

these aboriginal rights consisted of, or how they would be exercised — particularly remaining silent over aboriginal self-governing the rights. Beneath the surface, however, lay more fundamental concerns related to aboriginal self-government, including questions of power, jurisdiction, and costs. Much of the controversy centred about the extent to which the provinces were willing to compromise their constitutional right to self-rule in exchange for aboriginal claims to self-government. Equally significant was the issue of whether the details of self-government were to be politically defined by the courts *ex post facto*. To try and determine what unique rights Native Indians were entitled to under the Constitution's aboriginality provisions, the Constitution made arrangements for a series of up to four First Minister conferences, this being the last.

If one critical issue could be singled out at the crux of the debate, it was the question of aboriginal self-governing 'rights' as interpreted by Constitutional experts. The debate focused on whether section 35(1) represented an 'empty box' clause which contained no specific rights until negotiated politically; or did it constitute a 'full box' of rights, as native spokespersons asserted, which needed only to be clarified by the First Ministers. Native lobbies argued that they possessed an *inherent* right to self-government by virtue of their status as the 'ancestral occupants' of the land whose right to political sovereignty and land entitlement had never been extinguished either by treaty or conquest. The inclusion of section 35(1) merely reaffirmed for aboriginal groups what had already existed from 'time immemorial'; namely, their status as a nation within a nation whose self-governing rights predated the Confederation. In opposition to this were the federal and provincial governments who countered with what might be termed a *contingent* rights approach to aboriginal self-government. Under this type of arrangement, Native Indians would be conferred the right to self-government as set out in section 35(1) of the Act, but entrenchment of this right would be 'contingent' upon prior negotiations over details with the different levels of government. No proposal for self-government would be enshrined within the constitution that had not been politically negotiated beforehand or without the consent of the negotiating province. In other words, unlike native groups who proposed to entrench the principle of self-government first and negotiate the specifics later, the provincial and feder-

al governments were prepared to negotiate the terms and powers of self-government first, then constitutionally protect what had been specified.

Why did Native and government spokespersons assume such diametrically opposed positions with respect to clarifying the 'rights' over aboriginal self-government? For native groups the entrenchment of an intrinsic right to self-government with no strings attached was crucial. They entered the conference promising to settle for nothing less than an unqualified right to self-government, and notwithstanding some wavering as the conference progressed, they retained a common front to the end. In the opinion of participating native organisations, prior entrenchment of aboriginal self-governing rights was indispensable in severing the bonds of dependency and underdevelopment engendered by the



provisions of the Indian Act. Yet verbal assurances by the government to negotiate in good faith could not be accepted in light of repeated acts of political expediency. Only with constitutional amendment and recourse to the courts to exert pressure on recalcitrant provinces could Native organizations be assured of meaningful political participation. They demanded as close to an iron-clad guarantee as possible, as to ensure that the right to self-government was not lightly revoked or undermined by future government officials. Towards that end, Native groups refused to accept any process where the parameters of this self-governing right were contingent upon the threat of a provincial veto. Such a position was perceived as compromising their political leverage since it left little in the way of recourse to the courts should negoti-

ations falter.

Opposed to this interpretation were the government sectors who generally disdained any form of self-government that bypassed political negotiation. Not that federal or provincial representatives were unsympathetic to aboriginal self-rule aspirations. On the contrary. Premier David Peterson spoke earnestly of the 'sense of historical grievance that aboriginal peoples brought to the conference'. But he like others tempered this statement by acknowledging the 'sense of caution that governments brought' to the sessions. Financial and jurisdictions considerations proved to be major stumbling blocks. Most provinces hesitated over an unrestricted right to self-government for fear of incurring excessive costs and substantial cost-sharing with the federal government in areas such as welfare transfer payments. Also worrisome was the logics of implementing self-governing provisions. British Columbia was particularly adamant about any prior entrenchment of aboriginal self-government. The province contains 197 bands (one third of all Canada's), and 1,628 reserves (or 72% of the Canadian total). If the constitutional rights of native persons were guaranteed, Premier vander Zalm argued, the province would find itself in the daunting position of negotiating self-government agreements with each particular group. He warned of splitting the provinces into "three hundred and fifty small nations, where nobody would pay taxes, but would still claim the same privileges as other Canadians".

The attorney-general for Ontario, Mr Ian Scott, echoed British Columbia's apprehension. According to Mr Scott, one of the fundamental problems was not of conferring the right to self-government to Native Indians within geographic areas such as reserves. Rather, entrenchment problems were envisaged in areas where self-rule rights would be demanded by groups of 'landless' natives — particular those dwelling in urban areas. Finally, the provinces could not bring themselves around to any amendment which transferred jurisdictional control over aboriginal government to the judiciary. They united against any constitutional agreement which could be used against the government by the courts whose decisions in the past veered toward a liberal interpretation of aboriginal rights. Provincial premiers disputed the right of judges to define the meaning of vaguely worded constitutional agreements over aboriginal self-government which had eluded elected politicians. Definitional matters could not be taken