

The 1992 Charlottetown Accord and First Nations Peoples: Guiding the Future

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The constitutionalization of the inherent right of Aboriginal self-government has been the central goal of First Nations peoples in Canada for the past decade. The concept of self-government encompasses the traditional sovereignty that First Nations peoples enjoyed over their lands and the maintenance of their dignity as peoples. The dramatic rejection of the 1987 Meech Lake Accord by Elijah Harper exemplified the overall dissatisfaction that First Nations peoples had with that accord and the political process. History has a way of repeating itself and on 26 October 1992, Canada voted no to the Charlottetown Accord just days after Elijah Harper openly rejected the deal.

While the Charlottetown Accord may not be a viable option presently, aspects of the accord possess essential components to any future constitutional package that will include First Nations peoples and the solidification of their inherent rights into the Constitution. Principles in the accord that relate to First Nations peoples should provide a framework for any negotiated agreements between First Nations governments and the governments of Canada in the future. In this way, the accord may be influential. A brief examination of the Charlottetown Accord is helpful in understanding what will be needed in a future constitutional deal and negotiated settlements and what can be improved upon.

The Charlottetown Accord provided that the "aboriginal peoples of Canada have the inherent right of self-government within Canada." The inclusion of this clause was a major breakthrough for First Nations peoples in that a year before the accord was reached, its possible inclusion seemed unlikely. The use of "inherent" is crucial for First Nations peoples in that it signifies the important nature of self-government and its central role in their ability to define and to control their destiny.

The inherent right of self-government is explained by another clause of the Charlottetown Accord: the contextual statement. It reads:

The exercise of the right referred to in subsection (1) includes the

authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction, (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and (b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

The contextual statement sets parameters to the exercise of the inherent right of self-government. The meaning of this clause is unclear. What do the words "safeguard," "develop," "maintain" and "strengthen" really mean? How would the exercise of legislative authority work between First Nations governments and the federal and provincial governments vis-à-vis the inherent right of self-government? Natural resources are not included in subsection (b). This represents a major shortcoming for First Nations governments for two reasons. First, since the land base is such an important part of First Nations societies and the inherent right, it ought to include the major portion of the land; namely subsurface rights. Failure to do so weakens the nature of the inherent right at its most basic level. Second, without subsurface rights, First Nations governments would be denied a large portion of revenue to which the other two levels of government in Canada are entitled. Without an adequate economic base, such as natural resource development, the inherent right might very well be an unenforceable right.

The Charlottetown Accord also states that the inherent right of self-government:

... shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting *one of three orders of government in Canada*. [emphasis added]

This clause is significant in that it recognizes the sovereignty of First Nations governments and represents a move by First Nations governments towards the sovereignty now enjoyed by the Crown in right of Canada and the provinces. However, what is not clear is the extent to which First Nations governments are sovereign under the Charlottetown Accord. Would their legislative authority be equal to that of the provinces or would it be less? Another question about this clause is whether a third order of government necessarily implies a twelfth Crown for Canada (i.e., in addition to the Crown in right of Canada and the ten provinces). These

are fundamental questions that are left unanswered by the accord. Nevertheless, the principle of First Nations governments comprising one of three orders of government is significant.

No financial commitments were made in the accord but rather were dealt with in a separate political accord, which is not legally binding. This poses a major threat to the successful realization of Aboriginal self-government in Canada. Rights are one thing, but the ability to exercise those rights is another. Without a solid fiscal base, First Nations governments are significantly weakened. It has been argued by some that putting a financial commitment clause into the accord would have potentially weakened its acceptance among non-First Nations people.

It is submitted that the four points mentioned above are crucial to any constitutional amendments affecting First Nations peoples. The so-called "inherent" right of self-government, an explanation of what legislative powers the inherent right entails, the relationship between First Nations governments and the federal and provincial governments in terms of a third order of government, and a solid financial base should be, together, the substance of any future discussions of First Nations concerns and the Constitution. The Charlottetown Accord was not perfect, but it certainly offered more to First Nations peoples than anything prior to it. What is important to recognize from the accord is that it sets a basic standard upon which to judge future constitutional discussions respecting First Nations peoples. The accord is the starting point. Indeed, opinion polls have indicated that Canadians generally support Aboriginal self-government and, therefore, their "no" vote on the accord should not be seen as a rejection of the Aboriginal proposals in the accord.

It is difficult to ascertain what the future will hold for constitutional discussions in general and First Nations peoples in particular. What is certain is that the quest by First Nations peoples for more control and autonomy will continue to move forward. To this end, the importance of negotiated settlements is crucial.

The accord made provision for the constitutionalization of negotiated agreements between the governments of Canada and First Nations governments. This provides the impetus for the federal government to begin actively negotiating with First Nations to secure constructive and innovative means by which to implement self-government. The federal and provincial governments have indicated that they support Aboriginal self-government and this theme should be pressed forward by the national organizations representing the various First Nations peoples of Canada. The problem with backing off now from demands for self-government is

that it may have the effect of burying First Nations concerns in the national agenda.

There is a mechanism already in place to constitutionalize negotiated agreements. Section 35(3) of the *Constitution Act, 1982* reads:

For greater certainty in subsection (1) [aboriginal and treaty rights are hereby recognized and affirmed] "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

This mechanism allows for a reference to "treaty rights" to be incorporated into section 35(1) and thereby become recognized and affirmed. Any negotiated settlement therefore could become constitutionalized by way of referring to it as a "land claims agreement" as per section 35(3).

If future negotiations are to be meaningful, they must ensure that any future constitutional status for self-government applies to existing and future negotiated agreements. For one thing, this means that the municipal form of self-government advocated for a number of years by Indian Affairs must be rejected. Clearly, there is little room for such an approach in the post-Charlottetown Accord era. Agreements must recognize the inherent sovereignty (within Canada) of First Nations and must share legislative authority with First Nations so that their people can take full control of their lives. The spirit of the negotiations should keep in mind a number of the interpretive principles adopted by the Supreme Court of Canada and proposed in the Charlottetown Accord. Specifically, treaty rights are to be interpreted in a "just, broad and liberal manner" (s.35.6(1)).

The status of the federal government's Community Based Self-Government Strategy (CBSG) (fifteen First Nations taking part at any one time) is unclear. Based on the political commitments made in the accord, the CBSG process must be redefined to incorporate some of the essential elements of the accord, including the third order of government, the liberal interpretation and the inherent right to self-government clauses. Failure to accommodate these principles in the CBSG process represents an acceptance of the status quo, which was clearly rejected in the accord by the political leadership of Canada and which is equally unacceptable to First Nations.

The failure of the Charlottetown Accord means that the inherent right to self-government is not explicitly constitutionalized and the third order of government for First Nations has yet to be created. The accord may also have some political consequences relating to First Nations peoples. Although Aboriginal issues are part of the national agenda, there may be

a backlash that could adversely affect the goals of Aboriginal people. There could also be a shifting of priorities by the federal government. Indeed, Prime Minister Mulroney indicated days after 26 October 1992, that the economy must now become central to the national agenda. As well, the future role of the Assembly of First Nations and National Chief Ovide Mercredi is not clear, considering the in-house consultation problems and the ultimate rejection of the accord by the majority of First Nations peoples.

The Charlottetown Accord was not perfect for First Nations peoples, but it was not all bad. It exceeded the most optimistic views of what would be possible for First Nations in constitutional discussions. Aboriginal women had a number of clauses to protect and to ensure their equality in First Nations governments and in the application of Aboriginal rights (for example, see sections 35.5(2), 35.7 and 2(g) of the Canada clause). The inherent right to self-government and a third order of government were recognized. Despite this, Elijah Harper, days before the 26 October vote, said no to the accord and urged other First Nations peoples to do likewise. Time will be the judge if "no" was the right vote for First Nations peoples to cast.

One of the fundamental weaknesses of the accord was its comprehensiveness. It was either accept all of the accord or none of it. It is submitted that in order for a package of this magnitude to be accepted not only by First Nations peoples but all Canadians, the package should be separated into components. While the political elite may not prefer this means of constitutional change, they may not have any choice if they want to reform the Constitution. The rejection of the accord by First Nations peoples was probably more a political reaction than an issue of substance. First Nations peoples felt, like other Canadians, that the process simply did not allow for a full comprehension and understanding. Rather, even after the date for the referendum was announced, there existed no final legal text. I submit that this was one of the fundamental flaws for the rejection of the accord by First Nations and non-First Nations peoples. They were separated from the process to such an extent that they felt they were being "blackmailed" (a term used often by commentators on the accord's process). Regardless of whether this is true or not, this was the perception and people, especially First Nations people, reacted accordingly. This is not to suggest that the political process was the only reason why First Nations peoples rejected the accord, but it is submitted that this was one of the central reasons, regardless of what the accord actually recognized and gave to First Nations peoples.

The Charlottetown Accord was innovative in its treatment of First Nations concerns. It met, practically speaking, all the fundamental demands of First Nations (except for a constitutionalized financial commitment, which even the provinces do not possess). It safeguarded treaty rights exhaustively and protected the rights of First Nations women with no less than four clauses. The political accord assured satisfactory fiscal relationships between First Nations and the governments of Canada. The inherent right to self-government was unconditionally recognized in addition to the recognition of a third order of government in Canada. Although it had its interpretive weaknesses, like all legal texts, the accord was fundamentally a significant document for the First Nations of Canada. At the very least, First Nations had little to lose with the Aboriginal component of the package.

The principles of the Charlottetown Accord should be used by First Nations and the governments of Canada to secure meaningful self-government agreements. The political barriers should be few. The legal apparatus already exists in subsection 35(3) of the *Constitution Act, 1982*. The light of Aboriginal self-government will continue to shine only to the extent that some of the fundamental principles of the Charlottetown Accord are embodied in self-government agreements. If this is so, then the failure of the accord was not all negative for First Nations peoples, if the result is more sensitivity towards and understanding of their demands for their own forms and institutions of government within Canada.