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Constitutional Amendment: The Ultimate Challenge

THE CENTRAL DOCUMENT OF CANADA'S constitution is the Constitution Act, 1867 and its various amendments, the most significant being the Constitution Act, 1982. The constitution consists of far more than these acts, however. Constitution building began much earlier and reflects the evolution of relations among Aboriginal people and French and British settlers. (See Volume 2, Chapter 3 and our constitutional discussion paper, *Partners in Confederation*.[1])

Throughout our report, there are references to decisions of the Supreme Court of Canada that have helped shape and determine the meaning of Aboriginal and treaty rights under the constitution. Through such interpretations, the constitution takes on new meaning and direction. The constitution has also evolved through unwritten conventions and customs that are as much a part of the constitution as the written text. Perhaps the most familiar are the conventions concerning the operations of cabinet government and the role of the Crown in governance. There are also a number of statutes that breathe life into the concepts, values and structures embodied in the constitution. Obvious examples include the Supreme Court Act, the Official Languages Act and the Canada Elections Act. Clearly, then, the Canadian constitution is not static but rather a living, vibrant instrument that is constantly evolving.

How is constitutional change brought about? The most obvious method is formal amendment. Amendments may add provisions to the constitution, as with the Canadian Charter of Rights and Freedoms, added in 1982. They may change specific provisions such as the amendments made in 1965 to set a retirement age for senators. Formal amendment has not been the most common means of securing change, however. Decisions of the Supreme Court of Canada and before that the Judicial Committee of the Privy Council (until 1952) have had a profound influence on the constitution, its interpretation and its development. The results of federal-provincial jurisdictional disputes have had far-reaching and permanent effects on the division of powers between those two orders of government. Judicial interpretation and the advent of the Charter have clarified and developed Aboriginal and treaty rights.

Over time, parts of the constitution may fall into disuse, as the federal powers of disallowance and reservation have done. The same thing may ultimately happen to section 91(24) of the Constitution Act, 1867 as federal powers in relation to "Indians, and Lands reserved for the Indians" are gradually replaced by Aboriginal self-government.

The constitution has also been altered through public policy development and implementation. Public policy can be developed in a number of ways, including legislation, spending decisions of government and treaty making. There is an array of processes for achieving policy goals, ranging from public consultation, parliamentary committees, royal commissions and referendums to federal-provincial meetings and general elections where a single theme may predominate.

When the constitution is changed through a formal amendment, people can see the change and assess its implications. The same is true of amendment by way of court decisions. Change through policy development is much more subtle, however, because the constitutional consequences may not be readily apparent for some time. A clear illustration of this is the evolution of the federal spending power over the last 50 years. We have referred a number of times in this report to the Canada Health and Social Transfer (CHST), which replaced the Canada Assistance Plan and Established Programs Financing with a single, unconditional transfer to provinces. This was the most recent and perhaps most significant development with respect to the spending power since the Second World War.

Often, a public policy decision is a result of intergovernmental agreements. In many instances, constitutional boundaries are stretched to new limits through the dynamic of intergovernmental relations. The range of matters covered by federal-provincial financial relations — tax collection agreements, equalization payments and the funding of social programs through the CHST — shows the importance of this process. Another example is the agreement on interprovincial trade signed by the federal and provincial governments in July 1994. This agreement was reached even though two years earlier most provincial governments were unwilling to consent to a constitutional amendment on this subject during the Charlottetown negotiations. Compared with a constitutional amendment, an intergovernmental agreement allows for greater flexibility in its provisions and reduces the role of courts in its interpretation.

Clearly, then, understanding the concept of negotiation is central to understanding and implementing many of the recommendations in this report. The Canada-wide framework agreement recommended in Volume 2, Chapter 3 is an excellent example of a multilateral negotiation process involving federal, provincial, territorial and Aboriginal representatives. That agreement, when concluded, will rank as a major constitutional document. In Volume 2, Chapter 2, in particular our discussions of treaty making, implementation and renewal processes, we make a critical distinction between 'negotiation' and 'process'. Whereas negotiation is seen all too often as a one-time event, process suggests a continuing dialogue. A close analogy in federal-provincial relations is Canada's system of fiscal federalism, which is the result of more than 50 years of discussion, negotiation, experimentation and consensus building. Indeed, it is still evolving, and no end to the dialogue is in sight. Through a comparable nation-to-nation process of treaty making, renewal and implementation, a renewed relationship will emerge between Aboriginal people and non-Aboriginal people in Canada. This too will be the product of continuing negotiations that result in agreements that themselves are capable of change and development over the years.

Rights contained in agreements resulting from the negotiation process with Aboriginal nations are protected under section 35 of the Constitution Act, 1982. While constitutional boundaries can be stretched to meet new circumstances or be given new meaning by mutual agreement, those charged with concluding and implementing agreements are usually conscious of the fact that they are negotiating in the shadow of the courts. Negotiating an agreement to further public policy is preferable to resorting to legal action. Indeed, when governments do go to court to resolve a jurisdictional dispute, it is usually because intergovernmental negotiations have failed.

Early in our mandate, Commissioners realized that significant and wide-ranging change with respect to Aboriginal self-government was possible within the existing constitutional framework.[2] In this report, therefore, our recommendations are presented in such a way as to ensure that they can be implemented without constitutional change. The one exception concerns entrenchment of the Alberta Metis Settlements Act, discussed later in this chapter.

Following the Quebec referendum of 30 October 1995, however, and the subsequent federal legislation giving a federal veto on constitutional amendments to Canada's regions, there is also a possibility that significant constitutional change will be considered in the coming years. In light of this new scenario, the Commission believes strongly that constitutional questions of vital importance to Aboriginal peoples must be given equal weight and consideration. We identify six essential elements:

1. explicit recognition that section 35 includes the inherent right of self-government as an Aboriginal right;

2. an agreed process for honouring and implementing treaty obligations;

3. a veto for Aboriginal peoples on amendments to sections of the constitution that directly affect their rights, that is, sections 25, 35 and 35.1 of the Constitution Act, 1982 and 91(24) of the Constitution Act, 1867;

4. recognition that section 91(24) includes Métis people along with First Nations and Inuit;

5. constitutional protection for the Alberta Metis Settlements Act; and

6. alterations to section 91(24) to reflect the broad self-governing jurisdiction Aboriginal nations can exercise as an inherent right and to limit federal powers accordingly.

We would reiterate, however, that all but one of our recommendations can be implemented without a further constitutional round, and we would urge governments to proceed with implementation on that basis.

Based on the findings of extensive research conducted for the Commission and our own assessment of the constitution, Commissioners have reached a number of legal

conclusions that clearly push the boundaries of the constitution to new limits. Critics of these conclusions may well disagree and offer alternative interpretations. Rather than risk conflict over what the constitution does or does not mean, some would prefer to resolve issues through formal constitutional amendment.

Some differences in constitutional interpretation are acknowledged in this report. One example is our conclusion about the applicability of the Canadian Charter of Rights and Freedoms to Aboriginal governments. In his study for the Commission, Kent McNeil concluded that it does not apply; other experts, including Peter Hogg and Mary Ellen Turpel, concluded that it does.[3] To compound the problem of interpretation, many Aboriginal people believe that, regardless of what the constitution says, the Charter should not apply to them because they never consented to it and it does not reflect their values.

The issue could be resolved through formal constitutional amendment or through litigation. The question raises the prospect of a legal challenge from adherents of one of the stated positions. How such a case might arise is perhaps of less significance than the eventual resolution, which is linked to an interpretation of section 35(1) of the Constitution Act, 1982. We conclude that the Aboriginal and treaty rights recognized and affirmed in that section include the right of self-government. It is impossible to predict whether the Supreme Court would reach the same conclusion, but it is a major premise upon which much of our report is based.

An alternative to judicial interpretation to decide this issue would be a constitutional amendment. In the past, most fundamental changes in the constitution have been the result of judicial decision or amendment. Aboriginal and treaty rights have been reinforced by both methods — by the addition of section 35 in 1982, and by the courts in decisions such as Sioui and Sparrow.[4]

The two processes are fundamentally different. In our discussion of treaties in Volume 2, Chapter 2, we questioned whether the courts are the appropriate forum in which to settle what are essentially political disputes and suggested that the courts have probably gone about as far as they can go. On the other hand, the level of political consensus required for constitutional amendment is not easy to achieve, as experience has demonstrated. In 1987, after four years of effort, a proposed constitutional amendment to recognize the inherent right of Aboriginal self-government failed to achieve the necessary provincial government consensus required during the negotiation phase. In June 1990, the Meech Lake Accord failed because it did not receive the support of two provincial legislatures, despite having been approved twice by the House of Commons and by eight other provincial legislatures. In 1992, the Charlottetown Accord was rejected in a Canada-wide referendum.

1. The Amending Formula

As the fundamental law of the land, the constitution should be difficult to change. It is not unusual for constitutions to require an extraordinary majority of some kind, particularly

in the case of federal systems. In other words, a high degree of consensus among the people and their governing institutions is an appropriate prerequisite for constitutional change.

The Constitution Act, 1982 specifies complex formulas for amending the constitution, reflecting the fact that the constitution has its origins in an act drafted 130 years ago.[5] Thus the act reflects and combines the concerns and constitutional positions prominent in the 1970s and early '80s, when it emerged, as well as various constitutional conventions on amendment that had developed since Confederation.

Four provisions for changing the constitution are relevant to our discussion. The general amending formula (the process that would apply to most amendments) is contained in section 38(1) of the Constitution Act, 1982.[6] An amendment under section 38(1) requires an affirmative vote by both houses of Parliament and by two-thirds of the provincial legislatures representing 50 per cent of the population.[7] At present this means seven of the 10 provinces. Given the current distribution of the population among the provinces and the fact that the combined population of Ontario and Quebec is more than 60 per cent of the total population, an amendment would therefore require the consent of either the Ontario legislative assembly or the Quebec National Assembly. It should be noted that under section 38(1), Parliament is the only legislature with a veto on any amendment.[8]

Under section 41 of the Constitution Act, 1982, certain amendments require unanimity, which means that both houses of Parliament and the legislatures of the 10 provinces must concur.[9] The list of amendments subject to the unanimity rule is short and includes the following:

• the office of the Queen, the Governor General and the Lieutenant Governor of a province;

• the right of a province to a number of members in the House of Commons not less than the number of senators by which the province was entitled to be represented in 1982 (when the formula came into effect);

• subject to section 43 (discussed below), the use of the English or the French language;

• the composition of the Supreme Court of Canada; and

• an amendment to the amending formulas.

In the Commission's view, at least three of the items are potentially of interest to Aboriginal people, as discussed later in this chapter.

Section 42 identifies certain institutional amendments requiring approval under the general amending provisions set out in section 38(1):

• the principle of proportionate representation of the provinces in the House of Commons prescribed by the constitution of Canada;

• the powers of the Senate and the method of selecting senators;

• the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators;

• the Supreme Court of Canada (except for amendments affecting the composition of the court);

• the extension of existing provinces into the territories; and

• the establishment of new provinces.

In effect, several provisions in sections 41 and 42 clarify the limits of Parliament's authority under section 44 to "make laws amending the constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons".

The final way to amend the act is section 43, which provides for amendments that affect one or more but not all provinces. It was under this section that New Brunswick expanded the scope of its language guarantees under the Canadian Charter of Rights and Freedoms in 1993, and it is under this provision that Alberta is seeking constitutional protection for its law on the province's Metis settlements. It is also under section 43 that any alteration to boundaries between provinces would take place.

In addition to these specific requirements for approving constitutional amendments, several other provisions warrant consideration. The first is the 'opting out' provision in section 38(3). Most amendments can be secured upon agreement by both houses of Parliament and two-thirds of the legislative assemblies of provinces representing 50 per cent of the population. But what happens if one or two, but not more than three, provinces disagree with a particular amendment? Section 38 does not give any province a veto over an amendment but it does provide a protective shield. Section 38(2) identifies classes of amendments that derogate "from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province".

Under section 38(3), an individual province can opt out of any amendment that falls within this category; in other words, it cannot veto an amendment, but it is not required to accept amendments to which it objects. This section applies to a wide range of constitutional provisions, including sections of the Charter, provincial legislative authority found in sections 92, 92A, 93, 94A and 95, proprietary rights with respect to natural resources in section 109, and intergovernmental immunity from taxation in section 125 of the Constitution Act, 1867. Thus, where an amendment diminishes provincial legislative authority or affects a province's natural resources or other rights, individual provinces have legal protection in situations where they are in disagreement with the amendment. However, under section 40, it is only when an amendment relates to

education and other cultural matters that "Canada shall provide reasonable compensation to any province to which the amendment does not apply". Although the examples given apply to amendments to existing constitutional provisions, section 38(3) would also apply to any new provisions that fell within its scope.

Another provision of some importance is one regulating the time lines necessary to secure an amendment. Section 39 specifies that amendments proposed under section 38 that do not secure the required degree of support lapse after "three years from the adoption of the resolution initiating the amendment". It was on this rock that the Meech Lake amendment foundered. The same section establishes a minimum time limit as well, stating that no amendment can be proclaimed within a year of the adoption of a resolution unless all provincial legislative assemblies have dealt with the resolution. (The 1983 amendment on Aboriginal matters could not be proclaimed until 1984 because, even though it had met the necessary threshold under section 38(1), the Quebec National Assembly had not yet considered the matter.) In other words, consensus for an amendment must be developed and maintained within a fixed period of time. (There is no time limit for amendments initiated under section 41, the unanimity provision.)

It is instructive to compare the time limits set in the amending formula with the length of time it takes for a constitutional law case to move through the court system. Many of the most important Canadian constitutional law decisions have resulted from references by governments to the courts. A reference is a procedure by which a government asks a court for an interpretation of the constitution on a specific question. Only the federal government can refer questions directly to the Supreme Court. Most references are decided within a year of the request being filed. This does not include the lead time required to draft the question to be asked. References that originate at the provincial level take longer but they are also likely to be decided within the same time limits as the amending formula. Cases other than references take considerably longer and invariably would take much longer than the three-year maximum time limit contained in the amending formula.

As if the approval thresholds of the amending formula are not difficult enough, during Canada's recent experiences with constitutional amendment, governments have added some extra hurdles. Since 1982, when the amending formula was approved, our track record with respect to constitutional amendment has been marked more by failure, acrimony and complaints about the process than by success. These efforts in turn have spawned a variety of processes that are in effect supplementary procedures to the amending formula in the Constitution Act, 1982. These procedural innovations can be summarized in two words: public participation.

The doors to public participation were opened wide in 1980-81 during the parliamentary committee hearings on the draft text of the Constitution Act, 1982. With the addition of leaders of Aboriginal organizations and the two territorial governments, they were opened again, although in a different fashion, during the series of constitutional conferences "respecting constitutional matters that directly affect the Aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be

included in the constitution of Canada", which took place between 1983 and 1987.[10] During the Meech Lake negotiations of 1987-1990 Canadians demanded a say on the proposed constitutional amendment, and public hearings were held by two parliamentary committees, one in the summer of 1987 and another in the spring of 1990, when the idea of a companion resolution to the Meech Lake resolution was given consideration. In addition, there were public hearings by legislative committees in Quebec, Manitoba, Ontario and New Brunswick. In 1992, all Canadians were involved in a new ratification process — the third country-wide referendum in Canadian history.

The recent focus on constitutional amendment has produced other policies as well. For example, in 1986, the 1983 proposed amendment to the language provisions of the Manitoba Act changed the Manitoba Legislative Assembly's rules on processing constitutional amendments, establishing a fixed number of days for debate in the legislature and setting a requirement for public hearings. It was because of these rules that Elijah Harper, the lone Aboriginal member of the Manitoba Legislative Assembly was able to delay a vote on the Meech Lake resolution until the time limit expired.[11] The Meech Lake experience caused both British Columbia and Alberta to enact legislation requiring a provincial referendum before the government can introduce a constitutional amendment in the legislative assembly. Quebec had two referendums on its constitutional status, one in 1980 and the second in 1995. Under federal referendum legislation, the government of Canada can conduct a constitutional referendum should it choose to do so. The difference between the federal law and those of British Columbia and Alberta is that the former is permissive while the latter are mandatory. These, then, are some of the additional challenges of constitutional amendment that have evolved over the past few years.

Before assessing the application of the amending formula to the specific concerns raised in this report, two other points should be mentioned. The first is that the Yukon and Northwest Territories have no formal role in the amending process. Both territories participated in negotiations on proposed amendments on Aboriginal matters between 1983 and 1987 and in the negotiations leading to the Charlottetown Accord, but a vote by a territorial assembly has no direct effect on the outcome. The same applies to Aboriginal nations. The 1983 amendment to the Constitution Act, 1982 commits, but does not require, federal and provincial governments to consult with Aboriginal peoples on amendments to sections of the Constitution Act in which they are mentioned, specifically section 91(24) of the Constitution Act, 1867, and sections 25, 35 and 35.1 of the Constitution Act, 1982. Thus, other than a probable say in drafting an amendment, Aboriginal people as individuals and Aboriginal nations as political entities have no formal role in ratification other than as voters in a federal or provincial referendum.

We believe, however, that a strong argument can be made that the participation of Aboriginal peoples and territorial governments in the Charlottetown negotiations established a constitutional convention requiring their participation in future constitutional conferences. Moreover, it should be understood that their participation covers all subjects on the agenda, not just those of immediate consequence to Aboriginal peoples. The reality is that the entire Constitution Act, 1982 is of concern to them. The

moral legitimacy of any future constitutional amendment would be brought into question if Aboriginal people did not have a say in its content.

2. Constitutional Amendments and the Commission's Report

How does this discussion of constitutional amendment apply to our recommendations? Again, we emphasize that the recommendations (save the one on the Alberta Metis Settlements Act) can be implemented without constitutional amendment. Nevertheless, in the event that proposals for constitutional change become the focus of government attention in the future, the matters addressed in this chapter should be on the table for consideration, with priority on the six essential elements identified at the beginning of the chapter. The Commission considered four categories of potential amendments: amendments for greater certainty, consequential amendments, institutional amendments, and others.

2.1 Amendments for Greater Certainty

Two groups of recommendations in this report rely on governments and courts accepting the Commission's interpretation of the Constitution Act, 1982. The first concerns our interpretation of section 35 and is found in our discussion of the inherent right of self-governance as it is entrenched in the constitution (see Volume 2, Chapter 3). We have concluded that section 35 recognizes and affirms the inherent right of self-government as an existing Aboriginal and treaty right, and that Aboriginal nations can assume jurisdiction without benefit of a new treaty arrangement in core areas, including education, health, social services, languages and culture. Furthermore, we have concluded that the Canadian Charter of Rights and Freedoms applies to Aboriginal nation governments under section 32(1) and that such governments have the benefit of section 33, the notwithstanding clause.

These conclusions may be challenged, and the Supreme Court may find our interpretation incorrect. Although we think this unlikely, without the certainty provided by a constitutional amendment, it remains a possibility. The way to resolve this uncertainty is with a constitutional amendment — a negotiated amendment with Aboriginal peoples at the table to assure that their position is protected. Advocates of constitutional amendment are unwilling to adopt a 'wait and see' attitude, contending that there is too much to lose if a court decision proves unfavourable. An adverse court decision would not rule out the possibility of constitutional amendment, but it would reduce proponents' leverage at the negotiating table. After the Supreme Court gives its interpretation, it would be up to those who disagree to persuade federal and provincial governments that an alternative interpretation is preferable. Moreover, Aboriginal nations have no formal role in the amending process at present and consequently would not participate as full partners.[12]

What would such an amendment look like? One possible starting point would be the text drafted during the 1992 Charlottetown negotiations, which recognized the inherent right of self-government in Canada and established a constitutional framework for negotiation. But while the referendum results suggest that it was favoured by Métis people and Inuit,

many people in First Nations communities opposed that part of the amendment or the amendment on treaties. It cannot be assumed, therefore, that this text would be the starting point.

Governments might be willing to recognize the inherent right of self-government despite a restrictive interpretation of section 35 by the courts, but it is not certain they would.

We conclude that any forthcoming constitutional negotiations should include efforts to arrive at an agreed amendment to recognize explicitly Aboriginal peoples' inherent right of self-government, with Aboriginal nation governments forming one of three orders of government in Canada. Though existing treaty rights are recognized in section 35, treaty nations do not see section 35 on its own making a substantial difference with respect to Canadian governments' willingness to implement their treaty obligations. They want the question of treaty implementation on the agenda for constitutional reform.

The second amendment that could be made for greater certainty relates to section 91(24) and our conclusion that Métis people are included in the term "Indians" just as Inuit were included as a result of a Supreme Court decision in 1939 (see Volume 4, Chapter 5).[13] To date, the government of Canada has rejected the interpretation that section 91(24) includes Métis people. This issue may become the subject of a reference to the Supreme Court of Canada, initiated by the federal government acting on its own or at the request of the Métis National Council, which is anxious to have the issue resolved.[14] An amendment could be seen as the best means of providing the guarantees Métis people are seeking, an alternative that we propose in Volume 4, Chapter 5. (See our recommendation in Volume 4, Chapter 5 concerning the reference route if the government of Canada does not accept our interpretation of section 91(24) or is unwilling to pursue an amendment.)

During the negotiations leading to the Charlottetown Accord, the federal government agreed to amend section 91(24) to include Métis people.[15] The arguments for inclusion of Métis people varied. Some participants believed the amendment was no more than a clarification of the section, while others thought the amendment expanded the scope of the section. One issue associated with this amendment arises because jurisdiction implies the potential responsibility for expenditures. We use the term potential because the federal government does not accept financial responsibility for all Aboriginal people already within the scope of section 91(24). (See Volume 4, Chapter 7, particularly the discussion of financing social programs for Aboriginal people off Aboriginal territory.) Thus, the federal government does not consider that legislative jurisdiction necessarily implies expenditures. The implications of such an interpretation is another reason why this matter may go to court before any action is taken.

2.2 Consequential Amendments

A consequential amendment is one that becomes necessary as a result of another amendment or a different interpretation of the constitution. The one constitutional amendment the Commission is recommending as essential comes under this heading —

an amendment to protect the Alberta Metis Settlements Act. If Métis people are included in section 91(24), then any legislation relating specifically to them passed by a provincial legislature is probably ultra vires. Also, since Alberta has set aside land for Métis settlements through provincial legislation, the only sure way of shielding the legislation from unilateral change by the legislature is through an amendment to the constitution. However, efforts by Alberta to have such an amendment approved by the procedures of section 43 have not been successful.

The Charlottetown Accord proposed two such amendments, one amending the Constitution Act, 1867 and the other the Alberta Act, 1905.[16] In discussions on these amendments it became clear that the Alberta legislation required constitutional protection to prevent any future unilateral changes in it by the Alberta legislature and to prevent the provincial statute from being declared ultra vires. For these reasons, we recommended a constitutional amendment confirming the Alberta Metis Settlements Act (see Volume 4, Chapter 5).

2.3 Institutional Amendments

Institutional amendments relate to the structure and functioning of Parliament, the addition of new provinces and the amending formula.

In Volume 2, Chapter 3, we examined Aboriginal participation in the Senate and House of Commons and the idea of a third house of Parliament. Changes to the constitution in these areas require either the consent of Parliament and two-thirds of the provinces representing 50 per cent of the population (section 38) or unanimity (section 41). Most of these amendments are identified in either section 41 or section 42 of the amending formula. Amendments to the six matters listed in section 42 must meet the threshold requirements of section 38. The opting out provisions of section 38 do not apply to the amendments discussed under this heading.

The Senate

Canada is divided into four Senate divisions: Ontario, Quebec, the Maritimes and the West. Representation for Newfoundland and Labrador and the two territories is also provided for, the former as a result of Newfoundland's admission to Canada in 1949, and the latter through a constitutional amendment in 1975, made before the amending formula was adopted in 1982. During the Charlottetown negotiations, separate Aboriginal representation in the Senate was thought to be both necessary and desirable, but the details were left to post-referendum negotiations.[17] Any change in the overall composition of the Senate, such as the establishment of an Aboriginal division, would require a constitutional amendment under section 38(1).

The House of Commons

Section 42 details the procedures to be followed under section 38(1) in the event of amendments to "the principle of proportionate representation of the provinces in the

House of Commons prescribed by the Constitution of Canada".[18] The Royal Commission on Electoral Reform addressed the question of separate representation for Aboriginal peoples in the House of Commons but did not propose a constitutional amendment.[19] If separate Aboriginal constituencies were established as part of the existing seats allocated to a province, no amendment would be necessary, because the principle of proportionate representation would not have been modified. However, establishing separate Aboriginal representation in the House of Commons where constituencies cross provincial boundaries or the principle of proportionate representation is altered will require a constitutional amendment.

An Aboriginal House of Parliament

Section 17 of the Constitution Act, 1867 defines Parliament as follows:

There shall be One Parliament of Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.[20]

In Volume 2, Chapter 3, we recommended that Parliament establish an Aboriginal parliament as the first step toward creating a House of First Peoples or a third house of Parliament with its own special role in the legislative process. This would be possible only through constitutional amendment. What is less clear is whether such an amendment requires the consent of Parliament and all the provinces (section 41) or Parliament and two-thirds of the provinces representing 50 per cent of the population (section 38). Unanimity might be required because such an amendment could be seen as affecting the office of the Queen. Given the significance of such a change in Canada's legislative institutions, unanimity would likely be desirable.

The Supreme Court

We believe that the Supreme Court of Canada should include at least one Aboriginal member. At any time, the federal government could appoint an Aboriginal person to fill a vacancy on the court. We believe that a requirement that one of the justices be Aboriginal should be the subject of an constitutional amendment. This would require provincial unanimity whether it involved designating one of the existing nine seats or expanding the size of the court.

Creating new provinces

Section 42(1)(f) provides for the establishment of new provinces through constitutional amendment. For example, converting the northern territories to provinces would require the consent of Parliament and two-thirds of the provinces representing 50 per cent of the population. The territories themselves would have no say in the matter other than submitting a request.

Creating new provinces has been controversial ever since accession to provincial status was included in the amending formula. The territorial governments and many Aboriginal

people were extremely critical of the Meech Lake proposal to change the amending formula from two-thirds of the provinces with 50 per cent of the population to unanimity. The territories were not enamoured of the 1982 provisions, but they were even less enthusiastic about the proposed alteration. Indeed their criticism was one of a number that led eventually to the failure of the Meech Lake Accord.

Territorial leaders were full participants in the deliberations leading up to the 1992 Charlottetown Accord. They argued that admitting new provinces should be determined by Parliament alone, as it had been before 1982 under the provisions of the Constitution Act, 1871.[21] It was under these provisions that Parliament created the provinces of Alberta and Saskatchewan in 1905. Others at the table were concerned about new provinces being created by Parliament alone and the implications of this for the amending formula and representation in a reformed Senate organized around the principle of provincial equality. In the end a compromise was reached: the territories could be admitted as new provinces under an amended version of the provisions of the Constitution Act, 1871, but they would not participate in constitutional amendments under sections 38, 41 or 42, and their representation in the Senate would remain as it was before they became provinces.[22]

Some scholars have suggested that consideration be given to creating an Aboriginal province.[23] Should this idea be pursued, proponents would need to seek approval under section 42(1)(f). Presumably, the position of such a province within the overall constitutional framework — for example, representation in the Senate and House of Commons — would be addressed during negotiations leading to its establishment. It should be noted, however, that participation in constitutional amendments would be governed by the unanimity provisions of section 41.

Constitutional amendment

Apart from the federal government's commitment to consult Aboriginal peoples on amendments to sections of the constitution that mention them, Aboriginal peoples have no formal role in the amending procedure. Before Aboriginal people can have a say, the amending formula requiring unanimity under section 41 must be changed. The Charlottetown Accord provided for Aboriginal participation in amendments that refer specifically to them. Such amendments required "the substantial consent of the Aboriginal peoples referred to" in addition to the procedures already in place.[24] Given this rather vague wording and lack of clarity on the meaning of "substantial consent", it is evident that further attention would need to be given to devising a means not only to consult Aboriginal peoples, but also to obtain their consent to amendments that would affect their rights under sections 25, 35, 35.1 and 91(24).

These are areas of the constitution over which Aboriginal peoples should have a veto. As mentioned earlier, the Parliament of Canada, in February 1996, passed an Act Respecting Constitutional Amendments to 'lend' the federal veto to five regions as an interim step pending broader constitutional reform.[25] If that broader reform is not forthcoming or does not encompass an Aboriginal veto over sections 25, 35, 35.1 of the Constitution Act,

1982 and section 91(24) of the Constitution Act, 1867, then this new act should be amended to lend the federal veto to Aboriginal peoples for those sections.[26]

Several other possible constitutional amendments emerge from this report. They include amendments to clarify the current constitution, entrench certain constitutional principles and incorporate some of our recommendations.

Clarification

During our deliberations, questions were raised about the meaning of certain parts of section 35 of the Constitution Act, 1982. Apart from our conclusion about the inherent right of self-government, two other provisions may require clarification through amendment as opposed to court action. One relates to the term Métis in section 35(2) and what is intended by it. It is not clear whether it is limited to the western Métis Nation or has a broader meaning.

The second matter in need of clarification is section 35(3), which reads as follows: "For greater certainty, in subsection (1) 'Treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."[27] The basic understanding of this provision is that rights contained in modern land claims agreements are given constitutional protection under section 35(1) as soon as such agreements are concluded. Some might argue that this gives them the effect of constitutional amendments, but we do not think so. In our view, under section 35(3) the content of Aboriginal and treaty rights is simply expanded to include these recently acquired rights. If we are correct in this, there is no conflict between section 35(3) and the requirements of the amending formula.

Entrenchment of constitutional principles

The principle that comes to mind most readily is the fiduciary responsibility of governments to Aboriginal peoples, an issue that was also addressed during the Charlottetown round. Aboriginal leaders emphasized then that none of the changes in the division of powers set out in the final agreement in any way limited the federal fiduciary responsibility to Aboriginal peoples.[28] The more compelling question is whether it is even realistic to try to capture such a broad legal principle by means of a constitutional amendment.

Entrenchment of some measures we recommend

The two recommendations in this category are the proposed Royal Proclamation and the Aboriginal Lands and Treaties Tribunal. The Royal Proclamation is a highly symbolic act with no specific constitutional status other than as part of the constitution in the broader sense of the word. With constitutional recognition, however, it would also have constitutional protection. This principle of constitutional protection can also be applied to the tribunal. An amendment under section 38 would demonstrate provincial endorsement of the Aboriginal Lands and Treaties Tribunal and its role and would also resolve certain problems associated with its composition. Such an amendment could include provisions

on the jurisdiction of the tribunal and the method for selecting members. This would solve any problems that might arise with respect to section 96 courts. (See Volume 2, Chapter 4 for a complete discussion of these issues.)

Equalization and regional disparities

An amendment to section 36 of the Constitution Act, 1982, concerning equalization and regional disparities, warrants consideration. Specifically, the section should be amended to reflect the Aboriginal order of government and state that the commitment of Parliament and the government of Canada to the principle of making equalization payments extends to Aboriginal governments (see Volume 2, Chapter 3).

Intergovernmental immunity from taxation

Another amendment that should be made to the Constitution Act, 1867 concerns section 125 regarding intergovernmental immunity from taxation. (see Volume 2, Chapter 3). Since the principle is already established in the constitution, there is every reason to extend it to Aboriginal governments.

When the amending formula was drafted, it was thought prudent to examine its operation some time after it came into effect. Section 49 therefore required a review within 15 years of the date of the proclamation of the Constitution Act, 1982, which meant sometime before 17 April 1997. The only constitutional requirement was that the prime minister convene a first ministers conference to consider the operation of the amending formula.

On 21 June 1996, the government of Canada convened a first ministers conference. The government argues that this conference met the requirements of section 49. Efforts by Aboriginal organizations to be heard at the conference were unsuccessful. The conference did not result in recommendations for change in the amending process.

If history provides any guidance, federal and provincial governments will probably meet at some time to review the need for and possibly outline a number of constitutional amendments. When such a meeting might occur is a matter of conjecture. We are convinced, however, that Aboriginal people must be represented at any such conference. To do otherwise would be to repeat the mistakes of the past.

2.4 Other Amendments

Recommendations

The Commission recommends that

5.5.1

Representatives of Aboriginal peoples be included in all planning and preparations for any future constitutional conference convened by the government of Canada.

5.5.2

A role for Aboriginal peoples and their governments in the amending process, including a veto for Aboriginal people on changes to sections 25, 35, 35.1 of the Constitution Act, 1982 and section 91(24) of the Constitution Act, 1867, be one matter for consideration at any future conference.

5.5.3

Other matters of concern to Aboriginal peoples, including, in particular, explicit recognition of the inherent right of self-government, treaty making and implementation, the inclusion of Métis people in section 91(24), entrenchment of the Alberta Metis Settlements Act, and alterations to section 91(24) to reflect the broad self-governing jurisdiction of Aboriginal nations, form part of the constitutional agenda.

Taken together, the changes we propose to protect Aboriginal interests would constitute a comprehensive amendment to the constitution. Some of our proposals will be controversial. Nevertheless, if all governments and Aboriginal peoples accept the main premises of our report, the changes we propose are attainable.

Constitutional amendments do not happen overnight. They are usually the result of extensive negotiations. Even when negotiators reach agreement on an amendment, there is no guarantee that the amendment will be ratified. As recent experience has shown, constitutional amendment is anything but easy.

Even if discussions resume, a number of preliminary questions would arise: What is the likelihood of discussions succeeding? Would amendments related to Aboriginal peoples be part of a larger process of reform, comparable to the Charlottetown process, or would they be examined in a discrete process, as they were between 1983 and 1987? Did the 1992 referendum on the Charlottetown Accord establish a constitutional convention with respect to future constitutional amendments, at least for amendments of that magnitude? (In Quebec the referendum was conducted under the provincial law, whereas in the rest of the country the federal referendum law was used, including in British Columbia and Alberta, where a referendum is required for constitutional amendments. In those two provinces, at least, the decision is already made.) Who would initiate the negotiations? How much time should be devoted to the exercise? Would negotiation start with the Charlottetown text or would negotiators wipe the slate clean and start over again? How would public input, both Aboriginal and non-Aboriginal, be accommodated?

We have outlined the issues surrounding constitutional amendment because the subject kept recurring as we discussed our recommendations, although it surfaced very rarely during our hearings.[29] Constitutional amendment is certainly one way to achieve self-government. As we have stated repeatedly, however, and in light of what appears to be general acceptance that section 35 includes Aboriginal peoples' inherent right of self-government, we believe that the constitution already presents avenue for implementing the major structural changes recommended in this report. If this assessment is correct, the

constitutional amendment route is no longer essential to secure the desired result. Meaningful change can be achieved within the existing constitutional framework, which has proved remarkably resilient and flexible.

Even so, the Constitution Act, 1982 does not reflect the role and status that Aboriginal nations should have in the life of this country. There have been several attempts in the past two decades to rectify this omission — the amendments of 1982 and 1983, the constitutionally mandated first ministers conferences on Aboriginal matters, and the Charlottetown Accord. But the omission remains. We therefore believe strongly that the path to a renewed relationship between Aboriginal nations and Canada would be clearer and surer if the relationship of equality and respect we envisage were reflected in a constitution that was amended to include

1. explicit recognition that section 35 includes the inherent right of self-government as an Aboriginal right;

2. an agreed process for honouring and implementing treaty obligations;

3. a veto for Aboriginal peoples on amendments to sections of the constitution that directly affect their rights, that is, sections 25, 35, and 35.1 of the Constitution Act, 1982 and 91(24) of the Constitution Act, 1867;

4. recognition that section 91(24) includes Métis people along with First Nations and Inuit;

5. constitutional protection for the Alberta Metis Settlements Act; and

6. alterations to section 91(24) to reflect the broad self-governing jurisdiction Aboriginal nations can exercise as an inherent right and to limit federal powers accordingly.

Notes:

1 Royal Commission on Aboriginal Peoples (RCAP), *Partners in Confederation*: Aboriginal Peoples, Self-Government, and the Constitution (Ottawa: Supply and Services, 1993).

2 See RCAP, *Partners in Confederation*.

3 For a more extensive commentary on these two perspectives, see Volume 2, Chapter 3 on governance, in particular the discussion of the Canadian Charter of Rights and Freedoms. See generally Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms: A Legal Perspective", research study prepared for RCAP (1994); and Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal

Self-Government: Constitutional and Jurisdictional Issues", in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: RCAP, 1995). See also RCAP, *Bridging the Cultural Divide*: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Supply and Services, 1996), pp. 257-267. For more information about research studies prepared for RCAP, see A Note About Sources at the beginning of this volume.

4 R. v. Sioui, [1990] 1 S.C.R. 1025; and R. v. Sparrow, [1990] 1 S.C.R. 1075.

5 Discussions on an amending formula began in 1927 (when the relevant statute was the British North America Act, now the Constitution Act, 1867) and continued intermittently until the proclamation of the Constitution Act, 1982. In 1964, consensus was reached on an amending procedure known as the Fulton-Favreau formula. In 1971, consensus was reached on a regionally based amending procedure known as the Victoria formula. The latter was the amending formula initially included in the patriation resolution introduced in Parliament in October 1980. As a consequence of federal-provincial negotiations in November 1981, the Victoria formula was dropped from the resolution and the amending formula now contained in the constitution was added. Discussions did not end at that point but have continued ever since. Proposed changes to the 1982 provisions can be found in both the Meech Lake and Charlottetown legal texts. The amending formula was also the subject of study by a special joint committee of the Senate and the House of Commons in 1991.

6 This would include most amendments to the Canadian Charter of Rights and Freedoms, the division of powers, interprovincial trade, intergovernmental tax immunity, equalization and regional disparities, the Senate and the Supreme Court other than its composition.

7 Note that under section 47 of the Constitution Act, 1982, the Senate has only a suspensive veto of 180 days on amendments. In 1987 the Senate delayed its approval of the Meech Lake resolution adopted by the House of Commons, and the House of Commons passed the resolution a second time, thereby giving federal approval.

8 Under An Act respecting constitutional amendments, S.C. 1996, c. 1, s. 1(1), "No Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 of the Constitution Act, 1982, or may express its dissent under subsection 38(3) of that Act, unless the amendment has first been consented to by" provinces representing five regions: the Atlantic provinces, Quebec, Ontario, the prairie provinces and British Columbia.

9 Note that the Senate's role under section 41 is limited to a suspensive veto just as it is under section 38.

10 Section 37 of the Constitution Act, 1982 required that a single conference be convened. The amendment that emerged from that conference continued the process until 1987.

11 See David C. Hawkes and Marina Devine, "Meech Lake and Elijah Harper: Native-State Relations in the 1990s", in How Ottawa Spends: The Politics of Fragmentation, 1991-92, ed. Frances Abele (Ottawa: Carleton University Press, 1991).

12 One example of an amendment brought about as a direct result of Supreme Court decisions is section 92A, concerning natural resources. See J. Peter Meekison and Roy Romanow, "Western Advocacy and Section 92A of the Constitution", in J. Peter Meekison, Roy Romanow and William D. Moull, Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources (Montreal: Institute for Research on Public Policy, 1985). Consider also the complete lack of success Newfoundland has had in securing an amendment on offshore resources.

13 Re term "Indians", [1939] 1 S.C.R. 104. See Bradford W. Morse and John Giokas, "Do the Métis Fall Within Section 91(24) of the Constitution Act, 1867?", in Aboriginal Self-Government (cited in note 3), p. 140.

14 This was raised as a possibility by Gerald Morin, president of the Métis National Council, in Toronto, 1 February 1994, at a meeting of ministers responsible for Aboriginal affairs, Aboriginal leaders, and the Royal Commission on Aboriginal Peoples.

15 Draft Legal Text, 9 October 1992 (based on the Charlottetown Accord of 28 August 1992), section 8: "91A. For greater certainty, class 24 of section 91 applies---in relation to all the Aboriginal peoples of Canada."

16 Consensus Report on the Constitution, Final Text, Charlottetown, 28 August 1992, section 55; and Draft Legal Text, sections 12 and 24.

17 See Consensus Report on the Constitution, section 9; and Draft Legal Text, section 2.

18 Constitution Act, 1982, section 42(1)(a).

19 Royal Commission on Electoral Reform and Party Financing, Reforming Electoral Democracy (Ottawa: Supply and Services, 1991).

20 Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 17.

21 Constitution Act, 1871 (U.K.), 34 and 35 Vict., c. 28, reprinted in R.S.C. 1985, App. II, No. 11.

22 See Draft Legal Text (cited in note 15), sections 32 and 4. A new section 42.1 would have been added to the amending formula:

42.1 subsection 38(1) and sections 41 an 42 do not apply to allow a province that is established pursuant to section 2 of the Constitution Act, 1871 after the coming into force of this section to authorize amendments to the Constitution of Canada and, for greater certainty, all other provisions of this Part apply in respect of such a province.

The composition of the Senate was controlled by section 21(2) which read as follows:

21(2) Notwithstanding subsection (1), where a new province is established from the Yukon Territory or the Northwest Territories, the new province shall be entitled to the same representation in the Senate as the territory had.

Section 21(1) set provincial representation in the Senate at six for all provinces and provided for one senator per territory. Aboriginal representation was subject to future negotiations.

23 Thomas J. Courchene and Lisa M. Powell, A First Nations Province (Kingston: Institute of Intergovernmental Relations, Queen's University, 1992). See also David J. Elkins, "Aboriginal Citizenship and Federalism: Exploring Non-Territorial Models", research study prepared for RCAP (1994).

24 Draft Legal Text (cited in note 15), section 33. Section 45.1 would have been added to the current amending formula:

45.1* (1) An amendment to the Constitution of Canada, that directly refers to, or that amends a provision that directly refers to, one or more of the Aboriginal peoples of Canada or their governments, including

(a) section 2, as it relates to the Aboriginal peoples of Canada,** class 24 of section 91, and sections 91A, 95E and 127 of the Constitution Act, 1867, and

(b) section 25 and Part II of this Act and this section, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where the amendment has been authorized in accordance with this Part and has received the substantial consent of the Aboriginal peoples so referred to.

(2) Notwithstanding section 46, the procedures for amending the Constitution of Canada in relation to any matter referred to in subsection (1) may be initiated by any of the Aboriginal peoples of Canada directly referred to as provided in subsection (1).

* A mechanism for obtaining aboriginal consent would be worked out prior to the tabling of a Constitution resolution in Parliament.

** A reference to any provision relating to aboriginal representation in the Senate would be added here.

25 See note 8.

26 Note that in its report on Bill C-110, the Senate committee recommended that the bill be amended to provide an Aboriginal consent clause with respect to section 91(24) of the Constitution Act, 1867 and sections 25, 35 and 35.1 of the Constitution Act, 1982.

27 Added by the Constitution Amendment Proclamation, 1983.

28 A new section 127 would have been added to the Constitution Act, 1867 to give this protection. See Draft Legal Text (cited in note 15), section 18.

29 One notable exception was during a presentation by Ron George, president of the Native Council of Canada (now the Congress of Aboriginal Peoples) at our hearings in Moncton, New Brunswick, 15 June 1993. He noted that the constitutional conference required by section 49 would be "a major opportunity to set a clear progressive constitutional agenda".