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# Aboriginal Peoples and Constitutional Reform

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## ABORIGINAL PEOPLES AND CONSTITUTIONAL REFORM: WHAT HAVE WE LEARNED?

David C. Hawkes

Phase Three  
Final Paper

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What Have We Learned?

*David C Hawkes*

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## CONTENTS

v	Preface
ix	Acknowledgements
xi	Abstract
1	Chapter 1- Introduction
3	Chapter 2- Background
9	Chapter 3- Assumptions Underlying the Negotiations
17	Chapter 4- Major Issues
25	Chapter 5- The Participants' Views: Retrospective A. The Negotiation Process B. The Constitutional Amendment
37	Chapter 6- The Participants' Views: Prospective A. The Negotiation Process B. The Constitutional Amendment
49	Chapter 7- The Participants' Views: Impact of the Meech Lake Accord
53	Chapter 8- New Policy Directions
59	Chapter 9- Summary
67	Appendix A. Interview Questions
69	Appendix B. Interviewees
71	Publications in this Series

## PREFACE

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Ten years have passed since aboriginal rights and constitutional reform first appeared on the national political agenda. It did not occupy the centre stage, however, until the early and mid 1980s. It was then that section 37 of the *Constitution Act, 1982 (as amended)* required the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." The First Ministers' Conferences on Aboriginal Constitutional Matters which ensued, and the many meetings of senior officials and government ministers which preceded them, focussed on the task of making constitutional provisions for aboriginal self-government.

Given the importance of this subject, and the lack of information on it, the Institute of Intergovernmental Relations launched a research project on "Aboriginal Peoples and Constitutional Reform" in the spring of 1984. Phase One of the project responded to concerns that emerged at the outset of the constitutional negotiation process. As indicated by its title, "Aboriginal Self-Government: What Does It Mean?" Phase One examined various models, forms and proposals for aboriginal self-government. This included an exploration of the citizenship rights of aboriginal peoples, the experience of aboriginal self-government in other nations, and a review of Canadian developments over the past few years. The results of these investigations were compared to the positions taken by different groups participating in the constitutional negotiations, in an effort to identify areas of emerging conflict and consensus. These findings were elaborated in five Background Papers, a Discussion Paper, and a Workshop, which was held two months prior to the 1985 First Ministers' Conference (FMC).

Phase Two of the project, entitled "Aboriginal Self-Government: Can It Be Implemented?" responded to concerns which emerged later in the negotiations. The research question was double-barreled: it examined how self-government could be "implemented" in the constitution, and how it could be implemented "on the ground", once agreements had been reached. Initially, this phase of the project focussed on arrangements for the design and administration of public services by and to aboriginal peoples. In part, this was a reaction to events which occurred in the negotiations during 1985, when several governments announced

their intention to pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution. This became known as the "bottom-up" approach, a sharp contrast to the proposal to entrench aboriginal self-government in the constitution, and then to negotiate individual agreements (the "principles first" approach). The result was that, in addition to multilateral constitutional negotiations at the national level, negotiations outside the constitutional forum began on a bilateral or trilateral basis, at the local, regional and provincial/territorial levels. As a result, the research examined the practical problems in designing mechanisms and making arrangements for implementing self-government agreements.

Later in Phase Two the focus shifted to the search for a constitutional accommodation in 1987, anticipating the return to deliberations in the multilateral constitutional forum, the FMC. Research concentrated on exploring the major concerns which had been voiced regarding the recognition of the right to aboriginal self-government in the constitution, and the implications for federal, provincial and territorial governments. Phase Two produced ten Background Papers, two Position Papers from national aboriginal organizations, a Discussion Paper, a Bibliography, and Workshop Reports from two conferences held during this time. All of the publications from the complete research project are listed at the back of this book.

Subsequent to the final First Ministers' Conference in 1987, and with it, the end of Phase Two of the project, the Institute's Advisory Council expressed a strong wish to see a follow-up study which would be both retrospective and prospective in character, with a view to uncovering some lessons for future negotiations. As a result, Phase Three was launched in 1987 with a mandate to review, in a comprehensive fashion, the section 37 process on aboriginal peoples and constitutional reform. The findings from this final phase are contained in this book, which explores the negotiation process, how it was structured, and the issues that emerged during it. The monograph also looks at the assumptions and frameworks that underlay the negotiations, many of which the parties brought unwittingly to the table. Both past problems and new opportunities are addressed in terms of the negotiation process and the constitutional amendment. The study concludes with an analysis of the impact of the Meech Lake Accord and with some observations on the new policy directions emerging in the field of aboriginal affairs.

The Institute of Intergovernmental Relations wishes to acknowledge the financial support it received for Phase Three from the Dormer Canadian Foundation, the Government of Canada (through the Canadian Studies Directorate of the Department of the Secretary of State), the Government of Ontario and the Government of Saskatchewan.

The author, David C. Hawkes, is currently a Visiting Professor in the School of Public Administration at Carleton University. In addition to being the former

Associate Director of the Institute, he was also the principal researcher, author and project manager for all phases of the "Aboriginal Peoples and Constitutional Reform" research project.

Ronald L. Watts  
Director  
Institute of Intergovernmental Relations  
June 1989

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I am greatly indebted, as well, to the many representatives from aboriginal peoples' organizations and federal, provincial and territorial governments whom I interviewed during the course of my research. All gave freely of their time and were thoughtful in their responses and comments. Most retain a passionate interest in this field in general and in this "unfinished business" in particular.

*David C. Hawkes*

## ABSTRACT

As a result of the *Constitution Act, 1982* (as amended), a series of conferences were held on the subject of aboriginal peoples and constitutional reform. These constitutional negotiations, highlighted by First Ministers' Conferences in 1983, 1984, 1985 and 1987, failed to reach an accord on the crucial subject of aboriginal self-government. This study examines the assumptions underlying the negotiations and the key issues that emerged. The negotiation process and the various attempts at draft amendments are explored, both in terms of past experience and new possibilities, with a view to uncovering lessons for the future. The impact of the Meech Lake Accord is analyzed, as well as the direction of government policy since the standoff in 1987. Some concluding observations are made on why an accommodation was not achieved and on how prospects might be improved in forthcoming negotiations.

## SOMMAIRE

*La Loi constitutionnelle de 1982 (sous sa forme modifiée) a suscité la tenue d'une série de conférences portant sur les peuples autochtones et la réforme constitutionnelle. Les négociations constitutionnelles afférentes aux conférences des premiers ministres de 1983, 1984, 1985 et 1987 n'auront pas permis la conclusion d'un accord sur la question cruciale de l'autonomie gouvernementale des Autochtones. La présente étude vérifie les hypothèses sous-jacentes à ces négociations ainsi que les problèmes-clés qui y furent soulevés. De plus, l'auteur examine les mécanismes de la négociation et les diverses tentatives de projet de modification constitutionnelle—passées et présentes—avec le souci d'en tirer des enseignements pour l'avenir. Il est aussi question des effets de l'Accord du lac Meech et de l'orientation des politiques gouvernementales au Canada au sujet des droits des Autochtones, depuis l'impasse constitutionnelle de 1987. En conclusion, l'auteur tente d'abord d'expliquer l'absence de compromis réalisé jusqu'à maintenant en cette matière. Il suggère également l'adoption d'une approche différente en regard des négociations à venir.*



## 1 INTRODUCTION

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In March of 1987, on the floor of the National Conference Centre in Ottawa—and televised live across the country—aboriginal leaders, Canadian Premiers and the Prime Minister of Canada failed in their attempts to reach an agreement on constitutional reform. At issue was the recognition, in the Canadian constitution, of the aboriginal right to self-government. The First Ministers' Conference on Aboriginal Constitutional Matters of 1987 was the final of four such meetings mandated by Section 37 of the *Constitution Act, 1982* (as amended). The Conference brought to a close, at least temporarily, a chapter of Canadian political turmoil on aboriginal rights and constitutional reform which began a decade earlier. It is unclear, at this point in time, when that chapter might be reopened, or a new chapter begun. Nor is it clear, should this occur, where participants might begin afresh.

The time is ripe for some consideration of why an accommodation was not achieved in the past, and how prospects might be improved in future negotiations. As the title of this monograph indicates, the attempt here is to learn from past mistakes and to identify lessons for the future. This is no easy task in ideal circumstances. It is made more difficult by both the length of these negotiations and the number of parties (17) to them. What is a profound lesson to one negotiator may be of trifling significance to the next. What may seem to be a crucial flaw at one point in the negotiation process may appear unimportant a few years later. Nevertheless, there are patterns or trends that do emerge and insights that are corroborated.

The book is organized in the following manner. Chapter Two provides the background to the negotiations, placing them in their recent historical perspective. The assumptions underlying the negotiations, and the operational frameworks used by the negotiators are examined in Chapter Three. In Chapter Four, the key issues of substance, along which the major cleavages and lines of argument were formed, are explored. Chapters Five and Six examine the process of constitutional reform and the proposals for a constitutional amendment on aboriginal self-government. In Chapter Five, analysis is focussed on the path and the problems which confronted both the negotiation process and the various attempts at a constitutional amendment. Chapter Six looks to

possible future processes, and to new opportunities for a constitutional amendment. If and when negotiations begin anew, how could the process be designed to be more effective? What would be the most promising approach to a constitutional amendment? In Chapter Seven, the impact of the Meech Lake Accord is investigated. Chapter Eight comments on what new policy directions now appear to be on the broader policy horizon regarding relations between aboriginal peoples and Canadian governments—that is, in addition [to developments on the constitutional front, The final chapter provides summary observations on what we have learned.

Information is drawn from many sources. The verbatim transcripts of the First Ministers' Conferences were reviewed, with particular attention to the 1987 Conference. The positions of each of the parties to the negotiations on the various issues are thus tracked over time. A survey was also conducted of the Canadian print media for the year 1987. By far the most useful information, however, came from interviews with negotiators from all but two of the 17 parties to the constitutional negotiations. The central chapters of this study rely heavily upon these interviews, which have greatly influenced the format of this book. Interviewees were asked about: the assumptions of the various parties to the negotiations; the major issues on the negotiation table; the efficacy of the negotiation process itself, and how a new and improved process might be designed; the proposals for constitutional amendment that emerged, and what the most promising approaches might be for the future; the impact of the Meech Lake Accord; and the future of government policy in the field of aboriginal affairs more generally (see Appendices for details on interview questions and those interviewed). In all, a total of almost 40 persons were interviewed, in person, for an average of 90 minutes to two hours. With the process in a sense behind them, most interviewees spoke with candor. Indeed, for a growing number of those involved in the negotiations, the process is behind them in a very literal sense, since [they have moved on to other areas. Tracking down these individuals proved very worthwhile, in that their current "distance" from constitutional or aboriginal issues allowed them to speak more freely. In granting these interviews, respondents were assured that there would be no attribution of remarks in this document, and that they were being interviewed in their personal capacity only and not as a representative of their government or organization. Nor would their views be taken as official government or organization policy.

We turn now to provide some background to this study, and to situate the negotiations in their recent historical context.

## 2 BACKGROUND

The highly publicized and often acrimonious constitutional negotiations on aboriginal rights of the past decade cannot be understood outside their historical context. A former round of negotiations had ended at the Victoria Conference in 1971. These negotiations, frequently referred to as the "Victoria round", had addressed patriation of the constitution, a limited charter of rights, and the adoption of an amending formula for the constitution. Proposals for constitutional reform prior to 1971 had been designed, in part, to respond to the "Quebec question". At that time, the subject of aboriginal rights was not on the constitutional agenda. The amending formula, for example, had provided for the approval of any province "having or having had 25 per cent" of the population of Canada, an implicit reference to the falling demographic influence of Quebec in the federation at the time. Negotiations had broken down when the Quebec premier of the day, Robert Bourassa, could not bring his party and his people to support the proposed amendments.

The beginning of the next round of negotiations can be placed at March of 1976, when then-Prime Minister Pierre Trudeau proposed a draft proclamation on constitutional reform to the ten provincial premiers.<sup>1</sup> In the fall of 1976, however, the political landscape changed dramatically. The Parti Québécois was elected to power in Quebec, and promised to move that province toward independence from Canada. With the heightened concern for national unity which followed, a renewed interest developed in constitutional change.

The "battle for the hearts and minds" of Quebecers intensified when the federal government introduced its new proposals on constitutional reform, entitled "A Time for Action", and its companion legislation Bill C-60, in 1978. The federal government proposed that reform take place in two phases. In the first phase, matters would be addressed that the federal government alone could deal with. A second phase would include matters that required provincial consent. A new development appeared in Bill C-60 under the first phase, a

<sup>1</sup> For a fuller treatment of these constitutional negotiations, see, for example, Roy Romanow, John Whyte and Howard Leeson, *Canada...Notwithstanding* (Toronto: Carswell/Methuen, 1984); and Richard Sheppard and Michael Valpy, *The National Deal* (Toronto: Fleet Books, 1982).

proposed Charter of Rights and Freedoms. Although it would apply only to the federal government, it would allow the provincial governments to opt in at their discretion. Bill C-60 also contained a provision which attempted to shield certain aboriginal rights from the general application of the proposed Charter. Aboriginal rights, by now a rallying cry for aboriginal peoples across Canada, were to be addressed in the second stage.<sup>2</sup>

Following strong expressions of concern from many provinces on Bill C-60, Prime Minister Trudeau attempted a new round of federal-provincial negotiations, beginning with the First Ministers' Conference of October 31 to November 1, 1978. A Continuing Committee of Ministers on the Constitution was struck to pursue several agenda items, co-chaired by Saskatchewan Attorney - General and Minister of Intergovernmental Affairs Roy Romanow and the federal Minister of Justice, Otto Lang and later Marc Lalonde. It was the task of the CCMC to negotiate "best effort drafts" on the various agenda items among the eleven parties at the table, and to bring these drafts to the First Ministers at the next First Ministers' Conference scheduled for February 1979. That conference, however, ended without agreement on any major agenda items.

By the time that Joe Clark was elected Prime Minister in May 1979, native people in Canada were already engaged in debate on constitutional reform. The proposed Charter of Rights and Freedoms, introduced by Prime Minister Trudeau, had aroused in aboriginal peoples a concern for the constitutional protection of their indigenous, collective rights. It was during the Clark government, however, that native people first received formal recognition as legitimate players on this stage. A meeting was held in the fall among the CCMC co-chairmen (Romanow and federal Minister of State for Federal-Provincial Relations, Bill Jarvis, who replaced Marc Lalonde) and the "Native Presidents". The Native Presidents were the leaders of three national aboriginal organizations at that time: the National Indian Brotherhood, the Inuit Committee on National Issues, and the Native Council of Canada; and were led respectively by Noel Starblanket, Charlie Watt (with Michael Amarook), and Harry Daniels. At this meeting Bill Jarvis gave a commitment to meet with native leaders on constitutional matters which directly affected them, fulfilling a promise first made by the former Trudeau government. It was the first step toward a formalized role for aboriginal peoples in the process of constitutional reform.

The Clark government was short-lived, and with the re-election of the Liberals under Pierre Trudeau in February 1980, the approach of the federal government was fundamentally altered. Despite the long term (and some would argue strengthened) centralist thrust of the restored Liberal government, the avowed objective in the lead-up to the referendum in Quebec on sovereignty-

<sup>2</sup> Whyte and Leeson, op. cit., Chapter 1.

association was to put in place a renewed federalism to respond to the forces for change in Quebec and elsewhere. The Trudeau government thus set out to negotiate renewed federalism with the provinces almost immediately following the victory of the federalists in the May 20, 1980 referendum. However, the First Ministers' Conference on the Constitution held in September of 1980 failed to reach agreement, an outcome which appeared to be anticipated, in a strategy prepared for the Prime Minister by his senior advisor Michael Kirby, and contained in a memorandum, leaked to FMC delegates at the outset of the Conference. The failure of the conference provided the rationale for unilateral federal government action.

That action came in October 1980 with a new federal proposal for constitutional reform. The proposal contained three sections which were to address the concerns of aboriginal peoples. A proposed Section 25 provided for the non-derogation of aboriginal rights with respect to the Charter of Rights and Freedoms (that is, the Charter would not detract from aboriginal rights), thus shielding collective aboriginal rights from the unintended application of individual Charter rights. A proposed Section 34 would entrench aboriginal and treaty rights, and a proposed Section 37 provided for one further meeting of First Ministers and aboriginal leaders on constitutional matters. The latter section was a last minute addition, a result of confusion as to how to define aboriginal rights in the constitution.

Most provinces opposed the federal government's unilateral approach. In addition to launching court actions, the "gang of eight" premiers (a reference to the eight opposing provincial premiers) proposed their own patriation plan. They also lobbied for their cause in Britain.

They were not alone in London. The National Indian Brotherhood (NIB) was already there to plead for the special relationship between Indian people and the Crown (as represented in the Queen), a relationship which it thought was endangered by the federal proposals. The federal government was deeply involved as well in the "Battle of Britain".

Opposition by the "gang of eight" on the legal front led to a series of court challenges, initiated by the Governments of Manitoba, Quebec and Newfoundland, to the constitutionality of the federal unilateral action. The decision on the reference to the Supreme Court of Canada on the federal government's unilateral approach (*Reference re: The Amendment of the Constitution of Canada*) came on September 28, 1981. The Court said that while the federal action was legal in the strictest technical sense, it offended constitutional convention. By convention, a substantial measure of provincial consent was required on matters affecting federal-provincial relations before such a constitutional amendment could be forwarded to Westminster.

The balanced conclusion of the Court had the effect of forcing both Prime Minister Trudeau and the premiers back to the bargaining table. A First Minis-

ters' Conference on the Constitution was held in November of 1981 in a last-ditch attempt to reach an accord. The conference, initially scheduled for two days, stretched to four. On November 5, an accord was reached among the federal government and nine provinces, excluding Quebec. Kept out of the negotiations the night before, and opposed to key elements of the accommodation, Quebec Premier René Lévesque felt betrayed by his colleagues. The Government of Quebec would withhold its consent, the accord would remain partial, and the accommodation incomplete.

Public support for the new Canadian Charter of Rights and Freedoms was strong, and the First Ministers' Conference was an historic moment for many Canadians. Although the 1981 FMC was viewed as a success by many, two groups of Canadians—aboriginal peoples and women—felt that their rights were not adequately protected in the accord. The rights of aboriginal peoples, which were contained in earlier draft amendments, had been deliberately excluded at the last minute. In large part due to the extensive lobbying by aboriginal organizations in London, governments had become more concerned regarding the scope and meaning of aboriginal rights. Uncertainty, especially relating to possible implications of aboriginal rights upon provincial legislative jurisdiction, led to the deletion of section 35, that section containing aboriginal rights.<sup>3</sup> Canadian women were concerned that the gender equality clause (section 28), guaranteeing rights and freedoms equally to male and female persons, could be overridden by section 33, the legislative override provision or “notwithstanding” clause.

Only through the powerful combined lobby of Canadian women and aboriginal peoples in the weeks following the 1981 FMC were these rights more fully protected in the new constitution at the time of patriation. The aboriginal rights clause was reinserted, and gender equality under section 28 was made freestanding, and hence preeminent and above fundamental freedoms, democratic rights and racial equality. Even then, the word “existing” was placed before the words “aboriginal and treaty rights” in Section 35 (those rights to be recognized and affirmed), a move that cast a shadow over the true meaning of the section.

On April 17, 1982, the *Constitution Act, 1982* was proclaimed, and the Canadian constitution was finally patriated. Three sections of the Act related directly to aboriginal peoples. Section 25 guaranteed that the Canadian Charter of Rights and Freedoms will not

...abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including:

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

3 Romanow, Whyte and Leeson, op. cit., pp. 212-214. •

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Section 35 stated that:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Section 37 provided for the convening of a First Ministers' Conference on Aboriginal Constitutional Matters by April 17, 1983,

...including the identification and definition of the rights of those peoples to be included in the Constitution of Canada...

and for the participation of aboriginal peoples' representatives and delegates from the two territorial governments in those discussions. The seed of what was to become the Section 37 constitutional negotiation process was planted here.

The Conference was held in March of 1983, and an accord was reached among the parties on four topics: a process for negotiating the definition of aboriginal rights; sexual equality of aboriginal persons; consultation on constitutional amendments affecting aboriginal peoples; and the protection of future and existing land claims settlements. The result was the first amendment to the newly -patriated constitution. As a result of the 1983 FMC, Section 25 (b) was amended to read:

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired,

To Section 35, two new subsections were added: one included existing and future land claims agreements in the definition of “treaty rights”; another guaranteed aboriginal and treaty rights equally to male and female persons. The first would have the effect of providing existing and future land claims settlements with the same constitutional protection as treaties. The second would provide gender equality in aboriginal and treaty rights. Section 35 was amended to provide for a First Ministers' Conference to be convened, including the participation of representatives of the aboriginal peoples of Canada, before any amendment is made to the constitution (including subsection 91.24, the federal head of power over “Indians and the lands reserved for Indians”) which directly affects aboriginal peoples.

Section 37 was amended as well. Reference to the “identification and definition” of the rights of the aboriginal peoples of Canada, contained in this section in 1982, was deleted (“constitutional matters that directly affect” aboriginal peoples took its place). In addition, a provision was inserted that provided for at least three more First Ministers' Conferences on Aboriginal Constitutional Matters—in 1984, 1985 and 1987. It was clear, even then, that identifying

and defining aboriginal rights, in a manner acceptable to both federal and provincial governments and aboriginal peoples, would be a difficult task. This became known as the Section 37 process on constitutional reform, and is the subject of this study.

Thus, during the period from 1983 to 1987 four First Ministers' Conferences on Aboriginal Constitutional Matters were held. Only the first, in 1983, produced an accord and a subsequent constitutional amendment. As the analysis will show, to some this represented "failure", while to others it was yet another step along the road to mutual accommodation.

From 1984 onward the focus was *on* aboriginal self-government. To the extent that there remains a focus in the spring of 1989, it is still there. The analysis begins with the assumptions that underlay the negotiations, assumptions that in part set the framework and determined the behaviour of the parties to the negotiations.

### 3 ASSUMPTIONS UNDERLYING THE NEGOTIATIONS

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Successful negotiations depend upon a range of shared goals and objectives. These, in turn, rest upon common assumptions regarding the negotiation process, and upon a broad, mutual framework of analysis. Symbiotic values and norms are also important, in that they underlie and influence not only the framework and working assumptions, but also the goals and objectives.

To date, there has been no examination of these matters as they pertained to the section 37 process regarding aboriginal peoples and constitutional reform. Since these considerations form the base upon which successful negotiations are built, they are an ideal starting place for our analysis. The difficulty of communication among the 17 parties to the negotiations leads one to believe that the root of some of the problems could lie here.

Accordingly, the first question in the interviews with participants in the process dealt with whether aboriginal peoples and governments were operating on different assumptions and using different frameworks (see Appendices for interview questions, and for the names of those persons interviewed, all of whom were directly involved in the negotiations). Almost all respondents answered in the affirmative with the exception of several federal officials, who were of the view that assumptions were widely shared throughout the negotiations. The interviews then went on to explore how those assumptions and frameworks were different, first examining those of federal and provincial governments, and second, exploring those of the aboriginal peoples' organizations at the negotiation table. As indicated in the responses of some interviewees, some of these frameworks changed during the negotiation period.

#### Underlying Assumption.. of Federal and Provincial Governments

A frequent response regarding the working assumptions of federal and provincial governments focussed on the constitutional amendments of 1982. Many respondents felt that those sections of the amendment package relating to aboriginal peoples were not well understood by governments, nor perhaps by aboriginal peoples. (The package was agreed to at the last minute by First Ministers after a very short discussion of its merits.) Elements of the package

were not thoroughly discussed, there were few preliminary meetings, and there was little agreement on what the terms of the amendment meant. Many governments considered the commitment [to be narrow in scope, while others interpreted it more widely.

Interviewees from both governments and aboriginal peoples' organizations spoke of governments being "backed into" this commitment, with the result that the commitment was not strong, and the understanding not deep. (It has been remarked by some participants, however, that the same could be said about the lead up to the Meech Lake Accord.) Several persons argued that as the section 37 process unfolded some governments became more committed, some became uncommitted, while others lost interest.

It followed that some respondents were of the view that governments were back at the negotiation table only because they were forced to be there by the section 37 constitutional amendment. This perspective was echoed by respondents from both government and aboriginal peoples' organizations, and felt most strongly with respect to the three most western provincial governments. These same interviewees thought that, by and large, most governments were looking to make only minor concessions, and to minimize legal and constitutional changes. It was just another policy issue for most, and the "bureaucratic agenda" was "to get rid of the problem".

A second theme which emerged regarding the underlying assumptions of federal and provincial governments focussed on political will. One assumes, in such a negotiation, that all parties want to reach an agreement. A question here was whether or not governments were negotiating in good faith. Opinion was varied on this matter. Many government respondents thought that governments were willing to compromise, to negotiate, and to accommodate, although they were less certain that the aboriginal peoples' organizations at the table were willing to move from their fixed positions. Governments were there to negotiate in good faith, "to go so far", but not to reach agreement at any cost. Governments were cautious, but not unwilling. Everyone wanted to reach agreement, but on their own terms. All preferred constitutional recognition and a political solution to one determined by the courts.

On the other hand, a significant number of respondents from both governments and aboriginal peoples' organizations thought that not all parties were seeking agreement, and that there were "spoilers" there from the beginning. For the most part, this perception was one held by provincial governments, particularly those in the West. In the view of some interviewees, some governments "just played out the clock", while others, secure in the knowledge that there was no chance of success, felt free to advocate far-reaching and fundamental constitutional changes. Some aboriginal respondents saw some provincial governments as unforthcoming, wanting to get out of the process as quickly and with as little damage as possible.

This view—that governments lacked political will—became stronger after aboriginal self-government became the major agenda item, and stronger still following the 1985 First Ministers' Conference, at which the federal government, seven provinces, and two aboriginal peoples' organizations had tentatively agreed to an amendment package and a political accord. The loss of interest following the 1985 FMC was explained, in part, by some respondents' perceptions that the federal government's interest had shifted to Quebec. Others felt that the entire section 37 process was "a bit unreal" without Quebec's full participation. Several respondents from aboriginal peoples' organizations said that they detected a change in the federal government's approach in the 1983-84 period. The approach, they argued, became one akin to labour negotiations, in which labour and management engage in trade-offs until such time as a deal is reached.

The new approach, in their view, was closely associated with the recent appointment of Dr. Norman Spector to the position of Secretary to the Cabinet Committee on Federal-Provincial Relations, the federal government's principal advisor on constitutional reform. Dr. Spector had moved to Ottawa from the Government of British Columbia, where he was involved in very public and controversial labour negotiations. The object of labour-management negotiations is to reach, through compromise, a common ground (albeit in this case the common ground was federal-provincial agreement), with costs being incurred on both sides. This approach, emphasizing compromise rather than inalienable rights, was thought to be inappropriate for the identification and definition of aboriginal rights in the constitution.

A third theme which emerged was even more fundamental in character. It addressed the underlying values, philosophies and normative frameworks of the federal and provincial governments. Were these basically "assimilationist" in orientation, were they "integrationist", or were they based on a concept of "co-existence"? An assimilationist perspective assumes that aboriginal persons will become fully a part of the dominant society, and that they will leave their traditions and lifestyles behind them while adopting "Canadian" values. The integrationist framework advocates that aboriginal peoples come into the "mosaic" Canadian mainstream, but while retaining their language and elements of their culture (e.g., perhaps through their own schools). The co-existence model assumes that aboriginal and non-aboriginal peoples can co-exist as equals within Canada, and that aboriginal peoples can retain their economic, political and cultural systems. While these concepts were not always directly evident in the negotiations, they nonetheless exercised an enormous underlying influence.

Perspectives on this theme varied widely. Many respondents noted the pervasive liberal democratic norms and values that underlie Canadian political culture, and how this focus on individual equality diminished the legitimacy of

group rights, including aboriginal rights. There would be widespread pressure, it was felt, to have the Charter of Rights and Freedoms apply, without exception, to aboriginal governments. Some government respondents argued that government assumptions were not assimilationist, while some of their colleagues thought that the policy frameworks of some governments were assimilationist in orientation. Others were of the view that governments were integrationist in perspective, for the most part. Respondents from the aboriginal peoples' organizations noted brief periods of integrationist thinking, but said that government programs were still operating under the "dead hand of assimilationist thinking", since there was as yet, no replacement in government for the assimilationist framework.

#### Underlying Assumptions of Aboriginal Peoples' Organizations

In sharp contrast to governments, aboriginal parties to the negotiations, according to many interviewees from both governments and aboriginal peoples' organizations, viewed the government commitment in the constitution regarding aboriginal rights in very broad terms. These initial high expectations were raised even further when the first FMC held under section 37 (in March of 1983) produced a constitutional amendment. This led to an expectation, according to respondents from the aboriginal groups, that an amendment on aboriginal self-government would be forthcoming in 1987. Aboriginal peoples saw the section 37 process as an opportunity to ratchet up their demands, according to some, so that they would never have to return to the pre-section 37 situation. In the view of some government respondents, the section 37 process became an "all or nothing" game for aboriginal peoples' organizations, wherein constitutional reform was seen as "next to God", and a way of obtaining, in one fell swoop, "dignity, rights and money".

This is not to suggest that the four aboriginal peoples' organizations shared identical assumptions. Respondents from both governments and aboriginal peoples' organizations were quick to point this out. Nevertheless, it is accurate to state that the aboriginal parties to the negotiations saw the commitment to constitutional change in broader terms, that they held higher expectations, and that they invested more in the process. They were, clearly, the largest stakeholders in the negotiation, since it was their rights that were at issue.

In this overview of broad and general assumptions held by aboriginal peoples' organizations, a second common element relates to the objective of education. Respondents from the aboriginal peoples' organizations saw the section 37 process as an opportunity to educate not only government leaders, but all Canadians. As one interviewee put it, it was an opportunity to "change the vocabulary of government-aboriginal relations". Or as Zebedee Nungak of the Inuit Committee on National Issues phrased it, it was an opportunity to "do

constructive damage to the status quo". It was also an opportunity to learn. Interviewees from both government and aboriginal parties noted that the section 37 process provided aboriginal peoples with an apprenticeship in federal-provincial relations and Canadian summit politics. It also exposed aboriginal leaders, some of whom were unaccustomed, to direct relations with provincial governments.

A second theme to emerge regarding the underlying assumptions of aboriginal peoples' organizations focussed on the perception of unwillingness on the part of aboriginal parties to the negotiations to negotiate, compromise, and accommodate. Most government respondents to the interview saw at least some of the aboriginal parties at the table as unwilling to negotiate. "They were not there to negotiate", one said, "but to get their rights, as they defined them, entrenched in the constitution . . . and rights, as we know, are not negotiable." To many government respondents, aboriginal people were not prepared to define their rights in any particular way. Aboriginal peoples would not move, they said, from their position on the inherent right of self-government. Moreover, this position became more entrenched, they argued, over time. There appeared, to government interviewees, to be more good faith among the aboriginal parties to the negotiations in 1985 than in 1987. As the 1987 FMC approached, they said, aboriginal parties became less interested in a "deal". This was attributed, in part, to political turmoil in at least one aboriginal organization, which forced the leadership to adopt a hard line for the sake of internal unity.

Other respondents, from both governments and aboriginal peoples' organizations, disagreed with this analysis. They argued that aboriginal leaders wanted agreement, and were willing to negotiate and to accommodate, but that they were fearful of government motives. Aboriginal peoples have already made an accommodation, some said.

There were also differences of opinion as to the underlying assumptions among each of the aboriginal peoples' organizations at the table. Some interviewees described the differences in terms of a "fractured aboriginal position", inferring that a common position was to be expected. The Assembly of First Nations was seen as the least conciliatory and least compromising. They simply stuck to their position, some said. "Could the AFN have accepted an agreement, any agreement?" questioned one government respondent. Others noted that the AFN did move from its fixed position in the negotiations (e.g., on the Aboriginal Bill of Rights containing 32 items). Respondents from both government and aboriginal parties noted the broad constituency of the Assembly, with its wide spectrum of political views, cultures, resources, languages, and regional identities. In their opinion, this made it too difficult, politically, for the AFN leadership to agree. In the view of some government respondents, the AFN leaders were driven to radical positions by Indian "hard liners" as a result. In

the view of some respondents from aboriginal peoples' organizations, the AFN was "not serious" about reaching an agreement, although it saw other useful purposes for the negotiations, such as teaching Canadians about aboriginal and treaty rights, or providing a national political platform for Indian chiefs.

Interviewees from both government and aboriginal parties to the negotiations were of the opinion that, among the aboriginal peoples' organizations at the table, the Native Council of Canada and the Métis National Council were more willing to negotiate. With the rights of the Métis under question and lacking a land base they had little to lose and perhaps a great deal to gain. The Inuit Committee on National Issues was often regarded as being "in the middle". To the Inuit, constitutional reform was one avenue among several on the road to self-government. If it became blocked, self-government could be pursued through land claims or the division of the Northwest Territories (creating a Nunavut homeland in the eastern Arctic).

A third theme to emerge regarding the assumptions of aboriginal peoples' organizations relates to trust ties between aboriginal peoples and governments, or more precisely, the lack thereof. In particular, government respondents noted the mistrust of government parties to the negotiations by the aboriginal parties. For example, one such interviewee pointed to the fear that governments would "play with the words" in the constitutional amendment. This was especially the case with provincial governments. Some explained this in terms of the lack of interaction between Indians and provincial governments. Provincial governments did not really "know about Indians" (given the special and constitutional relationship between Indians and the federal government), and aboriginal peoples were "used to fighting" provincial governments on such thorny issues as resource ownership and management.

Finally, what of the underlying values, philosophies and normative frameworks of the aboriginal organizations at the negotiation table? It cannot be overemphasized that neither governments nor aboriginal peoples' organizations can be analyzed as one single bloc. Certainly no aboriginal group advocated an assimilationist perspective, which assumes losing one's original cultural identity. However, some aboriginal groups, such as the Inuit Committee on National Issues, were of the view that an integrationist approach was the most desirable, making aboriginal culture and self-government part of the Canadian system. For many Indian First Nations, co-existence was the preferred goal, with the aboriginal people and the Canadian system existing side by side, presumably with more limited contact.

Shared goals and objectives, common assumptions, a mutual framework of analysis, and compatible values and norms—these materials form the base upon which successful negotiations are built. The base, in the case of negotiations surrounding the section 37 process, was weak indeed. Many goals and objectives were not shared. The commitment of several governments was both

narrow and low, while the understanding of most was poor. Aboriginal peoples' organizations took a broad view of the commitment in section 37, and had very high expectations about the outcome. In addition, they pursued objectives, such as educating the Canadian public on aboriginal rights, which were clearly of secondary importance to the governments involved. It remains doubtful that all parties to the negotiations wished to see an agreement reached. Individual and collective rights clashed, and a mutual framework of analysis failed to emerge. One cannot reconcile a framework rooted in compromise, conciliation and accommodation with one grounded upon inalienable and immutable rights and principles, for which compromise is anathema.



In this chapter, the key substantive issues that prevented agreement from being reached will be identified. This analysis is based on three sources of information: the verbatim transcripts from the section 37 First Ministers' Conferences on the Constitution, particularly the 1987 FMC; interviews with persons involved in these negotiations from governments and aboriginal peoples' organizations; and a survey of the Canadian print media in 1987. Although the conclusions to be drawn from these sources often serve to reinforce each other, it will also become clear that there are differences on the issues themselves and often in terms of their respective priorities.

When asked in the interview as to the main issues which prevented agreement from being reached, respondents advanced a plethora of reasoned arguments. Some of these were prominent in the transcripts and print media, while others were not. By far the most common responses to this question in the interviews were "financing" (and the related issue of "federal/provincial responsibility") and the "inherent right to aboriginal self-government" (also referred to as the "sovereign" or "pre-existing" vs. "contingent" or "explicit" right to aboriginal self-government).

At issue in the "inherent right" controversy was whether the right to aboriginal self-government was a pre-existing right of aboriginal peoples, and thus beyond the reach of federal and provincial governments, or whether this right was one that must be recognized by federal and provincial governments, the exercise of which is conditional upon their agreement. If it were the former, the right would be embedded in the constitution, and aboriginal governments would be a constitutionally recognized third order of government in Canada. If it were the latter, federal and provincial governments would protect the principle of aboriginal self-government in the constitution, but it would be given definition, or form and substance, through subsequent negotiations.<sup>1</sup>

Other responses were also closely associated with these two predominant answers. For example, with respect to "financing", there was the issue of the

<sup>1</sup> See, for example, Canada, "Self-Government for Aboriginal Peoples: Lead Statement", Ottawa, 2-3 April 1985, CICSDocument 800-20/009.

risk of federal government "off-loading" of programs and services, especially to provincial and territorial governments; and the assumption of greater demands for resources on the part of aboriginal peoples. There was an assumption, without much foundation on the part of many government ministers and officials, that aboriginal self-government would be costly. Closely associated with the issue of "inherent right", there was the issue of a "third order of government", wherein aboriginal governments would join federal and provincial governments as equals in terms of constitutional recognition and protection. It was feared by some that this would of necessity diminish federal and provincial government powers, and lead to an unworkable federal system.

There were some exceptions. A few viewed financial issues as secondary, and several respondents from aboriginal peoples' organizations thought that, in the end, the inherent right was not a problem since it could have been dealt with in a preamble to a constitutional amendment, for example. These are certainly minority opinions, and are very much at odds with both the substance of the negotiations and the interview findings.

These two broad issues are also well represented in the transcripts and the print media. In the months preceding the 1987 First Ministers' Conference, many articles addressed the nature of the right to self-government ("inherent", "contingent", "delegated", "explicit", "pre-existing" and so forth). During this period, the federal government kept making reference to municipal government as a very likely form of aboriginal self-government. The following quotation from federal Indian and Northern Affairs Minister Bill McKnight is representative.

The Indian leadership doesn't like the comparison to municipal government, but without saying the word, I think that within the existing constitutional framework of Canada, that is what we are talking about.  
("Self-government is Objective", *Edmonton Journal*, January 10, 1987)

At the same time, aboriginal leaders were describing the right to aboriginal self-government in different terms. In response to federal government statements such the one above, the Grand Chief of the Assembly of First Nations, George Erasmus, argued that delegated authority, such as municipal status, is unacceptable

... because that can be withdrawn at any time. We do not intend to live under those kinds of rules.  
("Goal is Clear, Path to it is Not", *Calgary Herald*, January 7, 1987).<sup>2</sup>

2 It is interesting to note that in the disjunction between "inherent" and "delegated", no one looked outside Canada to other federal systems where a third tier of government derives its authority from the constitution, and not only by delegation from senior governments (e.g., Switzerland and local governments in some American states).

In his opening address to the 1987 First Ministers' Conference on Aboriginal Constitutional Matters, the Prime Minister focussed on this issue.

The Government of Canada takes the position that the explicit recognition of the right to aboriginal self-government is an essential prerequisite. Anything less, in our judgement, would be unacceptable to aboriginal organizations and the people they represent.

(The Right Honourable Brian Mulroney, Verbatim Transcript of the 1987 First Ministers' Conference on Aboriginal Constitutional Matters, Canadian Intergovernmental Conference Secretariat, p. 12)

When the federal government tabled its last attempt at a draft constitutional amendment, at the final session of day two of the 1987 FMC, it was clear that the nature of the aboriginal right to self-government remained the largest, single obstacle to agreement. As George Erasmus said of the federal draft,

The document makes it very clear that what we are talking about is a contingent right. You were not recognizing the pre-existing right, you were creating a right. (Verbatim transcript, 1987 First Ministers' Conference on Aboriginal Constitutional Matters, Canadian Intergovernmental Conference Secretariat, p. 215)

A similar point had been made earlier in the conference by then-Premier of Manitoba Howard Pawley.

The right to self-government has never been extinguished either by consent or by conquest and in any event should now be articulated within the Constitution of Canada.  
(*Ibid.* p. 93)

Although "financing" was a major issue according to those interviewed, it received much less attention in the media, as well as in First Ministers' Conferences. The media did report on an offer that was made at a pre-FMC meeting of aboriginal leaders and government ministers which was held in Halifax in January of 1987. The federal government offered to assume the "lion's share" of the cost of Indian and Inuit self-government (but not Métis self-government).<sup>3</sup> As well as saying that the federal government should assume the bulk of the cost of self-government on reserves, the *Ottawa Citizen* reported, federal Justice Minister Ray Hnatyshyn committed the federal government "not to off-load any programmes for native peoples" onto the provinces. He also committed the government to provide public services to native communities at levels comparable to non-native communities, recognized the need to provide more money to finance native self-government negotiations, and guaranteed that the creation of self-governing native communities would not result in them getting less money from Ottawa than they do

3 The federal offer for Inuit self-government was valid for only those Inuit north of 60 degrees (i.e., it excluded the Inuit of Quebec and Labrador).

We are persuaded that aboriginal rights need the same protection as all other rights.  
We believe aboriginal rights should be enforceable in the courts as any other rights.  
(Official Transcript, 1987 FMC, p. 163)

The issue of the Métis and subsection 91 (24) of the *Constitution Act, 1867* fell into this secondary range as well. The question here was whether the Métis do, or should fall under exclusive federal jurisdiction, as is the current situation with Indians and Inuit. The associated issue of government responsibility for the Métis, non-status and off-reserve Indians, and appropriate federal and provincial roles, also emerged. Were these people the responsibility of the federal government, provincial governments, or both orders of government. The federal government refusal to acknowledge responsibility aroused considerable concern among some provinces.

Thus far we have examined the major issues which emerged together in the interviews, the media coverage, and the verbatim transcripts. It is interesting,

however, to explore as well those issues which appeared in the print media but not in the interviews and transcripts, in addition to those items which seemed not to have appeared in any of these sources.

A major issue in the print media was the premier of Québec's refusal to participate in the 1987 First Ministers' Conference. It received scant attention in the interviews and at the FMC. As Quebec premier Robert Bourassa told reporters just prior to the conference,

...participating in (the First Ministers') Conference would be illogical and would give a false impression to the effect that the constitutional issue is settled and that Quebec cares little about its more fundamental rights.  
("Natives Ask Where Quebec Stands", *Montreal Gazette*, March 25, 1987)

The Prime Minister of Canada was also engaged on this issue during the conference. "L'absence du Québec constitue 'un fardeau', " he said. "Il est inconcevable de continuer sans le Québec" ("Mulroney déplore l'absence du Québec", *Le Droit*, le 27 mars 1987). The concern of many aboriginal leaders, that the Quebec Premier was using the FMC on Aboriginal Constitutional Matters to further his own constitutional interests, was mentioned only in passing during the interviews, and was diplomatically avoided during most of the FMC.

Quebec's participation in the section 37 process was never full nor formal. Since Quebec had not endorsed the constitutional accord of 1981, and felt excluded from the *Constitution Act, 1982*, the province had adopted the position that it would not participate in any process of constitutional reform or place any proposed constitutional amendments before the National Assembly. Quebec ministers attended meetings during the section 37 process at the urging of the aboriginal peoples of Quebec, to provide these peoples with a representative at the table. The significance of Quebec's reluctant and partial participation is difficult to gauge. Some saw Quebec as a strong supporter of aboriginal rights, while others thought that Quebec's voice, had it been raised, would have had a distinctly conservative tone. While the Government of Quebec was not very helpful during the process, it is doubtful that Quebec prevented an accord from being reached in 1987. More basic issues, described earlier in this chapter, were responsible for that outcome.

Several events occurred in 1987 which could have had a significant effect on the substantive issues. For the most part, however, they went largely unrecorded or unnoticed. Two polls were released on the attitudes of Canadians toward aboriginal issues, dealing with such matters as self-government and constitutional reform. One poll was conducted for the University of Calgary by Decima

4 See David C. Hawkes, *Negotiating Aboriginal Self-Government: Development Surrounding the 1985 First Ministers' Conference* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985) p. 16.

Research. It was part of a larger series of attitudinal studies undertaken by sociologist Rick Ponting. He found that a core of 30 per cent of a dull non-aboriginal Canadians supported special constitutional rights for aboriginal peoples. About 50 per cent of the sample approved of the explicit recognition of the right of aboriginal self-government in the constitution. Ponting concluded that there are "... no insurmountable public opinion barriers to real progress on aboriginal constitutional reform."<sup>5</sup>

A second poll, commissioned by the Inuit Committee on National Issues, was also conducted by Decima in February of 1987.<sup>6</sup> It focussed more explicitly on aboriginal self-government and constitutional reform, and found broad public support for many of the objectives which aboriginal peoples were pursuing. For example, the overwhelming majority of Canadians surveyed (84 per cent) believed that it was important for Canada's political leaders to come to an agreement on the issue of aboriginal self government. It found that a significant majority of Canadians (77 per cent) supported placing the right to aboriginal self-government in the Constitution.

When asked about the form a self-government agreement might take, the majority of those surveyed felt most comfortable with a model which is flexible, wherein aboriginal peoples could negotiate for some of the necessary powers from both municipal and provincial governments. As to the powers which aboriginal governments might exercise, the majority supported a significant array ranging from powers over language and cultural matters and the right to participate in First Ministers' Conferences on matters which directly affect aboriginal peoples (supported by 80 per cent) to powers over education, health and social services, and control over hunting and fishing and other renewable resources on aboriginal lands (not less than 67 per cent), to powers over subsurface resources, policing, administration of justice, and a voice in international offshore fishing negotiations or Canadian sovereignty in the Arctic (a narrow majority), to the power of aboriginal peoples to tax themselves (42 per cent).

Support for protecting the right of aboriginal self-government in the constitution varied by province. Support was highest in Quebec, Alberta and Ontario, and lowest in Saskatchewan and Manitoba. Even in the provinces with the lowest endorsement, however, there was majority support.

The lobbying activities of aboriginal groups received scant attention in the press. An example was a tour of provincial capital cities by the President of the Native Council of Canada, Louis "Smokey" Bruyere. The NCC was meeting

5 J. Rick Ponting, *Profiles of Public Opinion on Canadian Natives and Native Issues: Module 1-Constitutional Issues*, (Research Unit for Public Policy Studies, Faculty of Social Sciences, University of Calgary, 1987), p. 49.

6 Entitled "A Study of Canadian Attitudes Toward Aboriginal Self-Government".

with provincial premiers and ministers in an attempt to convince them of the wisdom of the NCC's constitutional reform package. The Assembly of First Nations also conducted a round of private consultations, while the Inuit Committee on National Issues lobbied constantly. Of the four aboriginal peoples' organizations involved in the constitutional negotiations, only the Assembly of First Nations was able to make consistently effective and efficient use of the print media. The Grand Chief of the Assembly, George Erasmus, appeared to be particularly adept at "grabbing headlines" when the need arose.

Generally speaking, the coverage of these matters in the print media was disappointing. The articles had little depth and concentrated on the positions of the various parties to the negotiations. There was very little description and analysis of the issues. When special features were included they tended to focus on the "plight of native peoples", or to present a "human interest story" approach. There were exceptions to this general trend with *Le Devoir* and the *Toronto Star* providing superior coverage.

Before moving on to examine the efficacy of the section 37 process, a final matter remains to be addressed in describing the negotiating environment. Although it is not a substantive issue, respondents were asked if personal differences among the negotiators (either at the level of leaders or senior officials) played a role in the material outcome. This question was inserted into the interview as a result of an interview pre-test conducted by the author, which identified this issue as potentially a major factor.

From the interviews it would appear that personal differences did not play much of a role, and if they did, that they were not an overriding factor. The majority of respondents, by a two to one margin, were of this view. Of those who thought that "personalities" played a role, some mentioned the perceived animosity between AFN Grand Chief George Erasmus and the federal government, and between Métis National Council leader Jim Sinclair and Saskatchewan Premier Grant Devine.

It should be noted, as well, that some interviewees believed that "personalities", in terms of personal friendship and empathy, played a positive role. Mention was made several times, for example, by both government and aboriginal party respondents, of the relationship which developed between both the Métis National Council and Inuit Committee on National Issues and the Nova Scotia delegation to the First Ministers' Conferences. At one point in the process ICNI delegates donned official Nova Scotia provincial ties to demonstrate the personal friendship that had been built between delegates from these two negotiating parties.

With this broad review of the major issues and the assumptions underlying the negotiations, we are now ready to launch into the retrospective portion of the analysis. In doing so, we shall examine the past problems in terms of both

process (the section 37 constitutional negotiation process) and substance (the proposed constitutional amendments on aboriginal self-government).

## 5 THE PARTICIPANTS' VIEWS: RETROSPECTIVE

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### A. THE NEGOTIATION PROCESS

Some observers have expressed the opinion that **the** section 37 negotiation process itself was to blame for the failure to reach an agreement on **constitu-**  
**tional** reform, and **that** a different process would have produced a different (and also more desirable) result. During the interviews conducted in 1988, this view was widely held by those involved and those who closely monitored the negotiation process which led to the apparently successful Meech Lake Accord, a major event which occurred just one month after the final, unsuccessful First Ministers' Conference on Aboriginal Constitutional Matters mandated by section 37. Whether these individuals still hold this view, in the wake of considerable public criticism of the process leading up to the Accord (particularly on the absence of public participation), and the difficulties which the Accord has faced in ratification, one can only speculate.

The differences between the two processes were quite remarkable. The section 37 process was constitutionally mandated, with **pre-arranged** First Ministers' Conferences, but uncertain objectives. The Meech Lake process was informal, with no **pre-set** meetings, but with clear objectives (the "unfinished business", particularly with Quebec, stemming from the "partial accord" on constitutional **patriation** and amendment reached in 1981). The section 37 process was characterized by large, multilateral (federal/provincial/aboriginal) televised conferences of First Ministers, with at times long and unclear agendas. The **Meech** Lake process was characterized by small, bilateral (interProvincial and federal-provincial) and multilateral meetings held in private, with a limited agenda. Other contrasts will become clear later in this chapter.

Given this perspective, interviewees were asked if they shared this view (that the section 37 process itself was to blame). The vast majority of respondents, by a margin of over two to one, answered in the negative. Section 37, it was noted, was broad enough to allow many processes. The one chosen was adopted by the parties, and the "players set the rules". It would have worked, some argued, if basic assumptions and objectives were different.

Most respondents thought that substantive issues were the major problem, and that the basic differences were philosophical in nature. "Tinkering with the

process" would not have produced agreement. Some thought that the process "didn't help", that it was cumbersome and ineffective, but that it was not the cause of failure. Others thought that the process worked well, and that negotiations such as these simply take more time. Some described the process as "great", since it allowed the Canadian public to see what was being negotiated (as compared to the closed nature of the Meech Lake process). Finally, as emphasized by several respondents, without this constitutional provision (section 37), many provincial governments may not have come to the negotiation table at all.

#### Problematic Aspects of the Section 37 Process

This is not to say that there were not undesirable aspects to the section 37 process. The next question asked respondents just that-what aspects of the process did they think were problematic. The reaction was overwhelming, both in terms of numbers of problems identified, and in terms of the depth and texture of the responses. They are grouped here in such a way that the number of problems are reduced (i.e., they are aggregated), but that the texture is retained (i.e., the variation in each grouping is explored),

##### 1.100 Public..

Perhaps the most frequent response focussed upon the public nature of the process, with all of the First Ministers' Conferences broadcast live on national television, and the impact which this had on the negotiations. It encouraged, some thought, "playing to the audience back home", and led to speech-making rather than to dialogue. In such a situation, governments were not frank, and aboriginal leaders were limited in what they could say. There would have been more candor, it was felt, in private multilateral negotiations ("You can't make a deal on T.V..."). This line of thought appears to ignore the many private meetings of aboriginal leaders and government ministers, as well as those of officials from federal and provincial governments and aboriginal peoples' organizations.<sup>1</sup>

Because of the highly public nature of the negotiations, it was argued, no trust ties were formed among the parties to the negotiations, especially between aboriginal peoples and the governments at the table. There was, as one negotiator phrased it, "no honesty and little communication". This developed, over

<sup>1</sup> For example, at the 1985 First Ministers' Conference, First Ministers and senior advisors retreated for a day-long "coffee break", while at the 1987 FMC, private sessions were held on the second day. It can be argued that the First Ministers' Conferences were only the tip of an iceberg of consultations. ♦

the course of the process, into mistrust among the parties, in particular between provincial governments and aboriginal peoples' organizations.

##### 2. Too high profile . . .

Closely related to the "too public" problem, and some interviewees suggested it as a corollary problem, was the high profile nature of the negotiation process. This led aboriginal leaders to have unrealistic views, some said, and to artificially raised expectations of the First Ministers' Conferences. The result, according to one respondent, was the "high noon stakes" of the First Ministers' Conferences, and the "one big pow wow syndrome" which aboriginal leaders took into the conferences-everything was "on the table" and the stakes were extremely high.

##### 3. Rigid timing...

Another frequently mentioned problem was the rigid timing of the FMC's. It may have been a mistake, some thought, to set up four First Ministers' Conferences in advance. Who would compromise in 1985, one respondent asked, when they knew that the negotiations were due to run until 1987? The longer the process, some argued, the higher the price for governments. The process dragged on longer than it should have, some said, and some of the pre-scheduled meetings were either not needed or poorly timed in terms of generating a successful outcome.

Others commented upon the short time frame of the process. The issues debated in the Constitutional Accord of 1982 and the Meech Lake Accord of 1987 had long antecedents, reaching back decades. Why should we expect, it was asked, to "sign, seal and deliver" aboriginal rights in five years, when most of the issues in the negotiations were less familiar?

A significant number of respondents believed that progress peaked in 1985, and that perhaps the absence of an FMC in 1986 produced a letdown. Several more cynical interviewees were of the view that progress peaked in 1983 (with the constitutional amendments), and that the process became a "walk through" after that time. The record of negotiations, however, does not substantiate the latter line of reasoning in any way.

##### 4. Too bureaucratic . . .

A comment made frequently by respondents from the aboriginal peoples' organizations at the table was that the process was too bureaucratic, had too many tiers, and placed too much emphasis on officials rather than leaders. In addition, it was overly legalistic, and placed too high a value on confidentiality. The reference here was not to the highly public First Ministers' Conferences,

but to the process at the level of government and organization officials, many of whom had legal training. This led to less contact between aboriginal and non-aboriginal leaders, and to complicity among government officials. In a sense, they argued, the process became controlled by bureaucrats. According to this line of reasoning, the institutional focus of the federal government's Office of Aboriginal Constitutional Affairs (OACA) was to keep the process going rather than to reach agreement.

According to these aboriginal respondents structuring the process in this way had other implications. As part of the Federal-Provincial Relations Office (FPRO), OACA naturally focussed on federal-provincial relations (it was staffed largely from within FPRO), rather than on relations between the Prime Minister and national aboriginal leaders. In the Working Groups, which were formed at the outset of the section 37 process, for example, government officials planned to meet with aboriginal leaders while aboriginal leaders wished to meet with government ministers (who, in their view, were their real non-aboriginal counterparts). Moreover, it was argued, FPRO was busy on the Meech Lake negotiations during the latter part of the section 37 process. Its mandate—conflict management of federal-provincial relations—was inappropriate for negotiations involving aboriginal peoples on matters of aboriginal rights. A further implication of structuring the process in this way was that the educational process which the aboriginal people were undertaking never got to the politicians, but simply ended with the officials. Since aboriginal peoples placed a high value on the educational nature of the process this was a significant shortcoming of such a structure, from their perspective.

These views were not unanimous. One respondent from an aboriginal peoples' organization thought that OACA "made it happen in 1985", a reference to its role in drafting amendments and to the near success of the FMC of that year. Others noted the frequent bilateral meetings of federal government ministers with aboriginal leaders, and the several meetings of the Prime Minister with national aboriginal organizations.

#### 5. Too large . . .

Another frequent complaint was that the process was too large and involved too many players. Moreover, the many players refused to break down into smaller groups to work on specific issues. The experience with Working Groups during the early part of the section 37 process was widely regarded as unsuccessful. The failure to establish trust ties among the participants meant that the parties to the negotiations were unwilling to delegate responsibility, however fleetingly, to other parties.

This situation also led participants to be suspicious of any meeting not involving all 17 parties to the negotiations. Governments felt that they could

not meet alone, on a bilateral basis, to discuss these matters. Formal meetings among the aboriginal peoples' organizations party to the negotiations took place only during the last few years, when "aboriginal summits" were held at key points during the process.

#### 6. Unclear agenda . . .

Some respondents felt [hat agreement on the objectives of the whole exercise had not been reached early on, and that this in effect doomed the process. There were no exploratory discussions. Instead, discussions became political right away, even at the level of officials. This was in sharp contrast to the Meech Lake process, where, as one respondent said: "bilateral meetings allowed non-politically charged discussion on discrete topics of interest to your province."

Not only was the agenda unclear, it was absurdly long, according to several interviewees, especially early in the negotiations. Again, this was in marked contrast to the Meech Lake process, where the agenda was concentrated on five main issues. (Of course, it was said, Quebec was in a position to determine the agenda.) The agenda problem was exacerbated, in the view of several respondents, by the fact that the federal government had no position on many of the issues, and by the reluctance of some aboriginal organizations to limit the agenda to self-governmmt.

#### 7. Meech Lake comparison, . . .

It has already become evident that many comparisons were made between the Meech Lake process and the section 37 process. Although this subject receives more extended treatment later (see Chapter 7), it is discussed here also because many respondents cited it in commenting upon the problematic aspects of the section 37 constitutional negotiation process.

Most of those who drew the comparison felt that the Meech Lake process would not have worked, or would not work now, on aboriginal constitutional matters. In the Meech Lake Accord process, they said, you could get a deal at the table. This was not true in the section 37 negotiations. Those in the room, especially the aboriginal leaders, could not make a deal. They did not have the mandate from their people to do so, it was argued. Others saw the same phenomenon in a different light. The Meech Lake process would not work, [they said, because the aboriginal peoples' representatives at the table "were not willing to give up anything"; there was no *quid pro quo* for compromises on the government side. Instead, they argued, aboriginal leaders were engaged in "ratchet diplomacy", with each concession made by governments becoming a new "floor" for negotiations—the result, a ratchetting up of the "bottom line".

Some were of the view that the problem was in the inability to disaggregate the aboriginal peoples' organizations involved in the negotiations. If negotiations had been carried on separately with each of the aboriginal parties, perhaps agreement could have been reached, for example, with the Inuit.

Another comparison had to do with the nature of the parties to the negotiations. In the Meech Lake Accord process, Quebec was seen by the other parties to the negotiations as an equal. In section 37, some governments saw the aboriginal peoples not as equals, but as simply other "interest groups".

Nor did the section 37 process focus on basic elements or principles, such as the five principles outlined by Quebec during the Meech Lake process. It was pointed out, however, that several attempts were made to do so during the section 37 process, such as the "essential elements" approach of the Métis National Council. Related to this comparison was that of the short agendas for Meech Lake and the initial long ones for section 37.

Negotiations in the section 37 process came to focus on one topic, aboriginal self-government (although only one topic, it engaged a large number of issues). In the Meech Lake process there was a wider range of topics. This is necessary, some respondents said, so that the negotiations are "positive sum" rather than "zero sum", and hence everyone can "win." As we shall see later, however, there were some who felt that the Meech Lake negotiations threw the negotiations on aboriginal self-government "off track", by diverting the interest of the federal and provincial governments away from aboriginal constitutional matters.

And finally, there were those who thought that neither the Meech Lake nor the section 37 processes were appropriate for pursuing constitutional reform. Both were examples of "executive federalism", and were inherently antidemocratic in nature. Rather than use the First Ministers' Conference as a mechanism, some respondents advocated more participatory and non-partisan institutions, such as a constituent assembly.<sup>2</sup>

2 Several respondents described a system in which Canada's brightest, most prominent, and most thoughtful citizens would run for a seat in a constituent assembly, which would have the task of shaping a reformed constitution for Canada. The process would be long (up to ten years), and would be based upon a significant research effort. This was felt to be preferable to leaving the important work of constitutional reform to ordinary members of parliament and legislatures, who, of political necessity, adopt a much shorter time frame and reach more expedient decisions. Although the feasibility of such an approach has not been seriously examined, these respondents did not hold out much hope in this regard.

## 8. Ministers

Some of the problems with the section 37 process centred around the subject of government ministers, according to several respondents. The change of government ministers, particularly at the federal level, was one such difficulty. Given the long "learning curve" in this field, it was felt that it took some time to get ministers "up to speed". Relatively frequent changes in ministers made this learning-and relearning—process all the more difficult. Other respondents commented upon the ability of federal ministers to chair meetings, which some regarded as inadequate at times, while others commented upon the sporadic strains between the chair and aboriginal leaders. Linked to this critique, in the view of some negotiators, was the lack of federal leadership throughout the negotiations. The federal government saw itself, or chose to portray itself as the impartial chairperson during the negotiations, leaving the leadership role to others. In doing so, the federal government failed to live up to the obligations of its trust responsibility to aboriginal peoples.

## 9. Analyses of (the Process,..

Finally, some additional and rather interesting, insightful and provocative analyses emerged as to why the section 37 process was problematic. One respondent noted that all provinces had the same weight in the negotiations, regardless of the degree to which their jurisdictions would be affected by the outcome. British Columbia, Saskatchewan and Alberta, which would arguably be the most affected, had no more say in the matter than Prince Edward Island and New Brunswick, where the impact would be less significant. A comparison was made, in the intergovernmental arena, to the issue of domestic oil pricing negotiations. Until the early 1970s, all First Ministers were involved in negotiations on the domestic price of Canadian oil. Since the producing provinces (British Columbia, Alberta and Saskatchewan) were consistently outnumbered in the meetings by oil consuming provinces, the negotiations tended to be rancorous and the decisions unacceptable to the producing provinces. When the format changed, and the oil pricing negotiations were conducted between the federal government and the producing provinces, the outcomes appeared to be more acceptable, while at the same time representing the interests of both producers and consumers. How this approach might be applied to the issue of aboriginal constitutional matters was left unsaid. What is clear, however, is that the eventual outcome of these negotiations will affect some jurisdictions much more than others, and that some considerable thought should be given to this matter.

Another respondent's analysis focussed on the incentive for resolution in this area. The section 37 process provided no built-in incentive for resolution of aboriginal constitutional matters. Perhaps a federal fund should be established,



the interviewee speculated, for the development of aboriginal self-government. Those provinces which first opted into the constitutional amendment on self-government would have the first opportunity at these limited federal funds, thus providing an incentive for provincial governments to seek an accommodation. Such an arrangement would also pose several problems. It would be offensive, in spirit at least, to the growing constitutional concept of equality of treatment. It would be unfair to aboriginal peoples who lived in provinces, the governments of which refused to opt in. Moreover, as federal funding dried up, such an approach would become a disincentive for some provinces, doing little to assist the cause of aboriginal peoples.

Finally, another analysis worth noting concerned the matter of public support. There was a lack of appreciation, by all parties to the negotiations, that Canadians in general must support constitutional change. It is not enough to convince the 17 parties to the negotiations; the 17 parties in turn must convince the general public that what they are pursuing is of value to all Canadians, and that they have a stake in the outcome of those negotiations.

## B. THE CONSTITUTIONAL AMENDMENT

As discussed earlier (Chapter 4), the difficulties in aboriginal constitutional reform went beyond process. These more substantive concerns focussed on the debates surrounding the various proposals for a constitutional amendment on aboriginal self-government.

Since one of the objectives of the research was to examine ways for bridging the barriers to achieve a constitutional amendment, the interviews canvassed opinion for new suggestions in this regard. Over a year had passed since the section 37 negotiations ended. The respondents were asked, looking back, if they had reached any conclusions as to how agreement on an amendment might have been achieved.

The immediate reaction of several respondents was negative. While a few simply said that they had no new suggestions, others thought that it was premature to reopen discussions on constitutional matters, "We weren't ready for an FMC in 1987, and we aren't ready to re-open now . . . perhaps in five or ten years", was one reply. Another interviewee speculated that "... we are not likely to have an amendment on self-government for 20 years." According to one respondent, the expectations of aboriginal peoples are still too high, and those of governments too low.

Most respondents, however, had more positive suggestions. Some of these dealt with the nature of the agenda for the negotiations. A few respondents, all of them government officials, felt that it was a big mistake to move to one agenda item—aboriginal self-government. This created an undue focus on symbols, in their view. Others believed that justifiability was a major impedi-

ment, and that chances for success would have improved greatly if there was no potential role for the courts in the negotiation of self-government agreements in the proposed amendments. Another view was that both "sides" had to move: governments had to join issue on financing, and aboriginal peoples had to join issue on rights.

As has been noted, however, some of the barriers were not even on the agenda. Provincial governments were wary of federal "cutbacks", and "offloading" of federal programs and services to provincial governments. This lack of trust between federal and provincial governments, suggested one official, must be overcome in order for the gap to be bridged.

Many of the suggestions focussed on the issue of the inherent right to aboriginal self-government, or the "sovereignty issue", as it was referred to. Some government officials thought that aboriginal peoples' organizations would have to move from their basic position on the inherent right, in order for negotiations to be fruitful. As one observer put it, most governments thought that the aboriginal peoples "were kidding" on the sovereignty issue, and that it was just a hard line negotiating tactic.

For several respondents from the aboriginal peoples' organizations the opposite case was true. They saw as a major barrier the fact that governments, particularly the federal government, were not prepared to move on the sovereignty issue, and to recognize a pre-existing legal authority still held by aboriginal peoples in Canada. To them progress peaked with the Nova Scotia "rolling" draft amendment #4, tabled on March 4, 1987.<sup>3</sup> It proposed, first, to recognize and affirm "the right of self-government, within the Canadian federation, of the aboriginal peoples of Canada", so as not to "derogate from any claims which the aboriginal peoples may have to an inherent right of self-government recognized and affirmed as an existing right" in the constitution. Second, the scope and effect of the right was to be dependent upon an agreement being reached by the appropriate parties, who were to negotiate in good faith, on such subjects as jurisdiction, powers, land, resources, funding, preservation and enhancement of language and culture, and equity of access. The "realization" of the right, therefore, was contingent upon negotiated agreement, these negotiations to be initiated at the request of aboriginal peoples, and recourse to the courts afforded should negotiations not proceed in good faith. Third, the negotiations on self-government agreements were not to diminish any existing benefits of aboriginal peoples. Fourth, the rights set out in self-government agreements were to be protected in the constitution as are existing and future treaties and land-claims agreements. A fifth element was a non-derogation clause, while a sixth and final clause was to commit the federal government to "the principle that aboriginal governments should have sufficient revenues to

<sup>3</sup> Nova Scotia Rolling Draft #4, CICS document number 840-440/009.

provide levels of public services to the aboriginal peoples of Canada reasonably comparable to the levels of public services provided to the non-aboriginal peoples of Canada." The import of the final clause, aside from the obvious equality principle, was to attempt to place the financial burden for these initiatives squarely upon the shoulders of the federal government.

Perhaps even more important than the degree of progress achieved on recognizing the existing rights to self-government, was the amount of agreement among interviewees from both governments and aboriginal peoples' organizations regarding the form of a constitutional amendment. A significant number of respondents suggested, as a way to bridge the gap on a constitutional amendment, the "silent right" approach first put forward by the Inuit Committee on National Issues and the Assembly of First Nations. Essentially, this would set aside the issue of inherent right, leaving the nature of the right to self-government out of the amendment. The amendment would provide for the negotiation of self-government agreements, and for their constitutional protection once agreed to. Since the focus of this approach is on the process of negotiating self-government agreements, the commitment to negotiate such agreements would require constitutional expression. The aboriginal peoples might regard the ensuing agreements as coming from their inherent right or "internal sovereignty", while governments might see them as coming from their "recognition" of aboriginal rights or their "delegation" of federal and provincial government powers. Each party could take away their own interpretation of the agreement, while the constitutional amendment remained silent on the nature of the right to aboriginal self-government.

Some of the barriers had little to do with the substantive issues emerging from the negotiations. Respondents from both governments and aboriginal peoples' organizations saw public opinion or perceived public reaction to a constitutional amendment on aboriginal self-government as a major concern. There was a fear of "white backlash", especially in western Canada, some said. For others, the sovereignty question was not so much the major issue as it was a proxy for the "... racism which is rampant across Canada." Aboriginal peoples must learn how to harness public opinion which is in their favour, concluded one respondent.

Finally, some of the suggestions for bridging the gap in terms of a constitutional amendment came back to the subject of the negotiation process. One negotiator thought that the parallel process of trilateral discussions at the provincial level (federal-provincial-aboriginal) on self-government, held during the section 37 process, weakened the resolve in terms of a constitutional amendment. If aboriginal self-government could be achieved without a constitutional amendment, why was an amendment so important? Another respondent suggested a "Meech Lake technique" for bridging the gap. Put 17 people

(the "politicians"--First Ministers and national aboriginal leaders) in a room to make the initial agreement. Of course, federal government support would be necessary, it was added. In no circumstances, suggested one official, should we go back to anything like the section 37 process.

From the analysis of the retrospective views of the participants, it is evident that significant problems existed in both the substance and form of the section 37 constitutional negotiations. It is clear, now, that both public and private meetings are required in such negotiations. It is also evident that a combination of bilateral, trilateral and multilateral formats must be used. Without these, working groups cannot be formed, nor can trust ties among ministers and officials be established. It is also likely the case, with the benefit of hindsight, that the rigid timing of the First Ministers' Conferences was a mistake. This is not to say that there was no need for a constitutionally-mandated process. On the contrary, without the constitutional commitment, the FMC's might never have been held. It would seem, as well, that negotiators should have examined more closely the silent right approach to a constitutional amendment, since support was more widespread than many negotiators had assumed.

In the following chapter, the participants look to the future. In doing so, they examine how the negotiation process might be restructured so as to be more efficacious, and what approaches might be the most promising in terms of achieving a constitutional amendment.

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## 6 THE PARTICIPANTS' VIEWS: PROSPECTIVE

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### A. THE NEGOTIATION PROCESS

If and when constitutional negotiations begin anew, how could the process be designed to be more effective? If you were to "do it again", interviewees were asked, what changes do you think should be made to the process? The next section examines the various suggested changes in design parameters.

#### Designing a New Negotiation Process

Just as the number of comments on the problematic aspects of the section 37 process was overwhelming, so too were the suggestions as to how to improve the negotiation process, only more so. Again, the responses are grouped in such a way that the number of suggestions are reduced (i.e., they are aggregated), but that the texture is retained (i.e., the variation in each grouping is explored). In total, close to one hundred design suggestions were advanced. As shall be seen, many of these were not compatible, and a significant number of them proposed courses of action which ran in opposite directions. What is a design flaw to one negotiator may be an essential part of the negotiation process to another. And as shall be seen, this often depends upon which side of the table one sits.

#### *1. More Meech Lake comparisons . . .*

In addressing the design of a new negotiation process, many respondents compared the section 37 process to the Meech Lake process. While many of these persons thought that the Meech Lake process "wouldn't work" ("the boys getting together..."), at the same time they also saw design elements in the Meech Lake process that could usefully be incorporated into a new negotiation process on aboriginal constitutional matters.

Some thought that it was fruitless to begin a new process until views have changed. An accord was reached on Meech Lake, they said, because Quebec's position on the constitution had changed. For negotiations to be successful in

this context, several argued, aboriginal peoples would have to "move from their position on the inherent right to aboriginal self-government."

In the Meech Lake process, there was a narrow and distinct agenda, with agreed objectives. There was an agreed set of principles, which the Government of Quebec had outlined "with sufficient vagueness" (for purposes of negotiation), commented one official. Perhaps the aboriginal peoples' organizations should develop a statement of five principles similar in form, if not in content, to that of Quebec. Others thought that this was an unlikely development. While Quebec was able to take the lead in the Meech Lake process, aboriginal groups cannot lead in this process, it was suggested, since they are not homogeneous (nor, it should be added, do they have the political strength under the existing system of constitutional change that Quebec possesses). It was also suggested that, since the stakes are higher for aboriginal peoples in these negotiations (it is the rights of aboriginal peoples which are at stake, rather than the rights of non-aboriginal Canadians), it is more difficult for their leaders to "negotiate a deaf".

There is need for a common understanding among all parties of what is under discussion. If it is sovereignty, one interviewee noted, then we must focus on its scope and parameters. The view is widely held that there is need of an agreed upon agenda with some precision.

A number of responders felt that, as in the Meech Lake process, there should be more bilateral meetings on aboriginal constitutional matters, followed by multilateral meetings. Several persons suggested that representatives from the aboriginal peoples' organizations should go on a bilateral tour of provincial capitals, followed some time later by representatives of the federal government. This technique was employed by Quebec Minister of Canadian Inter-governmental Affairs, Gil Rémillard and federal Minister of State for Federal-Provincial Relations Lowell Murray, at the outset of the Meech Lake negotiations. One observer suggested a process "one half way between Meech Lake and section 37".

As was the case in the Meech Lake negotiations, it was thought that negotiations should remain low key with most of the work behind the scenes, in the view of several interviewees. An "escape hatch" should be built in as well, so that a First Ministers' Conference can be postponed or negotiations can be stopped if failure is looming, some argued. Negotiations should only "go public" when there is a strong basis of support for an accord. A similar technique was used in the Meech Lake process, wherein parties agreed not to proceed to a First Ministers' Conference unless there were good prospects for agreement. There is an apparent contradiction between this sentiment and the view, also widely held, that negotiations on aboriginal constitutional matters cannot be as secret as those of the Meech Lake process. This is a subject which we shall return to shortly.

Finally, it was noted that in the Meech Lake process there was political will. While in the section 37 process the federal government was not prepared to use its leverage. However, others argued that the federal government cannot be the advocate of a particular process or statement of principles. As was the case in the Meech Lake process, when Quebec minister Gil Rémillard outlined his government's five principles at a weekend conference in Mont Gabriel, the impetus must come from the parties most desiring constitutional change (in that instance, the Government of Quebec).

## 2. More public...more private ...

A major consideration in designing a new process will focus on how open it will be. Although there are a significant number of respondents who preferred a less public and more closed process ("out of the limelight, check by jowl", with "less speechmaking"), most favoured a more open and public process, especially those from aboriginal peoples' organizations. The view was widely held that more public education and discussion would be helpful.

The public and televised nature of the section 37 process was important to aboriginal peoples. According to observers from aboriginal peoples' organizations, this served two purposes: (1) to put pressure on governments; and (2) to help to educate Canadians as to the issues. It was frequently assumed that if Canadians knew more about the issues involved, then they would support the positions of the aboriginal peoples. Although there is no firm evidence to support this contention, the somewhat unquestioned faith in education appears to be not without foundation. The survey data reported in Chapter 4 suggest that Canadians are, at the very least, sympathetically predisposed to the plight of aboriginal peoples and suggest that a significant proportion, if not an absolute majority, support placing the right to aboriginal self-government in the constitution.

Several government officials thought that the greater need was for political debate, not public education. To this end, it was suggested that there should be parallel private meetings to the public meetings which are held.

## 3. Smaller ...

No one advocated a larger process, involving more players. Several respondents suggested a smaller process, or the use of smaller group settings. A typical suggestion was to have meetings involving three persons from each delegation, and to include both government ministers and officials in such meetings.

#### 4. More third party involvement . . .

Many respondents felt that more research was required, and that a better information base was needed for the negotiations. Some proposed that this research be conducted by a third party and monitored by the parties to the aboriginal constitutional negotiations. A few suggested a "think tank" sponsored by an organization independent of the negotiations.

Others advocated the use of a third party mediator. The Indian Commission of Ontario was cited in this regard. The Commission was established by complementary federal and provincial orders in council, and is designed to assist Canada, Ontario and First Nations in Ontario to identify, clarify, negotiate and resolve issues of mutual concern. The Commission is an independent and neutral body, and has assisted in negotiations on such matters as land claims, resource management, policing and education.<sup>1</sup>

With a bigger role given to a mediator, as well as to researchers, prospects would improve, it was argued. Another idea which emerged in this search for "a neutral body to get the actors together" was that of a jointly-sponsored commission or inquiry that would travel across the country to receive the views of Canadians.

#### 5. How to begin anew...

Many suggestions were offered as to how negotiations should begin anew, should this opportunity present itself. One proposal was that the **leaders** of the four national aboriginal peoples' organizations should **first** meet with the Prime Minister to start the process. Another response, also from an official from an aboriginal organization, was to have the politicians first decide how the process is to be structured, as well as the basic principles of the negotiation.

Other respondents, notably **government** officials, thought that negotiations should begin among governments alone, particularly on the thorny topic of federal/provincial responsibility for aboriginal peoples. Other **government respondents** thought that "we should throw the ball to the aboriginal peoples". It is important that the aboriginal parties to the negotiations reach **agreement** among themselves first. Otherwise, the argument goes, agreement cannot be reached among the 17 parties.

It was suggested that Parliament alone might take the initiative and, with all-party support (and presumably the support of aboriginal peoples), propose legislation with respect to aboriginal self-government.

<sup>1</sup> For further information, see *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, August 1988) p. 75.

Yet another idea was to have the "on side" governments and the aboriginal peoples' organizations develop a draft amendment. If the **process** is renewed, the exercise of drafting constitutional amendments should begin sooner.

A number of respondents thought that while there should be agreement on objectives early on, negotiations should proceed to address practical problems on a sector-by-sector basis (e.g., education).

Many of these suggestions have some merit. Should negotiations be renewed, it would be useful for the Prime Minister to meet with the leaders of the aboriginal peoples' organizations to define objectives. It is perhaps obvious that the aboriginal leaders should meet early on to pursue common interests.

It might be less helpful for negotiations to begin among governments alone, as this would not assist in the building of **trust** ties. It might be premature to suggest that Parliament take the initiative, or to suggest that negotiations proceed on a sector-by-sector basis.

#### 6. Reorganizing the process..

Many suggestions were made regarding how to restructure the process. A few observers thought that more emphasis should be placed on the provincial level, and less on the national level. Regional discussions, some thought, would improve the "comfort level" in the provinces. In keeping with this line of thinking, some suggested "getting self-government on the ground first", and then protecting it in the constitution, a reference to the "bottom up" approach to implementing aboriginal self-government. Also along this line, several interviewees spoke of the need for more models or examples of self-government before constitutional negotiations recommence. Community-based discussion is required, it was argued, to build consensus among the aboriginal peoples.

It was suggested that a process similar to the one employed by the CCMC (Continuing Committee of Ministers on the Constitution) during the late 1970s and early 80s be used. A continuing **committee** of ministers or equivalents from all 17 parties could commission and receive reports, act as a clearing house, provide for ministerial monitoring of the process, and so forth. This suggestion assumes that the "best efforts drafts" which would be produced would not be ignored by First Ministers, as they were in the case of the CCMC in 1980.

Several respondents advocated the **identification** of working groups, involving federal, provincial and aboriginal participation (although not all 17 delegations need to be represented on each group). One suggestion was that these be structured by aboriginal peoples (that is, Inuit, Status Indian, Métis, Non-Status Indian).

Closely linked to this was a focus on "proper staff work", and the correct place for such work in the process. In terms of phasing, this means that staff

work takes place at the officials' level before going to ministers, and that ministers then decide when it goes before First Ministers.

Finally, the value of the aboriginal summit (a meeting of the leaders of the four national aboriginal peoples' organizations party to the section 37 negotiations) was brought into question. While some thought that it should be retained, and that it helped aboriginal peoples develop consensus positions, others thought the Assembly of First Nations controlled the summits, reflecting the federal government preoccupation with Status Indians and their organization (the Assembly).

#### 7. Timing...

On the subject of the timing of a new process, some observers thought that the former section 37 process was fine, but that progress simply took more time, and hence the process should be longer. Others thought exactly the opposite; that is, negotiations should take place over a shorter period of time. A time line is necessary, they argued, in order to "focus the mind", as was the case during the negotiations in 1982-83. Yet others were of the view that there should be no "lifespan" imposed on the process. Given the substantive differences around the table, it would seem unlikely that a shorter negotiation period would be successful.

It should be noted, while on this subject of timing, that many respondents were wary of when a new process should begin. A large number of government officials thought that a few years should pass before beginning anew. This would allow enough time to get some answers from the courts and to implement different models and examples of aboriginal self-government.

#### 8. Meetings . . .

Views on the frequency, type and number of meetings in a new process were mixed. Some advocated fewer meetings overall. Some argued for more ministerial meetings, but fewer meetings of senior officials, as these were regarded as less helpful. On the topic of First Ministers' Conferences, some respondents thought that there should be more, others that there should be fewer. Another view was that FMC's should be mandatory, although it is not necessary to have one each year. It would seem that the number of meetings is perhaps only of limited importance, assuming that some take place, and that they include senior government ministers.

#### 9. More informal..

Many respondents expressed the opinion that any new process should be more informal, and allow opportunities for the players to meet one another in less

structured situations. This would "sensitize" the negotiators to the views of the other parties and assist in the building of trust ties among them.

#### Other issues.

In discussing the rationale for the design of a new process, several comments were made which bear repeating here. First, a significant number of the negotiators think that either there is no need for a further approach (aside from the section 37 process), or that there is no better process than the section 37 process just completed. Second, although they regarded it as not politically marketable in Canada, several respondents considered the establishment of a constituent assembly as the most thoughtful way to proceed on such an important subject.

Finally, the view was expressed that there must be built into a new process some incentives for resolving these issues, either at the multilateral national level or at the bilateral or trilateral provincial or regional level. One incentive, as suggested in the last chapter, could be financial.

## B. THE CONSTITUTIONAL AMENDMENT

A completely redesigned process, however attractive, cannot be effective without substance. A constitutional reform process is created in order to produce a constitutional amendment. In exploring new opportunities, then, it is important that we examine the most propitious possibilities in this regard. Interviewees were asked, if negotiations were to reopen, what they thought the most promising approach might be (to achieving a constitutional amendment).

A large number of respondents from governments did not think that the constitutional negotiations should be restarted, as was reported earlier. For some, this was because "WC need to get a few court cases under our belt", while for others it was required in order to gain some experience with different models of aboriginal self-government. Some, though, based this view on their opinion that there was no likelihood of reaching agreement at this time, and that there was no promising approach to a constitutional amendment. Although this pessimistic outlook was more common among government respondents, some interviewees from aboriginal peoples' organizations also expressed this sentiment, albeit perhaps for different reasons. Some of them thought that no amendment would be achieved until the federal government changes. The problem, as they saw it, was the election of a Progressive Conservative regime in 1984. These respondents saw the Mulroney government as basically unsympathetic toward aboriginal peoples, based on their experience over the past four years. Since the interviews were conducted prior to the 1988 federal general election, its outcome must not be encouraging for these individuals.

Many respondents were more optimistic. One theme which emerged from their suggestions focussed on the subject of the constitutional amendment. Most thought that it would be a mistake to return to the 1983 agenda, with its 13 items. Attention should be concentrated on aboriginal self-govcmcn[ (as opposed to other rights such as language, land, treaties, etc.), since it is most workable. More work has been done on the subject of aboriginal self-government, and significant progress toward understanding has been achieved. Most respondents, from both government and aboriginal parties, thought that a new process should start with a self-govcmcnt amendment (or "internal self-determination", as one aboriginal interviewee described it).

Others, including government officials, thought that it would be helpful if governments revealed their agendas early in the process ("we can only go so far"). In this regard, it was suggested that the subject of federal-provincial financing should also be high on the agenda should negotiations reopen.

A second theme focussed on what has been termed the "bottom up" approach. Many government respondents were of the view that negotiations on aboriginal self-government should begin at the local level, using a regional trilateral avenue. Local, regional or provincial self-govcmnt agreements could be negotiated outside the national constitutional process. After seeing these in operation for a few years, consideration could then be turned to providing constitutional protection, should the aboriginal parties to these agreements feel uncertain as to their security. The example of the Sechelt self-grrvcmnt agreement and legislation was frequently cited in this regard. A few suggested that negotiations at the local level should be sectoral in nature, such as the hospital agreement between the Government of Quebec and the Kahnawake government.

A third theme was on the substance of a constitutional amendment on aboriginal self-government. Some respondents thought that the most promising approach was to build on an existing proposal. Several thought that the federal or Saskatchewan governments' proposed amendments from the 1985 First Ministers' Conference were an appropriate starting point. The federal draft amendment of 1985 proposed that the rights of the aboriginal peoples of Canada to self-government within the Canadian federation be recognized and affirmed, where those rights are set out in negotiated agreements, and that governments be committed to participate in negotiations directed toward concluding agreements with aboriginal peoples relating to self-government. These agreements would receive constitutional protection under section 35(2) of the *Constitution Act, 1982*, as do treaties and land claims agreements.<sup>2</sup> The Saskatchewan

2 The Prime Minister of Canada, "Proposed 1985 Accord Relating to the Aboriginal Peoples of Canada", First Ministers' Conference, The Rights of Aboriginal Peoples, Ottawa, 2-3 April 1985, pp. 1, 2.

proposal was similar to that of the federal government, with one very important difference. As Premier Grant Devine described it,

The change we recommended to the federal proposal was to move the commitment to participate in negotiations out of the constitutional amendment and place it into the attached political accord.<sup>3</sup>

A few interviewees suggested the federal or Ontario governments' draft amendments from the 1987 FMC. As one government respondent phrased it,

"explicit recognition" (of the right to aboriginal self-government) is as far as we can go we cannot go to "inherent", it gives too much power to the courts ...we can agree to entrench the right, so long as the courts don't get a free hand...

An important finding from the interviews with representatives from the national aboriginal peoples' organizations is that, for a significant number of these respondents, the right to aboriginal self-govcmnt does not have to be proclaimed "inherent", so long as it is justifiable (that is, it can be examined before a court of justice). A "distinct" or "explicit" right to self-government, for example, would suffice in this respect.

Three quite innovative substantive approaches to a constitutional amendment were advocated in order to address the problems surrounding the nature of the right to aboriginal self-government. The first is the "silent right" approach, described in the last chapter, which received wider support.

A second approach is the "preambular recognition" of the pre-existing right to aboriginal self-government. If the recognition were placed in the preamble to the constitutional amendment, it would not be justifiable, its proponents argue. This approach would focus on the process of negotiation as well, and would require some commitment in the constitution to negotiate self-government agreements.

A third approach is the "section 59" approach, named after the opting in provisions with respect to language rights. Under this approach, the general right to aboriginal self-government would come into effect when self-government agreements were reached (i.e., it would not be immediately enforceable). According to the advocates of this approach, it would give governments some comfort, although they must negotiate in good faith and it would give the aboriginal peoples a moral victory, since the right is in the constitution. The self-govcmrncnt agreements would be constitutionally protected as are treaties and land claims agreements. This approach would appear to be the most flexible, since it would allow provincial governments which

3 Saskatchewan, "Speaking Notes: The Saskatchewan Proposal", First Ministers' Conference, on Aboriginal Constitutional Matters, Ottawa, 2-3 April 1985, CICS Document 800-20/043, p. 2.

wished to proceed with self-government negotiations to do so, while enabling other provinces to maintain the status quo.

Several other approaches were suggested, although they received little support. One was the draft amendment distributed by the four national aboriginal peoples' organizations at the close of the 1987 First Ministers' Conference, just prior to its adjournment (it was not discussed at the FMC). The "Joint Aboriginal Proposal for Self-Government", tabled on March 27, 1987, was the most comprehensive of those put forward. It proposed to recognize and affirm the inherent right of self-government and land of all the Indian, Inuit and Métis peoples of Canada, and it set out, in some detail, the commitment to negotiate. Negotiations would be initiated at the request of aboriginal peoples, could be either bilateral or trilateral in nature, would be carried on in good faith, and would be accessible to all aboriginal peoples (i.e., including Métis). Negotiations would include, but not be limited to: self-government, lands, resources, economic and fiscal arrangements, education, preservation and enhancement of language and culture, and equity of access. These negotiations would not prejudice existing programs and services available to aboriginal peoples. The rights defined in the agreements would be protected in the constitution as are treaty rights.<sup>4</sup>

The Joint Aboriginal Proposal also contained detailed sections on economic and fiscal arrangements (ensuring that aboriginal governments have legislative authority to raise revenues and tax, providing for direct payments and fiscal arrangements from federal and provincial governments (including equalization), and designating the federal government as having "primary financial responsibility". A treaty renewal and renovation process, to fulfill the spirit and intent of existing treaties, was also proposed. Aboriginal and treaty rights were to be interpreted in a broad and liberal manner, and the usual non-derogation clause was inserted. In an interesting turn of phrase, the final clause proposed that nothing in this proposal "extend the legislative powers of Parliament or a provincial legislature."

Another approach was to link a constitutional amendment on self-government to "doing away with the *Indian Act*", a proposition based on the assumption that this would provide some incentive for Indians to negotiate a less colonial and more autonomous regime for self-determination.

From this analysis of the prospective views of former participants in the constitutional negotiations, it is evident that prescriptions with respect to

4 Assembly of First Nations, Native Council of Canada, Métis National Council, Inuit Committee on National Issues, "Joint Aboriginal Proposal for Self-Government", First Ministers' Conference on Aboriginal Constitutional Matters, Ottawa, March 27, 1987, CICS Document 800-23/030.

improving the negotiation process are many, and often contradictory. It would seem important, nonetheless, that any new process have both a public and a private component, for reasons which have been advanced in this chapter. This is particularly necessary if trust ties are to be (re)built. One can also conclude that although the rigid timing of First Ministers' Conferences was unhelpful, there is a need for a constitutionally mandated process. It might also be advantageous to proceed on bilateral, trilateral and multilateral levels at the same time, and to develop working groups of officials and ministers so that some background work can be initiated. This would also assist in the establishment of trust [its].

With respect to a constitutional amendment, two approaches appear to be more promising than others at this time, the "silent right" approach and the "opting in" (Section 59) approach. Both were the subject of informal discussions among aboriginal representatives and senior federal government officials in the Spring of 1989.



## 7 THE PARTICIPANTS' VIEWS: IMPACT OF THE MEECH LAKE ACCORD

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While the success of the Prime Minister and Premiers in reaching the Meech Lake Accord in June 1987 provided a stark contrast to the failure of the constitutional reform process on aboriginal rights, it was not thought by government ministers and officials, initially, that the Accord itself would have any substantive effect on aboriginal peoples, or on the provisions relating to aboriginal peoples in the constitution. Section 16 of the Accord, which provided that it would not derogate from the constitutional rights of aboriginal peoples nor alter the meaning of subsection 91.24 ("Indians and the lands reserved for the Indians"), was inserted to ensure that Meech Lake was "neutral" with respect to its impact on aboriginal peoples.

Since there was some disagreement concerning the neutrality of the Meech Lake Accord during the pretesting of the interview used in this research, a question was inserted on this topic. Respondents were asked: What impact do you think that the Meech Lake Accord will have, if any, in this general area of aboriginal peoples and constitutional reform?

Most respondents, including almost all government officials, thought that either the Accord would have no impact, or that its impact would be positive. Many of these officials thought that with Quebec as a "full participant" in the constitutional reform process, chances for success on the aboriginal constitutional front would be improved. With Quebec in, it would "break the logjam" with respect to further constitutional reform. Another benefit, also frequently mentioned, was the requirement of an annual First Ministers' Conference on the Constitution, which is part of the Meech Lake Accord. With a meeting of First Ministers on the Constitution annually, many interviewees thought that aboriginal peoples would stand a better chance of "getting aboriginal self-government back on the agenda". This would ensure more public discussion of aboriginal rights, it was suggested.

Another of the positive benefits of the Meech Lake Accord was more substantive in nature, and related to the "distinct society" clause of the Accord. The recognition of distinct societies of aboriginal peoples would be easier, it was argued, following the use of the clause with regard to Quebec ("Having

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raises questions as to the workability of the 1982 constitutional amendment process, at least as practiced in the Meech Lake approach. While private meetings may be more effective in reaching agreements among governments, they appear to have a negative effect in terms of achieving consensus among Canadians.

It would seem that public debate on the issues is required in advance of a political accord being reached. This reinforces the views of some of the participants in the section 37 process that the opinions of [the Canadian public should be canvassed, through such instruments as a Royal Commission, a Task Force, or a travelling Parliamentary Committee, prior to beginning negotiations anew.

Another option, perhaps less palatable, would be to alter the 1982 amendment process so that some changes in the amendment could be made at the resolution stage in Parliament and provincial legislatures, without forcing all parties at the table back to square one, thus reopening the initial political accord and accompanying proposed amendment. Changes of a minor nature, or those which did not alter the "pith and substance" of the main amendment, might be subject to a less onerous approval process. Of the two options, the former appears to be the most realistic in the short term.

## 8 NEW POLICY DIRECTIONS

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Before drawing conclusions on what lessons can be learned from the constitutional negotiations on aboriginal rights, it remains for us to examine what policy has emerged since the expiry of the section 37 process, as well as what shifts in policy may be necessary in the future.

### Recent Developments

Following the unsuccessful 1987 First Ministers' Conference on Aboriginal Constitutional Matters, many observers of the section 37 process felt that a policy vacuum had been created in the field of government-aboriginal relations. Governments at both the federal and provincial levels, and across all departments, had been working for the past number of years on the assumption that a new framework for government-aboriginal relations would emerge from the section 37 process—one based on the constitutional right of aboriginal self-government. When no accord was reached, and no constitutional amendment was forthcoming, the prospect for a new framework was gone. In many cases, governments and aboriginal peoples had put policy development "on hold" in various sectors, such as economic development, education, and resources, on the assumption that the constitutional process would produce a new, overarching policy framework within which to situate developments at the sectoral level. When the 1987 FMC adjourned, the argument goes, what was left was an overwhelming policy vacuum in all sectors at both the federal and provincial levels. Governments could not move ahead to operate on a new policy framework, but nor could they return to pre-section 37 approaches. The influence of the section 37 process was to demonstrate the poverty of the old policy framework without providing a new one.

Given the widespread currency of this view in the aftermath of the 1987 First Ministers' Conference, it was important to determine if the negotiators in the process also shared this opinion, and to solicit their perceptions on what directions government policy in this field was now taking. Most of those interviewed, by a ratio of three to one, thought that a policy vacuum had come to exist in the aboriginal area.

As to the matter of where current government policy is going, there was less agreement. There are, however, at least two broad exceptions to this disagreement. First, there is a common view that governments are now more interested in working from the bottom-up, rather than from the top-down (the latter characterized the constitutional process). A more incremental "grass roots" approach, at the community, regional or provincial level, is now seen by many as preferable to the constitutional approach which deals with principles and rights. Trilateral negotiations on self-government outside of the constitutional framework, involving the federal and provincial governments and aboriginal communities, are increasingly seen as the way in which government policy is developing.

Interviewees from the aboriginal organizations also see government policy going in this direction. They point to the Indian and Northern Affairs Canada (INAC) community self-government program, initiated in 1986, as an example of the new direction. \* It put forward a "process of community negotiations leading to community-specific self-government agreements and/or legislation...on practical arrangements...in Indian communities."<sup>2</sup> As one person phrased it, "the feds [sic] are going whole hog on delegated authority." While this approach is seen as a positive development among government officials, several respondents from the national aboriginal peoples' organizations thought that the failure to date of the trilateral process only served to prove that there is no alternative to the constitutional track.

A second exception to the disagreement on the movement of current government policy, closely related to the first in terms of policy direction, was the general consensus that negotiations will increasingly focus on particular issues or sectors, and the programs within them, rather than on broader political matters. Practical matters such as child care, education, native courtworkers, and economic development programs are now dominating the aboriginal affairs agenda. As one government official put it, "after section 37, everyone became practical." Some officials thought that one impact of the section 37 process was a greater willingness on the part of governments to devolve more responsibilities to aboriginal peoples, although some were quick to state that this willingness would have been even greater with a constitutional amendment on self-government. Of course, it is possible that governments would be more reluctant to devolve responsibilities if, under a constitutional amendment on aboriginal self-government, they could not get them back. The focus now has

1 "Policy Statement on Indian Self-Government in Canada" by the Honourable David Crombie, Minister of Indian Affairs and Northern Development, Ottawa, April 15, 1986.

2 "Questions and Answers", Indian Self-Government Community Negotiations, Indian and Northern Affairs, Canada, p. 1.

to become one of reducing dependency, the reasoning goes, which is a long term objective best dealt with on a sector-by-sector basis. Others were of the view that, with the momentum lost on the constitutional front, the only way left to proceed was with a strategy of incremental self-government.

A third theme, much less widely held, was that there is a need to restore a "loss of faith" with aboriginal leaders, and that the onus is on governments to reach out and to demonstrate their concern for, and their understanding of what self-government means. Others thought that it was the responsibility of the federal government to come up with a new approach, and not one "solely motivated by the objective of diminishing their fiscal exposure." Given the federal deficit and pressures on the expenditure budget, one should not anticipate that the federal government will move quickly on this suggestion.

A fourth theme, also somewhat limited in its currency, was the perception that governments were withdrawing from aboriginal programming and funding. For provincial government officials, the fear was that the federal government was now attempting to "offload" programs onto provincial governments. For aboriginal peoples, recent developments include not only new conditions on government financial arrangements and programming, as in the area of education,<sup>3</sup> but a "constriction of both federal and provincial funding to aboriginal people s."

#### Future Policy

It should be emphasized that the new directions in public policy noted above are not necessarily those that governments ought to follow. The former—what we have described to date—are descriptive of what governments appear to be doing.<sup>4</sup> What we will now address are prescriptions for government actions: these may or may not bear much resemblance to existing policy directions.

Interviewees were asked if they thought that basic assumptions and frameworks in this field had to change, and if so, in what way. On one hand, there was strong feeling among all parties that there will have to be change, and that the pressure for change will be endless. There is concern that a dangerous vacuum now exists, and that these issues will become harder to resolve over

3 The Minister of Indian and Northern Affairs announced restrictions with regard to student financing for Indians at post-secondary institutions, which led to highly public demonstrations (including a hunger strike by students) in the Spring of 1989.

4 Nor is this all that governments are doing. For example, since the expiry of the section 37 process in 1987, land claims agreements in principle have been signed with the Council of Yukon Indians in the Yukon and with the Dene/Métis in the Northwest Territories, and land claims negotiations are ongoing with the Inuit in the eastern Arctic.

time. In this scenario, either there is agreement soon or there will be violence in the streets. On the other hand, many respondents do not think that changes will come easily and are pessimistic concerning the future. They cite the growth of "aboriginal nationalism and the rhetoric of sovereignty" moving in one direction, while "neo-conservatives in the West, who oppose entrenching self-government" move in quite another direction. The fear of a "white backlash" is particularly strong in western Canada.

As to the direction in which this change should occur, there was less consensus. On the matter of the agenda for change, several government respondents were of the view that the new agenda had to be **socio-economic**, with an emphasis on aboriginal self-administration. For respondents from the aboriginal parties, the agenda must shift from the **socio-economic** to the political. As one person put it, "we must back up to 1867 and get into the Constitution." Another said: "Aboriginal peoples have to break the ties that bind them—ties to white colonialism." In terms of an agenda for change, the language of aboriginal peoples is clearly one of decolonization.

With respect to basic assumptions and frameworks that have to change, it was noted by respondents from the national aboriginal peoples' organizations that aboriginal peoples "are here to stay". They continue to be disadvantaged and this must be changed. Both the **assimilationist** and the integrationist frameworks have failed. Only one based on mutual co-existence, they argue, will be successful. Several government officials noted that some non-aboriginal leaders have not yet accepted the "aboriginal fact". Although progress has been made, they said, some are still assimilationist in orientation.

As to what basic changes should be made, many respondents suggested fundamental shifts in **policy**. One area had to do with changes to the *Indian Act*. Several persons advocated the abolition of the *Indian Act*, and thought that Indian people should design a new policy to replace the Act. Others thought that opting out of the *Indian Act* was at least a transitional agenda for Indian peoples. Institutional changes were also suggested. One was to strike a royal commission on aboriginal affairs, to broaden the debate and to seek public input into the policy-making process from both aboriginal and non-aboriginal peoples. Another was to implement a major recommendation from the report of the House of Commons Special Committee on Indian Self-Government, known popularly as the Penner Report after Committee Chairperson Keith Penner.<sup>5</sup> That recommendation was the establishment of a Secretary of State for Aboriginal Affairs in the federal government. A third was to use the Indian Commission of Ontario (ICO), described in Chapter 6, to resolve issues within the province

5 Canada, Report of the Special Committee on Indian Self-Government, *Indian Self-Government in Canada*, 1983.

of Ontario. It was also suggested, by persons outside Ontario, that a structure and process similar to the ICO might be a useful innovation in their provinces.

Other basic changes which were suggested were more attitudinal in character. There is a need for more respect and more knowledge of aboriginal peoples. Both aboriginal and non-aboriginal people need to know about the history, culture, and current contributions of aboriginal peoples to Canadian society. This will instill pride in aboriginal peoples, and support for them among non-aboriginal Canadians. This will serve to offset, at least in part, the asymmetrical power relationship between aboriginal and non-aboriginal Canadians.

Finally, it should be noted that many would simply advocate the reopening of the constitutional negotiations on aboriginal self-government, since in the view of a number of observers only a constitutional amendment can provide a new framework for policy in this field. It is argued here that aboriginal issues must come at the top of the list of items to be discussed in the next constitutional negotiations, and that deadlines for agreement must again form part of the process. One can understand the strong feeling on this matter, given the lack of any significant progress on aboriginal self-government during the two years since the lapse of the section 37 process. The evidence to date suggests that a constitutional amendment is required to provide a new framework for relations between aboriginal and non-aboriginal Canadians.

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## 9 SUMMARY

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What have we learned from our experience in regard to aboriginal peoples and constitutional reform? Do the participants' views of the section 37 constitutional reform process yield any lessons? Are there improvements which could be made to the process; are there more promising approaches to an amendment; and are there techniques of negotiation which could enhance success?

There are lessons from the section 37 experience. Underlying assumptions need to be more widely shared. Trust among the major actors needs to be engendered. The issues of federal/provincial responsibility and financing need to be faced squarely and openly. The negotiation process should be both private and public, with the views of Canadians on these subjects canvassed in advance. It is important to note that new approaches to a draft amendment are being discussed. What we do not know, at this point in time, is the real cost of the "failure" of the section 37 process. Will an opportunist present itself again, in such a fundamental way, to right some of the past wrongs and injustices created by hundreds of years of oppressive government policies and actions toward the aboriginal peoples of Canada? Or have we squandered an opportunity, the likes of which we are not likely to see again for some time to come? The conclusion of this study is optimistic in this regard. The observations and analysis which follow are offered in the hope that they might be of assistance, in terms of both process and substance, when constitutional negotiations on aboriginal rights resume.

### Underlying Assumptions

In one sense, the lack of agreement at the end of the section 37 process should have shocked no one. It is clear, now, that the commitment of some governments to, and their understanding of, the 1982 constitutional amendments regarding aboriginal peoples were weak. Some of the governments were at the negotiation

1 David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?* (Kingston: Aboriginal Peoples and Constitutional Reform Series, Queen's University, Institute of Intergovernmental Relations, 1985), p. 1.

table only because section 37 of the *Constitution Act, 1982* (as amended) in essence forced them to be there.

It is also clear, in retrospect, **that not all** parties to the negotiations wanted a constitutional amendment on aboriginal self-government. Political will, for whatever reasons, was obviously lacking. This conclusion is not restricted [o the representatives of **governments** at the table.

If the understanding and **commitment** of some governments were low, then the **expectations** of the aboriginal parties to the negotiations were high, perhaps unrealistically so. Some aboriginal people tended to see **constitutional reform** as a “panacea” for **all** of their political, economic, and social ills.

Assumptions about the objectives of the section 37 process were not widely shared. For example, only the aboriginal parties to the negotiation appeared to view the process as an opportunity to educate Canadians at **large** (rather than only federal and provincial government officials and ministers). This was, and remains an important **problem**. Public support is absolutely **critical** in [his area, a theme which will be expanded upon later in this chapter.

Suspicion was **overwhelming** during these negotiations. Provincial **governments** were suspicious of the motives of the federal government, especially when the federal Department of Indian and Northern Affairs appeared to be on] y marginally involved. The aboriginal parties at the table were suspicious of both the federal and provincial governments. There is a desperate need to build trust ties among the parties to the negotiations, as these are crucial to the success of the exercise. How this might be done is addressed in the section on the process, which follows **later** in this chapter.

Finally, it is now obvious that the parties approached the negotiations with different frameworks of analysis, based on, **at** times, **competing** values and norms. These were expressed in terms of individual rights versus group rights, and of the **competing** concepts of assimilation, integration and co-existence.

### Issues

The nature of the aboriginal right [o self-government remains the major issue to be addressed (or deliberately avoided, as will be argued **later**)— is it inherent, or is it contingent upon the negotiation of intergovernmental agreements? Close in terms of importance, but much less public during the negotiations, are the issues of financing and federal/provincial responsibility. Although this is primarily a concern with how to (and who will) finance aboriginal self-government, it also extends to accepting responsibility for off-reserve as well as on-reserve Indians, and for unequal and unfair differentiation of both federal and provincial government programs and services to aboriginal peoples. Any further negotiation must address these two issues up **front** on the formal agenda.

Issues of somewhat less importance, but which also deserve to be highlighted because of the concern attached to them, include the matter of **justiciability** (that is, whether the right to self-government is **able** to be enforced in the courts in the **absence** of self-government **agreements**), and the jurisdictional issue concerning whether the Métis are now, or should be **included** in subsection 91.24 of the *Constitution Act, 1867*, and hence **fall** within the federal domain. Nor should these matters be ignored should negotiations begin anew.

### The Negotiation process

Many critiques have been offered on the section 37 process of constitutional negotiation, and many suggestions for improvement put forward. As to whether the section 37 process itself was a “failure”, opinions vary. Aboriginal peoples tend not to see it as a failure, pointing to the educational value, the openness of the process (which they compare favorably to that of Meech Lake), and the longer time frame which they apply to achieving their objectives. Governments tend to see the section 37 process as a failure, and blame this, in large part, on the uncompromising attitude of aboriginal peoples and their adherence to fixed and unrealistic positions.

In terms of past problems with the process, its high profile and highly public nature inhibited the development of trust ties and effective communication. An unclear agenda and vague objectives, together with a rigid timetable and bureaucratic inertia, made an already massive and cumbersome process unlikely to generate agreement. Furthermore, there would appear to be a strong case to be made that bureaucratic politics within governments were part of the problem. There was no incentive for resolution, and little perception, at least on the part of government leaders, that there was much public support for pressing ahead with the objective of recognizing the right to aboriginal self-government in the constitution.

With respect to suggestions for improving the process, a large number of positive and realistic ideas present themselves. The objectives of the **exercise** should be more clearly defined, and agreed upon by all parties to the **negotiations**. A workable short list of priorities should be developed, and the agenda narrowed. Parallel meetings should be held, some in public [o **meet** the **education** objective of aboriginal peoples, and some in private to assist in the resolution of important issues. Private, smaller, more frequent, and more informal meetings would help to build trust ties among the parties to the negotiations, as would the use of temporary secretariats and joint staff-level task forces. This would also assist in keeping the meetings “low key”, and in reducing the “high noon stakes” of televised summit meetings. The use of other fora **simultaneously** should also be considered, and bilateral or provincial/regional tri-lateral processes may be of benefit here.

More third party involvement would also be welcome. A neutral, third party research effort monitored by parties to the negotiation; a third party "think tank" involving all parties to the negotiation; the use of an independent mediator; and the establishment of an inquiry or commission all deserve thoughtful consideration.

Incentives must be increased, both incentives to bargain and incentives to achieve resolution. Incentives to bargain can be introduced through such techniques as the use of the "best effort drafts", which were used by the Continuing Committee of Ministers on the Constitution (CCMC) during negotiations in the late 1970s and early 1980s. Ministers and senior officials took draft amendments on various sections of the constitution as far as they could go (their best efforts), often presenting a range of options for the consideration of First Ministers. This enabled a great deal of legwork to be done prior to First Ministers' Conferences, and for tentative agreements to be reached, pending the approval of First Ministers. Even in this case, however, best efforts can be to no avail in the absence of political will. With the re-election of the Trudeau government in 1980, after the short tenure of Joe Clark, the federal government declared that the best effort drafts were off the table.<sup>2</sup> The federal government, firm in the belief that the country was too decentralized and that the pendulum of power had swung too far toward the provinces, was determined to strike back.

If one wishes to build into the process greater incentives for resolution there would appear to be at least four sources which should be considered. One is legal, in that a court decision or remedy (say, for example, defining aboriginal self-government as an existing right in the constitution) might motivate governments to seek negotiated agreements. Given the progress of cases through the courts, and the nature of the case that would have to reach the highest court in order for this broad issue to be addressed, this seems an unlikely source in the short term. A second incentive, discussed in Chapter 6, is financial (the example used earlier was to allow the first aboriginal self-government agreements to have the first shot at what will be limited federal funding). This does not appear to be a realistic approach as it would never be acceptable to provincial governments or aboriginal organizations. A third incentive is moral. This could be more effective if there were a greater understanding of the relationship between aboriginal and non-aboriginal people since first contact, through greater historical research and education. Public opinion is crucial to make this work. So, too, is public opinion critical to the fourth incentive which is political. An example of the effective use of political incentive to reach agreement has been the threat to delay or stop major resource developments. On a broader plane,

2 For a fuller account, see Roy Romanow, John Whyte and Howard Leeson, *Canada...Notwithstanding* (Toronto: Carswell/Methuen, 1984), Chapter 3.

public support., fostered through greater education and understanding, is essential to achieving a resolution of these issues.

### The Draft Amendments

Attention should continue to focus on a constitutional amendment on aboriginal self-government. Two other topics demand space on the agenda—the issues of financing and federal/provincial responsibility. The first issue cannot be resolved without some considerable progress on the latter two. There could be wide support for a right to aboriginal self-government which is justiciable, but not termed "inherent" (alternatives include "distinct" and "explicit").

The most promising approach late in the section 37 process, and one widely supported near the end of 1988, is the "silent right" approach, in which the constitution remains silent on the nature of the right to aboriginal self-government, and relies instead upon a negotiation process to produce self-government agreements, with the rights defined therein receiving constitutional protection as do treaties and modern land claim agreements. Some support exists for a preambular recognition of the pre-existing right of aboriginal self-government, and there is considerable and growing support, in the spring of 1989, for an opting in approach modelled on section 59 of the *Constitution Act, 1867* (provincial opting in and a general right of self-government that comes into effect when agreements are reached).

It is possible, of course, that some combination of these approaches might be possible, and even desirable. The preambular recognition of the pre-existing right of aboriginal self-government, combined with the silent right approach in the text of the constitutional amendment, might be more acceptable to aboriginal peoples. The preambular and opting in approaches could also be linked. Whatever the proposed amendment, it must be seen in "positive sum" terms—all parties must be able to save face, and to style the agreement as a victory for them.

### New Directions

It is perceived that a policy vacuum exists in the field of aboriginal affairs, and most particularly in the relationship between aboriginal peoples and federal and provincial governments. Governments are focussing their efforts, such as they are, on what they term the "bottom-up" approach, which emphasizes incremental change on a program-by-program or sector-by-sector basis at the community level, outside of the constitutional framework. Provincial governments are concerned about the possibility of federal government "cutbacks" to funding



and programing for Indian peoples, in effect "offloading" the responsibility for providing such services to provincial governments.

It is widely understood that there has to be change, but at the same time there is great resistance to change. It is also greatly feared, in this regard, that if the Meech Lake Constitutional Accord is not proclaimed (it remains, at time of writing, to be passed by the legislatures of Manitoba and New Brunswick), then there will be no future constitutional conferences for some time to come. Without Quebec's participation in the process of constitutional reform, there is little hope of addressing the aboriginal constitutional agenda.

With the expiry of the section 37 process, aboriginal self-government in a sense "fell off" the national constitutional agenda. The corresponding loss of public awareness leads aboriginal peoples to more dramatic action to capture public attention, such as we have seen in Alberta with the Lubicon people and in Labrador with the Innu people. In the vacuum created by the failure to reach an amendment on aboriginal self-government, some aboriginal peoples are asserting their internal self-determination independently of the actions of others (e.g., the Akwasasne at St. Regis and the Kahnawakc near Montreal).

There is concern as well, among aboriginal peoples, that they may find it difficult to get back on the constitutional agenda, given the conspicuous absence of this item on the agenda of future constitutional conferences mandated by the Meech Lake Accord. It should be noted in this regard, that Prime Minister Mulroney, in debate in the House of Commons on the Meech Lake Accord, gave his undertaking that aboriginal self-government would be a priority item in the next round of constitutional negotiations.<sup>3</sup> He has also encouraged aboriginal leaders to consider pursuing a Meech Lake approach to future negotiations, as has his Minister of Federal-Provincial Relations, Senator Lowell Murray.<sup>4</sup> The Prime Minister has repeated his commitment on several occasions, including the televised federal party-leaders' debate during the 1988 election campaign ("I do not think that Canada will be complete as a nation until that matter

<sup>3</sup> *Hansard*, House of Commons Debates, May 11, 1987, p. 5932 and June 14, 1988, p. 16407.

<sup>4</sup> *Hansard*, House of Commons Debates, May 28, 1987, p. 6499. A similar plea was made by Senator Lowell Murray in an article entitled "The Process of Constitutional Change in Canada The Lesson of Meech Lake" which appeared in *Choices*, February 1988 (a publication of the Institute for Research on Public Policy).

(aboriginal self-government) is effectively resolved"), and in the Speech from the Throne on April 3, 1989.<sup>5</sup>

Aboriginal self-government will be difficult to achieve without constitutional change. Note the failure, to date, of the various trilateral negotiation processes at the provincial or regional levels with Métis peoples, the limited success of bilateral negotiations between Indian peoples and the federal government, and the difficulty of bringing governments to the negotiation table in the absence of a constitutionalized commitment to negotiate. Even if self-government agreements could be achieved outside of the constitutional framework, it would be difficult to implement them. For example, without legislation or a constitutional base, one cannot negotiate the fiscal arrangements upon which an aboriginal government would operate. There have to date been only two cases of legislated self-government, both of them respecting status Indians (James Bay Cree and Naskapi, and Sechelt). Without a constitutional base, or as some would argue, a broader policy framework, many substantial self-government agreements affecting the more diverse circumstances of other aboriginal peoples will be difficult to achieve and implement.

In the broadest of terms, future government policy must seek an accommodation with aboriginal peoples based upon the objectives of integration, co-existence and decolonization. The internal colonialism put in place by the *Indian Act* is now a source of national disgrace both within Canada and on the international stage. Previous policies of assimilation have not worked, and some aboriginal peoples are questioning the value of integration in terms of its effectiveness. We must begin by defining a common goal. We have in Canadian federalism, a great respect for different cultures, and a capacity to reach an accommodation acceptable to all.

There are, as well, instruments at our disposal which could assist in this regard. The use of a Royal Commission, with public input from across the country, could serve to build public support for a resolution of the matter. And given the experience with the Meech Lake process, it would appear that public participation should take place before an accord is reached among First Ministers. The majority of Canadians must be convinced of the need for constitutional change in order to achieve aboriginal self-government, and this support must be communicated to First Ministers. This public support may or may not already be there. What is clear, however, is that First Ministers have yet to be convinced

<sup>5</sup> During the 1988 election campaign, Prime Minister Mulroney made these remarks on the televised ENCOUNTER 88 program (verbatim transcript, Stenotran Services Inc., Ottawa, pp. t 60-t61 ). The reference in the *Speech from the Throne to Open the Second Session of the Thirty-Fourth Parliament of Canada*, April 3, 1989, appears on the first page.

on this score. At the federal level, a Secretary of State for Aboriginal Affairs has been suggested as a more effective voice for representing the interests of all aboriginal peoples (i.e., including Métis and non-status Indians) in the decision-making processes of the federal government.<sup>6</sup> The Indian Commission of Ontario (joint federal-provincial-Ontario Indian) is seen by some as a useful trilateral dispute resolution mechanism at the provincial level, which could be replicated with success in other provinces. There are instruments at our disposal which have yet to be used, in a federal system which is well designed to accommodate the aspirations of the aboriginal peoples of Canada. There is no reason to lose hope.

<sup>6</sup> Canada, Report of the Special Parliamentary Committee on Indian Self-Government, *Indian Self-government* in Canada. Ottawa, 1984.

## APPENDIX A: INTERVIEW QUESTIONS

1. Many observers of the section 37 process (aboriginal peoples and constitutional reform) have commented upon how aboriginal peoples and governments were operating on different assumptions or using different frameworks, and upon how difficult communication was among the 17 parties to the negotiations. Do you share this view?
2. If so, what were some of the (unspoken) assumptions underlying
  - (a) the approach of governments to the negotiations?
  - (b) the approach of aboriginal peoples' organizations to the negotiations?
3. Of course success is difficult to achieve when there is disagreement on the basic issues. What, in your view, were the main issues which prevented agreement from being reached?
4. Do you think that "personalities" or personal differences among the negotiators, either at the level of leaders or senior officials, played a role?
5. Some observers believe that the section 37 process itself was to blame, and that a different process may have produced more desirable results. Do you share this view?
6. What aspects of the section 37 negotiation process do you think were problematic?
7. If you were to "do it again", what changes do you think should be made to the process? How would you design a new process?
8. One of my objectives in this research is to canvass new suggestions for bridging the gap, or overcoming the barriers to achieving a constitutional amendment. Over a year has passed since the negotiations ended. Looking back, have you reached any conclusions as to how agreement might have been achieved?
9. If negotiations were to reopen, what do you think the most promising approach might be (to achieving a constitutional amendment)?
10. Some observers believe that we are now in somewhat of a policy vacuum, following the end of the section 37 process. In terms of [the current situation:
  - (a) what new policy directions do you see being implemented, or on the horizon, and
  - (b) what new policy directions do you think will be necessary?

11. Do you think that basic assumptions and frameworks of governments, or aboriginal peoples, or both, have to change? If so, in what way?
12. What impact do you think that the **Meech** Lake Accord will have, if any, in this general area (of aboriginal peoples and **constitutional** reform)?
13. Are there any other comments that you would like to make regarding aboriginal peoples and constitutional reform?

## APPENDIX B: INTERVIEWEES

Interviewee	Present or Past Affiliation
Mel Smith	Government of British Columbia
Eric Denhoff	"
Jack MacDonald	"
<b>Vic Farley</b>	"
Robert Plecas	"
<b>Oryssia Lennie</b>	Government of Alberta
<b>John Kristiansen</b>	"
Brian Barrington-Foote	Government of Saskatchewan
Claude Rocan	"
Jim Westasecoot	Government of Manitoba
Don Stevenson	Government of Ontario
Gary Posen	"
Pat Monaghan	"
Laura Metrick	"
Jean Rochon	Government of Quebec
<b>René Morin</b>	"
Barry Toole	Government of New Brunswick
Don Dennison	"
Bruce Judah	"
Carmen Moir	Government of Nova Scotia
Gordon Coles	"
Allan Clark	"

Barbara Knight  
 Gary Fake  
 Jerry Piper  
 Marc Malone  
 Stien Lal  
 Bernie Funston  
 Rick Van Loon  
 Scott Searson  
 Audrey Doerr  
 Philippe Doré  
 Peter Leslie  
 George Erasmus  
 John Amogalik  
 Michael McGoldrick  
 Louis ("Smokey") Bruyere  
 Martin Dunn

Government of Newfoundland  
 and Labrador  
 "  
 Government of Yukon  
 Government of Northwest  
 Territories  
 "  
 "  
 Government of Canada  
 "  
 "  
 "  
 Assembly of First Nations  
 Inuit Committee on National  
 Issues  
 "  
 Native Council of Canada  
 "

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