

## Introduction to Document One

In October of 1992, Canadians went to the polls to cast their votes on the "Consensus Report on the Constitution," commonly known as the Charlottetown Accord. This agreement, arrived at after a prolonged, some would say tortuous process of consultation and negotiations, represented the consensus of the Government of Canada and the provinces regarding changes to the constitution. In putting the complex package to the people of Canada, the First Ministers clearly hoped for a positive vote. They were wrong. The Charlottetown Accord was defeated nationally, and in most regions.

The accord contained a variety of provisions which would have affected Aboriginal peoples, including one which would establish them as a third order of government in Canada. However, evidence suggests even Aboriginal peoples tended to vote against the accord, despite the exhortations of the leaders of the major Aboriginal political organizations.

The *Native Studies Review* is pleased to present the sections of the accord which pertained to Aboriginal peoples, as a means of placing these sections firmly within the public record.

It is likely that future developments with respect to the Constitution will be measured against the elements contained within the defeated accord.

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Editor



Document One:                   Sections Pertaining to  
  Aboriginal Peoples  
  in the *Consensus Report*  
  on the *Constitution*  
  [Charlottetown Accord]  
  August 28, 1992

## Preface

This document is a product of a series of meetings on constitutional reform involving the federal, provincial and territorial governments and representatives of Aboriginal peoples.

These meetings were part of the Canada Round of constitutional renewal. On September 24, 1991, the Government of Canada tabled in the federal Parliament a set of proposals for the renewal of the Canadian federation entitled *Shaping Canada's Future Together*. These proposals were referred to a Special Joint Committee of the House of Commons and the Senate which travelled across Canada seeking views on the proposals. The Committee received 3,000 submissions and listened to testimony from 700 individuals.

During the same period, all provinces and territories created forums for public consultation on constitutional matters. These forums gathered reaction and advice with a view to producing recommendations to their governments. In addition, Aboriginal peoples were consulted by national and regional Aboriginal organizations.

An innovative forum for consultation with experts, advocacy groups and citizens was the series of six televised national conferences that took place between January and March of 1992.

Shortly before the release of the report of the Special Joint Committee on a Renewed Canada, the Prime Minister invited representatives of the provinces and territories and Aboriginal leaders to meet with the federal Minister of Constitutional Affairs to discuss the report.

At this initial meeting, held March 12, 1992 in Ottawa, participants agreed to proceed with a series of meetings with the objective of reaching



consensus on a set of constitutional amendments. It was agreed that participants would make best efforts to reach consensus before the end of May, 1992 and that there would be no unilateral actions by any government while this process was under way. It was subsequently agreed to extend this series of meetings into June, and then into July.

To support their work, the heads of delegation agreed to establish a Coordinating Committee, composed of senior government officials and representatives of the four Aboriginal organizations. This committee, in turn, created four working groups to develop options and recommendations for consideration by the heads of delegation.

Recommendations made in the report of the Special Joint Committee on a Renewed Canada served as the basis of discussion, as did the recommendations of the various provincial and territorial consultations and the consultations with Aboriginal peoples. Alternatives and modifications to the proposals in these reports have been the principal subject of discussion at the multilateral meetings.

Including the initial session in Ottawa, there were twenty-seven days of meetings among the heads of delegation, as well as meetings of the Coordinating Committee and the four working groups. The schedule of the meetings during this first phase of meetings was:

|                           |            |
|---------------------------|------------|
| March 12                  | Ottawa     |
| April 8 and 9             | Halifax    |
| April 14                  | Ottawa     |
| April 29 and 30           | Edmonton   |
| May 6 and 7               | Saint John |
| May 11, 12 and 13         | Vancouver  |
| May 20, 21 and 22         | Montreal   |
| May 26, 27, 28, 29 and 30 | Toronto    |
| June 9, 10 and 11         | Ottawa     |
| June 28 and 29            | Ottawa     |
| July 3                    | Toronto    |
| July 6 and 7              | Ottawa     |

Following this series of meetings, the Prime Minister of Canada chaired a number of meetings of First Ministers, in which the Government of Quebec was a full participant. These include:

|                              |                 |
|------------------------------|-----------------|
| August 4                     | Harrington Lake |
| August 10                    | Harrington Lake |
| August 18, 19, 20, 21 and 22 | Ottawa          |
| August 27 and 28             | Charlottetown   |



Organizational support for the full multilateral meetings has been provided by the Canadian Intergovernmental Conferences Secretariat.

In the course of the multilateral discussions, draft constitutional texts have been developed wherever possible in order to reduce uncertainty or ambiguity. In particular, a rolling draft of legal text was the basis of the discussion of issues affecting Aboriginal peoples. These drafts would provide the foundation of the formal legal resolutions to be submitted to Parliament and the legislatures.

In areas where the consensus was not unanimous, some participants chose to have their dissents recorded. Where requested, these dissents have been recorded in the chronological records of the meetings but are not recorded in this summary document.

Asterisks in the text that follows indicate the areas where the consensus is to proceed with a political accord.

## *I: UNITY AND DIVERSITY*

### **A. PEOPLE AND COMMUNITIES**

#### **1. Canada Clause**

A new clause should be included as Section 2 of the *Constitution Act, 1867* that would express fundamental Canadian values. The Canada Clause would guide the courts in their future interpretation of the entire Constitution, including the *Canadian Charter of Rights and Freedoms*.

The *Constitution Act, 1867* is amended by adding thereto, immediately after Section 1 thereof, the following section:

“2. (1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:

- (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
- (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
- (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;



- (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
- (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
- (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
- (g) Canadians are committed to the equality of female and male persons; and
- (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

(2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language and, for greater certainty, nothing in this section derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada."

## 2. Aboriginal Peoples and the Canadian Charter of Rights and Freedoms

The Charter provision dealing with Aboriginal peoples (Section 25, the non-derogation clause) should be strengthened to ensure that nothing in the Charter abrogates or derogates from Aboriginal, treaty or other rights of Aboriginal peoples, and in particular any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions.

## II: INSTITUTIONS

### A. THE SENATE

#### 9. Aboriginal Peoples' Representation in the Senate

Aboriginal representation in the Senate should be guaranteed in the Constitution. Aboriginal Senate seats should be additional to provincial and territorial seats, rather than drawn from any province or territory's allocation of Senate seats.



Aboriginal Senators should have the same role and powers as other Senators, plus a possible double majority power in relation to certain matters materially affecting Aboriginal people. These issues and other details relating to Aboriginal representation in the Senate (numbers, distribution, method of selection) will be discussed further by governments and the representatives of the Aboriginal peoples in the early autumn of 1992. (\*)

## B. THE SUPREME COURT

### 20. Aboriginal Peoples' Role

The structure of the Supreme Court should not be modified in this round of constitutional discussions. The role of Aboriginal peoples in relation to the Supreme Court should be recorded in a political accord and should be on the agenda of a future First Ministers' Conference on Aboriginal issues. (\*)

Provincial and territorial governments should develop a reasonable process for consulting representatives of the Aboriginal peoples of Canada in the preparation of lists of candidates to fill vacancies on the Supreme Court. (\*)

Aboriginal groups should retain the right to make representations to the federal government respecting candidates to fill vacancies on the Supreme Court. (\*)

The federal government should examine, in consultation with Aboriginal groups, the proposal that an Aboriginal Council of Elders be entitled to make submissions to the Supreme Court when the court considers Aboriginal issues. (\*)

## C. HOUSE OF COMMONS

### 22. Aboriginal Peoples' Representation

The issue of Aboriginal representation in the House of Commons should be pursued by Parliament, in consultation with representatives of the Aboriginal peoples of Canada, after it has received the final report of the House of Commons Committee studying the recommendations of the Royal Commission on Electoral Reform and Party Financing. (\*)

## D. FIRST MINISTERS' CONFERENCES

### 23. Entrenchment

A provision should be added to the Constitution requiring the Prime Minister to convene a First Ministers' Conference at least once a year. The



agendas for these conferences should not be specified in the Constitution.

The leaders of the territorial governments should be invited to participate in any First Ministers' Conference convened pursuant to this constitutional provision. Representatives of the Aboriginal peoples of Canada should be invited to participate in discussions on any item on the agenda of a First Ministers' Conference that directly affects the Aboriginal peoples. This should be embodied in a political accord. (\*)

### *III: ROLES AND RESPONSIBILITIES*

#### 26. Protection of Intergovernmental Agreements

The Constitution should be amended to provide a mechanism to ensure that designated agreements between governments are protected from unilateral change. This would occur when Parliament and the legislature(s) enact laws approving the agreement.

Each application of the mechanism should cease to have effect after a maximum of five years but could be renewed by a vote of parliament and the legislature(s) readopting similar legislation. Governments of Aboriginal peoples should have access to this mechanism. The provision should be available to protect both bilateral and multilateral agreements among federal, provincial and territorial governments, and the governments of Aboriginal peoples. A government negotiating an agreement should be accorded equality of treatment in relation to any government which has already concluded an agreement, taking into account different needs and circumstances.

#### 29. Culture

Provinces should have exclusive jurisdiction over cultural matters within the provinces. This should be recognized through an explicit constitutional amendment that also recognizes the continuing responsibility of the federal government in Canadian cultural matters. The federal government should retain responsibility for national cultural institutions, including grants and contributions delivered by these institutions. The Government of Canada commits to negotiate cultural agreements with provinces in recognition of their lead responsibility for cultural matters within the province and to ensure that the federal governments [*sic*] and the province work in harmony. These changes should not alter the federal fiduciary responsibility for Aboriginal people. The non-derogation provisions for Aboriginal peoples set out in item 40 of this document will apply to culture.



#### 40. Aboriginal Peoples' Protection Mechanism

There should be a general non-derogation clause to ensure that division of powers amendments will not affect the rights of the Aboriginal peoples and the jurisdictions and powers of governments of Aboriginal peoples.

### IV: FIRST PEOPLES

Note: References to the territories will be added to the legal text with respect to this section, except where clearly inappropriate. Nothing in the amendments would extend the powers of the territorial legislatures.

#### A. THE INHERENT RIGHT OF SELF-GOVERNMENT

##### 41. The Inherent Right of Self-Government

The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada. This right should be placed in a new section of the *Constitution Act, 1982*, Section 35.1(1).

The recognition of the inherent right of self-government should be interpreted in light of the recognition of Aboriginal governments as one of three orders of government in Canada.

A contextual statement should be inserted in the Constitution, as follows:

"The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of 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 ensure the integrity of their societies."

Before making any final determination of an issue arising from the inherent right of self-government, a court or tribunal should take into account the contextual statement referred to above, should enquire into the efforts that have been made to resolve the issue through negotiations and should be empowered to order the parties to take such steps as are appropriate in the circumstances to effect a negotiated resolution.



42. Delayed Justiciability

The inherent right of self-government should be entrenched in the Constitution. However, its justiciability should be delayed for a five-year period through constitutional language and a political accord. (\*)

Delaying the justiciability of the right should be coupled with a constitutional provision which would shield Aboriginal rights.

Delaying the justiciability of the right will not make the right contingent and will not affect existing Aboriginal and treaty rights.

The issue of special courts or tribunals should be on the agenda of the first First Ministers' Conference on Aboriginal Constitutional matters referred to in item 53. (\*)

43. Charter Issues

The *Canadian Charter of Rights and Freedoms* should apply immediately to governments of Aboriginal peoples.

A technical change should be made to the English text of sections 3, 4 and 5 of the *Canadian Charter of Rights and Freedoms* to ensure that it corresponds to the French text.

The legislative bodies of Aboriginal peoples should have access to Section 33 of the *Constitution Act, 1982* (the notwithstanding clause) under conditions that are similar to those applying to Parliament and the provincial legislatures but which are appropriate to the circumstances of Aboriginal peoples and their legislative bodies.

44. Land

The specific constitutional provision on the inherent right and the specific constitutional provision on the commitment to negotiate land should not create new Aboriginal rights to land or derogate from existing aboriginal or treaty rights to land, except as provided for in self-government agreements.

## B. METHOD OF EXERCISE OF THE RIGHT

45. Commitment to Negotiate

There should be a constitutional commitment by the federal and provincial governments and the Indian, Inuit and Métis peoples in the various regions and communities of Canada to negotiate in good faith with the objective of concluding agreements elaborating the relationship between Aboriginal governments and the other orders of government. The negotiations would focus on the implementation of the right of self-government including issues of jurisdiction, lands and resources, and economic and fiscal arrangements.



#### 46. The Process of Negotiation

##### Political Accord on Negotiation and Implementation

- A political accord should be developed to guide the process of self-government negotiations. (\*)

##### Equity of Access

- All Aboriginal peoples of Canada should have equitable access to the process of negotiation.

##### Trigger for Negotiations

- Self-government negotiations should be initiated by the representatives of Aboriginal peoples when they are prepared to do so.

##### Provision for Non-Ethnic Governments

- Self-government agreements may provide for self-government institutions which are open to the participation of all residents in a region covered by the agreement.

##### Provision for Different Circumstances

- Self-government negotiations should take into consideration the different circumstances of the various Aboriginal peoples.

##### Provision for Agreements

- Self-government agreements should be set out in future treaties, including land claims agreements or amendments to existing treaties, including land claims agreements. In addition, self-government agreements could be set out in other agreements which may contain a declaration that the rights of the Aboriginal peoples are treaty rights, within the meaning of Section 35(1) of the *Constitution Act, 1982*.

##### Ratification of Agreements

- There should be an approval process for governments and Aboriginal peoples for self-government agreements, involving Parliament, the legislative assemblies of the relevant provinces and/or territories and the legislative bodies of the Aboriginal peoples. This principle should be expressed in the ratification procedures set out in the specific self-government agreements.

##### Non-Derogation Clause

- There should be an explicit statement in the Constitution that the commitment to negotiate does not make the right of self-government contingent on negotiations or in any way affect the justiciability of the right of self-government.



### Dispute Resolution Mechanism

- To assist the negotiation process, a dispute resolution mechanism involving mediation and arbitration should be established. Details of this mechanism should be set out in a political accord. (\*)

### 47. Legal Transition and Consistency of Laws

A constitutional provision should ensure that federal and provincial laws will continue to apply until they are displaced by laws passed by governments of Aboriginal peoples pursuant to their authority.

A constitutional provision should ensure that a law passed by a government of Aboriginal peoples, or an assertion of its authority based on the inherent right provision may not be inconsistent with those laws which are essential to the preservation of peace, order and good government in Canada. However, this provision would not extend the legislative authority of Parliament or of the legislatures of the provinces.

### 48. Treaties

With respect to treaties with Aboriginal peoples, the Constitution should be amended as follows:

- treaty rights should be interpreted in a just, broad and liberal manner taking into account the spirit and intent of the treaties and the context in which the specific treaties were negotiated;
- the Government of Canada should be committed to establishing and participating in good faith in a joint process to clarify or implement treaty rights, or to rectify terms of treaties when agreed to by the parties. The governments of the provinces should also be committed, to the extent that they have jurisdiction, to participation in the above treaty process when invited by the government of Canada and the Aboriginal peoples concerned or where specified in a treaty;
- participants in this process should have regard, among other things and where appropriate, to the spirit and intent of the treaties as understood by Aboriginal peoples. It should be confirmed that all Aboriginal peoples that possess treaty rights shall have equitable access to this treaty process;
- it should be provided that these treaty amendments shall not extend the authority of any government or legislature, or affect the rights of Aboriginal peoples not party to the treaty concerned.



## C. ISSUES RELATED TO THE EXERCISE OF THE RIGHT

### 49. Equity of Access to Section 35 Rights

The Constitution should provide that all of the Aboriginal peoples of Canada have access to those Aboriginal and treaty rights recognized and affirmed in Section 35 of the *Constitution Act, 1982* that pertain to them.

### 50. Financing

Matters relating to the financing of governments of Aboriginal peoples should be dealt with in a political accord. The accord would commit the governments of Aboriginal peoples to:

- promoting equal opportunities for the well-being of all Aboriginal peoples;
- furthering economic, social and cultural development and employment opportunities to reduce disparities in opportunities among Aboriginal peoples and between Aboriginal peoples and other Canadians; and
- providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity.

It would also commit federal and provincial governments to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments to govern their own affairs and to meet the commitments listed above, taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of governments of Aboriginal peoples to raise revenues from their own sources.

The issues of financing and its possible inclusion in the Constitution should be on the agenda of the first First Ministers' Conference on Aboriginal Constitutional matters referred to in item 53. (\*)

### 51. Affirmative Action Programs

The Constitution should include a provision which authorizes governments of Aboriginal peoples to undertake affirmative action programs for socially and economically disadvantaged individuals or groups and programs for the advancement of Aboriginal languages and cultures.

### 52. Gender Equality

Section 35(4) of the *Constitution Act, 1982*, which guarantees existing Aboriginal and treaty rights equally to male and female persons, should be



retained. The issue of gender equality should be on the agenda of the first First Ministers' Conference on Aboriginal Constitutional matters referred to under item 53. (\*)

53. Future Aboriginal Constitutional Process

The Constitution should be amended to provide for four future First Ministers' Conferences on Aboriginal constitutional matters beginning no later than 1996, and following every two years thereafter. These conferences would be in addition to any other First Ministers' Conferences required by the Constitution. The agendas of these conferences would include items identified in this report and items requested by Aboriginal peoples.

54. Section 91(24)

For greater certainty, a new provision should be added to the *Constitution Act, 1867* to ensure that Section 91(24) applies to all Aboriginal peoples.

The new provision would not result in a reduction of existing expenditures by governments on Indians and Inuit or alter the fiduciary and treaty obligations of the federal government for Aboriginal peoples. This would be reflected in a political accord. (\*)

55. Métis in Alberta/Section 91(24)

The Constitution should be amended to safeguard the legislative authority of the Government of Alberta for Métis and Métis Settlements lands. There was agreement to a proposed amendment to the *Alberta Act* that would constitutionally protect the status of the land held in fee simple by the Métis Settlements General Council under letters patent from Alberta.

56. Métis Nation Accord (\*)

The federal government, the provinces of Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and the Métis National Council have agreed to enter into a legally binding, justiciable and enforceable accord on Métis Nation issues. Technical drafting of the Accord is being completed. The Accord sets out the obligations of the federal and provincial governments and the Métis Nation.

The Accord commits government to negotiate: self-government agreements; lands and resources; the transfer of the portion of Aboriginal programs and services available to Métis; and cost-sharing arrangements relating to Métis institutions, programs and services.



Provinces and the federal government agree not to reduce existing expenditures on Métis and other Aboriginal people as a result of the Accord or as a result of an amendment to Section 91(24). The Accord defines the Métis for the purposes of the Métis Nation Accord and commits governments to enumerate and register the Métis Nation.

## *V: THE AMENDING FORMULA*

Note: All of the following changes to the amending formula require the unanimous agreement of Parliament and the provincial legislatures.

### 60. Aboriginal Consent

There should be Aboriginal consent to future constitutional amendments that directly refer to the Aboriginal peoples. Discussions are continuing on the mechanism by which this consent would be expressed with a view to agreeing on a mechanism prior to the introduction in Parliament of formal resolutions amending the Constitution.