective, because "election is not an essential part of representation". Participation in Cabinet, the judicial system, the public service and agencies, in second chambers, offers greater potential for sharing power than mere electoral designs.

i. The Canadian Experience

Canada's Modern history, aside from the destiny of its first nations, revolves around the relationship between English and French Canadians. The latter, for two centuries, have managed to ensure guaranteed **francophone** representation in Quebec which was not obvious - and in central institutions of government.

Observers are right in saying that Canada **is not** a strictly "bi-national state" along **Austro-Hungarian** or Cyprus lines.<sup>22</sup> But Canada's apparently "functional" constitution results from a series of elaborate compromise between English and French over a long period.

The Quebec Act of 1774, which provided freedoms for the French in matters of law and religion,<sup>23</sup> was followed in 1791 by an even more astonishing document, the "Constitutional Act of 1791". This British act guaranteed an assembly for Lower Canada (i.e. for the French) and the division of Canada which was to lead to federalism.<sup>24</sup> The 1840 Act of Union could not reverse the dualist trend in Canada; "from 1850 to 1864, it was impossible to govern without support from Upper Canada and Lower Canada".<sup>25</sup>

The British North America Act, in its federal form, affirmed in 1867 the notion of guaranteed representation. First, because French Canadian leaders such as Cartier fought hard for a federal system of government and an autonomous Quebec where French legislators could protect a common patrimony. Of course, leaders from New Brunswick and Nova Scotia such as Leonard Tilley insisted on decentralization, but Quebec provided the crucial variable during actual negotiations.<sup>26</sup>

Signs of constitutional dualism in the 1867 constitution can be traced to the decision to create a second chamber in Quebec (the only province to do so since Confederation) with a view to protecting a provincial anglophone minority, in exchange for what Cartier (wrongly) thought was a 1/3 Quebec share of Senate seats and 65 seats in the House of Commons.<sup>27</sup> A certain dualistic concept of sharing power marks the letter and spirit of the B.N.A. Act:

sections 94 and 98 guarantee the existence of common and civil law traditions, thereby ensuring strong Quebec representation on the Supreme Court;

section 133 affirms French as an official language in Parliament;

section 93 provides francophone **catholics** in Quebec with control over their educational institutions.<sup>28</sup>

Tradition and convention played an important role in guaranteeing francophone representation in national institutions. According to Eugene Forsey, "the federal Cabinet must **represent** different regions of the Canadian federation", including Quebec.<sup>29</sup> A Cabinet without strong minority representation, whether from a regional minority (the West) or an ethnic minority (**Quebecois**), is destined to be short-lived. Quebecers occupy, as a matter of course, three of the nine seats on the Supreme Court. Quebec, unlike American states, dispatches 24% of all Senators. Many recent constitutional proposals have tended to seek firm guarantees for **francophone** representation in federal institutions, e.g. within the Senate,<sup>30</sup> the Supreme Court, the federal public service, and so on.

The Canada Act (1982) through its affirmation of French as the official languages of Canada and New Brunswick, implicitly requires French Canadian participation in government bodies.<sup>31</sup> S. 38(1)(b) of the same constitutional text requires that future amendments to the constitution be effected with the consent of Parliament (with heavy Quebec representation) and at least seven provinces with 50%+ of the national population: Quebec, with a quarter of this population, is hence favoured.

The Canadian political system has focused less attention on guaranteed representation for native peoples, if only because in 1969 the then federal government set forth a policy of socio-economic development and assimilation.<sup>32</sup> Nevertheless, the Prime Minister has emphasized the importance of guaranteed representation for aboriginal nations in Parliament and legislatures.<sup>33</sup> The creation, as of 1979, of the Nunatsiag riding in the high and eastern Arctic was certainly not justified by demographic (population) grounds. Its establishment, allowing for the election of the first Inuk M.P. (Peter Ittinuar), owed more to the desire to ensure Inuit political representation and to geographic reality as opposed to demographic calculations. Can an M.P. resident in Ottawa and Yellowknife "represent" Baffin Island?

ii. Foreign Experiments

Not all States specifically guarantee participation of minority peoples. For instance, the Commonwealth of Australia Constitutional Act (1900) contains no special provisions for aboriginal representation in the central legislative body.<sup>34</sup> However, many countries, confronted with the problems and opportunities associated with multi-people compromise, have taken legal and political steps to guarantee minority participation in the conduct of common affairs.

Representation in Cabinet

The Belgian constitution states that **francophones** - representative of a national minority - will account for half the national Cabinet, except for the position of Prime Minister.<sup>35</sup> Swiss practice, based on "rigidly obeyed customs," no single Canton will count more than one minister; that the **francophone** minority will provide two ministers, and; that the Cantons of **Basel** and Zurich be permanently represented.<sup>36</sup>

The Austro-Hungarian "**Ausgleich**" or compromise of 1867 resulted in heavy Magyar representation in the executive branch of government and in the common assembly. The fall of the House of **Habsburg** in 1918 has given this bi-national experiment a bad name. But Austria fell in face "of people who hated dynasties"; have events since in Central Europe - especially since 1938 - verified the fallacy of the 1867 compromise?<sup>37</sup>

Representation in the Lower Chamber

There are many instances of guaranteed minority representation at the international "plane as concerns the composition of the first legislative chamber.

The Cyprus constitution of 1960 guaranteed the Turkish minority a 30% share of seats in the lower chamber whereas Turks accounted for barely 20% of the population (Turkish representatives were elected from a separate **electorate**.)<sup>38</sup> A 1960 constitutional revision, in the spirit of the 1943 national "pact", guaranteed that the Maronite confession would obtain 30 of the 99 seats in the Lebanese Parliament, the **Sunni** confession some 20, and so on. (Candidates from **different** confessions are elected from a common, general electorate.)<sup>39</sup> The New Zealand constitution guarantees the **Maori** minority of aboriginal origin 5% of lower chamber seats, a figure which roughly corresponds to their recognized demographic weight.<sup>40</sup> The 1966 Fiji constitution provided for over-representation of non-aboriginal peoples in the legislative

assembly.<sup>41</sup> The Indian constitution of 1963 ensured a special representational mechanism for castes and tribal groups in the House of the People.<sup>42</sup>

Flexible Jurisdictions

Decentralization can provide a minority with control over affairs of central import for its survival as an ethnic and cultural nation. Thus, the Canton of Vaud can foster French culture in Switzerland; government in Madras (India) is enabled to ensure linguistic diversity; or **Greenlandic** can become the official language of Greenland.

In retrospect, federal custom does not prevent differing jurisdictions in respect of territory-wide and "cultural" matters. One set of legislators can obtain wider powers regarding cultural and social affairs as opposed to the economic area. Different legislators, as noted by Professor **Brossard**, can make different laws in different fields.<sup>43</sup>

The most recent illustration of this standard for constitutional flexibility can be found in Belgium. In 1970-71, a major constitutional revision resulted in the establishment of two "cultural councils" for the Flemish and **Walloons** at the national level: the Dutch and French Councils acquired exclusive jurisdiction respecting cultural affairs, including "international cultural cooperation". Ministries at the national Cabinet level were created for Dutch and French cultures: as a consequence, the French community cultural policies could not be blocked by a veto on the part of the demographic Flemish majority.<sup>44</sup> As a result of the Egmont Pact of 1977, decentralization was enlarged to encompass "personal" problems such as water management, the environment or local economic development.<sup>45</sup>



Transposed to Canada at the national level, the Belgian scheme, regardless of its defects or qualities, would result in national departments of French and English (perhaps Aboriginal) cultures controlled by the communities in question.

More generally, the flexible jurisdiction concept reflects the "consociation" concept which stresses minority over-representation in central institutions (whether the minority is geographically or ethnically defined), a veto over major constitutional changes for the minority and autonomy for national minorities.<sup>46</sup> It also is based on the "personality principle" whereby jurisdiction is not founded upon territorial scope, but on the cultural or ethnic identity of different members of the population. For the majority of Canadians to reject these notions would be paramount to rejecting the very existence of the province of Quebec as the "**patrie**" of **francophones** in North America.

#### Representation of Peoples in Upper Chambers

An upper chamber, or second chamber, constitutes in some cases the preferred forum for inter-ethnic reconciliation, as opposed to the "rep by pop" lower chamber. This reality was reflected in the 1981 Dene Nation proposal for a Denendeh Senate.

Various states have established special representational mechanisms for minority peoples in a second chamber. Equal representation from different Cantons slightly favours language minorities in Switzerland as concerns the Council of States.<sup>47</sup> In the Soviet Union, which is a very special case because of the overriding juridical concept of "democratic centralism" (i.e. highly centralized party control), each Republic dispatches 32 delegates to the Soviet of Nationalities - which means, in theory, Latvian representation **equals** that of Russian which comprises 50% of the national population.<sup>48</sup>

"The original **Cyprus** constitution established separate Community Chambers for the Greek and Turkish populations, entrusted with cultural and personal affairs, education and religion. The influence of these short-lived chambers was limited by financial constraints. In Czechoslovakia, the Slovak minority enjoys equal status in the second chamber (The Chamber of Nations) with the strong Czech majority: both peoples **dispatch** 75 delegates to this body. As is the case with the Soviet Union, such representational devices should be placed in the context of "democratic centralism" which is repugnant to Western concepts of pluralism.<sup>48</sup>

#### Language as a Lever for Representation

Provisions for the affirmation of official languages represent a strong instrument for minority representation in both the executive and legislative branches, for the simple reason services have to be provided in several languages, and that officials will have to ensure such services.

Again, Switzerland constitutes an excellent example of inter-ethnic compromise. The Swiss constitution asserts the existence of three official languages (although the French only account for 20% of the national population, and Italians only four percent); in addition, "Romanche, spoken by only 1% of the Swiss population to the east, is defined as a "national" language.<sup>49</sup> This obligation, combined with traditional Swiss common sense, has led to French and Italian over-representation in the federal public service. Furthermore, each Canton is free to choose its own official language, thereby ensuring that where numbers **warrant**, regional populations obtain service in their own language.<sup>50</sup> In Europe, the **Faroe** Islands (Denmark) and the **Aland** Islands (Finland) have gained local official recognition of their specific languages (Swedish in the latter case); on the Finnish mainland, the small Swedish minority (7%) has retained their tongue as a "national language" and their right to services in Swedish where numbers warrant.<sup>51</sup> As a consequence, the capital, Helsinki, is a bilingual city with a strong Swedish cultural community.

iii. Limits to Ethnic Representation Arrangements

*There is no question that states or regions confronted with ethnic pluralism should seek every means to guarantee that each of its peoples can identify with a common government. Different peoples should not seek ethnic conflict per se but recognize those circumstances where possible conflict will necessarily arise.*

*In 1945, it was possible to dream of "one world", under the aegis of a U.S. dominated United Nations, wherein ethnic differences would fade in face of development and a more common lifestyle. This has not been the case. Ethnic nationalism has not been reduced by international economic integration and inter-dependence. In many cases, the vitality of nationalist movements has been precisely **fuelled** by visible economic and social disparities due to such integration.<sup>53</sup>*

*Furthermore, marked differences in ethnic representation at the centre often produces political disintegration. This was the case in the instance of the ephemeral British West Indies Federation (1958-62) where Jamaica, with over half the federated population, had access to only 39% of central assembly seats and where Trinidad, contributing 40% to **the** overall common budget, only elected 22% of assembly members.<sup>54</sup>*

*However, there are definite limits to **equating** ethnic diversity and the functioning of common institutions.*

*First, where does the role of ethnic **delegate** end and the role of legislator for the general advantage begin? If a future Western NWT Assembly were to be transformed into a "diplomatic" conference, all the disadvantages of conventional diplomacy would quickly surface: posturing, deadlocks, delays and so on. As the British philosopher Edmund Burke noted two centuries ago, democratic representatives have first to work for the advancement of the whole body politic.<sup>55</sup> This is to say that any future guaranteed representation schemes for the*

Western NWT will have to be functional, within bounds of common sense, and workable.

Second, no arrangement is perfect. To take an example at home, a Quebec Senator still represents close to **four** times more people than his counterpart from the Atlantic provinces.<sup>56</sup> Hence, there are some obstacles to mathematics in representation at the political plane.

Third, however ingenious, guaranteed representation models cannot, in themselves, ensure the survival of the state of ethnic harmony. The Cyprus constitution<sup>57</sup> provided for a 70%/30% split between Greeks and Turks in Cabinet (although Turks formed only 20% of the population in 1960), in the public service. Yet the system quickly foundered, and as of 1983, the Island is divided into different political zones. The Lebanese constitution, dating back to the national pact of 1943, guarantees that a **Maronite** occupies the position of President, a **Sunni moslem** the position of Prime Minister, and a **Chiit moslem** the position of Speaker of the Assembly, and so on.<sup>58</sup> All 17 religious communities are represented in the Lebanese assembly.

Why did the two above frameworks crumble in a matter of years? Outside, foreign power intervention provides one cause of disintegration: for example, due to successive Palestinian immigration waves, the issue of "**whose is Lebanese**" **blocks** constitutional reform. The lack of common social and cultural values explains in part the Cyprus tragedy. In addition, confessional parties in Lebanon, ensured of guaranteed representation, have never presented a coherent programme for social and economic development.<sup>59</sup>

Different peoples may not like each other, but their aversion grows in relation to central impotence in effecting reform.

It is suggested that:

- (i) guaranteed representation for aboriginal peoples definitely espouses Canadian and comparative practice;
- (ii) there are functional and philosophical limits to representation schemes.

### 11.3 REPRESENTATION: BENEFITS OF FLEXIBILITY

A former federal Minister in charge of Federal Provincial Relations noted that **Canadian** constitutional texts "affirmed a great variety of special regimes":<sup>60</sup> Special status has acquired negative connotations in recent decades. Yet Canada, and its provinces, have been built on the principle of asserting specific privileges and duties.

Generally speaking, Canadian federalism is a very flexible animal. Quebec has signed international agreements with foreign governments, while Ottawa negotiates oil prices directly with Edmonton. The **P.E.I.** economy is managed from the national capital, while the RCMP is a provincial police in some provinces and not in others. There are two pension plans in Canada, and only six provinces receive equalization payments. Full linguistic rights for francophones exist in two provinces only. The present amending formula **favours** densely populated provinces. Residents of the Yukon and the NWT are denied resource ownership rights granted to citizens of the ten provinces.

The above litany could be extended ad nauseum. Suffice to say that Canadian federal practice largely condones the legal recognition of flexible arrangements for the conduct of public affairs depending on geographic location. It would appear that what works, works. The cause of guaranteed aboriginal people representation in public institutions is also supported by a wide gamut of comparative international arrangements.

#### i. The Canadian Tradition of Flexibility

**Negotiations leading to the British North America Act (1867) were replete with controversy concerning special guaranteed representation in central institutions. Indeed,**

whereas Mr. **Tilley** at the Quebec (1864) conference urged 32 Senate seats for the Atlantic colonies, M. **Langevin**, at the London meeting insisted on a 1/3 share for Quebec - which was obtained.<sup>61</sup>

D. **McGhee** emphasized "denominational" as opposed to ethnic criteria to determine control of separate schools ultimately **guaranteed** by S. 93 of the **B.N.A. Act** at the Quebec conference; and,<sup>62</sup>

both representatives from **P.E.I.** and Newfoundland colonies expressed severe dissatisfaction in respect of the 5 and 7 seats allotted them in the 200 member Parliament planned for at the Quebec conference.<sup>63</sup>

The London conference (1866) specified 24 divisions for Senate representation from Quebec to guarantee anglophone participation. No other province was submitted to this provision.<sup>64</sup>

The B.N.A. Act itself contains many provisions which dispell the concePt of equal powers, rights and privileges among different provinces and collectivities which has been diffused by a number of provinces in recent years, eg. Alberta.

s. 22 affirms the notion of "regional divisions" whereby **Quebec**, Ontario, the Maritime provinces and the West dispose of an equal share of Senate seats (24);

S. 51 states that **Quebec** will receive four extra seats in the House of Commons as the result of any new extension of seats; •

S. 133 at the time only obliged Quebec to provide institutional bilingualism.

Section 72 of the **same Act** provided for the creation of a special second chamber in Quebec.<sup>65</sup> At the moment of concluding a definitive constitutional settlement, Upper Canada leaders such as Brown saw this special mechanism as a unique device to protect protestant rights in Quebec.

Canadian electoral practice at the federal level is one of special deals. **P.E.I.** is guaranteed the same number of seats in the House of Commons as it is entitled to in the Senate (4). As of 1886, the Northwest Territories (then a vast geographic expanse covering much of Manitoba, Alberta,

Saskatchewan, etc.), gained 4 seats in the House of Commons whereas it was entitled to 2 under strict demographic standards; in 1903, the same region elected 10 federal M.P.s in relation to the six (6) it deserved under population criteria.<sup>66</sup> Under the Terms of Union of Newfoundland with Canada of December 1948, Newfoundlanders obtained, as a matter of right and justice, seven (7) seats in the House of Commons and six (6) representatives in the Senate.<sup>67</sup> The 1948 arrangements hardly coincided with "rep by pop" logic. As noted above, representation in the Canadian Senate also bears little relevance to demographic norms. As the "historical purpose" of the Senate consisted in the representation of regions, provinces and sections; as a result, Ontario Senators represented four times more citizens than Senators from the Atlantic provinces.<sup>68</sup>

In short, and without pursuing this theme (eg. B.C.'s representation in the Senate), Canadian tradition is founded upon asymmetrical concepts of regional representation. Geographical and other notions are applied to correct "first past the poll" and population criteria.

ii. Comparative Representational Designs

Comparative international practice, based on recognition of regional and social diversity, confirms the concept of guaranteed representation of minorities in different aspects of government.

The United Kingdom, forming a seemingly very centralized political system, has applied very flexible constitutional policy over the centuries, including in the matter of representation. The 1707 Act of Union with Scotland ensured strong local powers in the legal and religious areas. Reference has been made to relatively astounding 1791 provisions to guarantee the existence of a Lower Canada assembly.

More recently, the British government has approached the problem of decentralization of certain legislative responsibilities to Wales and Scotland. The "home rule" platform for Scotland was approved by a majority of voters in the region, but failed to clear the 40% ceiling of all

enlisted voters. Interestingly, the proposed British legislation proposed no reduced mandate for M.P.s elected from Scotland although their region would have enjoyed legislative special status.<sup>69</sup>

While Singapore left the Malaysian federation, Sabah and Sarawak retain special powers in cultural and personal matters. The Malaysian federal government has established several programmes to ensure adequate Malayan representation in the executive branch.<sup>70</sup> The Swiss technique of the half-Canton (entitled to only one seat in the Council of States) enabled the Jura francophone minority to gain partial sovereignty in the conduct of its own affairs in relation to the majority German Bern Canton.<sup>71</sup>

Denmark, aside from the Faroe Islands precedent, created special representational mechanisms for Greenlanders through the 1979 "Home Rule" Act which ensured autonomy for Greenland and an Inuit majority control over regional instruments of government.<sup>72</sup> Noteworthy is the fact that Greenland has retained representational prerogatives in the Danish national assembly.

France, a country renowned for its centralist policies, the daughter of Napoleonic policies of centralization diffused through the whole of Europe, established in 1981-82 special status for Corsica, an island which elects both a unique special regional assembly and whose national representatives maintain all national prerogatives.<sup>73</sup>

It is suggested that:

flexibility preside over the design of representational structures for the Western NWT, at both the common and regional/local levels of government.

#### 11.4 PARAMETERS FOR WESTERN NWT INSTITUTIONS

A central Western NWT Assembly must be in a position to legislate and act in a way which Northerners will recognize as significant and meaningful. Its government must be in a position to take measures when required, especially in times of emergency. Otherwise, the common polity will



disintegrate into warring factions. The parameters for guaranteed representation must take into account the risks of excessive emphasis on local government **concertation** and coordination as opposed to central resolution of conflict among representatives. Second, the **bi-cameral** solution, implying a Western NWT second chamber, may not constitute a "miracle" solution to NWT cultural and ethnic issues.

i. Limits to Western NWT Decentralization

The 1981 Dene Nation and Metis Assembly paper on public government called for large decentralization to "community government". Without entering into excessive detail, community governments would be entitled to make laws in respect of "natural resources" (including management of non-renewable resources) "services" (encompassing most social **services**); "finances"; and, operations (local works and roads/construction).<sup>74</sup>

If this proposal were to be applied to the letter, one would wonder what Dene and other representatives would discuss in **Yellowknife** or any other capital. Local and regional "community" government power would provide, in their demographic and political fragility, an ideal target for vicious and hungry multinational corporations always on the search for easy prey.

Possible supporters of a "nonfederal" solution for the Western **NWT** (i.e. all powers to local governments), would be falling into a trap sketched by Premier Levesque of Quebec who has affirmed Canada should be transformed into "a true Confederation".<sup>75</sup> The problem is that nonfederal government, whether in Switzerland, the U.S., Germany or elsewhere, does not work.<sup>76</sup> It would be sad if Western NWT communities were submitted to European Common Market "nonfederal" rules whereby a common executive was subjugated to **inter-ethnic** bargaining in the absence of any common social and cultural values.<sup>77</sup>

In sum, focus on guaranteed representation at the local government cannot supply a substitute for guaranteed representation at the centre for aboriginal peoples. "Diplomatic" solutions simply do not provide effective government for all citizens.

ii. Possible Parameters for Bicameral Solutions

A Denendeh Senate was a main element of the 1981 Dene Nation and Metis Association proposal respecting public government for Northerners. This proposal, without undue implied criticism, has to be placed into a broad context of evolutionary **bi-cameralism**.

The Canadian Senate has a poor reputation. Established to protect regional interests, it has failed to do so because it is "too **fragile** a force to resist" Cabinet and general trends.<sup>77</sup> For instance, during the crucial 1917 crisis over conscription when French Canada **was driven** into exile, the Senate "couldn't oppose" the government of the day.<sup>78</sup>

There has been only one provincial experiment involving a second chamber. Created in 1867 through the British North America Act, the Quebec Legislative Council disappeared amidst general indifference exactly one century later. Conceived as a mechanism to protect the interests of anglophone Quebecers, the latter occupied only 4 of the 24 seats in 1965. The Council occasionally played a **moderating** role in terms of legislation, but decreasingly so in its later years.<sup>79</sup>

Various proposals for reform of the Canadian Senate have been advanced. The item has been discussed on and off over the years in the constitutional revision forum. In 1978, the federal government, in its Bill C-60, suggested that members of a new second chamber be elected by Parliament and provincial assemblies. Other governments have recommended a transposition of the German second chamber (der Bundesrat) method of nomination whereby provincial governments would appoint delegations directly. But the German model is based on highly centralized legislative power and very technocratic working methods.<sup>80</sup> There is indeed a **contradiction** between regional representation and decentralization of powers.<sup>81</sup>

The overall second chamber issue should be viewed in relation to certain international directions. Examples of decline in Britain and abolition in other countries reveal decreasing relevance for second chamber objectives. In many countries, the second chamber is either perceived as a source of profitable employment or as a locus for study and research:

*"There is a clear and unmistakable trend against upper houses, houses of review or Senates as such, and towards unicameralism in legislative assemblies."* <sup>82</sup>

Finally, if minorities obtain guaranteed representation in the lower chamber, the problem of ethnic participation in a second chamber fades in importance. <sup>83</sup> This was the case in New Zealand which functions on the basis of unicameralism and where the Maori minority dispose of 5% of seats in a lower chamber. This reality also applies to Lebanon where different religious groups have never called for an upper chamber because of guaranteed seats in the legislative assembly.

In sum:

there is some question as to the overall relevance of upper chambers in modern society;  
the relevance of upper chambers also depends on the degree of decentralization in a given polity; and,  
guaranteed representation in a first chamber could serve as a substitute to representation in a second assembly.

It is suggested that:

- (i) There be limits to community government powers in the Western NWT if guaranteed representation for aboriginal peoples is to be considered seriously;
- (ii) The issue of a second assembly should be related to other avenues for aboriginal representation in Western NWT institutions.

### 11.5 GUARANTEED REPRESENTATION AND A SOCIAL CONSENSUS

No matter how ultimately sophisticated, future guaranteed representation for aboriginal peoples constitutes an essential but insufficient condition for the integrity and development of a future Western NWT polity in Canada. Constitutional arrangements should reflect both the letter and the spirit of a Northern consensus based on **certain** basic principles (or "Grundnorm" as depicted by Professor McWhinney)<sup>84</sup> particular to the area.

#### International Experience

Various examples at the international level show institutional devices - some would disparagingly say "gadgets" - cannot ensure political stability in the absence of a fundamental sharing of values and a social consensus among residents of a territory.

The 1960 Cyprus constitution provided very extensive guarantees for the Turkish minority: two flags, two community vetoes, two languages, two nationalities, and so on.<sup>85</sup> Sadly, the system never functioned. While responsibility for failure can be assigned to certain foreign powers, the basic fact was that Greeks and Turks could not, and would not in certain cases, agree on a common vision of the Island's development. Union between Egypt and Syria foundered after three years in 1961 not only because the Egyptian government attempted to dominate its partner politically, but because they sought to implement social and economic **policies** (eg. the nationalization of commerce)<sup>86</sup> which Syrians found repugnant.

A major cause of Greenlandic and Inuit agitation for Home Rule in the 1970s derived from the simple fact that the **Danish** welfare state coincided with Danish domination on the job market.<sup>87</sup> If, in 1982, 52% of **Greenlandic** voters opted in **favour** of leaving the European Economic Community, this gesture owed much to fears of distant economic and social domination: indeed, is membership in the **E.E.C.** desirable when Brussels decided in 1983 to ban the imports of baby seal skins and thereby deal a terminal blow to

the seal-skin market? The inability of Lebanese parties and their leaders to present much-needed programmed of social and economic reform, eg. in respect of Palestinian refugees especially after the 1967 Middle East war, transformed what was termed "a pacific civil war" into open civil strife as of 1975-76.<sup>88</sup>

This is not to say that participation of **all** groups, whether through political institutions or in active economic pursuits, is not a basic variable in any collective development adventure. Various international agencies, after decades of "smart" and quick recipes for development such as rapid industrialization or "green revolutions" based on commodity exports, are beginning to realize their plans ignored a basic dimension, the people participation dimension: participation in both economic and political spheres.<sup>89</sup> As the noted economist R. **Prebisch** commented, Western exported "economic liberalism" is often devoid of political liberalism and of connotations of representative government. The world periphery is then plunged into "imitative capitalism" with little popular support.<sup>90</sup>

#### The Quebec Example at Home

With signs of economic decline combined with demographic weakness at the national level - **eg.** an unemployment rate consistently hovering 2% above the national average over the past twenty years - **francophones** woke up to observe they were not masters in their own home (Quebec) where they account for 83% of the provincial population.<sup>91</sup> While they elected the provincial government, anglophones controlled the Montreal business community in times of decline which the latter could not arrest.<sup>92</sup>

One illustration of **francophone socio-economic inferiority** should suffice.<sup>93</sup> As of 1975, anglophones provided 86% of board members in large Quebec located corporations; in 1970, there was no monetary incentive for an anglophone to learn French - bilingual francophone employees earned 20% less than **unilingual anglophones!**

Something had to change, and change it did. Quebec language legislation in 1974 and 1977 was primarily aimed at providing jobs and management responsibilities for **francophone Quebecers**. Economic inequality in Canada prompted "segments of the francophone middle class" to opt for sovereignty outside Canada, as they perceived federalism as leading to Quebec becoming a **labour** reserve for the rest of the country.<sup>94</sup>

It would be a serious mistake to think the economic and social liberation platform was confined to ranting separatists. All federalist parties in Quebec share the **P.Q.** objective of advancing francophone **socio-economic** aspirations: the difference is in method. Prime Minister Trudeau, while striving for francophone representation in central institutions as a guarantee for the survival of federation, had to admit in 1977 that "francophones not only don't feel equal in Canada, they don't feel equal in their homeland, Quebec".<sup>95</sup>

#### The Gravity of Northern Development Outlooks

The federal government, as trustee for residents of the Yukon and the NWT in the economic policy area, has failed to devise a viable development policy for these vast territories. Part of the problem pertains to sheer bureaucratic inefficiency and confusion prevailing in Ottawa itself.<sup>96</sup> Regardless of the various causes, the Ottawa planning(?) system **favours** large-scale resource projects and the endless, circular perpetuation of "boom and bust" cycle which will last until there is no more junk in the ground.

Of course, it is a Canadian tradition to confine "northern regions", including those of provinces, to commodity exploitation, or, more simply, to "running the New York subway" where the real money is made.<sup>97</sup> But will Northerners continue to **accept** a development pattern which **Farley Mowat** has called "the great betrayal"?<sup>98</sup> Will aboriginal peoples continue to condone the imported prospect of "dingy prefabricated houses along dirty roads"<sup>99</sup> in "frontier settlements" that defile their ancestral homes and values?

Fortunately, Canadians are increasingly beginning to weigh the high social, cultural and ultimately economic **costs** of boom and bust development. Some work at federal agencies.<sup>100</sup> Others, in the North, regardless of ethnic origin, have opposed projects such as the Arctic Pilot Project which presents high ecological risks, little economic **return for** Canada and a doubtful contribution to energy self-sufficiency.<sup>101</sup> To summarize, Northerners want "jobs, not welfare", employment based on viable value-added economic pursuits which will offer **all** residents of the NWT income stability and human dignity.<sup>102</sup>

In this instance, aboriginal peoples will have to be party to economic and social development, founded upon respect of traditional Northern values and pursuits such as renewable resources. At present, indications are that existing lack of aboriginal participation in economic activities could lead to very explosive political and social consequences for the Canadian federation. If in relation to certain predominant materialistic values a man is worth what he earns or owns, francophones have every reason to display discontent; aboriginal peoples should be outraged. According to Professor **Hamelin**, during the course of his survey on Canadian Nordicity, it was noted that the aboriginal majority living in the North controlled **3%** of viable economic assets; only 25% of all communities surveyed **disposed of** a **viable economic base**, most of the others being inhabited by natives.<sup>103</sup>

Canada is a very strange country. Most foreigners, and the author can attest to this after seeing Italians arrive in Ottawa with heavy wool coats in July, tend to view the federation as a "Nordic" or "Northern" country. In reality, most Canadians huddle along the American border hoping to emulate their Southern neighbors. Yet, much of their territory is contested. This is the case in Quebec, and in the North where all residents desire political and economic change within Canada. Guaranteed representation and participation of aboriginal peoples in the Western NWT could ensure a new and more stable development pattern in the North.

A New Northern Consensus?

*In preliminary conclusion, guaranteed representation for aboriginal peoples in the Western NWT will not, in itself, guarantee effective change. However, the absence of guaranteed participation on the part of natives will lead to certain trouble and problems.*

*Hopefully, aboriginal and non-native representatives will be in a position not only to share power but to share values. Values based on respect of differences and attachment to the land and its resources, founded on the fact that the North is not a frontier but also and above all "a homeland".<sup>104</sup> Not that future Western NWT institutions should adopt a dogmatic anti-development stand: aboriginal organizations in the NWT have always stated their willingness to share resources with other Canadians, but on the basis of self-respect and on mutually acceptable terms.*

*Finally, if aboriginal representatives are to take part in the work of central institutions in the Western NWT, they will have to be in a position to shape the directions of change. They will have to have something meaningful to do, and have to be seen to be so doing.*

*As lands and resources constitute the most sensitive single political issue in the North, residents of the Western NWT would want to take note of proposals set forth recently by the Nunavut Constitutional Forum pertaining to the powers of a future Nunavut government (in full respect of future Land Claims Settlements):*

*"It is therefore recommended that Ottawa hold title for Nunavut lands and resources but extend beneficial use and enjoyment to a Nunavut government subject to whatever exceptions may be required.*

*That responsibility for minerals and mining be transferred over time to a Nunavut government with the federal government acting as Trustee in the meantime; and,*



*That oil and gas remain a federal responsibility but by a federal -Nunavut agreement a **Nunavut** government accept certain responsibilities and share in revenues and other features now contemplated by the Canada Oil and Gas Act."* <sup>105</sup>

1. "L'Esprit des Lois", Paris, XI, P.6.
2. C. ARKIN, "Two studies on representational government", Jahrbuch des Offentlichen Rechts der Gegenwart, Tubingen: J.C.B. Mohr, 1968, Pp. 4-5.
3. M. LESAGE, "Le Droit Sovietique" : "Les Institutions Sovietiques", Paris: P.U.F. (collection "Que Sais-je?", 1975; A. U. J. GICQUEL : P. GELARD, "Droit constitutionnel et Institutions Politiques", Paris: Montchrestien, 1977 (mise a jour), p. 24-26.
4. Article 6 of the revised 1977 constitution specifies the Communist Party is the guiding element of Soviet society. Membership is restricted to well below 10% of the population.
5. G. BURDEAU, "Droit constitutionnel et Institutions politiques", Paris: Pichon & Durand Auzias, 1965, P. 133 passim.
6. "Two Studies on Representational Government", op.cit. , P. 3.
7. M. DUVERGER, "Institutions Politiques", Paris: Themis, 1963, P.117.
8. M. WHITTINGTON, "Canada's North in the Eighties", M. Whittington & G. Williams Ed., "Canadian Politics in the 1980s", Toronto: Methuen, 1981, P.53.
9. Professor Hamelin (Interview by North/Nerd, Ottawa: DIAND, October 1976, P. 39) notes: "Indians and Inuit need a long consensus building process around them before they are in a position to state a group perspective or position".
10. "Public Government for the People of the North", op.cit., P. 5.
11. George Erasmus "Le Devoir" Interview, op.cit. (author's translation).
12. H. BRUN & G. TREMBLAY, "Droit Public Fundamental", Quebec: Presses de l'Universi ty Laval, 1972, P. 98 passim.
13. "Two Studies on Representational Government", op.cit. , P. 13.
14. G. SCALLE, "Manuel elementaire de droit international public", Paris, 1943, P.194.
15. C.J. FRIEDRICH, "constititutional Government and Democracy", Boston: Little Brown, 1941, P.258.
16. R. WESTLAND, "Rights and Politics in the Canadian Setting", Ottawa: O.S.R. background paper, 19/9, Pp. 93-95.

17. Friedrich (op.cit. , P.262) notes: "Ever since the 16th century, legislation was believed to be the most striking manifestation of political and governmental power."
18. In 1951, the Nationalist South African prime Minister Malan introduced the "representation of natives Act" which removed 50,000 "coloured" voters from the common Cape province roll. This legislation marked the Apartheid offensive which culminated in powerless "black" homelands such as **Transkei**.
19. P.E. TRUDEAU, "Federalism and the French Canadians", Toronto, Macmillan, 1968, P.211.
20. K.W. DEUTSCH, "The Political Significance of Linguistic Conflicts", "Multi-Linguistic Political Systems", Quebec: Presses de L'University Laval, 1973, Pp. 7-28; R.L. WATTS, "The Survival and Disintegration of **Federations**", "One Country or Two", Montreal: McGill Queen's University Press, 1971, Pp. 41-72.
21. N. WARD, "The Canadian House of Commons", University of Toronto Press, 1963, P. 3.
22. B. TOURET, "L'Amenagement constitutionnel des etats de peuplement composite", Quebec: P.U.L., 1973, P. 123.
23. Y. RENAUD & J.L. BEAUDOIN, "The Canadian Constitution : Legislative Documents", Montreal, Guerin, 1977, Pp. 15-21.
24. Ibid., Pp. 23-45 for the 1791 constitution and Pp. 47-72 for the Act of Union.
25. B. BISSONNETTE, "Essai sur la Constitution du Canada", Montreal, editions du Jour, 1963, P. 35.
26. G.P. BROWNE, "Documents on the Conferences of British North America", Ottawa: Carleton Library, 1969, Pp. 15-19.
27. F.A. KUNZ, "The Modern Senate of Canada", University of Toronto Press, 1965, P. 317 **passim**.
28. B. Bissonnette, op.cit. , P. 53 & P.180; G. BEAUDOIN, "La querelle du preambule", Le Devoir, Montreal, le 6 aout 1980, P. 13.
29. E. FORSEY, "Le Cabinet federal," L. Sabourin Dir., "Le Systeme Politique du Canada: Institutions federales de quebecoises", University of Ottawa Press, 1968, P.108. According to this expert, a federal Cabinet should count some 8-10 ministers from Quebec along with francophones from outside the province.

30. For example, J. Ch. Bonenfant ("le Senat", Sabourin *op.cit.*, p.132) recommended **francophones** acquire, in the name of duality, half of all Senate seats because the House of Commons would always be elected by an anglophone majority.
31. Sections 16-20 of the Constitutional Bill (1981).
32. S.M. WEAVER, "The Hidden Agenda", University of Toronto Press, 1982, 238 P.
33. See the text of M. Trudeau's April 29 1980 speech to a conference of First Nations in Ottawa.
34. A.J. PEASLEE, "Constitutions of Nations", The Hague: Martinus Nijhoff, 1963, volume II.
35. H. KLOSS, "Democracy and the Multi-National State", "Multi-Lingual political Systems", *op.cit.*, p. 31 *passim*. (Section 86(a) of the Belgian constitution (revised).
36. G. CODDING, "The federal government of Switzerland", Boston: Houghton & Mifflin, 1965, P.88.
37. E. CRANKSHAW, "The Fall of the House of Habsburg", London: Sphere Books, 1974, P.316
38. S. SAMI, "Chypre: Sa Constitution et ses Difficultés Politiques", Paris: Institut d'Etudes Politiques thesis, 1968, P.27.
39. C. RIZK, "Le régime politique libanais", Paris: Pichon & Durand Auzias, 1966, P.29.
40. A. BRADY, "Democracy in the Dominions", University of Toronto Press, 1966 (reprint), P. 88 and P.325
41. Article 47 of the Fiji constitution described by H. Kloss, *op.cit.*, P. 34 *passim*.
42. Section 330 of the Indian constitution (Peaslee *op.cit.*, P.411). Section 331 guaranteed certain representational privileges for the "anglo-indian" nation.
43. J. BROSSARD, "L'Accession a la Souverainete et le Cas du Quebec", Presses de l'Université de Montreal, 1976, P.758.
44. R. SENELLE, "La Constitution Belge Commentée", Brussels: Ministry of Foreign Affairs, 1974, Pp. 14-17, & Pp. 151-198; Ministry of Foreign Affairs, "La Belgique Contemporaine de 1830 a Nos Jours", Brussels, 1978, PP. 52-53.

45. CRISP Report, Brussels, "Les nouvelles institutions de la Belgique", 1977.
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48. H. Kloss, op.cit. , P.39. J.N. Hazrd ("The Soviet Union", Report of the 12th International Symposium on Comparative Law, (University of Ottawa Law Faculty), University of Ottawa Press, 1976, P.25. notes: "Federalism has always seemed to communists to have no political value for their system except as a compromise to quiet for a time ethnic hostilities springing from conditions of capitalism."
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51. Macrae, op.cit. , P. 220 (S. 14 of the Finnish constitution); P. PERNTHALER, "Modes d'action juridique dans le domaine linguistique", Laval University Symposium: "Linguistic Minorities and Interventions"; Quebec: Presses de l'University Laval, 78, Pp. 79-80.
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55. "Works", London, 1900, Vol.I., P.447.
56. R.A. MACKAY, "The Unreformed Senate of Canada", Toronto: McClelland & Stewart, 1963, P.122.

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59. Ibid., pp. 102-105; P.G. POLYVION, "Cyprus Conflict and Negotiation", London: Duckworth, 1980, 246 P. L.DISCHLER, "Die Zyprenfrage", Berlin: Alfred Metzuer Verlag, 1960.
60. Interviews granted by the Hon. William Jarvis to the "Gazette" and "Le Devoir", Montreal, September 26 and October 30, 1979.
61. G.P. Browne, op.cit., Pp. 135-39 & P.212.
62. Ibid., Pp.82-84.
63. Ibid., Pp.72-73.
64. Ibid., P. 262.
65. E. ORBAN, "Le conseil legislatif du Quebec 1867-1967", Montreal, Bellarmin, 1967, Pp.40-42.
66. N. Ward, "The Canadian House...", op.cit., P. 26.
67. The Text of the Terms of Union are presented in Renaud & Beaudoin, op.cit., Pp.409-431. Articles 4 to 6 encompass provisions for guaranteed Newfoundland representation in Parliament.
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69. Lord President of the Council, "Our Changing Democracy", London: H.M.S.O., 1975, paragraphs 61, 84 & 114-154.
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72. International Work Group for Indigenous Affairs (IWGIA), "Home Rule in Greenland", "IWGIA Newsletter", Copenhagen, June 1979, Pp.5-22.
73. M. MALONE, "La France a l'heure de la decentralisation", Policy Options, March 1982, Pp.16-20.

74. "Public Government for the People of the North", **op.cit.**, P.13.
75. Interview to "Le Monde", Paris, June 21, 1981, P. 6.
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77. **F.A. Kunz**, **op.cit.** , P.317.
78. **R.A. Mackay**, **op.cit.** , P.116.
79. E. Orban, "Le Conseil ...", **op.cit.** , Pp. 77-78 & P.341.
80. K. SONTHEIMER, "Grundzüge des Politischen Systems der B. R. D.", Munich: Piper Verlag, 1972, P.198 *passim*; G. ZILLER, "Der Bundesrat", Frankfurt am Main: Athenäum Verlag, 1968, P. 92 *passim*.
81. This theme was developed by **R.G. Robertson**, "The Regionalization of Power", Saskatoon, May 31, 1979, 9 P.
82. E. **MCWHINNEY**, "If We Keep a Senate, It Should be Elected", Policy Options, September 1980, P. 34.
83. C. Rizk, **op.cit.**, P.99
84. E. **MCWHINNEY**, "Judicial Review in the English Speaking World", University of Toronto Press, 1965. P. 100.
85. Article 1 of the 1960 constitution (**Sami, op.cit.** , P.27).
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88. M. Duverger, "Le régime politique libanais", preface, **op.cit.** , P.1
89. **UNRISC**, "The Quest for a Unified Approach to Development" Geneva, 1980, P.16 *passim*.
90. R. **PREBISCH**, "Interdependence and Development", OECD Development Centre, Paris, December 12, 1978, Pp. 19-27.
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92. One example: none of the five major Canadian banks as of 1976 had more than 2% francophone senior management (p. FORTIN, "La dimension économique de **la crise politique canadienne**", *Canadian Public Policy*, summer 1978, P.314).
93. F. VAILLANCOURT, "**La Charte de la langue Française du Québec: Un Essai d'Analyse Socio-Economique**", *Canadian Public Policy*, summer 1978, Pp.291-292.
94. G. BOURQUE, "**L'Etat Capitalist et la Question Nationale**", University of Montreal Press, 1977, Pp.247-252 & 287-88.
95. Statement on "national unity" made to the House of Commons, Ottawa, July 5, 1977.
96. F. ABELE & E.J. DOSMAN, "Interdepartmental Coordination and Northern Development", *Canadian Public Administration*, fall 1981, Pp.428-451.
97. B.W. HODKINS, J. BENEDIKSON, R.P. BOWLES & G.A. ROWLYK, "**The Canadian North: Source of Wealth or Vanishing Heritage**", Scarborough: Prentice Hall, 1977, P.67.
98. F. MOWAT, "**Canada North Now, The Great Betrayal**", Toronto: McClelland & Stewart, 1976, 191 P.
99. Report by P. Taylor to the "**Globe and Mail**", August 24, 1981 (reference to Tuktoyaktuk).
100. Canada, "**Northward Looking**", Science Council: Ottawa, Report 26, 1977, Pp.44-48. Also: K.J. RAE, "**The Political Economy of Northern Development**", Ottawa: Science Council of Canada, April 1976.
101. See F. BREGHA, "Arctic Pilot Project", "**Northern Perspectives**", Ottawa: C.A.R.C., April 1982, 12 P.
102. B. BRADEN, "Which Direction for the North?", **North/Nerd**, Ottawa: DIAND, September 1978, Pp.2-7 (concerning the conference on economic development prospects).
103. L.E. HAMELIN, "**Nordicite Canadienne**", Editions Hurtubise HMH: Montreal, 1975, 458 P.
104. The author adopted the theme of "homeland" as opposed to frontier or wilderness in addressing the joint French National Research Council (CNRS) - Soviet Academy of Sciences meeting in Paris on April 27 1983.
105. "**Bui l di ng Nunavut**", op.cit. , P. 26.



CHAPTER 111 :

GUARANTEED REPRESENTATION IN LEGISLATIVE INSTITUTIONS

Representative government has its limitations and aboriginal peoples have expressed skepticism, on occasion, respecting traditional legislative modes.

But the fact of the matter is that "ever since the Sixteenth century, legislation was believed **to** be the most striking manifestation of political and governmental power".<sup>1</sup> If the Western Arctic is to participate in the Canadian political family, legislative activities will be the single most crucial sign of sharing sovereignty with other citizens.

Native peoples will have to consider the importance of guaranteed representation and voluntary participation in government. To take one example: a land claims settlement could **easily** be subverted through territorial legislative **action** - either **directly** or **indirectly**. As C. Hunt wrote:

"For example, a general principle **might** be that traditional native rights will be respected. But which rights? How will **they** be respected? There are many ways of subverting the principle through implementation, and both sides will ultimately have to agree on the means of implementation."<sup>2</sup>

And, like it or not, natives will in all probability constitute a minority in the Western NWT. The majority, if only because of indifference, will seek to control political institutions. As Professor **Azkin** wrote about majority ethnic attitudes: "to them, successful integration means at once the strengthening of the State for whatever tasks may be set for it, the strengthening of their own national group **and** the increase of their own importance within the scheme of **things**".<sup>3</sup> In addition, the cause of aboriginal self-government was hardly served by the fact that the first fully elected NWT Council since **1905 only** took office in 1975. The advent

of a native majority in 1979 signal led new approaches and new ideas.

The absence of guaranteed representation for ethnic minorities in legislative bodies entails particularly sinister implications depending on circumstances. The implementation of various international treaties respecting national minorities in such countries as Poland, Czechoslovakia and Yugoslavia excluded guaranteed representation for several peoples including the Jews.<sup>4</sup> Hence, the Polish representative to the League of Nations (the then U.N.) could assure his colleagues that Jews would be "gotten rid of" in short order.

Once the importance of guaranteed aboriginal representation of law-making institutions is grasped, the question of the "scope" of aboriginal intervention must be addressed. Different institutional arrangements interact. For example, schemes for a second chamber will affect representation in the first. It is recommended that a broad perspective be adopted. In this regard, we can only agree with Professor McWhinney:

"This leads us to a second axiom of comparative constitutional law, namely the interdependence of constitutional governmental institutions. For they are, by their nature, so **inter-related** that change one in any substantive way and you change the others."<sup>5</sup>

As a consequence, we propose a review of the following sectors:

- i. the legislative assembly (or first chamber);
- ii. a second chamber;
- iii. special aboriginal committees within chamber(s);
- iv. participation in the amending process;
- v. participation in referenda;
- vi. the option of an advisory assembly; and,
- vii. linguistic provisions as a lever for participation.

To deploy a French expression, any representational arrangement would be implemented under the umbrella of an independent electoral control agency and a serious census organization: this goes without saying, but, perhaps, better in saying. Independent election and census arrangements constitute a fundamental part of Canadian political tradition, and would not be

specifically directed against native peoples.<sup>6</sup>

111.1 GUARANTEED REPRESENTATION IN A FIRST LEGISLATIVE ASSEMBLY

Why, some might say, special guarantees for aboriginal representation in a future Assembly? As it is, it could be asserted, Dene and Inuit constituencies account for 15 of the 22 existing ridings in the NWT.<sup>7</sup>

The fact of the matter is, given short term circumstances, aboriginal peoples will constitute a demographic minority in the Western NWT (unless Nunavut is cut in half). It is significant that the May 1983 Nunavut Constitutional Forum proposal for government in Nunavut contained no explicit reference to guaranteed Inuit representation in the territorial assembly.<sup>8</sup> Indeed, the 1979 Home Rule government regime for Greenland also omitted references to guaranteed numbers of Inuit parliamentarians in the Landsting.<sup>9</sup> The fact is that Inuit form a strong demographic majority in both regions.

It is in the Canadian tradition to provide for important minorities (the Dene and Metis, depending on estimates, account for well over 1/3 of the Western NWT population). The Constitution Act (1791) ensured a sociological (not demographic) and political minority, French-speaking Canadians, the right to their own assembly in Lower Canada.<sup>10</sup> The existing constitution makes special provisions for electoral circumscriptions in the House of Commons. Section 51 of the B.N.A. Act provides for special arrangements affecting Quebec and smaller provinces as a result of boundary revisions in the future. The same article ensures the NWT dispose of two (2) seats, a provision which hardly corresponds to "rep by pop" rules. Section 51A states that no province will dispatch fewer MPs than Senators to Ottawa, a guarantee specifically designed for P.E.I.

The Canadian political system, as a whole, has condoned guaranteed representation for major minorities. The federal compromise of 1867, when Upper Canada Leaders would have preferred legislative unity rather than federalism, ensured guaranteed French Canadian representation in national

*institutions because Quebec would foster a homeland for francophones.*

*It is in this context that several options will be presented for purposes of discussion.*

111.1 (i) Options for Discussion

*The following options could be considered.*

(a) Guaranteed Number of Seats or Percentage Thereof

*The Dene Nation have suggested 30% of the first chamber seats be reserved for aboriginal representatives. There are some international precedents to support such a thesis, but these **should be** greeted with some caution, eg. the New Zealand or Rhodesia cases.*<sup>11</sup>

(b) Regional as Opposed to Demographic Representation

*Legislative representatives **would** be elected in relation to "geographic" as opposed to demographic (rep by pop) criteria.*

*One possibility would consist in legislative representation for each community. This system would result in majority aboriginal representation in present circumstances on the **assumption** each **ethnic** community majority voted for their ethnic candidate<sup>12</sup> in the more than 30 communities comprising the Western NWT.*

*A further variation on this theme would involve elections in regions rather than communities. The problem here is that "regional maps" could coincide with existing Western NWT **ridings**: seven non-native **ridings**, five "native" constituencies excluding Inuit circumscriptions. This alternative would still result in strong native representation in theory.*

(c) A Mixed Regional Representation System

This option would entail election both by constituency on "rep by pop" lines, and "regional" elections, regardless of demography, to ensure geographic representativity of the assembly.

The effort to balance regional and per capita representativity led the **Nunavut** Constitutional Forum to recommend a Nunavut Assembly be composed of four elected members per region (with four regions) and 9 members elected on rep-by-pop grounds.<sup>13</sup>

The definition of "regions" in this context would correspond to geographic area, favouring such existing districts as Mackenzie Liard, Rae Lac La **Martre**, Mackenzie Delta or Mackenzie Great Bear.<sup>14</sup>

The mixed system would, in theory, result in substantial aboriginal representati on.

(d) Tough Residency Requirements

To ensure the NWT elections were not swamped by sudden plane armadas of instant voters whose vocation was transient and concerned with resource development, the Dene Nation in 1981 suggested that there be a ten-year residency requirement for new residents of the Western NWT. In 1982, a three year residency requirement was imposed for participation in the plebi scite on the di visi on of the Northwest Territories - as opposed to the normal one year delay.

With respect to the plebi scite, it should be noted that differences in the number of eligible voters between 1979 (territorial election - 1 year **residency** requirement) and 1982 was in **general** terms quite limited '(6%)<sup>15</sup> The drop for non-native votes was 20%.<sup>16</sup>

The above figures do not suggest a dramatic collapse in electorate depending on residency figures. However, the questi on of residency should be considered in relation to the "Mobility Rights" section of the 1981 Canadian Charter of Rights and Freedoms:

- "6. (1) Every Citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of permanent resident of Canada has the right
- (a) to move to and take up any residence in any province; and
  - (b) to pursue the gaining of a livelihood in any province.
- (3) The rights specified in subsection (2) are subject to
- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
  - (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services."

(e) Proportional Representation

As professor Azkin notes, proportional representation represents a powerful tool for participation of different ethnic minorities.<sup>17</sup>

Various proportional representation systems have been implemented in the world. The most simple variation consists in different territory-wide lists obtaining seats in relation to their part of a national vote: such is the system for example in the Netherlands. For example, the Catholic or Christian list has participated in Cabinet almost permanently for 30 years.

West Germany had adopted a composite system where voters opt both for a constituency member and a national "list" at the same election.<sup>18</sup>

The debate over and literature on p.r. is vast. Suffice to say that critics emphasize "weak" government and fluctuating coalitions. Such defects have not prevented Scandinavia, the Netherlands or Switzerland from establishing viable, strong democracies.

(f) The Canadian Status Quo

The status quo option would imply adopting traditional provincial "first past the poll" practice without undue regard for minority representation, either ethnic or regional.

It should be noted that this solution has resulted in anglophones being excluded from government in Quebec since 1976 (despite Parti **Quebecois** pledges in **favour** of electoral reform), in Acadians becoming foreigners in their own land, and in aboriginal peoples enjoying little or no provincial representation, eg. the case of Northern Quebec **Inuit**.

111.1 (ii) Discussion of the Options

(a) Option (a) Above: Guaranteed Seats or Percentage Thereof

There is no major obstacle to the implementation of this option, especially as Canadian electoral tradition guarantees provincial **collectivities** guaranteed seats in the House of Commons. Nor is there any overriding obstacle to adopting the 30% floor proposed by the Dene Nation.

What would happen, even given stringent residency rules, if the aboriginal demographic share of the permanent population of the Western NWT dropped drastically in coming decades? A provision could be contemplated whereby the native share of seats in a first assembly **would** decrease, but less so than the aboriginal drop in overall population. <sup>19</sup>

This discussion leaves aside the coherence of an aboriginal group so elected. It is conceivable that, say, 9 aboriginal members out of a group of 30 in a first chamber could belong to three or four different parties.

(b) Representation by Community

This option would seem most favorable in terms of immediate aboriginal interests.

There are disadvantages inherent in this proposal. It smacks of the fine art invented by Governor Gerry in Massachusetts in 1812 (Gerrymandering)<sup>20</sup> leading to very artificial electoral maps. To say the least, the non-native population would entertain difficulties in face of this proposal. In addition, the first chamber could evolve towards a diplomatic, inter-community, conference with little reference to the well-being of the whole Western NWT.

(c) A Mixed System: Constituency and Regional Representation

Advantages of this option include the fact it could be combined with option 111.1. (a), i. e., a guaranteed numerical share of seats. It would ensure adequate representation of regions as opposed to several major municipalities. It would result in both direct constituency links and balanced ethnic representation.

Disadvantages include possible complexity of designing the regional electoral map. In addition, if not combined with option (a) above, regions with aboriginal majorities could, in theory, elect non-native representatives, especially in the event of low voter turn-out.

(d) Stringent Residency Requirements

Regardless of which precise alternative is adopted in respect of guaranteed representation, the issue of a special residency requirement will have to be addressed.

It has already been noted that members of the Western Constitutional Forum have agreed that a residency requirement of more than one year is required; that a three year provision for the 1982 plebiscite still provided for a strong non-native majority in the Western NWT; and, that special



residency provisions could be considered in conflict with Section 6 of the Charter of Rights and Freedoms concerning mobility rights.

Several parameters should be established. The first is that the Western NWT situation is unique in Canada. French Canadians in Quebec hardly face the prospect of millions of outsiders invading the James Bay area for resource development; aboriginal peoples could be subjected to an influx of tens of thousands of workers in relation to Beaufort Sea and related development. Second, the ten year requirement does not appear acceptable, if only because it could lead to serious social and political problems to the detriment of the whole population, as was the case in Lebanon where a tiny portion of the one million refugees participated in political institutions.<sup>22</sup> It is also not clear how courts would assess the impact of the mobility rights provision contained in the Canada Act 1982.

In sum, a three year provision would appear suitable. At the very least, natives and non-natives should agree to a two year plus one day requirement, as transients tend to stay an average of two years or less in the NWT.

(e) Proportional Representation

Proportional representation presents certain definite advantages in the absolute. Under certain conditions, it could be combined with option (a) (guaranteed number of aboriginal seats) and would lead to a relatively stronger aboriginal position in a future chamber as it would be more difficult for a non-native "list to gain an absolute majority. It would entail more **consensual** policies, to which the NWT is accustomed at the moment. It would reduce adversarial politics.

Among possible disadvantages: the possible existence of several different aboriginal lists; or, low rankings for aboriginal representatives on common native/non-native lists.<sup>23</sup>

One compromise solution would be to combine an element of proportional representation with the mixed regional/constituency system Presented under option (c). Electors would vote both for a list and regional/constituency members. The disadvantage in this option is its very complexity.

(f) The Canadian Status Quo

This option presents many disadvantages.

The traditional British "first past the poll" system has provided poor protection for minorities in Canada. It is being contested in Canada itself, and in Britain where the **SDP/Liberal Alliance** obtained 5% of seats in the House of Commons with over 26% of the national vote.

Ultimately, these defects detract from the legitimacy of legislative institution; the classical British "temporary Cabinet dictatorship" system does not appear suited to the complex situation of the NWT.

111.1 (iii) Preliminary Conclusions and Observations

(a) Preliminary Conclusions

The fact of the matter is that no system is perfect in a perspective oriented towards ensuring aboriginal representation.

Take Option 111.1. (a) for instance. The Turks obtained a permanent 30% guarantee of seats in the first chamber, but decisions were taken by simple **majority**. The Turks quickly lost interest in chamber deliberations.<sup>25</sup>

Other options do not guarantee aboriginal representation in absolute terms. All candidates elected on a regional or **p.r.** mode could be non-native.

In addition to ensure effective representation requires other measures, both at the legislative and executive branch levels. As noted in the introduction to this chapter, an institutional framework functions as a whole and should be viewed in its **globality**.

(b) Preliminary Observations

The "Western Constitutional" Forum will wish to consider, at some point, the complex issues of voting procedures.

The range of options in this regard is considerable. They include separate electorates: this would presumably ensure the election of native representatives, but **could** lead, over time, to political division and acrimony.<sup>26</sup> Common electorates for aboriginal or non-aboriginal lists is a possibility and would mean each elector would vote twice. The system can be made to work, but experience shows that it leads to occasionally sordid political horse-trading between candidates of **different** lists: "if your people vote for me, my people will vote for **you**".<sup>27</sup>

British **tradition** is more **flexible** than one would imagine. Until 1948 for example, a British resident could vote for up to three times, at his place of residency, at place of work and for certain university candidates.<sup>28</sup> The former British system, which functioned for decades, could be transposed to the Western NWT in that an aboriginal person could vote for candidates in the community or area where he/she is entitled to benefits under a Land Claims Settlement, and, if the occasion arises, in the large municipality such as Yellowknife where different lists are being presented or where an "aboriginal" seat has been established.

111.2 REPRESENTATION IN A SECOND CHAMBER

111.2 (i) Introduction

*Guaranteed representation in a second chamber should be reviewed in an overall perspective as noted in Chapter II.*

*On the one hand, second chambers often play a useful role in the representation of regional interests and in the protection of aboriginal minorities.*

*On the other hand, the greater emphasis on guaranteed aboriginal representation in a second chamber (a Denendeh Senate or some other body), the less impetus for effective guaranteed representation in the lower chamber, which, for one thing, would retain traditional "money bill" prerogatives in the Canadian tradition. In addition, there is a general international trend towards unicameral legislatures, or, at the very least, towards elected second chambers, eg. the U.S. and Australia. The Canadian Senate and the now former Quebec Legislative Council were ineffective in presenting regional viewpoints, and in protecting ethnic minorities, eg. the Metis or the French Canadians. Perhaps, this is because they are viewed as homes for geriatric populations, appointed by the government of the day for often obscure reasons.*

*This is not to say that the Western Constitutional Forum should dismiss out of hand a second chamber where aboriginal peoples would play a major role. However, Forum members would want to assess such a prospect in relation to constitutional revision efforts in **favour** of a reformed Senate since 1978.*

*There would have to be an appearance of urgency applied to Senate reform since 1978.* In 1978, the Government of Canada recommended a major renewal of the second chamber, through election of members by provincial assemblies, and the House of Commons; more recently, the federal Minister of Justice issued a discussion paper on second chambers in June 1983.<sup>29</sup> Some years ago, the federal **N.D.P.** and Progressive Conservative parties

made statements in **favour** of a new second chamber.<sup>30</sup> The province of British Columbia, as of 1978, emphasized Senate reform as the key to renewed federalism.<sup>31</sup> Even the Provincial Liberal Party of Quebec focused on Senate reform leading to a Federal Council appointed by the provinces, just prior to the crucial May 20 1980 referendum on independence.<sup>32</sup>

Reality, as so often, differs from appearance. The federal government views second chamber reform - if it is effected on its terms - as a method to avoid resolution of the distribution of powers question. Neither the N.D.P., nor the Progressive Conservative Party, have heavily stressed Senate reform in recent months. Most provinces - as we can testify from personal experience without violating confidentiality of discussion - attach little or no importance to Senate reform. During 1979-1980 constitutional revision discussions, the second chamber attracted little attention, less interest. Quebec, perhaps the province in theory most concerned by second chamber reform with a view to protecting **francophone** rights, stated in 1980 that "little priority should be attached to Senate reform and the reform of other institutions, for priorities primarily concern a new division of powers".<sup>33</sup>

Given this general outlook three questions can be asked:

- i. what are **the objectives** for a western Arctic second chamber?
- ii. what will be its composition and designation modes?
- iii. what will be the relations with the first chamber?

#### 111.2 (ii) Objectives for Aboriginal Representatives in the Second Chamber

Presumably, aboriginal representatives in a possible Western NWT would seek to protect and enhance aboriginal rights.

The practical question is: what does the concept of "aboriginal rights" signify in practical terms? The national constitutional process pertaining to aboriginal rights is of little actual import in this regard, except those provisions pertaining to ongoing participation in the amending

process, the validity of land claims settlements as they may be, and ongoing participation with First Ministers.<sup>34</sup>

The question of aboriginal rights, as noted above, will have to be defined in the future as to scope and range. One question the Western Constitutional Forum might consider is: should native representatives in a second chamber review legislation in respect of aboriginal rights, or in relation to native "concerns"?

Until recently, many provincial governments confined aboriginal rights to "hunting and fishing prerogatives" subject to provincial legislation. The Dene Nation of the Western NWT views which concept as encompassing basic cultural and social modes of life.

The potential conflict is real and should be recognized as such.

#### 111.2 (iii) Composition and Designation Possibilities

##### 111.2 (iii) (a) Composition

In the event of affirmation of a two chamber system, there is no doubt that aboriginal representatives could demand strong and/or at least equal representation. As noted in previous chapters, various international experiments confirm the "principle of equality in law between different nationalities".<sup>35</sup>

In Canada, the Dene nation could take courage from the example of French Canadians in respect of the federal Senate. In this regard, a noted anglophone, from the West, recently rejected calls for equal numbers of representatives per province in a new Senate because:

"I think it is time that we accepted that Quebec is NOT the same as every other province. It is the only province in Canada with a French speaking majority. It contains some 85% of all the French speaking people in Canada. Quebec was given one third of the Senators in Canada in 1867. It now has 24 Senators out of 106; a bit less than 25

percent. Equal representation would mean that Quebec representation would drop to 10% while the representation of English-speaking provinces would go up to 90%. It is not realistic. No government of Quebec could agree to it." <sup>36</sup>

Later, Mr. Robertson returned to the theme of **taking** into account objective social differences in composing a second chamber. <sup>37</sup>

This is to say that the first inhabitants of the NWT have every reason to push for strong representation in a second chamber.

#### 111.2 (iii) (b) Modes of Designation

On the assumption that different peoples of the Western NWT will participate in a future second chamber - if required - the manner of designation should be left to these peoples and their respective regions. With regard to the Swiss regulations, Cantons presently designate representatives to the Council of States by election, through elections by Cantonal authorities, or by direct citizen vote. <sup>38</sup> Indeed, British constitutional tradition would **favour** non-electoral modes of designation <sup>39</sup> as would the present Canadian Senate appointment convention. This is to say that considerable room for flexibility exists.

#### 111.2 (iii) (c) Relations with a First Chamber

Presumably, in the event of a Western NWT bicameral system, the first chamber would retain legislative primacy in relation to money and treasury bills.

However, a second chamber with strong aboriginal representation, would dispose, at the very least, of a veto in respect of those measures deemed to adversely affect "aboriginal rights" or concerns.

During constitutional discussions at the national level in 1980, the concept of a Quebec control over legislative measures affecting the future of French language and culture in a future federal second chamber gained some acceptance. <sup>40</sup> This parallel, and others, would confirm ultimate native moderation of first chamber measures.

111.2 (iv) Preliminary Conclusions

The first question for the Western Constitutional Forum is to ascertain whether, given overall institutional dynamics, a second chamber is actually required.

If a second chamber is deemed necessary, members of the W.C.F. will want to consider the prime mandate of aboriginal members in a Western NWT Senate, i.e., their influence on legislation pertaining to aboriginal rights, and, as suggested, "concerns" given existing legal ambiguity across Canada in that regard.

Various precedents, in Canada and abroad, would support a very strong aboriginal representation in a second chamber engaged in a real and meaningful mandate. Modes of designation should be left to regional and native authorities.

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111.3 AN ABORIGINAL CHAMBER WITHIN CHAMBER(S)

111.3 (i) Introduction

The concept is quite simple. All aboriginal representatives in a future Western NWT legislative system, either located in a unique first chamber or in both chambers if a second House is considered necessary, would gather together in an official legislative committee on legislative rights for aboriginal peoples endowed with both rights of initiative and veto for legislative measures of concern to the native peoples.

This measure, for guaranteed influence of aboriginal peoples' rights and concerns, would be implemented regardless of numerical niceties referred to in section 111.1 (aboriginal majorities or minorities in the first chamber). It would apply regardless of whether a bicameral solution was adopted by the Western Constitutional Forum.

Such aboriginal members as there were would constitute, regardless of possible partisan preferences, a legislative caucus for native peoples of the NWT in its Western segment.

111.3 (ii) Discussions

First, a standing aboriginal committee **would** appear to be a product of guaranteed representation rather than a cause. If three native legislators gather once a year to discuss alcohol by-laws in Aklavik, the purpose of native representation would amount to a joke in bad taste. A special aboriginal committee, recognized under constitutional law, will require a critical mass of serious aboriginal representatives.

Second, there are precedents to support the proposal for an Aboriginal Chamber within Chamber(s). In 1978, federal government, headed by the present Prime Minister, suggested that measures of special linguistic significance - implying important cultural connotation, including jobs -

would have to be approved by a majority of the French speaking members of a new second chamber.<sup>41</sup> This concept was referred to in the 1980 Liberal manifesto in Quebec. More recently, Mr. Gordon Robertson returned to the theme in calling for a new review of the "francophone committee" notion as a means to reconcile French Canadian control over **major** federal language and cultural initiatives and their probably minority situation in a new second chamber.<sup>42</sup>

Indeed, language and culture problems assume the same urgency for francophones as aboriginal rights for native peoples. The issue, related to the amending process, is to ensure a veto power over legislation in crucial areas.<sup>43</sup>

The federal 1978 proposal stressed that measures of "special linguist significance" would also have to be approved by a majority of English speaking members of a new second chamber. In the case of the NWT, this would not appear to be necessary with respect to aboriginal rights.<sup>44</sup>

How would an aboriginal caucus deliberate? Members of the Western Constitutional Forum would want to consider whether a "consensus" would suffice, or whether decisions should be taken by a simple majority of members, or along more stringent lines.

#### 111.4 PARTICIPATION IN THE AMENDING PROCESS

##### 111.4 (i) Introduction

The principle of native peoples participating as such in the future amending process of a Western NWT is founded in theory and practice. An aboriginal voice on issues directly affecting the native peoples would ensure closer identification of such peoples with territorial institutions.

First, it is generally recognized that a **central government** in a federal system should consult with and obtain a large degree of consent from its provincial or state partners.<sup>45</sup> In Canada, this was the essence of the September 28, 1981 Supreme Court decision on the constitutionality of the unilateral federal resolution presented on October 2, 1980 to advance **patriation**: a significant measure of provincial consent was required.<sup>46</sup>

Other federations follow a similar rule. Constitutional amendments require a 2/3 majority within the West German second chamber, and a very high majority of U.S. State Assemblies.<sup>47</sup>

This means that the government of the day cannot act unilaterally to change a constitution in composite states.

Second, a major constitutional problem in Canada's political system pertained, in recent years, to the issue of a constitutional veto for Quebec. The Quebec Assembly is the only legislature elected by a majority of French Canadians who naturally identify with the provincial government.

As a result, **Quebecers** had every right to feel "isolated" and rejected on November 5, 1981. In the past, Canadian convention recognized a Quebec veto, eg. following the 1971 Victoria conference. The new amending formula "fails to provide Quebec with special **protection** in areas it **considers** essential", according to federal officials.<sup>48</sup> Of course, Quebec retains a veto over "the use of French and English" which is subject to unanimous accord.<sup>49</sup> However, French Canadians, as the federal government readily admits, would have been better protected by the so-called 1971 Victoria amending formula which was based on regional (including Quebec) consent. As Professor Lederman commented in 1981, "to **obtain** a new method of amendment" one has to apply the old rule, unanimity.<sup>50</sup> This was not the case.

There is every reason to believe that Quebec will attempt, in a federalist perspective, to modify the existing amending formula. **perhaps** along the lines of a "partial veto" suggested by **G.A. Beaudoin**<sup>51</sup> in areas of language, culture and civil law.

Third, in discussions with governments beginning in November 1982, aboriginal delegations fought hard to win constitutional affirmation of the concept of "consent" on matters pertaining to aboriginal rights. On March 1, 1983, they were bluntly told by governments that they would not consent to "consent" for native peoples in a new amending formula. Native representatives gained partial satisfaction however when, on March 16, 1983, governments agreed aboriginal delegations would participate in a constitutional conference to discuss any amendments affecting Section 91(24) of the B.N.A. Act, and Sections 25 and 35 of the Canada Act (1982).<sup>52</sup>

#### 111.4 (ii) Options for Discussion

Three options can be reviewed.

##### Option A: Participation with Legislative Bodies

This option would provide for the consent of aboriginal representative in a first chamber, or in a second chamber if necessary.

The "committee" option discussed under 111.3 above could serve as an instrument for this role.

##### Option B: The Referendum Route

This avenue would involve constitutional amendments being approved through a territory-wide referendum. A referendum could be initiated either through the legislative network, or by popular initiative (as is the case in Switzerland where a **small** portion of the electorate can demand the holding of a referendum).<sup>53</sup>

A future Western NWT constitution could specify that an amendment be passed with a majority of votes cast, and with a majority of votes cast by aboriginal voters.

Option C: Local /Regional Government participation

To ensure full aboriginal participation and representation in a future amending process, provisions could be drafted to provide for mandatory consultation of communities affected by the constitutional modification.

111.4 (iii) Discussion of the Options

Options (a) and (b) - legislative and referendum options - could be combined.

Option (c) would present some disadvantages, including the overall complexity of a cumbersome process.

Preliminary Conclusions

A first question that will arise is quite valid: why such emphasis on an amending formula when the existing NWT Assembly is in many respects a colonial creature of Ottawa? The Northwest Territories Act specifically excludes "amendment" of the said Act from territorial assembly powers.<sup>54</sup>

In existing circumstances, Ottawa retains a national veto-over constitutional change. The federal government retains the constitutional right to "disallow" or "reserve" assent to provincial bills; it can make "remedial laws" to ensure respect of confessional rights in education.<sup>55</sup>

In addition, it is the stated intention of the present federal administration to lessen the "colonial" aspect of territorial government and to promote "responsible" government.

A second question pertains to the scope of aboriginal consent. Should aboriginal representatives or voters dispose of a global veto, affecting all areas of constitutional concern, or a partial veto linked to the promotion and protection of aboriginal rights and interests?

The first option would seem preferable in the context of aboriginal self-government and representation. However, the second option should be seriously contemplated in order to avoid undue inter-ethnic acrimony or complex "deals" between different peoples. Aboriginal residents, as individuals and citizens of a Western NWT, **will enjoy full rights** to participate in amending items not directly related to their concerns as a collectivity.

Third, the concept of a suspensive veto, which would only delay a given measure, should be rejected. It does not constitute an effective instrument.

#### 111.5 GUARANTEED REPRESENTATION THROUGH SEMI-DIRECT GOVERNMENT

##### 111.5 (i) Introduction

Referenda have become a more acceptable feature of Canadian political life. The May 20, 1980 referendum on sovereignty association in Quebec confirmed that major questions of constitutional import could be directly answered by the people. In 1977, the federal government **itself** tabled a bill on the principle of referenda **on** major national issues.<sup>56</sup> In its October 2, 1980, resolution on patriation, the same government urged the referendum **avenue** as a means to break major federal-provincial deadlocks on constitutional change.

This hardly represents a surprising development. The homeland of semi-direct democracy, Switzerland, provides for constitutional amendment by referendum and also a **legislative** referendum system whereby a majority of cantons is not required.<sup>57</sup> Referenda are quite common in the United States at the local level, while major problems of economic policy were decided by referendum in Australia during the second world war<sup>58</sup>

The concept of semi-direct government **would dispell** some of the Dene Nation suspicions about the defects, real or imagined, of representative government. In addition, the impact of the 1982 plebiscite on division is there for **all** to see.

#### 111.5 (ii) Options for Discussion

If the concept of direct popular consultation on occasion is thought relevant, members of the Western Constitutional Forum will have to weigh several factors.

Who should initiate referenda? In the previous section of this chapter it was suggested that, along Swiss lines, initiative responsibilities be assigned to both the legislative body and popular bases, provided a given segment of the electorate signed a petition. The problem then becomes what segment of the population? **10% of** resident voters? 20%? 30%?

Apart from amendments to the constitution, what would be the subject matter for referenda? The scope for items is endless, from dog-catching in the Western Arctic to street lamps in Fort Smith.

How should referenda be interpreted? Setting aside the difficult problem of constitutional referenda discussed in the previous section where an aboriginal majority was recommended to confirm a positive vote on issues affecting aboriginal rights, several alternatives could be considered. Given the complexity, regional and ethnic, of the Western **NWT**, a qualified majority could, again along Swiss traditions, be contemplated, eg. numerical majorities with a certain number of regions.

#### 111.5 (iii) Discussion of the Referendum Option

To summarize general thinking on the subject, a referendum is a blunt instrument to be deployed deftly. For example, as of 1983, the Parti Quebecois found itself in trouble for evoking the prospect of "elections referendaires" around 1985.

Solemn referenda, involving major problems, can elicit serious reaction and participation on the part of citizens concerned, eg. in the constitutional area.<sup>59</sup> On the other hand, repetitive consultations tend to fatigue the electorate, with low turn-out and little interest.<sup>60</sup> This reality is reflected in the fact that about 80% of referenda initiated under the "popular initiative" clause have been rejected by the Swiss population.<sup>61</sup>

A second factor to be weighed is the effectiveness of representatives in the legislative forum. Experience tends to show that if law-makers are subjected to "call-back" or "imperative" mandate procedures, either explicitly or under the threat of a wave of plebiscites, they will usually avoid controversial legislation and seek refuge in passivity. To push this example to the extreme, representatives could be transformed into delegates to the Supreme Soviet.<sup>62</sup> This type of conflict could take the form of necessary tax-raising measures: under the pressure of a conservative electorate, legislators, eg. the case in California since 1978, could prefer massive public deficits and the refusal to finance necessary public services.

Furthermore, in multi-ethnic situations, referenda can induce increased acrimony if different peoples vote in different ways, and do so in visible ways. One recent example in Canada was the unfortunate 1980 plebiscite on conscription which produced a massive national majority in favour, and an equally massive Quebec majority against. This shocked the Liberal government in Ottawa at the time, and it sought to postpone, with success, the introduction of mandatory military service.<sup>63</sup> The fact that anglophones in Quebec voted against sovereignty association in 1980 has not enhanced their position since the re-election of the P.Q. in 1981.

#### Preliminary Conclusions

Given the above options and discussion, it is recommended that:



- i. the Western Constitutional Forum, if it adopts the principle of semi-direct government, affirm limits to the use thereof;
- ii. future constitutional provisions confine territory-wide recourse to referenda to amendments of the constitution and urgent issues of territorial importance;
- iii. popular initiative be limited to a large enough segment of the population, but a small enough portion to allow for aboriginal initiatives, to provide for serious consultation (say: 20%);
- iv. that territorial-wide referenda include stipulation for a qualified numerical-regional double majority to protect native interests.

#### 111.6 A POSSIBLE ADVISORY ASSEMBLY

##### 111.6 (i) An Option for Discussion

If guaranteed representation schemes in a legislative institutional network were not deemed adequate or desirable, a fall-back position would entail the creation of an advisory council on aboriginal affairs, composed of native representatives, with a mandate to advise a Western NWT Cabinet on their concerns.

There are some precedents for such a solution. In Finland, the **Folkting** created by the Swedish minority in 1919, although devoid of any official status, monitors overall respect of minority language rights and access to public services. This assembly, **elected by** Swedes in Finland, has had some influence on official Finnish policy.<sup>61</sup> In Northern Finland, the Sami Assembly passes resolutions which the Finnish government takes into account, although, again, this institution is of an informal nature.<sup>62</sup> Finally, the cause of the Sami people in their struggle to arrest the Alta dam project around Kautokeino (Norway) in 1980-81 might have been better served if their representatives had gathered together in an informal but recognized Parliament. (Part of the problem derived from internal divisions

among the Sami during what transpired as a very ugly conflict.)<sup>63</sup>

111.6 (ii) Discussion of the Option

This option might present advantages for non-natives opposed to the very concept of guaranteed representation in the name of (so-called) Canadian convention. Or for aboriginal persons opposed to any participation in common political institutions with non-natives.

It presents many disadvantages. It has been used in the past as a prelude to "Apartheid" (separate development) policies in South Africa, as an instrument to ensure the establishment of aboriginal ghettos.<sup>64</sup> The Finnish examples above appear somewhat specious, as Finland is both notorious for its civic tolerance (more so than Canada) and depends on Sweden for part of its economic development and international political support. Furthermore, advisory councils "advise": their advice can be, and in practice, is usually ignored. Governments are prone to establish advisory councils to better co-opt a constituency, eg. the federal efforts with respect to multi-cultural groups, scientists, economists, and so on. As for those native persons who resist any form of participation in tainted, general institutions, in the name of "sell-outs", **let** it be said that the trend of contemporary history in North America on the part of non-natives has precisely consisted in the denial of guaranteed representation within public institutions of government. Indians in **Canada** control over 300 reserves. They do not control their own lives and destinies.

It is suggested this option be dismissed out of hand.

111.7 LANGUAGE AS A LEVER FOR REPRESENTATION

III.7 (i) Introduction

Emphasis was placed in the previous chapter on the importance of linguistic rights both to affirm the legitimacy of collective existence and to ensure concrete representation in different branches of government.

Sections 16 to 20 of the Canada Act<sup>65</sup> provide for bilingual services for Canada and New Brunswick. These provisions signify that not only are **francophones** entitled to speak in a legislative assembly or in court in their own language, or to receive public services therein, but also that **francophones** will be required in large numbers within institutions of government to foster respect of these constitutional guarantees.

The **Nunavut** Constitutional Forum has seized upon the issue of promoting **Inuktitut** as an official language because "official status for **Inuktitut** will hasten the full participation by **Inuit** in employment opportunities in **Nunavut**".<sup>66</sup> This very sensible hypothesis gives way to recommendations for **Inuktitut** as an official language of **Nunavut**, as a language of instruction in **Nunavut** schools, and so on.<sup>67</sup>

111.7 (ii) Options for Discussion

- (a) The Western **NWT** constitution could declare all aboriginal languages, including **Inuktitut** if necessary, official languages of the Western Arctic, along with English, and French - if deemed necessary. This affirmation would be without qualification.<sup>68</sup>
- (b) The affirmation of aboriginal tongues as official languages with qualifications.

(c) No constitutional reference to official languages - as is the case in most Canadian provinces.

111.7 (iii) Discussion of the Options

Certain basic parameters have to be established in order that linguistic affirmation on the part of aboriginal peoples be placed in context.

It is generally agreed that central institutions cannot function if the number of official languages surpasses the number of three (3).<sup>69</sup> In the case of the European Economic Community, with seven official languages, the sheer expense and complexity of employing over half of permanent staff on translation tasks boggles the mind. Government must act, and be seen to act, in a language which can be understood by all.

Western Arctic communities face a difficult problem in this regard. Not only is there no common **(Dene)** language but different languages **(Cree, Chipewyan, Slavey, Hare, Dogrib)** are spoken by communities of objectively small dimensions.<sup>70</sup> The problem of the Dene, while quite different from that of the **Inuit**, resembles somewhat the situation of the Romanche people in Switzerland. Constituting 1% of the Swiss population, i.e. close to 50,000 persons, the Romanche people speak in reality five dialects which renders an **inter-romanche** vehicle quite arduous to conceive.<sup>71</sup> Nevertheless, **Romanche** is affirmed as a "national" language of Switzerland. Italian is an official **language**, despite the fact Italians represent only 4% of the Swiss population.<sup>72</sup>

Members of the Western Constitutional Forum will be aware of an additional factor: the threats to the integrity of different aboriginal languages, including **Inuktitut**, due to media barrages and the use of English as a common territorial channel for communication.

Preliminary Conclusions

*It is suggested that options (a) and (c) presented in section 111.7 (ii) above be rejected for reasons explicated in this sub-chapter.*

It is recommended that:

- i. a future Western NWT constitution declare Dene languages and **Inuktitut** (if required) official languages of the territory along with English and French;*
- ii. that communications with the public on the part of Western NWT public institutions follow the "where numbers warrant" provision exemplified in Canadian constitutional tradition;*
- iii. that, on **the basis** of a **Nunavut** Constitutional Forum recommendation,<sup>73</sup> the Western **NWT** government appoint a Commissioner for Official Languages in order to ensure wider and reasonable use of aboriginal languages; and,*
- iv. that the same government seek to promote the preservation of aboriginal languages as a fundamental aboriginal right, and such funds as deemed reasonable be directed towards a unification of Dene linguistic norms.*

*English would presumably remain the main common instrument for communications in the legislative area. This fact should not be interpreted as a denial of the extra-ordinary patrimony represented by several aboriginal languages, if only because they translate Northern life far more effectively than English.*

1. C.J. Friedrich quoted in "Two Studies on Representative Government", *op.cit.*, P. 7.
2. C. HUNT, "Approaches to native land settlements and implications for native land use and natural resource policies", CARC: Edmonton, 1978, np.
3. B. AZKIN, "State and Nation", London: Hutchinson University Library, 1964, P. 87.
4. L. C. GREEN, "The Protection of Minorities in the League of Nations and the U. N.", A. **Gotlieb** Dir., "Human Rights: Federalism and Minorities", Toronto: C. I. I. A., 1970, PP. 180-210.
5. E. McWhinney, "If we Keep a Senate...", *op.cit.*, P. 33
6. Burn & Tremblay. "Droit Public Fundamental", *op.cit.*, PP. 104-105.
111. 1 GUARANTEED REPRESENTATION IN A FIRST LEGISLATIVE ASSEMBLY
7. NWT, "Plebiscite on the Division of the Northwest Territories", Yellowknife: Bureau of Statistics, May 1982, P. 3 (Ten of the 22 are Inuit constituencies.)
8. N. C. F., "Building Nunavut", May 1983, 38 P.
9. H.C. GULLOV, "Home Rule in Greenland", Etudes Inuit, Quebec, No. I, 1979, PP. 131-138.
10. The full text of the Act is reproduced in "The Canadian Constitution: Legislative Documents", *op.cit.*, Pp. 23-45.
11. As A. Brady notes ("Democracy...", *op.cit.*, P.325) the number of Maori seats is small (5% "of the whole) in relation to their cultural importance. The 1979 Zimbabwe constitution provides for 20% guaranteed representation for the European population. Whether this latter provision holds is open to question.
12. Calculations based on perusal of statistics contained in "NWT Data Book", *op.cit.*, Pp.85-215. If aboriginal communities vote "aboriginal", they would acquire a majority.
13. "Building Nunavut", *op.cit.*, P.12.
14. "Constitutional Development in the NWT", *op.cit.*, MAP 4, Federal and Territorial Electoral Districts".
15. "Plebiscite on the Division of the Northwest Territories", *op.cit.*, P.12.

16. *Idem.*
17. "State and Nation", **op.cit.** , Pp.160-61.
18. Duverger, **op.cit.** , PP. 109-114.
19. Section 51(5) of the B.N.A. Act stated that the number of seats per province could not be reduced by more than 15% during a **re-assignment of ridings.**
20. **Duverger, op.cit.** , Pp.95-96. **C.G. GOCNELL**, "Gerrymandering In Georgia", Social Forces, 11 1937, P. 738.
21. The number of eligible voters for the 1982 plebiscite (NWT: "Plebiscite on the Division...", **op.cit.** , P.12.) excluding Inuit were: 7, 914 non-native and 3, 508 Dene.
22. **Rizk**, "Le regime...", **op.cit.** , P.31.
23. In the Netherlands, for example, national parties draw up lists of 150 candidates for the 150 seats in the lower chamber. If, for example, one was number 7 on a list which won 4% of the national vote, one would not be elected.
24. In interviews to the B.B.C. Radio 4 (London) on June 21, 1983, such noted politicians as Shirley Williams and A. Wedgewood Berm both stressed that conservative over-representation in Parliament reduced the relevance of House of Commons debates.
25. **S. Sami, op.cit.** , Pp.27-31.
26. **D.A. RUSTOW**, "Languages, Nations and Democracy", "Multi-Lingual Political Systems", **op.cit.** , P. 55.
27. **Rizk, op.cit.**, P. 102-105.
28. **I. JENNINGS**, "The British Constitution", Cambridge University Press, 1950.
29. Canada, "Constitutional Reform: House of the Federation", Ottawa: Canadian Unity Information Office, June 1978.
30. Progressive Conservative Party, "The Constitution and National Unity", Ottawa, 1978, Pp. 5-9. Opening statement by E. Broadbent to the Joint Committee on the Constitution, Ottawa, August 15, 1978.
31. British Columbia, "Constitutional Proposals", Federal Provincial First Ministers Conference on the Constitution, Ottawa, October 30, 1978. **P.29.**

32. P. L. Q., "A New Canadian Federation", Montreal, January 10, 1980, 145 P.
33. CLAUDE MORIN, "Dossier sur les Affaires Constitutionnelles", Quebec: Ministry of Intergovernmental Affairs, August 14, 1980, p.2 on the "Senate" section.
34. The Constitutional Accord (First Ministers Conference on Aboriginal Constitutional Matters, "1983 Constitutional Accord on Aboriginal Rights", Ottawa: CICS (Federal) (revised), March 20, 1983) includes as a future agenda item: "Statement of the Particular Rights of Aboriginal Peoples".
35. V. Knapp, "La solution constitutionnelles de probleme national en Tchechoslovaquie", op.cit., p.392.
36. R.G. ROBERTSON, "Homespun Mending of Canada", Policy Options, March 1982, P. 23.
37. In a speech at Laval University at Quebec on March 26, 1983, Mr. Robertson emphasized that even the culturally homogeneous West German Federation ensured differing numerical representation per province in the second chamber, der Bundesrat.
38. G. Coddling ("The Federal Government...", op.cit., p.72) notes "the election of representatives to the Council is purely a Cantonal matter".
39. F.A. Kunz ("The Modern Senate...", op.cit., p.317) notes that a constitution such as the Canadian "similar in principle to that of the United Kingdom" would be directed against a directly elected Senate.
40. Federal Provincial Relations Office, "Report to the Cabinet on Constitutional Discussion", Ottawa, August 30, 1980, P.12. This **secret** document was distributed at the First Ministers Conference on the Constitution by the Quebec delegations as of September 8, 1980.
41. Sections 69-70 of Bill C-60. Canadian Intergovernmental Conference Secretariat, "Proposals on the Constitution 1971-78", Ottawa, December 1978, Pp.187-90.
42. Statement to the Laval University Symposium on Federal Provincial Relations, Quebec, March 26, 1983.
43. For instance, it has been suggested that Quebec dispose of a veto at federal **provincial** conferences on matters considered "vital to the French language and culture" (W.R. LEDERMAN, "Continuing Canadian Constitutional Dilemmas", Toronto: Butterworth's, 1981. P.101.



44. S. 69(2) of Bill C-60, June 1978.
45. P. GERIN LAJOIE, "Constitutional Amendment in Canada", Toronto University Press, 1950, 340 P.
46. Third Decision, P. 42 of the original text.
47. Brun & Tremblay, "Droit Public...", *op.cit.*, P.135.
48. "Report to the Cabinet...", *op.cit.*, P.29. In reference to the "Alberta" formula under review during the summer of 1980.
49. Section 41(c) of the Constitutional Bill (1981).
50. "Continuing Canadian Constitutional...", *op.cit.*, P. 100.
51. "Le veto, le retrait, ou les deux?", Le Devoir, Montreal, March 5, 1983, P.15.
52. "1983 Constitutional Accord on Aboriginal Rights". Ottawa, March 16, 1983, Section 35(1)(revised).
53. Coddington, *op.cit.*, Pp.60-61.
54. G.N.W.T., "Government of the Northwest Territories", Yellowknife (no date), P. 3 of Section 3.
55. Sections 56, 57 and 93(4) of the B.N.A. Act. It is true that disallowances had not occurred since but the very fact it subsists serves as a sign of federal legislative supremacy.
56. D. CLIFT, "Referendum - Federal Style", Report Magazine, December 1977, Montreal, P. 7.
57. Coddington, *op.cit.*, Pp. 61-65.
58. R.R. BOWIE & C.J. FRIEDRICH, "Studies in Federalism", Boston: Little Brown, 1954, 887 P.
59. J.F. Aubert ("Petite Histoire Constitutionnelle de la Suisse", Berne: Francke Editions, 1974, P.98) noted that the Swiss people approved 78% of constitutional amendments proposed by the federal government in the first century following 19th century reform.
60. Coddington ("The federal government...", *op.cit.*, P.65) notes a 50% turnout at referenda taking place three times a year on average. This is all the more exceptional because some Cantons enforce mandatory voting practices.

61. Codd ing, **op.cit.** , P. 63
62. Brun & Tremblay, "Le Droit. . .", **op.cit.** , P.106
63. R. ALLEN, "Ordeal by Fire: Canada 1910-45", Doubleday, 1961. Pp.392-97.
61. A.K. PATERSON, "Swedo-Finns have model for linguistic harmony", The Gazette, Montreal, August 12, 1981. P. 7.
62. Personal observation as of 1977 in Inari and Utsjoki and statement by Peter Jull to the Inuit Committee on National Issues, Mont Ste. Marie, June 10, 1981.
64. From 1936 to 1946, a Native Representatives Council operated in an advisory function to the Government of South Africa prior to the introduction of tougher Apartheid policies. The system failed dismally, if only because Pretoria turned a deaf ear to advice from natives. E. McWhinney, "Judicial Review in the English Speaking. . .", **op.cit.** , P. 104.
65. These Sections concern: official languages of Canada; official languages of New Brunswick; proceedings in Parliament and in the Legislature; statutes and records; proceedings in federal and New Brunswick courts; communications by public with institutions.
66. "Building Nunavut", **op.cit.** , P.14.
67. *Ibid.* , Pp.14-15.
68. The N.C.F. (*ibid.* , P.14) recommended the adoption of French as an official language under the "where numbers warrant" condition - a recommendation any federal Cabinet headed by a bilingual Quebecois would be very appreciative of.
69. A theme developed by H. Kloss, "Democracy and the Multi-national State", **op.cit.** , P. 31 *passim*.
70. Information derived from "NWT Data Book", **op.cit.** , pp. 85-215: community data and languages spoken.
71. Comments by M. Lengereau,, Laval University Symposium on Linguistic Minorities and Interventions: Towards a Typology, Quebec, April 15-18, 1977, P.135 of the official report.
72. K.D. MacRae, "the Constitutional Protection. . .", **op.cit.** , P.217.
73. "Building Nunavut", **op.cit.** , P.14.

CHAPTER **IV**:  
GUARANTEED REPRESENTATION **IN THE EXECUTIVE BRANCH**

IV.1 Introduction

*It would be nice to affirm that legislative activities in Canada take precedence over executive operations. Such is not the case.*

*Governments in Canada adopted the facile British "cabinet government system" to the detriment of diverse regional representation and priority to open discussion among representatives. According to S.M. Lipset, "Contemporary Canadian politics should be seen as the product of the failure of British Parliamentary institutions to work in a complex North American union".<sup>1</sup> Indeed, the British tradition results in temporary dictatorships, dominated by the executive branch. The Canadian Parliamentary system is much more "presidential" than the U.S. presidential system. As a connoisseur of Cabinet government remarked, "It is behind the closed doors of the cabinet, and in the frankness of its confidence, that we achieve much of the vital process of accommodation and compromise that are essential to make this country work".<sup>2</sup>*

*The incremental supremacy of the executive branch, Cabinet, the public service, boards and agencies, corresponds to a general international trend. Cabinet Government, since Bageshot's historic observation in 1969, signifies the primacy of a head of government and his/her administration, because of "party solidarity" behind their leader.<sup>3</sup> The case of Britain, applicable in part to Canadian practice, is, as comments Duverger<sup>4</sup> exemplary: "Having passed from the Crown to Parliament, real power quickly passed from Parliament to the Cabinet".<sup>4</sup>*

*This is not designed to belittle the importance of guaranteed representation in legislative bodies. However, government, on a day by day basis, is conducted by the executive branch, its **civil** service, its boards and agencies, its ministers. Complexity of public government has led to centralization of power; demands on government, especially in the social and cultural areas, have resulted in growing emphasis on **sectoral** "bureaucratic expertise". The demonstration thereof is provided by the Canadian constitutional revision process. Our basic **law**, our rule for common survival, is not approved by the people. It is not debated in legislatures. Our constitution derives from discussions between tired Ministers and their officials, and flows from haphazard accords such as the November 5, 1981 constitutional agreement.<sup>5</sup> Federal-provincial relations are assigned to the executive in Canada. So much so that provincial executives on the Prairies, for example, have **moulded** decision-making processes and their clienteles so as to counter whatever Prairie province solidarity might exist. Prairie Union is a mirage: the executives have ensured such an outcome.<sup>6</sup>*

*In short, guaranteed representation for aboriginal peoples should first apply to the executive branch of a future Western NWT. As P. Deane noted for francophones, the advantage in representation for Quebec in federal institutions would imply **that** French Canadians, not necessarily working in their language, "would ensure consideration for their views in the decision making process".<sup>7</sup>*

*The Canadian constitution does not refer explicitly to guaranteed ethnic representation in organs of executive government. This, in our opinion, constitutes a constitutional defect among others. However, a review of the problem in the Western NWT could encompass:*

- i. representation in Cabinet;*
- ii. representation at the sovereign level;*
- iii. representation in the common public service;*
- iv. representation on boards and agencies;*

- v. open government as a tool for representation; and,
- vi. representation in inter-governmental affairs.

#### IV.2 GUARANTEED REPRESENTATION IN CABINET

##### IV.2 (i) Introduction

*In Canadian tradition, Cabinet Government means government by the Cabinet. Cabinet decides what is to be proposed, proposes and implements with the help of the permanent administration. One can regret this development, particularly in respect of regional and ethnic interest expression, but the reality of Cabinet eminence prevails.*<sup>8</sup>

*As noted in a previous chapter, other countries facing the problem of inter-ethnic coexistence, have had to resolve the issue of Cabinet representation. The Belgian constitution (revised) provides for strict equality among Francophone and Dutch Ministers, with the exception of the post of Prime Minister. The Swiss constitutional convention, rigidly respected, wills that no Canton (or province) should be represented by more than one of the seven ministers, and that the France-Italian minorities (amounting to some 25% of the population) should dispose of 3 Cabinet seats out of seven.*<sup>9</sup>

*Is guaranteed representation in Cabinet alone an insurance against inter-ethnic contention? The answer is negative, especially in the absence of a social consensus on values and development objectives. Turks were guaranteed 30% of Cabinet seats in the Cyprus Cabinet, but due to general ethnic acrimony and the disagreements between President **Makarios** and Vice **President** Kutchuk, their ministerial representatives turned thumbs for four years.*<sup>10</sup> *On the other hand, the absence of balanced regional and ethnic representation in Cabinet certainly confirms the fragility of an inter-ethnic public government accord. The collapse of the British West Indies Federation in 1962 was partially due to the absence of such charismatic regional leaders as Williams, Manley or Bustamente as active Cabinet ministers at the central level.*<sup>11</sup>

In Canada, the presence of a francophone Prime Minister and strong francophone Ministers has certainly fostered the cause of French Canadian dignity in Canada as a whole. M. Trudeau himself played a decisive role in defeating separatism during the 1980 Quebec referendum. Had he not been there, or had his francophone ministers such as Mm. Lalonde and Chretien been involved in personal pursuits, francophone minorities outside Quebec would not have been constitutionally entitled to the education of their children in French at the primary and secondary levels.<sup>12</sup>

Suffice to say, as a result, that guaranteed aboriginal representation in a Western NWT Cabinet hardly constitutes a matter for remote pursuits in academe.

#### IV.2 (ii) Options for Discussion

A range of options could be reviewed in this context.

##### (a) A Guaranteed Percentage of Cabinet Seats

A future Western NWT Constitutional text could guarantee a given number of Cabinet seats to aboriginal Canadians. This option would reflect choices made in Belgium and Cyprus, for example.

Possibly, future constitutional provisions could stipulate that "the executive council of the Western NWT shall be composed of members equally drawn from citizens who benefit from constitutionally affirmed Land Claims Agreements and from citizens who do not draw such benefits". This would leave aside the issue of Head of Government, which should be left to the wisdom of day to day deliberations.<sup>13</sup><sup>12</sup>

Members of the W.C.F. might wish to agree to a lower floor, perhaps 40%, perhaps 1/3.

(b) Regional Representation

This option would specify that a future Western NWT constitution would affirm that either:

- the executive council of the Western NWT would not include more than one member by electoral "region" (eg. Yellowknife); or,
- the ministry would be based on representatives from all electoral "regions" as opposed to ridings.

This illustration is taken from Swiss precedents,<sup>14</sup> and would depend on the definition of "regions", eg. Yellowknife and Mackenzie Delta (enlarged) as opposed to ridings as such. It is designed to ensure, through regional sensitivity, to guarantee minimal aboriginal representation in Cabinet, somewhat along the lines of "provincial" representation in the Federal Cabinet.

(c) General Provisions

A general statement of principle, perhaps contained in a preamble to the Western NWT constitution, could affirm that "the executive council of the Territory should be so composed as to reflect the ethnic and regional diversity of the Territory".

(c) Aboriginal Ministries

Using the "consociation" concept<sup>15</sup> applied in Belgium, the Western NWT constitution could specify the existence of certain ministries designed to implement programmed of the aboriginal peoples as such: an Aboriginal Department of Cultural Affairs, an Aboriginal Department of Social Affairs, etc.

Such a provision would, in theory, ensure not only the presence of native Ministers, but the institutional account at Cabinet level of aboriginal concerns.

(e) Reliance on Canadian Convention

Canadian convention wills that Cabinet formation, at the federal and provincial levels, reflect regional and ethnic diversity.

This rule is not always respected. **Francophones** have been effectively excluded from Cabinet government for over a century **in** nine provinces. There is no anglophone Minister in Quebec as of June 1983 (nor has there been any since 1976). Aboriginal participation in the existing NWT Cabinet falls below their representation in the territorial assembly.

IV.2 (iii) Discussion of the Options

Option (a) - a guaranteed number of Cabinet seats - is obviously **favourable** to aboriginal peoples.

If not accepted, option (b) - guaranteed regional representation represents the ideal fall-back position for the **W.C.F.** It could easily be combined with option (d) - guaranteed aboriginal Ministries based on "personal" as opposed to territorial jurisdiction.

Option (a) could, in **any** case, coincide with option (d) as a matter of course.

Option (c) represents some elements of confirmation of aboriginal presence in a future Western NWT Cabinet. Implementation thereof, in event of acute inter-ethnic acrimony, could prove cumbersome.

Option (e) - reliance on Canadian convention - constitutes the least preferable option. A Cabinet is what the chief minister wants it to be in Canada in the absence of safeguards.



Preliminary Conclusions

Many readers would find the above analysis exceedingly theoretic without reference to party politics.

Reference has already been made in the preceding chapters to the corrosive effects of party politics when artificially transposed to complex ethnic situations. The dissolution of the Singapore-Malaysian union owed everything in 1965 to party rivalries between **Tungku Abdul Rahman** and Lee Kuan Yew on the verge of electoral battle.<sup>16</sup> The Tungku was afraid that "Harry" Lee would grab mainland Chinese votes. Despite constitutional niceties, Belgian Ministers are "delegates" of their respective ethnically divided Socialist, Christian Democrat or Liberal Parties.<sup>17</sup> It would be sad if Western Arctic politics were to divide along "Southern" partisan lines when so many causes unite Northerners (eg. resistance to boom and bust cycles), and that such divisions should be reflected in consequent ethnic divisions.

This is not a luxury the North can afford. Effective aboriginal representation in Cabinet will be effective to the extent that Ministers concerned are not buried under "Southern" conceptual disputes about "free enterprise" as opposed to "social concerns".

Preposterous as such a prospect may seem, it is not implausible. Can a Western NWT provide itself the platter of sharp, often blind, adversarial politics paraded in the South?

This is a question for Northerners to answer. But let us remember that the present Prime Minister lauded some years ago "the shameful incompetence" of average Quebec Liberal MPs, "Witty donkeys" led along the road to affirm English supremacy in a sorry game where they could only be losers.<sup>18</sup>

IV.3 THE HEAD OF THE EXECUTIVE

IV.3 (i) Introduction

*In provinces, the Lieutenant Governor is the titular head of the Executive Power, entrusted in theory with wide duties including the appointment of Cabinet. He/she is appointed by the Governor General, i. e. by the federal Cabinet of the day.*<sup>19</sup>

*The role of the titular head is largely representational and ceremonial. However, there have been instances of particularly active Lieutenant Governors who increased the prestige of their province.*

*The situation in the NWT is more complex. The present Commissioner finds himself in a hybrid position whereby, as a federal civil servant, he is charged with heavy executive powers within the territorial institutional framework. This is an abnormal contradiction, both for the official in question, and for the residents of the NWT denied rights and responsibilities extended to 99% of Canadian residents located in provinces. As a result, the Special Representative recommended that the role of the Commissioner **evolve towards** a more acceptable, provincial Lieutenant Governor-type function.*<sup>20</sup>

*In addition, with the advent of Canadian-born Governors General in 1952, the federal government has adopted the convention of appointing English and French speaking Canadians on an alternate basis. In 1959, Mr. Vanier; in 1967, Mr. Mitchener; in 1974, Mr. Leger; and, in 1979, Mr. Schreyer. It is to be noted that aboriginal peoples constitute a larger majority in the Western NWT than French Canadians in the country as a whole.*

IV.3 (ii) Recommendation

*It is suggested that a convention be established for the federal Cabinet to appoint Heads of the Western NWT alternately from among the native and non-native populations. This suggestion assumes that this office would acquire a more "provincial" -type mould in the near future.*

#### IV.4 REPRESENTATION IN THE PUBLIC SERVICE

##### IV.4 (i) Introduction

*Aboriginal peoples entertain some justified suspicion towards the civil service. They are hardly represented therein, and administrative procedures in the North occasionally reflect imported "Southern norms".*

*The fact of the matter is that public administration constitutes the core of government activity. Public servants advise changing Ministers, control information flows, ensure the implementation - or non-implementation - of approved policies and programmed and represent government in day to day transactions with the public. Some Canadians consider these prerogatives undue. Various Conservative leaders, after their difficult interlude in Ottawa in 1979-80, have tended to blame senior civil servants for their alleged failures.<sup>21</sup>*

*Nevertheless, the requirement of a competent, effective and serious public service is nowhere more evident than in the Arctic. A serious public service provides continuity of effort and memory, a source of ideas and practical schemes in relation to agreed political goals, and an instrument to ensure all aspects - including regional and inter-ethnic factors - are considered prior to decision. One may rail against these "permanent politicians" as opposed to temporary legislators. One can call them "mandarins" with a hint of derision. However, Canadian public administrators have gained a high public reputation - despite the defects of the federal public service which will be alluded to in the following paragraph - at the international level for loyalty, independence and non-partisan imagination and acumen.<sup>22</sup>*

*Any minority, especially the native peoples of the Western NWT, would want to participate actively in a public service in a region where government is "big business" and often the only business.*

The consequences of not participating are not pleasant. In general, the Canadian administrative tradition, adopted from British precedents, emphasizes "functional" or "sectoral" priorities to the detriment of regional or ethnic concerns.<sup>23</sup> This can result, and has led to, serious defects in the design and delivery of public services. A special internal federal study on federal activities in Quebec from 1968-77 demonstrated serious lack of administrative regard for constitutional barriers to initiative, and an innate tendency to dismiss the special situation of Quebec as a homeland for French Canada.<sup>24</sup> This failing arose from little use of French in the federal government, the at the time poor participation of francophones in any federal departments, and sheer ignorance of basic constitutional and legislative texts. One field marked by high francophone participation, national defence, produced excellent relations between Ottawa and Quebec.

Participation in the Western NWT public service will guarantee that native peoples perceive the territorial government as "their" government, through improved and more sensitive design and delivery of services.

#### IV. 4 (ii) Options for Discussion

##### (a) Reliance on Canadian Tradition

No special constitutional, legislative or administrative provisions would foster aboriginal participation in the public service. Incremental policies might lead to greater native presence in a Western NWT public service.

Variations of this option produced a situation in Ottawa as of 1947 whereby, in the name of the "merit system" devised by Canadians of British origin, there were no francophone deputy ministers in the central public service.<sup>25</sup> It has coincided with a 3% representation of anglophones in the Quebec public service.

(b) Language as a Lever of Representation -

This option derives from results achieved for francophone participation prior to and following the federal "Official Languages Act" of 1969. As noted by an architect of this legislation, "the statistics of participation of French-speaking Canadians in the federal Public Service have improved substantially".<sup>26</sup> Such participation achieved an overall 26.4% ratio as of 1981, a 25% increase in relation to 1965. In the senior executive category, francophones accounted for 22.4% of high civil servants in 1980.

Reference has, however, already been made to difficult linguistic problems in the Western NWT, both in terms of division and the obstacles to achieving a common Dene tongue. In this respect, members of the Western Constitutional Forum may wish to assess the following alternatives:

1. linguistic capacity in aboriginal languages as a mandatory requirement for appointment to senior and middle positions; or,
2. linguistic capacity as an important criterion - over time - for appointment to senior positions.

(c) Definite Quotas for Public Service Positions

Future Western NWT constitutional provisions in general scope and subsequent legislation would specify given quotas to be **occupied** by aboriginal persons in a central public service. Such provisions could be expressed in either quantitative or qualitative ("in relation to the native population quotient") terms.

Quotas have a bad name in Canada and in countries shaped by British constitutional tradition. However, they have been applied with some success in Malaya<sup>27</sup> and in the United States for the black population as a means to overcome **socio-cultural** barriers erected by the **majority**. For his part, M. Trudeau, as an opponent of narrow nationalism,<sup>28</sup> dismissed the quota solution as a tool for increased francophone representation in the public service. But the situation of francophones and aboriginal nations of the NWT differ considerably.

(d) The Requirement for a Public Service Commission

The Nunavut Constitutional Forum suggested<sup>29</sup> the establishment of a Nunavut Public Service commission with a view to both providing for efficient administration and greater Inuit participation therein.

A Western NWT public service commission, composed of three members perhaps, would, by law, be enforced to include one aboriginal person.

(e) A Department of Personnel

As of June 1983, and without implied criticism of functions accomplished, the Commissioner of the NWT has retained executive responsibility for "personnel".<sup>30</sup>

However, given overall political change and the requirement for accelerated aboriginal participation for the Western NWT to remain viable as a proposition, a Department of Personnel could be created to ensure that public administration incorporates the outlooks and views of different peoples of the territory.

If such a department is agreed to within the W.C.F., we would suggest the perusal of the following two options:

1. a Minister and Associate Minister of native and non-native origin;
2. a Minister and a Deputy Minister of different ethnic origins.

IV.4 (iii) Discussion of the Options

Option (a) is clearly not acceptable, given the extraordinary situation of the first inhabitants of the Western NWT. Reliance on "convention" and incrementalism will lead to public disaffection with government.

Options (d) and (e) concerning a Public Service Commission and a Department of Personnel should be implemented regardless of other factors.

Friedrich and Guttman defined the context of options raised under items (b) and (c):

*"The formulation of a system of appointment and promotion which, while ensuring an efficient service, will not too strongly contravene territorial demands for representation in the service; and, the formulation of standards for the federal service that take into account not only the linguistic diversities of the member states but also the different standards of state educational services and their civil service."*<sup>31</sup>

What these experts were attempting to affirm in the difficult texture of European union consisted in attention to regional, linguistic and efficiency standards.

There are difficulties in this respect: *"qui trop embrasse, maletreint"* - "they who too embrace find no response". As the present Commissioner for Official Languages noted in Yellowknife, when does a multiplicity "cease to be practical" when addressing the problem of linguistic competence?<sup>32</sup> The diversity of Dene languages is such as to render linguistic competence a partial notion when considering appointment to the public service. English, more so than in Ottawa, represents an important uniting factor for a future Western NWT. One can regret "the opposing forces of convenience operational efficiency and sheer inertia" in this respect on the part of supporters of English;<sup>33</sup> the fact remains that government has to govern, and services have to be provided regardless of language. This is what people expect.

With respect to "quotas", many will cite the example of Cyprus (or other countries) where Greek superiority and aversion resulted in few Turks being promoted in the common civil service although the latter were constitutionally entitled to 30% of public service posts.<sup>34</sup> We think this fear perhaps excessive as native residents of the Western NWT should entertain every interest in a strong aboriginal presence in administrative organs if only to consolidate the integrity of public government institutions where they should form a political majority. "Affirmative

action programs" have been officially consecrated by the Government of Canada and the provinces in the Constitutional Bill (1981).<sup>35</sup> Reasonable quotas, implemented over time, should not cause panic in the non-native population.

Not that guaranteed representation in the Western NWT will constitute an easy, facile process at the administrative plane. A territorial administration is well ensconced, replete with serious administrators. It would be presumptuous and preposterous to assert their expertise was not needed for a new Western NWT territory. As required participation of aboriginal public servants extends, there will be problems, somewhat along the lines of the present federal public service where promotions are blocked and francophone participation rendered more arduous because of acquired seniority.<sup>36</sup> Hopefully, these obstacles should not prove insurmountable.

One final comment. Under no circumstances should the nominations to and promotions within the Western NWT service be linked to partisan preferences. A side effect of the diffusion of party politics might entail the appointment of politically "sure" senior civil servants at the expense of qualified aboriginal or non-native candidates. The Western German system of "Proporz", i.e. the nomination of political friends in a department a party can control, leads to "absurd extremes" and a lack of continuity in administrative affairs.<sup>37</sup> In arguing for "neutral superservants", Mitchell Sharp states:<sup>38</sup>

"A newly elected government when it needs to translate into practice its party platform is not partisan help, but sound practical and professional advice and administrative talent."

#### IV.4 (iv) Preliminary Conclusions

Option (a) should be rejected out of hand.



Options (d) and (e) should be implemented regardless of other arrangements.

With respect to option (b) (language requirements), it is recommended that linguistic criteria be viewed as an "important" variable in assessing appointment and promotion.

Quotas for aboriginal peoples could be implemented gradually (five years to five years) on the basis of small, but increasingly higher percentages (18%-20%-24%-30%) of this or that category, in order to allow for both administrative continuity and to foster pride among those aboriginal public servants not owing promotion to "quantitative" devices.

#### IV.5 REPRESENTATION ON BOARDS AND AGENCIES

##### IV.5 (i) Introduction

Regulatory boards and agencies constitute a major and often masked aspect of public government in Canada. Such federal boards as the N.E.B., the C.R.T.C. or the C.T.C. play quasi-legislative roles in the development of energy projects, communications or transport. Neither judicial nor legislative institutions per se, they establish policy and set public standards.<sup>39</sup>

Such boards and agencies will play a crucial role in the future Western NWT territory/province. Especially in the key sector of lands, land use, resources and development related thereto. This is of particular relevance when considering the institutional implications of land claims settlements in the NWT. **If** the Wildlife provisions of an Agreement in Principle fostered by **Inuit Tapirisat** of Canada, agreed to by the federal representative and the **I.T.C.** negotiator have not been approved by the federal government, it is precisely because a Nunavut Wildlife Management Board would **dispose** of wide prerogatives, with important **Inuit** representation.<sup>40</sup>

As of January 1982, there were some 22 public committees, boards and councils related to the functioning of the Government of the Northwest Territories. These ranged from the Commissioner's Award Committee, the N.W.T. Liquor Licensing Board, the Alcohol and Drug Coordinating Council, to the Water Board.<sup>41</sup> Aboriginal representation thereon was not crushing, given demographic realities.

#### IV.5 (ii) Option for Discussion

Legislative measures should ensure that **all** boards or agencies implicated in the implementation of policies or programmes affecting the definition of aboriginal rights as affirmed by land claims settlements, principally in the field of land use, renewable and non-renewable resources, be composed on the principle of parity between beneficial persons and non-natives as required. To take the example of the **Nunavut Wildlife Management Board**, half of the members would be native and half could be non-native.

This does not mean that aboriginal representatives would claim **parity** on the board of the "Stanton Yellowknife Hospital Board of Management".<sup>42</sup> It does signify that parity is called for when basic aboriginal rights, the land, its use, the disposal of the products thereof, and in the case of the Western Arctic, the maritime products and resources, are in play.

#### IV.5 (iii) Discussion of the Option

The first problem pertains to those boards where parity will be required. It is less serious than appears in that a future Western NWT constitution would, as a matter of course, incorporate the provisions of land claims settlements as integral parts of a territorial constitution. Such a step would be confirmed by legal precedents at the national level.<sup>43</sup> Boards and agencies where parity representation was required would first pertain to land use, land use planning, and resource development.

Second, it would appear imperative to avoid proliferation of regulatory boards and agencies. With no criticism implied with regard to an excellent proposal, the proliferation of regulatory bodies possibly intended for a **Nunavut** regime, including the Land Authority, **the** Wildlife Management Board, the **Nunavut** Planning Review Board, the **Nunavut** Impact Review Board, combined with the **Nunavut** Water Board (offshore jurisdiction undefined) and various local authorities' powers for development plans, leads one to question whether this administrative structure could actually function in a real world.<sup>44</sup> A real world where investment decisions are made in hours, if not seconds - as the author can well attest to - and where the number of qualified aboriginal representatives to sit on such boards is, through demographic necessity, somewhat limited.

#### IV.6 OPEN GOVERNMENT

One of the most displeasing aspects of Canadian "Cabinet Government" tradition pertains to exceedingly narrow definitions of information to be provided to the public on the conduct of public affairs. This "elitist" notion of government data, which the Dene Nation has every reason to criticize, also pervades provincial practices. The sort of "community consensus" required to choose a Northern leader demands open and fair discussion of all aspects of a problem - a notion somewhat foreign to Southern Canadians at ease with the Official Secrets Act which signifies that what one doesn't know can't give rise to litigation.

This is not to affirm that blind Canadians are led by other blind Canadians. Even the federal government has been obliged to implement a recent freedom of information legislation. What is certain and obvious is that:

- (a) government in the Western **N.W. T.** could attain greater legitimacy through a more liberal definition of the federal Official Secrets Act (which many of us have **signed!**);

- (b) government in this territory does not demand unusual standards of secrecy;
- (c) aboriginal peoples, in their **consensual**, public and informal approach to decision making, require facts and all information to the extent possible; and,
- (d) existing informal NWT executive methods of administration should be amplified and encouraged.

As aboriginal peoples appreciate frankness and an open perspective on common problems, and as an instrument to foster greater aboriginal participation in government as a whole it is recommended that:

- i. a future Western NWT government be constitutionally obliged to implement "freedom of information" practices;
- ii. such an administration make laws to ensure all problems of common interest, ranging from alcohol to land use planning, be examined in the context of full public information; and,
- iii. certain exceptions be made, especially as concerns communications with other governments (otherwise, no communications); security and like matters; relations with governments outside of Canada; certain legal and criminal matters; and such questions as may be deemed essential to the integrity of the territory, eg. sudden maritime policy communications.

Open government should in no respect, furthermore, threaten communications within a Western NWT Cabinet. "Cabinet papers", Cabinet documents, private advice, Cabinet records, and so on, should be excepted from a Western NWT Freedom of Information rule. Papers not related to direct Cabinet deliberations should be available to the public and their representatives. Departmental studies or papers should, as a matter of course, be also available to the public. Negative reaction therefrom could assist bureaucrats (including "aboriginal" mandarins) in ameliorating their proposed policies and programmed, or comments thereon.

IV. 7 REPRESENTATION IN INTERGOVERNMENTAL RELATIONS

IV. 7 (i) Introduction

NWT aboriginal representatives participated brilliantly at the First Ministers' Constitutional Conference on Aboriginal Affairs in March 1983, both as members of the NWT delegation and of aboriginal delegations. The question is: how can such participation be assured in the future, on aboriginal and other affairs?

Indeed, such participation would guarantee a strong voice for native interests in Canada in general and a required insurance that native input be injected into what has become a national decision-making process. "Policy Making" in Canada had, as of 1972, become increasingly subject to difficult federal provincial accord.<sup>46</sup>

Federal-provincial (territorial) relations may present an "air of grotesque unreality" on television during First Ministers' conferences or when private bargains are presented to the public.<sup>47</sup> But as representatives in the **Nunavut** Constitutional Forum recognized, "many big questions in Canada are solved by conferences of the federal, provincial and territorial government".<sup>48</sup>

Native organizations will also want to take note of **francophone** representation through the Quebec government at the international level. The Quebec government has signed agreements with France in the field of education and culture in 1965, and became "un gouvernement participant" of the **francophone** Agence de Cooperation **culturelle** et technique in 1971.<sup>49</sup>

In this regard, the Dene Nation suggested the Denendeh dispose of the right "to maintain cultural and diplomatic relationships with all other aboriginal nations".<sup>50</sup>

IV.7 (ii) Options

Representation in intergovernmental relations is a product of guaranteed representation in legislative and other bodies. Aboriginal representatives will participate in such relation to the extent that the federal government accepts a more "government to government" link with the NWT and its components. They will do so all the more easily because of their guaranteed participation in discussions on aboriginal rights over the next five years at the national level.

As a result, there does not appear to be any need for a specific provision in respect of this problem.

With respect to international relations, the federal government retains the right to entertain "diplomatic" ties with **foreign** states. However, as was the case for Quebec, there is no obstacle to a Western NWT government establishing cultural and economic relations with other peoples.

A future Western NWT constitution might stipulate the interest of its peoples in international matters and affirm this interest applies specifically to other aboriginal peoples. The natives of the NWT would, as a result, dispose of a constitutional mandate to develop relations with other aboriginal nations, and with other nations as such. Such a mandate would be implemented in cooperation with the Government of Canada.

1. S.M. LIPSET, "Review of Democracy in Alberta", Canadian Forum, Toronto, 1955: NO. 34, P.196.
2. R.G. ROBERTSON, "The Canadian Parliament and Cabinet in Face of Modern Demands", I.P.A.C. Conference, , . . . .
3. Burdeau, op.cit. , Pp.152-53.
4. Duverger, op.cit. , P.188.
5. For the whole business of sordid inter-official horse-trading in federal provincial relations, the best study remains: R. SIMEON, "Federal Provincial Diplomacy", University of Toronto Press, 1972, 324 P.
6. D.J. ELKINS & R. SIMEON, "Small Worlds: Provinces and Parties in the Canadian Political Life", Toronto: Methuen, 1980, 211P.
7. P. DEANE, "Opinion", The Journal, Ottawa, November 20, 1979, P.6.
8. "Because of the discipline imposed by cabinet government in Canada, regional interests cannot express themselves as freely in the national Parliament as in the U.S." J.A. CORRY, "Constitutional Trends and Federalism", A.R.M. Lower Ed., "Evolving Canadian Federalism", Durham N.C.: Dukes University Press, 1958, Pp.120.
9. Section 86 bis of the Belgian Constitution (revised) & Coddin, op.cit. , Pp.88-89.
10. Sami, op.cit. , Pp.25-31.
11. A. Etzioni, "political Unification", op.cit. , Pp.158-184.
12. Against heavy provincial opposition, and in exchange for an awkward amending formula affirmed in S.38 of the Canada Act 1982, Mm. Trudeau and Chretien obtained a consensus on Section 23 affirming minority educational rights for francophones in all provinces.
13. It should be noted that the Belgian N= N+1 constitutional provision has led to appointment of Prime Ministers from the majority in Flanders comprising 57% of the population.
14. "The Federal Government of Switzerland", op.cit. , Pp.88-89.
15. J. BROSSARD, "L'Accession a la Souverainete et le Cas du Quebec", Montreal: P.U.M., 976, .758 passim.
16. M. Coven, op.cit.

17. G.P. MEANS, "Malayan Politics", London University Press, 1970, Pp. 355-77.
18. P.E. TRUDEAU, "Some Obstacles to Democracy in Quebec", "Federalism and the French Canadians", *op.cit.*, p.120.
19. Sections 58 to 68 of the B.N.A. Act (1867).
20. C.M. Drury, "Constitutional Development...", *op.cit.*, Pp.58-61.
21. On this theme, see J. SIMPSON, "Discipline of Power: the Conservative Interlude", Toronto: personal Library, 1980, 369 P. and F. MacDONALD, "The Minister and the Mandarins", Policy Options, September 1980, Pp.29-31.
22. J.L. GRANATSTEIN, "The Ottawa Men: Civil Service Mandarins 1935-57", Toronto: Oxford University Press, 1982, 233 P.
23. E.P. LABERGE, "L'Administration federale", L. Sabourin Dir., "Le systeme politique de Canada", *op.cit.*, Pp.153 passim.
24. Information obtained by the Federal provincial Relations Office and (partially and at times incorrectly) reproduced by various press reports in November 1979.
25. Bowie & Friedrich Ed., "Studies in Federalism", *op.cit.*, p.74.
26. G. ROBERTSON, "Principle and the Art of the Possible: Language and the Public Sector in Canada", Ottawa: September 10, 1982, P.6.
27. Means, *op.cit.*
28. P.E. TRUDEAU, "Federalism, Nationalism and Reason", "Federalism and the French Canadians", *op.cit.*, Pp.182-203.
29. "Building Nunavut", *op.cit.*, P.13
30. "Government of the Northwest Territories", *op.cit.* as of June 25, 1982.
31. C.J. FRIEDRICH & R.H. GUTTMAN, "The Federal Executive", "Studies in Federalism", *op.cit.*, P.74.
32. Interview by Maxwell Yalden, "News of the North", Yellowknife, October 17, 1979, P.A14.
33. G. Robertson, "Principle and the Art...", *op.cit.*, p.9.
34. S. Sami, *op.cit.*, p.52.



35. Section 6(?) of the Constitutional Bill (1981).
36. N.S. MORGAN, "Nowhere to Go", Montreal: I.R.P.P., 1981, 100 P.
37. "Proportional Overrepresentation", The Economist, London, January 20, 1979, P. 42.
38. M.W. SHARP, "Neutral Superservants", Policy Options, November 1982, "P. 32.
39. E. HEHNER, "Growth of Discretions - Decline of Accountability", & P. SILCOX, "The Proliferation of Boards and Commissions", W.D.K. KERNAGHAN, "Bureaucracy in Canadian Government", Toronto: Methuen, 1973, Pp.108-123.
40. "Wildlife Provisions of an Agreement in Principle", Frobisher Bay, Initialed by R. Mitchell and T. Suluk, October 27, 1981.
41. G.N.W.T., "G.N.W.T. Public Committees, Boards, Councils", Yellowknife, January 1982, 29 P.
42. "G.N.W.T. Public Committees, Boards, Councils", op.cit., P.22.
43. Section 35(3) revised as of March 16, 1983, through the Constitutional accord on Aboriginal Rights affirms that "treaty rights" are assimilated to land claims settlements rights extant or as may be acquired.
44. I.T.C., "The Land and Resource Elements of An Agreement in Principle", September 1982 (draft), 237 P.
45. M. Whittington, "Canada's North in the Eighties", op.cit., P. 59.
46. Simeon, op.cit.
47. R.M. Dawson quoted by D.V. SMILEY, "Canada in Question", Scarborough: McGraw Hill, 1976 (second edition) P.114.
48. "Building Nunavut...", op.cit., P. 32.
49. C.P. MALONE, "La politique quebecoise en matiere des relations internationales", Thesis: University of Ottawa, 1978, ...  
BEAUDOIN, "Origines et developpement du role international du Quebec", P. Painchaud Dir., "Le Canada et le Quebec sur la Scene Internationale", Presses de l'Universite du Quebec, 1977, Pp.441-470.
50. "Public Government for the People of the North", op.cit., P. 9

CHAPTER V:

REPRESENTATION **IN** COMMUNITY AND REGIONAL GOVERNMENT

V.1 Introduction

Many aboriginal peoples entertain justified suspicion of distant government implemented by distant experts. The story of the North has been government in absentia. The results have not always been pleasant to **contemp**orate over the years.

Hence, it is hardly surprising that the Dene Nation would **place** heavy emphasis on community government, its role and its **structures**.<sup>1</sup> In an interesting chapter of his report, the Special Representative presented many interesting recommendations for the promotion of community and regional government.<sup>2</sup> The suggestions derive from the conviction that many advantages could be gained from democratic discussion of local and regional problems at a humane and direct level. This is especially the case for many native residents of the Western NWT, used to band government and frank examination of common issues. Second, the problem of distance between communities precludes an exact commonality of concerns between different municipalities. The issues facing **Inuvik** differ from those facing **Fort Smith**.

In Canada, **municipalities** are constitutionally considered to be provincial creatures.<sup>3</sup> This is not the case in West Germany, for example, which has affirmed the existence of "city-states" (provinces) such as Hamburg. Nor is it the case in the U.S. where city governments are concerned with policies (eg. cable television development) denied to the provinces in Canada.

A deep interest in regional government has also developed over the years, particularly in the Western Arctic under the aegis of COPE. In this regard, the **Nunavut** Constitutional Forum has affirmed the concept of a Western Arctic Regional Municipality, with special stress on the implications of oil and gas development. WARM would be delegated "primary responsibility for:

- education;
- policing;
- health services;
- economic development;
- wildlife management;
- representation of regional interests within **Nunavut.**"<sup>4</sup>

In sum, there exists a strong need to examine with imagination and sensitivity the question of guaranteed **representation in local** and regional government as a means to ensure viable native participation in a Western NWT political system. There are no **nsurmountable** legal barriers to imaginative solutions.

## V.2 FACTORS

### V.2 (i)

The first factor is the requirement for guaranteed participation of aboriginal peoples in local and regional institutions. Such participation would be easier in some respects than in a mixed, complex territorial institutional network.

### V.2 (ii)

The second factor pertains to the priority to be established between representation in central Western NWT institutions and representation in local/regional bodies.

For representation to be meaningful and relevant, representatives have to have something to do and to be seen to be active. In this regard, the question of balance between community and Western NWT powers is of crucial importance.

In 1981, the Dene Nation recommended the following scheme for "community government":

"Community Government will have powers in the areas below subject to certain limitations. With respect to natural resources and services, community government will generally implement Denendeh-wide policies. With respect to finances and operations, the community governments will generally be given more powers than they now have.

(a) Natural Resources

Community Land use Planning and development  
environmental matters  
management of renewable resources  
management of non-renewable resources.

(b) Services

- health  
education  
social services  
recreation  
culture  
- policing  
information services  
entertainment  
economic development including employment  
- housing  
- beer and alcohol distribution

(c) Finances

community budget  
management of funds  
issuing of licenses

(d) Operations

water supply  
- sewage  
retail goods

- construction and maintenance of public buildings
- public grounds
- utilities
- roads and airstrips." <sup>5</sup>

Combined with Mr. Drury's 1979 recommendations concerning the devolution to communities of powers over education, housing and social services (recommendations made to divert attention from the division issue), one is obliged to ask the following question: <sup>6</sup> what would an aboriginal representative do and be seen to do in Western NWT institutions? Native leaders might be tempted to "stay at home" in a perhaps more comfortable socio-cultural environment,

This discussion paper is not designed to peruse the arcane complexities of local government per se. The problem of representation does, however, raise the issue of representation for what? It is to be noted that the **Nunavut** Constitutional Forum has adopted a very cautious approach respecting local and regional government, with the exception of the WARM proposal. <sup>7</sup>

V.2 (iii)

A third factor pertains to the necessity of minimal human and financial resources for local and regional representatives to deliberate effectively. The Northern Quebec example is illustrative of this apparent paradox. Sections 12 and 13 of the **James Bay and Northern Quebec Convention** affirmed the principle of municipal government above the 55th parallel, and the establishment of a **Kativik** Regional Government. The **K.R.G.** in particular has been hampered by lack of funding.

In addition, there are economies of scale to be gained in certain fields of public administration. Negotiations with large multinationals or Petro Canada on resource development and impact would tax, to say the least, existing expertise in most Northern communities. The fact of the matter is that large corporations or governments prefer dealing with smaller jurisdictions. <sup>9</sup>

This would appear to suggest asymmetrical, varying solutions to the problem of local government representation and action are called for. One set of arrangements could apply to one community or region, and another set to another area.

### V.3 RECOMMENDATIONS FOR DISCUSSION

Tentative recommendations for discussion pertain to the composition of community assemblies, the priority in relation to representation within Western NWT institutions, linguistic criteria for representation and the issue of regional government.

#### V.3 (i) General Priority

While an important, often essential problem, guaranteed representation in local government should not take precedence over the question of representation in central, territorial institutions of government. It would be a tragedy if a future Western NWT Assembly were to be transformed into a diplomatic, nonfederal conference, with different "envoys" acting under instructions from higher authority.

#### V.3 (ii) Community Government Composition

The method of electing community government councils should, as has been suggested<sup>10</sup> be the responsibility of the communities. In areas inhabited by aboriginal persons eligible for benefits under a Land Claims settlement, there should be guaranteed representation of such natives in relation to their demographic share of the resident population.<sup>11</sup>

The method of designating a head of community government should also be left to community consensus.<sup>10</sup>

V.3 (iii) Linguistic Provisions

As an incentive to foster effective aboriginal participation in community government, the language of work within a community council would be decided by that council.<sup>13</sup>

This measure could foster a revitalization of native languages in the Western NWT. A future Territorial Department of Cultural and Language affairs could subsidize translation costs where necessary.

V.3 (iv) Regional Government

A Western NWT government should not be in a position to impose regional institutions in the absence of a consensus among communities concerned.

The creation of regional institutions should result from agreement of community governments in areas involved. The organization of such regional institutions, should, in turn be a responsibility allocated to community governments, with due respect for certain Western NWT standards.

V.4 DISCUSSION OF RECOMMENDATIONS

None of the above recommendations would appear open to severe controversy, except perhaps explicit recommendation (i) pertaining to representation priorities. Members of the Western Constitutional Forum might not want to avoid the principle that strong community government depends, in turn, on strong Western NWT government. If focus on Western NWT representation is diverted, community representatives could find themselves in direct dialogue with federal officials, a situation which they have come to regret in the past.

1. "Public Government for the People of the North", *op.cit.*, Pp.13-14.
2. "Constitutional Development...", *op.cit.*, Recommendations 4.1-4.44, Pp.43-56.
3. Section 92(8) endows the provinces with *exclusive* legislative power over "municipal institutions" in the British North America Act(1867).
4. "Building Nunavut", *op.cit.*, P.21.
5. "Public Government for the People of the North", *op.cit.*, P.13
6. "Constitutional Development...", *op.cit.*, pp. 44-47.
7. The N.C.F. ("Building Nunavut", *op.cit.*, P.22) declares "it would be simpler to create a Nunavut government and then work out the forms which local and regional government might take. ..."
8. Makivik Corporation, "Brief to the Standing Committee on Indian Affairs and Northern Development", Kuujuak, March 20, 1981, with appendices.
9. The NWT Assembly Report on Division of the NWT (1981, Pp. 79-80) refers to the "need for outside expertise" and the sheer problem of scale.
10. C.M. Drury, "Constitutional Development...", *op.cit.*, P. 48 : "Public Government for the People of the North", *op.cit.*, P.14.
11. Mr. Drury (*ibid.*) recommended proportional representation for band council members in common local institutions.
13. "constitutional Development...", *op.cit.*, P.48.



CHAPTER VI:  
ADMINISTRATION OF JUSTICE

VI.1 THE PROBLEM

Members of the W.C.F. would want to consider to what extent a future Western NWT constitution should affirm participation of Dene and Inuit in the judiciary power through recognition of customary law.

VI.2 INTRODUCTION

Many countries in the world have affirmed the principle of recognizing traditional legal standards and procedures.<sup>1</sup>

In Canada, the most striking example is supplied by the integration of traditional French customary law (the "civil law" tradition) in the Canadian legal system. The Quebec Act of 1774 affirmed the right of French subjects of the King to retain their "Paris customary" legal system. The B.N.A. Act (1867) affirms special status for Quebec in its civil law tradition.

These provisions have resulted in strong Quebec representation within the Supreme Court. At the moment, the Supreme Court is composed of nine members, three of which must be conversant in the civil law tradition. In recent years, and because of the duality inherent in the Canadian legal system, various proposals have been presented with a view to confirming and increasing Quebec representation within the Supreme Court.

In 1978, the federal government suggested that the Supreme Court membership and Quebec representation therein be expanded, whereas in 1979, the Task Force on National Unity recommended a bi-national Court with five Quebec members out of 11. In 1980, the provincial Liberal Party of Quebec

outlined a novel concept whereby constitutions' disputes would be examined by a "dualist bench" (half common and half civil law experts) at the request of one or more parties to litigation.<sup>3</sup>

During the summer of 1980, governments engaged in the constitutional revision process reached a consensus to increase Quebec representation in the Supreme Court from three to five members.<sup>4</sup> This consensus crumbled during the First Ministers' conference from September 8 to September 13, 1980, and was not part of the November 5, 1981 constitutional agreement from which Quebec was excluded. However, the Constitutional Bill (1981) provided Quebec with a veto over "the composition of the Supreme Court of Canada".<sup>5</sup>

In the Northwest Territories, many Dene and Inuit avoid the formal justice system in favour of traditional methods of working out disputes. One area which has caused contention is the family relations field, eg. the recognition of Inuit adoptions. Thus, the Dene Nation called for special Denendeh jurisdiction over "family relations" and the recognition of such practices as "the traditional Dene method of divorce."<sup>6</sup>

The problem in the Western NWT is complex. Among its different facets: the decision to legislate or not in respect of customary law; the creation of alternate legal avenues of appeal; the appointment of Court officials; the legal affirmation of informal methods of resolution of disputes; etc. The question will be further affected by probable attempts by governments and representatives of aboriginal organizations to determine the administration of customary law as a collective right.

### VI.3 POSSIBLE OPTIONS

#### VI.3 (i) No Explicit Provisions

No legislation or Western NWT constitutional provisions would refer to the question of customary law and the representation of aboriginal persons in an overall Western NWT legal system.

#### VI.3 (ii) The Need for Further Review

Because of the complexities implied in examining native participation in the legal process the members of the Western Constitutional Forum would further review the general problem of customary law.<sup>7</sup>

#### VI.3 (iii) Some Definite Provisions

A Western Arctic constitution would affirm the integrity and applicability of customary law, including in the area of family relations. Guaranteed representation for aboriginal leaders in legislative and executive bodies could lead to legislation (depending on negotiations with the federal government) and administrative steps to give substance to general constitutional provisions.

The W.C.F. might further wish to foster the codification of traditional legal precepts and consider the establishment of an alternative court system. In the latter case, the appointment of judges and officials would be a prime area of concern. Or, the W.C.F. might specify a common avenue of appeal, with mandatory aboriginal representation on the bench at the request of one of the parties to litigation.

#### VI.4 DISCUSSION OF THE OPTIONS

While option (i) - no measures - presents many disadvantages in the context of furthering the **application of customary law in actual** terms, it does present some advantages. In particular, the danger that hasty codification of customary law would be feasible, and that Dene or Inuit legal traditions could be diluted or distorted, particularly in a common appeal system.

Option (iii) - immediate measures - presents advantages providing aboriginal representatives occupy meaningful functions in the legislative and executive branches of government. It would reflect the urgency of the problem and legally confirm the pluralism of Western NWT legal values and methods. On the other hand, option (iii) is not devoid of disadvantages, including the problem of erosion of customary law through codification and hasty formal application. **In** addition, option (iii) assumes that natives and non-natives would actually, in most cases, prefer a formalized system and the recourse thereto during litigation over contentious matters.

Option (ii) in the present circumstances (further review and reflection) does not particularly stimulate the mind. However, it does reflect the complexity of the customary law problem and would also correspond to the present N.C.F. attitude in **respec** of **Inuit** law. The administration of justice constitutes a highly brittle and delicate function: it may require some delay to arrive at firm **conclus**ions.

1. "Building Nunavut", *op.cit.*, P. 23.
2. Section 94 concerning uniformity of laws in three provinces and Section 98 relating to the appointment of Judges in Quebec.
3. Canada, "Constitutional Reform: the Supreme Court of Canada", Ottawa: Canadian **Unity Information** office, 1978; "A Future Together", *op.cit.*, P. 83; "A New Canadian federation", *op.cit.*
4. Ministry of Intergovernmental Affairs, "Dossier Constitutionnel", Quebec: August 14, 1980, P. 3 of the section pertaining to the Supreme Court.
5. Section 41(d) stipulates unanimous agreement among governments to amend certain existing arrangements, including the use of French and English and the composition of the Supreme Court.
6. "Public Government for the People of the North", *op.cit.*, P. 7.
7. This was the solution adopted in May 1983 by the Nunavut Constitutional Forum in respect of Inuit customary law ("Building Nunavut", *op.cit.*, P. 23).

## CONCLUSIONS

On the assumption that the organization and structuring of community and regional government will not take precedence over issues of central Western NWT institutions, we would suggest a ranking of main issues to be decided by members of the Western Constitutional Forum in coming months.

First, we would suggest a first priority list, or phase 1 list, composed of the single most important and - at times intractable - problems. This list could contain five items:

- (i) The single most important problem pertains to representation in a first chamber. The most important questions include the acceptability of a minimal 30% guaranteed share of seats for aboriginal peoples in the coming years. A residency requirement of at least two years is worthy of attention, as is the issue of regional vs. demographic representation, especially if it is decided to allocate a low percentage of seats for guaranteed aboriginal representation.
- (ii) **In** our opinion, the second main problem pertains to guaranteed representation in Cabinet. Regardless of the arbitrary options presented in Chapter IV, the very principle of guaranteed representation for native representatives in Cabinet has to be debated at length. Once the principle has been accepted, technicalities can easily be devised along lines suggested or other models.
- (iii) Should members of the Western Constitutional Forum spend time and energy focusing on prospects for a second chamber (or Senate)? The above two items, and their resolution, will determine what focus should be applied. The fact of the matter is that second chambers are strange and often ineffective animals, except in exceptional circumstances, eg. the U.S.

- (iv) It is recommended that the W.C.F. concentrate, if necessary, on the concept of an aboriginal chamber within a public chamber set out in Chapter III (section 3). Such a mechanism would forge unity among aboriginal representatives, perhaps divided by partisan lines, and provide veto powers regardless of numbers involved.
- (v) Guaranteed representation in the public service is often neglected when considering the sharing of power among different peoples within the same polity. It is an essential area. Suggestions for moderate but increasing quotas and language as an important criterion could be discussed.

A second priority list would contain some four items. These relate to aboriginal participation in the Western NWT amending process, the recourse to referenda and limits thereto, the use of language as an instrument of representation and limits thereto, and the whole issue of open government in systems inherited from Canadian practitioners often obsessed by secrecy.

Both the above lists are arbitrary. However, our basic guidelines might provide some assistance in defining better lists. In particular, the W.C.F. will want to weigh the implications of party politics. They will want to stress the duties of future representatives, either in the direction of a social consensus on development, or as delegates of a distant federal power. They will be encouraged by the fact the Canadian tradition condones flexibility and attention to ethnic distinctiveness.

This constitutes an exciting venture. Constitution building is not an easy task, nor devoid of complexity. But its results can be historic and give rise to "the mythology", "the necessary myths" which will bind different peoples and regions over time.<sup>1</sup>

1. F. McDONALD, "The Formation of the American Republic 1776-1790", Baltimore: Pelican, 1972. P. (i).