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## Provincehood When?

by Richard Nerysoo, MLA

**I**t is clear that the provisions of the Meech Lake Constitutional Accord could have a profound effect upon territorial aspirations for provincehood.

The most significant provision in this regard is the change to the existing amending formula in the *Constitution Act, 1982*. That formula will be changed to allow any and every province to prevent the Northwest Territories and Yukon from becoming provinces. The amendment will also give all provinces a role in the theoretical extension of existing provinces into the territories. Provinces may exercise this power arbitrarily and for any or no reason whatsoever. As a result of this amendment, only the territorial governments would have no say in the process of establishing new provinces. It is asserted without much explanation, by supporters of Meech Lake, that this amendment is needed in order to ensure that provincial and regional interests are protected where any constitutional amendment is proposed. This does not alter the fact that the amendment represents a substantial change in the rules of the game.

From 1867 until 1982, only parliament had the power to create new provinces. In 1982, the amending formula that formed part of the "patriation package" included a provision allowing provinces to become involved in the creation of new provinces and in the extension of boundaries of existing provinces into the territories. This "involvement" would be raised to a requirement of unanimous provincial and federal consent to the creation of new provinces by the Meech Lake Accord.

***In the event that the Meech Lake Constitutional Accord is adopted in its present form, without amendment, the probability of achieving provincial and federal unanimity to the creation of new northern provinces is highly uncertain.***

Since no one has properly articulated what business a province has in the creation of other provinces, it is impossible, in my opinion, to know how they would exercise this veto power. For instance, would they be concerned about the effect on the "7/50" amending formula, already reduced in significance by moving most matters to a unanimity rule under the accord? Would they be concerned that we would be too poor to pay our way? Or too rich if the north's vast resources are given to so few? Or that a government and region composed primarily of aboriginal persons should be subject to different

rules? In the event that the Meech Lake Constitutional Accord is not adopted, the existing provision in the *Constitution Act, 1982* would require the consent of at least seven of the provinces representing at least 50% of the population of all the provinces.

In 1985, Gordon Robertson, a former non-resident commissioner of the Northwest Territories and Deputy Minister of Northern Affairs, wrote a paper entitled "Northern Provinces: A Mistaken Goal". In his paper, Mr. Robertson expresses his view that the objective of provincehood is likely to impose serious constraints on innovative and unusual political structures that might best suit the circumstances of the territories. Such alternative structures to provincehood might, he proposes, better reflect the particular ethnic, cultural and economic conditions of areas that are unique in Canada. Mr. Robertson proposes that everything important for the north could be achieved without provincial status. He suggests a special status for the territories which he calls "autonomous federal territories". The characteristics of such autonomous federal territories would include complete self-government. They would require a separate enactment setting out structures of government designed to meet the circumstances and needs of each territory. In addition, there would be no power in any federal minister to intervene in the administration and operation of territorial affairs, although a federal cabinet override may be retained in circumstances involving unspecified national interests and concerns. The enactments establishing these autonomous federal territories could be attached as schedules to the *Constitution Act, 1982*, provided that the unanimous consent of the federal government and the provinces could be obtained to permit the necessary constitutional amendment. Although Mr. Robertson indicates that there is no reason to think such unanimity would not be forthcoming, the recent events surrounding the Meech Lake Constitutional Accord discount this confidence to a great extent.

Superficially this approach to the creation of autonomous federal territories as opposed to northern provinces might appear to be an attractive alternative. However, it overlooks a very important feature of provincial status: that is, the ability to take part in critical discussions and decision-making processes at meetings and conferences of first ministers. These processes are sometimes referred to as "executive federalism" to describe the process of discussion and decision-making among the provincial premiers and the prime minister with respect to matters within federal responsibility, matters within shared federal and provincial responsibility, or matters within provincial responsibility which the federal government

influences by use of the federal spending power. These first ministers' conferences and meetings are held more frequently each year and have given rise, among other things, to the Meech Lake Constitutional Accord. They have become a fundamentally important part of membership in the provincial "club". That membership is not now accorded to territories, apart from controlled and limited interventions as "observers". Regrettably, in this conception of autonomous territories, populated substantially by aboriginal peoples, there is no place for the territories at the table and never would be apart, perhaps, from addressing purely "local" concerns.

There are those who feel that the fiscal obstacles to provincehood for the territories cannot be overcome. For these people, membership in the club means that no province can be given a "special deal" when it comes to equalization and specific purpose transfer arrangements. This overlooks the fact that equalization is a concept developed after the existing provinces joined confederation, and that most provinces, particularly Newfoundland, received special treatment to enable them to participate fully and equally in due course. Moreover, it is important to recognize that the territories *are* unique in Canada. The territories have a combined population of approximately 75,000, spread out over approximately 40% of Canada's surface area. The fiscal difficulties of providing programs and services to such a small population in such a large area are clear. Equally clear will be the necessity to make fiscal allowances to ensure the continued delivery of programs and services in northern provinces created from the territories. The development of innovative and unusual financial structures may be an answer to the fiscal problems which Mr. Robertson and others feel are the inevitable result of provincehood for the territories. It is more reasonable to address these in their proper context of fiscal or financial problems rather than to use them as excuses to impede political and constitutional development, and to allow them to act as an impenetrable barrier to provincehood.

The Northwest Territories has already made significant progress in recent years in becoming more independent of the government of Canada and in taking some important steps towards becoming an equal party in Confederation. This increasing legitimacy comes from a number of factors. First, there has been considerable progress in the continuing devolution or transfer of provincial-type responsibilities from the federal government. Second, there has been increasing recognition of the territorial role in resource development reflected in the northern accord. Third, there has been active participation in the aboriginal claims process and the development of new institutions of public government as part of that process. Fourth, the territorial profile in the national front and in the provinces has increased through the attempts made to eliminate the more negative impacts of the Meech Lake Accord on the territories.

The devolution process results in the Northwest Territories obtaining powers similar to those exercised by the provinces. Prior to devolution, those powers are exercised on behalf of territorial residents by the government of Canada. The most recent transfers include forestry, the health program, the northern scientific resource centre, land titles, the power corporation, and interterritorial road construction. Upcoming transfers include responsibility for criminal prosecutions, inland fisheries, class b and c airports, and, most important, oil and gas management through the northern accord.

The enabling agreement for the northern accord was signed on September 6, 1988. It opens the way for the federal and territorial governments to negotiate oil and gas resource management in the Northwest Territories. It is anticipated that the final accord will provide for exclusive management of onshore oil and gas development by the Northwest Territories, and a shared or joint role for the Northwest Territories in the offshore.

The aboriginal claims process plays a significant role in territorial constitutional development. In the Northwest Territories, the Dene/Métis agreement in principle was signed on September 5, 1988, and negotiations are continuing toward a final agreement scheduled for April 1990. It is anticipated that by the end of this year the Inuit of the Eastern Arctic represented by the Tungavik Federation of Nunavut will have concluded their agreement in principle. In Yukon, the Council of Yukon Indians has also recently concluded an agreement in principle and are pursuing negotiations towards a final agreement. These agreements will provide greater control by aboriginal groups over their lands and futures. They will have an important economic and political impact on the territories arising from compensation monies to be paid and the provisions for the establishment of institutions of public government under the claims. In addition, it is anticipated that the increased certainty about which lands are available for development and the basis upon which development may occur, will result in increased development in the territories.

In conclusion it is clear that the answer to the question "Provincehood When?" is constitutionally out of our hands. We can influence the outcome by developing innovative ways of dealing with the financial and political obstacles. But in the final analysis, provincial status for the territories will only result from, under the 1982 formula, a majority decision, or under the proposed Meech Lake amendment, a unanimous decision of the provinces and federal government that we are ready to join their "club". The likelihood of such a decision being made in the near future, or at all, is, as I have said, highly uncertain. When we knock on the door, as we most assuredly will, to say we are ready, will it be opened? Perhaps the proper question is not "Provincehood: When?", but "Provincehood: Who Decides?"