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DISCUSSION PAPER

10TH LEGISLATIVE ASSEMBLY

NORTHWEST TERRITORIES

1985 FIRST MINISTERS' CONFERENCE ON ABORIGINAL RIGHTS

Yellowknife, NWT

March 25, 1985

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1985 FIRST MINISTERS' CONFERENCE

Introduction

In preparation for the 1985 First Ministers' Conference (FMC) on Aboriginal Rights to be held in Ottawa on April 2nd and 3rd 1985, federal, provincial and territorial ministers met with aboriginal leaders in December, 1984 to discuss an agenda, and to examine the conference process to date. Since that meeting in December, 1984 the following agenda items have emerged for FMC 1985:

1. Self-government for aboriginal peoples;
2. Sexual equality rights;
3. Mandate for continued discussions; and
4. Nature of accord to be discussed at FMC '85.

These agenda items will be discussed more fully below.

At the meeting in December, 1984 the aboriginal associations stated that their objective for FMC '85 was to seek entrenchment of an inherent right to self-government for aboriginal peoples, together with rights to land and resources. Some governments, however, wanted FMC '85 to be a forum for setting the agenda for the period leading up to FMC '87. Western provincial governments generally felt that not enough work had been done to clarify the implications which aboriginal self-government would hold for the provinces, and therefore that constitutional amendments should not be contemplated until FMC '87.

Subsequent discussions, at meetings of officials in Winnipeg and Toronto in February and of Ministers in Toronto in March, have continued to focus on the right to self-government for aboriginal peoples, and the possibility of a constitutional amendment to guarantee this right. Participants felt that draft wording would assist everyone in dealing with this topic and the Federal Government therefore undertook to prepare draft constitutional accords relating to institutions of self-government for aboriginal peoples. Some provinces suggested that a political accord also be drafted as an additional item for consideration at FMC '85. The federal officials stated that they had no mandate to discuss or draft a political accord; however, they agreed to meet on an ad referendum basis with any of the provinces which wanted to pursue this approach.

On March 11th and 12th, and again on March 21, 1985 meetings were held to discuss draft constitutional and political accords which had been previously prepared by federal officials and some provincial governments. Ontario, Manitoba, New Brunswick, the Northwest Territories and the Federal Government appeared to favour a constitutional accord at FMC '85 which would lead to a constitutional amendment relating to self-government for aboriginal peoples. The remaining provinces and the Yukon preferred to give a political commitment at FMC '85 to continue discussions aimed at negotiating agreements to give to aboriginal peoples more control over their own affairs. Other matters discussed included sexual equality, federal/provincial co-operation on matters relating to aboriginal peoples, a possible workplan for the period from FMC '85 to FMC '87, and the need for more statistical information on aboriginal peoples in Canada.

This discussion paper, elaborates on the issue of self-government for aboriginal peoples, as well as on other proposed agenda items for FMC '85, in order to inform members of discussions on these matters to date and to seek direction on the positions to be adopted by the Government of the Northwest Territories at the forthcoming First Ministers Conference.

I. Self-Government for Aboriginal Peoples

It is clear that the concept of aboriginal self-government differs among the various aboriginal peoples. 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 accommodate adequately the aspirations of all native people. While the ICNI have advocated a form of public government for 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.

It is recognized that detailed discussions about the institutions of aboriginal self-government are unlikely to occur at FMC '85. Negotiations relating to the forms which institutions of self-government will take could be conducted between FMC '85 and FMC '87. At the Ministers' Meeting on March 11th and 12th, 1985 the Federal Government undertook to prepare, with consultation, a further draft constitutional accord for review by senior legal officials on March 21st, 1985. Revisions recommended by aboriginal groups at this March 21st meeting included removing references to

"institutions" of self-government and proceeding with an amendment relating to a general right to self-government. Other editorial revisions were also recommended. The primary objective of aboriginal groups appears to be to ensure that any amendment adopted at FMC '85 adequately recognizes and protects the general right to aboriginal self-government without prejudicing the legal implications of the recognition and affirmation of aboriginal and treaty rights under section 35(1) of the Constitution Act, 1982.

It is suggested that FMC '85 should as a minimum result in some commitment to the principle or concept of aboriginal self-government and a commitment to an elaboration of that principle or concept through mutually acceptable negotiation processes which would eventually result in institutions of self-government for aboriginal peoples. Aboriginal organizations are mindful of the need for some firm commitment to aboriginal self-government prior to FMC '87 if they are to obtain the implementation of the institutions of self-government after that date.

The Federal Government takes the position that constitutional change is necessary to lay a basis of trust and confidence as a pre-requisite to resolving aboriginal issues. The Federal Government has put forward in previous draft accords, proposals which recommend placing in the Constitution a right to institutions of self-government. This right would be unenforceable until the content and nature of the right is further defined through a process of negotiations between governments and aboriginal peoples, and agreements have been reached regarding institutions of self-government.

RECOMMENDATION

- a) That the GNWT support a constitutional Accord which would recognize the right of aboriginal self-government and which would give a firm commitment to amend the Constitution Act, 1982 to include a recognition of the right of self-government for aboriginal peoples.
- b) That any constitutional Accord which recognizes the right of self-government for aboriginal peoples should include provision for a negotiation process which would lead to agreements between the appropriate governments and the aboriginal peoples respecting the nature and content of the right as well as agreements respecting institutions for implementing the right.

- c) That agreements reached in negotiations with respect to the content of the right and the implementation of the right receive adequate and appropriate constitutional protection where the parties to the agreement so agree;
- d) That the GNWT should be a rightful party to all negotiations relating to institutions of self-government for aboriginal peoples in the NWT.
- e) That the GNWT should be a rightful party to any agreement respecting institutions of self-government for aboriginal peoples in the NWT which might arise from negotiations.

II. SEXUAL EQUALITY PROVISION

As a result of FMC 1983, the Constitution Act, 1982 was amended to include a clause which reads:

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.

When this clause appeared in the Constitution Act, 1982 aboriginal organizations were concerned that it was not the precise wording which was agreed to at FMC '83. The equality provision is limited to the rights in subsection (1) of section 35 (existing aboriginal and treaty rights). It might not address all the rights and freedoms pertaining to aboriginal people. Aboriginal organizations wanted to see subsection 35(4) reworded so that it would extend equality to all the rights of the aboriginal peoples. Governments generally felt that the present wording is adequate and no amendment should be made; however, if there were agreement that the wording does in fact create a problem, then they suggested amendments could be made to section 35 of the Charter to clarify the intent of the sexual equality provisions.

At FMC '84 it appeared that an agreement might be reached on a means of clarifying the equality provision in subsection 35(4). The AFN felt at that time, however, that they were not prepared to agree to the proposed amendment of section 35(4) because it would have the affect of undermining what the AFN interpreted as a guarantee of aboriginal and treaty rights under section 35(4). Section 35(1) uses vague wording

which "recognizes and affirms" aboriginal and treaty rights; however, when read with the existing section 35(4) it appears that the words "recognize and affirm" in subsection (1) actually mean "guarantee". Subsequently, the AFN communicated to then Prime Minister Trudeau, wording which it felt would be an acceptable means of clarifying subsection 35(4). The AFN proposed an amendment to be made to section 25 of the Constitution Act, 1982 as follows:

25(2) Notwithstanding anything in this Charter, all rights and all freedoms of the aboriginal peoples of Canada are guaranteed equally to male and female persons.

Most governments continue to take the position that no amendment is necessary to clarify subsection 35(4). The wording proposed by the AFN equality provision is practically identical to section 28 of the Charter which contains the general sexual equality provision; however, there is some concern that further uncertainty may arise as a result of placing the AFN equality provision in section 25 of the Charter.

At the recent Ministers' Meeting on March 11th and 12th, 1985 the Federal Government again put forward wording that would amend subsection 35(4) in a way which might undermine the interpretation that aboriginal and treaty rights are guaranteed to aboriginal men and women. Some of the provinces are strongly against removing sexual equality as an agenda item at FMC '85. It was felt that an amendment should be made to alleviate any fears which aboriginal women may have respecting the existing sexual equality provisions under the Constitution Act, 1982. More recently, the Native Women's Association of Canada and the Inuit Women's Association have indicated in a letter to the Prime Minister that they are concerned about the proposed wording for a possible amendment to section 35(4). They are strongly opposed to any alteration of the Constitution which would weaken their constitutional rights rather than enhance these rights.

RECOMMENDATION

That the GNWT support the position that any constitutional amendment to the sexual equality provision must guarantee to aboriginal men and women equally all of the rights and freedoms of aboriginal peoples, as well as all aboriginal and treaty rights under section 35(1) of the Constitution Act, 1982.

III. NATURE OF AN ACCORD FOR DISCUSSION AT FMC '85

The nature of any accord to be considered at FMC '85 is an issue on which no agreement has yet been reached. The aboriginal organizations, supported by New Brunswick, Manitoba and Ontario in particular, believe that an accord reached at FMC '85 should be constitutional in nature. The GNWT has also supported this position in the past.

The remaining provinces and the Yukon take the position that an accord should be political in nature, and should not result in any constitutional amendments at this time.

A constitutional Accord would result in constitutional amendments relating to self-government for aboriginal peoples, and a constitutionalized process for further negotiations respecting institutions of self-government. A political accord on the other hand would be a political rather than a legal commitment to hold discussions relating to better methods of dealing with the concept of aboriginal self-government.

RECOMMENDATION

- A) That the GNWT support the position that any accord agreed to at FMC '85 should be constitutional in nature and should include a provision for amending the Constitution Act, 1982 to recognize a right to self-government for aboriginal peoples, and that the accord should also include a commitment to conduct negotiations in the period from FMC '85 to FMC '87 with a view to reaching agreements on the institutions of self-government, which agreements would receive constitutional recognition and protection if the parties so agreed.
- B) That any amendment which recognizes a right to self-government for aboriginal peoples should be without prejudice to aboriginal and treaty rights recognized under section 35(1) of the Constitution Act, 1982.

IV. WORKPLANS FOR THE PERIOD FROM FMC '85 TO FMC '87

At the meeting of senior officials held February 21st and 22nd, 1985 the Federal Government tabled a draft workplan and timetable to solicit comment. A workplan and timetable were seen as beneficial in focusing the section 37 discussions after FMC '85, and in insuring that all outstanding issues will be fully explored prior to FMC '87. Items on the workplan

included agenda items from the 1983 Constitutional Accord as well as the constitutional proposals of the aboriginal organizations.

Two approaches were put forward for consideration. The first approach involves an agenda of all remaining items which would be common to all participants. There would be a minimum of two ministerial meetings each year, together with officials' meetings as necessary. Bilateral and multi-lateral meetings could be accommodated and community negotiations on institutions of self-government would be a part of this approach. An FMC prior to 1987 would be dependent on progress in the discussions.

The second approach would divide the period into two segments. The first year would deal with the proposals of the aboriginal organizations in four working groups, one for each of the Inuit, Indians, and Metis, the other for common issues. Working group divisions could also be on the basis of the four aboriginal associations. Ministerial meetings would give direction to the working groups. Community negotiations on institutions of self-government would also be a part of this approach.

At the Ministerial Meeting held March 11th and 12th, 1985 the participants generally agreed that discussions on a detailed workplan should not interfere with the more substantive agenda items at FMC '85. Consequently, it was proposed that discussions should be confined to obtaining a commitment and a mandate to hold a ministerial meeting within six months of FMC '85 to set a detailed agenda and workplan for the period FMC '85 to FMC '87.

RECOMMENDATION

That the GNWT support the position that there is a need for a mutually acceptable workplan and timetable for the period FMC '85 to FMC '87 and that a commitment and mandate should be sought at FMC '85 with regard to establishing an acceptable workplan and timetable as soon as practically possible after FMC '85.

