

Aboriginal Peoples and Constitutional Reform

ABORIGINAL SELF-DETERMINATION OFF A LAND BASE

John Weinstein

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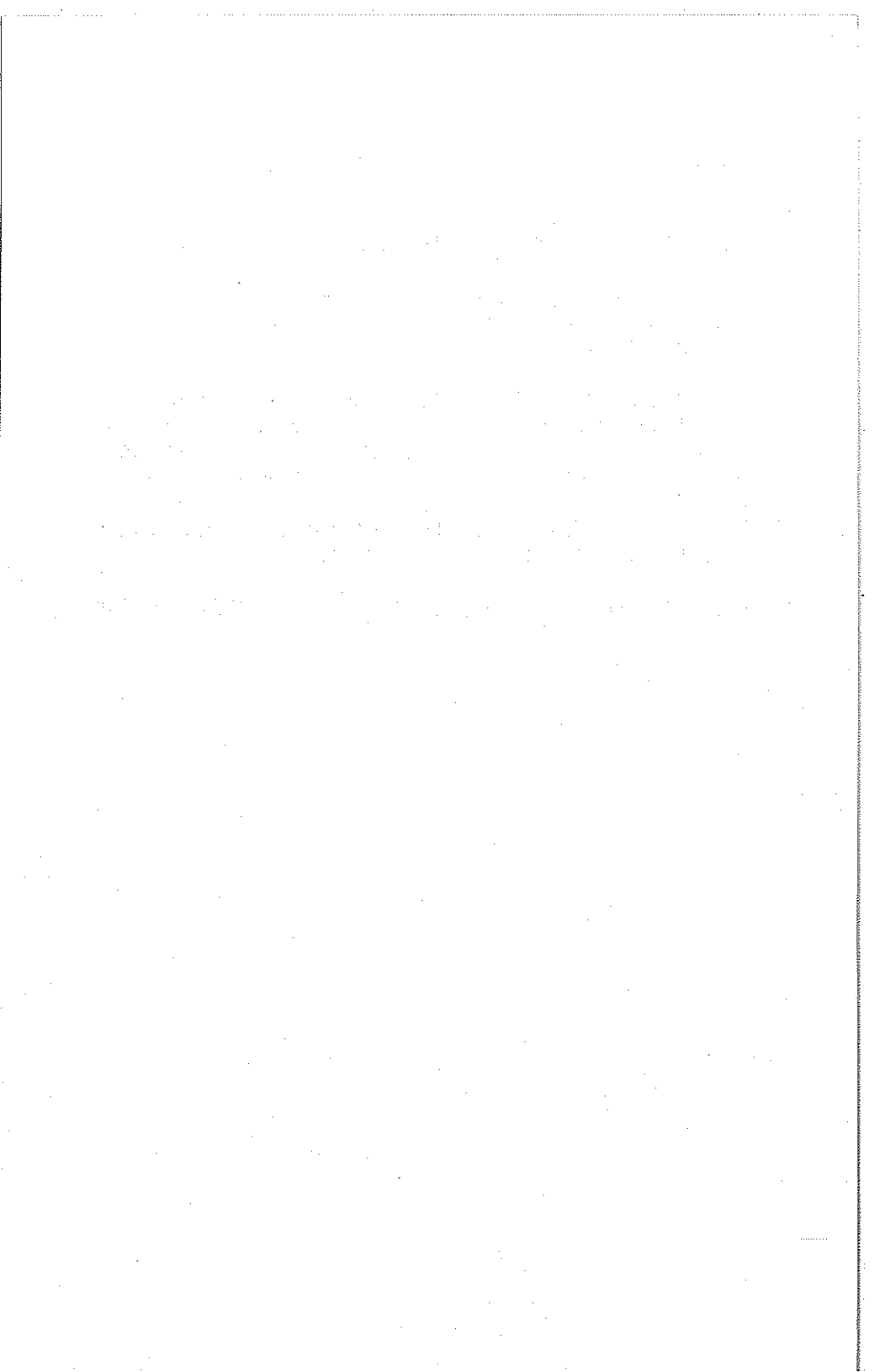


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PREFACE

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 arrangements 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 Insitute wishes to acknowledge the financial support it received for Phase Two of the project from the Donner 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.

A major gap in this field, in terms of research to date, concerns the situation of landless aboriginal peoples. John Weinstein's paper on "aboriginal self-determination off a land base" goes a long way to filling that gap. He provides us with a conceptual framework with which to approach the topic, and examines, from an informed and insightful perspective, the options for aboriginal self-determination off a land base. He concludes, in what may be regarded as the most significant contribution on this subject yet produced, with an examination of the prospects for accommodation with Canada's landless aboriginal peoples.

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ABSTRACT

During discussion of aboriginal constitutional matters to date, there has been a tacit understanding among participants to downplay if not avoid issues relating to the political and constitutional rights of aboriginal peoples living off a land base. This paper seeks to clarify the concept of aboriginal self-determination off a land base, and to account for the treatment of related issues in the section 37 process. It also explores various options for implementing self-determination off a land base, and assesses the prospects for the negotiation of agreements in this area through the "bottom-up" approach to self-government.

SOMMAIRE

Au cours des pourparlers concernant les peuples autochtones et la constitution, on s'est accordé implicitement pour minimiser sinon éviter toute question des droits politiques et constitutionnels des autochtones non dotés d'un territoire. La présente étude a l'objectif d'explicitier le concept de l'auto-détermination des autochtones hors territoire, et d'expliquer le traitement des questions se rapportant au processus de l'article 37. Elle explore aussi diverses options dans le but de rendre effective l'auto-détermination hors territoire et évalue les perspectives pour la négociation d'accords dans ce domaine en adoptant une approche "bottom-up" à l'autonomie gouvernementale.

PART I

INTRODUCTION

During the discussion of aboriginal constitutional matters to date, there has been a tacit understanding among participants to downplay if not avoid the issues relating to the political and constitutional rights of aboriginal peoples living off a land base. Part of this reluctance can be attributed to genuine concerns of the aboriginal organizations which will be discussed later in this paper. Another factor inhibiting movement on these issues is a considerable amount of conceptual confusion on the part of participants and observers. The purpose of this paper is to clarify the concept of aboriginal self-determination off a land base, and to account for the treatment of related issues to date in the section 37 process. In addition, the paper will explore various options for implementing self-determination off a land base, and assess the prospects for the negotiation and implementation of agreements in this area by aboriginal representatives and governments.

1 A CONCEPTUAL APPROACH

To a certain extent the conceptual confusion over self-determination for aboriginal people off a land base arises out of the terminology used in the section 37 process. "Self-government" has emerged as the paramount issue of First Ministers' Conferences and in fact has become synonymous with the process of identifying and defining the rights of the aboriginal peoples to be included in the Canadian Constitution. However, as an exhaustive conceptual approach to aboriginal constitutional issues, "self-government" poses problems for those engaged in the construction of models of self-determination for aboriginal peoples without a land base.

To date the proposals for self-government have presumed its practice on a land base. In those northern regions where aboriginal peoples constitute the majority of the population, proposals have centred on public forms of government (both regional and, in the Nunavut, territorial) in which participation is based on residency. Further south where aboriginal peoples are in a minority position, proposals have centred on aboriginal government in which participation is based on ethnicity. As the vast majority of aboriginal people without a land base inhabit the latter region, their situation will be

assessed relative to the proposal for aboriginal government on a land base.

If aboriginal government is to enact and enforce law for the membership of aboriginal groups, it requires an ethnically exclusive territory. Although there are examples of non-territorial ethnic and religious minorities being granted legislative, taxing and judicial authority in the Ottoman Empire and the East European states created after the First World War, that kind of autonomy presupposes a closed society, ethnic exclusivity, and lack of overlapping institutional arrangements for different groups which are inconsistent with the open and secular (albeit multicultural) nature of urbanized Canadian society. Of course, it could be argued that professional associations such as the Ontario Medical Association enact and enforce "laws" for their members, but the participation of an individual in a profession is more limited in nature and scope than one's participation in a distinct socio-cultural and political group. By legally regulating the activities of aboriginal people in the broad areas of political, social, cultural, and economic development, aboriginal governments off a land base would infringe on the right of aboriginal individuals to equality with non-aboriginal individuals in the same communities. As well, considerable confusion if not chaos would arise with a checkerboard of governments within the same cities and towns imposing varying legal regimes on different groups of citizens.

Those observers of the section 37 process who have pursued "self-government" as an exhaustive conceptual approach to aboriginal constitutional issues have tended to deal with the aboriginal population off a land base by asking whether self-government off a land base is possible, concluding (for the above reasons) that it is not, and then concentrating exclusively on the institutional, jurisdictional, and fiscal arrangements for aboriginal self-government on a land base. This is not a particularly helpful or productive approach as it fails to address the aspirations of a large part of Canada's aboriginal population, who are recognized in the Constitution and are as much entitled to participate in the identification and definition of the rights of the

aboriginal peoples to be included in the Constitution as those living on a land base. It also fails to account for the desire and right of aboriginal peoples off a land base to pursue their own form of self-determination through constitutional guarantees for the control and management of their own affairs and institutions, and for their guaranteed participation in the decision-making process of the state.

To date, the underlying assumption of government policy has been that aboriginal people desiring to exercise collective rights as aboriginal people should reside on or return to (if possible) lands set aside for them. Accordingly, those choosing or forced to live off a land base have been treated as "citizens like any other" or, at the most, as disadvantaged peoples with a right of access to equality of opportunity and affirmative action programs rather than special status. This assumption presupposes the desirability of integrating if not assimilating aboriginal individuals off a land base into the mainstream of Canadian society and precludes their autonomous development within the larger society. It permeates the federal policy of treating status Indians off reserve as well as non-status Indians and Metis as mainly a responsibility of the Provinces and limiting the exercise of federal jurisdiction to those living on Indian reserves. In effect, those who limit constitutional rights and protections to a land base inadvertently reinforce the integrationist if not assimilationist thrust of government policies which has been categorically rejected by aboriginal groups off a land base.

As a conceptual instrument, "self-determination" is more flexible than "self-government" in shaping a framework for the constitutional rights of all aboriginal peoples, based on an inherent sovereignty arising out of their unique historical experience and development. "Self-determination" has been recognized in international law as a right of peoples to determine their own political status and to freely pursue their own social, cultural and economic development. In practice, however, the exercise of this right varies according to circumstance, needs and aspirations.

For example, as the European powers did not flood their African and Asian colonies with immigrants, the peoples of these countries remained externally colonized majorities who were eventually able to assert their right to self-determination through the attainment of national independence. The aboriginal peoples of North America, on the other hand, were subjugated and reduced to minorities within their territories by settler populations, and thus have not been able nor will they be able to exercise their right to self-determination as fully. Moreover, those aboriginal peoples without a land base have been denied even the minimal degree of self-determination possessed by those living on a land base.

As a conceptual approach, "self-determination" starts with the premise that all aboriginal peoples have a right to autonomous development although the extent to which it can be implemented will vary from one group to the next. (After all, an aboriginal group on a land base which depends on aboriginal government for basic utilities and services such as water supply and fire protection will require more authority over its affairs than an urban and landless aboriginal group.) This approach sets the stage for the negotiation of institutional arrangements of self-determination in a manner which addresses the aspirations of all interested aboriginal peoples while taking into account constraints on implementation.

For aboriginal people living on a land base, "self-government" has emerged as a mechanism for implementing their right to self-determination. For them, the priority issues of the constitutional process have been the nature and extent of this right to self-government. Guaranteed representation of land-based aboriginal populations in public or non-ethnic institutions of government such as Parliament and the provincial legislatures has not surfaced as a priority issue to date. While some Indian leaders have rejected the proposal for guaranteed participation in what they consider to be alien institutions as an infringement on their sovereignty, it is possible that those seeking aboriginal self-government as an autonomous part of the

Canadian federation will eventually see the need for guaranteed representation of their constituencies in Parliament and perhaps, other legislatures. However, it is unlikely that they will promote this position until they have first secured self-government.

For aboriginal people off a land base, the twin mechanisms for implementing their right to self-determination will be a form of autonomy more limited than self-government, to be called "*self-administration*" (for the purpose of this paper) as well as *guaranteed representation in public or non-ethnic institutions of government*. The first mechanism arises from the belief of aboriginal people off a land base that they require control over the design and delivery of programs and services if these are to satisfy their needs and aspirations and reduce their dependency on governments. The second mechanism arises from the need of aboriginal people living in the larger Canadian society to increase their involvement in the decision-making process of the state if their collective interests are to be protected and promoted. Without governments of their own and without a population concentration which would favor the election of aboriginal candidates, they have been alienated by the political system and denied effective representation in political institutions. Proposals for guaranteed representation are designed to ensure that aboriginal people fully participate in the decisions of public institutions such as legislative assemblies and regional governments which impact directly on their collective interests.

2 THE SECTION 37 APPROACH

In order to assess the treatment of issues of particular applicability to aboriginal people off a land base in the section 37 process to date, we start with how the different players at the constitutional table relate to this population. The federal government, despite its reticence on urban Indian issues and its denial of constitutional responsibility for Metis, has nevertheless established a variety of special programs (urban and rural housing programs, for example) for aboriginal groups off a land base as disadvantaged people. At the same time, it has pressed the provincial governments to take the lead role in this area without much success.

Provincial governments are used to dealing with their citizens on the basis of residency, not ancestry or ethnicity, and have for the most part viewed Ottawa as the rightful source of special initiatives for aboriginal peoples. The rapid growth of urban aboriginal populations in western Canada has increased the social service costs of provincial governments and led to provincial demands for compensation. A major factor underlying the agreement of western provinces to the inclusion of aboriginal peoples in the constitutional agenda in the late seventies was a desire to press for fuller reimbursement from the federal government for the cost of services provided to status Indians off reserve

and, in some cases, for the transfer of their fiscal responsibility for Metis to the federal government.

The four national aboriginal organizations have responded to issues of particular applicability to aboriginal people off a land base largely on the basis of the nature of their constituencies. As a national assembly of band councils, the Assembly of First Nations (AFN) represents and promotes the interests of status Indian reserve communities. Of those status Indians living off reserves, some still identify with their reserve in a cultural and political sense and may, in fact, move back to reserves either permanently or intermittently. Others who have no intention of returning to reserves may have formulated positions unique to their situations and aspirations but these have not been brought to the constitutional conference table.

Due to their unique geographical circumstances, the Inuit people have access to a land base through traditional occupancy and the land claims process. Like the AFN, the Inuit Committee on National Issues (ICNI) has developed positions on the assumption that political rights will be exercised on a territorial basis. These organizations have tended to dismiss issues not premised on self-governing territories as falling outside the purview of the constitutional talks.

The national organizations of the Metis and non-status Indians, the Metis National Council (MNC) and Native Council of Canada (NCC) respectively, represent people almost entirely without a land base. While the recent enactment of federal legislation for the reinstatement of non-status Indians will allow many to return to Indian lands, the long outstanding Metis land claim on the prairies remains unresolved and the Metis a landless people. Throughout the section 37 process, the Metis National Council has kept a Metis land base high on the agenda, believing a land base to be a precondition to Metis self-government, but it has also tried to strike a balance between these constitutional priorities and the interests of the large number of Metis in towns and cities who would remain off a land base even if it were established. Entering the process, prairie Metis leaders expressed this balanced approach through proposals for

self-government for Metis on a land base, a more limited form of political autonomy for those off a land base, and guaranteed representation for the Metis people as a whole in Parliament and provincial legislatures.

One of the first issues of particular importance to aboriginal people off a land base to arise during the section 37 process was the design and delivery of programs and services. During the preparatory process leading up to the First Ministers' Conference on Aboriginal Constitutional Matters in 1983, "service delivery" appeared as a distinct item on the draft agenda for the Conference. Aboriginal participants, however, did not wish to deal with the item separate and apart from self-government, lest the federal and provincial governments engage in a futile debate of their respective responsibilities for service delivery to aboriginal peoples (and embroil aboriginal participants in their jurisdictional and fiscal disputes) without ever resolving how the responsibility for service delivery could be transferred to aboriginal government. In short, aboriginal organizations did not want the constitutional process to degenerate into a "buck-passing" exercise by Ottawa and the Provinces. As a consequence, "service delivery" was subsumed under a heading more palatable to aboriginal participants, the "resourcing of aboriginal governments", in the agenda for the ongoing process in the 1983 Constitutional Accord.

A number of other items of particular applicability to aboriginal people off a land base, which had appeared in the initial agenda for the 1983 First Ministers' Conference, were dropped altogether by the time of the conference. "Affirmative action" was more a priority of government than aboriginal organizations, the engine of an integrationist strategy (particularly that of the federal government) which was the very antithesis of the special status sought by aboriginal peoples. "Guaranteed representation of aboriginal peoples in Parliament and provincial legislatures", on the other hand, represented an opportunity for aboriginal people, particularly those without a land base, to pursue part of a self-determination strategy. The main reason for its deletion from the agenda of the ongoing process, despite

stated support for the concept by Metis, non-status Indian, and Inuit organizations, was the priority attached by aboriginal participants in the section 37 process to "self-government".

Thus, during this initial phase of the section 37 process (with a majority of provincial governments not yet accepting even the concept of self-government), the national aboriginal organizations attempted to steer clear of issues perceived to detract or shift attention from their constitutional priorities. These priorities were self-government and land and resources, even though their mode of articulation and emphasis at the beginning of the process varied from one aboriginal organization to another (for Indians, the emphasis being on aboriginal title and treaty rights; for Inuit, on the constitutionalization of land claims agreements and regional governments; and for Metis, through the creation of an autonomous land base). Those aboriginal participants with constituencies lacking a land base were particularly sensitive to issues which they perceived to detract from the priority issue of land base, the *sine qua non* of self-government.

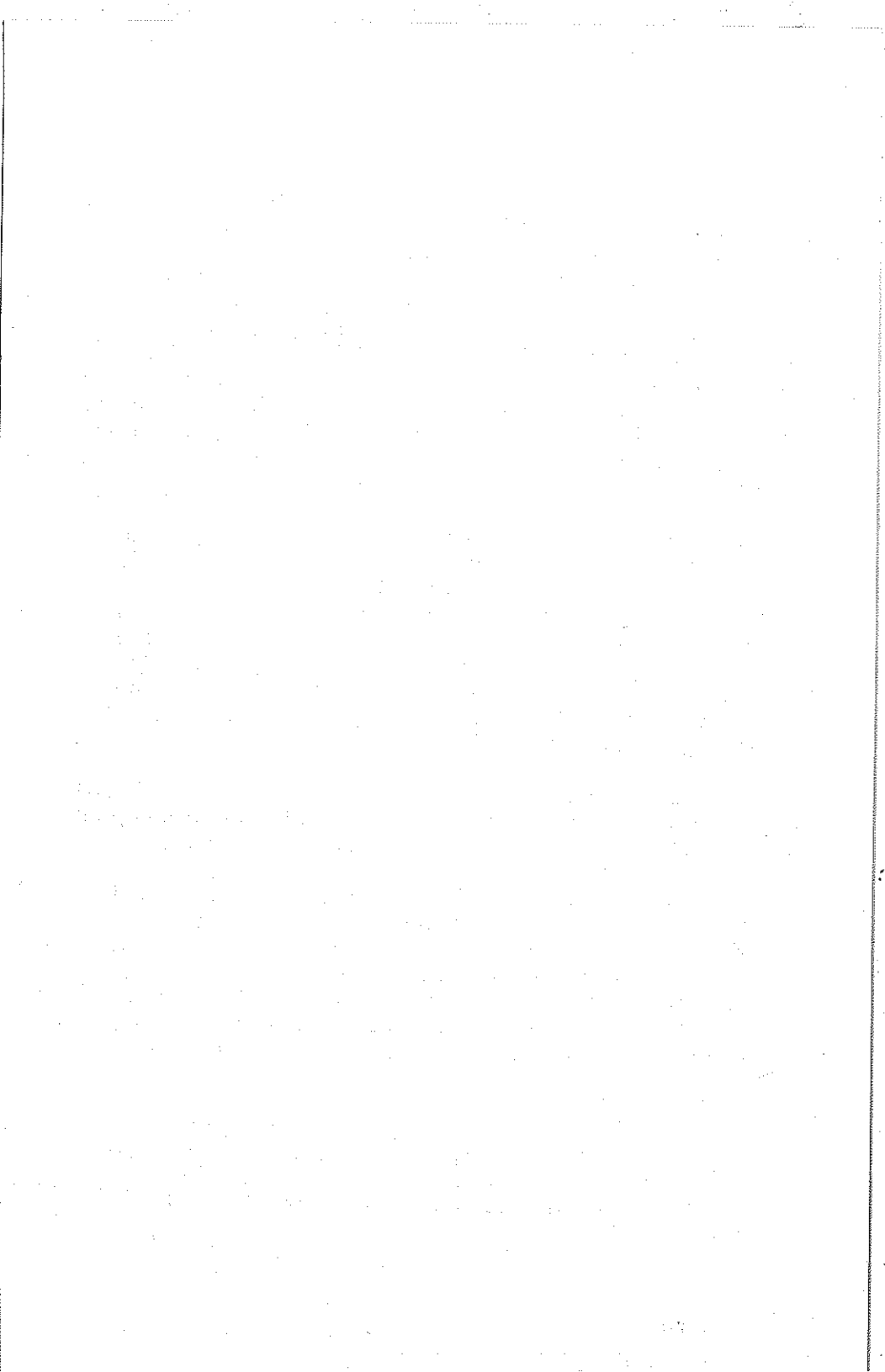
For example, an issue such as service delivery outside the context of self-government meant a sorting out of federal and provincial responsibilities at the table - hardly likely to enhance the prospects of a Metis land base. Those western provinces trying to transfer their fiscal responsibility for Metis to the federal government were unwilling to transfer public lands for the creation of a land base. As well, there was a persistent threat, to surface intermittently, of provincial governments trying to bury the land base issue altogether through proposals for dealing with aboriginal peoples off a land base in a separate forum.

As a result of this vigilance of aboriginal participants in maintaining the focus of constitutional discussions on self-government and a land base, issues pertaining to self-determination off a land base tended to be shunted aside. In one of the four working groups preparing for FMC '84, the MNC attempted to circumvent this problem with a proposal to include different aspects of self-administration off a land base (economic

development, education and training, language and culture, social services, fiscal resourcing, and implementation) under "Metis self-government outside Metis lands", a heading designed to offset allegations by other aboriginal groups that the MNC was raising "non-constitutional" issues. The issue soon died on the table, however, when the MNC informed participants that it wished to make progress on its priority items, a land base and self-government, before dealing with more limited forms of self-determination.

What had caused the reversal was an internal debate in which MNC leaders had concluded that keeping the issue on the agenda for FMC '84 would be an open invitation to federal and provincial governments to sidestep the contentious issues surrounding the establishment of an autonomous Metis land base. Certain "hard-line" provincial ministers had fuelled their apprehensions with statements at the table that participants should abandon "abstract" discussion of self-government and focus on the concrete needs of aboriginal peoples. The last thing desired by the MNC was an agenda item of its own choosing to become a forum for a "problem-solving" exercise directed towards more bureaucratic programs over which the Metis had no control.

The above profile illustrates three factors - the potential for federal-provincial conflict in the area of service delivery for aboriginal peoples, the territorial orientation of the status Indian and Inuit organizations, and the territorial aspirations of Metis and non-status Indian organizations - which governed the responses of aboriginal participants to issues of particular applicability to aboriginal people off a land base. From FMC '83 to FMC '85, the development and pursuit of the constitutional priority of self-government on a land base by aboriginal participants figured as an integral part of a strategy which has been termed a "top-down" approach to aboriginal constitutional issues. This approach was directed towards the recognition of aboriginal self-government in the constitution and then its implementation through negotiated agreements. With aboriginal participants pursuing the entrenchment of



b) enhanced participation of the aboriginal peoples of Canada in the area of programs and services, including their increased involvement in the design and delivery of programs and services, taking into account the special social, cultural, and economic needs of the aboriginal peoples of Canada;

c) assessment of financial provisions, including consideration of existing arrangements between the government of Canada and the provincial governments;

d) examination of eligibility requirements of programs and services for the aboriginal peoples of Canada, including residency requirements; and

e) examination of programs and services to the aboriginal peoples of Canada, including the degree to which they are comparable with services received by other Canadians residing in similar communities.

The Prime Minister informed the Conference that Senator Jack Austin, then Minister of State for Social Development, would head up the review of programs and services in concert with the provincial governments and aboriginal representatives, and would report the results to the constitutional conference in 1985. However, with FMC '84 failing to reach an agreement on self-government, the "Austin review" would be met with, at best, marked indifference on the part of aboriginal organizations which viewed it more as an exercise in federal-provincial relations than aboriginal autonomy. With the change of government, the review was buried.

Some of its critical elements would nevertheless resurface in the constitutional approach of the federal Conservative government. Schedule II of Prime Minister Mulroney's Proposed 1985 Accord Relating to the Aboriginal Peoples of Canada read as follows:

Federal-Provincial-Territorial
Cooperation on Matters Affecting
the Aboriginal Peoples of Canada

1. The government of Canada and the provincial and territorial governments are committed to improving the socio-economic conditions of the aboriginal peoples of Canada and to coordinating federal, provincial, and territorial programs and services for them.

2. In order to achieve the objectives set out in article 1 of this Schedule the government of Canada and the provincial and territorial governments shall, with the participation of representatives of the aboriginal peoples of Canada, enter into regular discussions, on a bilateral or multilateral basis as appropriate, which shall have the following additional objectives:

a) the determination of the respective roles and responsibilities of the government of Canada and the provincial and territorial governments toward the aboriginal peoples of Canada;

b) the improvement of federal-provincial-territorial cooperation with respect to the provision of programs and services, as well as other government initiatives, to the aboriginal peoples of Canada so as to maximize their effectiveness; and

c) the transfer to institutions of self-government for the aboriginal peoples of Canada, where appropriate, of responsibility for the design and administration of government programs and services.

The wording of the federal proposal represented an advance over that of its precursor, referring now to a transfer of service delivery to institutions of

self-government instead of heeding the "potential roles" of aboriginal governments in this area. However, like the "Austin review", Schedule II of the draft 1985 Accord was largely ignored in the all-consuming search for consensus on a self-government amendment. Nevertheless, these federal initiatives constituted the first steps in what would become known as a "bottom-up" approach to self-government - implementing self-government through detailed agreements on its form and substance before entrenching them. This approach put the focus on practical matters, especially service delivery, at the community and regional levels and offered potential for the development of institutions of self-administration for aboriginal people off a land base.

The "bottom-up" approach would take on new life with the impasse at FMC '85. Seven provincial governments supported the federal draft amendment to recognize and affirm the rights of aboriginal peoples to self-government where those rights were set out in agreements ratified by Parliament and the respective provincial legislatures. Two of the aboriginal organizations, the Assembly of First Nations and the Inuit Committee on National Issues, withheld their support ostensibly because the governmental commitment to negotiate these agreements had been shifted from the constitutional amendment to a political accord.

At a follow-up meeting of federal, provincial and territorial ministers and aboriginal representatives a few months after FMC '85 (June 5-6, 1985), the federal government, faced with a continued deadlock, announced that it was willing to enter into negotiations with the aboriginal organizations and provincial governments directed towards concluding agreements on self-government at the community or regional level. These agreements could then be considered for constitutional protection through future constitutional amendment. Thus, there would be a shift from multilateral negotiations at the national level aimed at a self-government amendment, to tripartite negotiations at the community or regional level aimed at agreements on the form and substance of self-government.

There were dangers inherent in the community/regional tripartite negotiations on aboriginal self-government. These negotiations would take place outside the constitutional framework and there was no guarantee that any agreements reached would eventually enjoy constitutional protection. As well, the approach made it possible for governments to bypass the national aboriginal organizations and deal with groups at the community level, thus having the potential to undermine the organizations at the constitutional table.

The AFN and ICNI could accept neither the substance nor the direction of the federal approach. Their constituencies had already gone through community consultations on self-government through parallel processes (the special Parliamentary committee on Indian self-government and the land claims process) and they didn't wish to repeat the exercise as a substitute for constitutional negotiations. They also opposed what they considered to be a "provincial veto" in the draft amendment, which they saw precluding the constitutionalization of bilateral agreements between Indians or Inuit and the federal government.

For just the opposite reasons, the MNC and NCC felt compelled to support the federal draft amendment at FMC '85, and the "bottom-up" approach to self-government through community-based tripartite negotiations. As a result of Ottawa's refusal to accept constitutional responsibility for them and its rejection of their land claims, the Metis had been denied access to a parallel process through which they could have pursued a land base, self-government, or self-administration off a land base. Tripartite negotiations appeared to offer a concrete and pragmatic method of concluding regional agreements outside the unwieldy forum of the section 37 process. As well, in behind-the-scenes discussions with MNC and NCC leaders at FMC '85, Prime Minister Mulroney had made a commitment to use his influence with the provinces to nurture these tripartite talks, and to include a land base in private meetings he intended to hold with the two organizations. As for fears of a provincial veto, the Metis, as a provincial responsibility, recognized that the support of the provinces was

required for any breakthrough on Metis rights in the extensive areas of provincial jurisdiction.

Another key factor behind the support of the MNC and NCC for tripartite negotiations was the opportunity it offered to finally deal with the priorities of their large constituency which would remain off a land base. Their member associations had established an array of institutions and service delivery mechanisms in the areas of education and training, culture and communications, economic development, social services, and housing, for their members in the cities, towns and rural/hinterland areas. The "bottom-up" approach held out the possibility of building upon these institutions through a devolution of authority over service delivery from federal and provincial governments. With the federal government and seven provinces now willing to support the constitutional recognition of a contingent right to self-government, there was less apprehension of self-administration being pursued at the expense of an autonomous land base.

Since the federal-provincial ministers' meeting in June, 1985, the MNC has taken the lead role amongst aboriginal organizations in pursuing the "bottom-up" approach to self-government. Its largest member associations have entered into tripartite negotiations with the federal government and their respective provincial governments, and have pressed for an autonomous land base as well as for self-administration off a land base. What the nature of agreements in the latter area will be, and whether they can be accorded constitutional protection are points which will be assessed in the upcoming sections of this paper.

PART II

OPTIONS FOR ABORIGINAL SELF-DETERMINATION OFF A LAND BASE

Just as the exercise of self-determination will vary from aboriginal people on a land base to those off, so it will vary amongst aboriginal groups off a land base from urban to rural/hinterland areas. In these different settings, the circumstances of aboriginal peoples vary widely, giving rise to different needs and aspirations, different forms of political representation and different sets of arrangements for self-administration. Regardless of the degree of authority possessed by these structures of self-administration, there will also be a need for aboriginal people off a land base to participate in those public or non-ethnic representative bodies which make decisions for the country, the provinces, and regions as a whole.

Aboriginal people have moved to cities in search of improved opportunities and services. Many have not been able to take advantage of these opportunities because of lack of education and job skills, and have ended up chronically unemployed and concentrated in depressed areas of the inner city. Without the support of the more cohesive communities in rural and hinterland communities, they have experienced rapid social breakdown with all its attendant glaring statistics and ever-greater dependency on the state. Despite the

extensive network of public services and institutions in cities, most have proven unresponsive to the particular needs and aspirations of aboriginal people, and in areas such as education and child welfare have contributed to the alienation of these people. Where aboriginal organizations have moved to alleviate these conditions, they have been plagued by a lack of authority and funding, and spend much of their time fighting with federal and provincial bureaucrats over the scope, terms of reference, and budgets of their programs and services.

From the above profile, three critical elements emerge underlying aboriginal demands for increased autonomy in urban centres. First, aboriginal people seek to overcome their dependency exacerbated by socio-economic conditions. Second, they seek to establish and expand culturally supportive services and institutions in order to foster greater social cohesion. Third, they seek a devolution of authority over service delivery from federal and provincial governments to aboriginal people.

Aboriginal populations without a land base in rural and hinterland areas share the problems of dependency and alienation with their urban counterparts, but are in a position to exercise a wider degree of autonomy. They constitute a much larger proportion of the local and regional population in these areas than they do in cities and can therefore play a significant role in the overall political development of these areas. There is a greater degree of cohesion in these areas as a result of close and extended kinship ties and thus a stronger social base for political organization. With aboriginal communities close to lands and resources from which their members have derived livelihoods, there is greater potential for community-oriented economic initiatives.

The fact that hinterland regions for the most part lack effective local government enhances the prospects of a devolution of authority from governments to these regions and their aboriginal inhabitants. Aboriginal communities would thus be able to pursue self-determination not only through self-administration of programs and services designed exclusively for their members, but also through participation in new local or regional governments on a

basis guaranteeing the representation of their collective interests. The next section will examine options for these two forms of self-determination off a land base - self-administration and guaranteed representation in public or non-ethnic forms of government.

3 SELF-ADMINISTRATION

a) Structure

There are two basic forms of *self-administration* of aboriginal people off a land base. *Institutional autonomy* rests on the assumption that aboriginal people can best gain control over their own affairs through the creation or expansion of specialized autonomous institutions and agencies in different areas of service delivery. *Political autonomy* rests on the assumption that aboriginal people can best gain control over their own affairs through the establishment or expansion of central policy-making bodies which would administer service delivery institutions and agencies as part of a larger function of political representation. As the prairie Metis have taken a lead role in the development of self-administration off a land base, their associations will be used as an empirical base for examining different models in this area.

Institutional autonomy fits within the Canadian tradition of accommodating certain minority interests. The denominational school rights guarantees of the *Constitution Act, 1867* and subsequent constitutional documents ensure institutional autonomy in the form of publicly-funded denominational school boards for Protestants and Catholics in Quebec and Catholics in a number of other provinces. A number of provincial

governments have provided social services to influential minorities (Quebec Protestants and Jews, and Ontario Catholics) through agencies operated by these groups. In much the same manner, Metis people and urban Indians could gain institutional autonomy by establishing their own legally recognized and publicly-funded school boards, training institutes, child welfare agencies, correctional services, cultural institutions, and other bodies in areas where the larger system has not accommodated them and which are deemed to be essential to their social and economic development.

Political autonomy goes far beyond institutional autonomy in that it articulates and seeks to promote through its operations the broad objectives of aboriginal people which transcend the purview of any individual agency. While provision for this type of political representation in law would deviate from the conventional treatment of minority group organizations as interest groups, it would build upon the role already established by Metis and non-status Indian political organizations off a land base. This role has been confirmed by their recognition and participation in the process of constitutional reform.

Both forms of self-administration face a number of constraints on their development. First, their decisions would apply only to those aboriginal people who choose to participate in their respective affairs. Unlike those on a land base, who would be subject to the powers (including service delivery) of aboriginal government, aboriginal people off a land base would have a right to "opt out" of self-administration by simply not participating nor seeking representation, and by receiving services directly from federal and provincial governments rather than aboriginal self-governing bodies.

Second, both forms of self-administration, in order to be effective, must be organized within the context of the Canadian federal system and its division of powers between federal and provincial governments. These governments have, as a rule, passed aboriginal people off a land base back and forth without either government accepting a responsibility to act on their behalf. To be

successful, self-administration requires a delegation of administrative authority over service delivery from both levels of government to aboriginal people. Therefore, aboriginal people must establish organizations which will allow them to deal with both governments on the basis of unity and strength, especially at the provincial and national levels.

Third, there has been a problem common to most aboriginal organizations at the national level that "top-heavy" executives, indirectly elected through the delegate system, have not proven responsive to the needs of aboriginal communities, especially in the area of service delivery. Self-administration assumes that programs and services can be most effective when those responsible for their design and management are accountable to those they serve. This calls for the direct election of the executives of self-administration structures by their membership.

Fourth, there has been the problem common to many provincial aboriginal organizations of regional alienation within the provinces. Self-administration must accommodate regional interests through adequate regional representation on the executive of provincial self-administration structures. As well, program and service delivery should take place at the level where it is most needed and feasible. Whereas training institutes and financial institutions can prove to be most effective at the provincial level, economic development corporations and recreation programs might be more appropriate at the regional or local levels. Where service delivery is carried out at the provincial level, regional concerns and interests can be accommodated through the establishment of branch facilities or, in areas such as post-secondary education and training, through candidate selection.

The most appropriate structures for the implementation of institutional autonomy would be *single purpose institutions* serving specific functions at the local, regional, or provincial levels. Among these institutions would be education and training institutes, child welfare agencies, media organs, economic development corporations and housing societies. All those Metis and off-reserve Indians resident in an area

served by their respective single purpose institutions would be eligible to participate in their affairs.

The membership of each institution would elect an executive or Board through the ballot box in the communities served by the institution, or at an annual assembly where the membership could also set overall policy direction. The Board would set specific policies for the development and delivery of programs, for hiring and managing staff, and for interfacing with the appropriate federal and provincial departments. It would be responsible to the members and would report at regular membership meetings and at assemblies. Staff would assume responsibility for the day-to-day administration of the institution.

The most appropriate structures for the implementation of political autonomy would be *councils* at the local, regional and provincial levels. If aboriginal people off a land base are to deal with federal and provincial governments on the basis of unity and strength, local and regional councils would have to be linked to provincial councils through the membership system. Accordingly, aboriginal people off a land base in each province would be entitled to membership in a provincial association but would participate through local and regional units.

The most effective method of leadership selection would be direct rather than indirect election. This can best be accomplished through a province-wide, "one-person, one vote" ballot box system of voting at the community level, with members electing their local councillors on a local basis, their regional councillors on a regional basis, and their provincial executive officers at large. To strike a proper balance between provincial and regional interests, the provincial council would consist of the provincial executive officers and one or more members of each regional council. The provincial council would serve as the political voice of aboriginal people off a land base, articulating their objectives and needs, formulating policy for dealing with governments towards the fulfillment of these objectives, and designing and managing services and programs for socio-economic development.

The chairman or president of the provincial council, elected at large by the entire provincial membership, would serve as chief executive officer and would be empowered to implement the policies of the council. He or she would be assisted by an executive committee or cabinet elected from among the provincial council. The members of the cabinet would occupy various portfolios in the areas of social policy, cultural policy, economic policy, finance, and intergovernmental affairs. They would be responsible for the design and delivery of programs and the management of institutions (such as cultural and recreational centres or credit unions) directed toward the fulfillment of overall policy objectives. They would hire and set direction for staff at the provincial level, while providing for decentralization of operations and facilities to meet the needs of their membership where they are concentrated at the regional and local levels.

The above profile reveals the relative strengths and weaknesses of the two forms of self-administration. Institutional autonomy allows for direct community participation in the design and administration of public services. In areas of service delivery where aboriginal people have experienced particular problems, it permits them to shape a mechanism and procedures for addressing these problems in a collective and responsive manner. Through their membership in these institutions, they also have an opportunity to raise concerns and question the performance of leadership and their staff as problems arise. However, this form of self-administration also spawns a multiplicity of single purpose institutions in different areas without central coordination and overall policy direction. This places additional strain on limited and overstretched resources (with its attendant budgetary problems for these institutions) and impedes the development of common strategies for dealing with governments.

Political autonomy places the design and administration of public services in the hands of elected councils, who would perform this function as would a responsible government, and who would answer for its performance at the polls. This could, in effect, create a bureaucracy

which could carry on with less public scrutiny and, presumably, with more patronage appointments than would be the case with single purpose institutions. These drawbacks would, however, be offset by the benefits accruing from the structure and scope of provincial councils. With a built-in system of responsibility and accountability of provincial and regional leaders to a "grass-roots" mass membership seeking political representation, these councils would command more legitimacy in the eyes of government and far more "clout" in negotiations than single purpose institutions. Their ability to set overall policy direction and to tie initiatives in various areas of service delivery to their political objectives strengthens their hand when dealing with governments.

Experience to date has shown that the prairie Metis have opted for political autonomy over institutional autonomy. During the past decade the Saskatchewan and Manitoba Metis associations introduced the province-wide ballot-box system of voting, and established provincial boards consisting of regional directors elected at the regional level and provincial executive officers elected at large. They established provincial institutions such as the Gabriel Dumont Institute of Saskatchewan (education and training), Pemmican Publications of Manitoba (Metis publishing house), and numerous service delivery agencies such as housing authorities and economic development corporations, all with boards controlled by the provincial associations. In Alberta, where much of the service delivery was carried out by single purpose institutions rather than the provincial Metis association, the Metis have recently adopted a structure and electoral system similar to their counterparts in Manitoba and Saskatchewan, and can be expected to move towards the integration of existing single purpose institutions, which are perceived to have become appendages of government.

Building on this preferred approach to self-administration, we now turn to the relationship of the council system of representation in the provinces to national organizations, as well as to aboriginal government on a land base. As indicated above, the

Metis must develop effective political organization at the provincial and national levels if they are to cope with the challenges of federalism and its division of powers. The demands of the section 37 constitutional process illustrate the need for national bodies which are capable of reconciling internal differences, articulating broad political objectives, and possessing the expertise to negotiate effectively with federal and provincial governments on constitutional, legislative and policy issues.

Aside from this all-important function of national representation and articulation, a national organization would be called upon to lobby the federal government on behalf of its provincial/regional membership in areas within federal jurisdiction, such as national housing and communications policy. It would also provide some national services especially in the area of information and communications. A national organization would also represent its constituent members in the international arena. International issues such as the anti-fur campaign, the development of instruments and standards for the protection of indigenous rights in international law, and the treatment of indigenous peoples in other countries have already drawn Canada's existing national aboriginal organizations into international bodies such as the World Council of Indigenous Peoples in order to protect their rights, interests, and livelihoods.

National aboriginal organizations established in the past, in the form of federations, have tended to suffer from a lack of responsibility and accountability, in large part due to the indirect election of national officers by delegates of member associations, rather than direct election by the people at the community level. This has given rise to a perception that national organizations are competing with their member associations for scarce resources and for the self-aggrandizement of national leaders. While responding to this sense of alienation, the adoption of direct election of national leadership by people at the community level begs the larger problem of spreading the limited amount of power of aboriginal people too thinly amongst different levels of political organization.

The prairie Metis have dealt with these problems by concentrating power in their provincial associations and by establishing an alliance, the Metis National Council, rather than a federal body at the national level for pursuing common objectives. A "sum of its parts", the MNC has an executive committee consisting of the presidents of the member associations. Thus, the same representatives who are elected at the provincial level make the decisions at the national level. While minimizing friction between the national organization and its provincial affiliates, this structure does not lend itself to meeting all the demands at the national level, particularly the required political coordination and negotiations on many fronts. In fact, originally mandated solely to represent the Metis people in constitutional negotiations and international issues, the MNC is presently undertaking more lobby and liaison work for its member associations in areas of service delivery, such as the Native Economic Development Program.

This paper's focus on aboriginal self-determination off a land base should not be construed as meaning that institutions of self-administration will evolve completely separate and apart from aboriginal government on a land base. In view of the limited population and revenue base of local governments on Metis lands, there would be good reason for these governments to undertake joint initiatives with regional and local councils representing Metis groups off those lands. In some cases, they could provide programs and services and manage institutions, such as educational authorities, jointly with the Metis councils. There is even a possibility, evidenced by some proposals arising out of the Metis community consultations on the prairies, that in some regions the Metis might seek a land and resource base to be held in trust by a Metis regional authority, representing Metis *both on and off* the land base. At the provincial level, it would make sense for Metis local governments (or their provincial representative) to collaborate with Metis provincial councils in the establishment and management of institutions, such as training and educational institutes, which serve the common interests of Metis throughout the province.

As well, it is quite possible that Metis local governments (perhaps through their own provincial bodies) would seek a relationship with a national organization comprised of provincial councils of Metis people without a land base. It should be noted that the Alberta Federation of Metis Settlement Associations, which consists of the only land-based Metis local governments in Canada, participates in constitutional negotiations through the Metis National Council, which groups together the provincial associations of the otherwise landless western Metis. Cultural institutions, communication systems, and international issues are some areas where joint initiatives of representative bodies of Metis self-government and Metis self-administration are likely at the national level.

b) A Legal Framework for Self-Administration

In considering a legal framework for aboriginal self-administration off a land base, one must first determine whether or not legal guarantees for these institutions and their powers are required. There is a tendency on the part of governments to argue that a devolution of authority over service delivery to institutions of self-administration can be accomplished within the bounds of existing legislation or through policy initiatives. Unfortunately, notwithstanding the good intentions which may underly this point of view, experience has proven that more than good will is needed for governments to act, especially on behalf of those aboriginal peoples living in predominantly non-aboriginal or mixed communities.

There are three reasons why constitutional guarantees are required for institutions of self-administration. First, the provincial governments, which have jurisdiction in most of the areas where a devolution of authority is called for, have proven to be, regardless of their political stripe, unwilling to act for minorities. The backlash engendered by the Manitoba NDP government's constitutional initiative on behalf of that province's francophone minority (an initiative undertaken only to avoid a court-imposed settlement) made a government originally supportive of Metis aspirations

fearful of doing anything for the Metis which could arouse public interest (and hostility). Likewise, other provincial governments in western Canada, where anti-aboriginal settlement tends to be higher than in other regions of the country, have avoided movement on aboriginal issues on the ground they would be alienating their "white" constituency.

Second, there is a need to ensure that once governments move on a devolution of authority over service delivery to institutions of self-administration, they do not unilaterally terminate the programs and services to be managed by these institutions. With a change in government, there is also a change in commitment and priorities which can militate against aboriginal institutions dependent upon government policy and legislation for their legal existence and financing. Only a constitutional guarantee can ensure the continuity which is needed for proper planning and administration of aboriginal service delivery.

Third, there is a need to ensure adequate fiscal provisions for institutions of self-administration. A devolution of authority to aboriginal people is meaningless if it is not accompanied by fiscal resources which will allow them to exercise this authority. The current preoccupation of most governments with deficit-reduction does not augur well for institutions of self-administration unless they have entrenched financial arrangements binding on government.

These three factors - the need for a mechanism to force governments to act, to prohibit them from unilaterally terminating what they have established, and requiring them to reserve part of public revenues for aboriginal self-governing institutions - underly the need for a constitutional amendment on self-governing institutions of common concern to all aboriginal peoples. They figure in the following basic elements of a self-government amendment which have dominated discussions during and since FMC '85: a governmental commitment to negotiate self-government agreements at the regional and community levels; a mechanism for entrenching these agreements; and entrenched fiscal provisions for institutions of self-government. For

aboriginal peoples off a land base, this constitutional amendment must have the effect of entrenching their right to their own democratic institutions of self-administration and requiring the federal and provincial governments to transfer their responsibility for aboriginal service delivery to these institutions. A precedent for the kind of legal regime under which institutions of self-administration would operate has been set by separate schools in those provinces where denominational school rights are constitutionally guaranteed (the provincial governments having jurisdiction over education subject to denominational school rights).

As a result of these entrenched minority religion education rights, a number of provincial governments have been required to enact legislation providing for separate school systems and setting out the powers of their boards. Even though these boards cannot enact laws of their own, they can exercise those powers set out for them in provincial legislation. These powers are extensive, including: the setting of policies and procedures; responsibility for physical infrastructure; the hiring and firing of staff; the setting of school fees and school taxes (which are collected by municipal governments); and the planning, design and delivery of education programs subject to standards and regulations of provincial legislation.

In a similar vein, constitutional guarantees for aboriginal self-administration would require the federal and provincial governments to enact legislation providing for the democratic institutions discussed in this paper and setting out their powers, responsibilities and fiscal arrangements. Whereas aboriginal governments on a land base would be vested with legislative authority, institutions of self-administration would be vested with administrative authority only. These institutions could not enact and enforce laws of their own, but they could exercise the powers set out for them in federal and provincial legislation. In areas such as education and child welfare, they would have to comply with the standards and regulations applying to similar services delivered by government, although there should be

enough flexibility to permit the design and delivery of culturally supportive services by aboriginal councils. Like separate school systems, institutions of Metis self-administration would have an entrenched claim on the public treasury for operational, funding, and constitutional protection from legislative incursion by government.

We now assess whether the three options for the implementation of self-government which have surfaced to date in the section 37 process offer the required constitutional protection to institutions of self-administration. Option one would create an autonomous or third order of government with exclusive and/or concurrent areas of jurisdiction, and would obviously be inapplicable to institutions of self-administration which are vested with administrative rather than legislative authority. There is also little chance of this option proving acceptable to the federal and provincial governments for aboriginal governments on a land base.

Option two would create a more limited form of self-government within the existing division of powers (through a delegation of powers) and could apply to aboriginal government and institutions of self-administration. The proposed 1984 Constitutional Accord included an amendment recognizing the right of aboriginal peoples to "self-governing institutions" - a term which fits both forms of self-determination - "that will meet the needs of their communities". It committed the federal and provincial governments to participate in negotiations with aboriginal representatives directed toward concluding agreements on the nature, powers and fiscal arrangements relating to these institutions, and to put any agreements into effect through legislation. Through this legislation, the federal and provincial governments could delegate their legislative authority over matters within their respective jurisdictions to aboriginal governments. They also could delegate their administrative authority over service delivery matters within their respective jurisdictions to institutions of self-administration.

The main drawback to this proposed amendment was its lack of constitutional protection for the legislative and administrative powers to be delegated through federal and provincial legislation. In fact, the net effect of this delegation would have been much the same had it been made through legislation not pursuant to the constitutional amendment. In order to guarantee the legislative and administrative powers of aboriginal governments and institutions of self-administration, an irrevocable delegation of powers would have been required. This could have been achieved through the inclusion of an aboriginal "consent" clause in the legislation, requiring the concurrence of aboriginal representatives prior to the legislation being revised.

Option three also would create a more limited form of self-government within the existing division of powers, but this time with powers to be determined through negotiated agreements which could then be given constitutional protection. It was exemplified in the proposed 1985 Constitutional Accord including a constitutional amendment for a "contingent" right to self-government (as set out in agreements), the scope of which was broad enough to include aboriginal government on a land base as well as institutions of self-administration (the proposed Accord stated "that agreements relating to self-government for aboriginal people may encompass a variety of arrangements based on the particular needs and circumstances of those people, including...management of, and involvement in, the delivery of programs and services"). The amendment would set the stage for negotiated agreements at the community and regional levels, including the form and substance of institutions of self-administration, which could then be given constitutional force. However, it lacked a legally binding commitment by governments to negotiate these agreements.

The scope of the latter two options demonstrates that constitutional entrenchment of aboriginal self-administration can be accommodated within a self-government amendment to Part II of the *Constitution Act, 1982* ("The Rights of the Aboriginal Peoples of Canada"). Whether agreement on an amendment fulfilling

the requirements of aboriginal peoples will be reached at FMC '87 remains to be seen. While the proposed amendment of 1984 included a commitment to negotiate, it lacked a mechanism for entrenching agreements. While the proposed amendment of 1985 included a mechanism for entrenching agreements, it lacked a governmental commitment to negotiate. An alteration of the latter to include this commitment would go a long way toward fulfilling the constitutional requirements of aboriginal people off a land base.

c) Fiscal Provisions for Self-Administration

As indicated in the previous section, an entrenched financial base for institutions of aboriginal self-administration is absolutely imperative if they are to function effectively as a political representative body and service delivery agency. A constitutional entrenchment of fiscal provisions for aboriginal self-governing institutions prohibits governments from breaching their commitments, and ensures continuity which is so indispensable to proper planning and administration of programs and services. It also sets the stage for aboriginal leadership to become fully accountable to their electorate for the expenditure of funds, thus phasing out a major aspect of the dependency relationship which has developed between aboriginal peoples and the state.

While there have been novel suggestions for a special tax on resource revenues to finance aboriginal institutions of self-government and self-administration, most proposals to date for an entrenched financial base have focussed on the options available within the framework of fiscal federalism. More specifically, they have focussed on the intricate network of intergovernmental equalization and transfer payments which constitute such an important part of federal-provincial relations. As a distinct and autonomous part of the Canadian federation, aboriginal self-governing institutions should be entitled to participate in fiscal federalism.

Most proposals for entrenched fiscal provisions for aboriginal self-governing institutions have centred on an

amendment to Part III of the *Constitution Act, 1982*, "Equalization and Regional Disparities". Section 36 commits the federal and provincial governments to promote equal opportunities for the well-being of Canadians, to further economic development to reduce disparity in opportunities, and to provide public services of reasonable quality to all Canadians. It also commits the federal government to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. In its *Statement of Principles* submitted to FMC '83, the provincial government of Manitoba supported the extension of equalization payments to aboriginal governments, so that they could provide services roughly comparable to those of other governments, albeit adapted to the special social, cultural, and economic needs of aboriginal peoples. A constitutional provision for aboriginal transfer payments should commit both federal and provincial governments to promoting the social and economic development of aboriginal peoples, and to making transfer payments to aboriginal self-governing institutions to ensure that they have sufficient revenues to provide services comparable to those of other governments, but adapted to the special needs of aboriginal peoples.

In keeping with the procedures of fiscal federalism, it would make sense for payments to be transferred to aboriginal governments and institutions of self-administration through established intergovernmental payment arrangements such as the *Established Programs Financing Act*. Long-term unconditional grants would be required for ongoing service delivery programs in the fields of education, training, social services, and housing. This type of funding would not only put an end to the incessant reporting, renegotiation and uncertainty which has impeded long-range decision-making and implementation, but would also shift accountability away from the federal and provincial governments to aboriginal organizations. It would also make funding renewal subject to negotiations between

aboriginal representatives and federal and provincial governments.

Conditional grants would be more suitable for specific projects in areas such as economic and community development and recreation. Many of these projects are "start-up" or ad hoc in nature, and thus do not require guarantees of long-term financing for their success. It has also been suggested that the initial financing of aboriginal self-governing institutions take the form of conditional grants, with unconditional block funding to be phased in for some programs once budgetary and accountability procedures are fully in place and operating effectively. In keeping with the arguments presented in this paper, payments to institutions of aboriginal self-administration would best be made at the national and provincial levels, where aboriginal representatives have the mandate and expertise to participate in intergovernmental negotiations.

4 GUARANTEED REPRESENTATION OF ABORIGINAL PEOPLES IN PUBLIC INSTITUTIONS OF GOVERNMENT

Even with the attainment of self-administration, aboriginal people off a land base will not possess law-making powers such as those which would apply to aboriginal government. Hence, they will still be subject to the decisions of legislative assemblies in which they, due to their population distribution and sense of alienation, have secured little representation. In fact, regardless of the degree of autonomy possessed by aboriginal peoples on or off a land base (barring the highly unlikely prospect of a sovereign third order of government), it is virtually impossible for them to shield themselves from the impact of decisions made by legislative assemblies affecting the social, economic and legal direction of the country.

Despite the emphasis of the section 37 process to date on self-government, guaranteed aboriginal participation in Parliament, provincial legislatures, and regional governments remain effective options for aboriginal political representation - particularly for those living in the larger society. There is reason to believe that with increased urbanization and increased aboriginal participation in public affairs, demands for guaranteed aboriginal representation in legislative assemblies will gain greater prominence. A further devolution of

authority to public forms of local and regional government in hinterland areas with large aboriginal populations will also be accompanied by demands for "ethnic" guarantees for aboriginal communities. The proposed 1985 Constitutional Accord kept the door open to this prospect by including, among the factors affecting self-government negotiations, "modifications to existing governmental structures to accommodate the unique circumstances of the aboriginal peoples of Canada".

In assessing the relationship between institutions of self-administration (aboriginal local, regional, provincial and national councils) and guaranteed aboriginal representation in public forms of government, it must be reiterated that these two forms of political representation respond to different needs. The first addresses the need for aboriginal control over their own affairs and institutions. The second addresses the need for aboriginal input into the decision-making processes of the state at the national, provincial and regional levels. If aboriginal representatives are to be responsible to aboriginal people in their respective spheres through direct election, these two forms should be independent of each other. In some cases (to be examined shortly), it will be possible to enhance aboriginal representation at the local and regional levels, by overlapping the geographic boundaries and membership of self-governing institutions with those of aboriginal ridings to be represented in Parliament and provincial legislatures.

a) Aboriginal Representation in Legislative Assemblies

It has been argued that Canada can accommodate a demand for increased aboriginal representation in Parliament through existing channels. The country has a long history of "gerrymandering" electoral boundaries to ensure representation of powerful minorities in Parliament. In fact, the federal *Electoral Boundaries Readjustment Act, 1964*, enacted to do away with the "gerrymandering" of constituencies by politicians, created an Electoral Boundary Commission in each province and authorized them to consider special community interests in the setting of electoral

boundaries. In effect, this has confirmed the drawing of electoral boundaries along linguistic and ethnic lines, the major beneficiaries being the anglophone minority in Quebec and francophone minorities outside Quebec. The province of Manitoba has adopted similar measures.

A similar approach to the shaping of electoral boundaries in regions with large aboriginal populations could significantly increase aboriginal representation in Parliament. A case in point is the partition of the Northwest Territories into two ridings, in effect, creating an Inuit riding in the eastern Arctic. As well, redrawing electoral boundaries in the northern parts of some provinces and in inner city constituencies on the prairies could easily create aboriginal pluralities if not majorities in a number of ridings. However, this approach would deny representation to the majority of aboriginal people who lived outside the limited number of constituencies with large aboriginal concentrations, including the vast majority of those living in central and eastern Canada.

An alternative approach to aboriginal Parliamentary representation would be to amend the Constitution to guarantee a block of seats in the House of Commons for aboriginal peoples in proportion to their total number. This would require the establishment of aboriginal (Indian, Inuit, and Metis) electoral constituencies across Canada, which would overlap general electoral constituencies and, in some cases, themselves (Indian and Metis electoral constituencies on the prairies). Separate electoral rolls for the Indian, Inuit and Metis peoples would be established and those seeking to register would have to meet normal electoral qualifications (age, citizenship, residency), as well as the membership criteria set by their respective group. In keeping with the fundamental principle of "one person, one vote", and the rights of aboriginal peoples based on their ancestry as well as their Canadian citizenship, aboriginal people could register on an aboriginal electoral roll or the general electoral roll, but not both.

A number of important aspects of the aboriginal Parliamentary representation system would have to be worked out through negotiations amongst the aboriginal

peoples and with the federal government. The distribution of seats amongst the Indians, Inuit and Metis would have to be determined according to their populations and concentrations, with minimum guarantees for some regions (e.g., Atlantic provinces). Whether aboriginal MPs sit as an independent aboriginal bloc or as members of the established political parties is also something to be worked out through negotiations.

The principle and mechanics of aboriginal Parliamentary representation could also be applied to aboriginal representation in provincial legislatures. This could give aboriginal people significant political influence in some western provinces, where the smaller population size of provincial electoral constituencies and larger aboriginal populations could facilitate electoral arrangements which are more responsive to the diversity of interests within the aboriginal population. For example, the proposal of the Alberta Federation of Metis Settlement Associations for the creation of a provincial electoral constituency, comprising the eight Metis Settlements of Alberta, could be accommodated within an aboriginal legislative assembly representation system.

As well, the boundaries of Metis electoral constituencies to be represented in provincial legislatures could be drawn to coincide with those of districts represented by Metis institutions of self-administration. This would ensure that Metis people off a land base could gain representation for the same district or region through a self-governing institution and a provincial legislature. Guaranteed representation in legislative assemblies is particularly important for aboriginal peoples off a land base, whose councils would receive much of their authority through delegation from, or through negotiated agreements with, provincial governments.

Guaranteed aboriginal representation in the Senate has also figured in the proposals of aboriginal organizations. This institution was established to protect special interests within Confederation, namely the regions and provincial rights, and its members are appointed by the Prime Minister along regional and provincial lines, with increasing attention being paid to minority and ethnic group representation. It could, conceivably, play

a role as watch-dog of the rights of aboriginal peoples. In much the same way that some provincial governments have proposed that a reformed Senate comprise members appointed by the provinces to ensure that provincial rights are respected by Parliament, some aboriginal organizations have proposed that it also include a constitutionally guaranteed number of aboriginal Senators, either directly elected by aboriginal people or indirectly elected by aboriginal self-governing bodies, who would promote the aboriginal interest in the review and ratification of federal legislation. Either on their own or together with aboriginal MPs, aboriginal Senators could also hold a veto over constitutional amendments affecting the rights of the aboriginal peoples of Canada.

b) Aboriginal Representation in Local and Regional Government

In addition to forming institutions of self-administration (such as regional councils) to offer representation and service delivery exclusively for their membership, aboriginal people off a land base in rural and hinterland areas are in a position to initiate and play a major role in the development and expansion of public forms of local and regional government in some regions of the country. This is particularly the case for the largest of the aboriginal groups without a land base, the Metis inhabitants of the mid-Canada corridor in the three prairie provinces. The map of affiliated locals of the member associations of the Metis National Council (Appendix 1) illustrates the concentration of prairie Metis in this corridor, running from Winnipeg north and northwest into the Peace River district of Alberta and British Columbia.

Many of these locals are located in predominantly Metis communities or in mixed communities which have not been granted local or regional governments, largely on the grounds that their population and tax base are too small to support such governments. In effect, these communities, despite the facade of local government in the form of advisory community councils, have been governed directly by provincial governments. In recent years, faced with Metis demands for a land base and

self-government, a number of provincial governments have expressed willingness to carry out a devolution of authority to public or non-ethnic forms of regional or local government in areas with Metis majorities. A case in point is the Northern Administration District established in Saskatchewan in the 1970s. The provincial government of Manitoba has assured Metis leaders that their aspirations can be accommodated through revisions to provincial legislation which would delegate more authority to public forms of local government in predominantly Metis areas, including the power to regulate land and resource development within a certain radius of communities, and to receive block funding to provide programs and services.

In promoting the development of public forms of government at the regional or community levels as opposed to Metis government, provincial governments intend to involve all residents of their northern communities in these political institutions, thus precluding a denial of the rights to the white populations in these communities and the potential for a backlash. Since the Metis constitute a majority or significant minority of the population in many of these communities, it is reasoned, they can pursue their distinct interests through control or heavy influence over the public forms of government. This line of reasoning, as marketable as it might be amongst the larger electorate, begs the issue of why ethnic guarantees are required for Metis participation in public forms of government.

The Metis were, in fact, the first architects of public or non-ethnic institutions of government designed to accommodate aboriginal people in the form of the province of Manitoba, which Riel's provisional government brought into Confederation in 1870. The *Manitoba Act, 1870* not only vested extensive powers in the new provincial legislature which the Metis should have been able to control through their absolute majority position in the province, but also offered an ethnic guarantee for the Metis in the form of a 1,400,000 acre land base. However, a massive influx of European immigrants into the province, coupled with chronic delays and irregularities in the implementation of the Metis land

grant, soon turned the Metis into a dispossessed minority.

A contemporary parallel to the arrangements struck by Riel's government and the federal government can be seen in Inuit proposals for a public form of territorial government to be dominated by the absolute Inuit majority in the eastern Arctic, and which would be supplemented by aboriginal rights guarantees in the form of land claims agreements. The prospect of history repeating itself to the detriment of the Inuit people is, for the time being, somewhat unlikely considering the inhospitability of the Arctic climate to non-aboriginal southerners. As well, in the event the Inuit did become a minority in their homeland, they could fall back on the guarantees of land claims agreements which, when reached, will be constitutionally protected under an existing provision of the *Constitution Act, 1982*.

The Metis in the mid-Canada corridor of the prairies enjoy no such assurances. Their homeland is subject to ongoing resource development projects which bring large numbers of migrant workers into growth centres. This poses a constant threat to the majority position the Metis might initially enjoy in public forms of regional or local government.

Without some sort of ethnic guarantee, attempts by Metis-controlled local governments to protect the collective interests of Metis during a massive influx could be challenged and struck down as being discriminatory. Also, as a result of the rejection of their historic land claims by the federal government, the Metis cannot fall back on land claims agreements as a guarantee of their collective interests in the event they are reduced to minorities. Therefore, they require guarantees during the establishment of public institutions of government that their collective voice will not be drowned out by competing interests during the development of their historic homeland.

One way to facilitate effective Metis political representation in new or expanded forms of public government would be to draw the boundaries of regional municipalities to take in Metis majorities or pluralities. A major drawback to this approach is the prospect of

balkanization inevitably arising from attempts to throw political boundaries around numerous enclaves of people scattered across a vast region. Another approach would incorporate a larger territory and population within the boundaries of regional authorities, but would structure representation on their governing councils to favor Metis communities. This could be done by basing representation on communities rather than population, thereby ensuring hegemony of the more numerous but less populous Metis communities over the less numerous but more populous growth centres (with their largely non-aboriginal transient populations). A third approach would guarantee a certain number of seats on regional governing bodies to the Metis population, with the Metis representatives to be either directly elected by the Metis people, or indirectly elected by the regional institution of self-administration (Metis regional council).

As many communities in the prairie hinterland are too small to support viable forms of local government capable of providing essential public services, it would make sense for provincial governments to carry out a devolution of authority to regional governments accommodating the Metis interest through one of the methods mentioned above. A division of responsibilities would then have to be worked out between regional Metis institutions of self-administration and these regional governments. Since the regional government would be responsible for the delivery of programs and services to all residents of the region (in areas such as police and fire protection, health and sanitation, etc.), the Metis would turn to their regional councils for those programs and services designed and administered specifically for Metis (such as child welfare, culture, economic development, etc.). Depending on the confidence placed in regional governments by the Metis population, either they or Metis regional councils could be mandated to negotiate resource-use agreements with resource corporations to ensure Metis training, employment and equity participation in resource development projects, as well as supply and service contracts for Metis small business.

This section of the paper has identified and elaborated options for political representation of aboriginal peoples off a land base through institutions of aboriginal self-administration, through aboriginal participation in public forms of regional government, and through a guaranteed block of seats for the different aboriginal peoples in Parliament and the provincial legislatures. While some of the arrangements for these forms of political representation can be made within the context of existing legislation and policy, it has been suggested that the twin major thrusts of aboriginal self-determination off a land base - aboriginal self-administration and guaranteed representation in certain public institutions of government - should be given constitutional force. The final section of the paper will examine the prospects for the negotiation and implementation of agreements on self-administration for aboriginal peoples off a land base in the ongoing constitutional process.

PART III CONCLUSION

5 THE PROSPECT OF SELF-ADMINISTRATION AGREEMENTS

At the time of writing, approximately one year before the final constitutional conference ensured by section 37 of the *Constitution Act, 1982* (as amended), there has been some progress towards a constitutional amendment recognizing a contingent right of aboriginal peoples to self-government (as set out in agreements), and committing the federal and provincial governments to enter into negotiations directed towards concluding these agreements. This growing consensus is arising out of multilateral (federal-provincial-territorial-aboriginal) negotiations at the national level pursuant to the "top-down" approach to self-government. At the same time, some conference participants have entered into "bottom-up" negotiations directed towards concluding agreements on the form and substance of self-governing institutions at the regional or community levels, which could be considered for constitutional protection once a self-government amendment and entrenchment mechanism are in place. The member associations of the Metis National Council have taken the lead role among aboriginal organizations in pursuing this "bottom-up" approach through tripartite negotiations with the federal government and some provincial governments. In the process, they are advancing blueprints for

self-governing institutions both on and off a land base, to serve as mechanisms for Metis political representation and socio-economic development.

In the tripartite talks in Saskatchewan, the provincial Metis association is pursuing a "land-based" strategy for some of its constituents, including the development of Metis local government. At the same time, it is trying to develop "a model for the practice of autonomy by urban Metis". It is also trying to expand existing institutional models (Gabriel Dumont Institute, the Metis economic development corporation) on a provincial and regional scale in order to implement strategies for job creation, education and training, housing, and economic development, and to establish a new cultural centre for the Metis people at the Batoche site. The Saskatchewan work plan calls for an in-depth assessment of needs, and for tripartite agreements on institutional models for service delivery, before discussions would begin on the jurisdictional and fiscal arrangements for self-governing institutions.

In Manitoba, the provincial government and the provincial Metis association have agreed to enter into bilateral discussions aimed at Metis participation in the design and delivery of programs and services directed to meeting their particular needs and circumstances, at Metis participation in government decision-making in matters directly affecting them, at preserving and enhancing Metis culture, and at promoting Metis economic development. Towards these ends, the two parties have agreed to pursue negotiations focussing on education and economic development initiatives, and to review the province's Northern Affairs legislation with a view to making public forms of local government more responsive to the specific needs and aspirations of the Metis. They also agreed to commence tripartite talks with the federal government in order to ensure adequate funding of institutions and programs for the Metis people.

In Alberta, the only province with an existing Metis land base, the provincial government has identified issues of concern to the Metis Settlements as its top priority during the post-FMC '85 period. Shortly after the constitutional conference, the provincial government

passed a constitutional resolution through the Alberta legislature in support of an amendment to the *Alberta Act* (which is part of the Canadian constitution) to guarantee the land titles of the Metis Settlements. This will occur after provincial legislation respecting the Settlements is revised to include reasonable land allocation, membership criteria, and democratic forms of local government.

As for the majority of the Alberta Metis living off the Settlements, the provincial government has suggested that their proposals for self-governing institutions could be dealt with through community consultations, pursuant to a Memorandum of Understanding on Native Development between the federal and Alberta governments. Since this federal-provincial agreement was designed primarily to coordinate federal and Alberta initiatives in the area of Metis and Indian social and economic development, there is a concern among the Alberta Metis that it would take tripartite talks completely out of the constitutional framework (and constitute what has been dubbed the "rock-bottom" approach to self-government). The Alberta Metis are now determining whether or not the terms of reference of the Memorandum of Understanding can be opened up, to ensure that tripartite negotiations at the community level can lead to agreements on institutions of self-administration which can be entrenched once a self-government amendment is made.

The problems encountered by Metis associations in tripartite negotiations to date, in particular the extreme caution demonstrated by provincial governments, illustrate why the "bottom-up" approach to self-government developed in the first place. With some provincial governments arguing consistently that they could not entrench aboriginal self-government before they knew what it entailed, it was necessary to operationally define the term. In this sense, working out the institutional, jurisdictional, and fiscal arrangements of self-governing structures can go a long way in dispelling the uncertainty and apprehensions which have impeded breakthroughs at the multilateral level. The success of the tripartite process in identifying and dealing with outstanding needs and

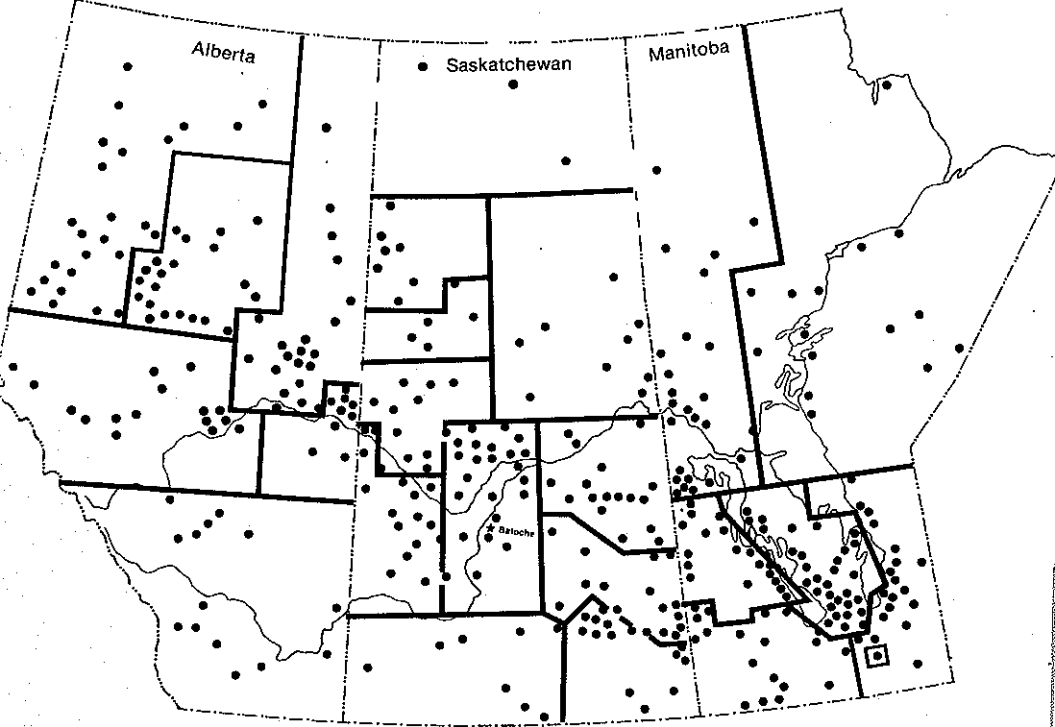
aspirations in a concrete and systematic manner may also allay the concerns of provinces in relation to the constitutional commitment to negotiate individual agreements on self-government, the issue on which FMC '85 foundered. Demonstrating the practical utility of aboriginal government and institutions of self-administration, as a means of counteracting the extreme underdevelopment and dependency of aboriginal communities, can only enhance the prospects of agreements on these self-governing institutions being concluded and eventually entrenched.

The "bottom-up" approach has also opened the door for the ever-increasing numbers of aboriginal peoples living off a land base to participate in the constitutional process. This paper has proposed some options for their political representation which could be given constitutional force. Now is the time for the constitutional players to act on their issues.

APPENDIX

METIS LOCALS AND ELECTORAL DISTRICTS

Metis locals and electoral districts



LIST OF TITLES IN PRINT

Aboriginal Peoples and Constitutional Reform

PHASE ONE

Background Papers

1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services*, 1984. (\$10)
2. David A. Boisvert, *Forms of Aboriginal Self-Government*, 1985. (\$10)
3. NOT AVAILABLE
4. Bradford Morse, *Aboriginal Self-Government in Australia and Canada*, 1985. (\$10)
5. Douglas E. Sanders, *Aboriginal Self-Government in the United States*, 1985. (\$10)
6. Bryan P. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984*, 1985. (\$15)

Discussion Paper

David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?*, 1985. (\$10)
Set (\$60)