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NORTHWEST TERRITORIES
10TH ASSEMBLY, 1ST SESSION**

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SESSIONAL PAPER

**10TH LEGISLATIVE ASSEMBLY
NORTHWEST TERRITORIES**

**THE 1984 FIRST MINISTERS' CONFERENCE
ON ABORIGINAL RIGHTS**

**Yellowknife, N.W.T.
February 22, 1984.**

SESSIONAL PAPER

10th LEGISLATIVE ASSEMBLY NORTHWEST TERRITORIES

THE 1984 FIRST MINISTERS' CONFERENCE ON ABORIGINAL RIGHTS

INTRODUCTION

In preparation for the 1984 First Ministers' Conference on Aboriginal Rights to be held in Ottawa on March 8 and 9, 1984, Federal, Provincial and Territorial Ministers met with aboriginal leaders in November, 1983 to formulate the agenda. Four broad items were suggested by the aboriginal groups and agreed to by Ministers, namely

1. Equality
2. Aboriginal Title and Aboriginal Rights, Treaties and Treaty Rights
3. Land and Resources
4. Self-government.

As a result of the Ministerial Meeting, Working Groups of officials were established to address each of the agenda items. The aboriginal organizations used specific working groups to develop their positions. The Assembly of First Nations (AFN) concentrated its presentation in Working Group II dealing with Aboriginal Title and Aboriginal Rights, the Metis National Council (MNC) and the Native Council of Canada (NCC) outlined their concerns in the Land and Resources Working Group and the Inuit Committee on National Issues (ICNI) focused its attention on the Working Group dealing with the topic of self-government.

In addition to the Working Group Meetings, Ministers met in Yellowknife in January, 1984 and in Toronto in February, 1984 to further refine the agenda items. The Executive Council, through the tabling of this sessional paper, wishes to make members aware of the issues to be discussed and to seek direction on the positions to be adopted by the Government of the Northwest Territories at the forthcoming First Ministers' Conference.

I. EQUALITY

This issue concerns the effect of the equality clause which became part of the Accord agreed to at the First Ministers' Conference in March, 1983. The clause is to become subsection 35(4) of the Constitution Act, 1984 and reads as follows:

35(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The concern on the part of the aboriginal organizations is that the foregoing is not the precise wording which was agreed to and secondly, inasmuch as the equality provision is limited to the rights in subsection (1) of section 35 (existing aboriginal and treaty rights) it does not address all the rights and freedoms pertaining to aboriginal people, for example statutory rights under the Indian Act.

Although section 28 of the Charter guarantees that the rights and freedoms referred to in the Charter are guaranteed equally to male and female persons, section 25 of the Charter protects the rights of the aboriginal peoples against attack under the Charter. Therefore if section 25 were found to be paramount to section 28, sexual discrimination might be constitutionally protected.

While the aboriginal organizations would like to see subsection 35(4) reworded so that it would extend equality to all the rights of the aboriginal people, the general feeling of governments is that the present wording is adequate and no amendment is required. They suggest that the subsection remain in its present form, but if there is agreement that the wording does in fact create a problem, then amendments could be made to section 25 to clarify the intent.

At the 1983 First Ministers' Conference, the GNWT supported the inclusion in section 35 of an equality clause. It was the position of the Ninth Assembly that Part II of the Constitution Act, 1982, of which section 35 is the only section, should become a Charter of Rights of the Aboriginal Peoples. It is suggested that in order to remove any doubt about the interpretation of the present wording of subsection 35(4), the subsection should be amended to clarify that it applies to all the rights and freedoms of the aboriginal peoples.

Recommendation

That the GNWT support the aboriginal groups' position to have subsection 35(4) amended to extend sexual equality to all of the rights and freedoms of the aboriginal peoples.

II: ABORIGINAL TITLE AND ABORIGINAL RIGHTS,
TREATIES AND TREATY RIGHTS

The major issues identified under this agenda item have been the following:

- A. Aboriginal Title
- B. Aboriginal Rights
- C. Removal of the word "existing" in subsection 35(1) of the Constitution Act, 1982
- D. Treaties

A. Aboriginal Title

Although they differed as to the interpretation of the term, all aboriginal groups wished the inclusion of the words "aboriginal title" in subsection 35(1) of the Constitution Act, 1982. The AFN see aboriginal rights flowing from aboriginal title, while the ICNI view aboriginal title as but one aspect of aboriginal rights rather than the source of those rights. While most Provincial and Federal governments took the view that aboriginal title is implicit in the concept of aboriginal rights, there was a disinclination on the part of governments to amend subsection 35(1) to include the term on the ground that such addition might indicate that aboriginal title and aboriginal rights are not synonymous and the courts might then expand the rights now covered by section 35. It is suggested that since it is agreed that aboriginal title is implicit in the concept of aboriginal rights, then it should be made explicit by including the phrase in subsection 35(1).

Recommendation

That the GNWT support the inclusion of the term "aboriginal title" in subsection 35(1) of the Constitution Act, 1982.

B. Aboriginal Rights

The Assembly of First Nations used this agenda item to discuss its view of aboriginal self-government. Aboriginal groups see the right to govern themselves as an inherent right and one which is a major component of aboriginal rights. The AFN have indicated that First Nation governments existed long before the arrival of Europeans and continue to thrive today.

In the Northwest Territories, the Western Constitutional Constitutional Forum and the Nunavut Constitutional Forum are in the process of examining models of governmental institutions suitable for implementation in a divided territory. It is recognized that forms of government which are designed for the north may not address the aspirations of original peoples in other parts of the country. The Federal Government has suggested that a statement of principles could be developed which would serve as a guide for an accelerated negotiation process to look at self-government for aboriginal communities. Alternatively, it was suggested that the community consultation could precede the statement of principles with the results of the consultation process serving as the basis for developing the statement of principles for the 1985 First Ministers' Conference. It is to be noted that a statement of principles would not be enforceable in a court of law.

The GNWT has supported the inclusion of enforceable rights in section 35 of the Constitution Act, 1982. It is suggested that the GNWT continue to press for constitutional entrenchment of the right to aboriginal self-government. Because aboriginal governments may differ from jurisdiction to jurisdiction, it is suggested that negotiations could take place with the appropriate Provincial or Territorial government involved and the Federal Government. Constitutional recognition could then be accorded to such governments to protect them from overriding Federal and Provincial legislation.

Recommendation

That the GNWT support the concept of entrenching the right of aboriginal self-government in section 35 of the Constitution Act, 1982 with the scope and nature of those governments to be negotiated in each jurisdiction with the appropriate provincial or territorial government involved and the Federal

Government and that constitutional recognition be given to the aboriginal governments which result from such negotiations.

C. Removal of the Word "Existing" from Subsection 35(1) of the Constitution Act, 1982

The 9th Assembly supported the removal of the word "existing" from subsection 35(1) of the Constitution Act, 1982. That subsection provides that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed. The word "existing" creates a source of confusion in that it may mean that only those rights which existed as of April 17, 1982, are protected, or that the rights which are recognized and affirmed are preserved in the state in which they existed on that date - i.e. they may have been previously emasculated by Federal or Provincial legislation.

Recommendation

That the GNWT support the removal of the word "existing" in subsection 35(1) of the Constitution Act, 1982.

D. Treaties

The discussion of this topic concerned the nature, scope and effect of treaties and the appropriate body to interpret these documents. It was the feeling of the AFN that the interpretation of what they consider to be "international documemnts" should not be left to the courts and suggested an Aboriginal and Treaty Rights Protection Office to perform this task.

The 9th Assembly supported the concept of Aboriginal Rights Commissions to oversee the operation of land claims settlements. It is suggested that such commissions established in each jurisdiction and on which aboriginal peoples would have a seat, would be an appropriate vehicle to interpret treaties.

Recommendation

That the GNWT support the establishment of Aboriginal Rights Commissions in each jurisdiction to oversee the operation of land claims settlements and to interpret treaties where they presently exist.

III. LAND AND RESOURCES

This topic essentially became a Metis agenda item and several issues were identified as they affected the Metis.

A. Metis Self-Identification

It has been the position of governments generally that there is a need to know how many Metis there are in Canada in order to ascertain, among other things, the cost of providing benefits to them. The Metis organizations, MNC and NCC, have stressed the need to identify their own members and object to non-aboriginal governments establishing an identification criteria for Metis.

It is suggested that the Metis are the ones who are best able to determine their own membership. While governments may assist in the implementation process by providing administrative assistance, they should not attempt to define identification criteria for aboriginal people.

Recommendation

That the GNWT support the concept of the right of aboriginal peoples to determine their own membership.

B. Metis Land Base

The Metis feel that there is a need for and a right to a land base in order to allow the Metis to survive as a distinct people. It was generally agreed that the right of aboriginal people to a land base had been recognized in the Northwest Territories and is being implemented by the land claims mechanism. The Metis are part of the Dene-Metis claim in the Mackenzie Valley but to this time there has not been a similar recognition of a Metis land base in southern Canada. It is suggested that the Metis, as an aboriginal people, have a right to a land base and that accommodation will have to be made as well for those non-status Indians who would not be repatriated to their original bands.

Recommendation

That the GNWT support the Metis in their claim to a land base.

C. Metis Self-Government on a Land Base

This issue concerns the form of Metis self-government on a land base and essentially applies to southern Canada. Metis are presently involved in the land claims process in the Northwest Territories. The Northwest Territories, through the two Constitutional Forums, is looking at public government with perhaps some guaranteed representation to ensure that aboriginal interests are protected. It is suggested that the same principles which have been discussed under the Aboriginal Title and Aboriginal Rights heading are applicable to Metis government on a land base.

Recommendation

That the GNWT support the concept of self-government on a land base, with such self-government to be negotiated in the appropriate jurisdiction.

D. Federal Responsibility for the Metis

The Metis have stated that Federal responsibility for "Indians" under section 91(24) of the Constitution Act, 1867 (Indians and lands reserved for the Indians) extends to the Metis. The courts have decided that the Federal Government's responsibility does extend to the Inuit by virtue of that section.

It is suggested that since the Metis are recognized as an aboriginal people under subsection 35(2) of the Constitution Act, 1982, the definition of "Indian" in section 91(24) of the Constitution Act, 1867 should be interpreted to mean the aboriginal peoples who are defined in subsection 35(2) - i.e. the Indian, Inuit and Metis.

Recommendation

That the GNWT support the position that the Federal Government is responsible for all aboriginal people pursuant to section 91(24) of the Constitution Act, 1867, including the Metis.

IV. SELF-GOVERNMENT

- A. The issue of self-government was presented by both the AFN and the Metis under their respective agenda topics. It is clear that the concept of aboriginal self-government differ among the various aboriginal organizations. The GNWT has recognized that due to the diverse background and heritage of the aboriginal peoples, various models of self-government will be required to adequately accommodate the aspirations of all native people. While the ICNI have advocated a form of public government for the Nunavut Territory, other organizations have favoured a government drawn along strict ethnic lines. Several models have been suggested including entrenched third orders of government as well as forms of government exercising Federal and/or Provincial delegated responsibility. As previously noted, it is suggested that negotiations should take place in each jurisdiction to determine the form of self-government which best serves the particular needs of the aboriginal peoples.

Recommendation

- a) That the GNWT support the concept of entrenching the right of aboriginal self-government in the Constitution Act, 1982 with the scope, nature and powers of such governments to be negotiated in each jurisdiction with the appropriate government.
- b) That the GNWT support the concept of according constitutional recognition to such aboriginal governments to protect them from overriding Federal and Provincial legislation.
- B. Subsections 42(1)(e) and (f) of the Constitution Act, 1982

The 9th Legislative Assembly adopted the position that subsections 42(1)(e) and (f) of the Constitution Act, 1982 should be repealed. Subsection 42(1)(e) speaks of the possible extension of provinces into the territories without the consent of the territory concerned. Subsection 42(1)(f) makes the establishment of new provinces subject to the general amending formula in the Constitution Act, 1982, thereby necessitating the consent of the Federal Government and at least seven provinces.

Although the issue of subsections 42(1)(e) and (f) remains on the agenda for future First Ministers' talks, the topic was not raised by the aboriginal groups for consideration at the 1984 First Ministers' Conference. As all agenda items for the 1984 Conference were those suggested by the aboriginal groups, the NWT did not feel that it was in a position to insist that the topic be included in the final agenda. However, GNWT Ministers have forcibly made this government's position known at the preparatory meetings.

The repeal of subsections 42(1)(e) and (f) is a vital concern to the GNWT and a discussion of this topic would logically fit under the heading of self-government.

Recommendation

That the GNWT continue to press for a discussion of the repeal of subsections 42(1)(e) and (f) of the Constitution Act, 1982 at the 1984 First Ministers' Conference.

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NORTHWEST TERRITORIES - THE 1984 FIRST
MINISTERS' CONFERENCE ON ABORIGINAL RIGHTS

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