NATIVE COUNCIL OF CANADA

SUBMISSION TO

THE SPECIAL JOINT COMMITTEE OF THE SENATE

AND OF THE HOUSE OF COMMONS ON THE

CONSTITUTION OF CANADA

DECEMBER 2, 1980

OTTAWA

INTRODUCTION

Mr. Chairmen, Honourable Senators and Honourable Members of Parliament. By way of opening, let me say at once that our appearance before you is accompanied by mixed and, sometimes, conflicting feelings. We are first of all conscious of the historical significance of this session with a "sense of history" that is deep and pervasive. These feelings are accompanied by an equally profound mistrust and suspicion that is rooted not only in the past 400 years of false promises to Native people, but in such contemporary events as the broken commitment by your government to provide us with "full participation" in this very process.

Honourable Members of the Committee, you must be as tired of listening to these complaints as we are of making them. That does not alter the fact that, speaking as sincerely and candidly as I can, we simply do not trust you, or your government, or any provincial government to properly protect our rights. If this Committee will not only "listen" to our proposals, but will actually "hear" them, then that in itself would be a breakthrough for all of us.

In a strange kind of way the Native people of Canada perhaps owe the non-native people a belated apology for several centuries of neglect. When your people first came to North America you needed, and got, our help. We shared our intimate knowledge of the country and its resources which allowed you to survive. We shared our knowledge of its geography which allowed you to successfully explore, then settle and then exploit. We shared the land and, quite often, our ancestry with you. It is obvious to us now that we did not go far enough and that we left you on your own much too early.

For the past 200 years at least we have watched you make a series of startling and frightening mistakes that have brought you and your social and economic structures to the brink of self-inflicted disaster. We have let

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you poison the air at Thurso and Dryden and Flin Flon and Prince George. We have stood by while you turned Lake Erie into a cesspool and the Ottawa and Wabigoon and Saskatchewan Rivers into open sewers. We said nothing while you turned vast sections of the land into Sudbury moonscapes. We have seen you build traffic-congested cities in which you cannot drive by day or even walk safely by night. We have heard your tedious, indeed, childish squabbles over who should get what rake-off from each barrel of oil exported to people more intent on dominating you than you are of dominating us.

How in the name of the Great Spirit can the Native people of Canada feel secure in the face of assurances that you, this very same group of people, are genuinely committed to protecting for us a quality of life that you have destroyed for yourselves? Why should we trust you?

Many generations of Native people undoubtedly hoped that, given time, you would learn from your mistakes, but it is becoming apparent that you need even more help today in nation-building than you did 400 years ago.

Well, Honourable Members and Senators, our Native people are firmly committed to a Canada built on equality and justice and respect and a willingness to share and, yes, brotherhood. We do not intend to remain "observers" while you implement a piece of legislation that will not only destroy yourselves, but will take us and our way of life with it.

## "PARTICIPATION" OF ABORIGINAL PEOPLES IN CONSTITUTIONAL REVISION

Mr. Chairman, in appearing before this committee we find ourselves once again attempting to salvage, at the last moment, some semblance of the commitments made by successive governments to Native peoples for their direct participation in constitutional renewal. Other parties to this process, with much less provocation, have out of frustration chosen to bypass your committee and proceed through the courts. We have not yet chosen this route. We still see ourselves bound by the commitments we share with governments for full, equal and ongoing participation in constitutional change. For us,

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such a commitment entails a process of joint negotiations with government, premised on the recognition of our special status as Aboriginal peoples and conducted in a spirit of good faith.

The past few years have seen many attempts by Native leaders to obtain governmental reciprocity on this commitment. All of these attempts, whether in the form of briefs to special Parliamentary committees, submissions to First Ministers, or appearances before the CCMC sub-committees, have been undertaken in the sincere belief that at least the beginnings of participation were in the offing.

At the initial First Ministers Conferences in October 1978 and February 1979, we were unable to obtain more than observer status. We presented a brief at the October, 1978 conference, which opposed an amendment process which did not provide for full Native participation and we called for positive recognition of the special status which we have in virtue of our aboriginal rights. (See Appendix 1-A of this brief) As on previous occasions, we received no reply to our representations, although the agenda for First Ministers was expanded to include the item "Canada's Native People and the Constitution".

At a joint Cabinet/NCC meeting on March 19, 1979, the issue of constitutional renewal was again raised and we were given some hope that a more substantive participation would begin, first at the level of officials, then with ministers. In describing the new process, the Minister of State for Federal-Provincial Relations, Mr. John Reid, stated that:

> "It may need to be stressed that the way in which this Constitutional subject is being handled is unique. The full participation of native peoples constitutes, in our view, substantial recognition of the special place occupied by Metis and non-status Indians and by the status Indians and the Inuit. This was what we intended."

At this time the NCC presented the Delcaration of Metis and Indian Rights as the principles for its position on the constitution, principles which had been approved by the NCC Board and by the National Assembly. I would now like to table this Declaration.

Again, Mr. Chairman, we received no response to our submission and the promised trilateral negotiations with federal and provincial ministers were never established.

It was only in December, 1979, at a meeting with the Steering Committee of the CCMC, that we once more had an opportunity to address the issue of participation. We were told for the second time of the uniqueness and importance that government placed on our participation: The Chairman of the CCMC, the Hon. William Jarvis, asserted:

> "This is the first occasion in history where elected representatives of federal and provincial governments in Canada have sat down with leaders of the First peoples to take the preliminary steps which will, I hope, enable us to review, clarify and revise the Constitution."

Now we were getting somewhere! Or so we thought. It soon became apparent that the Steering Committee could only listen, it could not respond. Its mandate was to carry our message to the CCMC and then to First Ministers, who presumably could respond. But they did not.

The next round of "participation" began anew following the February 1980 election, when the Prime Minister indirectly announced, at an All Chiefs Conference, that funding would be made available to finance the constitutional work of the three national Native organizations. By July, 1980, the NCC managed to conclude a contribution agreement with the government for the purpose of preparing its position on the constitution. The funds were intended, and have been used, to establish a Constitutional Review Commission to obtain the views of all Metis and non-status Indians in Canada, so that when negotiations take place their concerns will be fully known and represented. When the contribution agreement was concluded, there was no suggestion that this participation woud follow patriation. We began our work on the assumption that patriation and amendment would follow the process of trilateral negotiation.

We learned in June that the First Ministers had decided to delete the item "Canada's Native Peoples and the Constitution" from the summer agenda. In a letter to the Prime Minister on June 25th of this year, I requested clarification of the form of our participation in the future, drawing the Prime Minister's attention to our position that we must be involved at every step as full and equal partners.

> "A promise to this effect was given us last November by the former Prime Minister, Mr. Joe Clark, and we participated in the December 3rd meeting of the Steering Committee of the CCMC on that basis. I think I made it clear at that time that Native people are not to be treated as just another interest group presenting briefs to this or that committee but part of the ratification process itself. History would condemn us if we accepted any other role."

In his response, the Prime Minister could only state that a meeting of a CCMC sub-committee had been mandated to meet with the three Native organizations. (See Appendix II of this brief)

At our meeting of August 26th, 1980 with a sub-committee of the CCMC, we presented positions on the twelve agenda items. All three Native groups had substantive concerns on each of the items under discussion and it was on the understanding that the First Ministers would take these concerns seriously that we addressed the sub-committee at all. (See Appendix I-B of this brief) The Minister of Justice assured us that this would be the case, as did he promise to have his officials meet with ours to begin the process of joint work by redrafting a new preamble for consideration by First Ministers.

Neither of these commitments were realized. At the First Ministers Conference in September of this year, we were again only granted observer status. Beyond token reference by a few Premiers and the Prime Minister to Native people, the only substantive mention made was to our supposed acceptance of the new federal draft preamble.

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We saw this draft for the first time when it was tabled during the conference, and we had had no hand in drafting it.

Following the experience of the First Ministers' Conference, I wrote to the Prime Minister regarding the wholly new factor in the constitutional debate - unilateral patriation.

I said in that letter that:

> "If any unilateral action is planned to patriate the Constitution, may we have your assurance that our proposals to have aboriginal rights entrenched in the Constitution separately from the proposed Charter of Rights and Freedoms be seriously considered for inclusion in a resolution placed before Parliament. It is our understanding that it would be within your ability to do so under the BNA Act, as the responsibility for Native peoples lies with the federal government."

> "...As we have made clear on numerous occasions, we do not oppose patriation, even unilateral patriation, as long as we are assured of some movement on Native rights..."

Now, Mr. Chairman, our journey through the history of Native participation comes to the Proposed Resolution.

## THE GOVERNMENT'S RESOLUTION PROPOSAL

The Proposed Resolution as it now stands does not provide any definition of our rights and freedoms. It does not protect our supposed participation in constitutional renewal. And it does not offer to our people any hope that our rights and our participation will be enshrined in the future.

The sole mention of Native peoples in the document is, of course, in Section 24, which reads:

> "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada."

Aside from our dismay at not even being asked to assit in drafting the section, we view the section as an unqualified failure. It fails both in the wider sense of what must, at a minimum, be entrenched in the constitution to assure our rights will be recognized and protected and in the narrower sense of failing even to achieve what the government would wish us to believe the section accomplishes.

The intent of the section, according to the explanatory notes, is to:

> "...make it clear that the Charter is not intended to affect any rights and freedoms not specified in it, including those of the native peoples."

On the surface this section is aimed at the very minimal goal of avoiding conflicts between the individualistic provisions of the Charter and the collective nature of whatever rights exist for Native peoples. But it fails in this goal by only protecting rights from denial, as the wording in the clause indicates. This wording would not only permit any legislative or constitutional provision not a part of the Charter to deny the rights alluded to. It would also permit any diminishment short of outright denial by the Charter itself.

We find no comfort in the last part of the clause, which reads:

> "...rights or freedoms that pertain to the native peoples."

First of all, it is not clear what rights the section refers to. By avoiding the more relevant phrasing, "aboriginal rights and freedoms", the clause could easily be seen to refer only to rights all Canadians share. Secondly, the clause does not say how whatever rights which exist and pertain to Native

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peoples are to be defined and recognized. Here the sections on constitutional conferences and amending procedures might have avoided this problem by providing for our participation - but they do not. Finally, the clause suggests that a cut-off date for our rights exists, with all of the rights which might emerge out of post-patriation negotations being subject to diminishment or even denial by the Charter.

Other than the Charter of Rights and Freedoms, the most distressing aspect of the proposed resolution is the complete exclusion of the Native peoples from the procedures for constitutional conferences and for constitutional amendment. We have always argued that any amending formula must include special provisions for those sections of a new constitution directly related to Native peoples. It has become clear that the amending formula as it now stands in the resolution precludes the future entrenchment of Native rights in the constitution by making these rights subject to the approval of the provincial governments, none of which has endorsed the concept of aboriginal rights. This concern was reinforced on October 15th when Premier Hatfield of New Brunswick, to date the only Premier to agree to appear before our Constitutional Review Commission, stated that Native people should be treated no differently than any other group in the constitutional renewal process. Speaking on the intent of the drafters of Confederation, the Premier stated,

> "Clearly the intention of the governors in that part of what is now Canada was to assimilate the Native peoples. I therefore think that in fact that did happen, and did become the fact in Canada, and I therefore cannot argue that either the Metis or the non-status Indians have any particular claim that is different from that of any other group of people in our own country."

With these attitudes emerging from the provinces, it becomes obvious why the recognition of aboriginal rights, our inclusion in future conferences, and the entrenchment of Native consent provisions in an amending formula are so necessary.

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It is with this same reality in mind that we seriously question the Prime Minister's assurance to Native leaders that,

> "constitutional change after patriation will become easier, rather than harder..."

In fact, the recently leaked document from the federal-provincial relations office stated quite the opposite:

> "Entrenching (Native) rights will be enormously difficult after patriation, especially since a majority of the provinces would have to agree to changes which might benefit native peoples at the expense of provincial power."

CONSTITUTIONAL DOCUMENTS

The concerns of Aboriginal people extend beyond what the government has included in the Proposed Resolution to what the government has left out. In Section 52(1) of the Proposed Resolution, a list of documents appearing in Schedule I to the Constitution Act is referred to in a fashion which can only be interpreted so as to exclude from the Constitution of Canada any document not so appended. In common with NIB and ICNI, we are profoundly distressed over the absence of those constitutional documents which have stood in the past as confirming or recognizing aboriginal rights.

Canadian history records a legal and political tradition of recognition of the aboriginal rights of mixed blood people.

In the 18th century our aboriginal title to land was recognized in the Articles of Capitulation of 1760 and Belcher's Proclamation of 1762.

The most important pre-confederation confirmation of our rights is the Royal Proclamation of October 7, 1763. It stands as the cornerstone of constitutional recognition of Native rights and accordingly must be included in the Schedule. As we made clear in our brief before the British Select Foreign and Commonwealth Affairs Committee (see Appendix III of this brief), the Royal Proclamation provides the first confirmation of our special status within North America, the first confirmation of the requirement for mutual consent in altering our relationship with non-Natives, and the first confirmation of our inalienable rights to our lands.

In the 19th century the most prominent recognition of our rights was on the prairies where the Metis had emerged as a distinct national group and had asserted national rights against the Selkirk Colony, against the Hudson's Bay Company and, in the Provisional Government of 1869, against the Government of Canada. The Government of Canada met with negotiators representing the Provisional Government and the terms of the Manitoba Act were drafted and agreed to. The Manitoba Act was passed by the Provisional Government, by the Canadian Parliament and confirmed by Imperial legislation.

It stands as part of the Constitution of Canada. The Manitoba Act recognized Metis land rights and provided, in addition to their holdings in 1870, for an additional Metis land base of one million, four hundred thousand acres.

We notice that the Manitoba Act is contained in Schedule 1 to the Constitution Act. However, we insist that the recognition of our land and aboriginal rights in this Act be confirmed in the Patriation Resolution, because successive federal governments have consistently argued that these rights have been extinguished. The Statement of Claim Based on Aboriginal Title of Metis and Non-Status Indians, presented to the Government of Canada

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by the Native Council of Canada in March of this year, documents the failure of the government to extinguish those aboriginal rights of Metis people recognized in the Manitoba Act and the Dominion Lands Acts on the prairies, in northeastern British Columbia and in the Northwest Territories. At this time I would like to table this document for the benefit of the Committee.

In light of this continuing denigration of our rights, rights which are constitutionally recognized, we find it necessary to include reference to the Manitoba Act in our amendment package - specifically, in our proposed Section 23A(3)(d). In addition, the Half-breed Adhesion to Treaty #3 in 1875 should be given similar constitutional status as requested of the treaties by the National Indian Brotherhood.

We are very concerned that unilateral amendment and patriation may have unforseen consequences for these constitutional rights. Frankly, we do not believe that the government has given any consideration to how unilateral action will affect subsequent amending procedures for even those of our rights which have constitutional recognition, let alone how our other rights will be affected. We have certainly not had sufficient time to get a clear understanding. So I would suggest that "more time" is perhaps one of the most important amendments that this committee can make when it returns to Parliament.

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PROPOSED AMENDMENTS

I wish now to read through the amendments that we propose the committee must make to the resolution if it is to satisfy the elementary demands of justice. The committee will recognize most of these amendments from the presentation made last night and this morning by the ICNI and you will be hearing similar amendment proposals from the NIB tomorrow. This is in keeping with the common rights and objectives shared by all Aboriginal peoples and reflects the months of joint work we have invested in distilling the basic principles on which future negotiations with First Ministers must be built.

SECTION 1

The overriding powers of Parliament with respect to the Charter of Rights and Freedoms are contained in Section 1 of the Resolution Proposal. We recognize the need to allow Parliament some room to respond to national emergencies but we fail to see the need for a clause which, in effect, offers as little protection from an errant majority Parliament than any common statute. We do not propose to suggest an alternate wording to the section at this time, but we wish it to be known that we cannot accept such loop-holes for capricious governments. Native people are especially versed in the pitfalls of such laissez-faire provisions and we would hope that a redrafted version of Section 1, a redraft we understand is already in preparation, better address these concerns and those of previous witnesses.

SECTION 15 (as amended) provides that:

(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

(2) This section does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged persons or groups or the recognition of the aboriginal and treaty rights of the Aboriginal peoples of Canada.

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It is obvious, Mr. Chairman, why this minor amendment must be made to any provision for equality before the law. It would be inconceivable that our collective rights could be entrenched without explicitly protecting them from legal actions which argue that aboriginal rights are discriminatory. We are not just another disadvantaged group but a historic national minority with rights corresponding to that status.

ABORIGINAL RIGHTS AND FREEDOMS (new section)

SECTION 23A would provide that:

(1) For the purposes of this Act, the phrase "Aboriginal peoples of Canada" or "Aboriginal peoples" means Metis, Inuit and Indian peoples of Canada.

(2) The aboriginal rights and treaty rights of the Aboriginal peoples of Canada are hereby confirmed and recognized.

(3) Within the Canadian Federation, the Aboriginal peoples of Canada shall have the right to their self-determination and in this regard the Parliament and the legislative assemblies, together with the Government of Canada and the provincial governments, to the extent of their respective jurisdictions, are committed to negotiate with the Aboriginal peoples of Canada mutually satisfactory constitutional forms of recognition and protection in the following areas, inter alia:

a) aboriginal rights;
b) treaty rights;
c) rights pertaining to the Aboriginal peoples in relation to Section 91(24) and Section 109 of the Constitution Act, 1867;
d) rights pertaining to the Aboriginal peoples of Canada in relation to the Manitoba Act, 1870, the BNA Act, 1871, and the confirmation of those rights in the rest of Canada;
e) rights or benefits provided in present and future settlements of aboriginal claims;
f) rights of self-government of the Aboriginal peoples of Canada;

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g) guaranteed representation of the Aboriginal peoples of Canada in Parliament and, where applicable, in the legislative assemblies;
h) responsibilities of the Government of Canada and the provincial governments for the provision of services in regard to the Aboriginal peoples of Canada;
i) economic development and the reduction of regional disparities;

so as to ensure the distinct cultural, economic and linguistic identities of the Aboriginal peoples of Canada.

(4) No aboriginal right shall be subject to extinguishment by Parliament of Canada or by any legislative assembly.

(5) No lands, waters or resources of the Aboriginal peoples of Canada shall be subject to expropriation under any law of the Parliament of Canada or any legislative assembly without the express consent of those Aboriginal peoples holding such lands, waters or resources.

SECTION 24 (as amended) provides for:

"The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate, abridge, or derogate from any undeclared rights or freedoms that exist in Canada, including the aboriginal rights and freedoms that pertain to the Aboriginal peoples of Canada and those rights acquired

by or confirmed in favour of the Aboriginal peoples under the Royal Proclamation of October 7, 1763."

The committee will note the resemblance of this section to the drafts of section 26 of Bill C-60, tabled as the Constitutional Amendment Bill in 1978. Our strong preference for this wording has already been outlined, and is supplemented by the brief presented to you by the ICNI. A final consideration is that this new wording would ensure that all undeclared rights, not only Native rights, would be strengthened.

SECTION 32 (as amended) provides that:

(1) Until Part V comes into force, a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once in every year unless, in any year, a majority of those composing the conference decide that it shall not be held.

(2) Such constitutional conferences shall include the direct participation of representatives of the Aboriginal peoples of Canada for matters on the agenda which affect them.

In light of the disparity between promises of full participation for Native peoples in constitutional conferences and our experience to date, the addition of subsection (2) would entrench formally that which exists as a stated government commitment.

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AMENDING FORMULA RESPECTING THE ABORIGINAL PEOPLES OF CANADA (new section)

SECTION 51A provides that:

(1) Nothing in Part IV and V shall be construed as permitting any amendment to any constitutional provision that makes reference to any of the Aboriginal peoples of Canada without the consent of each of the Aboriginal peoples so affected in accordance with rules to be established by an appropriate person or body duly authorized for such purpose by the Governor-in Council.

The requirement for a special, limited amending provision for Aboriginal peoples has been made eminently clear in the last one hundred and thirteen years. The inability, or outright refusal, of government to confirm and protect the constitutional rights recognized in the Royal Proclamation of 1763 and in the Manitoba Act makes us acutely aware of the need for mutual consent in the process of entrenching or amending our rights. With this amendment we provide for this process and at the same time satisfy the requirement for Parliament to authorize the rules governing such a procedure.

CONCLUSIONS

Mr. Chairman, I began this brief with comments on our new role in nation-building, or rather nation rescuing, about promises made and broken, and about what it would take for you to help us fulfill our commitment, and that of the government, for full participation in constitutional revision.

I would like to end on a similar footing by proposing to you one way which could assist us all in tackling the complex and very urgent issues before us. We are aware that if the door is to be kept open to us after patriation

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occurs then the resolution must first be altered to incorporate special provisions to guarantee Native rights and participation in the future. Could not these issues be referred to a joint committee composed of Native, federal and provincial representatives duly authorized to discuss, elaborate and negotiate constitutional amendments directly related to Native peoples? The composition of this committee would, of course, be weighted in favour of the Native peoples and the federal government to reflect the special status of the former and the constitutional responsibility of the latter. Once an amending formula were to be adopted, the amendments agreed to by the committee could then be built into the constitution and be assured of country-wide support.

Mr. Chairman, we have been given good cause to wonder if the real intention behind our supposed involvement in the constitutional reform process, even our direct participation in a First Ministers Conference in the future, is to drag the resolution of our rights down a long dead-end street until they reach a wall of provincial opposition. The federal government could then lay the burden of responsibility for the failure to resolve our rights on the shoulders of its provincial counterparts. Needless to say this would be a frustrating and bitter experience for our people. As I have stated to committees such as this before, there is no such thing as selective justice. If our rights are not protected in the resolution, then neither are yours.