

THE SEARCH FOR ACCOMMODATION

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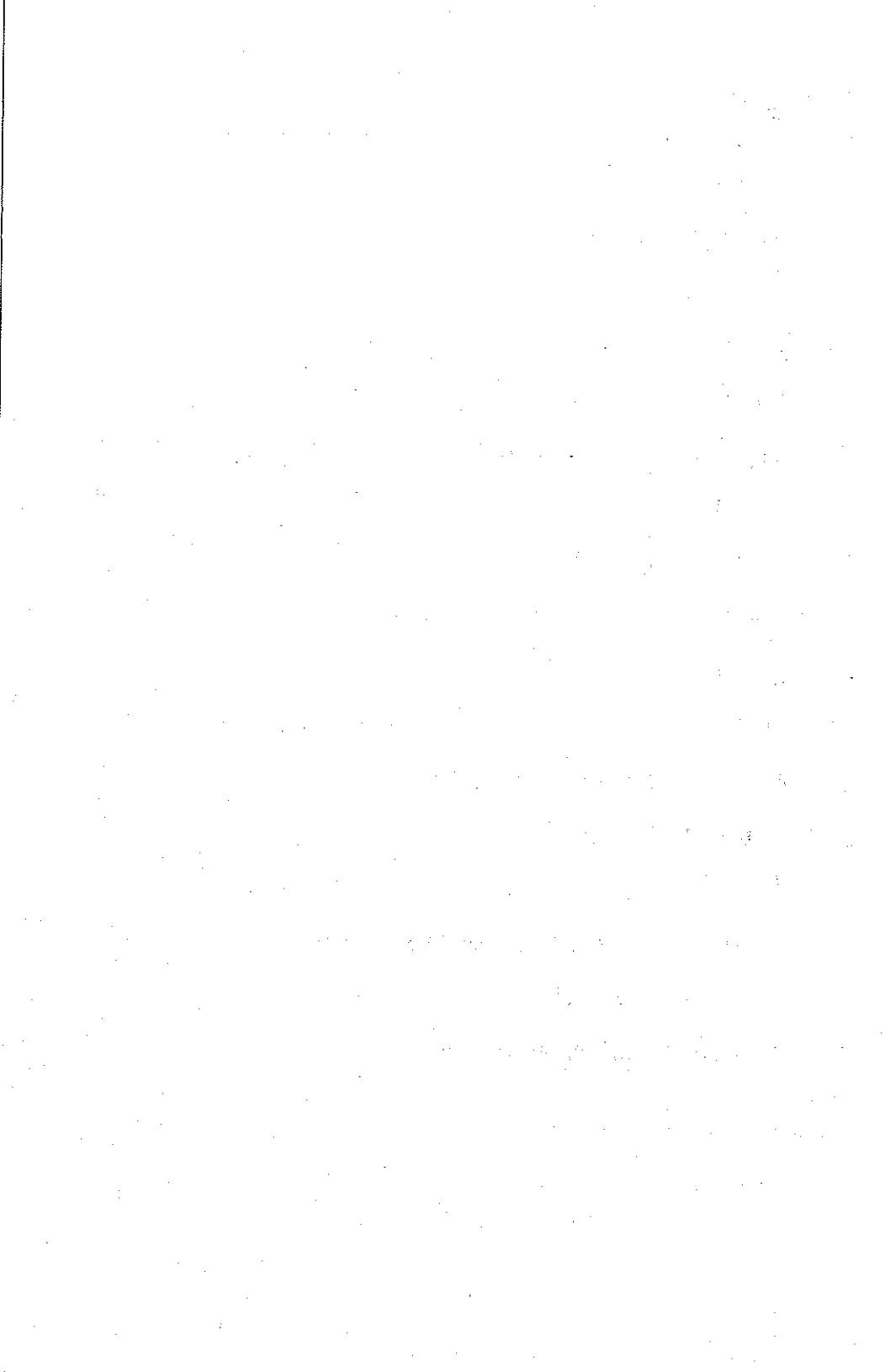
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PREFACE

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 focussed 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 focussed initially on arrangements for the design and administration of public services by and to aboriginal peoples. The research examined the practical problems in designing mechanisms and making arrangements for implementing self-government agreements. It concluded, in its initial year, with a Workshop on "Implementing Aboriginal Self-Government: Problems and Prospects", held in May of 1986.

As the 1987 FMC approaches, attention will become more concentrated on the multilateral constitutional forum (the FMC). 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. A third Workshop, on "Issues in Entrenching Aboriginal Self-Government", was held in February 1987. The Institute 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 Quebec, the Government of Alberta, the Government of Manitoba, the Government of Saskatchewan, the Government of New Brunswick, the Government of the Northwest Territories, the Government of the Yukon, the Assembly of First Nations, the Inuit Committee on National Issues, the Metis National Council and the Native Council of Canada.

This discussion paper examines the search for accommodation leading up to the 1987 First Ministers' Conference. The paper describes the major issues, and analyzes their prospects for resolution. Various forms of a constitutional amendment are reviewed, as well as the potential elements of a political accord. The paper concludes with an analysis of how the search for accommodation might end.

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February 1987

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This discussion paper is based upon interviews conducted with officials from all but one of the seventeen parties to the negotiations on aboriginal peoples and constitutional reform. Without their full cooperation, this research would not have been possible. I am indebted to them for their generosity and openness.

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David C. Hawkes

ABSTRACT

Negotiations on aboriginal peoples and constitutional reform will come to a head at the First Ministers' Conference in March 1987, the last such conference mandated by the constitution. In examining the drive for agreement, the major issues before the parties to the negotiations are described, and their prospects for successful resolution analyzed. The possible forms of accommodation – involving various elements of a constitutional amendment and a political accord – are surveyed, as well as their likely levels of support. Based on interviews with officials from the parties to the constitutional negotiations, conclusions are drawn as to how the search for accommodation might end.

SOMMAIRE

Les négociations concernant les peuples autochtones et les réformes constitutionnelles prendront fin à la Conférence des Premiers Ministres en mars 1987, dernière conférence de cette sorte exigée par la constitution. En examinant le désir d'en arriver à une entente, les problèmes majeurs auxquels font face les différents partis des négociations sont décrits et leurs perspectives d'une résolution fructueuse sont analysées. Les formes possibles de compromis – impliquant différents éléments d'un amendement constitutionnel et d'un accord politique – sont examinés ainsi que leur niveau probable d'appui. A partir d'entrevues avec des représentants des partis aux négociations constitutionnelles, des conclusions sont tirées en ce qui concerne la façon dont pourrait se conclure la recherche d'une entente.

PART I

1 INTRODUCTION

The 1987 First Ministers' Conference on Aboriginal Constitutional Matters is the final one mandated by the *Constitution Act, 1982* (as amended). As such, it is seen by many observers as the last chance for aboriginal peoples in Canada to have their rights – particularly that of self-government – enshrined in our constitution. Make no mistake about it – stakes are high in these negotiations, emotions are running strong, and the pressure is on. Years of work by federal, provincial and territorial governments and aboriginal peoples' organizations hang in the balance, not to mention the hopes, fears and aspirations of Canada's indigenous peoples. The outcome of the conference will shape policy in the field for decades to come. The results could establish the framework for a new and just relationship among aboriginal and non-aboriginal Canadians. Or they could sow the seeds of greater injustice and its attendant social pathology. The apex, or pressure point, will be the 1987 First Ministers' Conference, to be held in the National Conference Centre in Ottawa on March 26th and 27th, 1987.

This paper examines the search for accommodation, a search which will peak at that conference. What are the potential areas of consensus and conflict? What are the possibilities for agreement on the major issues? Since some parties to the negotiations remain nervous about the consequences of entrenching the right to aboriginal self-government in the constitution, it is necessary to identify these concerns, and to see if and how they can be overcome.

In order to obtain information on these matters, interviews were conducted with officials from all but one of the seventeen parties to the negotiations (federal, provincial and territorial governments, Assembly of First Nations, Inuit Committee on National Issues, Native Council of Canada, and Métis National Council). Interviewees were told that the results of the interviews would be kept strictly confidential. In keeping with that commitment, no remarks are attributed to any individual or party to the negotiations, nor is the position of any party identified on the

various issues surveyed. The interviews sought to tap officials' perceptions on the question and issues facing first ministers and aboriginal political leaders. There are no "right" or "wrong" answers to the questions posed.

Interviews took, on average, ninety minutes to complete. Officials from the parties to the negotiations were most cooperative in granting interviews during October and November, 1986, which proved to be a very hectic time. The interview schedule, a series of open-ended questions, can be found in Appendix A to this paper.

The paper is structured in the following manner. First, we examine what the various parties would consider to be a successful conclusion to the section 37 process (the series of First Ministers' Conferences of Aboriginal Constitutional Matters mandated by section 37 of the *Constitution Act, 1982* [as amended]). Second, we explore what questions have to be addressed, or issues resolved, in order to make the section 37 process "successful". Third, we analyze the prospects for resolving these issues. We then survey the possible forms which a constitutional accommodation might take, and the likely support for different modes of agreement. Finally, we look beyond the 1987 conference at what might be required in the presence or absence of a constitutional amendment, and at how the search for accommodation might end.

A further purpose is to be served by this paper as well, and that is to animate a Workshop on "Issues in Entrenching Aboriginal Self-Government", to be held in Kingston on February 17 and 18, 1987. The workshop, sponsored by the Institute of Intergovernmental Relations, will involve officials from aboriginal peoples' organizations and federal, provincial and territorial governments party to the constitutional negotiations, as well as project researchers and experts in the field. The workshop is designed to provide an opportunity for participants to examine, from an informed and critical perspective, some of the major issues that will require resolution if there is to be a constitutional accommodation in 1987.

2 WHAT IS "SUCCESS"?

If parties to a negotiation have widely divergent perceptions of what a successful outcome might be, the likelihood of agreement is greatly diminished. A logical starting point, then, in the search for accommodation is to explore what the different parties would define as a successful resolution to their negotiations.

Accordingly, the first question in the interview asked: "Generally speaking, what would you consider to be a successful conclusion to the section 37 process?". The vast majority defined success in terms of a constitutional amendment, although they differed substantially on its nature. Officials from several provinces thought that a political accord, unrelated to the constitution, could be seen as a successful outcome; while one provincial official expressed the view that either a political accord or a constitutional amendment could be defined as such.

Of those parties who defined success in terms of a constitutional amendment, most made reference to the draft accord tabled by the federal government at the 1985 First Ministers' Conference on Aboriginal Constitutional Matters. It proposed that the constitution be amended to recognize and affirm the rights of the aboriginal peoples of Canada to self-government within the Canadian federation where those rights are set out in negotiated agreements, and to commit governments to participate in negotiations directed toward concluding agreements with aboriginal people relating to self-government.¹ The rights defined in these agreements would receive constitutional protection under section 35(1) of the *Constitution Act, 1982* (as amended), as do rights defined in treaties and land claims agreements. Officials from several provinces and territories believed that the federal draft accord of 1985 would have to be enlarged in order to be deemed a success. The most frequently mentioned addition focussed on the need for a commitment to financing and resources for aboriginal self-government. Officials from the aboriginal peoples' organizations were also of this view. Unlike the government officials, however, they also included in their definition of

success an ongoing process beyond 1987. From their perspective, a negotiation process would be required after the 1987 First Ministers' Conference, regardless of its outcome.

There were other elements of a successful conclusion mentioned, albeit much less frequently. These included such topics as: treaties, aboriginal rights in the areas of language and culture, equity of access to the right to aboriginal self-government, non-derogation of aboriginal rights, and the exclusion of the so-called "provincial veto".

What can we glean from this survey of the perceptions of the parties to the negotiations as to a successful conclusion to the section 37 process? First, success will be judged on whether or not there is a constitutional resolution to the negotiations. Second, if success is achieved, it will likely take a form - if not the precise content - similar to that of the federal draft accord of 1985. Third, such an accord may have to be enlarged to include a commitment to financing and resources for aboriginal self-government, as well as an ongoing process beyond 1987.

We turn now to the issues which must be resolved in order to achieve that success.

PART II



3 THE ISSUES

When respondents were asked what questions have to be addressed, or issues resolved, in order to make the section 37 process a success, over twenty issues were mentioned. Only the most frequently-mentioned are reported upon here, and they are ranked in terms of frequency.

(1) federal/provincial responsibility

The most frequently-mentioned problem was that of ill-defined and often conflicting views as to which order of government – federal or provincial – has responsibility for aboriginal peoples. The issue is multifaceted, touching on matters of jurisdiction, financing and access to programs and services. The federal government has jurisdiction with respect to “Indians and lands reserved for the Indians” under section 91(24) of the *Constitution Act, 1867*, and with respect to the Inuit (re: Eskimo case). The federal government has argued that its responsibility does not extend to Non-Status Indians and Métis, and only to a limited extent to Status Indians living off-reserve. In the latter case, the federal government appears to have chosen to interpret section 91(24) as “Indians on lands reserved for the Indians.” Provincial governments have argued that the federal government is responsible for all Indians, regardless of their status under the *Indian Act* (which they argue is merely federal legislation, and hence unrelated to matters of jurisdiction), and regardless of their residence (on- or off-reserve). No government, with the exception of Alberta, is willing to accept full responsibility for the Métis.

Financing is also involved since the order of government which has jurisdiction or legal authority with respect to an aboriginal peoples is also looked to for providing financial resources. Since aboriginal self-governments will require funds from federal and/or provincial governments, the question of which order of government is responsible is of considerable consequence.

The same is true of aboriginal peoples' access to federal and provincial government programs and services. The order of government responsible is accountable for providing the appropriate programs and services.

It is interesting to note that the most "popular" issue has little to do with aboriginal self-government *per se*, and much to do with federal-provincial responsibility and financing.

(2) adequate financing

The second most oft-mentioned issue was ensuring that there is adequate financing for aboriginal governments. Although clearly related to the first issue of which order(s) of government has (have) the responsibility for providing financial resources, the second concern was that adequate financing might not be made available to aboriginal governments. Aboriginal peoples' organizations are fearful that federal and provincial governments will see the self-government initiative as an opportunity to cap or even cut their expenditures in the field. They are also skeptical as to the willingness of federal and provincial governments to share their taxation powers, and to enter into revenue-sharing and fiscal arrangements. Federal and provincial governments are concerned that the other order of government will use the self-government initiative to trim their expenditures, leaving them with a greater financial burden.

(3) the right to self-government

The issue here is whether the right to aboriginal self-government is subject to agreements being negotiated with federal and/or provincial governments to exercise that right. Is the right contingent upon the successful negotiation of agreements, or does it stand alone? Or does the right stand alone, but its implementation depend upon negotiated agreements? Governments, for the mostpart, prefer that the right to aboriginal self-government flow from the constitution, and that it be implemented only through agreement. Aboriginal peoples view the right to self-government as an inherent and existing right, flowing from their original occupation of the land, and thus it should be free standing.

(4) role of the provinces/"provincial veto"

Again, this issue has several dimensions. One concerns the role of provincial governments in negotiating self-government agreements with Status Indians and Inuit. Since the federal government has exclusive jurisdiction with respect to Status Indians and Inuit, should the provinces

be involved in self-government negotiations affecting these peoples? Status Indians and Inuit want to be able to enter into bilateral self-government agreements with the federal government, while provincial governments are concerned that their absence from such negotiations might have unintended negative repercussions for them.

A second dimension has to do with the constitutional amending formula to be applied to the aboriginal self-government amendment. Would the consent of all provinces be required to have a self-government amendment entrenched in the *Constitution Act, 1982*, thus giving each provincial government a "veto"? Or would the general amending formula apply (federal government and seven provinces representing 50 per cent of the population)? Officials from aboriginal peoples' organizations favour the latter option, while government officials held various opinions.

(5) land base

At issue here is whether the right to self-government should include the right to a land base for all aboriginal peoples. This is of particular concern to Métis and Non-Status Indians and other landless aboriginal peoples, who are of the view that the right to a land base should be included. For some, the right to a land base need not necessarily involve the transfer of land - access to and revenues from resources, and long-term land leases may be considered, in addition to cash settlements *in lieu*. Government officials were noncommittal on these matters.

(6) commitment to negotiate

A major issue at the 1985 First Ministers' Conference on Aboriginal Constitutional Matters concerned the government commitment to negotiate aboriginal self-government agreements. The accord proposed by the federal government at the conference would have made aboriginal self-government rights subject to negotiated agreements, and included a commitment to negotiate such agreements in the constitutional amendment. A number of provincial governments opposed placing a commitment to negotiate in the constitution, fearing that the courts might intervene, either to force them to the negotiation table, or to rule on the manner in which self-government agreements are to be negotiated. These governments preferred to have the commitment to negotiate in a political accord, effectively making it non-justiciable (part of the "Saskatchewan draft" accord of 1985).

The aboriginal peoples' organizations, the federal government, and several provinces were concerned that, should the commitment to negotiate not be constitutionalized, there would be little that aboriginal

peoples could do to bring reluctant governments to the table. Since both the Saskatchewan and federal government draft accords tied the rights of self-government to the successful negotiation of agreements, one can understand that concern.

(7) jurisdiction of aboriginal governments

This is perhaps the vaguest and most far-reaching issue before the seventeen parties to the negotiations.² At issue is what range of jurisdiction aboriginal governments will occupy, what fields of jurisdiction federal and provincial governments will vacate (e.g., from sections 91 and 92 of the constitution), and matters related to the gains and losses of government powers. Since each aboriginal government will wish to define its own sphere of jurisdiction, it is difficult to generalize concerning the potential impacts. Governments are anxious about the loss of jurisdiction that would accompany vacating and recognizing fields of aboriginal self-government jurisdiction, and of aboriginal government powers impinging upon federal and provincial jurisdiction (e.g., who would have jurisdiction over education for aboriginal peoples living in Winnipeg?). Aboriginal peoples express the opposite concern - one of the federal and provincial governments intruding in their areas of jurisdiction, and of the possible reluctance of those governments to vacate fields of jurisdiction and to recognize aboriginal jurisdiction. Related to this are matters of policy coordination among federal, provincial and aboriginal governments.

(8) Métis and Section 91(24)

A much more distinct, albeit no more tractable jurisdictional issue relates to whether Métis peoples are, or should be under federal jurisdiction in section 91(24) of the *Constitution Act, 1867*. Indians with Status under the *Indian Act* and Inuit are now recognized as "Indians" for the purposes of 91(24) - "Indians and Lands reserved for the Indians". Now that the constitution defines "aboriginal peoples of Canada" to include Indian, Inuit and Métis peoples (section 35(2)), does or should the term "Indians" in 91(24) extend to Non-Status Indians and Métis as well?

Predictably, the federal government argues that 91(24) does not and should not extend to Métis and Non-Status Indians. Some - although far from all - provincial governments argue that 91(24) now extends, or should be extended to encompass all aboriginal peoples. Only the government of Alberta claims exclusive jurisdiction over the Métis. Alberta is the only province to have a land base for some of the Métis people living there (the *Métis Betterment Act*, soon to be replaced by the

Métis Settlements Act).³ If Métis fall within the ambit of 91(24), the legislation could be found to be unconstitutional.

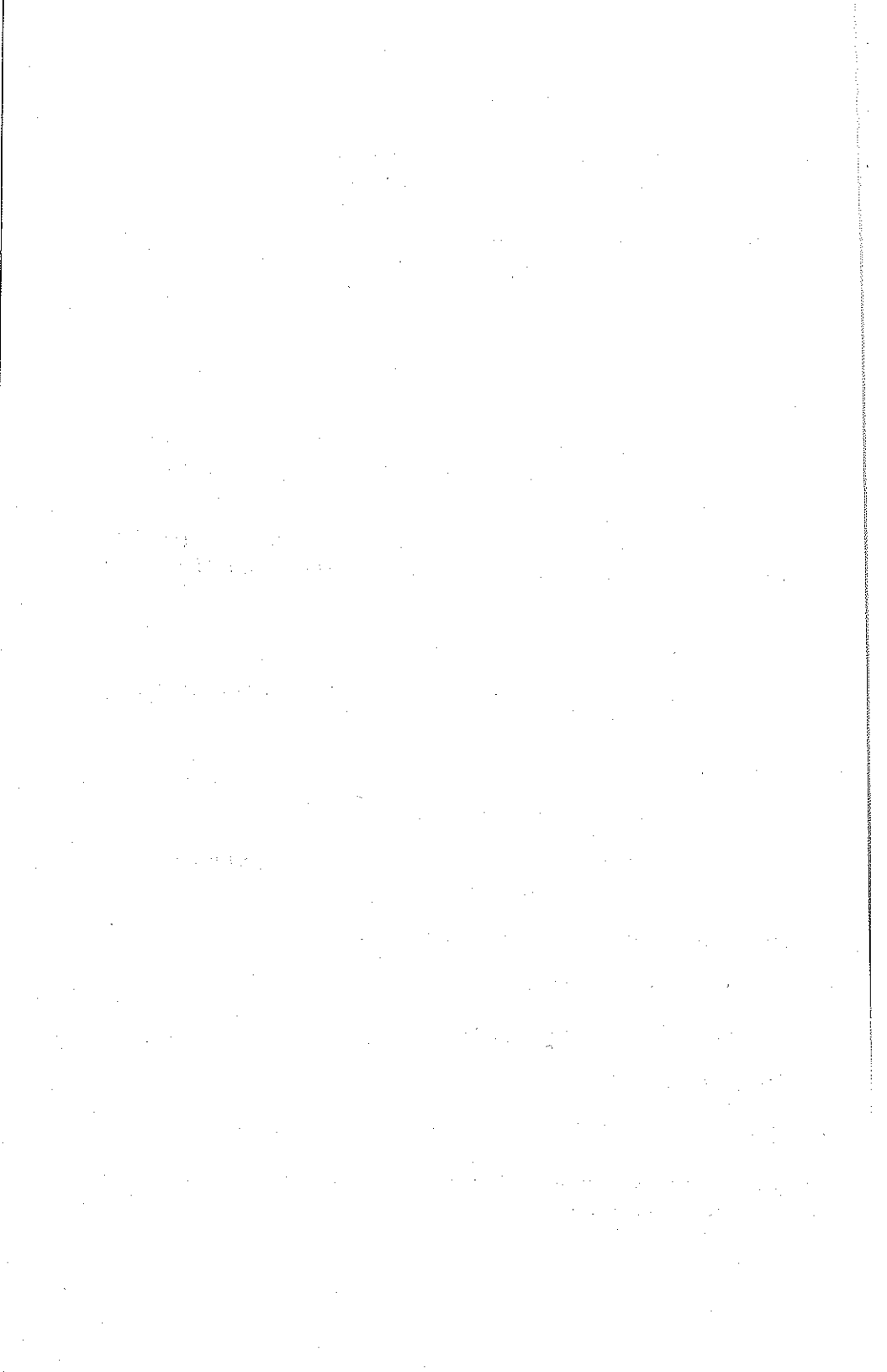
The positions of aboriginal peoples' organizations on this issue have varied over time. To be under exclusive federal jurisdiction, as members of the Assembly of First Nations can attest, is a mixed blessing. The fact that a government can legislate and occupy a field does not necessarily mean that it will do so; and if it does, that it will do so wisely.

(9) Other Issues

Other issues were mentioned as well, although far less frequently. They are listed below for purposes of information.

- whether federal and provincial governments will delegate powers to aboriginal governments, or whether they will become a third order of government (similar to the right to self-government issue)
- equity of access of all aboriginal peoples to the right to self-government (of particular interest to Métis and Non-Status Indians)
- aboriginal language and cultural rights
- the application of the Charter of Rights and Freedoms to aboriginal peoples and governments
- fear of the unknown
- non-derogation of aboriginal rights
- entrenching self-government agreements in the constitution (apart from "provincial veto" question)
- treaties (renovation, renegotiation, renewal)
- post-1987 negotiation process
- sexual equality of aboriginal persons
- definition of Métis
- representativeness of aboriginal peoples' organizations

We turn now to the prospects for resolving the major issues at the 1987 First Ministers' Conference.



4 PROSPECTS FOR RESOLUTION

The prospects for resolving the questions and issues identified in the previous chapter change with time, as does the importance and currency of the issue themselves. The issues identified in this paper, as well as their prospects for resolution, are those which officials thought to be pertinent in the last few months of 1986. No doubt the situation will be somewhat different at the First Ministers' Conference in March of 1987.

In general, most respondents felt that *some* of the questions and issues identified earlier could be resolved in 1987, although it is unlikely that all could be. Various observations were made in support of this view. One is quite straight-forward – parties simply do not agree on all of the issues. Others pointed to the problem of “agenda overload” facing parties to the negotiations, while some noted the “linkages” among the issues, which makes the solution to some contingent upon the resolution of others. All of this points, of course, to the need for some method of addressing unresolved issues beyond 1987, presumably through a post-'87 negotiation process.

We will now briefly examine the prospects for resolution on an issue-by-issue basis.

(1) federal/provincial responsibility

Unfortunately, those issues which appear to have the highest priority in terms of requiring resolution also seem the least likely to achieve it – federal/provincial responsibility, intergovernmental fiscal relations and adequate financing. Few interviewees thought that federal and provincial government responsibilities for aboriginal peoples could be agreed upon in 1987, at least at the level of general principle. In part, this is seen as due to the lack of proper information on the current situation – no common data base exists on government programs, services and expenditures regarding aboriginal peoples. However, other interviewees were of the opinion that the focus should be on basic principles and

cost-sharing, with the object being a fiscal framework rather than an auditor's report. They felt that agreement in 1987 is possible if negotiations proceed on the basis of addressing principles of financing aboriginal self-government, with the attendant fiscal and federal-provincial cost-sharing framework.

(2) adequate financing

This issue drew the most pessimism in terms of resolution. Some government officials thought that placing a commitment to adequate financing for aboriginal governments in the constitution would simply be too expensive, and that the costs would be too high for their governments to bear. In part, these observations were made by officials from finance and treasury departments, most of whom were only recently brought into the negotiations. Others were of the view that the financing issue is not properly the subject of constitutional reform, but should be dealt with in a political accord in federal-provincial agreements. Yet others thought that there was some chance for resolving this issue in 1987 if a "section 36 approach" were adopted. This would involve following an approach similar to that of section 36 of the *Constitution Act, 1982* (the equalization and regional disparities provision), but in this case federal and perhaps provincial governments would commit themselves to the principle that aboriginal governments be able to provide reasonably comparable public services at reasonably comparable levels of taxation.

(3) the right to self-government

More optimism was expressed on the prospects for resolution here, although this issue is strongly linked to the commitment to negotiate. The closer the right to aboriginal self-government is to standing alone, the less important the government commitment to negotiate is, and the weaker it can be. If it stands alone, it is protected by the constitution, and can be enforced by the courts. The more the right to self-government is subject to agreements being negotiated with federal and/or provincial governments, the more important the government commitment to negotiate, and the stronger it must be. If the right is subject to agreements being negotiated, then the commitment to negotiate such agreements must be in the constitution, if there is to be any hope of accommodation in 1987. It would appear that a balance must be sought to address the risks on both sides. If the aboriginal peoples' organizations take some risk in agreeing to have the right to self-government subject to agreement, then federal, provincial and territorial governments must

accept some risk in committing themselves to participating in negotiations designed to achieve those agreements.

Another possibility is the "silent right" approach, wherein the constitution is silent on the right to self-government. It is neither "contingent" nor "freestanding", but simply set aside without prejudice. In essence, the parties would "agree to disagree" on the issue, without jeopardizing the outcome of the debate. A constitutional commitment to negotiate would still be required, and the resulting self-government agreements would be deemed to have the status of treaties, and hence the rights defined therein would receive constitutional protection under section 35(1) as treaty rights. Leaving the "right issue" open would allow all parties to move ahead on self-government agreements, without prejudice to enhancing or diminishing the aboriginal right to self-government.

(4) role of the provinces/"provincial veto"

Prospects for resolution here are unclear. It is not obvious why, in certain circumstances, provincial or territorial governments need to be party to self-government agreements between the federal government and Status Indians On-Reserve, or between the federal government and Inuit residing in the Northwest Territories. It is clear, however, why provincial and territorial governments wish to monitor the negotiations, or somehow be involved in them, so that they can note areas of possible jurisdictional overlap and policy coordination.

The constitutional amending formula to be applied to the aboriginal self-government amendment is stirring up great debates. How many governments need to consent in order to have the self-government amendment entrenched in the *Constitution Act, 1982*? Prospects for resolution would appear dim if it is generally the position of governments that unanimity is required.

(5) land base

Almost no one thought that the issue of a land, or land-and-resource base for all aboriginal peoples will be resolved in 1987. Many government officials perceived this as an issue to be pursued in individual self-government negotiations, presumably following the 1987 First Ministers' Conference (FMC).

(6) commitment to negotiate

As was noted earlier, if the right to aboriginal self-government stands alone (i.e., is not contingent upon agreements), then approval can likely be reached that the government commitment to negotiate be placed in a clearly non-justiciable political accord. However, if the right to self-government is subject to negotiated agreements, then the government commitment to negotiate would have to be placed in the constitution for accommodation to be achieved.

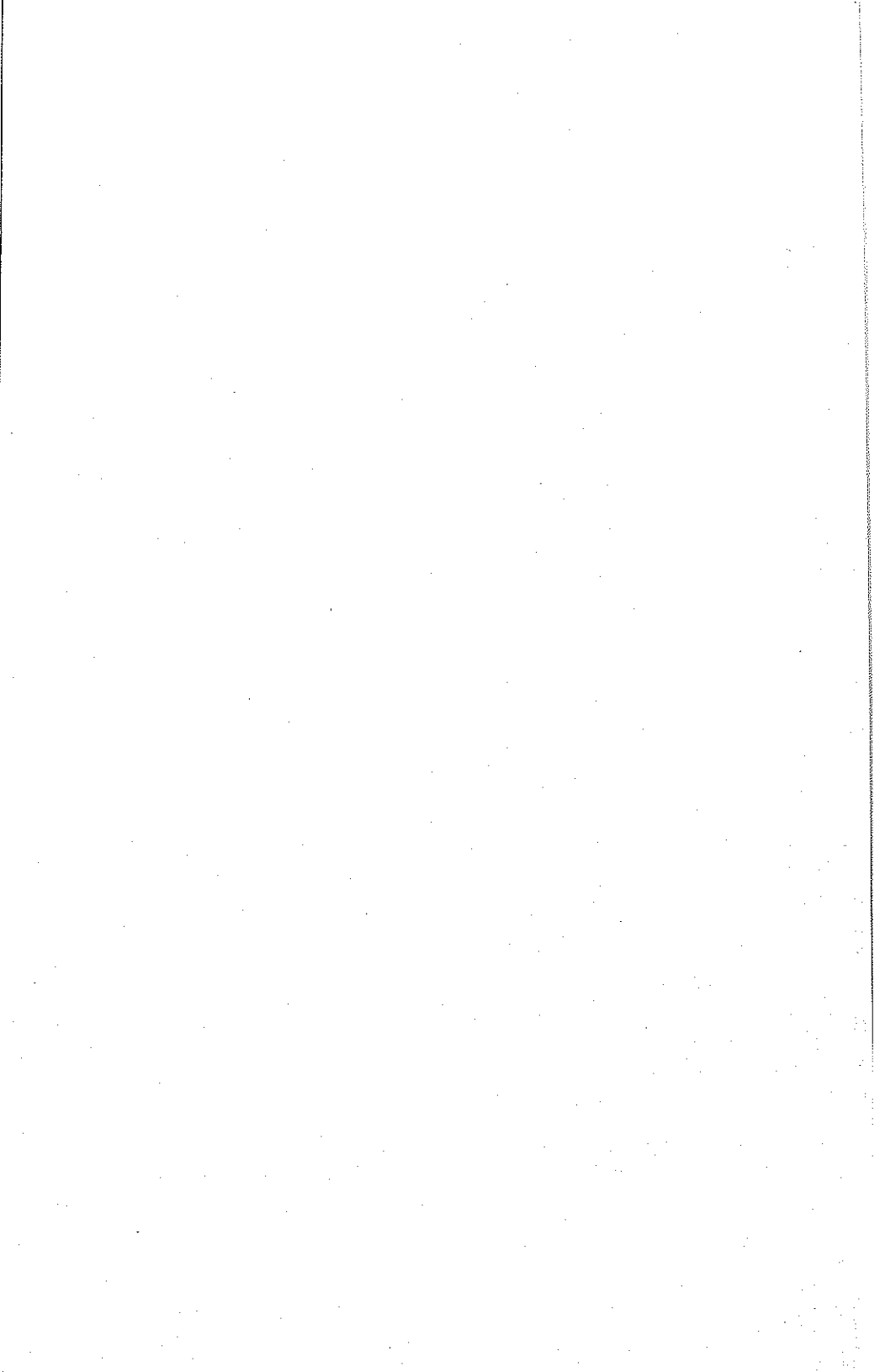
(7) jurisdiction of aboriginal governments

Given the broad scope, poor delineation, and far-reaching nature of this issue, no respondents thought that it could be resolved in 1987. Nor did many feel that it should be. Most were of the view that matters of jurisdiction should be dealt with in individual self-government agreement negotiations, presumably following the 1987 FMC.

(8) Métis and Section 91(24)

There was little optimism that this issue will be resolved in 1987. It could be "dealt with", however, by placing a "without prejudice" or non-derogation clause in the constitution, which would ensure that any constitutional amendments agreed to in 1987 did not unwittingly alter existing jurisdiction in this field. Of course, this issue could be addressed in the courts, although no party, each for their own reasons, appears anxious to do so.

PART III



5 FORMS OF CONSTITUTIONAL ACCOMMODATION

The search for accommodation on these issues could yield many possible results and take an almost infinite variety of forms. These include a constitutional amendment, a political accord, an extension of the negotiation process, federal and provincial legislation, or some combination of the above. It is also possible, of course, that no accommodation will be reached, and that discussions will end.

While it might prove interesting to survey all of the possible results of the negotiations, and the full range of forms which an accommodation might take, this is not the objective of this paper. Of the results and forms possible, the purpose here is to determine which are the most *probable*. We already know that success will be judged on whether or not there is a constitutional resolution to the negotiations. Therefore, the focus in this chapter will be on the most likely forms of constitutional accommodation. The possible nature of a political accord and the potential shape of an extended negotiation process will be addressed later.

In the course of the interviews with officials from governments and aboriginal peoples' organizations, respondents were asked to identify, from the various forms of constitutional accommodation possible, those that are receiving the greatest attention. The unstated assumption in the question was that those forms receiving the greatest attention are also the most likely to forge the basis for agreement, an assumption which is admittedly open to question. The forms of constitutional accommodation receiving the greatest attention are discussed below, and ranked in terms of the attention that they are receiving.

(1) variations on the federal draft accord of 1985

By far the most "talked about" form of accommodation is some variation of the constitutional amendment proposed by the federal government at the 1985 FMC. The core of this mode involves:

- a) recognizing and affirming the rights of aboriginal peoples to self-government within the Canadian federation, subject to agreements being negotiated;
- b) committing governments to participating in negotiations directed toward concluding such agreements; and
- c) providing constitutional protection for the rights defined in such agreements.

Of those who ventured an opinion on this matter, respondents from ten parties to the negotiations thought that variations on the federal 1985 draft accord were receiving the greatest attention. Some saw it as a starting point, to be strengthened or built upon; others saw it as the maximum likely to be achieved.

(2) variations on the Saskatchewan draft accord of 1985

The second most "talked about" form of constitutional accommodation was that presented by the Government of Saskatchewan at the 1985 FMC, or a variation thereof. The major difference between the Saskatchewan and federal drafts is that the Saskatchewan draft places the government commitment to participate in negotiations in a political accord, rather than in the constitution. Six of the parties to the negotiations thought that the Saskatchewan draft was receiving a great deal of attention. Some saw it as a "floor", others as a "reasonable" objective.

(3) province-by-province approach (section 39)

Although this is not a form of constitutional accommodation *per se* and more of a strategy or tactic, it is an approach mentioned by a few of the parties to the negotiations. The approach would be applicable if the situation arose where the requisite number of governments (to amend the constitution) could not agree on any form of constitutional amendment. If the federal government, all aboriginal organizations, and some provinces reached agreement, the constitutional resolution would proceed to Parliament and the respective provincial legislatures. Reluctant provincial governments might be convinced to "opt in" to the amendment during the next three years (the maximum "lifespan" of a proposed amendment after formally initiating the amendment procedure - see section 39(2)). If a sufficient number did (seven provinces with 50 per cent of the population), the amendment would be proclaimed.

This approach was considered by Prime Minister Trudeau when, at the 1984 FMC, the federal draft accord drew insufficient provincial agreement. He proposed, at one point, "signing up" those who agreed, and proceeding to Parliament and the respective legislatures. This would place pressure on the remaining provincial governments to follow suit.

It should be noted that this "province-by-province" approach was viewed as a "fall back" strategy. Although these interviewees favoured a constitutional amendment with broad support, they also preferred the "province-by-province" approach to a "watered down" amendment.

(4) British Columbia draft amendment of 1985

Almost no mention was made of the constitutional amendment proposed by the Government of British Columbia at the 1985 FMC. The B.C. draft amendment included:

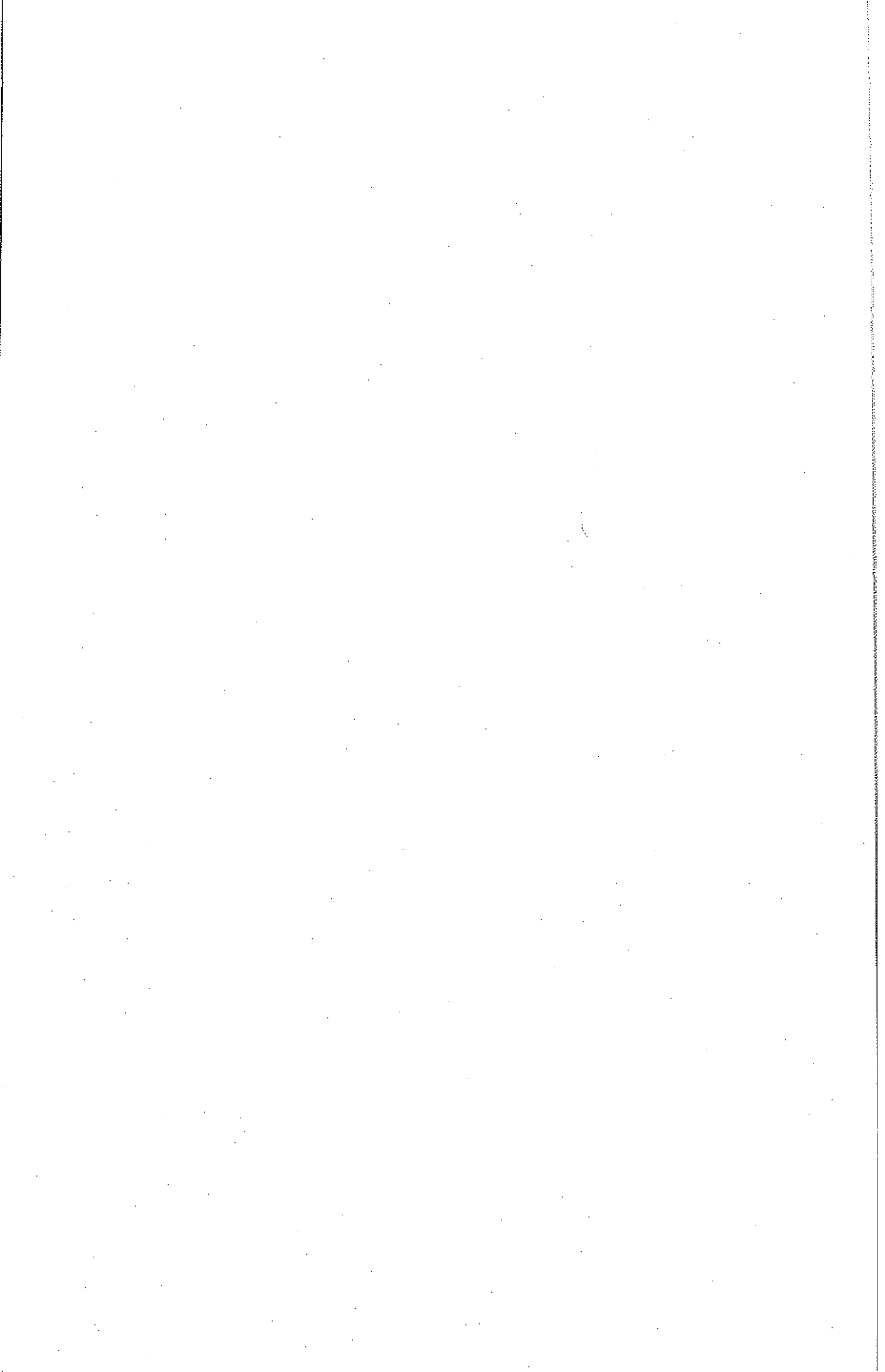
- a) recognizing that aboriginal peoples are entitled to rights of self-government, within the context of the sovereign authority of Parliament and legislatures, as set out in agreements; and
- b) that such agreements require the approval of the appropriate provincial and territorial legislatures and Parliament.

It provided no constitutional protection for rights set out in agreements, and no government commitment to negotiate agreements. It also restricted aboriginal governments to delegated powers only.

(5) entrench right to self-government only

Finally, one respondent identified a fifth approach. This would involve entrenching the right to aboriginal self-government (subject to negotiated agreements) in the constitution, with a political accord stating how such agreements are to be negotiated. Again, this was not seen as the optimal approach, but as a "fall back" strategy.

Having identified the possible forms of a constitutional accommodation, we turn now to examine the likely level of support for each.



6 SUPPORT FOR AGREEMENTS

Parties to a negotiation are unlikely to employ their complete strategy, or to divulge their "bottom line" prematurely. So it is with the parties to the section 37 negotiations on aboriginal peoples and constitutional reform. No one wants to play their final hand in advance of the 1987 First Ministers' Conference.

In order to assist us in determining what the level of support might be for the various forms of constitutional accommodation, it is useful to recall the positions of the negotiating parties at the 1985 FMC. The 1985 federal draft accord drew support from the Governments of Ontario, Manitoba, New Brunswick, Newfoundland, Prince Edward Island, and the Northwest Territories. Of the aboriginal peoples' organizations, the Inuit Committee on National Issues (ICNI) and the Prairie Treaty Nations Alliance (PTNA)⁴ supported the draft federal accord, while the Métis National Council (MNC) was generally supportive.

The Saskatchewan draft of 1985 drew support from the Government of Nova Scotia, and, with some conditions, grudging acceptance from the MCN and the Native Council of Canada (NCC). Only the Government of British Columbia supported its draft amendment.

Some changes in position appear to have taken place since 1985. It is the general view among parties to the negotiations that the Governments of Nova Scotia and the Yukon would now be prepared to support an accord along the lines of the 1985 federal draft, in addition to the MNC.

(1) variations on the federal draft accord of 1985

The dynamics of the negotiation process indicate that some variation of the 1985 federal draft accord is a benchmark for any constitutional accommodation. The federal draft, as it now stands, could draw the support of six provinces, one short of the number required by the constitutional amending formula. However, in order to draw the support

of aboriginal parties for the federal draft, some changes to it would be necessary.

The importance of support from the aboriginal peoples' organizations cannot be overstated. Government officials indicated that, for a constitutional accommodation to be acceptable, it must be supported by *all* of the aboriginal organizations at the table.

The crucial question, therefore, is *what* variation of the 1985 federal draft accord would be acceptable to the aboriginal peoples' organizations. It would appear, from the interviews conducted, that an accommodation will *not* founder on the right to self-government being subject to negotiated agreements, provided that aboriginal peoples have some leverage in terms of bringing governments to the negotiation table in order to work out such agreements.

This underlines the importance of the linkage we noted earlier between the right to self-government and the commitment to negotiate. Eleven of the parties to the section 37 negotiations indicated that a constitutional accommodation would require some process beyond 1987. It is interesting to note, however, that almost no one wished to extend the current (section 37) process "as is". Many officials, from both governments and aboriginal peoples' organizations, appeared either to be "burned" or "burned out" by the current process. Some suggested, as a minimum, that another First Ministers Conference on the matter, to be held in three to five years, be included in the constitutional amendment. This would allow parties to the negotiations to review progress toward aboriginal self-government agreements, and give aboriginal peoples' organizations some leverage in bringing governments to the table. More will be said regarding the post-1987 FMC process in the following chapter.

A second aspect of critical importance to the aboriginal peoples' organizations concerning the 1985 federal draft accord is the so-called "provincial veto". It is clear that the aboriginal people will not accept a constitutional amendment which requires the unanimous consent of every province. At issue here is whether entrenching the right to aboriginal self-government would amount to an amendment to the amending formula, thus requiring the unanimous consent of all eleven federal and provincial governments; or whether the general amending formula would apply.

A third concern of aboriginal peoples' organizations is adequate financing provisions for aboriginal self-government. Since this issue remains poorly defined, it is unclear whether it would have to form part of a constitutional amendment, or whether it could be dealt with in a political accord. At this point in time, it would appear that aboriginal

peoples' organizations would prefer a constitutional amendment modelled along the lines of section 36.

What is clear, however, is that a political agreement alone – that is, unaccompanied by a constitutional accommodation – is simply a “non-starter”.

(2) variations on the Saskatchewan draft accord of 1985

Support for a variation of the 1985 Saskatchewan draft amendment is weak, with only two or three provinces prepared to support it. Since it fails to link the right to self-government to a constitutional commitment by governments to enter self-government agreement negotiations, it is unlikely to attract further support.

(3) likely positions of the “uncommitted” parties

The positions of a number of parties remain unknown, and several have yet to make basic policy decisions.

The Government of Quebec has steadfastly refused to participate in any constitutional amendment – on aboriginal rights or any other matter – until it is brought into the partial accord of 1981, and becomes a full partner in confederation. Since such a reconciliation is unlikely to occur before the 1987 FMC, one can anticipate that Quebec will remain outside the process, and withhold consent from any constitutional amendment. However, Quebec has indicated its willingness to consider a section 39 approach, presumably after it is brought within a renegotiated partial accord.

The Governments of Alberta and British Columbia, to date, have not indicated support for either the federal or Saskatchewan draft accords. However, since 1985 both provinces have acquired new premiers, and some officials speculated that this might give rise to a review of these governments' policies on such matters. Speculation was particularly rife with respect to the position of British Columbia. Several officials thought that Premier Van der Zalm, with his penchant for negotiation, reconciliation and accommodation, would not want to be isolated on this issue.

There is also speculation concerning the position of the Government of Saskatchewan. If it chose to support a version of the federal 1985 draft, this would almost ensure, as the seventh province, agreement on a constitutional amendment. It is unknown, however, whether Premier Devine's renewed mandate, based largely in rural Saskatchewan, bodes ill or well for such a possibility. It is obvious that Saskatchewan will receive considerable pressure to come “on side”.

The position of the Assembly of First Nations is perhaps the most critical. Without their support, any form of constitutional accommodation is unlikely. Several officials were of the view that the right to self-government, subject to negotiated agreements, would not hold back the AFN from supporting an amendment, although a "provincial veto" most certainly would undo such a possibility.

7 BEYOND '87

Attention is now riveted on the 1987 First Ministers' Conference on Aboriginal Constitutional Matters. Parties to the negotiations pretend that there is no tomorrow, and are unwilling to publicly admit that agreement *may not* be reached at the FMC. By refusing to look beyond the 1987 Conference, it is widely believed that the maximum pressure will be placed on parties to reach a constitutional accommodation. No one wants to admit the possibility of failure.

Nevertheless, one must anticipate such a possibility, and consider the various implications – and options – in such an event. Moreover, even if there is agreement on a constitutional amendment in '87, some additional work or follow-up will likely be required. Accordingly, the final question of the interview asked respondents: "What if there is no agreement at the 1987 FMC?"

Many respondents immediately considered the issue of extending the negotiation process. Officials from at least seven of the parties to the negotiations felt that *some* process, at the national level, would be required beyond '87. Five thought that the *constitutional* process would be extended, while three believed that there would be no extension of the *section 37* process. As was noted earlier, no one was eager to continue the *section 37* process "as is".

Others responded in terms of another meeting. Officials from at least five parties thought that if there is no agreement at the 1987 FMC, another FMC on the subject would likely be held, perhaps in three to five years.

Some thought that, in such a circumstance (failure to agree), parties would revert to regional negotiations on aboriginal self-government – the so-called "bottom-up" negotiations at the local/regional/provincial levels. Of the five officials who saw this as a likely outcome, several also advocated regional negotiations first, and national negotiations second, as a more desirable process. However, an equal number of officials (five) were of the view that the trilateral, "bottom-up" process has failed. This

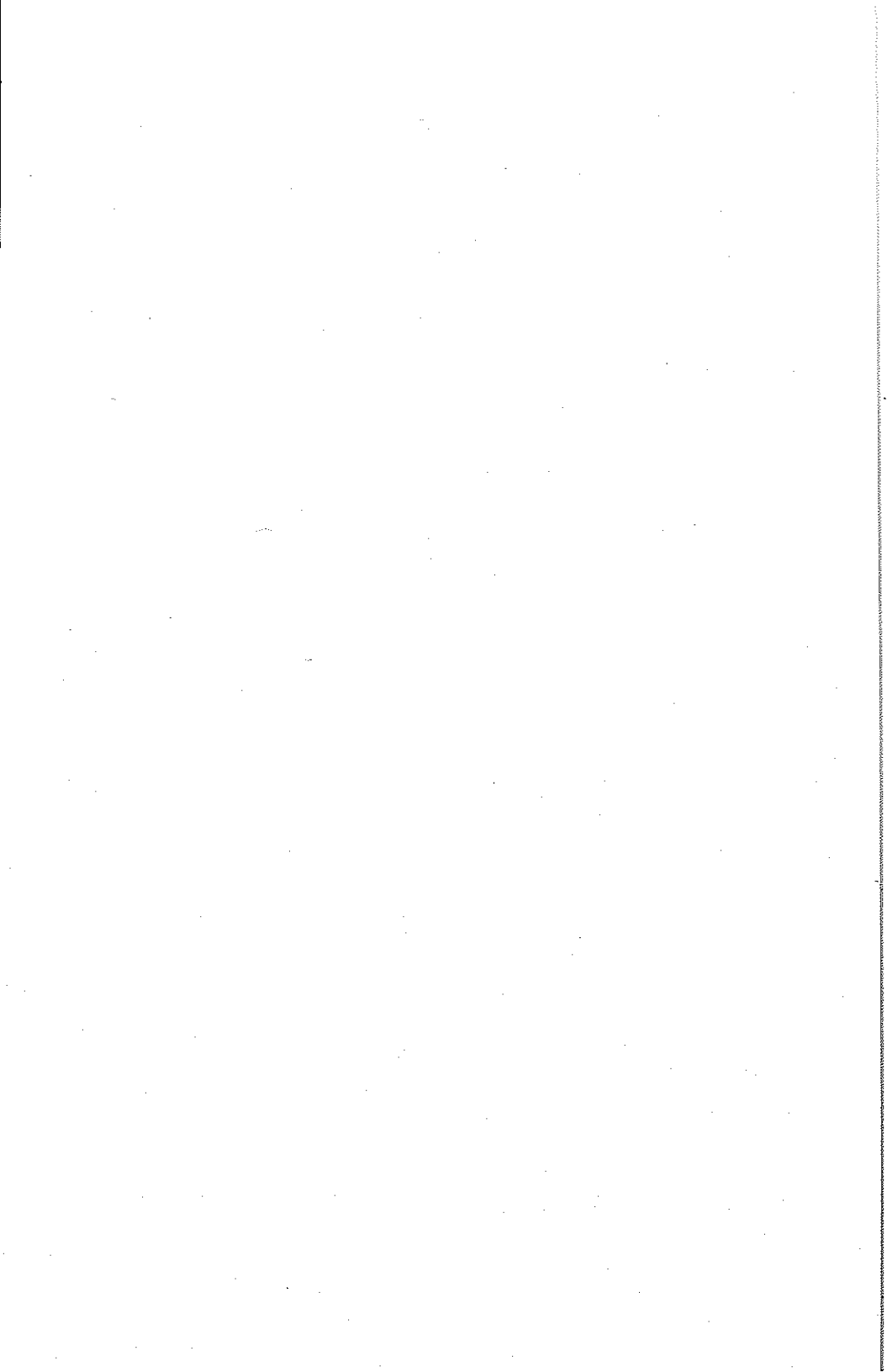
attitude was most strongly held by officials from the aboriginal peoples' organizations.

A few respondents thought that a political accord, extending the negotiation process, was a possible outcome should no agreement be reached at the 1987 FMC. A political agreement to have first ministers and aboriginal leaders meet again was also put forward. However, an equal number believed that a political agreement or accord, by itself (that is, unaccompanied by some constitutional resolution) would be unacceptable.

There were some officials who conceded that discussions on aboriginal peoples and constitutional reform might end, should agreement not be reached at the 1987 FMC. If such an outcome prevails, aboriginal peoples may revert to the courts, and pursue litigation which, in many instances, has been held in abeyance during the section 37 negotiations. Officials also noted that for some aboriginal peoples, especially Status Indians and Inuit, an alternative process exists in the form of land claims negotiations. Some interviewees believed that public support for aboriginal peoples is fading, due to financial restraint and "backlash" resentment. Others thought that aboriginal peoples would move to achieve their political goals through more controversial methods, such as non-cooperation (advocated by Ghandi during the Indian drive for independence from Britain) and civil disobedience (as practised by Martin Luther King in the U.S.A.).

One official from an aboriginal peoples' organization said that group was prepared for "glorious disaster", and that it was better to fail to reach agreement than to accept watered-down rights. However, officials from aboriginal peoples' organizations were also the most optimistic regarding the likelihood of reaching agreement at the 1987 FMC. Two of the four said that there *will* be agreement.

PART IV



8 THE SEARCH FOR ACCOMMODATION

It is now time to examine how the search for accommodation might end. This is no easy task, given the puzzle before us – the number of parties to the negotiations, the issues before them, the range of positions across those issues, and the possible combinations and permutations which present themselves.

One approach to coping with such complexity is to break down the options in terms of strategies, specificity and contents. The contents are the issues before first ministers and aboriginal political leaders – those discussed in chapters three and four (e.g., federal/provincial responsibility, the right to self-government). A different strategy may be employed to address each issue. The strategies include:

1. to set aside the issue “without prejudice”;
2. to create a process or mechanism for further discussion of the issue;
3. to place agreement on the issue in a political accord;
4. to place agreement on the issue in the preamble to the constitution;
and
5. to entrench agreement on the issue in the main body of the constitution.

Agreement could also vary in terms of specificity. This could involve leaving the terms of agreement general, in order to allow for “creative ambiguity”, or defining the terms of agreement specifically.

Before going further, it is useful to remind ourselves how parties to the negotiation define a successful conclusion to the section 37 process. Most defined success in terms of a constitutional resolution to the negotiations, modelled along the lines of the federal government draft accord of 1985. A significant number of respondents thought that the 1985 federal draft would have to be expanded to include a commitment

to financing and resources for aboriginal self-government, and an ongoing process beyond 1987.

THE ISSUES

What are the prospects for accommodation on the major issues identified earlier?

(1) federal/provincial responsibility

The most promising approach here is to focus on principles of financing, from which might develop a fiscal and federal-provincial cost-sharing framework. However, it would appear that there is insufficient support to have such principles – yet to be fully elaborated – form part of a constitutional amendment. A more workable approach, at present, would be to have a general commitment in principle of federal and provincial governments to aboriginal government self-sufficiency, to share in the financing of aboriginal self-government, and to build a data base upon which to determine appropriate federal and provincial shares. These elements could be placed in a political accord.

(2) adequate financing

The section 36 approach seems to be the most promising on this front. However, it would appear that here, too, there is insufficient support to have such a principle entrenched in the constitution. This is not to say that progress could not be made on this issue. As part of a political accord, governments could commit themselves:

- a) to not “offloading” their existing expenditures on aboriginal peoples to the other levels of government;
- b) to maintaining current expenditures on aboriginal peoples;
- c) to additional, incremental funding for aboriginal self-governments, subject to individual self-government agreement negotiations; and
- d) to move toward long-term block funding arrangements with aboriginal peoples.

(3) the right to self-government

There is almost no support among governments for entrenching a freestanding right to aboriginal self-government in the constitution. It is

possible, however, that agreement will be reached to entrench the right to self-government if that right is subject to the negotiation of agreements, and if there is a constitutional commitment to enter into such negotiations. A variation on this theme would be a commitment to another FMC, in three to five years, replacing the government commitment to negotiate, in effect replacing a legal obligation with a political one.

A second approach, also capable of generating agreement, is the silent right, wherein parties agree to set aside the issue without prejudice, and agree to deem self-government agreements as treaties (and rights defined therein as treaty rights). A constitutional commitment to negotiate (or another FMC) would be required, in addition to the constitutional protection of rights defined in self-government agreements or treaties.

A third approach, as yet untested, is to address the right (or the source of the right) to aboriginal self-government, or aboriginal rights in general, in the preamble of the constitution.

(4) role of the provinces/"provincial veto"

With respect to the role of provincial and/or territorial governments in the negotiation of self-government agreements, particularly with Status Indians On-Reserve and Inuit in the NWT (where negotiations might otherwise be bilateral), the most workable approach would seem to be to allow these governments to monitor or otherwise involve themselves in the negotiations, at their request. Trilateral agreements, including provincial and/or territorial governments, are also possible in such instances. An understanding on this issue is unlikely to find its way into the constitution, but could be reflected in a political accord.

With respect to the "provincial veto" or unanimity aspect (with regard to constitutionally entrenching a self-government amendment), a number of accommodations are possible. Agreement could be reached to have the general amending formula apply, should the contingent right approach be adopted. If the silent right approach is followed, and self-government agreements are defined as treaties, the general amending formula would also be sufficient to entrench an amendment.

(5) land base

It is highly unlikely that the land base issue will be resolved at the 1987 FMC, despite its importance to Métis and Non-Status Indian people. However, agreement on one or two aspects is possible. First, governments could commit themselves to addressing the land base issue

in individual self-government agreement negotiations. This commitment would most likely be reflected in a political accord. Second, governments could commit themselves to addressing the land base issue, at the national level, in a post-1987 negotiation process or at another FMC. This commitment, in order to attract sufficient support, would have to form part of a constitutional amendment.

(6) commitment to negotiate

Agreement, if it is to be reached on this issue, will likely take one of two forms. Either would require constitutional change. The first could be to have governments commit themselves to enter into negotiations on self-government agreements, in a form of words similar to the 1985 federal draft accord. The second would involve a commitment by governments to at least one more FMC on aboriginal constitutional matters. The second option may not be supported by the aboriginal peoples' organizations at the table.

(7) jurisdiction of aboriginal governments

Issues of aboriginal government jurisdiction and intergovernmental policy coordination are most likely to be addressed in future, individual self-government agreement negotiations. Achievements at the 1987 FMC are apt to be very modest, with, at most, federal and provincial governments committing themselves politically to negotiations on jurisdiction.

(8) Métis and Section 91(24)

If any resolution is achieved on this issue, it will likely be to set it aside without prejudice. A non-derogation clause, forming part of a constitutional amendment, could have this effect.

FORMS OF CONSTITUTIONAL ACCOMMODATION

Given this analysis, what form of constitutional accommodation, if any, appears to be the most likely outcome at the 1987 FMC? We surveyed the range of possible forms, and the likely support for each in chapters five and six.

Several are very definitely "non-starters", including: the Saskatchewan draft accord of 1985, which placed the commitment to negotiate in a political accord; the B.C. 1985 draft amendment; and the

idea of entrenching only the right to self-government, leaving the remaining items to a political accord.

This leaves only two possibilities – some variation of the 1985 federal draft accord, and the province-by-province (section 39) approach. In either case, each would likely be accompanied by a political accord and some agreement with respect to extending the negotiation process.

The preferred route for most parties to the negotiations is some variation of the 1985 federal draft accord. Several variations are capable of attracting sufficient support to meet the criteria of the general amending formula.

VARIATION I

The most comprehensive variation would involve five elements:

1. to recognize and affirm the right to aboriginal self-government, subject to agreements being negotiated;
2. to commit governments to enter into negotiations to secure such agreements;
3. to provide constitutional protection for the rights defined in those agreements (with the general constitutional amending formula applying);
4. to provide for an ongoing process involving at least one further FMC, which would include negotiations on aboriginal self-government and a land and resource base; and
5. a non-derogation clause, which would include setting aside without prejudice the Métis and 91(24) issue.

VARIATION II

This variation would drop the first element noted above, and remain silent on the right to self-government. In effect, this would set aside without prejudice the issue of whether the right to aboriginal self-government is inherent, existing, freestanding, contingent or delegated from other orders of government. Rights defined in self-government agreements would be deemed treaty rights, and protected under section 35(1).

VARIATION III

This version would drop elements (1) and (2) from Variation I. The constitutional commitment of governments to enter into self-government negotiations would be replaced by a political commitment, in that an on-going process, involving at least one further FMC, would allow public scrutiny of governments' progress toward concluding self-government agreements. The treaty right approach would also be employed here.

If insufficient support is garnered for any of these three variations of the 1985 federal draft accord, attention may shift to the province-by-province (section 39) approach, as a "fall back" strategy. For this to have any hope of success, support from all aboriginal peoples' organizations, the federal government, and a significant number of provincial governments (e.g., say, perhaps four or five of Manitoba, Ontario, N.B., N.S., Newfoundland, and P.E.I.?) would be required for either Variation I or II of the 1985 federal draft accord. With less support than this, a section 39 approach would lack credibility, and any reasonable chance of attracting enough provinces in order to have the amendment proclaimed.

ELEMENTS OF A POLITICAL ACCORD

Whatever the form of constitutional accommodation, it will likely be accompanied by a political accord. Since the parties to the negotiations cannot agree to a constitutional resolution of all of the issues before them, some issues will likely be the subject of a political agreement, while others are apt to be the subject of further negotiations.

The following are potential elements of a political accord.

(1) financing

This is the most likely, and some would argue the most important subject for political agreement. A financing package in a political accord could include the following commitments:

- a general commitment in principle from federal and provincial governments to aboriginal government self-sufficiency, and to share in the financing of aboriginal self-government
- a specific commitment by federal, provincial, and territorial governments:

- not to "offload" their expenditures on aboriginal peoples on other levels of government
- to maintain their current expenditures on aboriginal peoples
- to provide additional, incremental financing, subject to individual self-government agreement negotiations
- to move toward long-term block funding arrangements with aboriginal peoples
- a specific commitment by all parties to the negotiations (federal, provincial and territorial governments and aboriginal peoples' organizations) to build a data base, upon which to make informed decisions regarding the financing of aboriginal self-government

(2) role of provinces and territories in negotiations

A clause in a political accord could allow provincial and territorial governments to monitor, participate, or "opt in" to certain types of self-government negotiations and subsequent agreements, at their request. This could apply to agreements being negotiated between the federal government and Status Indians or Inuit, and to agreements which affect more than one province and/or territory (e.g., inter-provincial self-government agreements).

(3) constitutional entrenchment of the self-government amendment

A clause in a political accord could confirm the understanding of federal and provincial governments that the general amending formula applies with regard to the constitutional entrenchment of the self-government amendment.

(4) land and resource base

In addition to, or in place of a constitutional commitment to address the issue of a land and resource base for currently landless aboriginal peoples in an ongoing national process, or at a future FMC, federal and provincial governments could commit themselves, in a political accord, to addressing land and resources in negotiations on individual self-government agreements.

(5) jurisdiction of aboriginal governments

Federal and provincial governments could commit themselves, in a political accord, to address matters of aboriginal government jurisdiction and responsibility in future negotiations on individual self-government agreements.

(6) the negotiation process

All parties to the negotiations could commit themselves, in a political accord, to a revised negotiation process. This could involve negotiations at two levels – the local/regional/provincial level, and the national level. Parties could agree to focus on negotiations at the local/regional/provincial level for, say, three years, before returning to the national level, and perhaps another FMC. This would enable parties to concentrate on negotiating individual self-government agreements, and to review progress toward such agreements at the national level at a targeted date.