DRAFT STATEMENT OF ISSUES

(Dept. of Justice)

February 9, 1983

Section 37(2) March 15-16, 1983

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DRAFT STATEMENT OF ISSUES

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3. Rights of Native Women (1)
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ENFORCEMENT AND PROTECTION OF ABORIGINAL RIGHTS

At the ministerial meeting of January 31/ February 1, the aboriginal organizations proposed three provisions for the enforcement and protection of aboriginal rights; a general enforcement provision, an Aboriginal Rights Commission and aboriginal judicial authorities in areas such as customary law.

1. General enforcement provision; similar to section 24(1) of the Charter of Rights and Freedoms.

2. Aboriginal Rights Commission; an agency independent of the executive to air grievances and to ensure the protection of aboriginal rights.

3. Judiciary; the establishment of special courts to deal with aboriginal matters, and the review of other judicial matters such as providing for "collective or class" actions.

The Métis have proposed a Métis Rights Commission whose role would be to monitor and report to the appropriate legislative body on progress in the implementation of the Métis Charter. They see the Commission, created through legislation, operating in conjunction with a Métis Peoples Court, a Court of Law and Equity, which would be the Court of final jurisdiction with regard to Métis Rights.

The representatives of the AFN have proposed that a constitutionally recognized office be established for the protection of the aboriginal title, aboriginal rights and treaty rights of the aboriginal Indian Nations.

MOBILITY RIGHTS

Aboriginal organizations have put forward the following concerns with respect to mobility rights:

1. The ICNI wants to ensure that an Inuk who moves from one area to another will be able to benefit from the land claims settlement and other rights, program and services in the area into which he moves and will not be banned therefrom merely because he is a new resident. It wishes to have the principle recognized that an Inuk is an Inuk wherever he may reside.

2. The ICNI has also proposed that an Inuk from Greenland or Alaska should, once he becomes a Canadian citizen, also have the right to benefit from the land claim settlement and other rights, programs and services in the area in which he resides.

3. The NCC generally supports the position put forward by the ICNI. It has expressed concern that the present mobility rights clause should not be used to justify an influx of people of non-aboriginal descent into traditional aboriginal communities, and where this may occur the aboriginal peoples may need special protection. The NCC has also questioned the value to them of section 6(2) in the Charter of Rights and Freedoms. The right "to pursue the gaining of a livelihood in any province" has little meaning to the Métis who in general lack the education and the training needed to take advantage of it.

4. The AFN has indicated that it wants Canada to ratify the Jay Treaty to ensure that Indian peoples are guaranteed the right to move without hindrance across the American border.

ONGOING PROCESS

It was generally recognized that because of the substantial number of important and complex issues on the agenda, an "ongoing process" following the Section 37 conference should be established to allow for a thorough discussion of the issues.

It was generally accepted that the ongoing process should be established on a basis similar to, and should be seen as a continuation of, the Section 37 conference. In particular, it is suggested that the ongoing process:

- provide for continued discussions at the level of Ministers and First Ministers;
- guarantee that representatives of Canada's aboriginal peoples are invited to participate in those discussions;
- allow representatives of the Yukon Territory and the Northwest Territory to be invited to those discussions;
- provide that discussions will continue for a specific and reasonable length of time;
- should be guaranteed in the Constitution through constitutional amendment.

It was suggested that the ongoing process could deal both with issues requiring constitutional resolution and with issues not requiring constitutional resolution. The AFN stressed that it also considered it important to maintain a bilateral process involving discussion between it and the federal government. Several delegations felt that the ongoing process should allow for a regional or area by area resolution of the issues under consideration where appropriate.

CONSENT

Aboriginal organizations stress that those provisions of the Constitution dealing with aboriginal rights should not be amended without the consent of the aboriginal peoples. They have indicated that "consent" of the aboriginal peoples to constitutional amendments is being proposed only for amendments made to section 25 and Part II (section 35 and proposed expansions) of the Constitution Act 1982. The AFN has, in addition, proposed that such "consent" be required for any amendment made to section 91(24) of the Constitution Act 1867.

The ICNI and the AFN consider that aboriginal peoples should be given a right of veto over the constitutional amendments in question. The AFN has proposed also that aboriginal peoples be granted a right to initiate constitutional amendments. The NCC has, for its part, indicated that it wants a constitutional provision ensuring that aboriginal peoples will be consulted and will participate in any discussion respecting amendments to the Constitution directly affecting them.

The federal delegation and most provincial delegations have made it clear in discussion of this item that it is not possible to give a right of veto to, or to provide for the formal consent of, non-sovereign, non-legislative bodies in the amending formula. They have encouraged aboriginal organizations to consider alternatives to formal consent arrangements. The federal delegation and several provincial delegations have stated that they would support a constitutional amendment providing for the participation of representatives of the aboriginal peoples in discussions of amendments directly affecting the aboriginal peoples.

RIGHTS OF NATIVE WOMEN

Notwithstanding section 15 of the Charter of Rights and Freedoms, the ICNI and the NCC are of the view that there is a need for explicit constitutional recognition that aboriginal rights apply equally to aboriginal men and women.

Native Women have taken the view that the determination of membership is an aboriginal right subject to the principle of equality. The concern stems from the past experience of native women in Canada whereby they were legislatively discriminated against under the Indian Act.

Indian Nations maintain that the right to determine their citizenry is an aboriginal right.

REPEAL OF SECTION (42)(1)(e) and 42(1)(f)

It is being proposed that section 42(1)(e) and section 42(1)(f) of the Constitution Act 1982 be repealed. Section 42(1)(e) requires the consent of the Senate and House of Commons and at least seven provinces with 50% of the population to make alterations to provincial boundaries which would extend existing provinces into the territories. Section 42(1)(f) requires the consent of the Senate and House of Commons and at least seven provinces with 50% of the population for the creation of new provinces.

The proposal to repeal section 42(1)(e) and 42(1)(f) is being made by the ICNI, with the support of the NCC, the AFN and the governments of the Yukon Territory and the Northwest Territories. In their view, section 42(1)(e) implies that existing provinces would be extended into the territories; section 42(1)(f) is considered unfair and inequitable because requiring provincial consent for the creation of new provinces is likely to complicate, delay and even prevent the establishment of new provinces and thus frustrate the aspirations of the inhabitants of the Northwest Territories and the Yukon Territory to obtain provincial status. A call is being made to return to the provisions of the Constitution Act 1871 in this regard.

In discussions on this agenda item, the federal delegation has indicated that it is prepared to support repeal of section 42(1)(e) and (f). Certain provincial delegations have pointed out that section 42(1)(e) must be read in conjunction with section 43 and is intended to make it more rather than less difficult to extend existing provinces into the territories. Note has also been made that section 42(1)(f) is intended to replace the procedure for creating new provinces provided in the Constitution Act 1871.

TREATY RIGHTS
(Including Royal Proclamation)

At the ministerial meeting of January 31/ February 1, 1983, the Assembly of First Nations identified treaty rights and the Royal Proclamation as issues of first priority. They wish to ensure:

1. The Royal Proclamation of 1763:

   (i) is constitutionalized as a schedule to the Canada Act, 1982, specifically acknowledged under section 52(2);

   (ii) is applicable to all of Canada.

2. That the recognition of the Treaties:

   (i) includes recognition of all rights and freedoms which flow from agreements prior or subsequent to the Constitution Act, 1867, including those signed outside of Canada;

   (ii) includes the recognition as treaty rights all aspects flowing from treaties, land claims settlements or other agreements;

   (iii) includes recognition of the James Bay and Northern Quebec and Northeastern Quebec agreements as treaties.

3. The entrenchment of a federal government commitment to the negotiation of the treaties and agreements with the aboriginal Indian Nations.

4. The spirit and intent of the treaties is recognized and implemented under international supervision.

LAND BASE FOR MÉTIS

Metis representatives have made it clear that provision of a land base for Metis is their paramount demand in constitutional talks. They propose:

1. that it be recognized that all aboriginal peoples have a right to a land base;

2. that, based on a recognition of this right, governments negotiate precise amounts and location of lands for the Metis. (Metis representatives have indicated that they are interested primarily in unoccupied Crown lands and in lands which could otherwise be bought);

3. that the Crown provide Metis with compensation for lands lost in the past.

Several delegations have expressed doubt as to whether Metis demands for a land base and to compensation can be said to flow from an aboriginal land claim (i.e., traditional use and occupancy). Metis representatives consider provision of a land base to be a matter of aboriginal right which it is the purpose of the section 37 conference to identify and define. Note was made that Metis land claims are being negotiated North of 60° although none have been recognized South of the 60th parallel.

ENTRENCHMENT OF ABORIGINAL TITLE

One or more aboriginal organizations are proposing:

1. that section 35(1) of the Constitution Act 1982 be amended to make explicit reference to aboriginal title;

2. that, in addition, Part II be expanded to include a definition of aboriginal land and resource rights;

3. that the Crown make a commitment to negotiate land claims, stemming from aboriginal title, on an area by area basis as part of the ongoing process; and

4. that rights confirmed or acquired through treaty and land claims settlements be given constitutional protection.

Among the land and resource rights which aboriginal organizations wish to see recognized in point 2 above are the following:

(a) a right to the collective ownership of land and the resources of that land (including surface and subsurface, renewable and non-renewable resources); in the case of the Inuit, this right to extend to marine resources and the sea-ice;

(b) a preferential right, based on traditional use and occupancy, to harvest plant and wildlife resources.

SELF-GOVERNMENT

Each aboriginal organization is proposing that the Constitution guarantee aboriginal peoples a right to self-government.

(a) The AFN proposes that Part II provide a right to Indian government which would include:

- a right to determine their own forms of government;
- a right to enjoy satisfactory fiscal relationships with other governments;
- a right to determine their own membership; and
- a right to be exempt from taxation by non-Indian governments, public authorities and public corporations.

(b) The Métis Committee on Constitutional Issues (NCC) has submitted a proposal which calls for Part II to guarantee a right to self-government with jurisdiction over political, cultural, economic and social affairs and institutions deemed necessary to the survival and development of the Métis as a distinct people. It has also indicated that appropriate fiscal relationships, including equalization payments, should be established with other governments.

(c) The ICNI has proposed that Part II include rights to self-government.

Discussions have revealed:

(1) that the ICNI is interested primarily in the establishment of local and regional "non-ethnic" self-governing structures in the territories they inhabit and consider their traditional homeland (i.e., parts of the Northwest Territories, northern Quebec and Labrador); the creation of Nanavut is a priority for the ICNI; the ICNI is also interested in the constitution of an Inuit authority for the purposes of consent;

(2) that the NCC's proposals for self-government are closely tied to a provision of a land base; indications were that the NCC was advocating self-government principally for local communities of aboriginal peoples with powers akin to municipal governments as well as additional authority is areas such as education and economic development;

(3) the nature and form of self-government for the aboriginal peoples remains to be defined; it remains unclear also whether the powers and structure of local self-governments for aboriginal peoples would be provided for in the Constitution, through legislation, through treaty or land claims arrangements, or through some other means.

CHARTER OF RIGHTS FOR THE ABORIGINAL PEOPLES TO INCLUDE A PREAMBLE

Aboriginal organizations have proposed that Part II of the Constitution Act 1982 be expanded to include a list of rights specific to the aboriginal peoples. The suggestion has been made that such a list could be known as a Charter of Rights pertaining to the aboriginal peoples and should include a Preamble.

Each aboriginal organization has submitted its own recommendations as to what rights should be included in Part II (see document 830-120/019 in respect of the AFN; document 830-120/004 in respect of the ICNI; and documents 830-120/0023 and 830-120/014 in respect of the NCC). Most aboriginal organizations believe that at least some rights must be arrived at through negotiation with each aboriginal people, and the AFN has suggested that consideration might be given to having a separate listing of rights for each aboriginal people.

Among the matters being recommended for inclusion in Part II are:

(a) Land and Resource rights (including recognition and definition of aboriginal title);

(b) Rights confirmed or acquired by way of treaties and land claims settlements;

(c) Language and Cultural rights (including recognition of customary law);

(d) Political rights (including right to self-government);

(e) Enforcement provisions (including consideration of aboriginal rights protectorate office).

The ICNI has proposed an approach to developing a Charter of Rights which would have general principles entrenched in such a Charter which could subsequently be refined and implemented in an ongoing process.

SERVICE DELIVERY AND FINANCIAL PROVISIONS

There was wide general agreement that uncertainties surrounding respective federal and provincial responsibilities for service deliver need to be resolved. This problem appears to have three dimensions:

1. clarification of federal and provincial responsibilities for delivering services to aboriginal peoples;

2. enhanced responsibility for aboriginal peoples in the area of service delivery; and

3. review of financial provisions, including consideration of fiscal arrangements and equalization.

The Manitoba delegation presented a proposal on this issue which calls for a constitutional amendment to section 36 of the Constitution Act 1982 which would establish a commitment to provide resources to meet the economic, social, and cultural needs of aboriginal peoples.

Aboriginal organisations have indicated that they would not want discussions on this item to focus exclusively on jurisdictional responsibility for aboriginal peoples, and the AFN has made it clear that it would not support any proposal to amend section 91(24).

INVOLVEMENT IN INTERNATIONAL ISSUES

The aboriginal organizations seek the recognition of their right to participate in the discussion of international issues which directly affect them.

The ICNI urged the federal government to consult with the aboriginal peoples before entering into international agreements which could have significant impact on the aboriginal peoples. They also request the federal government to give greater attention to international issues of interest to the Inuit, such as the EEC ban on seal skins and the negotiation of exchange agreements with Greenland. The International Whaling Commission and the Migratory Birds Convention Act were noted as issues of pressing concern.

It was generally recognized that this item does not require a constitutional provision. The federal delegation undertook to explore with the Department of External Affairs how best representatives of the aboriginal peoples could make their concerns known to them.

On February 4th, 1983 the Under Secretary of State for External Affairs wrote to the three national aboriginal organizations to inform them of his Department's willingness to undertake, in an exploratory way consultations with them on those matters of most concern.

AFFIRMATIVE ACTION PROGRAMS

The aboriginal organizations have expressed concern that the existing constitutional provision in section 6(4), of the Constitution Act, 1982 would prevent affirmative action programs for aboriginal peoples in provinces where the rate of employment is below the national rate of employment; i.e., such programs could be declared unconstitutional.

The above noted interpretation of section 6(4) was not generally accepted by the federal and provincial delegations. Section 6(4) should only be read in relation to mobility rights and refers to provincial barriers on mobility.

HUNTING, FISHING, TRAPPING AND GATHERING

Aboriginal organisations seek constitutional protection for their traditional economic activities of hunting, fishing, trapping and gathering. The ICNI has proposed:

a) that it be recognized that these activities constitute the primary economic base of the aboriginal peoples;

b) that aboriginal peoples be given a preferential right, based on traditional use and occupancy, to harvest non-renewable natural resources.

The ICNI has indicated that such a preferential right, which would give aboriginal peoples a right to hunt, fish, trap and gather non-renewable natural resources in priority to sportsmen etc..., should not override the needs of resource management and the principles of conservation. It has also indicated that the rights of aboriginal peoples to hunt, fish, trap and gather should not be limited to the needs of basic subsistance but should instead be seen as basis for a potential industry.

The NCC generally supports the position presented by the ICNI. The Metis Constitutional Committee (NCC) has proposed that the constitution guarantee a right for Metis to hunt, fish, trap and gather on Metis, Crown and other lands to which they have right of access.

MOBILITY RIGHTS

Aboriginal organizations have put forward the following concerns with respect to mobility rights:

1. The ICNI wants to ensure that an Inuk who moves from one area to another will be able to benefit from the land claims settlement and other rights, program and services in the area into which he moves and will not be banned therefrom merely because he is a new resident. It wishes to have the principle recognized that an Inuk is an Inuk wherever he may reside.

2. The ICNI has also proposed that an Inuk from Greenland or Alaska should, once he becomes a Canadian citizen, also have the right to benefit from the land claim settlement and other rights, programs and services in the area in which he resides.

3. The NCC generally supports the position put forward by the ICNI. It has expressed concern that the present mobility rights clause should not be used to justify an influx of people of non-aboriginal descent into traditional aboriginal communities, and where this may occur the aboriginal peoples may need special protection. The NCC has also questioned the value to them of section 6(2) in the Charter of Rights and Freedoms. The right "to pursue the gaining of a livelihood in any province" has little meaning to the Métis who in general lack the education and the training needed to take advantage of it.

4. The AFN has indicated that it wants Canada to ratify the Jay Treaty to ensure that Indian peoples are guaranteed the right to move without hindrance across the American border.

CUSTOMARY LAW (Family Law)

Aboriginal organizations seek recognition of their customary law and traditional practices in the making of dispositions bearing upon them by the courts and other competent authorities (e.g., Childrens' Aid Societies).

The NCC see customary law being applied in whatever elements of a judicial system might be included in the self-government they seek.

The AFN advocates an Indian Court system that would interpret and enforce Indian customary law.

GUARANTEED REPRESENTATION IN PARLIAMENT AND LEGISLATURES

The ICNI and the NCC are of the view that aboriginal peoples should have guaranteed representation in Parliament, the provincial legislatures and territorial assemblies. The AFN representatives have not articulated their position on this issue to date.

The difficulty faced by aboriginal candidates under current conditions and existing electoral divisions is generally recognized. It was suggested that guaranteed representation might be proportional to the aboriginal population. The NCC consider it important that aboriginal representatives in Parliament, legislatures and assemblies serve their respective aboriginal peoples directly.

The Métis proposal for amendments to Part II, of the Constitution Act, 1982, includes a provision for guaranteed representation in Parliament and legislative assemblies. The ICNI propose that guaranteed representation could be provided through appropriate legislative amendments.

The majority of delegations indicated that this item requires further examination. It was suggested that consideration could be given to territorial constituencies as well as other models, such as that used for Maori representation in New Zealand.

LANGUAGE AND CULTURE

The aboriginal organizations emphasize the unique nature and importance of their social and cultural institutions.

The ICNI wish to include recognition of language, culture, customs and traditions. They believe it is important that Inuktitut be protected as an aboriginal language by territorial, provincial and federal governments where the language is used extensively.

The NCC and the AFN believe that the right of aboriginal peoples to use and develop their languages and cultural institutions is tied to aboriginal self-government.

The aboriginal organizations have noted that they wish to regain control of or access to archeological and heritage properties which are presently owned by governments. The AFN view the ownership of their heritage resources as an aboriginal right.

SECTION 35: REMOVAL OF WORD "EXISTING"

The aboriginal representatives are of the view that the word "existing" should be removed from section 35. The concern is that "existing" freezes the application of section 35 to rights which existed at the date of proclamation of the Constitution Act, 1982. Thus any rights that might be acquired subsequent to that date could not be protected by section 35.

This issue, raised by the aboriginal representatives at the January 31/February 1, 1983 ministerial meeting has not, to date, been discussed at length. However, the Manitoba delegation indicated support for the aboriginal position.

John Whyte

Memorandum for Assembly of First Nations Lawyers' Meeting, Ottawa, February 11th, 1983

RE: ESTABLISHMENT OF AN ON GOING PROCESS

1. BACKGROUND

Neither the s. 37 Conference to be held in March nor the more general enterprise of defining and constitutionalizing rights and arrangements for aboriginal peoples is a zero-sum game. By this I mean that it is not true that the poorer that Indians and other aboriginal peoples do in this process the better it will be for the provincial and federal governments. It would appear that some, if not a majority, of governments are approaching the s. 37 Conference as if it were a zero sum game and as if their interests would be best served by having the Conference fail so that there would be no new constitutional provisions conferring rights on aboriginal people or on their political communities.

This is a mistaken assumption because Canada's health as a community will be degraded so long as Indians and natives are kept dependent wards of the governments of Canada - subservient, dispirited, outcast, without political focus and costly to maintain. The alternative future for Canada's Indians and other aboriginal peoples is for them to assume the responsibility for developing a separate national focus. In other words Indian self-government is not, in essence, a diminuation of traditional governmental authority but a transfer of policy respsonsibilities and implementation responsibilities to a body or bodies with some prospect of generating responsive, creative and effective

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governance. Indian government poses the best chance of changing the pattern of economic dependency, of producing an educational policy which is meaningful and functional, of imposing responsible restrictions on hunting and fishing activity, of coming up with the right therapies to reduce present levels of crime, of responding with action and genuine concern to such social ills as poverty and disease, and so forth.

The A.F.N. is now preparing for a conference with one main objective being to extend and formalize the process so that the effort to produce a new political regime for Indians will not be terminated before it has even really begun. It can fairly be predicted that there will be opposition to doing this, notwithstanding the apparent commitment to an on-going process at the M.A.C.M. meeting on January 31st and February 1st. Consequently the first and most important task will be to explain that the creation of an on-going process is not a ticket to further confrontation and political embarrassment but an essential ingredient in producing the sorts of arrangements from which all Canadians will benefit.

The implication of these observations is that A.F.N. spokesmen must confirm the mutual benefit that comes from future discussions and from the constitutionalization of Indian political rights through demonstrating both the political idealism and the political realism of their proposals. On the other hand what will be confirmed is the idea that constitutional

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reform on aboriginal matters is costly and mistaken if proposals are presented as demands and in the form of fundamental, irreducible rights.

In short, the A.F.N. cannot assume that obtaining a commitment, constitutionalized or not, is a certainty. Rather, it must undertake to convince governmental participants that continuing the process is to everyone's advantage.

2. THE BILATERAL PROCESS

The A.F.N. position has been to establish a bilateral process with the federal government. These have been described as "discussions with a view to reaching agreement between the federal Government and the Assembly of First Nations on Constitutional Matters related to Indian people" (letter of November 29, 1982, Chief David Ahenakew to Prime Minister Trudeau). Later in this memorandum I shall discuss the legal question of whether bilateral constitutionalization is permissable, as well as the practical and legal arguments in favour of a bilateral process which does not lead to entrenchment in the Constitution. I want briefly to raise some questions about the strategy of establishing a bilateral process.

The main argument in its favour is that Indians are a federal responsibility under s. 91(24) of the Constitution Act, 1867. Provinces have no role in respect of Indian matters, except purely incidentally, and to allow them full participation

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in the process of constitutionalizing Indian rights is to deny the existing special constitutional place enjoyed by Indians. In particular, admission of the provinces to the process does two negative things. First, it holds the process of constitutionalization hostage to the willingness of seven provinces with 50% of the population (see s. 38, Constitution Act, 1982) and in the political context of some provinces being openly hostile to any form of constitutionalization and other provinces being covertly hostile to claims for larger Indian autonomy the route to political success in the constitutional sphere is uncertain. Second, to admit the proper role of provinces could be read as acceding to assimilationist policies. If Indians are just a special class of Canadian citizens whose constitutional rights are subject to the control of both levels of government, this might be seen as denying the present existence of a third order of political community which relates to the rest of Canada only through the agency of the federal government. This arrangement is represented constitutionally by s. 91(24). Indians ought not accept that the arrangement has altered merely because ten of the eleven non-Indian governments have accepted a new arrangement for general constitutional amendments.

There are, however, two arguments for not choosing an exclusively bilateral process. In the first place a constitutional provision extending the obligation to hold First Ministers' Conferences on aboriginal rights will keep up the pressure to work on finding Constitutional provisions respecting

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Indians. Without the pressure of constitutionally mandated meetings of First Ministers, constitutional discussions of a bilateral sort will be slowed down and ultimately neglected. In short I would go so far as to say that if an agreement for a bilateral process for constitutional talks were made it will not likely be lived up to. The federal government has too many excuses for not proceeding (no political urgency, economic issues are more important, the need to wait until after non-constitutional discussions between Indians and the government are concluded, etc.) to expect them to participate meaningfully. Mandatory federal - provincial meetings are what fuel the discussions and not the goodwill of the federal government, nor the political clout of the Assembly of First Nations.

Second, in bilateral negotiations, the federal side will be advised by bureaucrats who have far too many vested interests in the present arrangements. The presence of provinces will dilute the influence of those people who are the Indian "experts" and who don't want to risk any alteration. It is a well known phenomenon that the regulators of any sector become very conservative and resistant to any changes in the organization of the sector they are responsible for. In other words, although provinces may be hostile to Indian interests they are not structurally foreclosed from entertaining changes and they can be persuaded that it is in their interests to agree to a change. The same cannot so easily be said of the federal government.

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In sum, this does not mean that the A.F.N. should not push for a bilateral process. It does mean, however, that to the extent that elements of multilateralism are left in the process this is by no means against the interests of the A.F.N. If the ongoing process which is agreed to requires periodic all-government meetings to consider recommendations arising from an informal bilateral process, and if the ongoing process which is agreed to also requires approval under the terms of s. 38, before constitutional changes can be made this is not necessarily an intolerable result.

3. GUARANTEEING THE ON GOING PROCESS

a) Methods

The most obvious method for guaranteeing the on going process is to enact a replacement section for s. 37. Under the terms of s. 54, s. 37 will be repealed automatically on April 17, 1983 and once the First Ministers' Meeting scheduled for March 1983 is concluded there will be no further constitutional obligation on the governments in Canada to meet and discuss Constitutional matters affecting the aboriginal peoples. In the absence of an agreement by the federal government and a sufficient number of provinces to entrench in the Constitution a replacement to s. 37, the process could be kept alive through the continuance of the First Ministers' Meeting which is being held in March. This would be done by having the Chairman (the Prime Minister) not declare the meeting ended when it concludes on March 16, 1983 but rather adjourn it to a future date to be announced.

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This strategy is clearly only second best. In fact, it is not very satisfactory at all. If it is necessary to resort to this strategy it will be because a significant number of provinces (at least four, or, alternatively both Quebec and Ontario) do not wish to constitutionalize a plan for future meetings. This means that the Prime Minister's adjournment would be seen as a mere device to keep alive a process for which there is inadequate political consensus. In this context provincial governments may boycott future reconvened meetings and would likewise refuse to give assent to any substantive measures requiring constitutional consent.

A third method would be for all governments (or at least as many governments as are required under s. 38 to achieve a constitutional amendment) to agree to an informal (ie non-constitutional) document which set out a program for, and conditions of, a series of future meetings. This, of course, would not be as satisfactory a result as a constitutionally entrenched provision. It does, however, have one very large advantage. Such an intergovernmental agreement would be in effect as soon as the first Ministers signed it and would not require implementation through the procedures set out in ss. 38 and 39. Under this process amendments cannot be approved by first ministers but rather require assenting resolutions of Parliament and the requisite number of provincial legislatures. Therefore there will be a delay in implementation during which

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period any first minister may back out of an agreement made in March on the ground that there is not sufficient political support for the necessary resolution. Furthermore, under s. 39(1) the amendment cannot be proclaimed until one year from the date the first resolution is passed by Parliament or a Legislative Assembly, unless all governments have previously adopted resolutions of assent or dissent. Hence if a hostile province refuses to place the amendment before its legislative assembly, which is quite likely, there will be more than a year elapse between the agreement in March and implementation.

The deficiencies of not having a constitutional amendment are that agreeing governments may not feel as bound to honour the agreement - they can plead that altered circumstances, or more pressing governmental business trump their informal agreement. Second, those governments which do not agree to the informal agreement can claim not to be bound (since there has been no constitutional duty created) and refuse to participate. This could be a serious blow to future constitutional discussions but not necessarily so. Suppose eight governments or less agreed to an informal process. Those governments could meet with aboriginal groups and agree to commence implementation of constitutional terms. They could do this without participation from all governments so long as at the end of the day there were sufficient assents to satisfy the requirements of s. 38.

Consequently the best method of implementing an on-going process would be an unanimously approved constitutional

amendment. Next would be constitutional amendment with Parliament plus seven provinces with 50% of the population. Next would be an informal agreement of a substantial number of governments and, finally, would be the mere adjournment to a future date of the s. 37 meeting which is to be commenced on March 15, 1983.

b) Content

The replacement to s. 37 will, of necessity, have to be expressed in general, non specific language. It should probably parallel the language of the present s. 37. The crucial question is whether the A.F.N. should insist that the terms of the new s. 37 should mention a bilateral process between the A.F.N. and the Government of Canada. There are two issues under the general question. First, should the A.F.N. require that the new s. 37 mention, and give sanction to, a bilateral process? Second, should the A.F.N. require that the new s. 37 introduce a special amending formula for constitutional provisions relating to Indians which requires the consent of only the federal government and Indian representatives? My recommendation on both these questions is tenatively in the negative? The strongest reason why the new s. 37 should not attempt to create a new amending formula for Indian matters requiring consent from Indians and the federal government alone is that such a provision is probably tantamount to an amendment of Part V (Procedure for Amending Constitution of Canada) and under s. 41(e) any amending to Part V requires the consent of all the governments of Canada. This will simply not be agreed to by the Province

of Quebec for two reasons. First, Quebec will not voluntarily agree to a measure which confirms that the subject matter of Indians is an exclusive federal matter and, second, Quebec will not participate in an act applying the provisions of the Constitution Act, 1982 a document which it considers lacks legitimacy and does not bind Quebec. There may be other provinces which would also withhold consent but, in any event, unanimous agreement is not an overly realistic expectation. On the other hand, there is an argument that a Constitutional amendment either to s. 35 or to the new s. 37 (which would state that, for matters directly affecting Indians, federal and Indian consent is both necessary and sufficient) would not fall within s. 41(e) and would, therefore, not require unanimous provincial consent. Section 41(e) says unanimity is required for amendments to Part V. Putting the consent clause in s. 35 or s. 37 would be an amendment to Part II or Part IV, not Part V. I have my doubts about whether this argument would succeed because Part V is actually an exhaustive code covering constitutional amendment in Canada and any provision creating a special amendment rule, regardless of where it is placed in the Constitution, would be an amendment of the general rule (ie. s. 38) and, consequently an amendment of Part V.

In conclusion, therefore, an attempt to remove provincial participation in constitutional amendments respecting Indians will probably (but not certainly) require agreement

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from all eleven governments and this is not likely. This does not mean that such an amendment should not be proposed but, in my view, such an amendment should not be part of the A.F.N.'s bottom line bargaining position - there is too great a risk that this issue could frustrate the whole conference.

As for the question of whether the A.F.N. should require that the new s. 37 mention bilateral negotiations which would be subject to formal implementation under the terms of s. 38 of the Constitution Act, 1982, it might be unwise to give the bilateral process question as much visibility as this strategy requires. It must be remembered that the new s. 37 will have to be approved, according to s. 38, through resolutions of the Senate and House of Commons as well as through resolutions of the legislative assemblies of the assenting provinces. That requirement poses a substantial risk to the implementation of any agreement made at the First Ministers' Meeting. The best way to minimize the risk is to keep the new s. 37 short, general, and confined to a statement of principle.

It might be thought the element of risk is a relatively minor concern compared to the apparent desirability of entrenching elements of a bilateral process. The reason why I think it is not is that there are, in fact, few real advantages to entrenching elements of a bilateral process. If the new s. 37 does not confer on the Government of Canada and Indians the exclusive right to make constitutional amendments there is little functional difference between an informal agreement under

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which bilateral negotiations are conducted and an entrenched provision doing the same thing. Again, while it may be a good opening strategy to talk about recognizing bilateral negotiations in the new s. 37 it is not, in my opinion, important enough to form part of the A.F.N.'s bottom line.

There is a third possible element to be included in the new s. 37 and that is a consent clause requiring consent by Indian representatives for any changes directly affecting Indian rights or creating arrangements for Indian political units. This is distinct from the above discussion of a consent clause: the earlier discussion concerned the entrenchment of a requirement of consent from only the Government of Canada and Indians; the present issue is about adding Indian consent to the existing requirements for consent found in Part V. The question of Indian consent is being treated more fully in a separate paper but it is worth noting that one of the ways of achieving the same objectives is to have the consent clause introduced as part of the negotiations on ongoing process. The main advantage of this strategy is that it may be less conspicuous. The goal would be to place in any constitutional provision, stipulating that there must be an annual First Ministers' Conference for the purpose of defining and developing aboriginal rights, a clause in this form (underlined portion):

> New 37(2). Each conferences convened pursuant to subsection (1) shall include in its agenda items or items pertaining to the rights of the aboriginal peoples

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of Canada and any proposal resulting from such agenda items shall be presented for authorization by resolution of the Senate and House of Commons only if the representatives of the appropriate aboriginal people or peoples have consented to such proposal.

There are several problems with this strategy. First, it is fairly transparent; although it is not a full consent clause it does recognize the A.F.N. and other aboriginal groups as equal to the federal government and provincial governments for some purposes. We can be assured some governments will put up a strong opposition to this.

Second, it is not a full consent clause in that it doesn't require Indian consent for constitutional amendments which do not flow from s.37 meetings. If the eleven governments (or eight of them) decided outside the context of a First Ministers' meeting to entrench an amendment directly affecting Indian rights (eg. limiting hunting and fishing rights) they could do this simply by following the procedure in ss. 38 and 39 and the consent clause which has been proposed would have no effect. Perhaps if the political fight for a consent clause is going to be waged it might well be a full clause. On the other hand if governments agree to Indian and native participation in constitutional conferences it seems a logical next step to give those groups a formal voice in decision making. That is why fighting for a consent clause in the context of discussions on the future process seems appealing. The third problem is that even the limited consent clause which is being

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proposed might be viewed as an amendment to Part V since, in effect, it introduces an alteration to Part V's code of amending procedures. If so, then unanimity is required and, as already stated that is virtually impossible, at least in the March meeting. Again the counter argument is that only Part IV is being amended so the unanimity rule doesn't apply.

c) Informal supplementary agreement

If it is decided not to insist on the inclusion of either a bilateral consent provision in the new s. 37 or the explicit recognition of elements of a bilateral process in that section, then the appropriate place for establishing the bilateral process would be in an informal supplementary agreement. Such an agreement would not absolutely require the agreement of all governments but to be operationally effective would need the acceptance by enough governments to satisfy the requirements of s. 38 of the Constitution Act, 1982.

The following matters should be considered by A.F.N. for inclusion in the supplementary agreement:

1. The question of Co-Chairmen. The federal government will never agree to co-chairmen at First Ministers' meetings but that does not mean it is not an appropriate idea for Ministers' meeting (M.A.C.M.) or officials' meetings. The concept of co-chairmen is important in terms of controlling the agenda,

controlling the conduct of participants during meetings, and gaining access to the press.

2. Splitting Indian and Native groups. The supplementary agreement could establish that not all aboriginal peoples need to be participants at all meetings or for all agenda items. The agreement would, of course, recognize that there are areas of overlapping interest. It could also grant observer status to aboriginal groups not directly affected by particular agenda items.

3. Addition of Agenda items. There is little prospect (as well as being undesirable) of listing all possible agenda topics in the new s. 37. Nor is it likely that all the agenda items can be thought of, or agreed on, at the March meeting for explicit inclusion in the supplementary agreement. Therefore, there needs to be a mechanism for adding agenda items. This could be especially valuable for the A.F.N. since it would mean that the whole A.F.N. constitutional agenda need not be developped or disclosed at the March meeting. If this were the case the pressure to be complete (and not to overlook any claim, regardless of its prematurity in the present context) would be removed. The best agenda adding mechanism would be simply to give any party

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the right to place any matter on the agenda for a M.A.C.M. meeting. With respect to First Ministers' meetings there are two possible rules. One is that agenda items for First Ministers must be approved by M.A.C.M.. The other is that any party may also directly add items to First Ministers' Conferences agendas. The latter rule would be better for the A.F.N. since it means their interests could not be politically foreclosed by Ministers.

4. Reporting back to First Ministers' Conference. A mechanism for reporting M.A.C.M. negotiations and recommendations to First Ministers has to be devised. The simplest may be to mandate a common report where possible but where not possible to require majority or plurality reports and to allow those participants at M.A.C.M. who are not in agreement to submit minority reports.

5. Bilateral Process. The supplementary agreement should establish a bilateral process between the A.F.N. and the Government of Canada in respect of matters affecting Indian rights. The justification for this would be that Indian nations are not the responsibility of the provinces; under s. 91(24) it is exclusively the federal government which has constitutional responsibility for Indians, including the responsibility to develop new constitutional arrangements.

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Recognition of a bilateral process in the supplementary agreement does not in itself obviate the need to implement constitutional changes through section 38, ie. with general provincial consent. Although leaving in the requirement of provincial consent does not accord with A.F.N. policy, if the requisite level of agreement for the removal of provincial consent is not forthcoming, (and it is very likely not to be forthcoming), this sort of informally acceded to bilateral process is better than nothing.

Under the bilateral process it would be expected that all constitutional provisions directly affecting the rights of Indian people and the rights and obligations on Indian nations will be negotiated between the Government of Canada and the A.F.N. without provincial participation. Any arrangements which result from these negotiations which require implementation through constitutionalization will be presented to a meeting called under the new s. 37. It would be hoped that any such agreement would be endorsed by the provinces without protracted debate, or delay in passing the implementing resolutions. Provincial willingness to bilateral agreements would be logical in that historically and legally (prior to April 17, 1982) the federal government was

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the sole agent for mediating with Indian people over Indian interests and other national interests. The Indian community represents a distinct political community which should not be required to seek multilateral government support for constitutional change as if it were just another interest group. Of course, these arguments go to the need for a formal bilateral constitutional process and not just to informal provincial deference to the bilateral negotiations but, for reasons already exhaustively examined, the principle of provincial deference implicitly made in the context of a bilateral process through a supplementary agreement may be the most that can be achieved at this point.

4. BILATERAL CONSTITUTIONALIZATION UNDER THE PRESENT CONSTITUTION

This paper has taken a pessimistic view of the prospects of getting agreement for a constitutional provision which would permit the entrenchment of amendments respecting Indian matters on the agreement of Indians and the Government of Canada alone (ie. no provincial participation). It has then made suggestions for a second-best, informal arrangement of bilateral talks. A far better solution would be to find a way, under the terms of the current Constitution, for constitutional changes to be implemented bilaterally. If this could be done the political pessimism expressed earlier in this paper would be irrelevant. There are two possible routes for implementing

constitutional change agreed to bilaterally: a) through creating a schedule of rights recognized in s. 35, and b) through amendments under s. 44, the provision which allows Parliament unilaterally to amend the Constitution of Canada in relation to the executive government of Canada.

a) Schedule of Rights under s. 35

This mechanism has been developed by Professor Howard McConnell of the University of Saskatchewan. He has described it in these terms (letter from McConnell to Delia Opekokew, January 14th, 1983):

"Since nothing new is being added to the Constitution, but the already existing terms in s. 35 "aboriginal and treaty rights" are merely being given content, an amendment [under s. 38] is needless. Section 37 contemplates already a conference to supply a definition, and the definition could be "incorporated by reference" in a schedule or schedules at the end of the section or the conclusion of the Act. There is precedent for this, for example, in s. 80 of the B.N.A. Act which referred to certain constituencies in Quebec then inhabited by English voters, the boundaries of which were fixed by the Second Schedule. A common definition for Indians, Inuit or Metis might be appended in a single schedule, or possibly three schedules could be added if the rights diverged."

Implicit in this suggestion is that if Canada and the Indian nations could agree on the schedule that agreement

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would be a sufficient level of consent for incorporation.

My own view is that this suggestion will not survive close legal scrutiny. Assuming that there will be some provinces which will resist all attempts to exclude provinces from the process the McConnell strategy will be subjected to legal challenge. Furthermore, its legal weaknesses will, I believe, cause Ottawa not to urge its acceptance (the federal government is reluctant to appear to be again acting in a legally high-handed manner). If these assumptions are correct (1. the strategy is legally defective; 2. one or more provinces will resist the strategy by attacking its legality; 3. the federal government will not actively promote its use) then we can assume that the strategy will not turn out to be useful in promoting the A.F.N.'s objectives at the March First Ministers' Conference.

Before leaving this point a brief legal analysis of Professor McConnell's suggestion would be in order. Section 35 recognizes existing aboriginal and treaty rights. In a sense it does very little since what it recognizes are rights, by which it means "legally recognized claims". What s. 35 does do is constitutionalize these legal rights and thereby protects them from legislative and executive diminution.

Section 37(2) on the other hand talks about matters which are theoretically distinct from s. 35 legal rights. One is "constitutional matters that directly affect the aboriginal peoples of Canada" and the other is "the identification and definition of the rights of those people to be included in the

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Constitution of Canada." Both these categories go beyond existing rights. The category of constitutional matters could include such matters as transfer payments to Indian bands or nations, or the creation of a treaty rights protection office. Although these sorts of arrangements might be said to emanate from existing aboriginal and treaty rights, the claim would be weak. In any event the point is that s. 37 clearly contemplates the creation of new arrangements not related to aboriginal rights and that undercuts the claim that s. 37 is merely the mechanism for providing detailed substance to the rights recognized in s. 35. Likewise, the second category ("definition of rights to be included...") contemplates new rights and not only the elaboration of existing rights.

Even if the above argument were wrong, there is another point which undermines the McConnell strategy. If s. 37 is, in fact, the mechanism for giving specific content to s. 35 it is silent as to what level of agreement is needed to constitutionally confirm the detailed rights. One might argue from the basis of s. 91(24) of the Constitution Act, 1867 that federal consent should be sufficient. But s. 37 expressly adopts the mechanism of a First Ministers' Conference for elaborating and developing aboriginal rights and this means that federal and provincial governments are to be involved in the process respecting constitutional matters affecting "the aboriginal peoples of Canada". In s. 35(2) "the aboriginal peoples of Canada" is defined to include the

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Indian peoples. It could be argued that just because provincial involvement is explicitly contemplated does not mean that provincial consent is required - after all the inclusion of a role for representatives of aboriginal peoples in s. 37(2) seems not to have led to the constitutionalization of the need for Indian and native consent. However, there is a presumption, derived from Part V, that provincial involvement in Constitutional matters includes the requirement that there be provincial consent. There is nothing in s. 37(2) to rebut that presumption or to suggest that there ought to be some other consent rule.

Consequently that the matter of aboriginal rights discussions is found in the context of s. 37 is harmful to the argument that the constitution has left untouched, and outside the scope of s. 38, a special area of constitutional amendment, respecting Indians.

b) Amendment under s. 44

Section 44 says "subject to section 41 and 42 [this exception could be significant to some constitutional matters affecting Indians], Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada...."

The first point that should be made is that if the federal government were to agree to make constitutional amendments under this section when proposals for amendment were agreed to by both the government and Indians, this would clearly be an instance of bilateral constitutional amendment.

But it would be a weak form of entrenchment since some future Parliament could make subsequent amendments altering Indian rights without Indian consent. Naturally one could try to deal with this by making Indian consent one of the first proposals to be implemented. However, an unilateral amendment under s. 44 would trump an agreement which had been constitutionalized under s. 44, even one which said that there could be no changes without Indian consent.

Assuming continued good faith on the part of the Government of Canada or, alternatively, assuming that the implementation under s. 44 of a Canada-Indian Constitutional agreement, would impose a substantial political constraint on Parliament, then the s. 44 strategy would be effective.

Two legal problems arise. First will bilateral agreements on, say, self-government actually exclude provincial interference with the operation of the agreement? Second, would such constitutional amendments relate to the executive government of Canada?

As to the first question, provinces might argue that notwithstanding a Canada - Indian agreement to confer tribal or band autonomy, it has jurisdiction under its powers under s. 92 of the Constitution Act, 1867 to regulate what Indian government does. This would clearly be correct so long as s. 88 stayed in the Indian Act, R.S.C. 1970, c. I-6. This section makes provincial law applicable, with some important exceptions, to and in respect of Indians. For the s. 44 amendment route

to work s. 88 would need to be repealed. However, that in itself would not be adequate since the Supreme Court of Canada in the Four B decision held that provincial law applies on Indian reserves and to Indians apart from the operation of s. 88 of the Indian Act. The federal Parliament would therefore need to enact a provision expressly excluding provincial law. In technical language Parliament would need to enact a provision which would occupy any areas of concurrent jurisdiction that may exist with relation to Indians. By this means provincial interference could be precluded. Some constitutional scholars think that federal Indian jurisdiction may not be broad enough to cover all areas which might be reached under an Indian self government plan but, in my opinion, Parliament's authority under s. 91(24) is probably sufficiently broad.

The second problem is whether a constitutional arrangement between Indians and the Government of Canada relating to, say, a protection office, funding of Indian government, the jurisdiction of Indian government, special hunting and fishing arrangements, land entitlements, etc. would count as being in relation to "the executive government of Canada". The answer to this is that there is no reason why such an agreement could not be if Parliament were to enact the appropriate enabling legislation.

Consequently, the route of bilateral constitutionalization which shows the most promise is through s. 44, although

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at the same time it provides the weakest form of entrenchment and the least constitutional protection for the rights of the Indian people of Canada.

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INCORPORATION OF A SCHEDULE BY REFERENCE:

THE CONSTITUTION ACT, 1982

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A paper prepared at the request of The Assembly of First Nations

February 9, 1983

In attempting to avoid the difficulties posed by the section 38(1) amending formula, Professor Howard McConnell of the College of Law, University of Saskatchewan, has suggested that an agreement defining the rights of the aboriginal peoples could be incorporated by reference into the Constitution:

> For the purposes of the definition of "aboriginal rights" in section 35, no amendment is needed because no change is being made to the text of the Constitution. All that is being done is to give one of its terms meaning. Judges do this frequently when they give a fuller extension, through judicial interpretation, to terms such as "peace, order and good government"; the only thing that would differ in this context would be that instead of defining the term through judicial craftsmanship, it would be defined in the process of executive-federalism, as provided for in section 37(2). Consequently, rather than proceeding by the laborious amending process, the testamentary concept of incorporation by reference might be resorted to.
> (W.H. McConnell, Indians and the New Constitutional "Package": Some Suggestions for Innovation, paper presented at the Native Law Centre seminar on Indian Government, 14 January, 1982.)

Professor McConnell goes on to say that "the concluding resolution of the Conference would then be endorsed as being incorporated by reference into, and as defining, section 35. This could be done without any undue strain, as section 37(2) refers to section 35, if not by name, at least by necessary inference."

In his letter to Delia Opekokew, counsel to the Federation of Saskatchewan Indian Nations, dated 14 January, 1983, Professor McConnell stated that "the definition could be 'incorporated by reference' in a schedule or schedules at the end of the section or the conclusion of the Act."

However, the Act contains no mechanism for incorporating a schedule or schedules defining the rights of aboriginal peoples. Moreover, section 80 of the Constitution Act, ~~1982~~ 1867, to which Professor McConnell refers in his letter, makes specific reference to "the second Schedule to this Act." Similarly, sections 70, 108, 113, and 128 of that Act make specific references to other schedules.

It is submitted, therefore, that incorporation of a schedule or schedules by reference could only be done through amendment of the Constitution Act, 1982, and according to section 38(1) this would require the support of seven provinces with 50% of the total population.

Nevertheless, the use of a schedule or schedules may be considered a convenient method of constitutional recognition of the rights of the aboriginal peoples. Such schedules would be incorporated by reference through an amendment to the Constitution Act, 1982.

As stated above, schedules have been used previously in Canadian constitutional documents. For example, section 108 of the Constitution Act, 1867 lists in a schedule the public works and property formerly belonging to the provinces which became the property of Canada upon Confederation. Apparently the contents of the schedules to the Constitution Act, 1867 were negotiated after the coming into force of that Act.

Incorporation of a schedule of Indian rights by reference has another advantage. Federal and provincial leaders may be unwilling to allow the Constitution to be amended to include a long section setting out the rights of aboriginal peoples. They may feel that such an amendment would give too much prominence to these rights. But if the very same rights were set out in a schedule or schedules to the Act, they would not appear so prominent; yet they would have just as much protection (if the Act is worded appropriately).

A new subsection could be added to section 35 as follows:

> 35.(1A) The rights of the aboriginal peoples of Canada as enumerated in [a Schedule or Schedules] to this Act are hereby recognized, affirmed and guaranteed.

The constitution could be amended each time agreement is reached on a new schedule relating to the rights of the aboriginal peoples. Such an amendment would have to meet the requirements of section 38(1)--that is, it would require resolutions of Parliament and seven of the provincial legislative assemblies.

Alternatively, the Constitution Act, 1982 could be amended to incorporate all future schedules reached through the on-going process. The participants of the 1983 Constitutional Conference could amend the Act to state that any agreements concerning the rights of the aboriginal peoples reached through the on-going process established by that conference would be set out in schedules to the Act and would become part of the Act.

New subsections could be added to section 35, as follows:

> 35. (1B) The rights of the aboriginal peoples of Canada, as identified and defined [by the on-going process established at the s. 37(2) Constitutional Conference] are hereby recognized, affirmed and guaranteed.
>
> (1C) The rights of the aboriginal peoples of Canada, as identified and defined [by the on-going process established at the s. 37(2) Constitutional Conference] shall be enumerated in a Schedule or Schedules to this Act.
>
> (1D) The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation setting out a Schedule or Schedules referred to in (1C) forthwith upon [the on-going process established at the s. 37(2) Constitutional Conference] reaching agreement on the identification and definition of the rights of the aboriginal peoples of Canada. [(1D) is modelled on s. 48]

The proposed amendment could be viewed as a change to the amending procedure set out in Part V. If this is the case, it would require the unanimous consent of Parliament and all ten legislatures, pursuant to section 41(e). It could be argued, however, that the proposed amendment is a change to Part II rather than Part V and, as such, would require the consent of Parliament and seven provinces, pursuant to section 38(1). One would expect that the constitutional validity of such an amendment passed pursuant to section 38(1) would eventually be challenged in the courts.

The value of incorporation by reference of future schedules would depend on the nature of the on-going process. If the on-going process provides a genuine opportunity for the solution of many of the constitutional issues facing aboriginal peoples, then the ability to incorporate the results of the process quickly and accurately into the Constitution becomes important. If, on the other hand, the on-going process is inadequate, the incorporation mechanism can provide no solutions in itself.

Submitted by:
Blood Tribal Council
Constitution Committee

Draft Proposal
February 14, 1983

Preconditions to Participation in the First Minister's Conference Pursuant to Canada Act 37 (2)

Summary

The Indian peoples, Bands, Tribes, Governments and Nations of Southern Alberta affected by Treaty Seven participate in the First Minister's Conference planned for March 15 and 16, 1983 in Ottawa to fulfill the requirements of the Canada Act Section 37 (2) upon the fulfillment of the following conditions:

1. that there be a preconference agreement that participation of Indian leadership does not imply acceptance of Canadian sovereignty over their people, territories and resources nor satisfaction of the application of the Canada Act to their people, territories and resources;

2. that there is a preconference agreement that discussions will be limited to the establishment of an interim mechanism to fascilitate agreement between the federal government and Indian governments about ongoing mechanisms and processes to identify and define Aboriginal and Treaty rights;

3. that there be a preconference agreement that all existing services and programs to Indian peoples, communities, governments, organizations and agencies will be continued at existing levels of funding by governments of Canada with appropriate cost of living increments until the processes identified and established in two above are completed to the satisfaction of the Indian people of Canada;

4. that there is a preconference committment by the government of Canada to provide the necessary financial support to Indian communities and Indian components of established mechanisms to permit the best possible participation in the process(es) established by mutual agreement;

5. that there be a preconference committment by the government of Canada that there will be no action by itself and/or the provincial governments to affect the Aboriginal and Treaty rights of the Aboriginal peoples of Canada without the express consent of the Indian peoples of Canada by referendum in the absence of an agreed upon mechanism and process for such consent. The method and process to obtain consent must be subject to scrutiny from an official U.N. Observer appointed by the Committee on Trusteeships and Decolonization.

Preamble to Elaborations

Because there is serious concern about the implications of the participation in the First Minister's Conference as

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required by Section 37(2) of the Canada Act it is important that there be certain assurances made by the government of Canada and these assurances are sufficient to permit Indian leaders of conscience to agree to attendance of the First Minister's Conference, the following concerns should be dealt with before the First Minister's Conference:

1. Since most Indigenous people, communities, governments and leaders are not sufficiently informed about Canadian and British constitutional law and many issues concerning Indigenous people cannot be dealt with by law without certain political decisions it is impossible for Indigenous peoples, communities, governments and leaders of conscience to accept complete subjugation under Canadian sovereignty at this time. It is therefore necessary to assure potential Indian participants in the First Minister's Conference that such an act does not carry with it consequences detrimental to the best interests of his/her people and their future. In all fairness decisions made about the future of Indian peoples in Canada must be made with the full knowledge of their implications and possible consequences, therefore Indian leaders seeking peaceful, just and cooperative settlement of outstanding issues between the government of Canada and their people should not be required to compromise their rights under International law by inadvertantly relinquishing such by participation in the First Minister's Conference. For these reasons it is recommended that the position of Treaty Seven be as follows: (from Summary)

    1. That there be a preconference agreement that participation of Indian leadership does not imply acceptance of Canadian sovereignty over their people, territories and resources nor satisfaction of the application of the Canada Act to their people, territories and resources.

2. Given the seriousness of the matter at hand for Indigenous people and all future generations great care and time should be taken to deal with the concerns of this conference so that the best interests of Indian people are served in the best possible way. Also given the experiences of the National Indian Brotherhood with the Joint Cabinet/National Indian Brotherhood Committees (negotiating mechanism) it is clear that the mechanisms to provide for the necessary processes for the identification and definition of Aboriginal and Treaty rights must be carefully discussed and consented to by the Indian peoples, communities, governments and leaders. There must also be federal government committment to the mechanisms created so that the tasks may be completed within reasonable periods of time understanding as well

that the processes to be initiated might be many and complex including for some Indian peoples and governments discussions/negotiations with provincial governments and even re-negotiations of treaties where the spirit and intent of the treaties have not been met to the satisfaction of some parties to such treaties. To ensure proper committment to this process for resolving constitutional issues between Indian peoples and the governments of Canada, there must be provision for International scrutiny from both the U.N. Human Rights Commission and the Committee for Trusteeships Decolonization. For these reasons the following position is recommended: (from Summary)

2. That there is a preconference agreement that discussions will be limited to the establishment of an interim mechanism to fascilitate agreement between the federal government and Indian governments about ongoing mechanisms processes to identify and define Aboriginal and Treaty rights.

3. Many Indian people, communities, governments and leaders have been most disturbed by some of the methods the federal and provincial governments have utilized to coerce Indian people, communities, governments and leaders into acceptance of situations and/or circumstances detrimental to their best interests and whereas the most common device for such coersion has been money, required by Indian people and their communities for various services and programs it must be apparent to the government of Canada that confidence in any process must be earned by demonstrations of good and just intentions. Therefore the following is recommended: (from Summary)

3. That there be preconference agreement that all existing services and programs to Indian peoples, communities, governments, organizations and agencies will be continued at existing levels of funding by governments of Canada with appropriate cost of living increments until the processes identified in two above are completed to the satisfaction of the Indian people of Canada.

4. Needless to say without financial support from the federal government most Indigenous people, communities, governments and leaders would not be able to give the necessary time and personnel to the education of the community members and conduct the necessary meetings etc. for informed decisions to be made. Lack of a committment to provide funding would necessarily have to be understood as a curtailment of broad and comprehensive participation of Indian community members in

the determination of their future within the state of Canada. For this reason the following is recommended: (from Summary)

4. That there is a preconference committment by the government of Canada to provide the necessary financial support to Indian communities and Indian components of established mechanisms to permit the best possible participation in the process(es) established by mutual agreement.

5. Every precaution must be taken to prevent a few unscrupulous persons from collaberating with groups whose interests conflict with the Indian peoples for the purpose of undermining and/or compromising the future of the Indian peoples of Canada. Therefore, unless these has been a mechanism for such consent endorsed by Indian governments with the express consent of their members, the governments of Canada must demonstrate to the international community that Indian peoples of Canada voluntarily chose to consent to changes that affect their Aboriginal and Treaty rights. This preconference agreement would indicate to the world community Indian and Canadian compliance with the principle of participatory democracy in all its dealings with the Indian people of Canada as it affects their Aboriginal and Treaty rights. For these reasons the following position is recommended: (from Summary)

5. That there be a preconference committment by the government of Canada that there will be no action by itself and/or the provincial governments to affect the Aboriginal and Treaty rights of the Aboriginal peoples of Canada without the express consent of the Indian peoples of Canada by referendum in the absence of an agreed upon mechanism and process for such consent. The method and process to obtain consent must be subject to scrutiny from an official U.N. Observer appointed by the Committee on Trusteeships and Decolonization.