

Patriation and Section 35: The Role of Allan Blakeney in Securing Indigenous Rights

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Preface

In 1982, after intense discussions and negotiations in the preceding 18 months, the Constitution of Canada was patriated from the United Kingdom. Included in that massive constitutional change was the adoption of section 35 of the *Constitution Act, 1982*. Through this section, the rights of Canada's Indigenous peoples were recognized and affirmed for the first time in the Constitution of Canada. That section reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(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.¹

For many of us who were intimately involved in the negotiations, this was a dramatic and satisfying change. The inclusion of section 35 was one of several crowning achievements. It was, however, only the beginning. This general section, while important, would not be com-

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1 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*].

plete until the parameters and definitions of its content were fully “unpacked.” How did we see that process unfolding, and within what parameters would section 35 subsequently be developed? Those of us who represented provincial governments during the patriation process had various expectations in this regard.² First, we anticipated that the First Ministers of Canada would meet with Indigenous leaders over the succeeding years and in a long and thoughtful process come to some agreement about the content of section 35. Second, whatever the result of those negotiations, we understood that the completed section 35 would be expressed in a manner consistent with the sovereignty of Canada; that is, we understood that the section would not lead to the constitutional recognition of sovereign international Indigenous nations. Third and finally, we expected that the expansion of detail in section 35 would bring about significant institutional change to the political structure of Canada. Unfortunately, these expectations were not fulfilled, and the result of this failure reverberates through the body politic of Canada to this day.

The Focus of This Paper

This paper will attempt to do four things. First, it will review some of the background essential to understanding how Indigenous leaders were involved in the patriation process and why section 35 was adopted as part of the patriation package. Second, it will elaborate on the role of former Premier Allan Blakeney of Saskatchewan in securing the adoption of section 35. Third, it will examine some of the expectations for significant structural change to the Canadian political system that were contemplated by the non-Indigenous participants involved in the patriation negotiations and, most importantly, why those expectations were never met. Finally, the paper will attempt to answer the fundamental question: are Indigenous peoples and their rights protected by the adoption of a general section 35, or has the existence of such a general provision actually hindered progress toward a more complete reconciliation between Indigenous and non-Indigenous peoples in Canada?

As a non-Indigenous person who participated in these negotiations, I realize that my views on many of these matters may not necessarily reflect or coincide with those of the Indigenous participants in the patriation process. However, despite that, and in the spirit of reconciliation, which most importantly requires ultimate agreement between the Indigenous and non-Indigenous communities in Canada, I believe that the following observations might be useful in forwarding the process of dialogue regarding section 35 and its place in our constitutional order.

Background

Sadly, the experience of Indigenous populations in Canada has paralleled that of other peoples on the planet who at one time or another have experienced political, cultural, and economic domination by other peoples or other states. This is not new in human history. The Europeans did not invent imperialism, nor did they invent racism. They did, however, practise it on a

2 At the time I was Deputy Minister for the Department of Intergovernmental Affairs in the Government of Saskatchewan. As such, I was the chief civil servant in charge of negotiations for my Minister, the Honourable Roy Romanow, and Premier Allan Blakeney.

global scale far more extensively than previous imperial states. The Canadian experience, with some significant exceptions, has paralleled that of other areas.

The immediate consequences of the imperial and colonial domination of Canada were marked by two major policies. First, the lands of the existing Indigenous nations were appropriated by treaty, or by force in some instances. Second, colonial administrations from the earliest time attempted to assimilate Indigenous nations and peoples into the dominant culture, and especially into the dominant religion. This included efforts to extinguish the linguistic, cultural, and historical existence of Indigenous populations, and paralleled attempts by European states to do the same in other areas of the world.

This paper will not recount the shameful actions and processes of the British and Canadian governments in the years between 1763 and 1982 — actions and processes that resulted in the almost complete destruction of Indigenous societies, cultures, and languages.³ Rather, the paper will pick up the narrative at the point when Indigenous peoples became participants in the process of constructing, and in some cases reconstructing, the constitutional state of Canada.

The Short Road to Participation

Most Canadians are somewhat familiar with the long road to constitutional independence in Canada. It began in 1867 and continued until 1982, when the Constitution of Canada was patriated. Along the way there were dozens of conferences amongst First Ministers in Canada, and hundreds if not thousands of meetings of officials. The process became familiar. The First Ministers of the federal and provincial governments of Canada would meet and attempt to find acceptable changes to the *British North America Act* (now the *Constitution Act, 1867*).⁴ No other political or social groups were allowed to sit at the table or exercise decision-making power. Along the way there was some progress on important matters, but the holy grail of these talks, the severing of Canada's final constitutional ties to Great Britain, remained elusive. Several times the governments of Canada seemed on the verge of a successful negotiation, only to have it fail for one reason or another each time.

The growth of separatist sentiment in Québec in the mid-1960s brought a new urgency to the need to modernize and patriate the old *British North America Act*. Pierre Trudeau, first elected as Prime Minister in 1968, committed his government to securing a new constitutional arrangement that would allow the Canadian state to develop in a manner consistent with the individual and collective views of the various parts of Canada. In a series of negotiations that began in 1968 and ended in 1971 with an agreement on a package called the Victoria Charter, he almost succeeded. The package was tentatively approved by all 10 provincial governments, as well as the federal government, at a meeting of first ministers in 1971. However, the Liberal Party government of Québec, headed by Premier Robert Bourassa, succumbed to domestic provincial pressure and at the last minute withdrew its approval.

3 Others have documented this history in a more complete manner. In particular, see the reports of the Truth and Reconciliation Commission: *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada*, Catalogue No IR4-9/2015E-PDF (Montreal: McGill-Queen's University Press, 2015).

4 *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

In the 1976 Québec election, Mr Bourassa's government was defeated by the Parti Québécois. The political turmoil created by the election of the separatist Parti Québécois manifested itself almost immediately in discussions about the constitutional status of Québec in Canada, as well as about the relative distribution of powers between the federal Parliament and provincial legislatures. The threat of separation galvanized political leaders to search for constitutional changes that would accommodate the new realities of Canada.

Participation of Indigenous Peoples in Constitutional Change

As part of the process leading up to the Victoria Charter in 1971, Pierre Trudeau's government issued a White Paper outlining proposed changes to the status of Indigenous peoples and their treaties in Canada.⁵ The roots of this effort can be traced to 1963 and the work of Harry B Hawthorne, which changed the entire context of how Indigenous people and peoples were viewed in Canada.

In 1963, the federal government commissioned Hawthorne to investigate the social conditions of Aboriginal peoples across Canada. In his report, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, Hawthorne concluded that Aboriginal peoples were Canada's most disadvantaged and marginalized population. They were "citizens minus." Hawthorne attributed this situation to years of failed government policy, particularly the residential school system which left students unprepared for participation in the contemporary economy. He recommended that Aboriginal peoples be considered "citizens plus" and be provided with the opportunities and resources to choose their own lifestyles, whether within reserve communities or elsewhere. He also advocated ending all forced assimilation programs, especially the residential schools.⁶

Drawing upon this early work, and guided by its own liberal ideology, the Trudeau government issued the "White Paper" — a policy document that contained a series of recommendations involving Indigenous peoples. The most important of these were:

- Eliminate Indian status;
- Dissolve the Department of Indian Affairs within five years;
- Abolish the *Indian Act*;
- Convert reserve land to private property that can be sold by the band or its members;
- Transfer responsibility for Indian affairs from the federal government to the province and integrate these services into those provided to other Canadian citizens;
- Provide funding for economic development;
- Appoint a commissioner to address outstanding land claims and gradually terminate existing treaties.⁷

5 Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969*, Catalogue No R32-2469E-PDF (Ottawa: Indian and Northern Affairs Canada, 1969).

6 "The White Paper 1969," online: *Indigenous Foundations* <indigenousfoundations.arts.ubc.ca/the_white_paper_1969/> [perma.cc/RSZ5-74FH].

7 *Ibid.*

The proposed changes were rooted in the government's belief that in order to combat the upsurge of separatist sentiment in Québec, Canada must be "re-founded" with an emphasis on individual rights and freedoms, supported by an intense Canadian nationalism. In other words, collectivist notions based on ethnic, linguistic, religious, or regional identities were to be beaten back by changing the Constitution of Canada to ensure that a new Canadian loyalty, based on individual rights and freedoms, would be given primacy in the Canadian state. In such a conception, the linguistic, ethnic, treaty, and territorial claims of Indigenous people were perceived to be one more pressure that must be resisted.

The White Paper caused a huge furor amongst Indigenous peoples of Canada. Harold Cardinal, a leading Indigenous chief in Alberta, had the following to say regarding the White Paper:

In spite of all government attempts to convince Indians to accept the White Paper, their efforts will fail, because Indians understand that the path outlined by the Department of Indian Affairs through its mouthpiece, the Honourable Mr. Chrétien, leads directly to cultural genocide. We will not walk this path.⁸

As a result, Indigenous peoples across Canada sought to organize themselves in order to seek participation in any constitutional discussions that might fundamentally change their relationship with Canada. They began by issuing a direct response to the White Paper, usually referred to as "The Red Paper."⁹ This paper responded in detail with a plan of action and specific proposals, most of which revolved around recognizing and affirming treaty rights in Canada (at this point the paper did not include or recommend steps to be taken by the Inuit people of Canada). The paper ended with an explicit warning:

If the Federal Government accepts its well-established obligations and seeks to honour them fully and enthusiastically, there is good reason to believe that consultation and progress are possible. But in the case of grave social wrongs and deeply felt concerns, time is of the essence. The Indian leadership today is accustomed to the honourable and peaceful discussion and eventual solution, of the rights and needs and aspirations of our people. But if for much longer the rights are not noticed, needs not met, or aspirations not fulfilled, then no one — especially having regard to developments all over the globe — can be assured that the rank and file will continue to accept such pacific conduct from its leaders.¹⁰

Indigenous leaders were successful in resisting the adoption and implementation of the Liberal government's White Paper. However, with the abandonment of this approach, the Trudeau government was left with no coherent strategy to deal with Indigenous issues. From 1971 to 1976 both constitutional negotiations and negotiations with Indigenous groups were temporarily put in abeyance as the Trudeau government first attempted to deal with results of the 1972 election that had left them in a minority status, and then with increasingly important economic matters brought on by huge increases in oil prices in the world.

As noted above, constitutional negotiations then leapt to the front of the agenda again after the surprise victory of the Parti Québécois in the 1976 Québec election. Suddenly, it became vital — from the perspective of the Prime Minister and a number of the Premiers —

8 *Ibid.*

9 Indian Chiefs of Alberta, "Foundational Document: Citizens Plus" (2011) 1:1 Aboriginal Policy Studies 188.

10 *Ibid* at 210.

to “reinvent” Canada in order to ensure that the pressures for Québec separation were met and defeated. The Prime Minister turned once again to securing constitutional changes that would reinforce individual Canadian loyalty to the country while dealing with regional/ethnic linguistic and regional/economic demands. As a result, Indigenous leaders found themselves both powerless and buffeted by a maelstrom of contending pressures throughout the country. Thus, when constitutional negotiations resurfaced, Indigenous leaders and Indigenous matters were completely sidelined. The White Paper’s assimilative policies had been replaced, then, with a policy of neglect and disinterest.

Fighting to Be Heard

The major response by the federal government to the threat of separation posed by the election of the Parti Québécois government in 1976 came in the form of Bill C 60, in June of 1978. Strikingly, in a stunning omission, the statement of aims in the bill, which spoke specifically about the equitable sharing of the benefits and burdens of living in the vast land called Canada, did not mention Indigenous people at all. More importantly, when the bill described the constituent elements of Canada, it included the territories of the Yukon and Northwest Territories, but did not mention Indigenous Nations. An explanatory document published with Bill C 60 raised the prospect of “native groups” and governments agreeing on provisions to be enshrined in the proposed constitutional charter of rights, but did not state that Indigenous people would participate in the broader process as equal members at the decision-making table.

How might we explain this omission? The simple answer is that the federal government and Parliament felt that they were faced with an extreme emergency, and their response was accordingly calculated to speak to the imminent threat of the breakup of Canada, and not to future relationships with Indigenous peoples. Nevertheless, it is clear that Indigenous peoples, their treaties, and their inherent rights as nations were not only absent from Bill C 60, but were absent from any meaningful discussion at any level.

The Indigenous Response

At the annual meeting of the National Indian Brotherhood (NIB) in August of 1978, it was agreed that a delegation of chiefs and elders would visit the Queen to ask that the Canadian Constitution not be patriated unless “Aboriginal rights” were recognized in it. At this point, it became obvious to the federal government that Indigenous people would have to be included in the constitutional process in some manner. Therefore, the federal government proposed to the provinces that Indigenous representatives be invited to make presentations to the First Ministers Conference at the upcoming constitutional conference in October. However, this proposal was not taken up. Instead, Indigenous representatives were invited to the conference, but only as observers.

When the First Ministers met on October 30, 1978, they welcomed the Indigenous observers and noted the importance of their concerns in the constitutional discussions. This was deemed insufficient by the National Indian Brotherhood, which circulated a letter to all delegates expressing the view that Indigenous representatives should be involved in the constitutional discussions as equal participants. In the period between November 1, 1978, and

January 30, 1979, discussions took place between the three national federations representing Indigenous peoples in Canada and the federal government. As a result, these three organizations were once again asked to send observers to the second First Ministers Conference on the Constitution that was held on February 5 and 6, 1979. At that conference, the Prime Minister, with the support of several premiers, proposed that the meeting accept that federal and provincial ministers and/or First Ministers meet with Indigenous leaders at a later date to explore their concerns and have a dialogue on outstanding issues related to the Constitution. The Prime Minister also proposed that, as part of the work on the Constitution, federal and provincial governments adopt a specific item entitled “Canada’s Native Peoples and the Constitution.” For the first time, it looked as if progress was being made.

Constitutional Discussions Derailed by Two Federal Elections

The two federal elections, first in the spring of 1979 and again in the early winter of 1980, effectively placed constitutional discussions on the back burner. Indigenous peoples attempted to raise a number of issues with the minority Conservative government headed by Prime Minister Joe Clark, and in some respects they were successful. But nothing of consequence happened until Pierre Trudeau was re-elected as Prime Minister in February of 1980.

Just a few months after Trudeau’s re-election, Québec held its referendum on sovereignty association. During the referendum campaign, the Prime Minister and the Liberal Party of Canada made a specific promise to renew constitutional discussions and to renew Canada if the people of Québec voted to stay within the federation. When the people of Québec rejected separation in the spring of 1980, Prime Minister Trudeau moved quickly to begin that process by calling a First Ministers Conference for June 9, 1980. Indigenous leaders, however, were not invited to the conference.

As the process of constitutional renewal unfolded, it soon became clear that the agenda for constitutional change had grown, especially on items of interest to the provinces, and that there would be no quick patriation process. Consequently, the First Ministers decided to re-establish the Continuing Committee of Ministers on the Constitution, or the CCMC, to sort through the various items and begin a negotiation of possible proposals that could be put to the First Ministers again in September.

For Indigenous peoples and their organizations, much of what they thought had been progress made in 1978 and 1979 seemed to have been lost in June of 1980. They were not invited to the June 9 meeting of First Ministers as participants, or even as observers. At the time, the federal and provincial governments attempted to justify this on the basis of the need to “sort things out” as to the agenda and the process that would result in patriation. However, the June 9 meeting was far more than a simple meeting designed to deal with administrative matters. In particular, the federal government had put together a series of proposals that would form the basis of a patriation process to be enacted and completed before the end of the year. Most telling for Indigenous peoples was the proposed constitutional preamble suggested by the Liberal government. This preamble stated:

Faithful to our history, and united by a common desire to give new life and strength to our Federation, we are resolved to create together a new constitution which:

shall be conceived and adopted in Canada,

shall reaffirm the official status of the French and English languages in Canada, and the diversity of cultures within Canadian society,

shall enshrine our fundamental freedoms, our basic civil, human and language rights, including the right to be educated in one's language, French or English, where numbers warrant, and the rights of our native peoples, and shall define the authority of Parliament and the legislative assemblies of our several provinces.¹¹

The preamble's casual mention of "native rights," lumped together with fundamental freedoms, language rights, and the status of French and English in the country, demonstrated once again how little influence Indigenous people had at this point in the constitutional renewal process. Most tellingly, there was no proposal for their full participation in the process, much less any understanding of the breadth of feeling and vision that Indigenous peoples had for their own constitutional future.

When the preamble was again discussed later in the summer, and it was decided that there needed to be substantial revision, there was considerable discussion about whether or not Canada was a single political entity, the role of dualism and self-determination, and what constituted a nation in Canada. None of these concepts were discussed in relation to Indigenous peoples.¹²

How could this have happened? How is it that Indigenous concerns had slipped off the national agenda almost completely, despite the apparent progress of the late 1970s? It would be easy to ascribe malice to the participants, or even deliberate thoughtlessness. However, as someone who was intimately involved and can still vividly recall those events, I can tell you that it was not a matter of ill will, but rather a calculation that to introduce what was perceived to be the complexity of these matters into an already "cluttered" agenda would doom any speedy patriation effort. This was especially true of the federal government, but also of many of the provinces. Plainly speaking, the participants in the process decided that Indigenous issues could not be effectively addressed until phase two of constitutional discussions, at a time when the Québec crisis had been resolved and there was a Canadian Constitution with a domestic amending formula. And so, once again, it was decided that Indigenous organizations and their leaders would not be invited to the First Ministers Conference in September as full participants, but only as observers (although they were invited to make a full presentation to the CCMC in August of 1980).

Substance of Proposals

Although Indigenous peoples were not being seated as equal participants at the constitutional table, they were nevertheless refining their respective positions and presenting these in a more comprehensive fashion to governments at various levels. As you might expect, the positions of different Indigenous communities and leaders varied on many issues. The National Indian Brotherhood concentrated on securing recognition of treaties and the implementation of those treaties within the constitutional framework. The Inuit people of Canada, however, had

11 Roy Romanow, John Whyte & Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Thompson Canada, 2007) at 64.

12 *Ibid* at 84-86.

no such treaties, and were forced to consider constitutional provisions that would recognize their inherent and traditional rights in the North of Canada. The Métis people of Canada were at a significant disadvantage, since they had no land base for their people, and were of course of mixed genetic heritage. Finally, First Nations people who did not have a treaty card, and were referred to as non-status Indians, had even more difficulty in making their demands heard. In the sorting out process that took place between 1971 and 1980, organizations representing the First Nations of Canada, the Inuit, and Non-Status Indians (and later the Métis) became the official spokespeople for Indigenous peoples in Canada.

For the First Nations of Canada, as represented by the National Indian Brotherhood (NIB), the broad goals of participation in the constitutional process were first to secure constitutional recognition of the treaties, the treaty process, and the substantial matters that flowed from them. The second goal was to secure recognition of a number of general principles that flowed from the historical rights of First Nations in Canada. These included, but were not limited to, the right to identify their society with the territory, the right to self-determination within that territory, the right to self-government by political systems and processes that reflected each community's will, the right of First Nations to determine their own membership rules, the right to enter into treaties, alliances, and agreements with other nations, and the right to refuse entry to their territory.¹³ Overall there was a nexus between historical sovereignty, land base, treaties, and historical practices, both social and political, that in the NIB's view needed to be included in any renegotiation or revision of the Canadian Constitution.

As mentioned above, Inuit peoples of Canada were forced to play catch-up in the national discussions regarding Indigenous peoples. In September of 1979 they formed the Inuit Committee on National Issues, the ICNI, in order to formulate and present a coherent policy on the rights of Inuit people in Canada. This committee was governed by a number of broad principles which stated firmly that Inuit rights in Canada had never been extinguished and that Inuit people would not accept extinguishment of their rights as a prerequisite to constitutional discussions. In a resolution adopted at their meeting on September 7, 1979, the ICNI insisted that "the concept of aboriginal rights be recognized as a dynamic and evolutionary concept which must closely reflect the growth and evolution of Inuit society and culture and, therefore additional rights relating to the Inuit culture, traditions and customs may require legal recognition from time to time as aboriginal rights through future legislation or agreements."¹⁴ They went on to emphasize that Aboriginal rights, as derived from Aboriginal land title, might from time to time require greater protection than the rights of other citizens of Canada, and "that where no settlement of aboriginal claims had been entered into, the aboriginal rights of Inuit deriving from their use and occupation of land from time immemorial shall not be affected in any way by the proposed alternative."¹⁵ Together with supporting documents, this became the position that would be carried into the constitutional discussions that began again after the Québec referendum in the spring of 1980.

13 A full list of these proposals can be found in a document prepared in April of 1980 by the Federation of Saskatchewan Indians. This document was largely adopted by the NIB later in 1980.

14 This quotation is taken directly from my personal briefing book, which contained a copy of the original resolution as passed at the meeting in Iglooklik, Northwest Territories, on September 7, 1979: Resolution of Inuit Committee on National Issues (7 September 1979).

15 *Ibid.*

As one might expect, the position of the Native Council of Canada, the NCC, mirrored in many respects the position of the other two organizations, especially regarding general Aboriginal rights in Canada. However, a lack of treaties, a land base, and an inability to accurately define their membership, made it more difficult for NCC to formulate a coherent constitutional position. As a result, they tended to concentrate more on social and economic issues, especially as they affected Indigenous people in urban areas.

The CCMC Meeting in the Summer of 1980

The federal and provincial governments of Canada prepared for the CCMC meeting with the three Indigenous organizations in different ways. For the most part, there was general agreement among the federal and provincial governments on delaying dealing with the substance of Indigenous constitutional proposals. Indigenous organizations were urged to provide detailed commentary on the 14 subject matters that had been agreed to by the First Ministers and to avoid attempting to add to the constitutional agenda. However, the Saskatchewan government was prepared to endorse many of the objectives of the Indigenous organizations, largely due to the extensive consultation and political contact between the Government of Saskatchewan and the First Nations and Métis organizations in the province. This growing partnership was mainly the result of a strong belief on the part of Saskatchewan Premier Allan Blakeney that a new constitutional arrangement would enhance his government's efforts to deal with the increasing social and economic difficulties experienced by Indigenous peoples in the province.

The motivation of the Premier in this regard was complex. As a result of his work as a civil servant, as a Minister in the Tommy Douglas government, and during his time as Premier, he developed a deep commitment to ensuring not only equality of opportunity for the citizens of his province, but a deeper equality of condition, to ensure that opportunity would be shared by everyone. In particular, this meant the provision of basic social services and education for all. It also meant using the power of government to bring about changes in attitudes toward those who were disadvantaged in society. While there was a temptation on the part of the CCF and the NDP to provide these social services on an equal basis to all people, Mr Blakeney became convinced during his time as Premier of the need for a different approach and relationship with Indigenous people. He outlined this approach in a book about his time as Premier:

A closely connected issue was the relationship generally between white society and people of Indian and Métis organization — aboriginal peoples, to use today's language.

Mr. Thatcher's government had taken some steps to help aboriginal people. The government did what he thought best. It did little to find out what aboriginal people thought was best for them. I, along with several ministers, tried to build a relationship with aboriginal leaders. When one is trying to improve the lot of disadvantaged people, particularly when there are cultural differences between these people and mainstream government, it is important to get the perspective of the people you are trying to help. You may feel you know what the next step should be. And you may be right. But if they don't think that this would be the best next step, you are probably doomed to failure.

I had a standard line when I spoke to groups of aboriginal people. In brief form it went: you have problems, some of them big problems. We (the provincial government) can't solve your problems. We don't know what the real problems are. You do. Only you can solve your problems or take the first steps to solve them. But we can help. What we ask you to do is to figure out what your problems are and what

steps to deal with them should be taken first. If you think we can help, please call on us. We can work with you in sorting through the problems, but we can't decide what you should do.¹⁶

Premier Blakeney's approach on this matter was typical of his approach to governing. He tended to concentrate on "practical solutions" to social problems. Although he was extremely bright, he did not have the usual failing associated with intelligent people, in that he was willing to listen to others and to discuss their needs and possible solutions to problems. Indeed, he was renowned for "worrying a problem to death."

In June of 1980, however, although he had established excellent relationships with Indigenous people in Saskatchewan, and was quite sympathetic to their needs, Blakeney did not see Indigenous leaders as forming another order of government in Canada. That is, he did not think that they should have a seat at the table with First Ministers during the negotiations on patriation. This did not mean that he was unsympathetic to what was then called "Indian self-government." Indeed his government had already commenced a series of meetings at both the administrative and political levels to explore with the Federation of Saskatchewan Indians the possible meaning of self-government, the legal basis for it, and its operational impact inside the province. He was also open to constitutional recognition of these governments at some point. Therefore, he was quite supportive of the three national organizations meeting with the CCMC in August of 1980, and made a point of instructing Roy Romanow, Saskatchewan's Intergovernmental Affairs Minister, and me, the Deputy Minister of Intergovernmental Affairs, to be sympathetic to the involvement of the Indigenous leaders.

The Presentations

The CCMC meeting with Indigenous leaders took place in Ottawa on August 26, 1980. In attendance were delegations from each of the three national Indigenous organizations mentioned above. The ICNI was headed up by Charlie Watt, the National Indian Brotherhood by Del Riley, and the Native Council of Canada by its President, Harry Daniels. The federal government delegation was headed by the Honourable Jean Chretien, Minister of Justice. Roy Romanow, Minister of Intergovernmental Affairs, who was also co-chair of the CCMC with Mr Chretien, represented Saskatchewan. Finally, there were Ministers from the provinces of Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Québec, Ontario, and British Columbia. In addition, the delegations had senior civil servants in attendance.¹⁷

Each of the Indigenous organizations began with a presentation. Charlie Watt from the ICNI made the first presentation, followed by Del Riley, and Harry Daniels. The Indigenous representatives had been asked to concentrate on each of the 12 items that were under discussion at the CCMC. While they complied with this request, they also broadened their remarks to encompass what they considered to be the most important issues for Indig-

16 Allan Blakeney, *An Honourable Calling: Political Memoirs* (Toronto: University of Toronto Press, 2008) at 115-116.

17 Mr Bob Weese, Executive Director for Constitutional Affairs, was the senior civil servant in attendance from Saskatchewan. This is one of the few meetings that I did not attend. Since the First Ministers meeting was very close, it was decided that I should remain in Regina to prepare the Premier for the upcoming meeting in Ottawa.

enous peoples in Canada. As John Whyte, chief constitutional lawyer for the government of Saskatchewan, recorded in his minutes, three topics quickly emerged from the presentations:

First, is the matter of Indian government. All three groups talked about the need for the new constitution to recognize some specific Indian and native rights such as land rights, aboriginal rights, treaty rights, and right to self-government, or larger political community. Second, all three groups recognized that the discussions during the summer of the 12 topics agreed to on June, 1980, by the First Ministers, had implications for their constitutional policies in that the extent to which the agreements arrived at during the summer and early fall would bear on the question of Indian political autonomy. Third, all three groups recognized that apart from the question of new constitutional rights (e.g., the right to Indian government), the agreements reached during the summer and fall, on the 12 topics, could have a bearing on existing Indian rights and policies. For instance, the agreement on fisheries could affect existing Indian fishing rights; the agreement on communications could affect the ability of native people to take control of some channels that are broadcasting in the north; the agreement on patriation and amendment could fail to take account of the special relationship between the Queen and the native people of Canada. The agreement on the preamble could fail to give due recognition to the historical and constitutional place of Canada's native people; the agreement on resources could weaken (or enhance) the land claims of Indians and native people; and the agreement on the Canadian economic union could restrict protectionist trading patterns which Indians may wish to establish or protectionist employment or mobility policies which the federal government and Indians may create.

For the most part, the native groups addressed themselves to the latter category of concern. Their complaint was that decisions were on the verge of being made and Indians had no role to play during the summer discussions and were being given no participatory role at the First Ministers conference in September. ... They were concerned that significant decisions will be made and entrenched and will put beyond revision in light of Indian concerns and Indian input. Harry Daniels of the Native Council Canada was particularly outspoken and threatened to block the entrenchment of any constitutional amendment through the mobilization of opposition in Westminster. He stated that there are enough sympathetic persons in both the House of Commons and the House of Lords [at Westminster] to bring about delay and political embarrassment.¹⁸

Mr Chretien tried to assure the Indigenous organizations that their concerns in relation to the 12 topics would not be ignored. He indicated that there would be a meeting between the organizations and First Ministers, probably in the spring of 1981, to discuss all of the topics. He then went on to assure them that any agreements would be open to revision at that meeting. However, later in the meeting, Mr Chretien also said that once the 12 items were agreed to, there would be no going back. He did not clarify this inconsistency. Mr Romanow, from Saskatchewan, sought to reassure the Indigenous delegations that their views on the 12 topics could be listened to because there was no deadline to the current discussions and therefore comments from their groups could be used to revise the package as necessary. Of course, this was in complete contradiction to Chretien, who knew full well that the federal government's deadline was the First Ministers Conference in September. Predictably, according to press reports:

[T]he Indian and native organizations were extremely bitter about the course of the meeting. They did not feel that they had gained any ground in their attempt for greater participation in the process, or

18 This quote is taken from a confidential memo written by Mr JD Whyte to me and various other members of the Government of Saskatchewan: Confidential Memorandum from JD Whyte to Howard Leeson et al (4 September 1980). It summarizes the presentations and comments on future directions for the Government of Saskatchewan on this matter.

that there had been any increased understanding of the extent of the Indian and native constitutional position.¹⁹

Mr Whyte's summary report was forwarded to Mr Blakeney and expressed concern about Mr Chretien's position that the idea of Indigenous self-government or political autonomy was not in the works in the foreseeable future. To quote Mr Whyte's report further:

Since this government has commenced a series of meetings at the official's level, and ministerial/FSI president level, on the topic of special constitutional recognition this federal position is noteworthy, the Saskatchewan policy of exploring with the FSI the possible meaning of "self-government," its legal bases, and its operational effect, would seem to be prudent policy, notwithstanding Mr. Chretien's position. Indian self-government is the dominant constitutional position of the native groups and it is sensible to acquire an understanding of it before coming to any conclusion on it. The position taken by Mr. Chretien will only lead to fruitless and frustrating discussions with native groups over the foreseeable future. Saskatchewan's policy of exploring the idea does not commit us to accepting it and allows us to develop a sounder basis upon which to consider it and, if necessary, reject or reformulate it. If we wish to be a significant and sympathetic player in the area of native people in the Constitution, we should not let Mr. Chretien's rejection of the self-government goal influence our own thinking in this area.²⁰

Two things emerged that were important for discussions between Indigenous groups and governments in Canada during the next year. First, it is important to recognize that all three groups were quite clear and determined about — and argued cogently for — the recognition of self-government and autonomy for Indigenous peoples in Canada. The three groups maintained that position throughout the period leading up to patriation, and at conferences later in the 1980s. Second, it is also clear that the arguments of Indigenous peoples, both at the provincial and at the national level, made a substantial impact on the thinking of both Saskatchewan Premier Allan Blakeney and Deputy Premier Roy Romanow. It was after this meeting that the Saskatchewan government became determined to see entrenchment of at least a general statement about Aboriginal rights in the package of proposals that would be adopted at Westminster. This support would become critical for Indigenous groups in the two weeks following the First Ministers' agreement on patriation at their November 1981 meeting.

The Inclusion of Section 35 in the Patriation Package

The meeting with the CCMC in August of 1980 would be the last time that the national Indigenous organizations met with First Ministers or their representatives prior to patriation. Indeed, it would be the last meeting of its kind until the first ministers meeting of 1983. The acrimonious end to the September 1980 first ministers meeting on the Constitution in Ottawa launched the country into a constitutional crisis that ended only 14 months later when the political leaders got together again in Ottawa in November 1981.

For Indigenous leaders and their organizations, it was an agonizing period of uncertainty. During this time, they were completely excluded from the various meetings between and amongst the provincial and federal leaders, relieved only by their testimony before the Special Joint Committee on the Constitution, which began examining the federal proposals for constitutional renewal in January of 1981. Of course, there were literally dozens of

¹⁹ *Ibid.*

²⁰ *Ibid.*

individual meetings with various provincial governments and leaders, as well as the federal government. Gradually, especially with some governments like Saskatchewan, the idea of the entrenchment of Indigenous rights in the Constitution became more of a priority. The argument against entrenchment, put forward most cogently by Mr Chretien at the August meeting of the CCMC, was that the entrenchment of Indigenous rights was far too complex to introduce to the agenda being contemplated for patriation, and would therefore have to wait for a separate meeting after patriation had been accomplished. However, support for this argument was slowly eroded: in Saskatchewan, for example, the idea that a broad recognition of Indigenous rights could be included in the patriation package, with the “unpacking” of all that this meant to be undertaken after patriation had been accomplished, became not only acceptable, but desirable.

By the time that the Special Joint Committee on the Constitution began its consideration in January 1981 of the various parts of the patriation resolution, vigorous lobbying of the federal government by Indigenous leaders produced a startling breakthrough. In its final report, the Committee recommended the inclusion of a section 33, later section 35, that would guarantee Aboriginal (Indigenous) rights in the Constitution of Canada.²¹ With the federal parliament now onside, it remained “only” for Indigenous organizations to persuade all of the provinces.

This meant that by the time First Ministers gathered in the first week of November 1981 for one last try at patriation, there was support from some governments for a special section that would simply say that these rights, whatever they were, were guaranteed in the new constitution. Of course, there were some governments, most notably British Columbia, that were absolutely opposed to such a broad guarantee. Other governments were silent, which was interpreted by some to mean that they were in favour of a special section, but were not willing to include a guarantee of these rights in the original patriation package.

First Ministers Meeting, November 1981

Most students of the Canadian Constitution will be aware that the last-ditch meeting of the First Ministers in the first week of November 1981 was thought by many to be a longshot at best, if not doomed to failure before it started. By the night of November 4, 1981, this prediction seemed on the verge of becoming reality. However, a number of individual and small group meetings on the night of November 4 produced an acceptable compromise between and amongst nine provincial leaders and the Prime Minister of Canada.²²

21 There are a number of descriptions of this process available. For example, see Peter Hogg & Annika Wang, “The Special Joint Committee on the Constitution of Canada, 1980-81” (2017) 81 SCLR 3 at 17, 18.

22 For those who are not entirely familiar with what happened on that night I invite you to look at any one of several accounts of the bargaining that took place. My own book, *The Patriation Minutes* (Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies, 2011) [Leeson, *Patriation Minutes*]), is one of them, and I think probably the most useful for those who are looking for details about what transpired. I was one of four deputy ministers who was asked to meet with his colleagues at 9 pm on the night of November 4 in the Château Laurier Hotel, with instructions to “get the deal,” based on some preliminary talks between the Honourable Roy Romanow from Saskatchewan and the Honourable Jean Chretien from the federal government, often referred to as the “Kitchen Accord.” It was raw politics and bargaining at its most basic, something not seen ever before in Canadian constitutional history.

How did this happen, and why was it important for Indigenous rights? This bargaining session was important because the four deputy ministers who met at 9pm in the Château Laurier Hotel were under instructions to “get a deal,” that is, to make the necessary compromises that would allow First Ministers to look at a completed proposal the next morning. When we met that evening, it was accordingly with the understanding that not everything we wanted would be possible. The broad outline of the agreement involved trading the provincial amending formula proposal for the federal proposal on a charter of rights and freedoms. Of course, there were other sections, including a natural resources section, a mobility rights section, equalization, language rights, and originally, Indigenous rights. All of the sections, with the exception of the Indigenous rights section, found their way into the compromises in one form or another. Why were Indigenous rights left out on the night of November 4? The short answer is, those that wanted the inclusion of Indigenous rights were forced to delete them or see the deal fail entirely.

The actual bargaining on the shape of the final deal on November 4 began late in the afternoon in a small kitchen off of the main conference room where the First Ministers were meeting. Jean Chretien and Roy Romanow, who had maintained contact with each other during the previous years as co-chairs of the CCMC, scratched out a possible deal on a small piece of paper that later became the “Kitchen Accord.” Just before the negotiations broke up late in the afternoon on November 4, with the very real possibility that there would be no agreement, Romanow reported to Premier Blakeney about the shape of a possible deal. Blakeney shared this with Premier Lougheed from Alberta, and they agreed to send officials to Premier Blakeney’s suite at the Château Laurier later in the evening to see if they could refine what needed to be included through negotiation, and perhaps, get a majority of provinces onside before the resumption of the meeting the next morning. Later, Premier Peckford from Newfoundland asked if his Deputy Minister could be included.

While this represented an important moment in the path to patriation, it should be noted at this point that Indigenous rights were not included in the Kitchen Accord, primarily because the federal government still saw the addition of such rights as adding a layer of complexity that would mean that no deal was possible.

To continue the story, then: at around 9pm on the night of November 4, at Premier Blakeney’s suite in the Château Laurier, three other deputy ministers and I were tasked with the responsibility of negotiating a complete deal that Premier Blakeney could then present to the other premiers. My counterparts were J Peter Meekison, Deputy Minister of Intergovernmental Affairs from Alberta, Cyril Abery, Deputy Minister to the Premier from Newfoundland, and Mel Smith, Deputy Minister of Justice from British Columbia. Saskatchewan’s chief lawyer had been tasked with drafting an agreement based on the Kitchen Accord, which I could then take to the meeting. However, the draft was not quite ready and so when we met, I decided to work from the paper that Mr Abery had brought with him. Although it differed in some respects from what I would have presented, I made the decision to go ahead because the material was largely the same and it had the political advantage of coming from a Conservative province, which I thought would be more acceptable to some premiers. Also, I had been instructed by Premier Blakeney to ensure that “Aboriginal rights” were part of the agreement, despite their being absent from the Kitchen Accord. The Newfoundland document had Aboriginal rights already included.

The discussions went fairly rapidly. All of us had been instructed to “make the deal,” and therefore there was little if any tactical discussion. We went quickly through the document, discarding the idea of a referendum on language rights, and including section 2 of the charter under the notwithstanding clause at the insistence of Alberta. When we came to the section on Aboriginal rights, Mel Smith from British Columbia raised an objection to its inclusion. He argued that in British Columbia there were no treaties and that they were simply not prepared to include a section for which, in their opinion, there were no parameters. Both Mr Abery and myself argued for its inclusion, noting that we thought this not to be a major impediment. Dr Meekison was silent, which I interpreted to mean agreement with Mr Abery and myself, but which I discovered later was not the case. Alberta was also opposed to the inclusion of Aboriginal rights without some limiting language. Thus, after some discussion, we were forced to agree to the deletion of that section in order to secure a deal.

Once we had completed the discussion, I reported the results to Premier Blakeney and we had these drafted into a tentative agreement. I reported to him that British Columbia was adamantly opposed to the inclusion of Aboriginal rights, and that they were unlikely to move from that position. It was, for them, a dealbreaker, and without British Columbia no agreement would go forward. Premier Blakeney accordingly agreed, albeit reluctantly, to the removal of the section. However, he indicated to me privately that if there were other changes at a later date, he would again raise the matter of including the section.²³

At this stage Premier Blakeney then set about including premiers from other delegations whom he thought might be agreeable to what we had developed. Specifically, these included the Premier of Newfoundland, who had been represented at the drafting, the Premier of Nova Scotia, and the Premier of Prince Edward Island. The details of this procedure are laid out in other publications, and I won’t repeat them here. Suffice it to say, Premier Blakeney was successful in getting most of the Premiers on board, including Premier Davis from Ontario, who had until then supported the federal government.

Three Premiers did not agree that night, however. The first was Premier Hatfield from New Brunswick, who was not apprised of the results of the negotiations by Premier Davis until the next morning, but was ultimately ecstatic at the agreement. The Premier of Manitoba, Sterling Lyon, had already left the meeting to return to campaigning for his re-election in Manitoba, and was therefore unable to agree in person, although eventually his representative did agree to the package. This left only Premier Lévesque, who was not contacted until the next morning at a meeting of the “Gang of Eight” premiers. As is now well known, he was extremely angry that the other premiers had managed to come to some agreement, and attempted to prevent the deal from going forward.²⁴

At the meeting of the First Ministers the next morning, there was general agreement on the package. Each of the First Ministers signed a document, except Premier Lévesque, who declined to do so. At the end of the meeting, the Prime Minister noted that Aboriginal rights had not been included, and suggested that a conference with the Aboriginal leaders of Canada

23 As we will see, this proved to be extremely important later on.

24 For further information on why Québec was left out of the discussions, and why they decided not to agree, there are a number of publications which give differing views on this matter. For my own view, I would refer you to my book: Leeson, *Patriation Minutes*, *supra* note 22.

be included to demonstrate that this was not the end of the commitment by governments to the constitutional recognition of Indigenous rights. Everyone agreed.

The Return of Section 35

Needless to say, Indigenous leaders were furious that the section on Aboriginal rights had been left out of the final deal, and they accordingly lobbied the federal and provincial governments intensely to secure reinstatement of that section. In Saskatchewan, Premier Blakeney met with the Federation of Saskatchewan Indians and other leaders about what had happened, and what could be done to get the section reinstated before patriation. He met with both First Nations and Métis leaders. In his book he says:

Soon after my return to Regina, I met with aboriginal leaders and outlined to them why I had been unsuccessful. I was not clear on their position. From public announcements, it was by no means clear that they favoured the terms of the aboriginal clause we were debating. I went on to say to them that if another opportunity came up for me to press for an aboriginal clause I would do so. I had the distinct understanding that they wanted me to do so. I didn't expect that such an opportunity would arise soon, but with constitutional matters, one never knew. And quite unexpectedly an opportunity did arise.²⁵

It needs to be reiterated at this point that after leaving the talks, the First Ministers agreed that there would be no changes to the package. They did so because of the need to avoid the unraveling of the package once political leaders arrived home. However, it was also agreed that should any or all of the First Ministers propose a change, other changes could be put forward.

In the week following the agreement questions arose as to whether or not the notwithstanding clause would apply to section 28, the guarantee of equality rights for men and women in the charter. Women's groups were concerned that equality rights in section 15 could be overridden by the notwithstanding clause instead of being guaranteed by section 28.²⁶ They mounted a major lobbying effort of all governments to secure a change during the drafting of the accord, and most governments agreed fairly quickly, deciding that this was a drafting error, and not a substantial change. However, Allan Blakeney did not agree, and argued that if the change to the women's rights section was made, Aboriginal rights should also be re-added to the package. Indeed, Blakeney indicated that he would not support the change to section 28 without such a reinstatement.

As you might expect, this caused considerable consternation, especially in British Columbia and Alberta, whose governments were quite willing to accept the change to section 28, but had opposed the inclusion of an Aboriginal rights section. On November 18, Blakeney outlined his arguments in a long telex to Prime Minister Trudeau, which he shared with other First Ministers. To quote:

The accord of November 5, 1981, agreed that the charter rights would remain intact, but that sections dealing with fundamental, legal, and equality rights later identified to be section 2 and section 7 to 15, and section 28 would be subject to a notwithstanding clause, this has been incorporated into the official working draft of November 5, 1981.

25 Blakeney, *supra* note 16 at 191.

26 For further explanation of this discussion please see Romanow, Whyte & Leeson, *supra* note 11 at 213-214.

One 17 November 1981, during a conference call, federal officials suggested a compromise wording which would more clearly delineate the respective applications of section 28 and section 33, the purpose being to ensure that sexual equality was not brought under the ambit of section 33 and respective sections other than section 15. Saskatchewan agreed to that compromise.

Since yesterday some now wish to eliminate the application of section 33 to section 28 entirely. This is a change in substance, and therefore, a change to the agreement itself.

Premier Blakeney has stated that the Saskatchewan government is prepared to accept the accord of November 5, 1981, even though, as with any compromise, there were elements he would have otherwise preferred. If the accord of November 5, 1981 were changed in substance, then it is incumbent on us to consider another change of substance, too.

More specifically, if the agreement is now to be reopened and if changes to section 28 are agreed to, it seems only fair to change the agreement to include section 34 [now see section 35] for the native peoples of Canada. To change the substance of the agreement in this way, without further considering a change to reinstate section 34 is not acceptable to us.

To summarize, we are quite willing to maintain the original agreement and to accept the compromise wording on section 33, worked out and agreed to by officials on November 17, and telecopied to us later that night, however, if you propose to change the substance of the agreement and amend section 28, we would agree to it only if another change in the substance of the agreement is accepted as well, namely the reinstatement of section 34 on native rights.²⁷

Despite this clear telex, and several press releases, Premier Blakeney's stand was characterized as being "anti-women's rights." He came under enormous pressure from women's groups, culminating in a rally in front of the Saskatchewan legislature, to which he spoke. After the rally, several leaders of the various women's groups admitted that they had been misinformed of the government's position. However, many of them were still in opposition to the Saskatchewan government stand on the basis that they felt that Premier Blakeney was "trading rights." That is, he was attempting to blackmail women's groups into supporting Aboriginal rights.

During the next several days pressure began to build on other governments to reinstate the Aboriginal rights section and eventually Premier Lougheed in Alberta issued a statement saying that he would agree to reinstate Aboriginal rights if the word "existing" was added to the clause. With the agreement of Alberta, Saskatchewan agreed and the changes were incorporated.

The Aftermath

This did not end the discussion however. As Premier Blakeney had noted earlier, it was not clear to him that Indigenous groups supported the clause that was to be inserted. In the coming weeks, Indigenous groups clarified their position by expressing disappointment that the word "existing" had been added to section 35. Indigenous organizations were worried that this would limit any future legal challenges emanating from the general descriptions of the section. They were also extremely disappointed that there was no enforcement clause attached to section 35. Finally, and most importantly, most Indigenous leaders had expected a section that elaborated on some of the crucial matters put forward at the CCMC meeting in 1980, matters like treaty rights, self-government, land claims, and overall compensation as well as future

27 Original telex in my possession. This can also be found in Blakeney, *supra* note 16 at 193.

fiscal relations. Without these crucial subsections, they worried that the future of Indigenous rights would be determined by institutions beyond their control, such as the Supreme Court of Canada.

As we know, a constitutional requirement for a First Ministers' Conference with Indigenous leaders *was* included in the patriation package. This was crucially important if Indigenous peoples were to negotiate elaborations of self-government, treaty rights, and future fiscal relations. However, the worst fears of Indigenous peoples and their representatives were realized when subsequent conferences with First Ministers proved to be little more than public relations exercises. The specific rejection of self-government by seven provincial premiers in 1983 was especially telling. After 1987, and the final conference chaired by Prime Minister Brian Mulroney, the elaboration and refinement of section 35 never materialized.²⁸

The Roads Not Taken

Despite the fact that the conferences with First Ministers were failures, it is still useful to speculate on changes that would have occurred had the negotiations been successful. More generally, where might we be now had that happened? We are not without many blueprints, including comprehensive proposals from Indigenous organizations, Royal Commissions, and the Charlottetown negotiations, in addition to well researched studies from academics and others who have specialized in this field during the last 40 years. I can add to these some of the discussions which we had within my agency, the Department of Intergovernmental Affairs, immediately after the adoption of section 35 in November of 1981. I would stress that these were preliminary and not well circulated, and in some cases not circulated at all. But they should provide readers with a glimpse of the kinds of things that were thought about from the non-Indigenous side, at least in Saskatchewan.

First, there was considerable discussion about the relationship between section 35, treaties, and the concept of sovereignty. This is not an unexplored field but it is fraught with difficulty. Many First Nations and Inuit groups maintain that their sovereignty, both over people and land, remains undiminished as a result of the creation of Canada. In particular, First Nations point to their treaties, which most considered to be international treaties, as evidence for this view. By contrast, I can tell you that the opening position of the Government of Saskatchewan in the early 1980s would have been that section 35, "Aboriginal peoples," and the land now contained within the nation state of Canada were all to be considered within the sovereignty of Canada. That is, whatever future constitutional relationships obtained as a result of section 35 and the discussions surrounding it, the sovereignty of Canada over the peoples in the land within the existing border would remain intact. Therefore, the provincial government expected that any constitutional negotiations with Indigenous peoples about the extent of their sovereignty would have to be contained within that parameter. Clearly, these would have been difficult negotiations.

Second, there was a belief that there would be a need to change the amending formula in the Constitution of Canada, at least insofar as section 35 is concerned, and perhaps even more

28 Some good work was done on the Charlottetown negotiations, but this was a general package which as we know fell apart when put to the Canadian people in October 1992.

extensively. That is, the guarantee of Indigenous rights contained in section 35 would need to be protected from unilateral change by non-Indigenous governments. Section 35 would need to be protected by ensuring that Indigenous peoples are consulted and agree to any constitutional changes that would substantially affect it. Once again, these would have been difficult discussions.

Third, we realized that there would have to be considerable institutional change that would serve both the real and symbolic needs of Indigenous and non-Indigenous Canadians. We accepted the view that inherent in the adoption of section 35 was a different view of Canada from what had been the norm prior to 1981. At its most basic, we saw section 35 as committing Canada to a conception of two “founding peoples,” the first peoples of Canada as represented by the various Indigenous communities, and the second peoples of Canada, those who came primarily from Europe originally, but from other international communities as well over the last 145 years. This is an obvious break with what had become the norm of discourse in Canada about the two founding peoples of the country being the French and English “nations.” In short, it meant revising our sense of where we are in history and where we need to go.

What are some of the obvious institutional changes that seemed necessary to implement this new view of Canada? The list would be long. However, one might start with ensuring that the viceregal appointments in the country alternated between Indigenous and non-Indigenous Canadians. Therefore, the Governor General of Canada should be from an Indigenous community every other time. Who would make that appointment, and under what regime of consultation, would need to be determined. It could be that on the Indigenous side the appointment would be made in consultation with the relevant group, say the Inuit community, in a traditional manner of their choosing. This would mean that in practice every sixth Governor General would be from the Inuit community. On the non-Indigenous side the practice of alternately selecting a person from one of the largest linguistic communities might continue. The same regime, with appropriate differences, would apply in the provinces. Appropriate representation for Indigenous people in other institutions such as the Supreme Court and the legislative and executive bodies of Canada would also have to be discussed and determined.

Fourth, we recognized that the question of land and Indigenous claims to land within Canada would need to be discussed on a broader basis than had been the case in the past. For example, since the patriation of the Constitution in 1981 we have seen the creation of the territory of Nunavut. This territory does not contain all of the Inuit people of Canada, but the majority of residents of Nunavut are Inuit. We felt that it was not outside the realm of possibility that where a majority of the land was occupied by Indigenous peoples, we would need to consider whether the creation of more provinces was appropriate. The ramifications of this would be immense, of course. It would mean changing the amending formula, fiscal arrangements in Canada, and various other sections of the Constitution that would be affected. We also recognized that we would need to consider what powers were appropriate for these provinces, since the institutional and other arrangements might be significantly different than what we contemplated under sections 91 and 92 of the present Constitution. We also considered that there might be “halfway houses” between the creation of new provinces and staying with the status quo. For example, there might be areas within provincial jurisdictions, outside of traditional reserves, where Indigenous peoples made up the majority of the population. In such cases, it could be that political subunits with designated powers could be created. For

example, a large area of northern Saskatchewan is predominantly Indigenous, and therefore might have a special assembly of its own with powers that are guaranteed under the Constitution. Again, the political institutions and practices in these subunits might be considerably different from traditional European-style institutions. The possibility for such creative and useful institutional arrangements is virtually unlimited. But would it be politically possible?

Finally, we also realized that these negotiations would involve a fundamental restructuring of the fiscal arrangements of Canada. These could range all the way from a final settlement of all existing and future land claims, reparations, etc, to new arrangements under equalization and fiscal stabilization regimes that would aid Indigenous peoples in developing and funding necessary educational, social, and cultural programs within their communities. Once again, potential arrangements are virtually limitless, and would prove to be very difficult to negotiate and finalize. These are but a few of the “roads not taken.”

Conclusion

In writing this paper I have attempted to do four things. First, I wanted to outline briefly the background to participation by Indigenous leaders in the patriation process that began in earnest in 1980. In particular, I wanted to demonstrate how forceful and comprehensive this process had been, and how it had been both frustrated and advanced by non-Indigenous leaders at different moments in time.

The second objective of the paper was to examine how and why a general section on Indigenous rights was finally inserted into the patriation package. More specifically, I wanted to examine the role of former Saskatchewan Premier Allan Blakeney in securing the inclusion of that section. This should not be construed as an attempt to diminish the substantial role of Indigenous peoples in the process. Of course, it was their efforts at educating and persuading federal and provincial leaders that eventually provided the substantial base for adoption of the section. Having said that, it is quite clear, whatever the usefulness of this observation, that there would have been no section 35 if it had not been for the tenacity and courage of Premier Allan Blakeney. After his telex to the Prime Minister in which he indicated that he would not sign on to a revised section 28 unless Aboriginal rights were restored to the agreement, the response of the federal government was amusement and disbelief. They really did not believe that he could maintain that position (Jean Chretien remarked in private, “wait until the women come after him”). However, despite enormous pressure, Blakeney did maintain his position and eventually saw the restoration of what is now section 35 to the final agreement. It would have been far easier for him to have simply acquiesced to the revised section 28 and hoped for the best. But, despite his unassuming manner, he was a person with strong principles and some steel in the backbone. Once set on his course he was not easily dissuaded. When Indigenous people needed support from the non-Indigenous community at a crucial time, Allan Blakeney provided that support.

Third, the short examination in the section on “roads not taken” of what is needed to completely “unpack” section 35 demonstrates how extensive and complex the required changes would be to the Canadian constitutional structure. Of course, written changes would take us only a short distance in the journey required to fully realize the needed new arrangements. Complete constitutional change requires decades of usage to develop conventional practices

and norms sufficient to operationalize the bare written structures. One need only look at the progression of case law and processes with regard to the new *Charter of Rights and Freedoms* that was put in place in 1982 to understand the truth of this statement. The full elaboration of section 35 would be even more far-reaching.

Finally, despite strong arguments to the contrary, I firmly believe that having a general section 35, despite its shortcomings, has been far better for Canada and for Indigenous people than not having it at all. It would be easy to conclude that by inserting the general section, non-Indigenous governments in Canada were able to sidestep having to engage in real discussions that would have led to far more concrete and detailed constitutional provisions. However, I believe that had section 35 not been inserted as part of the patriation package, there was little chance that either a general section, or more detailed provisions, would have found their way into the Constitution. As we know from subsequent negotiations, without considerable political leverage, there was little chance of getting meaningful constitutional change. For example, with both Meech Lake and the Charlottetown Accord, Québec had maximum leverage on the negotiations and the outcome, and still those agreements failed. Indigenous peoples have never had sufficient political leverage to effect change on their own. Therefore, because of section 35, and although not really equipped to do so, the courts have been able to provide significant help to Indigenous peoples at key times during the last 40 years. This has been particularly true of the case in land claims negotiations and the assertion of treaty rights.

The failure of the meetings of Indigenous organizations with the First Ministers of Canada in the years between 1981 and 1987, and in particular the failure of the 1983 conference, have proven to be a huge loss for Canadians, both Indigenous and non-Indigenous. It was understood by everyone in the process that meaningful progress toward the decolonization of Canada could only be accomplished through a broad negotiating process. As mentioned above, despite the inclusion of section 35, which provided new legal options for Indigenous peoples, reliance on the courts is a poor substitute for institutional change of the kind that is needed. In particular, this is true for the crucial issues of Indigenous self-government, sovereignty, land transfer, and permanent fiscal arrangements. No court can negotiate or impose institutions or settlements of this nature. Thus, Canada has been left in a constitutional limbo after the adoption of section 35.

Where to go from here? Clearly, we need to begin the process of negotiation again on a broader basis if we are to be successful in changing the institutional and cultural arrangements of this country to recognize what is needed for a successful Canada going forward in the 21st century. However, even with the best intentions and honest goodwill on both sides, changes will be extremely difficult to undertake and complete. In order for there to be any chance of success the overall atmosphere of reconciliation would need to be much further advanced. As it is presently conceived, after the report of the Truth and Reconciliation Commission, the process is one in which Indigenous communities have become fully involved through the Commission and other mechanisms, but non-Indigenous Canadians outside of governments have only been peripherally involved in these discussions. It is quite clear that a parallel process of reconciliation needs to begin in the non-Indigenous communities of Canada. Without that process, any negotiations on constitutional and institutional change will founder on apathy and ignorance. If people are not engaged and involved, they will always find that other priorities are more important.

It would be easy to be overwhelmed and to despair about our ability to conduct a successful process of negotiation. I can only say that for those of us who were involved in the patriation process, we also felt overwhelmed and often despaired of any successful conclusion. But we persevered and I believe that Canada is a better place for our having made the compromises and effort needed to bring about significant change. I am confident that there are leaders in both the Indigenous and non-Indigenous communities that can do the same thing in the future.

