

BRIEF TO THE SELECT COMMITTEE ON THE 1987 CONSTITUTIONAL ACCORD

New Brunswick Aboriginal Peoples Council*

Introduction

The New Brunswick Aboriginal Peoples Council, the representative organization for the off-reserve aboriginal population of New Brunswick, welcomes the opportunity of appearing before the Select Committee on the 1987 Constitutional Accord and would like to begin our presentation by thanking Premier McKenna and the Government of New Brunswick for providing this opportunity to New Brunswickers to express to the Committee our thoughts, concerns, fears and suggestions regarding the Meech Lake Accord 1987.

Secondly, I would add that I have been asked by the Native Council of Canada, the national organization representing the provincial and territorial off-reserve Indian and Metis people of Canada, to represent their interests here today.

Thirdly, and most importantly of all, from the very onset of this presentation we want you to know that we totally and completely reject the Meech Lake Accord unless provision for concerns of aboriginal people, northerners and other Canadians are met.

For the aboriginal people of New Brunswick and indeed all of Canada the Meech Lake Accord--the process under which it was born and the failings so evident in it, represents not only a contemporary ongoing problem for the first citizens of this land, but completes another chapter in the long and difficult history of our people, a history marked by far too many broken promises and forgotten agreements solemnly made by past governments of this land.

Having stated that we see the Meech Lake Accord as another broken promise, then it should come as no surprise to the Committee that the New Brunswick Aboriginal Peoples Council, the Native Council of Canada and nearly all aboriginal groups in Canada have been and continue to call for improvements to this constitutional document to correct and alleviate the many concerns that women, northerners, ethnics, official language minorities and aboriginal people have in regards to the Meech Lake Accord.

Background

For the Committee to understand and to hopefully appreciate the rationale for our opposition regarding Meech Lake, one must understand the long arduous road which Canada's aboriginal people have had to travel in relationship to the constitutional development process of this country. In order to give you an insight into our positions, I must take you on a brief history tour.

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Beginning in 1978, the aboriginal people of Canada directed our attention towards achieving participation in the constitutional renewal process of this country. While we were not always welcomed at First Ministers' Conferences or included in early agendas, we were adamant about our place in Canada's constitution and our leaders of the time were convincing enough to gain observer status at early First Ministers' Conferences in October 1978 and February 1979 on the constitutional renewal process. As a result in December 1979, the national aboriginal leaders and elected representatives of the Federal Government and the provinces sat down together to discuss the constitutional patriation process. We thought we had finally made it to the negotiating table. Our joy was short lived, for in June 1980 the First Ministers met and decided to delete the subject "Canada's Native People" from the summer agenda of the Continuing Committee of Ministers on the *Constitution*. At the September 1980 First Ministers' Conference, we once again were observers who sat patiently on the sidelines while the Prime Minister and Premiers of the day discussed constitutional patriation and gave token mention of our place in this document and the history of Canada.

Federal/Provincial disagreements over the patriation process in 1980 and 1981, combined with aboriginal lobbying in Great Britain convinced the Federal Government of the need to gain aboriginal support for patriation. The NCC received Federal funding to create the Constitutional Review Commission of The NCC and led in convincing the government to introduce the aboriginal rights section to its resolution before the Parliamentary Committee in January 1981. On the 30th of January in a historic negotiation session on aboriginal people, the then President of the NCC, Harry W. Daniels, with the national leaders of the NIB and ICNI were informed of the wording for the *Constitution*: "The aboriginal rights of the aboriginal peoples of Canada are hereby recognized and confirmed." Fearing years of litigation over the definition of who the aboriginal peoples of Canada were, Mr. Daniels convincingly argued for the inclusion of the wording "the aboriginal peoples of Canada includes the Indian, Inuit and Metis people of Canada." At 6:00 p.m. of that evening agreement was reached and those party to this historic moment rejoiced. We felt that we had finally gained recognition of aboriginal and treaty rights of the aboriginal people in the *Constitution* of Canada and that these rights were finally to be entrenched and protected from future abrogation by Federal or Provincial Governments. Unfortunately, once again our joy was short lived for in February, 1981, under pressure from the Premiers the Federal government introduced an amendment which was intended to allow Parliament and one province to reach agreements that would destroy aboriginal rights and the protection of those rights. With the support of the NDP, the aboriginal groups were able to prevent this amendment from passing, but the bad faith of the Government renewed aboriginal opposition to the patriation package and poisoned the atmosphere.

In light of this, it should not have been a surprise when the First Ministers dropped Section 34, the original aboriginal rights clause from the Accord of No-

vember, 1981. In a state of shocked disbelief, the Aboriginal Rights Coalition initiated a massive public campaign, organized protests, marched and united with the women's groups in the country and successfully forced the Premiers to put back into the *Constitution* an aboriginal rights clause Section 35, and Section 37 provided for an FMC on aboriginal rights to be held within one year. Unfortunately for aboriginal people the watered down version of Section 34 had the addition of the word "existing."

On April 17, 1982, the *Constitution* was proclaimed including Section 35 and Section 37, the aboriginal provisions.

On March 15, 1983, the aboriginal FMC guaranteed by Section 37 of the *Constitution* was convened. Much valuable time was spent on arguing about what "existing" meant, what was the purpose of the FMC, who represented what aboriginal group and which level of Government would be responsible for aboriginal people. Seeing that little chance existed for progress, the aboriginal groups lobbied long and hard for an ongoing FMC process. The major accomplishment of FMC 83 was getting the First Ministers to agree to an Accord extending the process for five more years and calling for three more FMCs on aboriginal rights in the next five years. While we gained future FMC's we lost the clause which promised that the Section 37 process was "for the identification of and definition of the rights of the aboriginal people to be included in the *Constitution of Canada*." The Government drafters changed this clause to read "Constitutional matters that directly effect the aboriginal people of Canada," again clearly an example of treachery and bad faith on the part of the Governments.

The next opportunity that aboriginal people had to meet the Prime Minister and Premiers was also Prime Minister Trudeau's last FMC. Unfortunately it also clearly indicated the lack of good will or faith by the majority of the Premiers to deal fairly with aboriginal people and our rights. The meeting adjourned with the Premier's cautioning aboriginal leaders to be patient; that constitutional wording needed to be precise; that change takes time. For aboriginal people 500 years is long enough.

The two remaining FMC's were held in 1985 and 1987 respectively. The major topic of discussion was aboriginal self-government, an attempt by the aboriginal groups to gain control over their daily lives and a degree of self-determination. The lack of goodwill and over-abundance of rhetoric condemned FMC 85 and 87 to failure. Besides this the newly elected Government of Prime Minister Mulroney in September 1984, stated his desire to get Quebec's signature on the constitutional document. This quickly usurped attention in the constitutional process from aboriginal issues. In August 1986, Quebec's five conditions for constitutional acceptance may indeed have completely derailed the aboriginal constitutional reform process. It was noticeable that at nearly every working group meeting on aboriginal matters and at all Ministers' meetings leading up to FMC 87, that various delegations from the provinces would conspicuously disappear along with Quebec, who was not officially participating in the FMC process due to their stated position of nonrecognition of the *Canada Act, 1982*. Also

the Prime Minister and many Premiers raised the fact that agreement without Quebec's participation would be difficult to obtain. They may well have been telling us that the priority was no longer aboriginal people and our rights but fulfilling the goal of the Prime Minister, to get Quebec to sign the *Constitution*.

The failure of the FMC process for aboriginal peoples of Canada can best be described by the very words Prime Minister Mulroney used at the end of FMC 87:

There shall be a price to be paid for our failure. I don't want anybody leaving this room or leaving this city today under any illusions about that. Unfortunately, those called upon to pay the largest share of that price shall be those least equipped to pay it, namely the aboriginal peoples who have paid an unfair share of that price for an unfair share of time.

The Birth of Meech Lake

The *Constitution Amendment, 1987* more commonly referred to as the Meech Lake Accord, was born out of the failure of the aboriginal constitutional process. Indeed the aboriginal people of Canada could probably say that the Meech Lake Accord was conceived in the backrooms during the many meetings held between 1985 and 1987 supposedly dealing with aboriginal rights. It could even be suggested that aboriginal people and our rights may well have been displaced if not sacrificed in order to obtain agreement on the Meech Lake Accord. We say this not because of what the Accord says about aboriginal people but for what it does not say, that is, no commitment to have ongoing constitutionally assured FMC's on aboriginal rights. Future aboriginal FMC's would at least symbolically recognize that the national agenda has room for aboriginal peoples' issues.

Further to this the unanimity provision is both an affront to northern Canadians, the majority of whom are aboriginal, and a provincial override to their stated desire for 'provincehood' at some time in the future. For northern aboriginal Canadians to be told that this was not the case, that unanimity would never be used as a way by which southern provinces would prevent provinces from being created in the north, is hard to believe. Secondly, it creates a second class citizenship for all northerners and smacks of colonialism at its worse.

Prime Minister Mulroney stated in Parliament when he spoke during the initial debate on the Meech Lake Accord, October 21, 1987, that, "If I, for one moment, thought anyone's rights were being overridden by this Accord, I would not have recommended it to my colleagues in the Government, and the Government would not have brought it forward for consideration in this House." If the Prime Minister, Premiers or any legislator can not see that the imposition of the unanimous consent of existing provinces violates the fundamental rights of northerners, creates a second class citizenship status for residents of the N.W.T. and Yukon and places an onerous obstacle in the path which may lead to creation of provinces in the Territories, that the exercise of the extended veto by any one province indeed overrides northerners' rights, then either our first Ministers are blind or have chosen to appear to be blind.

The Meech Lake Accord has several other facts which are repugnant to the first citizens of this land. One is the provision for a FMC on fisheries. To aboriginal people a primary aboriginal and in many instances a treaty right is that of fishing. We are greatly concerned at how such a meeting could be held on so fundamental an aboriginal treaty rights issue without the participation of aboriginal people.

Another item for future discussion amongst First Ministers is that of Senate reform. To the Native Council of Canada, this topic is also of concern. Since 1979, when the NCC issued its *Declaration of Metis And Indian Rights*, one of our rights stated was that of guaranteed representation in Parliament, the Senate and provincial Legislatures. For Premiers to discuss Senate reform without our participation again is an affront to one of our stated rights which we claim as part of our form of aboriginal self-government.

Indeed many of the issues and items raised by other Canadians regarding the shortcomings of the Meech Lake Accord also are of concern to aboriginal people. Equality rights and the fear that these hard fought rights may be jeopardized, the appointment of Supreme Court Judges, the opting out of national programs with compensation, are of additional concern but we have chosen to limit our comments to those items which are seen to be a more timely primacy to aboriginal people. Additionally we know full well that other New Brunswickers shall discuss in detail these additional issues.

Having presented you, the Select Committee on the 1987 Constitutional Accord, a brief background on aboriginal peoples and our involvement in the constitutional process and our immediate concerns in regards to the Meech Lake Accord, we now would like to table a proposition which if used may well enable the Provincial government to, firstly, endorse Meech Lake, thereby enabling the Province of Quebec to have its beloved Quebec Accord passed intact and unamended; secondly, it would give the Premier an ideal opportunity to obtain consequentially additional amendments to which he has spoken; thirdly, it would lessen the possibility that the province of New Brunswick would have to either be seen as abandoning its principles concerning the need for amendments to protect linguistic minorities, women and aboriginal peoples or be seen as the killer province of Meech Lake.

The Proposition: Companion Resolutions

The specific proposition which we are forwarding at this time has already been articulated to the Senate and the provincial Premiers by the Native Council of Canada. I am sure that Premier McKenna is aware of this fact and may already be considering it a viable option in resolving the current Constitution impasse and the present dilemma which faces the First Ministers of Canada.

The "Companion Resolutions" option involves initiating three separate amendments to rectify the three fundamental concerns raised by the Langevin

Accord regarding the rights, status and constitutional capacities of aboriginal peoples and northerners. In summary, the Langevin Accord:

- terminates the process of aboriginal constitutional reform;
- makes northerners second class citizens with regard to representation in the Supreme Court of Canada; and closes off the long-held and long-sought opportunity for equitable constitutional development of the territories into provincehood.

The following constitutional action is required to meet these concerns, whether by amending the Accord or by initiating separate amendments:

- (1) Reinstatement of a constitutional action is required for ongoing constitutional conferences on aboriginal matters, an initiative that would legally require the holding of a First Ministers' conference at which aboriginal and territorial leaders must be present as full participants.
- (2) Clarification of the *Constitution Act* to ensure equitable representation of the north in the Supreme Court, and;
- (3) Provision of equitable treatment for northern Canadians by at least maintaining the current Section 38 rule for the establishment of provinces in the Territories or, preferably, by restoring the pre-1982 bilateral procedure by which all other provinces have entered Confederation.

Companion resolutions are simply resolutions for amending the *Constitution* that are initiated for adoption at the same time the Langevin Accord would receive attention. The steps involved include:

- agreement to a text for each of the amendments;
- drafting of appropriate resolution language;
- tabling of the resolutions in Parliament and the Provincial Legislatures;
- considering the resolutions as a package and holding one or more votes that, if supportive, would formally initiate the procedure for amending the *Constitution*.

At this point in our history, aboriginal Canadians do not nor can not put much trust or faith in being told that the Accord cannot be opened or that our concerns can be dealt with in the next round.

Since New Brunswick and Manitoba have yet to pass the resolution and in light of Premier McKenna's concerns we look towards the province as the final

chance for change so that the Meech Lake Accord can be a truly uniting document rather than a divisive one.

The three amendments sought by aboriginal people are attached for your consideration.

**DRAFT COMPANION AMENDMENT
REINSTATEMENT OF THE ABORIGINAL REFORM PROCESS**

SCHEDULE

CONSTITUTION AMENDMENT, 1987(A)
CONSTITUTION ACT, 1982

1. The *Constitution Act, 1982* is amended by adding thereto, immediately after Section 35.1 thereof, the following section:

"35.2 (1) A constitutional conference composed of the Prime Ministers of Canada and the First Ministers of the Provinces shall be convened at least once every five years by the Prime Minister of Canada to address matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples, the first such Conference to be convened no later than one year after this section comes into force.

(2) For each Conference convened under Subsection (1), the Prime Minister of Canada shall invite representatives of the aboriginal peoples of Canada to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the Governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a Conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from Subsection 35(1)."

CITATION

2. This Amendment may be cited as the *Constitution Amendment 1987(A)*.

NOTE 1. This Amendment requires application of the s. 38 general amendment procedure and is not consequential to or reliant on the passage of the proposed *Constitution Amendment, 1987 (Langevin Accord)*.

**DRAFT COMPANION AMENDMENT
TERRITORIAL REPRESENTATION IN THE SUPREME COURT**

SCHEDULE

CONSTITUTION AMENDMENT, 1987(B)
CONSTITUTION ACT, 1867

1. The *Constitution Act, 1867* is amended by adding thereto, immediately after subsection 101C.(4) thereof, the following subsection:

“(5) For greater certainty, a reference in this section to the Government of a province other than Quebec or to the Bar of that province shall include the Government of a territory and the Bar of that territory.”

CITATION

2. This Amendment may be cited as the *Constitution Amendment 1987(B)*.

NOTE 1. This Amendment would require application of the general amending procedure (s. 38), as it does not affect the composition of the Supreme Court, and is consequential to passage of the proposed *Constitution Amendment, 1987* (Langevin Accord).

**DRAFT COMPANION AMENDMENT
ESTABLISHMENT OF PROVINCES IN THE TERRITORIES**

SCHEDULE

CONSTITUTION AMENDMENT, 1987(C)
CONSTITUTION ACT, 1982

1. The *Constitution Act, 1982* is amended by adding thereto, immediately after Section 44 thereof, the following section:

“44A. Notwithstanding anything in this part, Parliament may exclusively make laws amending the *Constitution* of Canada in relation to the establishment of provinces in the Yukon or Northwest Territories.”

or

1. The *Constitution Act, 1982* is amended by adding thereto, immediately after section 45 thereof, the following section:

“45A. Notwithstanding anything in this part, an amendment to the *Constitution* of Canada in relation to the establishment of provinces in the Yukon or Northwest Territories may be made only in accordance with s. 38(1).”

CITATION

2. This amendment may be cited as the *Constitution Amendment, 1987(C)*.

NOTE 1. Either of these amendments would require the application of the unanimous procedure but would not, as drafted, be consequential to or reliant on passage of the proposed *Constitution Amendment, 1987* (Langevin Accord).