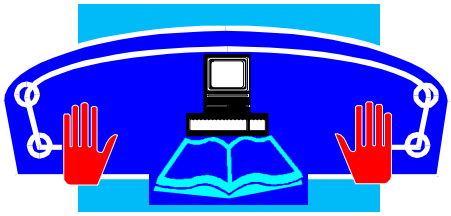

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ACCESS TO SURVIVAL A PERSPECTIVE ON ABORIGINAL SELF-GOVERNMENT FOR THE CONSTITUENCY OF THE NATIVE COUNCIL OF CANADA

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National Coordinator
NCC Constitutional Secretariat

Position Paper

Institute of Intergovernmental Relations

Queen's University
Kingston, Ontario
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PREFACE

Section *37* of the *Constitution Act, 1982* (as amended) requires the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." Discussion leading Up to and during the First Ministers' Conferences on Aboriginal Constitutional Matters quickly focused on the task of making constitutional provisions for aboriginal self-government. Many involved in the process openly questioned the meaning of "aboriginal self-government".

In view of the importance of this subject, in May of 1984 the Institute of Intergovernmental Relations launched a research project on "Aboriginal Peoples and Constitutional Reform". Phase One of the project responded to concerns that emerged at the outset of the constitutional negotiating 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 parties to 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).

Developments in 1985, subsequent to the First Ministers' Conference, may have a dramatic impact on the constitutional negotiation process. At a meeting of government ministers and aboriginal leaders held in June, 1985, several governments indicated their intention to pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution (the "bottom-up" approach). This contrasts with the proposal, which has thus far dominated discussions, to entrench the right to aboriginal self-government in the constitution, and then to negotiate individual agreements (the "principles first" approach). The result is that, in addition to multilateral negotiations at the national level, negotiations will now proceed on a bilateral or trilateral basis, at the local, regional and provincial/territorial levels.

Phase Two of the project is entitled "Aboriginal Self-Government: Can It Be Implemented?", and responds to concerns now emerging in the negotiations. This phase of the Institute's project therefore will focus initially on arrangeme"nts for the design and administration of public services by and to aboriginal peoples. The research will examine the practical problems in designing mechanisms and making arrangements for implementing self-government agreements. Clearly, the "bottom-up" approach could have a major effect *on* the process of constitutional reform as it relates to aboriginal peoples in Canada.

As the 1987 FMC approaches, attention will become more concentrated on the multilateral constitutional forum (the FMC). The 1987 FMC may consider the constitutional entrenchment of individual agreements previously negotiated, or it may attempt to reach agreement on a "principles first" approach for defining and entrenching aboriginal rights in the constitution, especially those relating to aboriginal self-government. The research agenda in the second year of Phase Two anticipates this shift in preoccupation, with the focus turning to the search for a constitutional accommodation in 1987. If this search is to be successful, it will be

necessary first to inquire into, and then to resolve or assuage a number of genuine concerns about aboriginal self-government and its implications for federal, provincial and territorial governments. Research in this part of the project will explore these concerns.

The Institute wishes to acknowledge the financial support it received for Phase Two of the project from the Dormer Canadian Foundation, the Canadian Studies program (Secretary of State) of the Government of Canada, the Government of Ontario, the Government of Alberta, the Government of Manitoba, the Government of New Brunswick, the Government of Yukon, the Assembly of First Nations, the Inuit Committee on National Issues, the Metis National Council and the Native Council of Canada.

As part of Phase Two, the Institute offered to publish and distribute a position paper on aboriginal self-government from each of the aboriginal peoples' organizations party to the section 37 negotiations (Assembly of First Nations, Inuit Committee on National Issues, Native Council of Canada, and Metis National Council). Since positions have evolved over the past few years, and are now spread across a large number of sources, this will enable each organization to consolidate its views in a single document. It is thought that these position papers will be helpful to governments, aboriginal peoples and the general public in terms of promoting better understanding. In addition, they may help to facilitate the negotiation process.

The contents of these position papers, including this one by the Native Council of Canada, are entirely the product of the respective organizations. They do not represent the views of the Institute of Intergovernmental Relations, nor does the Institute endorse the positions taken therein. They are designed to provide aboriginal peoples with an opportunity to articulate what they require from self-government.

David C. Hawkes
Associate Director
Institute of Intergovernmental Relations
July, 1986

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I want to acknowledge a number of people whose efforts painted me into the corner where this paper was produced.

Special thanks are due to the more hard-nosed delegations at the FMC conference table who make us think that much harder about how we can get our point of view across to other Canadians. Of course, we must include those delegations who support our efforts and give us the hope we need to keep the faith.

The comments and suggestions of Professor Brad Morse, David Hawkes and Robert Groves helped clarify the work in its latter stages.

Finally, I must acknowledge the patience and tolerance of my wife, Tonnah and my son, Wanekia, who thinks Daddy lives in the cellar chained to a word processor.

Martin Dunn

ABSTRACT

This paper is designed to describe the perspective of the Native Council of Canada (N CC) on the subject of Aboriginal self-government for NCC constituents. The constituency, itself, is outlined with a description of the circumstances in which our peoples find themselves. The inequities this constituency faces (compared to other Aboriginal peoples) are delineated in the context of the specific accommodations required to ensure this constituency has equitable access to the Aboriginal right of self-government. The mechanisms, institutions, and functions of self-government are then discussed in the context of this constituency's various requirements.

SOMMAIRE

Le but de cette étude est de décrire la perspective du Conseil National des Autochtones du Canada (CNAC) au sujet de l'autonomic politique des autochtones chez les électeurs du CNAC. La circonscription électorale-même est délimitée, accompagnée d'une description des circonstances duns lesquelles se trouvent nos peuples. Les injustices auxquelles font face ces électeurs (en *comparison avec d'autres peuples autochtones*) *sent tracées clans le* contexte *des changements spécifiques requis afin d'assurer que ces électeurs aient un juste accès au droit des autochtones à l'autonomie politique. Les mécanismes, les institutions* et *les fonctions de l'autonomic politique sent ensuite discutés duns le contexte des divers besoins de ces électeurs.*

1 INTRODUCTION

At the outset it must be clearly understood, that this booklet does not represent the official position of the Native Council of Canada (N CC) on the issue of self-government for Aboriginal peoples. That position is still evolving and will continue to evolve in relation to the input of its own constituency and, the various circumstances that constituency faces in different parts of the country. But in the interest of generating discussion and increasing understanding of the significance of this issue to the NCC constituency, we present the following information.

It must also be clearly understood that the constituency of the NCC faces many unique circumstances, compared to other Aboriginal peoples, in terms of establishing and developing access to those self-governing rights which are being entrenched in the Constitution. Unfortunately, and perhaps even intentionally, many Canadian governments are doing their best to ignore these circumstances. Certainly they have received little consideration in the process to date. It is for this reason that this introduction is longer than some might expect. We want to be absolutely sure that there is a thorough understanding of the differences (as well as the similarities) that the constituency of the NCC faces on this issue.

To accomplish that we must establish:

1. Who the constituency of the NCC are;

2. The special or unique circumstances that must be addressed to accommodate our peoples;
3. And finally the processes and mechanisms by which these difficulties can be resolved.

Only when these three elements are clearly understood, can we then address the subject of self-government, itself.

1. The NCC Constituency

The NCC represents the largest number of Aboriginal people recognized under Section 35 of the *Constitution* Act, *1982,* including both Indian and Metis people. [1]

1.A. Indian Constituents

Contrary to carefully manipulated public opinion and the wishful thinking of many Governments, most Indian people in Canada are not now, and never will be registered under the *Indian Act.* The Indian constituency of the NCC are the descendants of the original peoples of North America who, as individuals and collect ivities, identify themselves as Indian people and/or with Indian communities.

There are some members of NCC affiliates who are Status Indians, and there are increasing numbers who are New-Status Indians. But the majority of NCC Indian constituents are now referred to as unregistered or Non-Status Indians. That does not and cannot affect the rights of these individuals and communities to recognition as Indians under Section 35 of the Constitution and to access to the rights entrenched in the Act.

1. A.1. Non-Status Indians:

In particular, Non-Status Indians are those persons of Aboriginal ancestry who identify themselves as Indians and who:

WERE NEVER REGISTERED - Literally thousands of Indian people have never been registered under the *Indian Act.* Many of these people were absent or ignored during registration processes. Others simply refused to register or were ignorant of the necessity to register

themselves or their children . Those who have not registered, but are entitled to register under Bill c-31 may be able to do so in law, but there is, in fact, no policy or process within the Department of Indian Affairs to carry out such first time registration. [2] In addition, there will continue to be an important segment of the NCC constituency and are entitled to access to Aboriginal and treaty rights whether or not they are registered under the *Indian Act.*

WERE ENFRANCHISED - Thousands of other Indian persons were enfranchised directly, or were struck from registration lists when their parents were enfranchised, or were "de-listed" as "civilized", or for political activism. [3] There were periods when the Department had the power to unilaterally enfranchise individuals and their families, and other circumstances in which individuals were pressured to enfranchise "voluntarily". Some of these persons may be able to register under Bill C-31 criteria. But many will not or cannot register. In any case registration under the */rid/an Act* as "General List" Indians will often not change affiliation with NCC and certainly will not affect their eligibility to be recognized as Aboriginal people under Section 35 of the Constitution Act, 1982, or Section 91(24) of the 1867 Act.

NEVER SIGNED TREATIES - There is a good deal of confusion over the relationship between registration under the *Indian Act* and eligibility for identification as a "treaty" Indian. In the Prairies, the terms seemed interchangeable. Certainly, unregistered Indians rarely received treaty payments. In areas and circumstances where the two situations were co-equal, those Indians who did not enter treaty and their descendants were deprived, in some cases of registration eligibility.

In other areas, particularly pre-Confederation treaty areas, there was no practical relationship between treaty and registration. In central Canada, particularly Ontario, there is a bewildering mixture of the two situations. Whatever the technical situation was vis-à-vis treaty and registration, the relationship of these people to Section 35 Treaty and Aboriginal rights, and to the

right of self-government in particular, is no different than that of other Aboriginal peoples. This issue is not resolved by Bill C-31 and may require Federal legislation to meet the Crown's fiduciary obligations. [4]

WERE EXCLUDED FROM TREATY - There were two situations in which self-identifying Indian people were excluded from treaties being signed in their area. They were often excluded by colonial criteria from entering the treaty in the first place, or they were later "expelled" from the treaty upon "discovery" that they did not meet colonial eligibility requirements established after the treaty was signed. [5]

Prior to 1830, most persons of Aboriginal ancestry whose community signed a treaty were included in that treaty. After 1830 the eligibility of mixed blood people became increasingly problematic for colonial administrators. By 1850 and the signing of the Robinson treaties, it became a matter of specific policy to exclude many mixed-bloods from entering treaty. [6] Although this policy was temporarily (and locally) reversed in the Treaty Three areas in the 1870's to offset the influence of Riel when an adhesion to Treaty Three was made with a specific Metis/Halfbreed group, the policy was re-established after Riel's death.

The aftermath of this policy generated a considerable segment of the NCC constituency, and continues to provide that service today, particularly north of 60. This group has the clearest case for "dual-Aboriginal identification." Once identified as treaty "Indians" and registered under the *Indian Act,* they were subsequently identified as Metis and excluded from treaty (and often enfranchised) on that basis.

ARE DESCENDANTS OF THE ABOVE - In every case the descendants of the persons who experienced one or more of these historical circumstances still suffer the consequences today. By virtue of government policy they have been unilaterally excluded from the benefit of their own birthright. In every sense of the word, they are Aboriginal people within the meaning of Section 35, and -where their circumstances are parallel to that of other Aboriginal peoples- have an obvious right to equitable access to benefit from that birthright. (See pages 18-22)

1. A.2. New-Status Indians

In particular, those persons of Aboriginal ancestry who are being re-instated to Status under the *Indian Act,* and who:

ARE REGISTERED ON A GENERAL LIST - Until the advent of Bill C-31, "general list Indians" were relatively rare, simply because registration usually involved band membership. Bill C-31 generates a situation in which many, if not most, of the persons who are reinstated under the Bill will not have band membership, and will be identified on a general registration list. It is obvious that most of the people involved are NCC constituents now, and it can reasonably be expected that most of them will continue to maintain that association.

LIVE OFF RESERVE - There are increasing numbers (approximately 100,000) of pre-C-31 Status Indian band members who actually live off-reserve. Since the concerns of these people are not band-related, they are turning increasingly, to the NCC for representation. Considering that up to one-third of Status Indians currently live off-reserve, this group becomes both a significant element in the NCC constituency, and a group that will require distinct accommodation in terms of access to their rights,

1. B. Metis (Half breed) Constituency

Since there are two organizations representing Metis at the conference table, it is important to understand that the Metis constituency of the NCC includes both blood-relatives of Red River Metis, and completely distinct Metis populations which pre - and -post date both the people and the history of Red River, Whatever definition of Metis may be adopted by any government or delegation, the irrefutable fact is that the NCC negotiated the term "Metis" into the constitution with the

intention of including those of its constituency who identified themselves as Metis.

Although neo-colonial historians and Canadian academia in general resist the concept, others are beginning to outline Metis history in Canada from a much broader base than a Stanley or a Morton has done.' Without delving into argumentative detail, it can be reasonably demonstrated that populations of Metis, distinct from those of Red River, existed both before and after the 1800-1885 Red River/ Batoche period. These include the Acadians of the Maritimes, the Half breed population of Sault Ste. Marie, the communities of Hudson's Bay Half breeds in various parts of the country, and, the most recent constituents of the NCC, the mixed Inuit-White, or Inuit-Indian population of Labrador.

It is also important to understand that, although the genesis of Metis populations were the result of Indian-White relationships, a very small percentage of today's Metis people originate in that way. Today far more Metis are born from two Metis parents, and from Metis/Indian parents, than are born from Indian/White parents. The current emphasis on the Indian/White genesis somehow implies that the population is temporary or less "indigenous" than other Aboriginal populations. That is a gross misconception which unfortunately contributes to the inequity Metis people face as an Aboriginal population. in reality, many Metis people have more. Indian "blood" or "genes" than many Status Indians.

In particular, we are concerned with those persons of Aboriginal ancestry who identify themselves as Metis and who were:

DENI ED RECOGNITION AS ABORIGINAL PEOPLE - Until the passage of the current Constitution *Act,* Metis people in Canada were denied recognition asa specific Aboriginal people. But those who suffered the result of racial bigotry, colonial ignorance, and political expediency have now achieved that recognition. By virtue of that previous denial, the Metis constituency of the NCC are still without access to the very rights they struggled to entrench and must have that access

established on an equitable footing with the other Aboriginal peoples. (See pages 18 and 24)

NEVER INCLUDED IN TREATY - Prior to 1830, mixed bloods associated with treaty-making groups were, as a matter of course, included in the treaty. [8] But after 1830, the position of the Metis/Halfb reed/mixed-bloods became increasingly problematic for colonial administrators. Those who were "obviously Indian" were reluctantly included, but by 1850 when the Robinson treaties were signed, the exclusion of half breeds was officially sanctioned.

With the interesting exception of the Half breed (Metis in the French version) Adhesion to Treaty Three, which was promoted as a way of lessening Riel's influence in the Northwest, the policy continues to expand the NCC constituency even today. The fact that current land claims policy insists, in practise, on Metis being identified with an Indian group for purposes of comprehensive claims, reinforces our concern for equity. Today Metis people are, in fact and in law, an Aboriginal people and, as such, are entitled to Metis-specific accommodation on an equitable basis with other Aboriginal peoples.

EXCLUDED FROM TREATY AS HA LFBREED - With Riel safely hung, federal policy descended on Metis with a vengeance, and thousands of Half breeds were excluded or expelled from treaty and struck from band lists. In the west, scrip was used both as a carrot and a stick to entice/force Metis and Half breeds to "voluntarily" withdraw from treaty. [9]

In Ontario hundreds of families were marked for expulsion because, in the opinion of a hired Magistrate, they did not "live like Indians". Others were allowed to stay, but their children were struck from the lists at age 21. [10] Given the unilateral and obviously arbitrary nature of these actions, it is little wonder the Metis constituency of the NCC is determined to achieve constitutional protection from the vagaries of government policy.

REFUSED SCRIP ON RESIDENCY BASIS - Even if Metis were to concede that the mechanism of scrip was a well-intentioned attempt to compensate some western Metis people for the loss of their Aboriginal rights, the unilateral, arbitrary and inept application of scrip policy left most Metis with their Aboriginal rights uncompensated, if not intact. Many Metis were denied scrip simply because they lived on the wrong side of the Manitoba-Ontario border (when they finally figured out where the border was to be.) The fact that Ontario officials promised (but did not deliver) scrip to Moose Factory Metis only underlines, once again, the arbitrary nature of government policy and the necessity for constitutional protection.

AND ARE DESCENDANTS OF THE ABOVE - Virtually all of the Metis constituency of the NCC have suffered, or are descendants of those who have suffered, the deprivation of their Aboriginal birthright. It is against this backdrop that the initiatives for constitutional protection in general, and for access to mechanisms for the development of self-government, in particular, that the concerns of the NCC Metis constituency must be viewed.

2. Special Circumstances

If the FMC process has served no other purpose, it has at least made it clear that the resolution of constitutional issues will vary greatly with the locale and the circumstances of the people and the communities involved. It is essential to have some understanding of the range of these circumstances within the NCC constituency, so that a parallel range of accommodation can be developed.

2.A. Non-Status Indians

Within the Non-Status Indian constituency itself, there is a broad range of life-style, residential location, and circumstance. In many cases, these circumstances will parallel those of other Aboriginal peoples, but in many others they will be distinct and will require distinct

accommodation . These circumstances include those who are:

BAND RELATED - This group is made up of those who have maintained family and social ties with existing Indian Bands. In many instances this group will have occupied land adjacent to reserves. Many of these people will be eligible for repatriation under Bill C-31, but many of their children and their grandchildren will not be included under the present terms of the *Indian Act.* [11]

TRIBAL ASSOCIATION - This includes those Indians who have maintained a tribal association quite apart from Status or Band membership. This situation is prevalent in British Columbia, and in other areas where the matriarchal form of social organization is predominant.

DISTINCT COMMUNITY - This includes existing communities in which Non-Status Indians are a majority or represent a significant and identifiable minority in a community. [12] These communities often have a perceived relationship to a specific land base through treaty or potential land claim.

WILDERNESS & ISOLATED - This includes persons who live in isolation or are widely scattered in wilderness areas. The relationship to land for these persons is often an individual one, based on family use and occupancy.

URBAN INDIVIDUALS - This includes that large group of Non-Status Indians who live in urban or suburban locations, and who may not be able to identify with a particular Aboriginal land base.

2.B. NCC Metis Constituency

An equally broad range of circumstances exists in the Metis constituency of the NCC. This includes both those Metis who are distinct from specific Indian communities, and those who experience a considerable degree of overlap, particularly with the Non-Status Indian

community. This includes individuals and communities who are:

BAND RELATED - This would include those Metis who *were* omitted or expelled from Treaty or bands because they were identified as Metis or Half breeds. Some of these Metis will be able to repatriate under Bill C-31, but the majority of their children will not. It is this group that is least likely to reinstate as a means of accessing their Aboriginal rights.

IN DISTINCT COMMUNITIES - In many areas Metis peoples developed distinct communities. In some they are a majority, and in others a minority to neighboring populations. In this situation there is often a distinct relationship to a specific land base, on the basis of use and occupation.

WILDERNESS & ISOLATED - As with Non-Status Indians, there are Metis who also live in isolated or wilderness environments, and w110 have an individual or family-based use and occupancy relationship to the land on which they live.

URBAN INDIVIDUALS - There are large numbers of Metis who live in urban areas, very often in a "community of interest" context. (See below)

2.c. Mixed Community

As reality would have it, many, if not most NCC constituents are a mixture of the categories outlined above. The proportions of the mix vary from place to place, creating the necessity for an equally flexible mode of accommodation. It is this type of community which will most require the "ground-up" approach, since only the community itself will know its specific mix and corresponding needs. This will include communities in which the mixture is:

INDIAN/METIS (ENFRANCHISED) - This community would feature a predominance of people who identify themselves as Indian, but would include an identifiable Metis

population. This type of community is more common in central and eastern Canada, but can appear anywhere in which lack of registration was caused by enfranchisement or "marrying-out". The further back on the family tree the enfranchisement occurred, the more likely the descendants are to identify as Metis.

MET IS/I NDIANS (TREATY/STATUS) - In the central west and northwest of the country, the situation is likely to be reversed. The majority of the community will identify as Metis, with the remainder associating with Indian identity. This would be particularly obvious in a community where people were excluded or expelled from treaty because they were identified as Half breed or Metis. But their relationship to the Indian community would still be strong by virtue of family ties and new marriages.

METIS AND NON-STATUS INDIANS (INTER-MARRIED ETC.) - There are many communities and many segments within larger communities which are completely overlapped between Metis and Indian. It is in these communities that "dual Aboriginal identity" is a simple fact of life. The arbitrary and often artificial terminology applied to Aboriginal populations has been obliterated in these communities by the living process of human relationship.

As a matter of interest, it might be pointed out that the process of identification as Indian or Metis can, for mixed-blood persons, be a function of the basic social structure of the group. It is rare to meet an Aboriginal person from a matriarchal culture who identifies as Metis, no matter how mixed his or her genes may be. The mothers who made the membership rules in a matriarchy weren't about to exclude their own children. The rule-makers in the patriarchal groups, however, were often anxious to exclude white men's children, with the result that Metis identity was much more likely for those children later in life.

URBAN (COMMUNITY OF INTEREST) - It is only in recent years that the phenomenon of the urban Aboriginal

person has been recognized as significant. The reality of permanent populations of Indian and Metis peoples is a fact in every Canadian city. Almost by definition, these populations are a demographic minority who are separated (in most, but not in all cases) from their ancestral land base. These peoples have established a "community of interest" in theirurban environments. Certainly, as Aboriginal people, they should be able to expect to access their birthright. Since these persons are a very significant element in the NCC constituency, such accommodation is a matter of priority.

3. Accommodation - Mechanism and Process

Any person of Aboriginal descent whofinds him or herself in one or more of the above categories has experienced some form' of deprivation of right and/or benefit. They have become members of the affiliated provincial and territorial organizations of the NCCwith the express purpose of eliminating the discrimination they have experienced, and of establishing equity between themselves and other Aboriginal peoples.

3.A. The Struggle for Equity

To understand why specific accommodation is so impor-tant to NCC constituents, we must first establish that the accommodation is lacking, and then understand how that lack of accommodation impacts on the lives of people. Once that is established, the necessity of the struggle for equity becomes self-evident.

3.A.1. Relationship to Governments

Whatever accommodation does exist for Aboriginal peoples is based on explicit relationships to Canadian governments. These relationships fall under the broad areas of constitutional accommodation, claims negotiation, legislative initiatives, and policy applications.

THE FEDERAL GOVERNMENT - From the text of Section 91 (24) of the *Constitution* Act, 1867 it is clear that the Federal government has exclusive jurisdiction to legislate for "Indians and lands reserved for Indians". It is equally clear that the Inuit, by ruling of the Supreme

Court of Canada, are "Indians" within the meaning of that section. But this is where any semblance of clarity ends in a foggy morass of self-serving legal interpretation.

Historically, the Federal government has chosen to exercise its jurisdiction only for those Indian peoples who are registered under the *Indian Act,* and for some Inuit peoples. By default, if not explicitly, those same Federal governments have ignored and, in effect, legislated against the majority of Indian people in Canada who are not, and will never be registered under the *Indian Act.*

The Federal government has been a model of consistency in progressively delimiting the numbers of Indian people who could be registered under the *Indian Act.* Operating for decades under the assumption that all Indians would become extinct or be assimilated into mainstream Canada, successive Federal governments cheerfully inflicted policies of cultural genocide on its "wards.."[13] Given the level of treatment accorded even Status Indians, the effect on NCC constituents was only too predictable.

Excluded or expelled from treaty, enfranchised and driven off their ancestral lands, struck from band lists, and separated from their families by a paper wall, the Metis and Non-Status Indians were deprived of what little benefit registration under the *Indian Act* could bring. More importantly, they were technically and unilaterally deprived of their Aboriginal culture, heritage, and birthright in the name of the law. Operating on the theory that what the law took away, the law could restore, these people formed the organizations that make up the NCC to fight for restoration of their birthright.

PROVINCIAL GOVERNMENTS - From the text of Section 92 of the *Constitution Act, 1867, we* might assume that Provincial governments do not have the authority to legislate for Indians and lands reserved for Indians. This might seem reasonable until we stumble across the fact that provincial governments do have jurisdiction over Crown Lands within their borders. The situation becomes even more troublesome when we determine that

some provinces – Ontario for example – must be a participant in treaties negotiated in the provice. Then we fall into an incredibly involved history of Federal-Provincial agreements relating to Indian peoples, and the problem becomes all too apparent.

In pre-1981 Constitutional terms, the provinces have no defined responsibilities for Aboriginal peoples within their borders, other than those related to residency within the province. Technically, there is no legal relationship between Aboriginal peoples and provincial governments – except for those relationships defined by Federal-Provincial agreement. And therein lies the catch. Those agreements most often apply exclusively to Indians for whom the Federal government accepts responsibility, i.e. registered Indians.

On the one hand, unregistered Indians and Metis are excluded from effective 91 (24) recognition by the *Indian Act* and left to the tender mercies of tile provinces. On the other hand, provincial relationship with Indians is primarily to registered Indians. In recent years, some provinces have developed specific programs and services for Metis and Non-Status Indians, but these are not based on a specific legal relationship.

3. A.2. Access to Rights

In practical terms, access to rights for Aboriginal people has been achieved exclusively through having a formally identifiable relationship to government. Historically, that relationship has ranged from total settler dependence on Indians, to an alliance of sovereign peoples, to totally dependent Indian wards of the state. Where specific relationship to the state did not exist, processes for establishing and accessing rights did not exist, as far as the settler governments were concerned. That situation has not, and is not likely to change in the forseeable future. <See Appendix 2> Because most NCC constituents lack a formal relationship to government, the mechanism for establishing access to rights is even more critically important.

At present, there are only three vehicles which may provide access to Aboriginal rights. They are:

CLAIMS PROCESSES - The inequity experienced by the NCC constituency is evident in the current Federal Land Claims policy. The recent report of the Task Force for Claims Policy Review has an immediate effect on their Aboriginal rights in terms of access to claims processes.

NCC CLAIMS OBJECTIVES - The fact that the first amendment to the Constitution entrenches the Land Claims process, as a mechanism to Constitutionally protect specific Aboriginal rights creates an even greater priority for NCC objectives in this area. These objectives are:

1. To include the NCC constituency in both comprehensive and specific claims policy, on an equitable basis with other Aboriginal peoples.
2. To ensure that the Treaty rights of both Metis and Non-Status Indians are validated in the claims process.
3. To guarantee access of NCC'S constituency to Section 35(3) of the *Constitution Act,* 7982, as a vehicle for constitutional protection of specific rights identified in a Claims process. [14]

CLAIMS POLICY INEQUITIES - Despite the fact NCC constituents are Aboriginal people under Section 35 of the Canada Act, they are unilaterally discriminated against in current Federal Claims policy outside of the Northern Territories. The need to respond immediately and effectively to these issues is made obvious by a simple listing of the inequities our peoples face in the context of Claims policy. They are:

1. Both Inuit and most Status Indian peoples have funded access to claims processes denied to most NCC constituents.
2. Only Indian bands can make specific claims under the current policy. By definition other Aboriginal communities are excluded from this process. [15]
3. This policy denies these peoples access to the Constitutional protection of Aboriginal rights which

are available to other Aboriginal peoples under Section 35(3) .

CLAIMS REVIEW REPORT - Even a cursory scan of the recent report of the Federal Task Force on Comprehensive Claims is sufficient to justify NCC concerns. The fact that these concerns are dealt with so briefly in the report supports the necessity for NCC's insistence on a higher profile for its constituency in the Claims process. The single recommendation that does address Metis and Non-status Indians is worth quoting directly.

> The history and current situation of most Metis and non-status Indians is quite different from other Aboriginal peoples...Most Metis and 'on-status Indian groups have been excluded from the comprehensive claims policy and from other processes, such as treaty renovation and self-government negotiations with the federal government. Therefore, a separate policy and process should be developed by the government so that Metis and non-status Indians can negotiate with government to remedy past injustice and to establish new relations. [16]

The linkages between the claims process, the constitutional process, and self-government are not only emphasized in the report, but by the Minister of Indian Affairs in a press release accompanying the report. He says:

> We must also ensure that any new policy on comprehensive claims is integrated with other government processes, such as the constitutional process, and the move to self-government. [17]

It is the mandate and the responsibility of the NCC to ensure that its constituents are equitably included in the application of that new policy.

TREATY NEGOTIATIONS - Traditionally, the relationship between Aboriginal peoples and governments was established by treaty. The fact that these treaties varied in form and content over the last 500 years has generated a range of issues and problems with every Aboriginal group at the table. In terms of the NCC constituency, those problems are compounded by the reality that most of its constituency has been excluded or expelled from the treaty process or have never been involved in treaty.

If treaty, within the meaning of Section 35 of the *constitution Act, 1982,* is to be a major mechanism for identifying and/or accessing specific Aboriginal rights, then the constituency of the NCC must be accommodated in that process. That accommodation must be capable of responding to the following situations:

PRE-CONFEDERATION TREATIES - The recent Supreme Court decision in the Simon case has given weight to the long-standing argument of Maritime Aboriginal peoples, that the previously denigrated treaties of "peace and friendship" in the Maritirnes were, and are, clear recognition of Aboriginal right which were not and cannot be "superseded by law." A re-examination or renegotiation of these treaties, in modern terms, would be one viable means of constitutionally protecting Aboriginal rights in the Maritimes and pre-Confederation Ontario. The critical element, from the NCC perspective, is that this process specifically include the NCC constituency in these areas.

OMISSION FROM TREATY - Where it can be established that individuals or communities were inadvertently or deliberately omitted from a treaty process in their area, mechanisms for entering that treaty or negotiating a separate treaty must be provided. Under current claims policy, such a process would be classified as a specific claim, and be available only to Indian bands within the meaning of the *Indian Act.*

EXCLUDED FROM TREATY - As was pointed out earlier, many NCC constituents were deprived of treaty right by

virtue of various forms of enfranchisement. Given the status of the constitutional recognition of treaties in section 35, and the obvious abuse of federal legislative authority in depriving Indian people of their relationship to treaty via the Indian Act, accommodation in this area is a minimum requirement on the grounds of justice alone.

NEVER ENTERED TREATY - NCC constituents who never entered treaty as a collectivity (as in much of British Columbia), currently have to look to the comprehensive claims process for accommodation. Except for a few specifically defined areas in Canada, the current claims process denies access to many NCC constituents who never entered treaty.[18] Equity would require the development of a treaty-making and/or Land Claims Agreement process specifically designed to accommodate these groups.

3.A.3. Constitution Act, 1982 - Section 35

Since the FMC process is currently the only mechanism available in which the NCC constituency can address their rights, the priorities of the NCC are those mandated by the last NCC Annual Assembly. These priorities are:

1. Equality of all Aboriginal peoples under Section 91 (24) and Section 35 of the *Constitution Act, 1982*.
2. The Constitutional entrenchment of the right to self-government for NCC constituents, which specifically includes the right to guaranteed representation in the Federal Parliament and Provincial legislatures.
3. The Constitutional entrenchment of a land and resource base for NCC constituents.
4. The inclusion of NCC constituents in any land claims process by which specific rights may be entrenched or constitutionally protected.

4. Basis For Survival

Given the facts demonstrated in the previous pages - that the NCC represents the largest number of Aboriginal peoples in Canada; that those people are faced with a

unique set of circumstances vis-à-vis other Aboriginal peoples; and that they exist in an inequitable relationship in terms of access to their Aboriginal birthright- we can now turn to avenues for resolution of this situation. Clearly, accommodation for the constituency of the NCC is not just a matter of preference, or even a matter of principle in the context of justice. It is a matter of basic survival as Aboriginal peoples in Canada.

The fundamental element upon which that survival depends is recognition – both as Aboriginal peoples, and in terms of establishing a specific relationship to Aboriginal government and other governments as a means of accessing Aboriginal right. To establish a foundation for that process we must look at a broad range of possibilities. For the purposes of this paper we will limit our exploration to those processes necessary to laying the foundation for access to the right of self-government for the NCC constituency.

4.A. Recognition of Community

Government, by any definition, is a function of community, and it is reasonable to assume that Aboriginal government will be a function of Aboriginal communities. As obvious as that may appear, there are many collect ivities which, for reasons we have already outlined, are lacking or have been excluded from recognition as Aboriginal communities, in much the same sense that unregistered individuals are excluded from recognition under the *Indian Act*. Our current concern is that this lack of recognition will also bar them from the process of negotiating self-governing agreements for their communities.

There are two basic mechanisms by which Aboriginal communities could be recognized. They are:

VIA CREATION OF NEW BANDS - There are two specific sections under the Indian Act by which new Indian bands can be created. Section 17 permits the Minister to create new bands from General Lists, and Section 2.1(c) from specific populations of unregistered Indians and/or Metis offers intriguing possibilities. The application of these sections for purposes of establishing entities which would

be eligible for Aboriginal government is certainly unprecedented, but, with political will, seems at least possible.

VIA NEGOTIATED RECOGNITION - Another class of mechanism that could be considered is that of negotiated recognition of Aboriginal community. This process could readily be part of a claims agreement, or included in the range of trilateral community-level negotiations that governments are currently promoting. This would require considerable revision of the current Federal Claims policy to include NCC constituents, or to create an entirely new process from whole cloth. In either case two distinct categories of community would have to be accommodated. These are:

ABORIGINAL GEOGRAPHIC COMMUNITY - The more straightforward case is that of an identifiable collectivity of Aboriginal people who occupy a specific geographic area. In a context where this population was a clear majority, the resolution would be uncomplicated, if not simple.[19] Where the population was a minority, the resolution might be more problematic, and would have to be approached on a case-by-case basis.[20] In any case, a viable mechanism and identifiable process would have to be established to facilitate the application of such communities for recognition as an Aboriginal community.

ABORIGINAL COMMUNITY OF INTEREST - Since reality is rarely straightforward, and governments never are, it will also be necessary to deal with the more difficult situation of Aboriginal people who are not identified with a specific geographic Aboriginal community. As we noted previously, this would include minority populations, isolated and wilderness populations, and urban populations. One suggestion would be to treat these individuals as a "collective community of interest", related to a specific locale, area or region. Their "territory" would be cultural rather than geographic, and their "jurisdiction" would be defined accordingly. The essential and functional result would be a means of incorporating a very large segment of the Aboriginal

population into decision-making processes which affect their lives as Aboriginal people-no more and no less than Canadians enjoy as non-Aboriginal peoples.

DEVELOPMENT OF LAND BASE - If we adopt the predominant point of view expressed in previous publications on this issue, a land base would be the primary and over-riding criteria for the establishment of a specific Aboriginal government.[21] If the NCC were to adopt that point of view exclusively, then we would have to insist on access to a land base for every person of Aboriginal descent in Canada. As tempting as that position might be from a political or international perspective, it is frankly recognized as being largely impractical, today. But if self-government is tied exclusively to a land base, the NCC would find itself forced into that position.

There are, of course, considerable segments of the NCC constituency who do have a clear and present claim to a land base.[22] As in the case for community recognition, the mechanisms to establish this land base are the land claims process and the more recent trilateral negotiation processes. Having already outlined the present and potential difficulties the NCC constituency has with these processes, we will simply point out that equity of access to the processes is essential to the establishment of a land base for those segments of the NCC constituency who can demonstrate eligibility for lands via those processes.

ACCOMMODATING THE LANDLESS - Traditionally, the thinking around Aboriginal peoples and their lands has too often been discussed in the context of "use AND occupancy". Certainly this context is appropriate for many Aboriginal peoples–but not for all. In fact, if we were to separate the "use" from the "occupancy", we could create a new regime of accommodation for many NCC constituents who do not conveniently fit into the traditional cubby-holes.

The Ontario government delegation suggested at one meeting that it could be more important to have what land represents than it is to have the land itself. Although

this is clearly inappropriate for many Aboriginal communities, it has a ring of functional reality for those who no longer have an association with a specific land base, but who have a claim based on deprivation of Aboriginal rights.

By virtue of Land Claims or Trilateral agreement it would be possible to identify a specific tract of Crown land, the resources of which could be developed for the benefit of a specific Aboriginal community. A specified percentage of resource taxation in a particular area could be earmarked for the use of a specific community. The obvious extension of this idea into the arena of government could result in guaranteed representation in Provincial and Federal legislatures based on an Aboriginal "community of interest. "

5. Relationship to Self-Government

In order to accomplish the purpose of this introduction, we must now apply the information presented in the previous pages in the context of Aboriginal Self-Government. From the NCC perspective the relationship of its constituency to Aboriginal Self-Government is the relationship of a people to its birthright. We have identified our present and future constituency as Aboriginal people within the meaning of Section 35. We have demonstrated the inequities faced by our constituency in terms of accessing Aboriginal rights in general, and the right of Self-Government in particular. As a delegation in the constitutional conference process, we claim the right of self-government for our constituency on an equitable basis with other Aboriginal peoples. <See Appendix 1>

The question that must be addressed by the FMC forum, and answered by the NCC delegation is, "How is it going to work for our people?" by way of summarizing this introduction and setting the stage for a more technical outline of the self-government issue we can set . out the pre-conditions that must be met before self-government can become a reality for the constituency of the NCC. The sad fact is that there is no formal arrangement of commitment on the part of governments to create a forum in which this issue can be addressed

by NCC constituents other than the FMC process which presumably ends next year. At the same time, most registered Indians and Inuit can look to formal legislative, treaty and lands claims process to accomplish their self-government objectives.

THE RIGHT OF SELF-GOVERNMENT - For NCC'S constituency the right of self-government is, by definition, a Constitutional issue. Without Constitutional entrenchment, and in the light of the inequities outlined above there is no other way to make self-government attainable. There are however, a number of ways to constitution alize the fact of on-the-ground self-government.

CONSTITUTIONAL ENTRENCHMENT - The only formal and legally recognized process currently available to address the rights of Metis and Non-Status Indian peoples is that established by the first amendment to the new Constitution. Status Indians and Inuit have both a formal relationship with the Federal Government under Section 91 (24) of the Constitution Act, 1982, and via land claims negotiations under the present federal claims policy. The most obvious effect of this situation is to confine NCC to a single option - the Constitutional Conference table. The inevitable result is that constitutional entrenchment is seen as the only available solution to every Aboriginal rights issue.

BILATERAL PROCESS - The NCC has been pursuing the option of a Bilateral Process for more than a decade, with no permanent result. The Prime Minister's promise to stage Bilateral meetings with Metis and Non-Status Indian people has re-opened a vague possibility that a bilateral process and structure may provide a viable alternative for some of the issues the NCC is now forced to maintain at the FMC conference table. Issues that may find partial or complete resolution in a bilateral process include:

1. Recognition of MNSI under Section 91(24) via unilateral Federal declaration.

2. Inclusion of MNSI in Federal Land Claims policy within the meaning of Section 34(3) of the *Constitution Act, 1982.*
3. Development of a Land and Resource base negotiated on the basis of structures and mechanisms established under (1) and (2).

SUPREME COURT - As a last resort, the NCC must consider the possibility that some issues may have to be resolved in domestic, and perhaps international courts. There are some indications that the NCC may be forced into court to intervene on behalf of its constituency, if and when other Aboriginal groups take court action. 23

2 KEY ELEMENTS OF SELF-GOVERNMENT

1. Constituency base

The artificial division of self-government constituency bases into "public" and "ethnic" modes may be academically convenient, but such a division could well lose many NCC constituents in the process. The introduction has already made it evident that the NCC has the broadest constituency base of any FMC Aboriginal delegation. One segment or another of this constituency will qualify for one or another of almost any government constituency base that can be described. Certainly the NCC represents distinct communities who could qualify for public forms of government. Unlike the other Aboriginal groups, the NCC also represents a highly urbanized group who could well form a constituency base of their own, and many mixed groups who could qualify under all three criteria.

1.A. Public Government

Public forms of government, that is government for and by the entire peoples of a given area, could be developed by two specific NCC constituencies. The first of these has the "advantage" of a recognizable continuous territory - the Northwest Territories, to be specific. The second "group" could be identified in a variety of locations and circumstances, with the common element

being that the people involved are the majority in the communities or areas concerned. but are surrounded by "public" (i.e. Provincial or Municipal) jurisdiction s.[24] Each presents its own particular requirement for accommodation in terms of Aboriginal self-government.

NORTHWEST TERRITORIES - The NCC constituency in the NWT is represented by the Metis Association of the Northwest Territories, and presents an apt example of a people who meet every criteria for Aboriginal self-government, but could still be disenfranchised in their own land. They are part of a majority Native population, who should expect to be able to participate in the government of their lands on the same basis and with the same rights as any other Canadian community. By virtue of their majority status, the Native people of the North would form a public government that would be Aboriginal. But even that right is seriously threatened.

There are a number of proposals being considered for the partitioning of the Territories and the development of eventual provincial status. If this division were to be undertaken carelessly and without safeguarding the birthright of the NCC constituency involved, these people will be forced into repeating the history of the rest of Canada where Aboriginal people were compelled into a marginal existence in their own lands .25 Even here, where there is a clear and existing right to public forms of government, NCC constituents could become the victims of southern forces, in precisely the same way the western Aboriginal community of Red River fell victim to the eastern policies of Macdonald.

ABORIGINAL MAJORITY COMMUNITIES - Certainly, any geographic community which features a majority population of Aboriginal peoples has the potential to adopt public forms of government. The question of whether or not public government could adequately accommodate the needs of a given community would be for that community to decide for itself.

The process of identifying and validating such a community would be relatively simple on a reserve, more

complex in off-reserve or Non-status Indian communities, and more difficult still where Metis were included in a specific Aboriginal community. There are constituents of the NCC currently living in all of these situations.

1.B. Ethnic Government

To distinguish between "ethnic forms" and "public forms" of government is to assume that "ethnic" and "public" governments are somehow different. To the extent that this distinction accurately reflects the demographics of a particular Aboriginal population, that population could be described as having "ethnic" forms of Aboriginal governments . The specific model a given "ethnic" government might adopt or develop must be related to the characteristics of the community involved. To the extent that this distinction is contrived as a way of trivializing the need for Aboriginal peoples (as distinct from the Canadian "public") to govern themselves, the very concept of "ethnic" government is negatively racist.

BAND-BASED - It might seem inappropriate to some that the NCC would even concern itself with "band-based" government when much of its constituency is, by definition, excluded from such bands. There is a very real potential that the creation of new bands may provide an effective vehicle for the accommodation of a significant number of NCC constituent groups and communities. If the proposals and initiatives outlined in the introduction are, in fact realized, then band-based ethnic government becomes a probability for some Indian constituents. In effect, the mechanisms for band-creation become a vehicle by which at least one form of self-government becomes practically realizable. This possibility is particularly attractive to communities where large numbers of "New-Status" Indians are being registered, but who may not acquire band membership. The *Indian Act* currently provides the necessary means, and membership codes could be specifically designed to incorporate the unregistered Aboriginal population of a specific community.

COMMUNITY-BASED - There are other concentrations of NCC constituents who are a majority in a particular location -such as a neighborhood or, perhaps, an unorganized territory- but are surrounded by a larger, non-Aboriginal, population. In order to accommodate these populations, they could be treated as a "majority" for the purposes of a self-government agreement, in the same context as a band without a reserve. In cases where the Aboriginal community is geographically integrated with (but culturally and politically distinct from) the surrounding population, the agreement could be based on a need-specific format which is co-ordinated with the government of the surrounding population.

COMMUNITY OF INTEREST - In situations where the Aboriginal population has residency in an area, but are not contiguous in the "neighborhood" sense of the word, a "community of interest" could be identified and accommodated. Accommodation for self -govern ment in this situation might be developed in terms of guaranteed representation in political forums where decision-making impacts on the lives of Aboriginal people. It could also be as simple as the development of contract-for-service for a specific population – perhaps even from another Aboriginal government.

2. Relationship to Land

Except for private ownership, NCC constituents do not have a legally recognized land base. But that does not mean that they do not have a relationship to land. As Aboriginal peoples, NCC constituents have exactly the same relationship to land as other Aboriginal peoples. As a matter of birthright, they have an indigenous and a spiritual relationship derived from the same source as the Inuit, for example.

NCC constituents currently use and occupy thousands of square miles of land in a manner very similar to their forefathers.[26] The fact that many may legally be considered squatters on that land by non-Aboriginal law, does not change the basic and traditional relationship to land that is central to the lives of many NCC constituents. What is obviously lacking is a means to

validate or recognize that relationship in the context of developing self-governing agreements.

Of course many other NCC constituents have been deprived of even a "use and occupancy" relationship to specific lands. By exclusion or expulsion from treaty, they have been deprived of the use of treaty lands; by enfranchisement they have been deprived of residency on reserves; and via a multitude of Provincial and Federal game laws they are deprived of their traditional harvesting pursuits. In short, thousands of NCC constituents have been unilaterally deprived of the very relationship to land that is seen as being such a "key" element to the development of self-government.

2.A. Land Based

If the concepts of "government" and "territory" are indelibly linked in the less flexible minds among us, the NCC is prepared to negotiate a means for a land base for those who can establish a just claim. There are at least three readily available (but currently non-accessible) processes by which this could take place. They are:

NEW STATUS RESERVES - When Bill C-31 has completed its process of identifying those NCC constituents who are currently eligible for registration, it will be possible to identify a number of communities currently resident on a specific land base. If these populations were recognized as Aboriginal communities, and if there was sufficient political will, it should be possible to establish specific "new status reserve s." If the populations involved were agreeable, self-government could then be established on a similar basis as will be available to band governments.

LAND CLAIMS NEGOTIATION - In many other circumstances NCC constituents have long lists of potential specific and comprehensive claims which could easily be the basis for a series of Land Claims agreements. Literally all of the NCC'S provincial and territorial affiliates have developed land claims research sufficient to identify viable claims proposal s.[27] In this

context, the establishment of a land base and the negotiation of self-government could be simultaneous, or at least parallel.

TRILATERAL NEGOTIATION - If the trilateral negotiation processes that are now being promoted by some governments are open to NCC constituents, then a third mechanism for identifying a specific land base would seem to be available. Those NCC constituent communities who met whatever criteria might be established, could have a land base identified with Federal and Provincial participation. This process could be staged in lieu of a specific or comprehensive land claim, or be a mechanism to deal with a formal claim.

2.6. Non-Land Based

No matter how many new-status reserves might be created, or how many land claims settled, or trilateral agreements signed, there will be large numbers of NCC constituents who will not be included in these processes. There is a permanent and growing population of Aboriginal peoples who will never be land-based in the sense of the word being used in relation to self-government. if only because of their sheer numbers, these people must be accommodated in the context of Aboriginal self-government. There are at least three processes that could be considered for this purpose. They are:

NEW STATUS LIST - Again, we can use Bill C-31 as a tool for identifying a segment of the "landless" Aboriginal population. The long-dormant "General Indian List" will automatically identify and count those persons who are registered without band membership. [28] A little practical demography can also identify those on that list who are not connetted to any other forms of Aboriginal government. These persons could be identified either geographically (by Provice or region) or as a "community of interest" for purposes of self-government accommodation.

NEGOTIATED RECOGNITION - given the rising level of awareness in the Aboriginal community about the right of self-government and its potential for improving their lives, it is entirely likely that groups will identify themselves from time to time as candidates for self-government. If the appropriate mechanisms are established to recognize and validate these proposals, land, itself, need not be a determining factor.

COMMUNITY OF INTEREST - To restate an idea raised in the introduction (See page 11), the groups mentioned above could be recognized as an Aboriginal "community of interest. " For example, the physical structure of the NCC, itself, is derived from such a "community of interest. " Individuals and small groups (who have clearly identified themselves as Aboriginal peoples)have organized themselves into "locals" which are, in turn, interrelated by the zones or regions which make up the provincial and territorial organizations which have then affiliated with the NCC. At any given demographic and/or geographic level, these people constitute of "community of interest" which has already identified itself, and been recognized to some extent by governments, for both service and political purposes.

In terms of developing Aboriginal governments, the cultural and political "interest" of these "communities" of people becomes the "territory" on which self-government agreements can be based. Given tile necessary political will, this concept could become a criterion with the specific purpose of identifying and validating Aboriginal populations who are proposing, and are prepared, to relate to each other on the basis of self-governing processes and institutions.

3. Constitutional Protection

Having established the above processes and mechanisms, we are still faced with the problem of establishing constitutional protection for Aboriginal self-government. We have only to look at the history of Federal and Provincial legislation in relation to Aboriginal peoples and their lands to realize how critically necessary such

protection is. [29] But there are mechanisms by which this protection can be readily established. They are:

VIA TREATY RENOVATION - Since Treaty rights are currently recognized and affirmed in the Constitution, and are likely to be guaranteed before the Section 37 process is complete, any process that becomes or alters a treaty within the meaning of Section 35 achieves constitutional protection. The difficulty, at the moment, is that the NCC constituency is, by application of government policy, excluded from current treaty renovation processes. If that policy were to be changed or a parallel policy set up for NCC constituents, then at least one method of constitutionally protectin9 governments set up under treaty would be realized.

VIA LAND CLAIMS AGREEMENTS - Thanks to the first amendment to the new Constitution, a similar means of constitutionally protecting self-government arrived at via Land Claims agreements is available. Unfortunately access to this process for NCC constituents is limited to north of 60. But again, with the political will to change that policy or establish a parallel process, a ready means of establishing constitutional protection could be put in place.

VIA SECTION 35 ACCORD - Finally, the clause which entrenches the right to self-government in the Constitution could, itself, provide the means of Constitutional protection. The proposed wording of most FMC delegations has already suggested that possibility. [30]

3 STRUCTURE OF SELF GOVERNMENT

1. Government and Representation

It is interesting to note that we are being asked to address almost every aspect of self-government except its function. The assumption seems to be that the function will be identical to that of non-Aboriginal governments – to control (via law) and administer (via bureaucracy) public policy within a given community or region. Given the predominance of the *Indian Act* format of band councils, this assumption may be verified in many communities. But in those areas where traditional Aboriginal forms of government have survived or are being revived, the function –and the resulting structure– may be very different from current expectations

In fact, we have one Aboriginal government sitting at the conference table now, that of the NWT. An examination of the transcripts on the self-government issue reveals that they are the only government to mention the difference Aboriginal values will make in both the process and structure of government. [31] The function of consensus in the decision-making process, and the relationship of elected officers to their community, are already being felt in terms of developing a specifically Aboriginal point of view from within a government. The application of Aboriginal values to the

governing process may well generate entirely distinct governing structures.

1.A. Forms of Aboriginal Government

The NCC has, in the-past, presented what was described as a two-tier regime for establishing the specific forms of Aboriginal governments. 32 The first tier would accommodate those NCC constituents who comprise a geographically-specific Aboriginal community. The second tier would provide forms of representation for Aboriginal "communities of interest" in the existing non-Aboriginal governing structures.

LOCAL - As roughly outlined previously, local forms of government would parallel the forms of recognition for "new" Aboriginal communities. New bands could parallel the forms of current or future band governments. Taking local circumstance, skills, and needs into account, other forms would be developed in treaties, claims, or trilateral negotiations. The essential factor here is that the form be proposed and negotiated by the community who will eventually exercise governing responsibility and not be imposed by an externally developed formula.

COMMUNITY/REGIONAL - Community (in the sense of broader than local) and regional forms of government could be developed in the context of a specific Aboriginal people, tribe, or group of associated communities. Unlike their non-Aboriginal counterparts, these broader-based bodies would more likely be structured as subordinate to and derivative of local governing structures. In any case, a regional option is essential to accommodate the surviving pre-Columbian political relationships between Aboriginal peoples, or more current treaty associations of many Aboriginal peoples.

PROVINCIAL - The destructive impact of provincial borders on Aboriginal political relationship and Association has yet to be chronicled, but they are obvious enough in terms of the application of varying provincial laws on peoples who straddle their borders. 33

Many of these groups may find it necessary to develop forms of self-government as a result of agreement between themselves and more likely that local Aboriginal governments themselves may form alliances or specific structural associations on a provincial, trans-provincial, or provincial-territorial basis. Again, it is more likely that these provincial governing structures would be subordinate to the local forms, with specific and delimited jurisdictions to exercise in terms of co-ordination, particularly between Aboriginal governments and non- Abor-iginal provincial governments.

NATIONAL - It is reasonably certain that there will never be a direct Aboriginal equivalent of the national Canadian Parliament. Even in the unlikely circumstance that such a structure were formed, it is certain that its function, and jurisdiction, would be totally different from the non-Aboriginal structure. It may well be necessary to develop one or more national bodies to lobby for, co-ordinate, and even design national policy for one or more Aboriginal perspectives, but a national government which dictates policy to subordinate levels of government would contradict the very basis of Aboriginal political activity.

It is much more likely that a relatively informal national council would evolve. In terms of lobbying and co-ordination, this group would be more functional than structural. In terms of policy development and application, it would apply more on an optional rather than a premptive mode. In any case, it would not likely require specific constitutional protection, since it would be a creation of the other Aboriginal governments involved.

1. B. Forms or Representation

The NCC has proposed for more than a decade, that guaranteed representation in existing non-Aboriginal Parliaments be a factor in inter-relating the Aboriginal and non-Aboriginal worlds.[34] In terms of its current presentation, this would be a function of the second tier of self-government proposed for NCC constituents.

At the local level, this would involve representation on councils, school-boards, and child-welfare agencies, particularly in communities where the NCC constituency is a significant minority, or a significant user of local government services. This format would be repeated at the community/regional level wherever it was demographically appropriate. At the provincial level, this would include guaranteed seats in the Provincial legislature based on population and population ratios. This scenario would be repeated at the national level in terms of the House of Commons and the Senate. 35

2. Role of Aboriginal Citizens

The role of an Aboriginal citizen in the context of an Aboriginal government would directly parallel that of a Canadian citizen in the context of Canadian governments. In terms of a franchise to vote or otherwise participate in the formation or selection of government, the specifics would vary from situation to situation. Where necessary, the technical details could be spelled out in agreements, membership codes, internal constitutions, or election bylaws.

There is a very real concern being expressed by New-Status Indians who fear they will be refused band membership and, therefore, participation in the political life of their communities. A system of appeals procedures may be necessary for an interim period. The necessity for such a procedure will be in direct proportion to the character of the membership criteria proposed by a given membership code.

4 AUTHORITY AND JURISDICTION

1. Basis of Legitimacy

From the exchanges during the FMC process to date, it is evident that the major hurdle to agreement on self-government for Aboriginal peoples in Canada is the determination of the jurisdiction, powers, and authority that those governments will exercise. The hurdle that faces FMC delegations has two related components – ignorance and misunderstanding. The height of the hurdle is in direct proportion to the fear and anxiety generated on either side of the hurdle. The maximum height on the government side is generated by the word "sovereignty"; and on the Aboriginal side, by the word "delegated. " Somewhere between the two lies an area of potential agreement that can only be reached by informing the ignorance and dispelling the minunderstanding that are preventing progress.

What must be established as a foundation for this discussion is the basis of legitimacy or validity for Aboriginal governments. Simply expressed, from an Aboriginal perspective, the basic . right to self-government is based on the inhere nt· and fundamental human right of an indigenous people to the processes necessary for self-determination. In broad terms,; most delegations would accept this fundamental assumption for other peoples in other lands.[36] Perhaps even most

delegations would accept the concept for Aboriginal peoples in Canada. The problem is, how do you translate that concept into reality within the Canadian concept of federation?

In deference to those slightly more dense souls who still think all Aboriginal peoples should be content with municipal "powers" of government, we should point out that Aboriginal governments must not only have "powers-to" properly govern. They also, as history starkly demonstrates, must have "powers-from" the intrusions of other governments. The fact that non-Aboriginal governments have historically used their power, jurisdiction and authority to diminish the very existence of Aboriginal governments in Canada makes the counter-position even more necessary. [37]

To simply establish Aboriginal governments is not sufficient, in itself, to ensure their healthy development and co-existence with other non-Aboriginal governments. There must be a clearly recognized regime of powers, authorities, and jurisdictions which cannot be unilaterally infringed upon. Given the cruel lessons of history, Aboriginal governments must not only exist, they must have a valid co-existence with a legitimacy that is thoroughly understood by all Canadian governments, Aboriginal and non-Aboriginal alike.

During the FMC process, several mechanisms have been identified by which Aboriginal self-governments could be validated. They are:

EXISTING CONSTITUTIONAL RIGHT - Most NCC constituents who live in communities which have an Aboriginal majority of the population believe they have an inherent right (as Aboriginal and indigenous people) to make their own political decisions, on their own land, about their own lives. The most direct way to recognize that fact is to have the FMC conference confirm that the term "Aboriginal rights" in Section 35 includes the right of self-government. For greater clarity that confirmation would be spelled out in a specific constitutional amendment of self-government. For greater clarity that confirmation would be spelled out in a specific constitutional amendment on self-government. In fact

this is the approach taken by all of the 'Aboriginal delegations and most of the government delegations at the FMC table.

EXISTING TREATY RIGHT _ Parallel to, or in conjunction with the entrenchment of the right to self-government, many treaties offer another existing mechanism to validate the authority and jurisdiction of Aboriginal governments. This IS particularly true of many pre-Confederation treaties, which were signed when the Aboriginal populations and settler populations were involved in "nation" to "nation" negotiations. [38] As descendants of many of the peoples who signed these treaties, the NCC's Maritime constituents have a particular interest in the possibilities offered by self-government as an expression of an existing treaty right.

BILATERAL LAND CLAIMS AGREEMENT - Aboriginal governments could also be legitimized in the context of Federal Land Claims policy. Because these agreements would be protected under Sec 35(3), this vehicle becomes a secondary process by which specific self-governments are "entrenched" for protective put-poses. The specific terms of relationship, powers, jurisdiction and authority would be spelled out in the agreement itself, with the consensus of the participants.

As we described earlier, it would be necessary to adopt the recommendation of the Claims Task Force report that a parallel claims process be established for Metis and Non-Status Indian peoples. [39] That process, if it embraced both comprehensive and specific claims, could provide a viable vehicle to establish appropriate Aboriginal governments for NCC constituent groups who have such claims to make.

TRILATERAL SECTION 35 AGREEMENT - There are communities of Aboriginal peoples who may not qualify under Land Claims criteria, or who may forego the claims process in favour of trilateral agreements. In this context the specific powers and jurisdiction of a specific Aboriginal government would be worked out in a trilateral agreement between the Federal government, an Aboriginal

community, and a specific Provincial government – or governments in the case of trans-provincial regional agreement.

2. Evolution of Jurisdiction

In responding to the applications of specific communities for the development of Aboriginal self-government, it may be advisable to evolve or schedule – at the request of applicants - the implementation of specific powers, jurisdictions, and authorities over a period of time. To ensure the phasing-in of successively complex and increasingly exclusive areas of jurisdiction, the timetable itself would have to be judicially enforceable.

The same techniques discussed previously would be adopted for this process, including constitutionally entrenched schedules via the secondary mechanisms of treaty renovation, land claims agreements and/or trilateral agreements. Devolved jurisdiction and powers could be implemented via legislation, delegation, and administrative or contracted arrangements, where such arrangements were proposed by the communities involved.

3. Determination of Authority

The question of how the authority of Aboriginal governments is determined may well prove to be the sticking point of the entire FMC process. Despite the fact that all delegations (and even the Constitution itself) look to the Great Spirit or God as the ultimate or absolute source of authority for government, there is scant agreement on how that authority flows and to whom it flows . All Aboriginal peoples agree that their authority to govern flows as a result of inherent right as an indigenous or Aboriginal people. Most governments agree that the authority of Aboriginal governments must find its place within the current constitutional framework. Clearly, meticulously careful distinctions must be developed. Both points of view must be accommodated to avoid a polarization of Aboriginal and non-Aboriginal delegations.

We have a number of mechanisms which can be adopted or combined by mutual agreement of specific parties.

Given a mechanism by which agreements can be entrenched, those who are prepared to move immediately can establish full-blown self-governing bodies. Others, by mutual agreement, can develop bilateral or trilateral agreements which will eventually result in entrenched self-governments. At the other end of the scale there are Aboriginal peoples who prefer to establish their governments in the context of devolved jurisdiction from Federal and Provincial governments.[40] Presumably, these governments could alter their status, by mutual agreement, when conditions were suitable to all parties.

4. Application of Powers

The policy sectors in which the powers, jurisdiction, and authority of Aboriginal governments would be exercised would vary with all of the factors we have presented to date. In some sectors, Aboriginal jurisdiction would be exclusive and complete, while in others it would be shared or minimal. The precise application and ratios would be specified in the agreements involved. Obviously, those areas would relate to the priorities of the specific Aboriginal population involved.

There are identifiable areas where the application of the jurisdictions of Aboriginal governments are likely to be focused. These areas are most often those in which the cultural perspective of Aboriginal and non-Aboriginal populations are markedly different. This is particularly true for NCC constituents who have been deprived of the little protection that reserve enclaves might have provided against the domination of non-Aboriginal perspectives. In most cases these areas are directly involved with the survival of Aboriginal culture and peoples as distinct social and political entities. These areas are:

RESOURCES - Clearly any Aboriginal population which occupies a land base would have a priority concern over the natural resources of that area. Given the negative impact of both under- and over-ground exploitation of Aboriginal lands in the past, it is likely that jurisdiction over resources will be a contentious issue. It is in this

context that treaty renovation, and land claims agreements can play a determining role.

It is also in this context that NCC constituents must be equitably accommodated, in direct ratio to the degree they have been excluded from these processes in the past. In those situations in which the exclusion was so successful (from a settler point of view) as to make re-patriation of a given Aboriginal population to a specific land base impossible, governing control of the resource development of a different area might be considered in the compensation section of a lands claims agreement. In effect, the Aboriginal population involved would (in absentia) have a controlling interest in that specific area, or be specifically assigned equivalent Crown royalties. A similar mechanism could be activated to accommodate NCC constituents who currently live in the "community of interest" situation described in the introduction.

EDUCATION - The most critical area for the application of Aboriginal jurisdiction, in terms of cultural development and survival, is that of education. The Canadian educational system has only recently begun to respond to the fact that the standard Canadian educational system has been and still is ethnocidal to Aboriginal cultures. It is difficult for even the most ardent neo-colonialist to argue with the proposal that Aboriginal peoples should control (or at least have a controlling influence) on how their children are educated. In fact, this may prove to be the single most important issue for the landless constituency of the NCC.

The most easily identifiable "community of interest" among urban Aboriginal peoples is related to education and indigenous culture. Given the obvious need to accommodate land-based and majority Aboriginal populations in a distinct Aboriginal tier of self-government, the area of education offers a ready example of an area in which the second, or representative tier of self-government could operate. In locales of high Aboriginal population, Aboriginal school boards could be established. In minority representation on existing school boards may provide sufficient accommodation.

HEALTH - The necessity for specific jurisdiction in the area of health springs from two sources. The first is cultural, in the sense that traditional healing practices would be more readily available to those who require them. The second is socio-economic, in that access to general health services would be provided to Aboriginal populations on a more equitable basis than is currently the case. Again, this is of particular significance to NCC constituents who have been deprived by Federal policy, of health services currently available to Status Indians.

EMPLOYMENT - The differences in the role which employment plays in Aboriginal and non-Aboriginal communities are factors that require specific Aboriginal jurisdiction in this policy sector. The inability of current policy to accommodate the seasonal requirements of Aboriginal populations, and the need for specially-designed training programs to meet the needs of Aboriginal populations, are two of the more obvious examples.

5 ABORIGINAL CITIZENSHIP

1. Membership Codes

The issue of determining the specific membership in a particular Aboriginal group absorbed considerable energy in the first several months of the FMC process. The original emphasis, for Aboriginal groups, was to ensure that non-Aboriginal governments did not constitution alize the current unilateral mechanisms (the *Indian Act)* for determining group identification. On a secondary level there was some initial concern between Aboriginal groups themselves vis-à-vis Status and Non-Status Indians, and between the two Metis constituencies.

There were two factors that diffused the issue, at least at the FMC meetings. The first was a general tacit agreement among the Aboriginal groups themselves that membership was more of a community concern than a national one, and would be resolved at the community level. The second element was the Federal introduction of the concept of "membership codes" which, in the case of band membership', created a two-year hiatus while codes were developed.

The introduction of Bill C-31 into the mix has considerably clouded the issue, since it emphasizes a distinction between registration under the *Indian Act* and membership in a specific band. Some new-Status

constituents of the NCC have an obvious concern that some membership codes will arbitrarily exclude them from their home communities, in exactly the same way the *Indian Act* did, thus reinforcing the sexual discrimination C-31 was supposed to eliminate. It is too early to make final conclusions on this concern, but recent developments are not promising. [41]

To the extent that models for band government will influence the development of other forms of Aboriginal government, the issue of membership codes may well re-surface in the constitutional multilateral forum. If the development of membership codes becomes a triter-ion or condition for self-government, then obviously, NCC constituents must be involved in that process. In any case, beyond lobbying for principles of equity and fairness, it is unlikely that national organizations will have much of a role to play in the determination of membership. But where a clear case of injustice or the unilateral application of unfair criteria are identified, national pressures must be brought to bear.

2. Membership vs Definition

In the context of the membership issue, the closely related issue of definition wasted an equal amount of multilateral process time. Again, the initial emphasis for Aboriginal groups was to prevent governments from unilaterally applying legalized definitions to Aboriginal peoples. The obvious concern was that thousands of Aboriginal people could be excluded from their birthright as NCC constituents have been excluded in the past. A sub-set of that concern related to the broader question of identification as an Aboriginal person by individuals.

INDIVIDUAL DECLARATION - Although many NCC constituents will find accommodation in terms of membership and identification within their existing communities, many others will not. By any other criteria, and certainly within the meaning of Section 35, these individuals are Aboriginal people and are entitled to recognition as such, both under the Constitution and in the context of self-government. Where appropriate,

mechanisms must be provided whereby an individual can identify him- or herself as an Aboriginal person.

Whether or not that individual can be associated with a specific land-based Aboriginal community, he or she has a basic right to self-identification, and a recognized association with his or her Aboriginal heritage and birthright. The very existence of the NCC constituency provides a mammoth inventory of case histories demonstrating the necessity for this form of accommodation. Without that accommodation, the present ethnocidal pressures on NCC constituents will continue its inexorable slide toward assimilation – a result that is specifically decried by public federal government statements. [42]

3. Registration and Enumeration

Registration and/or enumeration are well-accepted techniques, in the non-Aboriginal world, for identifying particular populations for specific purposes. Aboriginal populations, on the whole, have a deep, and historically validated suspicion of such techniques. The ranks of the NCC can often date their eligibility for membership from a given census or identification process which excluded themselves or their parents from identification with other Indian peoples.

The much-touted '86 census, even with its special emphasis on Aboriginal peoples, will suffer from this entrenched fear and suspicion. The counting of minorities by self-appointed majorities has a dark history eclipsed only by the process of enumeration and registration. This entire subject is best left to the day when Aboriginal communities can look to their own securely entrenched governments to institute whatever process the community itself deems necessary.

4. Appeals Procedure

The legacy of unilateral, non-Aboriginal government imposition on the Aboriginal community, of arbitrary identification criteria is a seething cauldron of mistrust. Some Aboriginal communities, themselves, have become infected with arbitrary and exclusionary policies. As a result, the establishment of independent appeal

mechanisms will certainly be necessary, for at least an interim period. To be effective, that mechanism must be developed by a consensus of the Aboriginal peoples involved. Failing that consensus, those negatively affected may be forced to turn to the courts for resolution.

6 FINANCING ABORIGINAL GOVERNMENT

The discussion of how Aboriginal governments might be financed might well seem ephemeral to NCC constituents, who have yet to ensure access to mechanisms for the creation of self-governing institutions. The constituency of the NCC is so diverse that one or another constituent group could fit any given circumstance in ter-ms of structure, jurisdictions, and financial base. In addition to developing methods to finance land-based or demogr-aphic majority governments, the NCC must also propose methods for financing governments based on landless constituents, and those which would be included in what we have described as a "community of interest. "

1. Tax Base

The tax base for any specific Aboriginal government will vary with the situation in which that government is created, and with the opera tic, nal situation in which it finds itself. Where Aboriginal governments are operating on an exclusive land base, the taxation process could include taxes on income, property, corporations, sales, etc. Where the Aboriginal population is the majority in a mixed community, opting-out clauses (in favour of the general, non-Aboriginal, tax system) might be provided for the non-Aboriginal population . Where the demographic situation was reversed, the Aboriginal

minority could elect to pay Aboriginal government taxes in the same mode as Separate School taxes are collected. The possibility of resource-specific taxation will, of course, depend on the availability of exploitable resources to tax. For NCC constituents who qualify for land claims, taxable resources could be specified as part of the agreement package. In the case of treaty renovation or hi/trilateral agreements, similar arrangements could be outlined.

The necessity to accommodate Aboriginal peoples who live off a land base will require more creative thinking. Those off-reserve Status people who have band membership may be able to develop accommodations with their band governments for voluntary payment of taxes in exchange for benefit. Those who are unable to make such an arrangement or who do not have band membership, could be identified as a specific "community of interest". This community could elect to pay Aboriginal taxes, and be assigned a designated portion of existing non-renewable resource taxes as a means of financing their governing activities.

2. Revenue-Raising

Other forms of revenue raising would be limited only by the imagination and skills of the Aboriginal communities. Lotteries, bingos, harvesting licenses for hunting, fishing and camping are a few possibilities which could be "borrowed"' from existing government practices. There has been one suggestion that a "free port" zone could be established in appropriate locales. On a smaller scale, fees and fines relating to infractions of local bylaws would help support local legal systems. A licensing fee charged to academics who want to study Aboriginal peoples (what a special surcharge to anthropologists and archeologists) could prove a ready source of revenue. The possibilities are too many to list, but there is no doubt that Aboriginal entrepreneurs will contribute their share of ideas.

On a more serious note, we can expect that revenue from land claims settlements will play a significant role in at least the initial development of Aboriginal governments. The difficulty for most NCC constituents

is that they do not currently have access "to claims processes. Accommodation must be developed to, establish claims as a revenue source for NCC constituent governments.

3. Fiscal Arrangements

Special fiscal arrangements will be required for Aboriginal governments in exactly the same way they are required by current non-Aboriginal governments. In many cases, Aboriginal communities survived simply because there were too few resour-ces to attract non-Aboriginal settlers. In other cases Aboriginal peoples wereforced onto sites specifically because there were no useable resources available. Horses, it seems, hadn't yet learned to eat oil.

In these situations, many Aboriginal communities will find themselves in the same fiscal situation as some have-not" provinces. The mechanisms developed in response to the needs of non-Aboriginal governments will serve Aboriginal government just as well. A system of equalization payments to ensure a basic level of service would obviously be appropriate.

PROGRAM FUNDING - Program funding could be appropriately dealt with on a contract basis, between the Aboriginal government involved and the service agency or other government body. This would be necessary in those situations in which the Aboriginal government could not, or- did not wish to establish exclusive jurisdiction in a specific program area. This form of contracted program would be particularly appropriate in circumstances where the existing tax base for the Aboriginal gover-nment was inadequate to provide the service or program. At the invitation of the Aboriginal community involved, a core-funding arrangement(similar to those currently used to fund provincial and national Aboriginal organizations) might be viable as a way of providing resources for a range of governing functions, including programs and services.

COST-SHARING - Without exception, both Federal and Provincial governments have contributed to the cur-rent

state of NCC constituents in Canada today. It is becoming increasingly obvious that both levels of government are dedicated to protecting their interests in relation to Aboriginal peoples and their Aboriginal governments. On the basis of Section 91 and Section 92 jurisdictions alone, it is necessary, from a practical point of view, that cost-sharing modes must be expanded to cover the developing situation.

There has been a tacit agreement on the part of some Provinces to develop initiatives in relation to Metis. To date, only Manitoba, Ontario, and Quebec have expressed any willingness to address the Non-status Indian question. The unresolved question of Federal-Provincial jurisdiction in this area is another potential stumbling block for the entire process. How such cost-sharing procedures are to be developed may be for the governments to decide for themselves, or may be part of trilateral agreements. There is no question but that such arrangements must be in place and soon, if Aboriginal self-government is to become a reality for many Aboriginal peoples.

7 INTERGOVERNMENTAL RELATIONS

1. With Other Governments

Quite apart from fiscal arrangements via federal-provincial cost-sharing, Aboriginal governments are going to establish a range of intergovernmental relationships with other governments. Depending on circumstance, these relationships could require interactive contact with municipal, provincial, regional, territorial and federal governments. Contrary to many expectations, this would not require a new network of relationships. But it would mean a formalizing of many current interactions on a governrnent -to-governrnent basis, rather than that of client-to-service relationship. In many cases, the current relationship would actually be simplified and streamlined by the new arrangements, at least in the case of NCC constituents.

Once the jurisdictional question of the federal 91 (24) relationship to all Indian (if not to all Aboriginal) peoples is clarified, the basis for Aboriginal government interaction with both Federal and Provincial governments will be more evident. In the meantime, those relationships can be developed via hi/trilateral agreements for specific purposes with specific Aboriginal communities.

GUARANTEED REPRESENTATION - A distinct form of relationship is being proposed for some NCC constituents, in terms of guaranteed representation for Aboriginal peoples in the Federal House of Commons, the Senate, and Provincial Legislatures. This would not only provide a direct liaison between non-Aboriginal legislators and Aboriginal peoples, but would provide a built-in watchdog for Aboriginal interests in the various parliaments and legislatures. The precedents for representation of special interests and populations have already been tabled by the NCC.

FEDERAL-PROVINCIAL LIAISON - In the context of the two-tier system being proposed by the NCC, a specific Federal Relations function would be necessary for purely operational (if not diplomatic) purposes. Whether this function would be carried out on an Aboriginal government to Federal and/or Provincial government basis would be a matter of agreement between the concerned parties. In any case, the development of national councils and provincial councils, or similar types of lobbying bodies, would carry out at least some aspects of this function.

Given the comparatively small size of many proposed Aboriginal governments, it may be that some will have more in common with municipal or county-type governments, than with the larger bodies. Certainly, NCC is proposing that the concept of guaranteed representation be extended to the municipal level where it is appropriate. This would include representation on boards and committees which deal with issues of significance to the Aboriginal government concerned. It may also be appropriate in some circumstances to contract for service from a municipal government, rather than duplicate an existing service.

2. With Aboriginal Governments

One area of government-to-government relationship that will develop is that among and between Aboriginal governments themselves. It should be clear that these relationships may ultimately prove to be the most significant for the future of a distinct Aboriginal reality

in Canada. Certainly, Aboriginal governments will have more in common and more to gain from association with each other than from non-Aboriginal governments.

On this basis, it is not difficult to imagine the development of liaison councils, Or the establishment of Aboriginal relations offices to carry out many interactive functions. It is entirely likely some Aboriginal governments could contract services from other Aboriginal governments, again diminishing the overlap or duplication of services.

8 CONCLUSION

To a large extent, then, our conclusion is our premise. Self-government is a right of Aboriginal peoples which should be specifically articulated in the Constitution of Canada. The constituency of the NCC are Aboriginal peoples within the meaning of the *Constitution Act, 1982,* and must be accommodated with appropriate forms of Aboriginal self-government. The fact that historic (and current) unilateral and arbitrary government action has denied, and does deny, this constituency access to that right must be admitted, and particular care taken to achieve an equitable solution. Simple justice demands it, and no less can be accepted.

The NCC looks to the FMC process to resolve this issue, but is prepared to go to whatever lengths and to whatever forum is necessary to achieve the Aboriginal right of self-government for its constituency. The difficulty is considerable but not insurmountable. There are practical solutions which can be worked out on a community-by-community basis. The majority of Aboriginal people in Canada cannot be excluded from self-government simply because the necessary solutions do not fit the academic or bureau cr-atic moulds that have been cast for others. It is the responsibility of those who are creating the problem to resolve it, while the opportunity is being presented to us all via the reform

of the Canadian Constitution. The constituency of the NCC is prepared to take its rightful place in that process.

What is required is the creation of a specific, formal, and ongoing fOrUm in which these issues can be addressed by the governments and Aboriginal peoples concerned. This forum, or process, must have as direct a relationship to the constitutio nalization of Aboriginal rights as have treaties or land claims agreements. It may well be that the "activating mechanisms" for the rights of NCC constituents will vary considerably, on a case-by-case basis, from those available to other aboriginal peoples. They must, however, have a similar result – the constitutionally protected articulation of the treaty and aboriginal rights which are the birthright of every NCC constituent. That includes, of course, the right to Aboriginal self-government.

APPENDICES

APPENDIX #1

NCC SELF-GOVERNMENT AMENDMENT PROPOSAL
(from FMC Dec. 830-173/014 March 11-12, 1985)

"S.35(5) The rights of the Aboriginal Peoples of Canada include the right to self-government within Canada.

S.35(6) Parliament and the Government of Canada are committed, together with the legislatures and governments of the provinces to the extent that they have jurisdiction, to negotiate and conclude agreements with the Aboriginal Peoples to self-government, including such related matters as:

(a) the jurisdiction, responsibilities and powers of Aboriginal self-governments and the geographic area under their authority;

(b) the appropriate fiscal arrangements between the Government of Canada, the provincial governments where applicable, and Aboriginal self-governments;

(c) membership;

(d) ownership and management of land and resources;

(e) any other matters agreed upon by the parties.

S.35(7) Any agreement and the terms of any agreement reached as a result of negotiations pursuant to

sub-section (6) shall be deemed to be treaties and treaty rights respectively within the meaning of section 35(l).

S.35(8) Nothing in Sub-sections (6) and (7) shall be construed so as to abrogate or derogate from any aboriginal and treaty rights guaranteed in sub-section (l).

S.35(9) Nothing in this part extends the legislative powers of Parliament or the legislatures of any province. "

APPENDIX #2

PROPOSED MEMORANDUM OF UNDERSTANDING

The following proposed memorandum of understanding was presented to the Prime Minister, the Minister of Justice and the Minister of Indian Affairs on the eve of the meeting (Dec. 10, 1985) which the Prime Minister had promised to chair at the close of FMC 85. The memorandum was intended to place the promise of equity which the Prime Minister had made, in a form and format that Federal departments and officials could evolve into a bilateral process and structure between MNSI and the Federal government. The Prime Minister declined to sign the memorandum without explanation other than a remark that his Minister of Justice had "some problem" with it. The "problem" was never identified.

A MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF CANADA AND THE NATIVE COUNCIL OF CANADA

THE GOVERNMENT OF CANADA IS COMMITTED TO THE IDENTIFICATION, DEFINITION AND CONSTITUTIONAL PROTECTION OF THE RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA.

THE NATIVE COUNCIL OF CANADA HAS DEMONSTRATED THAT THEIR INDIAN AND METIS CONSTITUENTS, BEING WITHOUT EQUITABLE RECOGNITION IN FEDERAL LEGISLATION AND POLICIES, FACE A DENIAL OF ACCESS TO AND BENEFIT OF THE CONSTITUTIONAL RECOGNITION AND PROTECTION OF THEIR RIGHTS AS ABORIGINAL PERSONS.

IN RECOGNITION OF THIS INEQUITY, THE PRIME MINISTER COMMITTED HIMSELF ON APRIL 3, 1985 "TO EXAMINE WAYS IN WHICH WE CAN WORK TOGETHER TO GUARANTEE THEIR RIGHTS AND OBTAIN THAT EQUALITY WHICH THE CONSTITUTION ACT ENVISAGED".

THE GOVERNMENT OF CANADA RECOGNIZES THAT ALL ABORIGINAL PEOPLES MUST BE GUARANTEED EQUITABLE ACCESS TO THE ABORIGINAL, TREATY AND OTHER RIGHTS AND FREEDOMS RECOGNIZED AND PROTECTED IN THE CONSTITUTION.

TOWARDS ENSURING THAT THIS OBJECTIVE IS GIVEN REAL AND PRACTICAL EFFECT, THE GOVERNMENT OF CANADA AND THE NATIVE COUNCIL OF CANADA AGREE TO ESTABLISH PROCESSES FOR THE DEVELOPMENT OF CONCRETE PROPOSALS FOR ACCESSING AND IMPLEMENTING THE RIGHTS OF THE NATIVE COUNCIL OF CANADA'S CONSTITUENTS.

BILATERAL AND, WHERE APPROPRIATE, TRILATERAL STRUCTURES SHALL BE CREATED AND ADEQUATELY RESOURCED TO PURSUE SPECIFIC PROPOSALS ON SELF-GOVERNMENT AND LANDS AS WELL AS TO CONDUCT A COMPREHENSIVE REVIEW OF THE IMPACT OF FEDERAL POLICIES ON THE NATIVE COUNCIL OF CANADA'S MEMBERSHIP. THIS REVIEW WILL DEVELOP ON FEDERAL RECOGNITION OF THEIR COMMUNITIES AND RECOMMENDATIONS REGARDING ACCESS TO LAND CLAIMS MECHANISMS WITHIN THE MEANING OF SECTION 35(3) OF THE CONSTITUTIONACT.

IN UNDERTAKING A JOINT PROCESS TO ADDRESS BILATERAL INITIATIVES AND THOSE REQUIRING THE INVOLVEMENT OF PROVINCIAL GOVERNMENTS, THE GOVERNMENT OF CANADA AND THE NATIVE COUNCIL OF CANADA SHALL ESTABLISH AS A MATTER OF PRIORITY THE FOLLOWING

* COORDINATIVE REQUIREMENTS WITH FEDERAL AGENCIES AND PROVINCIAL GOVERNMENTS;

* SUB-COMMITTEES OR A TASK FORCE COMPRISED OF GOVERNMENT AND ABORIGINAL REPRESENTATIVES TASKED WITH PURSUING SPECIFIC INITIATIVES;

* THE REQUIREMENT FOR COMPLEMENTARITY OF FEDERAL INITIATIVES AND POLICY REVIEWS AFFECTING THE NATIVE COUNCIL OF CANADA'S MEMBERSHIP;

* MECHANISMS FOR SECURING ABORIGINAL LANDS AND RESOURCES THROUGH FEDERAL-NCC AND TRILATERAL INITIATIVES;

* THE BASIS FOR RECOGNITION OF ABORIGINAL COMMUNITY BY FEDERAL LEGISLATION AND/OR POLICY, AND;

* A PROCESS TO RESOLVE THE CURRENT EXCLUSION OF METIS AND INDIAN RIGHTS AND INTERESTS FROM EXISTING LAND CLAIMS MECHANISMS.

NOTES

1. There is a dim hope that the census to be undertaken in the next few months will provide more accurate statistics on Metis and Non-Status Indians. It would certainly not be difficult to improve on the pitifully inaccurate 1981 figures. Until then a very rough (and very conservative) rule of thumb is that there are three MNSI for every registered Indian. This would give the NCC a constituency of at least 800,000 persons. One Secretary of State report (Taylor, 1979) estimated that 15 per cent of the Canadian population has some Aboriginal ancestry.
There has been some (contrived) speculation that the NCC constituency will be absorbed by registration under Bill C-31. If the rate of rejection of applications is compared to the final number actually registered under the Bill, INAC figures alone will belie that idea. In fact, between General List Indians and those whose consciousness is raised by rejection, the NCC constituency is likely to increase significantly in the next few years. The number of applications under Bill C-31 from Nova Scotia alone has already more than doubled the 81 census figures for MNSI in the area.

2 The current policy is prepared to deal with those who were registered and lost their status and the first generation children of those persons. But there is no specific procedure or policy regarding the registration of those who may technically be entitled to register, but who have never been registered.
For example, there are 1400 Indians in the interior of Newfoundland who, since 1949, have been unable to convince a reluctant INAC to register them and to recognize their communities as bands. Similarly there are about 1,000 Cree in the "Isolated Communities" of north-central Alberta wh, were missed in the 1899-1900 Treaty 8 process and who, since the 1940s have been similarly unable to achieve recognition or registration. Other cases exist in British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, and the Maritimes.

3. See: - "Efforts to Develop Aboriginal Political Associations in Canada 1850-1973" Don Whiteside, Phd, January 1974. Outlines how enfranchisement was used to prevent Indian leaders from organizing on reserves by refusing entry to those who were stripped of status.

4. The Supreme Court decision on the Simon case clearly establishes simple descendence from treaty signees as a basis to validate access to treaty right. Federal legislation (The Indian Act) cannot unilaterally erode Federal fiduciary responsibility to meet treaty obligations.

5. See: - "Royal Commission Report, Bagot Commission, " 1847, Section III - "presents; Recommendations as to the means of limiting and gradually abolishing the issues" (of treaty payments) and also see Borron reports of 1892-99.

6. See: - "The Treaties of Canada with the Indian s," Morris A. , 1862, p. 20
and also
"Supplementary Report" E. B. Borron, 1894, Irving Papers, OPA.

7. See: - *The New Peoples, Being and Becoming Metis in North America,* Peterson & Brown, University of Manitoba Press, 1985,

8. ". . if any man or woman, being a half -Indian wished to become part of, or attached to any tribe, he or she shall be claimed, and in every respect considered as belonging to that tribe. . ."
See: - "Resolutions of the Council of Principal Chiefs", Jan. 28, 1836, United Kingdom, 1847, Section III, p. 197.

9. See:- CP, Statutes of Canada (42 Vict. cap. 34), 1879: and (47 Vict. cap. 27) 1884.

10 See: - Macrae Report on Robinson Treaty Annuities, 1898-99. A policy of "Non-transmissible Title" was adopted by DIA, which allowed some half breeds to remain registered but provided that their children should be struck from annuity payment lists at age 21.

11 "The new bill will end only some of the more obvious forms of sexual discrimination. It will perpetuate others and will create some new ones. . .by passing on the current sexual discrimination imposed on Indian women to their children, thereby replacing overt sexual discrimination with a new blood quantum system based on distance from one or more parents who are registered.
The n?w act will restore full rights to only a fraction of the current non-status population. The majority of those affected will receive only a new type of status that involves two federal benefits that can be dropped at any time. The effect will be to continue the practice institutionalized since 1869 of splitting up families and pressuring those who are reinstated to leave the reserves. " From House of Commons Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development respecting Bill C-31 , An Act to amend the Indian Act, March 19, 1985.

12 Even the faulty statistics of te 1981 census reveal more than a dozen communities or areas in which MNSI people are an absolute majority of the local population, including non- Aboriginals.

13 "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question and

no Indian Department. " D.C. Scott, Department of Indian Affairs, 1920 PAC RG10, VOL. 6810, file 470-2-3, vol. 7.

14. Section 35(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquit-cd.
15. "The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation". . from *Outstanding Business, A Native Claims Policy, Specific Claims,* D I AN D, 1982.
16. The most recent indication from Federal officials of the Office of Aboriginal and Constitutional Affairs (OACA) is that this "new relationship" must include the Provinces, where MNSI are concerned.
17. This linkage poses a triple threat to MNSI peoples. If claims, constitutional process, and self-government are linked to each other without specific access for MNSI, then this triple-revolving door would certainly exclude most of the Aboriginal people in Canada from access to their rights.
18. Under current policy, new treaties are only considered in comprehensive claims areas, and the exclusion or omission of an individual from treaty is a specific claim that can only be presented by a band – which may well have a vested interest in denying the claim of that individual or group.
19. Census figures for 1981 show more than 100 communities across Canada where MNSI are a majority of the Aboriginal population (although the Aboriginal populations are a majority in all but 13 of these situations) .
20. There are just over 70 communities or areas in which MNSI are a significant minority (33 to 49 per cent) of the Aboriginal population enumerated in the 1981 Census.
21. "One essential feature (of self-government) is a land base, without which self-government is not viable. " from *Aboriginal Self-Government, Rights of Citizenship and Access to Governmental Services,* Noel Lyon, Background Paper Number 1, Aboriginal

Peoples and Constitutional Reform, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, 1984.

22. The further north and west one moves in Canada, the more this is likely to be true. There are bbth comprehensive and specific claims by peoples who still occupy the land base, and by those who have been unilaterally expelled from their homelands. These claims were outlined by NCC Provincial associations in a three-year claims research project between 1979-81.
23. There are current attempts to block registration under Bill C-31 by a few western Bands, and a Supreme Court referendum on 91 (24) jurisdiction for all Aboriginal peoples is becoming more and more likely.
24. 1981 Census figures identify five communities, six divisions, and two other areas where MNSI are a clear majority of an Aboriginal population in a situation in which the Aboriginal population is, itself the majority of the entire population enumerated.
25. "Aboriginal people are currently a majority in the NWT. Aboriginal people, the Dene, Metis and possibly the Inuvialuit will immediately become a minority in the western territory no matter where the boundary is drawn. Therefore, support for division by the Dene and Metis is necessarily conditional on their being satisfied that their rights will be protected in the west. Therefore, they cannot wait to negotiate their place in government after division takes place. "

    From Responses to the Royal Commission on the Economic Union and Development Prospects for Canada's Recommendations on the North From the Western Constitutional Forum of the Northwest Territories, November 1, 1985.
26. See: - FMC Dot: 840-289/007," Background to NCC position on Land and Resources, Ottawa, Dec. 14-15, 1983. Shows land-use map of current family trapping areas in the Nipigon region.
27. The NCC and its PTO s were funded for a three-year period to document their "'potential claim s." The

claims themselves were not received by the Office of Native Claims, but were rejected two years later on the strength of a legal opinion from a legal advisor to a federal government social services department.

28. The Department could also compile figures of those applicants who were denied registration under Bill C-31 on technical grounds but who would be no less Indian under Section 35. These persons will most certainly have an identifiable "community of interest" which could be accommodated on a regional basis.

29. The Department of Indian Affairs, itself has always functioned in a fox-in-tile-ct~icken-coop syndrome. A simple chronology of the evolution of the Department tells its own tale:

1755 -Established as a central military authority
1860-Transferred to Commissioner of Crown Land
1867-Transferred to Secretary of State (J. A. MacDonald)
1873-Transferred to Dept. of Interior
1936-Transferred to Dept. of Mines and Resources
19-19-Transferred to Dept. of Citizenship and Immigration
1965-Transferred to Northern Affairs and National Resources
1966-Established as Department of Indian Affairs and Northern Development

It would seem apparent that the "chickens"' wer, transferred to the care of the *government* "fox" most in need of Indians and Indian lands.

30. With a few" exceptions, all of the various wording put forward entrenches the right to self-government. The differences lie in the need [or perceived lack of need) to entrench the mechanisms and processes by which self-government is later developed. The 1985 Conference foundered, not on the issue of entrenching self-government, but on the issue of entrenching a commitment to negotiate the process by which self-governments would be realized on-the-ground.

31. The Hon. Dennis Patterson was also careful to point out that Aboriginal government was possible within Confederation and without threat to other Canadians.

See: - FMC Dec. 830-143/001, Toronto Feb. 13-14, 1984.

32. See: - FMC Doc: 840-293/007 Elements of NCC Audio-Visual Presentation on Self-Government, Edmonton, Jan. 11-12, 1984.
Also see
FMC Doc: 840-293/003 Verbatim Transcript of the Jan, 11-12 meeting for the text of the presentation.

33. The unilateral imposition of borders (national, provincial, territorial and regional) was one of the major factors in fracturing the traditional political, social, and even family relationships of most Aboriginal peoples. The fact that these borders shifted constantly – particularly between provinces and provinces and territories after Confederation - generated even more arbitrary applications of policy. Today the impact is most often felt in the very different policies one government might have toward Aboriginal peoples as compared to another, in the area of child welfare, for example.

34. See: - "A Declaration of Metis and Indian Rights", The Native Council of Canada, March 19, 1979, ISBN N0.0-9G90970-2-6, claiming "the right to guaranteed representation in all legislative assemblies".

35. For precedents within the framework of existing Confederation arrangements, see FMC Doc: 840-288/008, Dec. 12-13, 1983, "Parliamentary Representation for the Native Peoples of Canada", Professor K.Z. Paltiel, Carleton University.
Also see
FMC Doc: 840-288/009, Dec. 12-13,1983: "Group Rights in the Canadian Constitution and the Legitimacy of Aboriginal Claims to Internal Self-Government" Professor K.Z. Paltiel, Carleton University.

36. This should be made obvious enough by Canada's status as a signatore to the United Nations Covenant on self-determination. The argument is specifically applied to the Canadian Aboriginal situation in: "Brief on behalf of the Dene – Dene Rights and International Law", Professor Richard Falk,

Princeton University, An address to the Berger Commission, Sept. 1976, NWT.

37 The outlawing of the Potlach in B.C. is a casebook example of legislation applied in the name of "civilization" which, in effect, outlawed the vary process by which lands and governance of lands was passed from generation to generation. The possibility that this effect might have been inadvertent, makes the need for constitutional protection even more critical.

38. See: - "Maritime Treaties, The Myth of Peace and Friend ship," A brief analysis for presentation to the Government of New Brunswick on why Pre-Confederation Atlantic Canadian Treaties are of Constitutional importance. " New Brunswick Association of Metis and Non-Status Indians, 1983. "

39. The report is currently on the desk of the Minister of DIAND. A formal Government response to that report is expected in June. At that time it is hoped the quandary of MNSI in relation to access to claims will be resolved.

40. See:- Bill C-93 An Act Relating to the Establishment of Self-government for the Sechelt Indian Band.

41. One of the primary difficulties is getting access to the text of proposed Membership codes, while there is still time to intervene. The current process requires a member of the band to request a copy from DIAND, which puts the very people who might be excluded by the code at a distinct disadvantage in terms of appeals – even if they approved of the code.

42. "A hundred and some years have not changed the minds of the Aboriginal peoples. . .They have not assimilated. . .We have invited them to join Canada and become equals in every sense. . . Not assimilation. , . That was never the intention. "
From: FMC Dot: 800-18/004, Verbatim Transcript, Ottawa, March 8-9, 1984, "Statement by the prime Minister of Canada, the Right Honorable Pierre Elliott Trudeau to the Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples. "

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