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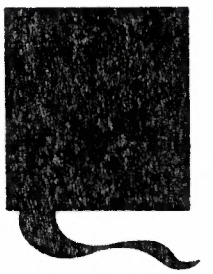

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ABORIGINAL SELF GOVERNMENT

Some issues and possible approaches for incorporating an inherent right to Aboriginal Self Government in the Canadian Constitution

A DISCUSSION PAPER

Prepared For:

Federal-Provincial Relations Office
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1.0 INTRODUCTION

Central to the constitutional position of some of the major Aboriginal organizations, including the Assembly of First Nations, is the requirement that the revised Constitution recognize, reflect and protect an inherent right to Self Government.

This is seen as a pre-condition, as well as a departure point for more detailed discussion on the specifics of new government to government relationships for the future.

During the week of November 1 1991, the federal government moved from its initial refusal to contemplate recognition of an inherent right, to an indication that it was open to discussing constitutional recognition of such a right if certain concerns were addressed.

It is clear that any such recognition would have to be accompanied by a series of related understandings on the substance of the right as well as on questions relating to process.

The objective of this paper is to identify and discuss some of the issues, factors and elements that will probably require agreement by the parties on:

a) How any such inherent right will fit and interrelate with the recognition and reflection of other levels of government within the Canadian Constitution;

b) Specifically any parameters, or guiding or interpretative principles that will be required to govern the more detailed elaboration of such a right for particular Aboriginal peoples; including

c) Understandings in respect of the laws that will apply to specific Aboriginal peoples, or within particular areas, while the process of detailing the modern day recognition of Aboriginal governments is undertaken.

The paper provides a framework for identifying the issues that will require consideration, should the major parties reach an agreement in principle to explore how and on what basis, an inherent right might be included in the Canadian Constitution.

Issues are identified and positions of the major parties are reviewed where known. The paper also puts forward some ideas for consideration in relation to each of the "next stage" issues identified.

Any such paper, given the time available, can do little more than identify possibilities, suggest possible structure, direction and approaches and possible content for more detailed consideration. The hope is that the paper as written provides some focal points for moving to the more rigorous and expanded analysis that will be required.

The paper clearly does not purport to be a definitive working through of the ideas presented and their implications, nor indeed is it comprehensive of the areas that might ultimately require consideration. It is a beginning.

2.0 SETTING THE STAGE - THE ISSUES IDENTIFIED

2.1 Some Starting Assumptions

a) It will be essential for any broader constitutional "deal" to reach agreement on the fundamentals of the Aboriginal Constitutional Agenda.

b) Central to that Agenda are the AFN and Inuit positions calling for the clear constitutional recognition and protection of an inherent right to Self Government.

c) Any such recognition of an inherent right will have to be accompanied by clear understandings on the nature and basis of the inter-relationships with other levels of government recognized in the Canadian Constitution.

d) The detail of the nature and basis of these inter-relationships will need to reflect certain constraints, limits, parameters and guiding or interpretative principles relating to both the substance of Aboriginal Self Government, as it will apply to different Aboriginal peoples, as well as the processes that will be employed to achieve agreement on what that inherent right means in modern day terms and for different Aboriginal peoples.

e) We must now assume a willingness on the part of all key participants to now focus, not on whether or not such a right will be recognized in principle, but on the areas where more detailed agreement on specific aspects of that right will be required to achieve its inclusion in a revised Constitution.

2.2 What Now Confronts the Parties?

In moving into more detailed discussions the parties will confront, at the outset, the following planning questions:

Areas	a)	What are the areas where more detailed agreement will be required?
Reasons	b)	Why is agreement necessary in each of the areas identified?
Possible Content	c)	What might be the approach and/or possible content to achieving understanding in these areas?

Implications d) What would be the practical and legal implications of the agreements reached in these areas?

Locus of Agreements e) Where might such agreements best be reflected? eg. in the body of the Constitution itself and/or in ancillary political accords?

Process f) How might agreements in such areas be arrived at, ie. considerations relating to process?

Probable Reactions g) What are the likely reactions of the major participants:

- Aboriginal
- Provincial and Territorial Governments
- The Federal Government

to the suggested elements, content, approach and process.

2.3 The Areas Where More Detailed Agreement May Be Essential and/or Desirable

The focus of this paper is more specifically on the first questions identified - ie. the areas where more detailed agreement may be required, why such agreements are essential and/or desirable, and the possible content and approach for dealing with each of the areas identified.

The questions focusing on implications, where such agreements might best be located, the desirable process and possible reactions from the key participants will be the subject of few if any comments at this stage.

It is suggested that the areas where more detailed agreement will likely be required to put a minimum level of definition and understanding on what an inherent right means will likely include some, if not all, of the following.

The need to address:

a) *Nature and Basis of the Right*

The nature and basis of the Aboriginal right to Self Government including a description of the basic interrelationship between Aboriginal governments and other constitutionally recognized governments within the context of the Canadian Constitution.

Flowing from such an agreement will be a requirement for the negotiation of supplementary understandings. The questions are in what areas, on what basis, and how.

b) *Parameters and Principles to Guide Elaboration of the Right*

What are the broad parameters and principles that will guide future discussions on the elaboration of the right - generally, ie. across the board and as it relates to different Aboriginal groups as well as particular areas of jurisdiction?

c) *Which Laws Will Apply*

In the context of agreement on these broad parameters and principles, **what jurisdictions and/or laws** will take precedence or prevail especially in the transition period from the present day arrangements to a full elaboration of the rights for different Aboriginal peoples?

d) *Process to Elaborate Rights*

How matters relating to the recognition and interfacing of jurisdictions, laws and programs (ie. the exercise of those jurisdictions) will be dealt with as a matter of process - and will these be the same for all Aboriginal groups?

e) ***Government to Government Process to Oversee Elaboration of the Right***

The establishment of ongoing government to government forums and processes for overseeing the more detailed negotiations that will be required. Once again the issues of whether these will be the same, or different for different Aboriginal peoples.

f) ***Dispute Resolution***

How will disputes arising from the modern day definition and elaboration of what the inherent right to Self Government means be dealt with?

3.0 THE POSITIONS OF THE PARTIES

Central to trying to predict possible responses to these questions is achieving an understanding of where each of the major parties now stand on the issues contained in the requirements identified above.

3.1 The Federal Position

The federal proposals tabled in September did not speak explicitly to the nature of the right to be recognized.

Implicitly the proposals, while leaving the question of the nature of the right as one of the items to be considered by the Joint Parliamentary Committee, gave major indications that the right to be recognized was, in the federal view, not inherent in its nature, but rather would be government granted - a devolution of negotiated authorities.

Although faced with early opposition from the AFN on this and other aspects of the proposals, the federal government initially indicated an unwillingness to recognize the right as inherent.

Stated federal concerns:

a) Acceptance of the right as inherent could provide a springboard for arguments of "sovereign state" status especially in the international context;

b) Concerns in relation to which laws would be held applicable. The federal view was that general Canadian law must apply unless there were expressed negotiated exceptions.

Acceptance of the right as inherent without ancillary understandings could arguably provide a basis for exactly the opposite arguments.

> *"... our reluctance to use the word inherent is based primarily on concerns we have about the precise meaning of the word. According to our understanding it could imply that no federal and provincial laws apply to Aboriginal peoples, except with their consent - that they have the absolute right to govern themselves absolutely, if they so choose. It also seems to be used sometimes as the basis for a claim to international sovereignty."*
>
> The Hon Kim Campbell - Minister of Justice - November 1, 1991

> "The federal government does not accept the argument that Aboriginal nations are sovereign nation states in the international sense or that Aboriginal people have the right to decide unilaterally which laws of Canada or a province they are bound by."
>
> Federal Background Paper - "Aboriginal Peoples, Self Government, and Constitutional Reform - Nov 1991

In the period since November 1, 1991, the federal government, while reiterating previously stated concerns, has communicated an openness to considering the "inherent right" position of the Aboriginal groups, if it is put forward in a way which meets the stated federal concerns.

As stated by the Right Honourable Joe Clark, Minister responsible for Constitutional Affairs (November 7, 1991):

> *"Our concern with [the] term is straightforward. We believe that the word -- undefined or unmodified -- could be used as the basis for a claim to international sovereignty or as the justification of a unilateral approach to deciding what laws did or did not apply to Aboriginal peoples.*

Our concern with inherency is not with the word but with the meaning. If we can be shown that an amendment can be drafted to ensure that an inherent right does not mean a right to sovereignty or separation, or the unilateral determination of powers, we will look at that. If Aboriginal-Canadians can help define what inherency would mean in practical terms -- in terms of authorities and jurisdictions and powers -- in such a way that the integrity of this federation is not put in question, we would welcome that. We are not opposed to inherency.

We are opposed to inherency as a code word for sovereignty."

Beyond the stated concerns, it can be assumed that other concerns exist to varying degrees, such as:

a) Fear of sheer unmanageability as a matter of process: over 600 First Nations, together with a myriad of other Aboriginal groups at various levels, many of them without land bases; and many of them without clear confirmation of a mandate to represent a clearly defined constituency;

b) Concerns that too much power would actually have to be ceded;

c) Fiscal concerns; and

d) A concern that at its very heart, the AFN position in particular, presents a fundamental challenge to the right and capacity of the federal and provincial governments to control decision making as they are able to do under current constitutional arrangements.

3.2 The Assembly of First Nations Position

The initially strong rejection by the AFN of federal proposals has been based on a number of clearly inter-related concerns:

a) The failure to recognize the right as an inherent right;

b) Concerns in relation to the stated general intent to seek continued application of federal and provincial laws;

c) Concerns that the right will be subject to the Canadian Charter of Rights and Freedoms without exception;

d) Problems with the suspension of the enforceability of the right for up to 10 years; and

e) Concerns about the "past tense" recognition of Aboriginal governments in the proposed "Canada" clause.

There are a range of other AFN concerns more specifically focused on other general parts of the federal proposals, as well as other elements of the Aboriginal-specific proposals.

Generally, Indian reaction emphasizes a failure in the federal proposals to reflect the beginnings of the concept of equality. The different treatment afforded Quebec in relation to protection of its language, culture and distinctiveness, in contrast to that accorded to Aboriginal peoples, is viewed as unfair and hypocritical. Other proposals are also pointed to where arguably greater or more equal Aboriginal participation should have been reflected, eg. the proposed Council of the Federation.

Clearly at the top of the list is the continued insistence that the recognition of the Aboriginal right to Self Government must further recognize its inherent nature. Recognition of an inherent right is seen by Indian people as both a tie to their past, as well as the required foundation for future more detailed discussions. It is viewed as both a pre-condition and a basis upon which to proceed with the more detailed elaboration of the right that will be required over time.

Statements from the AFN, although not totally consistent, nor without ambiguity, do appear to accept that the recognition and elaboration of the inherent right will occur within the context of a revised Canadian Constitutional Framework:

"First Nations seek to have their own authority and right to self-determination explicitly recognized and protected by the Canadian Constitution, in the same way that the internal sovereignty of Quebec or any other province is recognized and protected."

"First nations and the Constitution" - AFN Draft Working Paper October 18, 1991

"We want as a people recognition of our collective rights as distinct people. We are distinct people with inherent rights."

"By recognizing our inherent right to govern ourselves, it does not mean that Canada will be dismembered, it does not mean that our people will create their own military organizations, it does not mean that we'll be rushing off with our own Criminal Code, it does not mean that we will reject all federal laws, and provincial laws."

"What it does mean is that, for the first time in our history, our people will have freedom of choice that is built into this idea of self-determination."

"There's nothing wrong, in my view, with a people choosing Canada's Criminal Code and applying it as their own. For that matter if they want to accept the child welfare laws of a province, then they should do it."

National Chief Ovide Mercredi to the Canadian Bar Association - October 15, 1991

Simply stated, the AFN position on the requirement to recognize the inherent right is a call for recognition of the right to Self Government as a pre-existing right - "not something white governments in 1991 are going to grant to native people."

Central to the position, and beyond the language itself, is a clear rejection of the status quo whereby non-Indian governments retain to themselves the effective final decision-making authority on all aspects of the present and future relations between Aboriginal peoples and non-Indian governments. These decision-making powers include the ability to determine what arrangements will be entered into, what powers will be ceded, as well as the power to unilaterally define limits and constraints on program and or financial arrangements for the future.

The AFN position reflects both a plea and a demand for fairer treatment - for incorporation of some elements of fairness and equity in the decision making process pertaining to recognition and elaboration of the right to Self Government.

The AFN and some other Aboriginal groups see little in the federal proposal to date that provides them the critical assurance that decisions will be made any differently than they have been, over the past 100 years.

The "inherent right" discussed is really the cutting edge of a demand for a different sharing of power in respect of all decisions from this point on, and the explicit recognition of this different power sharing. Lacking such an assurance it can be anticipated that agreement on the essentials will not be forthcoming.

3.3 Other Aboriginal Associations

3.3.1 The Inuit

The Inuit join the AFN in their demand for the entrenchment of the right to Self Government as an inherent right.

> *"... we strongly believe that any proposal for constitutional reform must recognize and entrench the inherent right of Aboriginal peoples to Self Government ..."*
>
> *"... Inuit Assembly on the Constitution ... Pangnirtung Accord reflected the following that:*
>
> > *Inuit have the inherent right to Self Government and this right need not be defined for the purposes of constitutional entrenchment.*
>
> *It also declares that:*
>
> > *The Aboriginal right to Self Government is a collective human right arising from the will of the people, and is not dependent for its existence upon grants of power from federal or provincial governments."*

Letter Rosemary Kuptana to the Right Hon Brian Mulroney - October 9, 1991

The Inuit are unequivocal that "the inherent right to Self Government is a right we earnestly desire to exercise within Canada". They take the position that "the inherent right to Self Government reflects the right of Aboriginal peoples to exercise some exclusive legislative powers in our communities and regions."

3.3.2 The Metis National Council and the Native Council of Canada

Both the MNC and the NCC have reacted a lot more positively to the federal proposals in total, although both organizations to varying degrees and on different bases, are still incorporating references to the requirement that the right to Self Government must be viewed and recognized as inherent.

The reduced emphasis on the nature of the right, is partially attributable to the nature of the constituencies that each of these organizations represent or claim to represent, juxtaposed against the essence of what, under any definition, constitutes a central characteristic of the concept of an inherent right. This characteristic involves the notion of a right pre-existent to some defined point in time - usually meaning pre-existing or pre-dating Indian/Inuit contact with the European settlers of Canada.

The Metis and the constituency of the Metis National Council, being people of mixed blood, cannot claim any right to Self Government as inherent if the "pre-existing" characteristic is defined in the way mentioned above.

The Metis base their line of argument for recognition of an inherent right to Self Government on pre-Confederation Metis societies in the West, especially Manitoba, and more particularly through the fact, actions and agreements struck by the Manitoba Provisional Government in 1869-70.

"... the Metis people ... through the existence of the Manitoba Act, 1870, classically exemplify the application of the inherent right of Aboriginal Self Government, are a founding nation of Canada and ... continue to be nation builders."

Letter Yvon Dumont to Hon Tom Siddon dated October 9, 1991

More specifically, the MNC background to this argument is as follows:

- By 1869 the Metis effectively represented over 90% of the population in the settlements centred at Fort Gary where the Red and Assiniboine Rivers meet;
- The Metis, as a people, rejected and resisted Canada's advances to take over the West as a Canadian Colony or Territory post-1867; and
- The Metis set up a provisional government that ruled the Red River area in 1869-70. This government negotiated specific agreements with Canada.
- By agreeing to the enactment of the Manitoba Act of 1870 the Metis agreed to join Canada.

See "National Unity and Consitutional Reform" - The report of the Manitoba Metis Senate Commission - July 1991

The specifics of the present-day Metis constitutional positions reflect "working towards establishing different forms of government institutions that will give them more direct control of decision making and matters that directly effect them."

Reflecting the fact that the large majority of the Metis population are not residing on an Aboriginal land base (with the exception of the Alberta Metis Settlements) and the more dispersed nature of the population, Metis demands are seen, by governments, to be more pragmatically focused than parallel Indian positions and demands.

The Native Council of Canada (NCC) is in a more precarious position to the extent that the population it claims to represent is changing in its character and numbers. To the extent that it includes off reserve status Indians within its claimed constituency, in many parts of the country, such representation claims are the subject of competition by Indian First Nations, and other Aboriginal organizations.

The NCC's historical position has seen it, together with the other national Aboriginal associations emphasizing:

> *"... the requirement for recognition of the Aboriginal rights of Self Government as reflecting the inherent right of Aboriginal peoples to self determination within Canada."*
>
> *"The NCC has consistently sought recognition of the status of Aboriginal peoples as a constituent third order of government in Canada."*

The NCC position also reflects the following:

> *"The application of federal and provincial laws could be made explicitly subject to the right of Self Government; Aboriginal governments should also be treated as provinces regarding ss. 1 and 33 of the Charter (eg. capacity to legislate limits and/or suspend Charter)."*

See NCC Discussion Paper - "NCC Objectives and Options for Constitutional Reform" Nov 7, 1991

3.4 The Provinces

At this stage, information available does not allow for the incorporation of a "state of play" review of the positions of all provincial and territorial governments in relation to whether or not they might be prepared to accept positions reflecting a constitutionalized "inherent right to Aboriginal Self Government."

A key exception is the Government of Ontario which on August 6, 1991 entered into a "Statement of Political Relationship" with the First Nations of Ontario in which it:

a) Recognized the right to Self Government of the First Nations as an inherent right within the Canadian Constitutional Framework; and

b) Committed itself to the "further articulation, exercise and the implementation of the inherent right to Self Government within the Canadian Constitutional Framework."

Ontario has committed itself to pressuring for the recognition of such an inherent right in the current round of constitutional discussions. It has further indicated that it will be examining possibilities for similar understandings with other Aboriginal groups where appropriate.

Also of note is the recent (October 28, 1991) Report of the Manitoba Constitutional Task Force, which reflects an all party conclusion to the following effect:

> *"... This process should therefore include a clear and unequivocal recognition in the Constitution that Aboriginal peoples constitute the original people and a fundamental characteristic of Canada ... this recognition is properly embodied in the Canada Clause."*
>
> *"Having recognized that Aboriginal peoples are an integral part of Canada, we must move swiftly to give meaning to this recognition by entrenching in the Constitution of Canada that Aboriginal peoples have the inherent right to Self Government within the Canadian Constitutional Framework."*
>
> See - Report of the Manitoba Consitutional Task Force - p.21 - October 28, 1991

4.0 THE UNITED STATES EXPERIENCE - MIGHT IT BE RELEVANT?

There is a direct and relevant parallel between the recognition and evolution of Tribal sovereignty in the United States and the current Canadian debate in respect of the nature of the right to Self Government to be recognized.

It is of particular relevance given the continued reference to the US experience as a model, by some of the Canadian Indian leadership when they speak of their position and aspirations in the Canadian context.

4.1 Origins of US Tribal Sovereignty

The American Tribal experience can be shortly summarized:

a) At the time of European discovery of America, Indian Tribes were sovereign - they governed their own affairs and depended upon no outside source of power to legitimize their acts of government.

b) The sovereign status of Tribes was recognized by the US government notwithstanding that the settlers claims to dominion over all of the territories, limited to some degree, the sovereignty of the Tribes.

c) The US Supreme Court early resolved some of the consequential uncertainly around the legal status of the Tribes as Nations by holding that the rights of original inhabitants were, while not disregarded, impaired to a considerable extent under the legal principle of discovery.

d) Flowing from the US Supreme Court's judgements relating to the limitations on Tribal sovereignty arose the now familiar characterization of US Tribal governments as "domestic dependent nations."

e) The Supreme Court position left a clear picture of tribal nations whose independence had been limited in two areas:

   1) Conveyance of land; and

   2) Ability to deal with foreign powers.

   For all internal purposes, the Tribes were sovereign and free from state intrusion on that sovereignty.

4.2 US Tribal Sovereignty Today - Its Meaning and Limits

a) Over the last 150 years the early Supreme Court position as indicated above has been modified by judicial determinations of additional limitations on tribal sovereignty inherent in the domestic dependent nation status of the Tribes.

Examples include criminal jurisdiction over non-Indians and a number of areas were it has been determined that tribal actions are based on insufficiently defined tribal interests to sustain those actions.

b) While oversimplified, the major attributes of tribal sovereignty in the US today can be described as follows:

1) **Indian government possess inherent government power over all internal affairs of the Tribes;**

2) **The states are precluded from interfering with the Tribes in their Self Government;**

3) **Congress has the plenary power (which it has exercised) to limit tribal sovereignty; and**

4) **The courts have imposed judicial limitations upon tribal sovereignty in a number of areas.**

4.3 Some Comments on the Relevance of the US Experience

The US legal and political framework reflects, to some extent, the political premises of Indian and broader Aboriginal positions being put forward in the Canadian context today.

Some key factors to note:

a) Canada is dealing with three groups of constitutionally recognized Aboriginal peoples, not one.

b) The US recognition of the "internal inherent sovereignty" of US Tribes has been accompanied by a congressional power of override and acceptance of a judicial capacity to limit the nature and extent of the "sovereign powers" exercisable by the Tribes.

The US situation does reflect a significantly different legal and political base, over a significant period of time, than has thus far been recognized in the Canadian context.

Some practical consequences of the US approach, which are of relevance and importance to the upcoming debate on the content and meaning of inherency in the Canadian context include:

1) **Inquiries over the powers of Tribes usually begin with the assumption that the Tribes possess the disputed authority.**

2) **As sovereign governments, US Tribes are free to act unless some federal (as opposed to state) intrusion has affirmatively modified that sovereignty.**

3) **The fact that tribal powers are inherent and not derived from the federal government has resulted in the provisions of the Bill of Rights, restricting the federal government, being held not to apply to the Tribes.**

4) **The self governing characteristics of the Tribes have been held to enable Congress to delegate powers to them that would not be possible to other non-governmental organizations - valid because the Tribes already possess some independent regulatory authority in the subject matter area.**

5) **With some exceptions, tribal sovereignty has also operated as a shield against intrusions of state laws into matters involving Indian lands and people.**

Clearly Canadian legal, political and judicial history and experience is considerably different.

While many of the consequences of possible recognition of an inherent right in the Canadian context will ultimately involve a consideration of concepts and experience present in the United States including, in particular the effective parameters that exist on Indian tribal sovereignty, the Canadian departure points are different.

In particular, there is an unbelievably complex mix of current federal and provincial jurisdictions, program and associated arrangements occupying the field relating to Indian lands and peoples. Over time this will effectively have to be re-aligned and to a large extent, vacated. An additional complication is present as a result of third party interests which are complex and pervasive.

It should also be noted that the recognition of US tribal sovereignty beyond the larger more frequently used examples such as the Navajo, is that US tribal governments are still, for the large part, close to entirely dependent on the transfer of resources from non-Indian governments. To some extent the recognition is more optical than real. The arguably more astute judicial and political recognition of some of the key Indian concepts relating to their inherent right - has not translated into the equality of opportunity - social and economic, that might have been hoped for and expected.

5.0 COMMENTARY - THE MAJOR AREAS REQUIRING DISCUSSION

The material that follows provides a preliminary identification and discussion of some of the major areas where more detailed agreements will likely be required; an indication of why these areas are of importance and some possible approaches to content in each of these areas - **should an inherent right to Self Government be recognized in the Constitution.**

It is emphasised, that at this stage, the general areas where understandings appear to be necessary are identified and discussed. The details of possible wording must follow at a later point in time.

Should the parties in fact reach the point of working on the detailed language that will be required in these and/or other areas, it will be absolutely essential that the detailed wording, as well as the political understandings themselves **be without ambiguity**. None of the parties needs a repeat of the historical experience around interpretation of the language of the Treaties, or for that matter many of the modern land claim settlements.

5.1 Some Opening Observations

Any recognition of the right as an inherent right will need to be accompanied by ancillary understandings in most, if not all of the areas indicated below.

In particular, clearly defined parameters and guidelines for the elaboration of the inherent right, will be critical to any possibility of achieving an overall agreement. To achieve acceptance of the parameters that will have to accompany recognition of the inherent right, will in turn involve achieving agreement on a complete package which cumulatively, through all of its elements, will be an acceptable and saleable package for each of the associations to their constituencies.

In other words, although the focus will, in the immediate instance, be on specific parameters and associated understandings to accompany the inherent right, of equal importance to the saleability of the right, and any associated parameters, will be the understandings to be achieved in a number of other areas as identified below.

The federal government has now signalled an openness to considering proposals for incorporating an inherent right. However, some fundamental concerns and questions have been identified which must be adequately answered for the federal government to agree to the inclusion of such a right.

In summary, the major concerns as set out by The Right Honourable Joe Clark are:

> *"We believe that that word [inherent] - undefined or unmodified - could be used as the basis for a claim to international sovereignty or as the justification of a unilateral approach to deciding what laws did and did not apply to Aboriginal peoples ... If we can be shown that an amendment can be drafted to ensure that an inherent right does not mean a right to sovereignty or separation or the unilateral determination of powers - we will look at that."*

The federal concern is that the integrity of the Federation must not be put into question by amendments recognizing an inherent right to Aboriginal Self Government - "a unilateral definition of Self Government or a unilateral declaration of powers and laws" will clearly be unacceptable.

Beyond the publicly stated federal concerns, it appears clear that other factors are present in the mix which have contributed to past opposition to acceptance of the right as an inherent right:

- Fear of sheer unmanageability as a matter of process;
- Concerns that too much power would actually have to be ceded;
- Fiscal concerns; and
- A concern that the authority of the federal and provincial governments to control decision making, reflected under current constitutional arrangements, is being assailed.

While aspects of the AFN's position remain unclear, it appears to have been consistently stated that the AFN preference is to achieve recognition of an inherent right to Self Government within the Canadian Constitutional context and to reach the required, more detailed agreements on the specifics of what that right will translate into, through subsequent government to government negotiations.

The AFN position is unclear and to a degree ambiguous on the central question of which laws will be considered to apply once the inherent right is recognized. Similarly, positions are unclear or ambiguous in relation to the exact process that should be used for defining the specifics of the jurisdictions that will be possessed by Indian governments and how they will relate to federal and provincial jurisdictions.

It is also unclear which level or levels of Indian government, will actually engage in the process of negotiating agreements to reflect the specific jurisdictions that will be recognized, as well as related financial and intergovernmental arrangements.

As discussions proceed in the months ahead, the AFN can legitimately be required to provide clearer positions in these areas.

The central problem does not appear to be whether or not agreement can be reached that the inherent right will be recognized and reflected within the Canadian Constitutional context. While it has not been specifically conceded that a reflection of the right in this manner will impose some inevitable limitations on the scope of authority and jurisdiction to be recognized, this is clearly one of the fundamental questions that will need to be left with all of the associations for clear response in the immediate future.

However, in the end, agreement that the inherent right will be recognized within the Canadian Constitutional Framework, with all that entails, appears to be achievable. Assuming agreement is achievable in other areas, it should be possible to reach agreement in one of the areas of central concern to the federal government ie. that Indian people will not view constitutal recognition of the right as providing a basis for claims to "sovereignty in the international context."

The problem that does exist is more centred on what will accompany that recognition - specifically, which governments will be acknowledged to possess what powers, at what points in time. Is there any possibility that recognition of the right as inherent will create a legal vacuum?

It is clear that the recognition of significant, but varied jurisdictions, for different Aboriginal governments will be required over time. Some elements of this requirement have been reflected in the federal proposals to date.

However, many Indian leaders only see these jurisdictions and powers, and the approach identified in the federal proposals, as mirroring the current approaches of the Department of Indian Affairs, ie. as relatively minor in the broader scheme of things and for most Indian leaders, unacceptable.

While the right sectors of jurisdiction are identified - economic development, justice, health, etc. there has been little specific confirmation of the federal government's willingness, or indeed ability, to define jurisdictions of any significance for Aboriginal governments in these areas.

Most of the approaches and examples used to date have really just focused on existing or marginally expanded program enhancement measures. **This has translated into a fundamental concern particularly for the AFN - a concern that following the recognition of the right, its scope and application will be effectively narrowed to the absolute minimum by the combined approaches of the federal and provincial governments and/or by a non-Aboriginal court system.** To some extent a valid concern mirrored in the US experience.

There is a related concern that while the federal government protests concerns about the possibility of Aboriginal governments unilaterally seizing and defining their own jurisdiction and powers, the reverse situation is in fact the more likely scenario - ie. the federal and provincial governments working, whether as a matter of clearly recognized authority or through sheer voting strength, to effectively and "unilaterally" determine what powers they are prepared to give up to First Nations.

Federal concerns about leaving with any one government unilateral decision making power do not sit well with the Indian leadership. While they are confronted with concerns about "unilateral decision making authority" by First Nations, the more likely continued scenario is the federal and provincial governments possessing defacto "unilateral" or final decision making authority in these areas and retaining such authority throughout the negotiations process.

The flip side of the AFN concerns, for the federal government, have been mentioned. For the federal government, and for most, if not all, provincial governments, a situation where Aboriginal governments could effectively unilaterally declare which jurisdictions and powers are to be assumed and when they would be deemed operative, is clearly unacceptable.

Once again this federal position reflects a mix of factors including a fairly limited vision in many quarters of the federal government, in relation to the powers that should and can realistically be exercised by Aboriginal governments, together with a more legitimate concern in relation to how to accommodate over time the large diversity amongst Aboriginal peoples as well as the financial and practical considerations related to the effective elaboration of the right to Self Government across a broad range of program areas.

The end conclusion is that some movement is critically going to be required from both the AFN as well as the federal government - at the present time a gap does exist but it should be a bridgeable one.

It should be noted that a similar gap clearly exists between a significant number of the provinces and the Aboriginal associations. For the purposes of discussion in this paper, the focus will be on possibilities for narrowing the differences that exist between the federal government and the AFN, given that this is where conflict is presenting itself with greatest clarity at the present time.

In examining current federal positions, it can argued that there will need to be a shift in current positions to achieve the following:

- A commitment to come into discussions without pre-conditions or exclusions on the nature, scope and extent of jurisdictions that are effectively open for discussion; Some clear jurisdictions may be the subject of exclusion by negotiated agreement, eg. defence, etc. but such exclusions must flow from agreement, not unilateral decision making.

- A committment that reflects an assurance, acceptable to the Aboriginal groups, that the end result of negotiations will be the transfer of meaningful appropriate governmental and program powers - determined through mutual agreement.

- A fall-back independent appeal mechanism, in the event that the assurance in relation to meaningful jurisdiction does not yield the required results from an aboriginal point of view.

- A related commitment on resourcing to meet the needs of Aboriginal governments rather than merely maintain historical financial allocations - ie. commitment to the principles to guide the development and negotiation of new government to government fiscal relationships.

- Related changes to other parts of the current federal proposals (see infra).

From the AFN would be needed, in the first instance, confirmation that acceptance of the inherent right within the Canadian Constitution involves the clear recognition that Indian governments are being recognized and will exist within the context of the relationships defined with the Canadian Constitution and as such does not provide a basis for pursuing sovereignty in the international sense.

In addition, it would appear that the AFN will need to clearly confirm that it does not adopt an interpretation that recognition of an inherent right would be followed immediately by across the board "open" jurisdictions for Indian governments, to be filled-in through subsequent negotiations.

Such a position, which is still ambiguously kept open in many of the AFN positions and statements to date, would be patently unworkable from both a government as well as an Indian perspective.

The AFN will also need to sort through, and be able to provide to governments, a detailing of how various levels of future Indian government, whether at the First Nation, Tribal Council, regional or national level, will be mandated by First Nation membership at the community level to negotiate in defined areas. The fact that this point needs to be addressed (more an understanding relating to process than end results at this time), is in and of itself a compelling argument against creating the legally and politically unstable vacuum that would result under "the right means we possess all jurisdictions to be narrowed down through subsequent negotiations" approach.

Such a position is unworkable and needs to be clearly set aside by the AFN at an appropriate point in time if any overall agreement is to be reached. Once again a point made earlier should be re-emphasized. To achieve acceptance of such parameters and understandings will require achieving agreement on a package which cumulatively, across all of its elements, provides an acceptable, workable and saleable package for each of the associations.

There will be a lengthy transition period in moving from present structures and arrangements to new relationships on a government to government basis. Any approach which allowed for a jurisdictional vacuum to be created - in favour of

leaving blank Aboriginal jurisdictions to be filled in through detailed negotiations is not going to be acceptable and as indicated will not serve Indian First Nations and their membership well.

If this observation is accurate, it would seem to be necessary that one of the agreements to accompany recognition of the inherent right will reflect a recognition that federal and provincial laws, under the current legislative framework, will continue to apply on an interim or transitional basis, until negotiations have been entered into and recognition of detailed Indian government jurisdictions achieved. Any such agreement to maintaining the current legislative framework on a transitional basis has to in turn be accompanied by clear-language protection that the result of negotiations will in fact be substantial; responsive to the aspirations and needs of individual First Nations and accompanied by clear commitments to negotiate for needs-based financial arrangements on a government to government basis.

If the AFN, with considerable justification on the basis of past history, does not receive guarantees rather than soft political assurances that there will be the recognition of required and meaningful jurisdictions, both within the body of the Constitution and in ancillary agreements as appropriate, then no overall agreement will be achieved.

5.2 Some Specific Suggestions on Parameters and Other Areas Where Agreement Will Be Required

The premise is that the right will be recognized as an inherent right. This is the Indian tie to the past and their foundation for the future.

While clearly tied to Section 35, reflection of such an inherent right and associated understandings will probably need to be provided for in a stand alone section(s) of the Constitution which would remove the uncertainties and possible limitations of the current Section 35 language.

The question of how an inherent right will be "attached" to the Metis will have to be confronted by governments sooner rather than later; ie. the language used will have to accurately reflect both past historical differences as well as differences in application of the general rights recognized in the future.

Clearly the Metis National Council and the NCC are not putting forward a claim to an inherent right on exactly the same basis as the Indians and the Inuit. However, for the constituencies of the MNC and NCC, any end agreements would have to reflect a right and process commitment to negotiate meaningful Self Government appropriate to particular circumstances, and with a clear statement of respective roles and responsibilities of the federal and provincial governments for the future.

The recognition and reflection of an inherent right will likely have to be accompanied by related agreements in the areas discussed in the Sections that follow:

a) <u>Commitment to the elaboration of the Right</u>

There will clearly need to be a constitutional commitment to the processes required to effectively achieve the longer term elaboration of the right specific to particular Aboriginal peoples.

b) <u>Some Clarity on What Constitutes an Indian (Aboriginal) Government</u>

It will now be necessary to achieve some clarity of understanding on which groups at what levels will constitute the "points" of negotiation that federal and provincial governments will deal with. More accurately stated, there is now a need for clarity of understanding on the process for confirming which groups, with what mandates, representing what constituencies.

This is in the end an issue that must be decided upon by the Aboriginal leadership themselves. For example, in the case of Indian people, it can be anticipated based on past AFN resolutions, that it will be individual First Nations who will possess the ultimate decision making power in respect of the negotiation and ultimate exercise of Indian government authority. It will be First Nations who will determine where and on what basis they might opt to

delegate their authority in a clear manner to other levels of organization or Indian government institutions. **Once again clear understandings on the requirements for and the process for confirming negotiation mandates will be essential.**

c) <u>Application of Federal and Provincial Laws</u>

There will need to be an understanding that federal and provincial laws , ie. the current legislative framework, will continue to apply until the specifics of jurisdictional claims by Aboriginal governments are negotiated and accommodated. As indicated, a legal vacuum would be unacceptable and unworkable. Aboriginal government infrastructures are not in place to achieve an automatic occupation of the kinds of jurisdictional fields that will be on the table for discussion.

However, the continued application of the present federal and provincial legal framework must be characterized as <u>transitional</u>, as opposed to reflecting a premise on the part of governments, of a continuing dominant legal framework within which the federal and provincial governments will retain decision-making powers on what jurisdictions will be conceded.

d) <u>Future Application of Federal and Provincial Laws</u>

There will be a need for confirmation in some detail on the process that will be required to elaborate the specifics of Aboriginal government jurisdictions, and the corollary negotiated vacation of those jurisdictions by federal and/or provincial governments.

Once again there will be a requirement for assurances that no government, or governments, will possess, as a matter of authority or voting majorities an effective veto or unilateral decision making powers.

This will mean, for example, that current federal policies and approaches which require Indian First Nations, in negotiation with the federal government, to have their Constitutions "approved" by the Governor-In-Council, would not be acceptable as a premise for future negotiations. Such an approach reflects the federal government retaining to itself an effective total veto power over the results of negotiations.

The federal government urgently needs to engage in a major review of what are the critical interests and areas where it must have some say and where its agreement will definitely be required on a negotiation by negotiation basis.

Current approaches reflect an essentially unquestioned assumption that everything down to the last detail is within the federal purview and will have to be agreed to.

Where areas are claimed to reflect legitimate federal government interests, and where detail is required - the federal negotiators will have to be much better prepared to indicate why such detail is required and for what purposes.

e) **The Need for Independent Arbitration, Review and Decision Making Authorities**

If the concept of a more level negotiating field, as contemplated under the preceding sections is in fact accepted by all participants, it will be desirable to achieve agreement in respect of an independent arbitration, review and decision making capacity, ie. an agreed upon dispute resolution process.

A working through of this suggestion might, in the end result, provide some verification of the seriousness of intent of the federal and provincial governments as well as removing the perception of continuing decision-making control by those governments.

There are any number of possibilities which might be considered here. Careful thought will need to be given to whether the mechanism in question should function at the political level (on a government to government basis)

or might indeed be an independent body, jointly appointed to perform more quasi-judicial functions eg. some form of Commission or Council.

This latter possibility contemplates a body which might act as an arbitrator, review mechanism and/or decision making body in respect of aspects of the specific negotiations that will be required to elaborate the right. Clearly terms of reference will need to be developed on an all-party basis and a premium requirement would be to ensure that such a body did not become overloaded with the "minor details" of specific negotiations. **A clear definition of powers will be criticial.**

Such a structure might, for example, be somewhat similar to the proposed Council of the Federation (where both ironically and unacceptably Aboriginal peoples were not contemplated as playing a role), with a much more specifically focused mandate.

A further line of possibility might be to provide for appeal on legal matters to either the Supreme Court of Canada or perhaps a Supreme Court Bench modified by special empanelling provisions for the hearing of appeals on Aboriginal matters.

Whatever the form and structure, some assurance that review and decisions on disputes relating to future jurisdictions and detailing of Self Government and interrelationships with the federal and provincial governments, will have to be clearly seen to rest with a more balanced, independent and equitable mechanism. If decision-making powers legally or defacto, are left to the federal and provincial governments, agreement is extremely unlikely. Provisions for a continuing political level process at the First Ministers' level to review "on-going progress" clearly do not constitute a sufficient response in this area.

More bluntly stated, it is suggested that the parameters that would be required to guide the negotiation of more detailed Self Government arrangements, will only be acceptable to Aboriginal groups if they are accompanied by an assurance that there is an ability to have those

negotiations, in the end result, yield meaningful results in terms of the jurisdictions, powers and authorities and associated financing that will be required.

If decision-making is left in the hands of the federal and provincial governments, as it has been in the past, realistically speaking no Aboriginal group will be able to say with confidence that the end results that they require can be assured. Accordingly there is a premium on searching for a jointly structured and appropriately mandated body to perform many of the mediation-arbitration-decision making functions that will likely be required as more detailed, but major issues, are confronted.

f) The Canadian Charter of Rights and Freedoms

There will be a need for more explicit understandings on the legal authority and ability of Aboriginal governments, in defined circumstances, to balance individual and collective rights differently than if the Canadian Charter of Rights and Freedoms were applied across the board.

While notionally Section 25 of the Constitution Act provides some implicit recognition of this concept, a detailing of the inherent right would compel a more specific articulation of the general parameters within which the Canadian Charter of Rights and Freedoms might be effectively superseded by the authority of Indian governments, to reflect and accommodate their rights as collectivities in defined areas.

The more explicit recognition of such authority will have to carry with it some agreed upon focus in respect of the type of considerations or areas where the Charter can effectively be superseded, as well as eventual detailed understandings of the process, whereby a duly authorized Indian government will be able to supersede or suspend the operation of the Canadian Charter of Rights and Freedoms. Individual safeguards and appeal mechanisms would require consideration in this context.

At this stage, discussion might usefully focus on some of the same type of considerations as are reflected in the proposals relating to the application of the Charter to Quebec, namely:

a) Protection of language;
b) Protection of culture;
c) Protection of traditional Indian government political structures, etc.

g) **The Ten Year Negotiation Period and Enforceability of the Right**

It is suggested that the package recognizing an inherent right, accompanied by agreed upon parameters in some of the abovementioned areas, would need to be accompanied by some other adjustments in current federal proposals.

The justiciability of the right, and the proposals in relation to when that right would be enforceable require review.

The 10 year negotiation period prior to the right being enforceable, as provided for in the current federal proposals, is optically bad - even though it sought to accommodate the reality of extended negotiation requirements with many diverse Aboriginal groups.

It is suggested that as part of the overall revisions to the package, and indeed to render palatable the suggested parameters discussed above, it should be clearly indicated that the inherent right would be justiciable from the outset. It will be remembered that the inherent right will not be recognized unless it is accompanied by agreements in most of the other areas indicated above, especially the requirement to clarify the continuing application of federal and provincial laws during a transitional period, as well as in the longer term.

It will be up to Aboriginal groups to determine whether they wish to risk the courts before giving negotiations a try.

It is further suggested that the 10 year "cut off point" (as characterized by The Honourable Kim Campbell in her recent address) be either removed altogether or re-characterized and re-explained. The latter approach may not now be possible - the issue has been so distorted in public communication to date.

The full elaboration of the right as it relates to the many different Aboriginal groups across the country will, in many instances, require more than 10 years by the time the required developmental work has been undertaken to be followed by the detailed negotiations that will be required on a local basis.

They key to acceptance of the overall package, and the understandings in relation to the right in particular, is not going to be through suspending legal enforceability of the right to accommodate required negotiations.

It will be in leaving Indian peoples the right to make the choice. The understandings that will be critical to achieving any agreement on the actual recognition of the inherent right should provide sufficient incentive for all involved to go the negotiation route. Continued emphasis on a 10 year time period, during which the enforceability of the right would be suspended, merely creates an unnecessary optical obstacle which has the effect of compounding some of the other difficulties identified above.

It should also be evident that entrenchment and immediate justiciability of the right will still leave a requirement for aboriginal governments to negotiate not only in relation to jurisdictions, but more importantly, detialed aspects of financial arrangements. The Aboriginal participants will in one sense have more to lose than the federal and provincial governments if the negotiations fail. The inherent right without more, cannot involve finite detailed financial support obligations.

h) **The Proposed Canada Clause**

The AFN has indicated continued problems with the suggested content of the proposed Canada Clause. Two different types of problems are identifiable:

1) "Two founding nations" without reference to the place of the original occupants in the founding of the Nation, will continue to present legitimate problems to Aboriginal peoples.

2) The reference to Aboriginal governments in the past tense will not be acceptable.

The challenge here is to reflect:

1) The fact of original occupany and associated Aboriginal governments in positive complementary language - the oft repeated "this did not all start when Columbus fell off the boat" is legitimate and requires different accommodation.

2) Language which focuses on the fact of Aboriginal governments historically - their continuation albeit in a suppressed form, and the need to elaborate in modern day terms the place and scope of authority of Aboriginal governments based on recognition of their inherent right to Self Government.

The reality, as acknowledged (to some degree) by the government, is the historical existance of Aboriginal governments, suppression of those governments by the colonizing powers, to now be followed in the 1990s by a modern day articulation of an appropriate place for such governments in the context of a revised Canadian Constitutional Framework.

This historical and present day reality and the "historical flow" as described, has to be seen to be reflected in positive contributory terms - which should not be an impossible task.

i) Some Other Areas

Although not related to "parameters" as such, there are a number of other areas which will likely be of importance to the overall "package" approach, which is suggested as critical to achieving agreement on the "parameters" to accompany recognition of the inherent right.

These other areas are identified in point form without extended discussion at this time.

1) The Entrenched Continuing Process

To deal with matters not effectively addressed and to politically monitor progress on the negotiations focused on elaborating the rights.

See comments on proposed Dispute Resolution Mechanism which should be seen as complementary to the on-going political process.

Clarity of mandate, structure, etc. will be required as part of any overall deal.

2) Aboriginal Participation in the Senate

Only possible, if at all, if it is clear seen as complementary to the recognition of Aboriginal governments in their own right.

Clarity of the nature and status of Aboriginal participation will be required.

Should the comments be considered - if not, why not?

3) Entrenchment of Property Rights

If the proposals are retained, they will be problematic on a number of fronts for Aboriginal peoples.

4) Appointment of Judges to the Supreme Court

See suggestions above on possible special empanelling provisions for the hearing of Aboriginal issues.

5) Amending Formula

Need for clear and acceptable provisions in relation to:

a) What areas will require Aboriginal input/consent through a modified amending formula - not just narrowly defined Aboriginal-specific issues.

b) Concerns about any retention of requirement for unanimity as it may effect the ability to make future changes in which Aboriginal peoples have legitimate interests.

c) Protection for Aboriginal constitutional provisions and rights, with precision on Aboriginal consent requirements as a component of any adjusted amending formula.

6) Residual Government Jurisdiction

Clarity in respect of a continuing federal residual role in Aboriginal matters - to be dealt with in the provisions relating to the future application of federal and provincial laws.

7) Council of the Federation

The issue of Aboriginal participation needs to be addressed.

6.0 WHAT MIGHT THIS LOOK LIKE?

By way of summary, what might "inherency" mean and involve in practical, cumulative terms.

(1) An Aboriginal Package

An overall package reflecting significant amendments within a number of the areas contained within the initial federal proposals.

(2) Inherent Right Plus Accompanying Agreements

Recognition of an inherent right to Aboriginal Self Government subject to and in the manner prescribed in specified sections of the Constitution and/or designated ancillary agreements.

(3) Changes to the Proposed "Canada Clause"

Adjustments to the language of the proposed amendments that reflect the fact that Aboriginal peoples (Indian and Inuit) were historically self governing and remain in possession of that right today, with the specifics of the right to be elaborated in modern day terms in accordance with the understandings suggested.

(4) Confirmation of the Fact That the Right Will Be Elaborated Through Negotiations

Reflection of the fact that the inherent right is recognized and is to be further elaborated in the context of the revised Canadian Constitutional Framework of which it is now part.

(5) Right Within and Part Of a Revised Canadian Constitutional Framework

Explicit confirmation in an appropriate manner that the right recognized within the Canadian Constitutional Framework does not provide a basis for the assertion of sovereignty in an international sense.

(6) Nature of the Right and Its Elaboration Will Be Different for Different Aboriginal Peoples Depending on Circumstances

Reflection of the fact of a difference in the nature of the right recognized as between Indian and Inuit on the one hand (where the right can be classified as inherent) and the Metis. This consideration may be accompanied with more "sensitivity" by careful drafting of the provisions detailing the process for elaboration of the right to adapt to different Aboriginal peoples.

(7) Agreement on How Negotiation Mandate of Aboriginal Groups Will Be Confirmed

Agreement on the broad principles that will provide guidance in determining which Aboriginal groups, at which levels will be eligible to negotiate - probably in the form of a clear indication from the Aboriginal leadership on the process that will be used to obtain and confirm authority to negotiate from a particular membership or constituency for prescribed purposes, whether at the First Nation/local community, Tribal Council, regional, provincial or national levels.

(8) Specific Understandings For Elaboration of Right For Non-Land Based Aboriginal Peoples

A general agreement on the principles to be applied in the elaboration of the right for Aboriginal peoples not residing on an Aboriginal land base.

(9) Commitment and Principles to Guide Negotiation of New Fiscal Arrangements and Government Responsibilities

Agreement on the principles to guide the negotiation of new government to government and institutional and program specific financial arrangements as well as the principles and/or process for the effective clarification of the future responsibilities of the federal and provincial governments in respect of such financial arrangements.

(10) Continued Application Of Current Legislative Framework On A Transitional Basis

Understandings to the effect that the current legislative framework would apply on a transitional basis until the specifics of the jurisdictions to be possessed by specific Aboriginal governments and their institutions are negotiated and accommodated. The parties will need to confirm that a legal vacuum is an unacceptable end consequence of the recognition of an inherent right.

(11) Confirmation of Negotiation of Significant Aboriginal Jurisdictions

Confirmation that beyond the transitional period, there will be recognition of significant jurisdictions appropriate to the needs and circumstances of the Aboriginal government involved, and that the vacation of those jurisdictions, to the extent that they are currently occupied by the federal and provincial governments in those areas, will occur.

(12) Detailing Of Types of Jurisdictions and Powers By Way of Example

A more specific detailing than currently provided, of the types of jurisdictions and arrangements that may result, going significantly beyond the current simple list of jurisdictional sectors. This is required to provide some confirmation of the seriousness of intent to achieve major adjustments over time, not just quasi-municipal government delegated powers, as is still the fear of many of the Indian leadership.

(13) Dispute Resolution Mechanism for Major Issues

Agreement on political and/or quasi-judicial structures with an appropriately focused mandate to constitute a dispute resolution process - ie. to review, arbitrate and make decisions on major issues arising from the elaboration of the right through negotiations with particular Aboriginal groups. Such a dispute resolution process might also involve, for example, defined rights of

appeal to a specially constituted panel of the Supreme Court of Canada on major specified issues.

(14) Commitment to Entrench On-Going Political Process

The review and arbitration, or dispute resolution process should be accompanied by an all party commitment to a formal on-going government to government political structure, or structures, to review progress, deal with outstanding issues and generally oversee the implementation and fine tuning of the new relationships established.

(15) Status of Application of Canadian Charter of Rights and Freedoms

Explicit recognition that the Canadian Charter of Rights and Freedoms can be superseded by Indian governments in defined areas and through agreed upon processes, to reflect and accommodate the rights of collectivities. An override or suspensory power, but subject to clear understandings in relation to which governments can use such power, in what manner and in relation to clearly defined interests, eg. language, culture, traditional government structures, etc.

(16) Right Immediately Justiciable - Removal of Proposed Ten Year Period

Agreement that the rights recognized will be justiciable immediately. Removal of the 10 year timeframe to the extent that this has been proposed or interpreted as a "cut off date" for negotiations as well as period during which the right would not be legally enforceable.

(17) More Sensitive reflection of the Place of Aboriginal Peoples in the Founding of Canada

Adjustments at appropriate points in the body of the Constitution to reflect the fact that the revised Constitutional Framework reflects three structural components - the original Aboriginal occupants, and the two subsequent founding French and English peoples.

(18) Other Revisions Reflecting Government to Government Relationships and the Principle of Equality

Revisions to other elements of the package to provide for and reflect a principle of equality of government (including Aboriginal government) participation, eg. participation of representatives of Aboriginal governments in the proposed Council of the Federation.

Somewhat simplistically cast and reflected within the overall "package" summarized above, are a series of specific parameters which it is suggested be attached to the recognition of any inherent right. By way of summary, these are:

a) The explicit confirmation that the right is recognized and is to be elaborated in modern day terms within, and as part of the Canadian Constitutional Framework.

b) The transitional application of federal and provincial laws under the current legislative framework, to ensure that no legal vacuum exists while negotiations proceed.

c) The negotiated removal of provincial and federal jurisdictions and recognition of Aboriginal government jurisdictions without precondition or exclusion in terms of what is negotiable.

d) The explicit recognition of when and on what basis the Canadian Charter of Rights and Freedoms can be superseded by Aboriginal governments to reflect their collective rights and interests.

e) Identification of an agreed upon dispute resolution process to deal with disputes relating to the modern day elaboration of the inherent right to Self Government.

f) Commitment relating to future financial arrangements and associated responsibilities of the federal and provincial governments.

7.0 CONCLUSIONS

Past federal and provincial concerns relating to the recognition of an Aboriginal right to Self Government are in the end significantly driven by concerns relating to political power, ability to control and the impending inevitability of a fairly major redistribution of financial and other resources.

Government fears which focus on a lack of clarity in AFN positions, particularly in respect of clear confirmation that an inherent right would not be used as a springboard to claims to international sovereignty and unilateral Aboriginal decision-making in respect of their government jurisdictions and powers, are legitimate, but only to a certain point.

This paper has suggested areas where related understandings will be critical to any possibility of constitutionalizing the right as an inherent right.

Movement by the federal (and provincial) governments, as well as clarity of position and associated movement, on the part of the AFN in particular, is now critically required.

The immediate requirement is to focus discussions in two ways:

a) What are the range of elements that will be required in a total package; and

b) The issues that now have to be dealt with within each of the areas that will make up that total package.

Central to the package are the so called "parameters" that would accompany recognition of the inherent right.

Language will be critical here. Parameters are by definition restrictions or limitations. The challenge will be to demonstrate that the essence of the right will not be undermined, or even more critically, contradicted by the nature and content of the so called "parameters".

It is suggested that the word "parameters" be discarded. In effect we are talking about related ancillary or interpretative understandings.

The most challenging of these understandings will be in relation to:

a) Avoiding creation of a legal vacuum, by reaching agreement on the basis for maintaining the current legislative framework on a transitional basis; to be counterbalanced with

b) Commitments that the process of elaborating Aboriginal government jurisdictions will be conducted on an equal basis and will yield meaningful results - not just a perpetuation of past, and to a large degree, current federal views of marginal adjustments to allow Aboriginal peoples to manage their own programs.

One without the other will mean agreements will not be achievable.

In this regard, some final reference to the US experience is desirable.

The US recognition of Tribal sovereignty has two over-simplified characteristics:

a) The benefit of the doubt is in favour of US Tribal governments in the event of a disputed jurisdiction **but**

b) The counterbalance is a clear congressional power of regulation, override and effective veto, accompanied by a parallel capacity in the courts to provide "judicially determined limitations" on Tribal government powers and actions.

The approach suggested in this paper is to alter the balancing between these two factors through all elements to be included in the package:

a) To provide more incentive and requirement for negotiated change to the current framework;

b) To reduce or proscribe the unilateral decision-making power of the federal government (and provincial governments) in a carefully detailed manner.

It is suggested that the re-balancing of these two critical elements, is dictated by the fact that the acceptance and elaboration of the right to Self Government as an inherent right is coming in the 1990s (not the 1800's as occurred in the United States), and that all fields of jurisdiction are effectively occupied by a complex mix of federal and provincial government laws and regulations, as well as thrid party interests, in many instances.

The realignment of current jurisdictions and responsibilities and more importantly, the vacating of occupied jurisdictions in favour of Aboriginal government jurisdictions, will only occur over a lengthy period of time, as developmental work is undertaken and capacities are built and strengthened. In addition, this process will involve the sensitive identification and accommodation of a broad range of third party interests across the country.

By way of overview summary, some final questions and answers:

a) ***Is there the basis for agreement in principle on the part of all major participants that an inherent right to Self Government might be included in a revised Constitution?***

Federal	-	open to discussion
Ontario	-	yes, subject to elaboration
Saskatchewan	-	possibly
British Columbia	-	possibly
Manitoba	-	All Party Report - yes
Other Provinces	-	information not available
AFN	-	Not at this time - but possible
Inuit	-	Possible
MNC	-	Probable
NCC	-	Probable

b) Where might such an inherent right best be reflected in a revised Constitution?

Possibilities include:

- a modified Section 35
- a Stand Alone Section

Probability - stand alone section to avoid uncertainties and limitations of current Section 35 wording.

c) What will likely have to accompany the recognition of an inherent right?

1) All party agreement on principles, parameters, and limits - effectively providing the framework - the basis upon which the three levels of constitutionally recognized government will relate to each other for the future.

These will likely include by way of example:

- The right to be recognized as part of, and within the context of a revised Canadian Constitutional Framework;
- Continued application of the current legislative framework on a transitional basis;
- Commitment to processes that will yield the recognition of meaningful Aboriginal government jurisdictions - no limits set unilaterally on what is negotiable;
- Acknowledgement that the Canadian Charter of Rights and Freedoms can be superseded in its application in defined areas and through defined processes;
- An agreed upon independent Dispute Resolution Process to deal with major issues arising from the negotiations elaborating the right, eg. who has standing; and

- Commitments relating to future fiscal arrangements and an associated realignment of the responsibilities of the federal and provincial governments.

2) Agreement on the process to be used to arrive at the modern day translation of that inherent right for different Aboriginal peoples.

3) Agreement on a political level process (reflecting the government to government relationship) to oversee the effective working through and negotiation of the specifics.

4) Agreement on an appropriate dispute resolution process.

5) Agreement on where understandings in each of these areas might best be reflected, eg.:

	Constitution	Political Accord
1)	The Right	Restated
2)	Broad Parameters	Restated
3)	Commitment to Process	Details of Process
4)	Commitment to Political Process to Oversee	Details of Political Process
5)	Commitment to DRM	Detail of DRM

The above re-summarizes the major elements. The task ahead is to begin discussions and development of positions that will be required to bring together each of these elements as well as the overall package that will be required for the individual elements to be sustained.